UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CORDUA RESTAURANTS, INC.,	§	
	§	
Petitioner,	§	
	§	
v.	§	No. _____
	§	
NATIONAL LABOR RELATIONS BOARD,	§	
	§	
Respondent.	§	

PETITION FOR REVIEW

Pursuant to Rule 15(a) of the Federal Rules of Appellate Procedure, Cordua Restaurants, Inc. (Cordua) hereby petitions the United States Court of Appeals for the Fifth Circuit to review and set aside a Decision and Order entered by the National Labor Relations Board (NLRB) on April 26, 2018, in the matter styled Cordua Restaurants, Inc. and Steven Ramirez and Rogelio Morales and Shearone Lewis, Case Nos. 16-CA-160901, 16-CA-161380, 16-CA-170940, 16-CA-173451, reported at 366 NLRB No. 72. A copy of the NLRB's Decision and Order is attached as Exhibit A.

This Court has jurisdiction in this matter pursuant to 29 U.S.C. § 160(f) because the Board's Decision and Order is a final order, and Cordua transacts business within the geographical boundaries of the Fifth Circuit. The NLRB's Decision and Order against Cordua is not supported by substantial evidence and is contrary to law.

Cordua respectfully prays that this Court review and set aside the NLRB's Decision and Order and that Cordua receives any further relief to which it may be entitled.

Respectfully submitted,
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By: */s/ Daniel N. Ramirez*

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CERTIFICATE OF SERVICE

I do hereby certify that on May 9, 2018, a true and correct copy of the foregoing Petition for Review was served upon the following parties via first-class U.S. mail and email:

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EXHIBIT

A

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Cordúa Restaurants, Inc. *and* Steven Ramirez *and* Rogelio Morales *and* Shearone Lewis. Cases 16–CA–160901, 16–CA–161380, 16–CA–170940, and 16–CA–173451

April 26, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND KAPLAN

On December 9, 2016, Administrative Law Judge Sharon Levinson Steckler issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed cross-exceptions and a supporting brief. The Respondent and General Counsel filed answering briefs and reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions and briefs and has decided to adopt the judge's rulings,[1] findings,[2] and conclusions[3] in part, to reverse them in part, and to adopt the recommended Order as modified and set forth in full below.[4]

1. The judge found, applying the analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F. 2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), that the Respondent violated Section 8(a)(1) of the Act by discharging employee Steven Ramirez in response to his filing of a collective action lawsuit against the Respondent alleging minimum wage and overtime violations under Federal and State law. We agree.

There is no dispute that filing the lawsuit constituted protected concerted activity and we agree with the judge that the General Counsel met his initial evidentiary burden under *Wright Line* of establishing that the lawsuit, joined by many employees in the months leading up to Ramirez' discharge, was a motivating factor in his termination. We further agree with the judge that the Respondent failed to establish its *Wright Line* defense that it would have discharged Ramirez even in the absence of his protected concerted activity. The Respondent's main defense is that it discharged Ramirez not for his protected concerted activity, but for his unprotected activity of attempting to steal employee wage information from confidential company files and lying about it during investigative interviews. We reject this defense on several grounds.

[1] The Respondent excepts to the judge's granting of the General Counsel's motion to strike three non-record exhibits attached to its posthearing brief to the judge. We find it unnecessary to pass on this exception because the judge did not rely on the exhibits to support her findings and, in any event, they would not affect the result in this case.

[2] The Respondent and General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Applying *D. R. Horton, Inc.*, 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), as affirmed by the Board in *Murphy Oil USA, Inc.*, 361 NLRB 774 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015), the judge found that the Respondent violated Sec. 8(a)(1) by promulgating and maintaining an arbitration agreement that requires employees, as a condition of employment, to waive their rights to pursue class and collective actions involving employment-related claims in all forums, whether arbitral or judicial. Subsequent to the judge's decision, the United States Supreme Court granted certiorari in *Murphy Oil, USA*. See *NLRB v. Murphy Oil, USA, Inc.*, 137 S.Ct. 809 (2017). Pending the Supreme Court's decision in *Murphy Oil* we shall sever and retain the complaint allegation pertaining to the arbitration clause as well as the related Sec. 8(a)(1) allegation that Assistant Manager Alex Nguyen threatened employees with lost employment if they refused to sign the arbitration agreement by telling them "I wouldn't bite the hand that feeds me."

Similarly, although we reject the Respondent's argument that the judge abused her discretion when granting the General Counsel's motion at the hearing to amend the complaint to allege that several employee handbook provisions were unlawfully overbroad, we shall sever those rules' allegations and retain them for further consideration.

Member McFerran joins her colleagues in severing the allegations that the handbook rules and the arbitration agreement are unlawful. She observes that—with regard to Nguyen's statements declaring that employees' failure to sign the arbitration agreement would lead to termination, and that "I wouldn't bite the hand that feeds me"—the determination whether those statements violated Sec. 8(a)(1) does not necessarily turn on the lawfulness of the arbitration agreement. Even assuming, arguendo, that the Respondent could lawfully impose the agreement on employees, employees would still have a Sec. 7 right to engage in protected concerted activity in opposition to the agreement, and a threat of retaliation for engaging in such activity would still be unlawful. Nonetheless, because her colleagues are simply severing these allegations for future consideration and not adjudicating the issue on the merits, she concurs in the decision to sever this allegation as well.

[3] The Judge omitted the names of the Respondent's supervisors and agents in Conclusions of Law paragraph 2. However, the Consolidated Complaint alleged, and the Respondent's First Amended Answer admitted, that at all material times Rigoberto Romero, Claudia Navas, Damian Ambroa, Sergio Rodriguez, Patricia Lopez, John Karber, Fred Espinoza, Naomi Reichman, Alex Nguyen, and Patricia Quinones were supervisors of the Respondent within the meaning of Sec. 2(11) of the Act and agents of the Respondent within the meaning of Sec. 2(13) of the Act.

[4] The General Counsel seeks a make-whole remedy that includes consequential damages incurred as a result of the Respondent's unfair labor practices. The relief sought would involve a change in Board law. Having duly considered the matter, we are not prepared at this time to deviate from our current remedial practice. Accordingly, we decline to order this relief at this time. See e.g. *Laborers' International Union of North America, Local Union No. 91 (Council of Utility Contractors)*, 365 NLRB No. 28, slip op. at 1 fn. 2 (2017).

The Board has held that "mere request[s]" by employees for information relevant to Section 7 activities are protected, "even if the employer contends that [the requested information] is confidential." *Faurecia Exhaust Systems*, 355 NLRB 621, 622 (2010). The protection is lost, however, if the employee obtains, or seeks to obtain, the requested information surreptitiously. Id., citing *Ridgely Mfg. Co.*, 207 NLRB 193, 197 (1973), enfd. 510 F.2d 185 (D.C. Cir. 1975). Ramirez' conduct was plainly protected under this precedent.

While employed at the Respondent's Sugarland restaurant in late July 2015, Ramirez sent a text message to Naomi Reichman, the Assistant Manager of the Respondent's Artista restaurant, where Ramirez occasionally worked. As the judge found, Ramirez' text message requested that Reichmann obtain his pay records for him. Not only was this a protected request under *Faurecia*, it was permitted by the Respondent's handbook. The Respondent argues, however, that Ramirez also sought the pay records of other employees. The text does not support this contention but, even if it did, such a "mere request" would have remained protected under *Faurecia*.

Contrary to the Respondent, there is also no evidence that Ramirez asked Reichman to steal the wage information of other employees. In support of that argument, the Respondent relies principally on a text from Reichman to Artista's General Manager Damian Ambroa, stating that Ramirez had "asked" if she could obtain employees' payroll information. But nowhere in Ramirez' text did he ask Reichman to "misappropriate the [wage] information or to obtain the records by disregarding any policy set forth in the Respondent's employee handbook." *Faurecia,* supra, 355 NLRB at 622. Compare *Macomb Daily*, 260 NLRB 983, 984–986 (1982) (finding unprotected an employee's surreptitious conduct in waiting for bookkeeper's supervisor to go to lunch and then pressuring the bookkeeper, despite her initial refusal, to provide him with wage information).

Accordingly, because Ramirez' wage information request—either as found by the judge, or as argued by the Respondent—was protected, it cannot serve as a legitimate *Wright Line* defense. But even assuming that Ramirez' conduct was unprotected, we agree with the judge, for the reasons that she states, that the Respondent's reliance on that asserted unprotected misconduct as the basis for his discharge was a pretext. We, therefore, adopt the judge's finding that Ramirez' discharge violated Section 8(a)(1).[5]

[5] In adopting the judge's pretext finding, we do not rely on the adverse inference the judge drew against the Respondent for failing to call Reichman as a witness in its case in chief.

2. We do not agree with the judge, however, that the Respondent discharged employee Shearone Lewis in violation of Section 8(a)(1). For the reasons explained below, we reverse the judge's finding and dismiss this complaint allegation.

Lewis was a server at the Artista restaurant where, as noted above, Ambroa was the General Manager and Reichman was the Assistant Manager. Lewis joined Ramirez' lawsuit in June 2015, and recruited other employees to join.

By most accounts, including Ambroa's, Lewis was a very good server whom patrons frequently requested. However, she was also difficult to work with, as evidenced by disciplinary reports predating her April 2016 discharge. For example, Ambroa and Reichman testified about a March 2014 confrontation they witnessed between Lewis and kitchen staff employee Noelia Herrera. Ambroa testified that an upset Lewis "scream[ed]" at Herrera about the delay of an order Lewis had placed. Lewis received a written warning and a suspension for this incident. She received another written warning and suspension in May 2015 for "yell[ing]" at a server for not assisting in server side-work duties, such as setting tables and polishing glasses.[6]

In October 2015, another confrontation occurred between Lewis and her coworkers that resulted in an investigation by Human Relations Manager Patricia Quinonez. As described by the judge, five kitchen employees of Hispanic origin "accosted" Ambroa with complaints that

We reject the Respondent's reliance on *Fresenius USA Mfg. Inc.*, 362 NLRB No. 130 (2015), in arguing that it lawfully discharged Ramirez for lying to Chief Operating Officer Espinoza in an investigatory interview that his texts to Reichmann were only for the purpose of obtaining his work schedule. In *Fresenius,* the Board found that the employee's dishonesty "did not implicate a legitimate interest in shielding his Section 7 activity from employer inquiry" because he "had no reasonable basis to believe that Fresenius was attempting to pry into protected union activity generally or that he would suffer reprisal for the activity in question because of its prounion content." Id. slip op. at 2. Here, by contrast, Espinoza pried into Ramirez' protected activity by asking if he requested Reichman to obtain employees' payroll information. Ramirez was entitled to "shield[this] Sec. 7 activity from [the Respondent], even by lying." Id. at 1, fn. 3. We find *Fresenius* distinguishable for the additional reasons provided by the judge, namely, that the employer in that case conducted a detailed investigation into the employee's alleged misconduct and had a confession which the employee subsequently denied making. Here, the Respondent failed to discuss the matter with Ramirez for about 6 weeks, during which time it permitted Ramirez to work. When Espinoza finally confronted Ramirez, he failed to provide Ramirez an opportunity to review the assertedly inappropriate texts.

[6] This is R. Exh. 7, referenced in Sec. XI, C. 2 of the judge's decision. The judge incorrectly found that this "disciplinary action form does not accurately reflect the events" of the May 2015 incident; the judge confused this disciplinary form with the one she thought Lewis received for the "spoiled dessert" incident in October 2015.

Lewis made derogatory remarks to them after she discovered that a spoiled dessert had been served to a guest. In written statements taken by Ambroa, the five employees alleged that Lewis came into the kitchen screaming for the sous chef to complain about the dessert. Most of the statements allege that before the chef appeared, Lewis looked at the employees and said "Y'all looking at me like y'all don't speak my language;" two statements allege that she called them "dumb foreigners" or "f__ing dumb people;" and one statement alleges that she called them "stupid." Ambroa forwarded the statements to Quinonez who worked at Respondent's corporate office. Quinonez arrived at the restaurant 2 days later to conduct an investigation. After meeting with the five employees, who all confirmed their statements, Quinonez presented the employees' accusations to Lewis and reminded her that "this is not the first time we have received complaints about your behavior." Lewis admitted yelling for the chef because the kitchen is so noisy, but denied calling the employees any names. Although Ambroa recommended that Lewis be discharged, Quinonez warned Lewis not to engage in any future inappropriate conduct.

Management personnel also complained about Lewis' conduct. In December 2014, Lewis was counseled for insubordination for refusing a manager's directive that all staff remain after hours to set up the restaurant for business the next day. In December 2015, Assistant Manager Nguyen emailed Ambroa with complaints of continual "false" accusations by Lewis - sometimes "in the middle of the restaurant with [employees] witnessing the entire incident" - of unfair treatment with respect to tables and sidework that he assigned her. Nguyen stated that he felt "harassed" by Lewis' "petty, selfish issues" and demanded that a decision be made by someone "higher up" to resolve the problem. Ambroa forwarded Nguyen's email to Espinoza, adding his own complaints that Lewis threatened to call her lawyer on several recent occasions when he tried to counsel her for being late to work, and stated that "SHE NEEDS TO GO!!" Ambroa criticized the failure to discipline Lewis after the spoiled dessert incident 2 months earlier, and stated "we cannot let her do whatever she wants just because she is part of a lawsuit. I can get 15–20 team members to testify against her, relating to all of her misconduct while at work."

It was against this background that the events leading to Lewis' discharge arose. In late February 2016, several employees contacted Quinonez alleging that Lewis and a second employee were creating a "hostile environment" at the Artista restaurant. On March 23, Quinonez interviewed 15 employees at the restaurant. In those interviews, and in written witness statements that Quinonez obtained from these employees, many of the employees described Lewis as constantly screaming at them for not doing their jobs correctly, being rude and impatient to kitchen staff when placing orders, and being "disrespectful to management" by disrupting pre-shift meetings and "arguing loud with the management team." Three statements allege that Lewis made comments critical of Hispanic employees for not understanding English and calling them "wetbacks," and two statements allege that she threatened to report kitchen staff to immigration authorities. As summed up by the chef and kitchen manager, and confirmed by the statements of two other employees, the restaurant was a good place to work but "gets bad only when [Lewis] is working" (chef's statement); and "there is peace and tranquility in the kitchen when she doesn't come to work" (statement of kitchen manager).[7]

Quinonez discussed her investigation with chief operating officer Espinoza and both agreed that in light of the employees' complaints and Lewis' past discipline and warning for the same mistreatment of coworkers, discharge was warranted. Quinonez informed Lewis of her discharge in an April 5 meeting, where she provided her with a termination form stating that she was discharged for the following misconduct: making inappropriate comments to coworkers regarding national origin, race and color; directing derogatory comments toward workers (e.g., "wetbacks," Mexicans, etc.); confronting coworkers about whether they can speak English; speaking rudely and unprofessionally to coworkers; and being disrespectful toward supervisors/management. Lewis denied the allegations, telling Quinonez "you know me, I don't talk like this."

Discussion

Applying *Wright Line*, the judge found that Lewis was discharged in violation of Section 8(a)(1). She found that the General Counsel established the requisite showing under *Wright Line* that Lewis engaged in protected concerted activity by joining the FLSA lawsuit and recruiting others to join it, and that the Respondent was aware of that activity and was motivated by animus against that activity in discharging her. The judge further found that the Respondent failed to establish its *Wright Line* defense that it would have discharged Lewis even absent her protected concerted activity. Although we agree with the judge that the General Counsel satisfied her *Wright Line* burden of showing that Lewis' discharge was unlawfully motivated, we find that the Respondent

[7] Lewis also provided a written statement denying any problems between her and kitchen employees, except for a "language barrier" that sometimes created difficulties in explaining to them a change to a guest's menu order.

established that it would have discharged her even absent the unlawful motive.

To establish a defense under *Wright Line*, an employer must show by a preponderance of the evidence that it would have taken the same action even in the absence of the employee's union or protected concerted activity. *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007). In certain cases in which the employer has disciplined an employee for asserted misconduct, the Board permits the employer to meet its *Wright Line* defense if it can establish, under all of the circumstances that it had a reasonable, good-faith belief that the employee engaged in the misconduct, and that it acted on that belief in taking the adverse employment action against the employee. This arises in cases involving misconduct of a severe nature where the employer conducted an extensive investigation that substantiated its reasonable belief of the employee's misconduct. See, e.g., *DTR Industries*, 350 NLRB 1132, 1135–1136 & fn. 29 (2007) ("Given the magnitude of the financial loss caused by this 2-day spurt of ruined production, and the Respondent's careful elimination of other bases to explain the production errors," the respondent established its reasonable belief that the employee intentionally produced defective products), enfd. 297 Fed.Appx. 487 (6th Cir. 2008) (unpublished); *GHR Energy Corp.*, 294 NLRB 1011, 1012–1013 (1989) (Respondent met its *Wright Line* burden by establishing that it would have suspended the employees, even in the absence of their protected activity, because based on its investigation, the respondent reasonably believed the employees had engaged in serious misconduct endangering other employees and the plant itself.), enfd. 924 F.2d 1055 (5th Cir. 1991) (unpublished). The principles from these cases apply here.

As detailed above, when Quinonez was alerted to accusations in February 2016 that Lewis had created a hostile work environment at the restaurant, she commenced an investigation where she obtained numerous employee statements attesting to Lewis' offensive and inappropriate comments about her coworkers' race and ethnicity and her reputation among employees and management as an employee who was difficult to work with. Lewis had been warned and suspended twice in the previous 2 years for verbally accosting coworkers, and counseled in December 2014 for refusing a manager's work directive. In addition, a complaint by five employees in October 2015 that Lewis had screamed and called them derogatory names was serious enough to warrant an investigation by corporate headquarters and, a mere 4 months later, Quinonez received multiple new complaints about Lewis' behavior, substantiated by most of the 15 employees who provided written statements to Quinonez. Based on Lewis' past record, and Quinonez' investigation of the February 2016 complaints, Quinonez recommended that Lewis be terminated; Espinosa agreed and Lewis was terminated.[8]

It bears emphasizing that the Respondent received repeated complaints by many of Lewis' coworkers that she made demeaning and derogatory comments about their race and nationality and threatened to report two employees to immigration authorities. Based on these serious and widespread complaints, substantiated by signed, witness statements obtained by the Respondent during its investigation, we find that the Respondent met its burden of demonstrating that it had a reasonable, good-faith belief that Lewis created a hostile work environment for a large number of employees. And the impact on employee morale was apparent, as described by the Respondent's chef who stated that the restaurant was a good place to work but "gets bad only when [Lewis] is working." In *Harris v. Forklift Sys.*, 510 U.S. 17, 22 (1993), the Supreme Court observed that a "discriminatorily abusive work environment . . . can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers."

Although the judge credited the testimony of Lewis over the testimony of the complaining employees, her findings in this regard are distinct from whether the Respondent reasonably believed that Lewis did engage in the misconduct.[9] The Respondent was not required to

[8] By the time Lewis was discharged, the Respondent had discharged the other employee, Cecilia Blanco, whom employees also accused of creating the hostile work environment.

[9] We do not accept the judge's credibility resolutions to the extent they are based on her finding that the investigatory statements of some employees were inconsistent with their trial testimony, or that their testimony was contradicted by other witnesses. For example, the judge discredited employee Maria "Ruby" Garza because her statement that Lewis yelled at her and coworkers "primarily" in the kitchen, was inconsistent with her testimony that Lewis yelled at her in front of customers and in the kitchen. We see no inconsistency, as the statement does not indicate that Lewis' yelling was confined primarily to the kitchen. Nor is the judge correct in finding that Garza's testimony contradicts her statement that Lewis recruited employees to join the FLSA lawsuit. Garza testified, consistent with her statement, that Lewis regularly recruited employees to join the lawsuit (Tr. 553).

Similarly, the judge determined that employee Herrera's statement was inconsistent with her testimony because the statement made no mention that Lewis: 1) cursed at kitchen employees; 2) threw things at her, and 3) threw a stale salad in the trash. We see no material inconsistencies. With respect to the first point, Herrera's statement noted that Lewis "flip[ped her] off" (i.e. gave her "the middle finger") in a dispute over the proper method for placing salad orders, which was consistent with Herrera's testimony that Lewis cursed at kitchen employees. As to the next two points, Herrera did not testify, as the judge found, that Lewis threw things at her; rather, she testified that Lewis

"prove that [Lewis] had committed the misconduct alleged," *DTR Industries*, supra, 350 NLRB at 1135; rather, even accepting the judge's credibility resolutions as correct, the Respondent was required only to show that it discharged Lewis based on its reasonable belief that she engaged in the serious misconduct for which she was discharged. In short, although the facts here are unusual due to Lewis' credited denial of misconduct, given the circumstances surrounding the Respondent's belief that she engaged in serious misconduct—particularly its receipt of many serious complaints by her colleagues—we find that the Respondent has satisfied its burden.

Finally, we disagree with the judge that the 3-month delay between Ambroa's December 2015 email complaints about Lewis and Quinonez' investigation in March suggests that the Respondent tolerated Lewis' misconduct until it discovered in March that Lewis recruited employees to join the lawsuit and that this discovery spurred the Respondent to terminate her. The Respondent did not wait 3 months before acting on the December complaints; it commenced its investigation in March in response to *new* employee complaints of Lewis' misconduct that Quinonez received in February. Those complaints, which were cited as the basis for Lewis' discharge, were documented in the employee statements submitted to Quinonez during her March investigation and, contrary to the judge, the statements were not all "non-specific" as to when Lewis' misconduct occurred. A statement by a chef alleged that, just "last week," Lewis threatened kitchen employees that she would report them to Immigration, and a kitchen employee's statement similarly alleged the same threat by Lewis "a few days ago." A statement by another chef alleged that Lewis "screamed" at him "last week" because her order was not ready and another statement described Lewis yelling in the kitchen "a few days ago" that "there are a lot of wet backs working here, they do not know what they are doing in there, they don't even speak English."

In sum, we find that the Respondent established a reasonable belief, based on the numerous complaints by employees, that Lewis engaged in a continuous pattern of inappropriate and confrontational conduct directed at her coworkers, and that it acted on that belief in discharging her. Accordingly, we conclude that the Respondent has carried its *Wright Line* burden of establishing that it would have discharged Lewis even in the absence of her protected activity. We therefore reverse the judge and dismiss the allegation that she was discharged in violation of Section 8(a)(1).[10]

ORDER

The National Labor Relations Board orders that the Respondent, Cordúa Restaurants, Inc., Houston, Texas, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discharging an employee because he engaged in protected concerted activities.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days from the date of the Board's Order, offer Steven Ramirez full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Steven Ramirez whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision.

(c) Compensate Steven Ramirez for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 16 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Steven Ramirez and within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designed by the Board or its agents, all payroll records,

threw a stale salad in the trash because the lettuce was not crisp. And Herrera's statement similarly mentioned the "incident that happened when the lettuce was not crisp . . . ."

Finally, with respect to kitchen manager Eduardo "Lalo" Vera, who testified that Lewis frequently called kitchen workers "stupid," we reject the judge's finding that Ambroa contradicted Vera by testifying that he never heard Lewis use that term. That Ambroa may not have heard such language by Lewis means only that; it does not contradict Vera's testimony.

[10] We rely on the same rationale in adopting the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(1) in discharging employee Rogelio Morales. Even accepting the judge's crediting of Morales' testimony that he did not participate in the lewd and offensive conversation with employee Bert Arnes in the presence of a customer, the Respondent established that it reasonably believed the customer's complaint that Morales willingly participated in the conversation and that it discharged him for that reason and not for his protected activity in joining the FLSA lawsuit.

social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its metropolitan Houston, Texas facilities copies of the attached notice marked "Appendix."[11] The notices shall be posted in English, Spanish, and any other language deemed necessary by the Regional Director. Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an internet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If Respondent has gone out of business or closed any of its restaurants, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by Respondent at any time since September 10, 2015.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 16 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the allegations pertaining to: (1) the Respondent's promulgation and maintenance of its arbitration agreement and threat of lost employment if employees refused to sign the agreement, and (2) the Respondent's maintenance of allegedly overbroad handbook rules, are severed from this case and retained for future resolution.

Dated, Washington, D.C. April 26, 2018

Mark Gaston Pearce, Member

Lauren McFerran, Member

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT terminate you because you engaged in protected concerted activities, including participating in a collective wage lawsuit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Steven Ramirez full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Steven Ramirez whole for any loss of earnings and other benefits resulting from his unlawful discharge, less any net interim earnings, plus interest, and WE WILL also make him whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Steven Ramirez for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 16 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlaw-

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ful discharge of Steven Ramirez, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

CORDÚA RESTAURANTS, INC.

The Board's decision can be found at www.nlrb.gov/case/16-CA-160901 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Laurie Duggan, Esq., for the General Counsel.
Daniel Ramirez, Esq. and Jacob Monty, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

SHARON LEVINSON STECKLER, Administrative Law Judge. This case was tried in Houston, Texas on June 27 through July 1, 2015. The three charging parties were servers at Respondent Cordua's restaurants (Respondent) and were involved in a class action suit against the Respondent regarding payment of wages pursuant to the Fair Labor Standards Act. Each was terminated.

Charging Party Steven Ramirez (Ramirez) filed charge 16–CA–160901 against Respondent Cordúa, Inc. (Respondent) on September 24, 2015 and filed the amended charge on October 29.[1] Charging Party Rogelio Morales (Morales) filed charge 16–CA–161380 on October 5. Charging Party Shearone Lewis (Lewis) filed charge 16–CA–170940 on February 29, 2016 and an amended charge on March 4, 2016. Lewis also filed charge 16–CA–173451 on April 6, 2016.

On January 28, 2016, General Counsel issued an Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing (Second Complaint) based upon the charges from Ramirez and Morales. On May 31, 2016, General Counsel issued another Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, which included allegations based upon Lewis' charge. Respondent filed timely answers in which it denied all wrongdoing.

[1] All dates are in 2015 unless otherwise indicated.

The Second Complaint alleged the following violations of Section 8(a)(1):

1. About September 10, Respondent terminated Ramirez because he concertedly complained about wages, hours and terms and conditions of employment and concerted filed a collective action complaint under the Fair Labor Standards Act (FLSA) in federal district court.

2. About August 15, Respondent terminated Morales because he concertedly joined the federal class action FLSA suit filed by Ramirez.

3. Regarding Lewis, Respondent, because Lewis concertedly joined the federal class action FLSA suit filed by Ramirez and concertedly complained that she and other employees should not be required to sign an arbitration agreement, took the following actions against Lewis:
   a. About October 1, reduced the number of restaurant patrons she served and reduced her shifts; and,
   b. On April 5, 2016, terminated her.

4. Since about September 29, Respondent promulgated and maintained an Arbitration Agreement to discourage employees from engaging in concerted activities.

5. About December 11, Respondent, at one of its restaurants, threatened employees with:
   a. Unspecified reprisals if they did not sign the arbitration agreement; and,
   b. Not scheduling employees for work if they did not sign the arbitration agreement.

On the last day of hearing, after Respondent closed its case and before General Counsel presented rebuttal witnesses, General Counsel moved to amend the Second Complaint by adding the following allegations:

1. Based upon the Employee Handbook, the following provisions are unlawful:
   a. Under "Standards of Conduct", the provision stating "Conduct that is disruptive, non-productive, unprofessional, is strictly prohibited."
   b. Under cause for Human Resources preventative correction action process, the inclusion of "solicitation on Company premises."
   c. "The following actions are cause for immediate termination of employment, with or without warning or prior notice:" . . .
      i. "leaving Company premises or work location during working hours without permission of your supervisor"; and,
      ii. "Committing other acts which tend to bring the Company into disrepute."
   d. "The following are behaviors that may develop into explicit violence in the workplace and are cause for a corrective action up to and including termination:" . . . "(i) Arguing."
   e. "Media and Press Relations": "All questions from the media and press regarding the Company's business must be directed to the COO. No other member of the Company should discuss such matters with the media

and the press." "Cellular telephones and pagers belonging to team members cause a disruption in business. Likewise, the use of digital camera, including the types that are included on some cellular phones, are also prohibited. Team members are not allowed to bring cellular phones or pagers to work, unless they are company-issued."

2. About July 2015, Respondent, by Damian Ambroa, engaged in unlawful surveillance when it viewed and/or took photographs of Steven Ramirez' text messages, seen at R. Exh. 8.

3. About August 2015, Respondent, by Rigo Romero, unlawfully interrogated George Henderson.[2]

4. About September 2015, Respondent:
   a. Orally promulgated and maintained an unlawful rule that employee personnel files are confidential;
   b. Unlawfully applied the above confidentiality rule to the termination of Steven Ramirez; and,
   c. By Fred Espinoza, unlawfully interrogated Steven Ramirez.

5. About March 2016, Respondent, by Patricia Quinonez and Damian Ambroa, unlawfully interrogated employees.

During the hearing, Respondent objected to the amendments due to lack of notice that deprived Respondent of a full and fair hearing on these matters. It additionally argued that the amendments were beyond the statute of limitations. I requested that both parties brief the propriety of the amendments and, just in case they would be received, whether the amendments were violations. Respondent, as part of its brief but without any motion to include in the record, included additional documents to support its arguments.

To better understand the allegations and my rulings regarding General Counsel's proposed amendments, I will provide a discussion of the facts with analysis following closely after each section. I first address jurisdiction and General Counsel's proposed amendments. Because I decide that the amendments regarding the employee handbook are properly included, I analyze those rules. I also discuss Respondent's latest arbitration agreement.

The facts then show the Charging Parties were engaged in protected concerted activities by joining a suit against Respondent for alleged violations regarding wages. I then present the facts of the alleged discriminatory actions against the alleged discriminatees and the alleged Section 8(a)(1) statement to employees at Artista. I find that Respondent unlawfully terminated Ramirez and Lewis in violation of Section 8(a)(1) and that Respondent threatened employees with the statement at Artista. I recommend dismissal of the remaining allegations.

After the hearing, the parties filed briefs, which I have carefully read and considered. Based upon those briefs and the entire record, including the testimony of the witnesses and my observation of their demeanor, I make the following:

[2] General Counsel withdrew this allegation in the posthearing brief.

FINDINGS OF FACT[3]

I. JURISDICTION

At all material times, Respondent, a Texas corporation with an office and place of business in Houston, Texas, has been engaged in the operation of several retail restaurant facilities in the Houston, Texas area. During the 12-month period ending December 31, 2015, Respondent, in conducting its business operations, derived gross revenues in excess of $500,000 and purchased and received at its Texas facilities goods or services valued in excess of $5000 which originated outside the State of Texas. Respondent therefore is an employer engaged in commerce within the meaning of Section (2), (6) and (7) of the Act.

II. THE PROPOSED AMENDMENTS

In this section I review applicable law for Respondent's additional documents to the brief in support of its arguments for exclusion of the amendments. I then examine the applicable law of amendments and discuss the amendments in two categories: the published handbook rules; and the remainder of the allegations, which are based upon testimony of witnesses.

A. Respondent's Additional Documents, Attached to Its Brief

Respondent attached a few documents to its brief to support its rationale for rejection of the amendments. General Counsel moved to strike these documents after receipt of the brief as it had no opportunity to cross-examine anyone in response to the exhibits. Respondent filed a Response to General Counsel's Motion to Strike, and contended that extra-record evidence may be cited and used in briefs. I find that Respondent failed to move to reopen the record to add these documents and case law supports a finding to strike these documents as they were not part of the record.

[3] Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather upon my review and consideration of the entire record for this case. My findings of fact encompass the credible testimony, evidence presented, and logical inferences. The credibility analysis may rely upon a variety of factors, including, but not limited to, the context of the witness testimony, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 303–305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings regarding any witness are not likely to be an all-or-nothing determination and I may believe that a witness testified credibly regarding one fact but not on another. *Daikichi Sushi*, 335 NLRB at 622.

When a witness may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. 861 F.2d (6th Cir. 1988). This is particularly true where the witness is the Respondent's agent. *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006). Testimony from current employees tend to be particularly reliable because it goes against their pecuniary interests when testifying against their employer. *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978); *Georgia Rug Mill*, 131 NLRB 1304 fn. 2 (1961); *Gateway Transportation Co.*, 193 NLRB 47, 48 (1971); *Federal Stainless Sink Division*, 197 NLRB 489, 491 (1972).

Respondent misplaces reliance upon *Horizon Contract Glazing, Inc.*, 353 NLRB 136 fn. 2 (2008). The two-member Board denied motions to strike extra-record statements of the parties because "[t]he challenged statements are in the nature of arguments based either on record evidence, the judge's decision, or reasonable interpretations of record evidence." Even if the case had precedential value, none of the documents submitted by Respondent are based upon record evidence, a judge's decision or any interpretation of record evidence. Id.

The situation here is also dissimilar to the cited *Alaska Pulp Corp.*, 325 NLRB 522 fn. 1 (1998), enfd. in part and remanded, rev. and remanded in part sub nom. *Sever v. NLRB*, 231 F.3d 1116 (9th Cir. 2000). There a respondent moved to strike portions of General Counsel's answering brief because, according to the respondent, the brief allegedly contained representations of factual matters not included in the record. The Board found the motion lacked merit as the record reasonably supported the factual assertions the respondent sought for exclusion. Id.

General Counsel's Motion to Strike included pertinent case law. In *Fund for Public Interest*, 360 NLRB 877, 877 fn. 2 (2014), the Board struck portions of a respondent's brief that relied upon evidence not entered into the record. In *United Steelworkers*, 356 NLRB 996 fn. 2 (2011), rev. denied sub nom. *PPG Industries, Inc. v. NLRB*, 460 Fed. Appx. 1 (D.C. Cir. 2012), General Counsel moved to strike the union's answering brief for the portions discussing an arbitrator's opinion and award that were not in evidence, which the Board granted. General Counsel also cited *Birch Run Welding*, 286 NLRB 1316 fn. 3 (1987). The Board granted General Counsel's motion to strike certain factual representations in respondent's exceptions that were not presented as evidence and therefore not included in the record, nor subject to cross-examination. These cases demonstrate that evidence not in the record cannot be added after the fact, particularly as Respondent failed to move to reopen the record to add these documents.

I therefore strike the documents attached to Respondent's Brief to the Administrative Law Judge and any portion of the brief that relies upon them. I now turn to the applicable law on amendments.

B. Applicable Law on Amendments

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).

In *Stagehands*, supra, General Counsel moved for an amendment to the complaint for a hiring hall violation when only one discriminate was named in the complaint. Timing was significant as General Counsel did not amend as soon as it knew of respondent's actions but only after all witnesses had testified and respondent rested. The Board declined to assume that the lack of objective criteria used in the hiring hall process related to respondent's determination not to refer the discriminate and determined the amendment was prejudicial to respondent. It dismissed the allegation without prejudice.

In dealing with General Counsel's amendments, I examine the amendments in two categories: allegations based upon the rules included in Respondent's Employee Handbook; and, allegations based upon testimony adduces at hearing.

1. Handbook rules/policies

Respondent, throughout the hearing, objected to receipt of the entire handbook as an exhibit as the handbook contained rules that might be found unlawful. During hearing, Respondent made clear that it did not want the Handbook entered into evidence because the Board would look at the rules. Respondent did not produce the Handbook pursuant to General Counsel's subpoena as the subpoena was somewhat limited and I did not order it to be produced. General Counsel apparently resorted to other sources to find it before the hearing was over and moved for admission, which I granted.

Respondent relied upon "the Handbook" when questioning former Assistant Manager Naomi Reichman about her conduct. (Tr. 141–142.) However, it declined to enter any relevant portions into evidence. Respondent entered into evidence portions of the Handbook but also that the discriminatees' signed statements that a number of the handbook provisions were reviewed when they were hired. It also cited to the sexual harassment and racial harassment policies: Those were included in the handbook too, but Respondent only submitted those policies into evidence, rather than the Handbook as a whole.

In applying the 3 criteria in *Stagehands*, Respondent cannot claim surprise: It stated on the record it did not want the rules in the record because fault would be found with the rules. General Counsel was able to have the Handbook admitted on the fourth day of the hearing. General Counsel did not allege any disciplinary actions or discriminatory actions pursuant to the Handbook provisions and only that the rules are facially unlawful. No testimony is needed to determine whether the rules, which continue in effect, are facially unlawful. I therefore find that these amendments are properly included in this proceeding and are addressed below.

2. Amendments based upon testimony adduced at hearing

These allegations are based primarily upon Respondent's witnesses testimony. Some of the allegations, such as surveillance of Reichman's telephone and verbally making a new rule about confidentiality of personnel files, relate to whether Ramirez was lawfully terminated. Others involve new allegations of interrogation in connection with the alleged terminations.

Based upon the first factor in *Stagehands*, Respondent was surprised to have the amendments proposed after the close of its case. The third factor in *Stagehands* also supports Respondent's position. Although the proposed amendments are factually intertwined with this case, Respondent might have handled the presentation of its case differently or recalled witnesses before it closed had the amendments not been made before that time. *Consolidated Printers, Inc.*, 305 NLRB 1061, 1064 (1992). Similarly instructive is *Bruce Packing Co. v. NLRB*, 795 F.3d 18, 23–24 (D.C. Cir. 2015). The District of Columbia

Court of Appeals stated that a critical issue with a late amendment was whether the respondent was informed before the record closed that it might be liable for the additionally alleged conduct. General Counsel did not move to include its new allegation regarding unlawful promises to its employees until after Respondent closed. The respondent was not given an opportunity to hone its case for the alleged unlawful statement and may have questioned the witness differently.

I therefore deny admission of these amendments and dismiss those without prejudice to any party's right to file charges regarding these allegations. *Stagehands*, 347 NLRB at 1172 and fn. 12.

III. RESPONDENT'S OPERATIONS

Respondent operates several Latin-themed restaurants in the metropolitan Houston area: Churrascos; Americas; Artista; and the Amazon Grill. It also operates a catering business. Churrascos has five locations, including Sugarland and River Oaks.

Artista is unique among the restaurants because it provides dinners to patrons who usually are scheduled to attend events at the Hobby Arts Center, such as Broadway shows, private events, award shows and concerts. On show nights, Artista may have 200 or more clients to seat and serve within a short period of time. In the summer, the Hobby Center tends to have fewer shows, but Artista still serves lunch and dinners. Some of its servers are designated for "VIPs." The VIP servers are known for their high quality of service. If slow, part-time employees are released from work first and the restaurant is staffed with the full-time employees. Artista's general manager is Damian Ambroa, who supervises approximately 90 to 100 employees as part of his duties.

Servers at all locations wait tables and ensure guest satisfaction. The servers also perform assigned side duties, such as polishing glassware, rearranging party rooms, and refilling iced teas, depending upon the location. Most of these duties are performed before or after customers are in the restaurants. The manager on duty usually assigned the side duties.

On the corporate side, Patricia Quinonez has held the position of Respondent's Human Resources Director since 2000. She deals with all employee matters, including investigations, payroll and benefits. She conducts investigations about every to three months. Quinonez stated that Respondent does not take notes of all investigations. She also testified that that Respondent consistently follows its progressive discipline policy. (Tr. 489.)

Quinonez reports to Fred Espinoza, Respondent's chief operating officer. The restaurants' general managers also report to him. Espinoza runs the day to day operations, purchasing, and marketing. The persons who have the power to terminate employees are the restaurants' general managers, Espinoza and Quinonez.

IV. HANDBOOK RULES

A. Applicable Law

"In determining whether a work rule violates Section 8(a)(1), the appropriate inquiry is whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights." *Hyundai America Shipping Agency*, 357 NLRB 860 (2011). "Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement." *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998) (footnote omitted), enfd. 203 F.3d 52 (D.C. Cir. 1999). "In determining whether a challenged rule is unlawful, the Board must, however, give the rule a reasonable reading. It must refrain from reading particular phrases in isolation." *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).

If the rule explicitly restricts Section 7 rights, it is unlawful. Id. at 646. If it does not, "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." Id. at 647.

Here, none of the handbook rules were promulgated in response to union activity. General Counsel argues only that the arbitration agreement was implemented due to Section 7 activity. The issue, then, with each rule is whether employees would reasonably construe the language to prohibit Section 7 activity.

Ambiguous rules are construed against the drafter of the rule. *Flex Frac Logistics, LLC*, 358 NLRB 1131, 1132 (2012), remanded on other grounds, 360 NLRB 1004 (2014), enfd. 746 F.3d 205 (5th Cir. 2014).[4] The Board does not wait until chill is apparent abut instead acts to dispel the rule before chill occurs. *Hooters of Ontario Mills*, 363 NLRB No. 2, slip op. at 21 (2015), citing *Flex Frac*, supra. An ambiguous rule can chill employees' Section 7 protected activities by creating "a cautious approach" to the activities because of fears of employer retaliation. *Whole Foods Market, Inc.*, 363 NLRB No. 87, slip op. at 3 fn. 11 (2015). Therefore, all rules are examined to determine whether an employee would reasonably construe the language to prohibit Section 7 activities. *Lily Transportation Corp.*, 362 NLRB No. 54 (2015). The test for Section 8(a)(1) violations is not subjective, but objective: "[W]hether [it] would reasonably have a tendency to interfere with, restrain or coerce employees in the exercise of their Section 7 rights . . . ." See generally *Multi-Ad Services, Inc.*, 331 NLRB 1226, 1227-1228 (2000), enfd. 255 F.3d 363 (7th Cir. 2001). Also see *Whole Foods Market*, 363 NLRB No. 87, slip op. at 2, citing *Triple Play Sports Bar*, 361 NLRB 308, 314 (2014), enfd. 629 Fed.Appx. 33 (2d Cir. 2015).

Respondent contends that General Counsel has taken the rules out of context, and when placed in context, they are lawful. As the following analysis demonstrates, in context a number of the rules violate Section 8(a)(1) of the Act.

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[4] The first *Flex Frac* decision was issued by a Board panel whose members included two persons whose appointments to the Board were eventually considered invalid. *NLRB v. Noel Canning*, __ U.S. __, 134 S.Ct. 2550 (2014). Before *Noel Canning* issued, the United States Court of Appeals for the Fifth Circuit enforced the Board's Order. No question exists about the validity of the court's judgment. See *Lily Transportation Corp.*, 362 NLRB No. 54, slip op. at 1 fn. 2 (2015).

B. Under "Standards of Conduct", the Provision Stating "Conduct that is disruptive, Non-productive, Unprofessional, is strictly prohibited."

The three types of behavior are not further defined. "Disruptive" conduct is imprecise and may include disputes between employees about Section 7 topics. *First Transit, Inc.*, 360 NLRB 619, 621 (2014). Recently the Board affirmed a finding that a rule prohibiting "boisterous or other disruptive activity in the workplace" was unlawful. *Component Bar Products, Inc.*, 364 NLRB No. 140, slip op. at 1, fn. 1 and slip op. at 11 (2016). Also see *Purple Communications, Inc.* 361 NLRB 575, 575, 580 (2014) (creating disruption during working hours on company property found unlawful).

Similarly, employees reasonably would view talking about Section 7 topics as "non-productive." The rule does not distinguish between poor work habits versus discussions of protected activity during break time. Because the rule provides no guidance regarding about specific types of conduct not permitted, the rule is overly broad. See generally *First Transit*, 360 NLRB 619, 620.

However, I find that employees should know what unprofessional conduct is and is not so broad that employees would not be able to distinguish between Section 7 activities and professional conduct at work.

C. Solicitation Rule

The Human Resources preventative correction action process will be applied for "solicitation on Company premises." (GC Exh. 15 at 12.)

The rule is indeed overly broad. Solicitation and distribution are not the same in the legal sense. Traditionally "solicitation and distribution of literature or *different* organizational techniques and their implementation pose[d] *different* problems both for the employer and for employees." *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 619 (1962) (emphasis in original). Solicitation is viewed as an oral request; distribution is considered handing out literature. Id. at 617–618. Here, Respondent's rule only covers solicitation.

Rules prohibiting solicitation during working time are presumptively lawful because ". . . that term denotes periods when employees are performing actual job duties, periods which do not include the employee's own time such as lunch and break periods." *Our Way*, 268 NLRB 394, 394–395 (1983). An employee may solicit for Section 7 concerns outside of working hours. *Cooper Tire & Rubber Co. v. NLRB*, 957 F.2d 1245, 1249, reh'g denied 968 F.2d 18 (5th Cir. 1992), cert. denied 506 U.S. 985 (1992). Thus, a solicitation rule is presumptively invalid when solicitation is prohibited during the employee's own time. *Our Way*, 268 NLRB at 394.

An employer may ban solicitation in working areas during working time; however, in most work sites the ban cannot be extended to working areas during nonworking time. *UPS Supply Chain Solutions, Inc.*, 357 NLRB 1295, 1296 (2011). Restaurants are an exception due to the nature of the business. The right of employees to solicit must be balanced against the employer's right to maintain discipline in such an establishment. *Double Eagle Hotel & Casino v. NLRB*, 414 F.3d 1249, 1253 (10th Cir. 2005) enfg. as modified 341 NLRB 112 (2004), cert. denied 546 U.S. 1170 (2006). When applied to restaurants and entertainment venues, an employer may lawfully prohibit solicitation in areas open to the public. *Dunes Hotel*, 284 NLRB 871 (1987). Also see *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 506 (1978) (primary purpose of restaurants is to serve customers, but restaurants have non-public areas in which solicitation of non-working employees must be permitted); *Restaurant Corp. of America v. NLRB*, 827 F.2d 799 (D.C. Cir. 1987).

Respondent does not define premises and makes no distinction between non-working areas and working areas that are open to the public. It also fails to distinguish between working time versus non-working time, which also is an impermissible restriction on employees' rights. *Casino San Pablo*, 361 NLRB 1350, 1352–1353(2014), citing *Our Way*, supra, and *Stoddard-Quirk*, supra. Because an employee would not know the difference in premises, an employee would interpret "premises" to the entire facility, instead of non-working areas. Prohibition of solicitation in non-work areas during non-working times is unlawful, even in these venues. *Dunes Hotel*, supra, fn. 1. Also see: *Turtle Bay Resorts*, 353 NLRB 1242, 1270–1271 (2009), enfd. sub nom. *Oaktree Capital Management, L.P. v. NLRB*, 452 Fed.Appx. 433 (5th Cir. 2011). The rule therefore violates Section 8(a)(1) of the Act.

D. Rules Prohibiting Leaving Without Permission and Creating Disrepute for Respondent

The rules state:

> The following actions are cause for immediate termination of employment, with or without warning or prior notice: (*These are only examples and are not intended to be all inclusive*) . . .
>
> - Leaving Company premises or work location during working hours without permission of your supervisor; . . .
> - Committing acts of dishonesty towards the Company, its customers, and other Team Members, organizations servicing the Company or committing other acts which tend to bring the Company into disrepute . . . .

(GC Exh. 15 at 12) (italics and underline in original).

1. Leaving premises or work location

The rule about leaving the work premises or work location during working hours is unlawful. The situation is not limited to working time, but the broader working hours, which includes employee breaks and meal times. *Purple Communications*, 361 NLRB 1050 (2014).

The rule does not state that an employee cannot take unauthorized leaves or breaks. *2 Sisters Food Group*, 357 NLRB at 1817–1818. Instead, the rule limits leaving at any time, which employees reasonably would construe to prohibit a Section 7 activity, such as a walk-out strike. *Labor Ready, Inc.*, 331 NLRB 1656 fn. 2 (2000).

2. Acts tending to bring Respondent into disrepute

General Counsel alleges only the portion of the rule that discussed bringing the company into disrepute, not the first part of the rule about committing action of dishonesty. However, the rule about other conduct bringing the company into disrepute is

unlawful.[5]

In reading the rule as a whole, the rule is remains vague about the "other acts." The concept of dishonesty could be as wide as stealing or bribery, but "other acts" involving disrupte is a wide, unexplained gulf. An employee would reasonably interpret that Section 7 activities, such as bringing to light wage disputes or lawful picketing, would be prohibited. In *Schwan's Home Service, Inc.*, 364 NLRB No. 20, slip op. at 5 (2016), a rule prohibiting any conduct, whether on or off duty, that could be detrimental to the employer's interests or reputation was unlawful. The rule, like here, gave too much discretion to the employer to determine what grounds an employee would suffer consequences for action, including those covered by Section 7. Id. Also see *First Transit Inc.*, 360 NLRB 619, 620 fn. 5 (rule prohibiting outside activities detrimental to employer's imagine or reputation or conducting one's self outside working hours in a way detrimental to employer reputation or interest unlawful).

Even including the portion about dishonesty, the rule also does not differentiate between conduct that is permissible and the extreme of defamatory conduct. The "mere fact that statements are false, misleading or inaccurate" is not sufficient to remove the employees from the protection of the Act. *Valley Hospital Medical Center, Inc.*, 351 NLRB 1250, 1252 (2007), enfd. 358 Fed.Appx. 783 (9th Cir. 2009). Because the rule makes no differentiation, it is unlawful. *Chipotle Services LLC d/b/a Chipotle Mexican Grill*, 364 NLRB No. 72, slip op. at 1 fn. 3 and slip op. at 9 (2016). Also see: *NLRB v. Elec. Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464, 476–477 (1953) (communications may be disloyal when not connected to ongoing labor dispute); *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53, 61 (1966) (statement would be defamatory is made with knowledge of falsity or reckless disregard for its truthfulness).[6]

Respondent argues that the rule as a whole does not demonstrate an unlawful meaning. *Tradesmen International*, 338 NLRB 460, 461 (2002). However, *Tradesmen* was differentiated in *Hills and Dales General Hospital*, 360 NLRB 611, 612 (2014). In *Tradesmen*, the rule included the caveat of conflicts of interest that required employees to represent the employer in a positive and ethical manner. As in *Hills and Dales*, the rule includes no such caveat. Also see *Quicken Loans, Inc. v. NLRB*, 830 F.3d 542, 550 (D.C. Cir. 2016) (non-disparagement rule "flies in the teeth of Section 7"), enfg. 361 NLRB 904 (2014).

In addition, Respondent also argues that disparaging Respondent's products is not protected under the Act. *St. Luke's Episcopal-Presbyterian Hospital v. NLRB*, 268 F.3d 575, 580 (8th Cir. 2001), denying enf. 331 NLRB 761 (2000). The Board's findings, to which I am bound, determined that the employer hospital violated Section 8(a)(3) when it terminated an obstretric nurse, involved in organization efforts, for speaking out to a local television station about inadequate staffing levels in her department that could affect the health and safety of mothers and infants. The hospital's defense was that fellow employees did not want to work with her because of her protected activities, which was an unlawful consideration, and were her statements were not disloyal, reckless, or maliciously false. 331 NLRB at 761–762. The Eighth Circuit's determined the nurse was not engaged in protected activity by making the statement because the statement was materially false and misleading. 268 F.3d at 580–581. In defining how the nurse exceeded the protection of the Act, the court stated that an employee loses protection of the Act by appealing to the public through information "with reckless disregard of its truth or falsity." Id. at 580, citing *Montefiore Hosp. & Med. Ctr. v. NLRB*, 621 F.2d 510, 517 (2d Cir. 1980).

The Eighth Circuit decision in *St. Luke's* does not clear Respondent's rule: The rule still does not distinguish between a defamatory statement and permissible protected conduct. I therefore find this rule unlawful. *Chipotle*, supra.

E. Rule Prohibiting Arguing

The rule is part of the policy entitled "Violence in the Workplace." The rule states initially that Respondent intends to provide a safe workplace and does not tolerate any workplace violence against employees or by employees, including threats and violence itself.

The pertinent part of the allegation is: "The following are behaviors that may develop into explicit violence in the workplace and are cause for a corrective action up to and including termination:" . . . "(i) Arguing." (GC Exh. 15 at 18–19.) Other behaviors on the list include ambiguous threats, indirect threats, displaying symbols associated with hostile or violent groups, invading personal space, glaring, cornering people, swearing, humiliating others, and losing emotional control. Id.

Respondent argues that, as part of the violence in the workplace policy, which also prohibits banning weapons in the workplace, makes the rule lawful and that an employee reasonably would not find the rule to be construed any other way.[7] However, on its face, the rule is overly broad as employees would not know what discussion was permissible under Section 7. Employees have the right to discuss workplace conditions but it is no guarantee that a protected discussion will not "intemperate, abuse and inaccurate statements." *Linn v. United*

[5] Under cause for immediate termination of employment, Respondent also maintains a rule prohibiting "misrepresentation or an exaggeration of the truth." (GC Exh. 15 at 12.) General Counsel did not allege this rule as a violation and I make no finding here.

[6] *Costco Wholesale Corp.*, 358 NLRB 1100, 1101 (2012), although not precedential, is persuasive. The rule there involved "statements that damage Costco." The Board stated that this type of rule, which did not have any provisions to show that protected activities were excluded from the rule's ambit, was unlawful. A number of cases were cited to support these propositions, *inter alia*: *Southern Maryland Hospital*, 293 NLRB 1209, 1222 (1989), enfd. in relevant part 916 F.2d 932, 940 (4th Cir. 1990); *Claremont Resort & Spa*, 344 NLRB 832 (2005); and, *Beverly Health & Rehabilitation Services*, 332 NLRB 347, 348 (2000), enfd. 297 F.3d 468 (6th Cir. 2002).

[7] Respondent cites a laundry list of acceptable phrases, such as threats of violence, displaying violent symbols and glaring, cited in General Counsel Memorandum 15-05. General Counsel memoranda are neither precedential nor binding upon the Board. *National Dance Institute-New Mexico, Inc.*, 364 NLRB No. 35, slip op. at 12 fn. 26 (2016); *Atelier Condominium*, 361 NLRB 966, 1004 (2014), enfd. 653 Fed.Appx. 62 (2d Cir. 2016); *Fun Striders, Inc.*, 250 NLRB 520 fn. 1 (1980); *Youngstown Sheet & Tube Co.*, 235 NLRB 572, 575 (1978).

Plant Guards, 383 U.S. 53 (1966). Prohibiting employees from arguing here is in the broadest sense and not limited to dealing with customers. Employees who read this rule reasonably would "steer clear" of employment controversies, criticisms of the employer, and perhaps "less than positive" statements, all of which are protected activity. *T-Mobile*, 363 NLRB No. 171, slip op. at 2–3 (2016) and cases cited therein. The rule has a similar effect to those requiring employees to work harmoniously when the term harmoniously was not defined. *2 Sisters Food Group, Inc.*, 357 NLRB 1816, 1817 (2011). Compare *Copper River of Boiling Springs, LLC*, 360 NLRB 459, 459 fn. 3 (2014) (differentiating non-violative rule because it included effects upon guests). The rule is part of a list, but the list does nothing to define what arguing would be and would be therefore "attenuated." *Schwan's Home Services*, 364 NLRB No. 20, slip op. at 5; *Casino San Pablo*, 361 NLRB 1350, 1352 (2014) (rule prohibiting disrespectful conduct unlawful despite pairing with insubordination).

As a result, reasonable employees would not know what "arguing" would lead to explicit violence and would preclude employees from engaging in vigorous discussions of Section 7 issues.

F. Rule Prohibiting Contacts with Media and Press Relations

The rule states:

> In order to assure accuracy, all questions from the media and press regarding the Company's business must be directed to the COO. No other member of the Company should discuss such matters with the media and the press.

(GC Exh. 15 at 19.)

Rules that prohibit employees from talking about wages, hours and terms and conditions of employment to third parties are unlawful. *Schwan's Home Service, Inc.*, 364 NLRB No. 20, slip op. at 3–4 (2016); *Victory Casino Cruises II*, 363 NLRB No. 167 (2016). Also see *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1987). Employees "have a clear right" to publicize employment issues and disputes. *Schwan's*, supra. This rule precludes all contact with the media and press.

The rule's use of the term "business" does not indicate whether it applies to proprietary information or the protected subjects of wages, hours and terms and conditions of employment. Employees are not required to guess the meaning or risk their jobs to do so as the ambiguous term is construed against the promulgator of the rule. *Whole Foods Market*, 363 NLRB No. 87, slip op. at 2. The media relations policy is overly broad and therefore violates Section 8(a)(1) of the Act.

G. Rule Prohibiting Personal Cell Phones, Pagers and Recording at Work

This rule states:

> Cellular telephones and pagers belonging to team members cause a disruption in business. Likewise, the use of digital camera, including the types that are included on some cellular phones, are also prohibited. Team members are not allowed to bring cellular phones or pagers to work, unless they are company-issued.

(GC Exh. 15 at 20.)[8]

The rule is unlawful in two aspects: First, it prevents employees from bringing their cell phones to work at all. Secondly, it prohibits use of recording equipment, such as the camera in the phone.

The first aspect of the policy does not give any rights to use the devices because they may not be brought to work. *Whole Foods Market*, 363 NLRB No. 87, slip op. at 3. Employees reasonably would understand that they cannot conduct Section 7 activities during break times or lunch periods on their phones, similar to the reasoning in the solicitation rule.

The second aspect is prohibition of recording by camera. The rule has no safe harbor for protected activities. A reasonable employee would interpret the rule as prohibiting protected activities, which might include recording of protected picketing, documenting unsafe working conditions, documenting discussions about terms and conditions of employment or documenting inconsistent application of employer rules. *T-Mobile*, 363 NLRB No. 171, slip op. at 4 (2016), citing *Whole Foods*, 363 NLRB No. 87, slip op. at 3 and *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190, slip op. at 4 (2015). Respondent's brief acknowledges that employees may record or photograph when engaged in protected concerted activity. However, this rule does not consider whether employees could use the phone during non-working time, such as before or after a shift. Because employees reasonably would not understand they could record under circumstances other than scheduled breaks, the rule chills employees who wish to exercise their Section 7 rights and therefore violates Section 8(a)(1) of the Act. *Whole Foods Market*, supra, citing *Rio All-Suites Hotel*, 362 NLRB No. 190, slip op. at 5.

V. RESPONDENT MAINTAINED UNLAWFUL REQUIREMENTS FOR ARBITRATION

On September 29, 2015, Respondent introduced the following arbitration agreement and required all employees to sign the agreement. This agreement superceded a lengthier arbitration agreement that had no specific provisions that allowed employees to access the processes of the Board and denied employees the right to maintain class action suits and arbitrations. However, it permitted collective action. (Jt. Exh. 1.)

The new arbitration agreement states:

> I agree to arbitrate and resolve any and all employment-related disputes between the Company and affiliate entities and myself. I understand that the consideration for this Agreement is my employment, or continued employment, with the Company and the different benefits that go along with employment with the Company, including the promises and commitment made in this Agreement. I understand that the purpose of this Agreement is to provide both the Company and myself a way in which claims or disputes may be resolved by binding arbitration rather than litigation in recognition of the fact that resolution of any differences in the courts is rarely time or cost effective for

[8] Under corrective/preventative action, Respondent also maintains a rule against use of a personal cellular phone while on the clock. (GC Exh. 15 at 12.) I make no ruling as it was not alleged.

> either party, the Company and I have entered into this Agreement to establish and gain the benefits of a speedy, impartial, and cost-effective dispute resolution procedure. I understand that arbitration is for the purpose of resolving disputes between me and the Company. As such, I agree that I am waiving my right to file, participate or proceed in class or collective actions (including a Fair Labor Standards Act ("FLSA") collective action) in any civil court or arbitration proceeding, including but not limited to receiving or requesting notice from a pending collective action, to the extent permitted by law. Therefore, I agree that I cannot file or opt-in to a collective action under this Agreement, unless agreed upon by me and the Company in writing. In no way does this waiver of class and collective actions preclude the consolidation of my claim and other employees' claims within a single arbitration proceeding to promote efficiency and cost-effectiveness. Additionally, in no way does this Agreement serve to preclude me from bringing an unfair labor practices claim against the Company pursuant to the National Labor Relations Act.

(Jt. Exh. 2.)

General Counsel cites *D.R. Horton, Inc.*, 357 NLRB 2277 (2012) and *Murphy Oil*, 361 NLRB 774 (2014). Respondent relies upon the Fifth Circuit decisions denying enforcement of these Board decisions. *D.R. Horton v. NLRB*, 737 F.3d 334, 359–360 (5th Cir. 2013); *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015).

The September 29 arbitration agreement is unlawful because it precludes class and collective actions unless Respondent agrees. This agreement, promulgated after the Region initially issued complaint, directs its attentions to collective action pursuant to the FLSA. The prior agreement actually permitted some collective action with opt-ins, but now Respondent removed that privilege. As a result, employees are required to waive their rights to collective action, which is a core right pursuant to the Act. *Murphy Oil*, 361 NLRB 774, 780–781. The requirement that Respondent agree to a possible joinder means any efforts to do remain squarely within Respondent's control; it therefore would preclude employees from pursuing such claims, which also makes the agreement unlawful. *24 Hour Fitness*, 363 NLRB No. 84, slip op. at 2 (2015). Also see *California Commerce Club, Inc.*, 364 NLRB No. 31 (2016); *Solarcity Corp.*, 363 NLRB No. 83 (2015).

The Supreme Court and the Board are the only authorities that may reverse Board precedent. Until such action occurs, I am bound to uphold the Board's controlling precedent. *Chesapeake Energy Corp.*, 362 NLRB No. 80 (2015); *Pathmark Stores*, 342 NLRB 378 fn. 1 (2004). In addition, other circuits found that the Federal Arbitration Act did not apply to exercise of Section 7 rights and found prohibiting class action remedies, such as those under the FLSA, unlawful. *Lewis v. Epic System Corp.*,[9] 823 F.3d 1147 (7th Cir. 2016), petition for cert. No. 16-285 September 2, 2016; *Morris v. Ernst & Young*, 834 F.3d 975 (9th Cir. 2016), petition for cert. No. 16-300 September 8, 2016. Also see: *24 Hour Fitness USA Inc. v. NLRB*, 2016 WL 3668038 (5th Cir. 2016), revg. 363 NLRB No. 84 (2015), petition for cert. No. 16-701 filed November 23, 2016.

I therefore find the arbitration agreement unlawful because the Board's precedence in *Murphy Oil* is unchanged and remains controlling Board law. *Manor West, Inc.*, 311 NLRB 655, 667 fn. 43 (1993).

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.

VI. THE CHARGING PARTIES ENGAGED IN PROTECTED CONCERTED ACTIVITY

In this section, I discuss the applicable law that defines protected concerted activity, the facts surrounding the charging parties' involvement in a lawsuit against Respondent, and provide analysis.

A. Applicable Law

Section 7 of the Act explicitly states that employees have the right to engage in concerted activities for the purpose of "mutual aid and protection." This right is not exclusive to employees' collective bargaining activities. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 564–565 (1978). Employees may work together to improve their wages and terms and conditions of employment. *Meyers Industries (Meyers II)*, 281 NLRB 882, 883–884 (1986) affd. 835 F.2d 1481 (D.C. Cir. 1987), cert. denied, 487 U.S. 1205 (1988).

The Board has consistently defined concerted activity as encompassing the lone employee who is acting for or on behalf of other workers, or one who has discussed the matter with fellow workers, or one who is acting alone to initiate group action, such as bringing group complaints to management's attention. *Kvaerner Philadelphia Shipyard*, 346 NLRB 390 (2006), citing *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984); *Meyers Industries (II)*, 281 NLRB 882 (1986); *Globe Security Systems*, 301 NLRB 1219 (1991); and *Alaska Pulp Corp.*, 296 NLRB 1260 (1989), enfd. 944 F.2d 909 (9th Cir. 1991).

B. Facts: The Charging Parties are Involved in FLSA Action

The three charging parties were all servers employed by Respondent at its various restaurants at different times. Charging Party Ramirez noticed that his pay checks seemed unchanged, even when he had served more patrons. He talked with other servers and busboys about their pay checks. They consulted with an attorney about the differences. As a result, on January 23, Charging Party Ramirez, with six other servers and busboys, filed a collective action pursuant to the Fair Labor Standards Act (FLSA) and the Texas Minimum Wage Act (TMWA) in federal district court against Respondent and its owner (FLSA action). The action sought damages in back pay, liquidated damages, attorneys' fees and court costs for Respondent's

[9] This case provides additional guidance for finding that an arbitration agreement requirement to waive class and collective claims is unenforceable.

alleged willful failure to pay overtime to its employees. (GC Exh. 2.)

In late January, Quinonez received notice of the FLSA suit and notified Espinoza. Quinonez notified Ramirez' general manager at Churrascos River Oaks, but told the remaining general managers in July at a meeting. Charging Parties Rogelio Morales and Shearone Lewis joined the FLSA action on June 18. (GC Exh. 5.)

About 1 month after the general managers' meeting, the general manager at Sugarland, Rigo Romero, called Quinonez about the suit and asked who from his restaurant was participating; about a week after Romero called, the general manager at Artista, Damian Ambroa, called Quinonez with the same request. Quinonez advised each general manager which employee, including the charging parties, were participating in the FLSA action.

Respondent moved to compel Ramirez and the other employees into binding arbitration because the employees signed arbitration agreements as part of their terms of employment, to which the employees agreed. (GC Exh. 3.) By November, 27 employees joined the collective action.

The Alleged Discriminatees' FLSA Action Is Protected Concerted Activity

When employees seek to work for "mutual aid and protection," they are not limited to approaching the employer for assistance. *Eastex*, 437 U.S. at 565. Such activity is protected so that employees can work together to improve their working conditions. Id. at 566–567. They are protected from retaliation from an employer if resorting to "judicial forums." Id. at 566 (cites omitted). Civil actions by employees are protected activity. *Le Madri Restaurant*, 331 NLRB 269, 275–276 (2000) (suit alleged failing to pay minimum wages, overtime, unlawfully made deductions for tips and cash losses, and misappropriated tips). *U Ocean Place Pavilion, Inc.*, 345 NLRB 1162, 1170 (2005) (employees' FLSA suit alleging failure to pay overtime, wages and tips). Filing a FLSA action, even if done by one employee on behalf of a group, is considered collective action as it contemplates group participation. *Beyoglu*, 362 NLRB No. 152, slip op. at 1–2 (2015). Discussions with fellow employees about such allegations also constitute concerted activity. *East Village Grand Sichuan Inc. d/b/a Grand Sichuan Restaurant*, 364 NLRB No. 151, slip op. at 1 fn. 2 (2016).

Here, Ramirez initially filed the suit about wages and was not alone in his action. He was joined by a number of employees, including Morales and Lewis. The FLSA action constitutes protected concerted activity by these employees.

VII. APPLICABLE LAW FOR THE REVIEW OF THE CHARGING PARTIES' ALLEGED DISCRIMINATION

The Complaint alleges that Respondent terminated the Charging Parties individually for their protected concerted activities. Terminating an employee for protected concerted activity is unlawful. *Citizens Investment Services Corp. v. NLRB*, 430 F.3d 1195, 1197 (D.C. Cir. 2005), enfg. 342 NLRB 316 (2004). Similarly, an employer may not terminate an employee as a preemptive strike for the perception that an employee will engage in protected concerted activity. *Parexel Int'l*, 356 NLRB 516, 519 (2001). As we are reminded:

> The Act protects all employees, not just exemplary employees, from adverse action by an employer based on their protected activity. In cases like this, in which there may be lawful grounds for discipline, it is our job to determine whether the alleged discriminatee was indeed disciplined because of his protected activity, using the analytical tools developed by the Board over its many years of enforcing this provision of the Act, with the approval of the courts.

Alternative Energy Applications, Inc., 361 NLRB 1203, 1207 (2014).

Where arguably more than one motive exists for alleged discriminatory action for protected concerted activity, a mixed motive analysis is applied. The analysis is set forth in *Wright Line*, 251 NLRB 1083 (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). Also see *MCPc v. NLRB*, 813 F.3d 475, 489–490 (3d Cir. 2016), affg in rel. part 360 NLRB 216 (2014). Under *Wright Line*, the General Counsel must first demonstrate, by a preponderance of the evidence, that the worker's protected conduct was a motivating factor in the adverse action. The General Counsel satisfies this initial burden by showing: (1) the individual's protected activity; (2) employer knowledge of such activity; and (3) animus. If the General Counsel meets his initial burden, the burden shifts to the employer to prove that it would have taken the adverse action, even absent the protected activity. See, e.g., *Mesker Door*, 357 NLRB 591, 592 (2011).

The employer cannot meet its burden merely by showing that it had a legitimate reason for its action; rather, it must demonstrate that it would have taken the same action in the absence of the protected conduct. *Bruce Packing Co.*, 357 NLRB 1084, 1086–1087 (2011); *JCR Hotel, Inc. v. NLRB*, 342 F.3d 837, 841 (8th Cir. 2003). If the employer's proffered reasons are pretextual (i.e., either false or not actually relied on), the employer fails to show that it would have taken the same action for those reasons regardless of the protected conduct. *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007). An employer fails to meet its rebuttal burden when the evidence shows that it tolerated an employee's shortcomings until the employee engaged in protected activity. *Global Recruiters of Winfield*, 363 NLRB No. 68 (2015) (Hirozawa, concurrence), citing *Diversified Bank Installations*, 324 NLRB 457, 476 (1997). The trier of fact may not only reject a witness story, but also determine that the truth is the complete opposite. *Boothwyn Fire Company No. 1*, 363 NLRB No. 191, slip op. at 7 (2016).

VIII. CHARGING PARTY STEVE RAMIREZ IS DISCHARGED

Ramirez worked at various Respondent restaurants between September 2012 until his termination on September 10, 2015. He worked at Churrascos River Oaks until March 2015, when he transferred to Artista. Quinonez informed Claudia Navas, the River Oaks general manager, about the suit and instructed Navas not to retaliate against him. Quinonez further instructed the manager to direct any questions about the suit and obtaining

payroll records to Human Resources.

Ramirez said he felt the transfer to Artista was necessary as he believed the managers were talking about retaliatory action. Although his transfer form states he requested the transfer for scheduling, he denied telling anyone in management that he had scheduling issues, nor did he mention that he believed management was harassing him. However, HR Manager Quinonez and General Manager Navas both testified that Ramirez said the transfer was better for his schedule.

About May, while working at Artista, Ramirez discussed the lawsuit with servers, busboys and bartenders in the restaurant and parking lot. When employees asked about the suit, he directed them to the attorney handling the matter, Tran. In about July 2015, Artista General Manager Ambroa also asked Quinonez about the suit and who was involved from his unit. He could not recall whether Quinonez told him about Ramirez' involvement; Quinonez did tell him that Charging Party Lewis was involved with the action. Ambroa learned about Ramirez' involvement with the FLSA action from employees Rubi Garza, Daniel Perez and Vincente Cardenas. Ambroa then advised Assistant Manager Naomi Reichman.[10]

Ramirez contends that, in May, his manager at Artista allegedly forced him to transfer to Churrascos in Sugarland on Memorial Day weekend. Ramirez recalled the date due to a flood the following day. Reichman notified Ramirez that he would be transferred to Sugarland. Reichman told him that she said she would agree that he could work in Sugarland for two months and transferring back to Artista. Reichman reported to Damian Ambroa, the Artista general manager. Ambroa denied that Respondent could make anyone transfer to another restaurant and demonstrated that a server working at Artista during that summer would have had fewer opportunities to earn, given the seasonality and the number of shows at the Hobby Center. (Tr. 962–963; R. Exh. 26.)

Ramirez did not speak with Churrascos Sugarland General Manager Rigo Romero about the transfer and did not call the Human Resources office either. Romero recalled he was contacted by his banquet coordinator, who told him Ramirez wanted to pick up shifts. (Tr. 1121–1122.)

Ramirez knew of no other employee who was required to transfer. While working at Churrascos Sugarland, he continued to talk with employees in person or by telephone texting about the collective action. Ramirez again directed these employees to Attorney Tran. He worked at this location until his termination on September 10. In the meantime, Ramirez kept in touch with Assistant Manager Reichman to work extra shifts at Artista. Between May and Ramirez' termination in September, six employees from Sugarland joined the collective action; before that time, none were involved. (GC Exh. 5.)

As previously noted, Quinonez notified other general managers about the collective action in July. Approximately one month after Quinonez notified the general managers, Rigo Romero called Quinonez about the suit. According to Quinonez, he wanted to know what to do if employees came to him about the suit and wanted to check the records. (Tr. 379.) He also was advised of which employees were involved in the FLSA action.

Ramirez also noted that, in August and September, he was required to stay late to perform side duties at least every other Friday and Saturday until 2 a.m.[11] During the week, the restaurant closed at 9:30 p.m., yet he stayed until 12:30 a.m. on some Wednesdays and Thursdays. He was accompanied usually by the manager and three others who were participating in the collective action. His claims were not corroborated and General Manager Romero denied that employees stayed past 1 a.m.

A. In Late July 2015, Artista General Manager Ambroa Photographs Text Messages Between Reichman and Ramirez

General Manager Damian Ambroa took photographs of texts between Assistant Manager Reichman and "Big Pimping Steven" and sent them to Quinonez. Despite Respondent's policy of not bring personal phones to work, Reichman left her cell phone at the desk to call employees and allegedly had permission to use Reichman's password to get into the phone because Ambroa's company telephone was poor. Ambroa had Reichman's password and used it to gain access to the telephone. The phone rang with another call and Ambroa read the message.

The basis for the investigation was a text message exchange allegedly between Reichman and the text name "Steven 'Big Pimpin.'"[12] Manager Damien Ambroa found Reichman's cellular telephone on a stand and opened it. He saw the message and began to read it. He then took pictures of the text message. The photographed text message stated:

Reichman:	Ok. . . It's nomimandel
Steven:	Ok cool
	Just got it
	I'll make sure to ask him those questions that benefit you. I'll ask them again in front of eran [sic, Eran, Reichman's husband and employee at the restaurant] just so yall are sure yall protected.
Reichman:	I'm going to start storing stuff on flash drives
	Tomorrow . . . Do you remember when you started working at CRO [sic, Churasscos River Oaks]?
Steven:	Hell yea
	Yeah august 2012
	Training. On the floor September
Reichman:	Ok . . . Email this info to me . . . So that we have actual correspondence
Steven:	Ok will do it now
Reichman:	I'm going in early so no one sees me look-

[10] During the course of events, Reichman married and changed her name. For consistency in this decision, the last name Reichman is used.

[11] Ramirez did not work Fridays and Saturdays for his first month and a half at Sugarland.

[12] Ramirez denied that he was called that name, but was called "Pretty Boy." I make no credibility finding on whether the email was from Ramirez because Respondent clearly believed it was Ramirez and took action on that basis. Late in the hearing, Ramirez admitted that he was the person in the text message.

	ing through this stuff . . . .
Steven:	On Monday right?
Reichman:	Tomorrow . . . . And I would like to see the lawyer on Monday What really sucks is that I found out that there are mit getting paid more than I am! Anyway I'm going to sleep. . Keep in touch with email tomorrow because I leave my phone on the desk and Damian knows you started this and I don't want him to know

(R. Exh. 8.)

The copy provided at hearing included no date or time for the text messages. Ambroa testified that he knew the messages were from Ramirez because Reichman previously used his nickname. He also confirmed that the August 2012 start date, mentioned in the text message, coincided with Ramirez' start date. He further assumed that Reichman was sneaking around because she said she was going in early and did not want to be seen. After photographing the text message, he sent copies to his supervisor, COO Espinoza.

At the time of the email exchange, Reichman resigned and planned to change jobs the next Friday. However, Ambroa observed her drinking alcohol on the job and immediately terminated her before her resignation took effect. About July 26, 2015, Reichman, already terminated, had a text message exchange with Ambroa, who ended the conversation by telling her she was in trouble for drinking on the job and not to text him again. During the exchange, Reichman said that Ramirez asked her to obtain payrolls for other employees. She denied cooperating with Ramirez to obtain the information. She offered to bring her flash drives and computer to Ambroa for inspection. However, her email also said she was forwarding back to Respondent emails that she was printing up. (R. Exh. 9.) No emails were presented at hearing.

Reichman called Ramirez and said that she was wrongfully terminated for stealing information. On the stand, Ramirez denied that he was aware of what information she was stealing, but maybe it was check stubs. Reichman testified she had been drinking on the job and only learned of the reasons she was terminated through the grapevine.

Reichman had access to confidential personnel files, which were normally in a closed or locked office. Reichman also scanned personnel documents, such as documents necessary for licensure to serve alcoholic beverages, for corporate headquarters; these documents were not retained by the location once scanned and sent to headquarters. Reichman also could access certain public folders for other employees at different locations. However, she denied that the restaurant location would keep copies of Social Security numbers because Ambroa would scan and send to corporate HR, and then destroy it. Ambroa, who obtained the text, testified that Reichman had access to the company computer system, which held employee information of wages, payroll, social security numbers and bank account numbers. (Tr. 814.)

About July 26, 2015, Ambroa notified COO Espinoza about the text messages. Espinoza was concerned that social security numbers were at risk, that flash drives were involved to store information and that an assistant manager, who had access to alarm codes, could enter the restaurant early. Espinoza notified Quinonez and the information technology department. The information technologist could not conclusively determine whether anything had been taken, said it was likely nothing was taken and would cost quite a bit to make sure information was not stolen. The IT investigation took a few weeks. Quinonez did an investigation and had possession of emails between Reichman and Ambroa, none of which were presented at hearing.

B. In September 2015, COO Espinoza Interviews Ramirez and Terminates Him

Espinoza had two discussions with Ramirez, which occurred on September 4 and 10, 2015. Espinoza testified he did not have time earlier because the restaurants had a "second December," with Houston Restaurant Week, which runs specials at a set price. Espinoza also had other duties to which he had to attend. (Tr. 1036.) Quinonez was on vacation. In the meantime, between August 3 and September 1, three more Sugarland employees joined the FLSA action, making the number of employees participating in the action now 20.

1. September 4, 2015 interview

On September 4, 2015 Espinoza recorded the first discussion with his telephone, but did not advise Ramirez that he was recording him. The meeting lasted no more than 10 minutes and Espinoza did not present to Ramirez the text messages Ambroa had sent him.

Espinoza began the conversation that he was conducting an investigation. Espinoza informed Ramirez that he understood Ramirez filed the lawsuit against Respondent and respected his right to do so, but Respondent' had to guard the employee's personnel records and the privacy of those records. Ramirez asked what type of records. Espinoza said it was personal information and asked Ramirez if he knew that sharing the information could violate the law. Ramirez said he had no idea.

Espinoza then asked for Ramirez' cellular telephone number and his carrier. He then asked Ramirez about texting Reichman. Ramirez repeatedly said that he only contacted Reichman through text messages about his schedule. Espinoza asked to see his phone and when Ramirez said he would not do so, Espinoza asked that he write down that he refused to do so. Ramirez asked if he could contact his attorney first. Espinoza said Ramirez could contact his attorney after the meeting. Espinoza then said, "So what I understand that you're refusing to show me your phone and you're refusing to that in writing." (R. Exh. 27.) Ramirez asked again if he could quickly call his attorney. Espinoza again said Ramirez could call after they were done. Ramirez asked if he was in trouble. Espinoza said it was an investigation, and he asked if Ramirez texted Reichman about obtaining records. Ramirez denied sending any texts. Espinoza asked about "text messages to her" about a flash drive. Ramirez again said strictly work. Espinoza again asked if Ramirez asked Reichman for any company records, which he again denied. Espinoza again asked about Reichman giving him records or a flash drive with information, which Ramirez again denied. Espinoza asked whether Ramirez told

Reichman to delete records, which Ramirez denied. Ramirez emphasized that he talked about shifts in his texts and said he was telling the truth. Espinoza asked if he might find out later Ramirez was dishonest. Ramirez again denied it. Espinoza asked, ". . . if we happen to have records or whatever you know they're going to prove exactly what you're telling me?" and then confirmed that Ramirez would not write down anything at that time. Ramirez again said he would write his answer if he could call his attorney. Espinoza concluded the interview.

Espinoza concluded Ramirez was lying.

2. September 10, 2015 meeting

On September 10, Ramirez was scheduled to work a shift. When he arrived, General Manager Romero directed him to a private office with Espinoza waiting for him inside. Romero stayed for the meeting. Espinoza pulled out his telephone and began recording the conversation, as did Ramirez. Romerez said nothing during the meeting.

Espinoza, after telling Ramirez that he spoke with "various employees" about the breach of confidentiality in the personnel records. Espinoza asked if Ramirez had anything to add, which he did not and asked why it mattered. Espinoza said that the investigation revelaed he worked with other employees to access employee records and he was dishonest about texting Naomi and accessing employee records. Espinoza asked Ramirez what he was having Reichman doing with his records. Ramirez said he did not need Reichman to do anything. Espinoza then asked whose records Reichman was trying to obtain. Ramirez denied that he was trying to obtain records or telling Reichman to do anything. He said he was just trying to text about his schedule. Espinoza then asked Ramirez write down his story, and Ramirez refused because he was told not to write down anything or sign anything. Espinoza, three times, without waiting for Ramirez to respond, repeated that Ramirez was denying to write down his version of the story. Ramirez started to say he was stating it, and Espinoza interrupted and again said, "You're denying to write down your version of the story." Espinoza then said that the employee handbook only allows examination of records with permission and any violation would be a serious offense that "can result in termination." Espinoza then stated that, according to the handbook, Ramirez lied during the investigation "by accessing confidential employee records according to this investigation" and "encouraging another employee to access confidential employee records and lying to me about texting Naomi." (R. Exh. 28.) Ramirez asked who texted Naomi, because his texts were always about business. Espinoza again said Ramirez could write down his side of the story. Ramirez asked if he could call his attorney. Espinoza said Ramirez could call his attorney afterwards. Ramirez asked if he signed if he could continue working there. Espinoza said it was not a matter of signing, but a matter of getting Ramirez' version of the story. Ramirez again denied that he asked for records. Ramirez again asked if he wrote his side of the story, would he continue to work there. Espinoza then said, "What does that have to with uh?" Ramirez asked if he was being terminated. Espinoza again said that if Ramirez wrote it down it might be a different version. Ramirez demanded to know if he was terminated. He said he did not do anything wrong, never asked for records, that he did not know Reichman that well and did not trust her. Espinoza told Ramirez he was terminated for violating the policies and wished him the best. [13]

Respondent contends that Ramirez was asking Reichman to obtain personal information, including social security numbers, and putting information on flash drives. Ramirez denied that he sought information to be put on flash drives. Ramirez initially testified that he only texted Reichman about his schedule, then said he also talked with her about parties and he did not recall whether he had additionally texted her about other issues. On recall, Ramirez said that he did not want to sign or write anything without his attorney because of the pending FLSA action.

Respondent did not ever contact Reichman after her texts to Ambroa because, according to Espinoza, she no longer worked for Respondent and the matter was an internal investigation. It also concluded that the issue was a matter of trust with Ramirez. Espinoza testified that honesty was at issue, particularly as Ramirez handled credit cards, cash and gift certificates. Espinoza denied that the FLSA action had anything to do with terminating Ramirez.

The messages included the times but did not include dates. Ramirez ultimately testified, after some denials, that he was involved in the text message conversation. Ramirez also testified that that some pages were missing from the text. However, Ramirez said he spoke with Reichman by telephone before she sent the texts: She was calling from a bar and was slurring her speech, sounding drunk. (Tr. 1196–1197.) He admitted he wanted information about his hours only.

C. Disparate Treatment Evidence

According to Quinonez, Respondent's policy on theft is that it is strictly prohibited and cause for immediate termination. Quinonez presented several examples of terminations that involved stealing. In the first example, a manager cashed the same check twice. During the investigation, the manager was presented with the picture of him cashing the check at the bank for the second time and then started crying. He was terminated for stealing and lying during the investigation. In the second example, Respondent terminated another employee for stealing beer from the bar and then selling it to the kitchen employees. A third employee utilized the manager's number to void checks for food, which meant the customer was not paying for the food. (R. Exh. 10.) The fourth example was an employee who stole gift certificates and bottles of wine. She also said that employees were terminated for adding tips.

D. Analysis

Respondent violated Section 8(a)(1) when it terminated Ramirez. General Counsel presented a prima facie case under *Wright Line*, supra. The Board also said, in dicta, employers could satisfy their *Wright Line* burden by showing dishonesty has been an independent reason for prior terminations or that a practice of discipline for similar acts of dishonesty exists.

[13] Ramirez also testified that in the week before his termination, management at this location began conducting mandatory meetings, including talking about clocking in and out procedures.

Fresenius USA Mfg. Inc., 362 NLRB No. 130, slip op. at 1 (2015), vacating 358 NLRB 1261 (2012). I find that Respondent's rationale is a pretext.

1. Credibility

Respondent asks that I find Ramirez was not engaged in any protected activity with the text and demands that I discredit him for lying in the investigation and under oath.

I credit Ramirez' reluctant admission that Reichman was to obtain his pay records, to which he was entitled pursuant to Respondent's handbook. The text also establishes that Ramirez sought to question someone with Reichman's husband, Eran, an employee, present for "protection." That statement implies some form of "joining together" for a protected purpose, one which Respondent apparently found but decided to pursue another course of action.

Respondent did not ask Espinoza about his knowledge of who joined the FLSA and when it occurred. I find it difficult to believe that Espinoza would not have known when employees were added to the list of the collective action as Quinonez advised the general managers when she was asked. I discredit much of Espinoza's testimony as he was fed a significant number of leading questions and was asked to speculate. *J-H Rutter-Rex Mfg. Co.*, 206 NLRB 656 fn. 2 (1973) (speculative testimony not credited when other testimony is credited). He also was evasive when asked whether Ramirez was advised the interview was voluntary. Espinoza identified Ramirez' consent when he asked Ramirez to follow him into a room, sit down and began discussing matters, and that Ramirez was free to leave at any time, so he interpreted these actions as consent. (Tr. 1051–1052.)[14]

Espinoza's questioning in the interview was misleading and do not support Respondent's conclusions. For example, Espinoza asked whether Ramirez had text messages "to her about a flash drive or anything else." Looking at the text message, Reichman wrote to Ramirez about the flash drive, not Ramirez to Reichman, so the question was misleading. The demand that Ramirez write his side of the story was repeated with Ramirez asking to speak with his attorney. Respondent also failed to show Ramirez the text message that set off the investigation. I therefore cannot credit Respondent's claim that the interviews were designed to find the truth.

In addition, all respondent witnesses who had contact with the text message chain between Reichman and Ramirez speculated on its meaning. Again, no one ever presented the text messages to Ramirez. Because Respondent speculated instead of finding out what it meant, I also cannot credit Respondent's witnesses on this point. See generally: *Ernst & Young*, 304 NLRB 178, 179 (1991) (in a compliance hearing, not relying upon speculative testimony); *DSL Mfg. Inc.*, 202 NLRB 970, 971 (1973) (speculation does not equal evidence).

[14] When pointed out that Espinoza did not answer the question put to him, Respondent's counsel changed the question from "Did you tell him that he didn't have to participate in the interview?" to "Was the interview voluntary?" (Tr. 1051.)

2. General Counsel presents a prima facie case on Respondent's discharge of Ramirez

Respondent contends that neither Ambroa nor Espinoza held any animus towards Ramirez. However, Espinoza's testimony about his assurance to Ramirez that Respondent recognized his right to maintain the FLSA action rang hollow when compared to the questions that followed and other events in Respondent's investigation. See generally *Conley Trucking*, 349 NLRB 308, 312 fn. 9 (2007), enfd. 520 F.3d 629 (6th Cir. 2008). Regarding timing, employees continued to join the FLSA action that Ramirez started.

The facts above establish that Ramirez was engaged in protected activity by continuing to answer employee questions about the FLSA action on which he is the lead plaintiff. At the time of the text message, Respondent knew that he was lead plaintiff and it had recently told Managers Ambroa and Romero the names of employees participating the FLSA action. The list of employees joining the suit demonstrates that wherever Ramirez worked, more employees joined the FLSA action.[15]

How Ambroa found the text message raises more questions than it answers. Although Ambroa had access to Reichman's telephone, the time stamp of the text is not the time of the text or its date. The time on Ambroa's photograph of the text reflects the time he took the picture. Comparing R. Exh. 8 with R. Exh. 9, Ambroa apparently had to scroll past the date and time to get to the content. He believed the text came from Ramirez because of his nickname and purposely looked at a text that was not received during work, and certainly not whatever message came up that allegedly prompted him to look at Reichman's cell phone. However, by this time Ambroa knew that Ramirez was one of the employees involved in the FLSA action.

Respondent maintained throughout the hearing and its brief that its paramount concern was the confidentiality of the employee records. Its brief cites Texas law about protecting these documents. However, the course of the investigation demonstrates animus and pretext. When reasons for termination are pretextual, it is "sufficient to demonstrate unlawful motivation." *Tecmc, Inc. d/b/a T.M.I.*, 306 NLRB 499, 503 (1992), enfd. 992 F.2d 1217 (6th Cir. 1993), citing *Dorothy Shamrock Coal Co.*, 279 NLRB 1298 (1986).

Respondent failed to speak with Ramirez expeditiously and instead had him work throughout the busy Houston Restaurant Weeks. Espinoza, on one hand, was admittedly busy, but he also said the texts made him question Ramirez' honesty, including dealing with customer information, such as credit card numbers. Despite misgivings about Ramirez dealing with customer information, which Respondent emphasized in its brief, Espinoza contradictorily allowed Ramirez to work through the month of August, which Espinoza characterized as another "December" for business volume.

The failure to follow up with Reichman is also troubling: She offered to show that she had no information, yet Respondent did not take her up on her offer. Both Ambroa and Espino-

[15] Respondent even asked Ramirez whether he transferred in order to recruit more employees for the FLSA action. Ramirez denied doing so.

za testified that she was no longer employed there, so it made no difference. Ambroa instead cut off contact with her. Respondent's failure to question the witness who could clear Ramirez also points to a lack of concern about the investigation and the confidentiality of its documents. *Escambia River Elec.*, 265 NLRB 973, (1982), enfd. 733 F.2d 830 (11th Cir. 1984) ("sham" investigation). Also see *The Sheraton Anchorage*, 363 NLRB No. 6 (2015) (sham investigation reflects true discriminatory intent); *K&M Electronics*, 283 NLRB 279, 290–291 and fn. 45 (1987) (failed to interview witnesses).[16]

About 6 weeks passed between the time Espinoza was informed of texts and his initial interview with Ramirez. During the investigation, no one for Respondent showed the text message to Ramirez, nor did it tell Ramirez that it had this text message. As noted in the credibility section, Espinoza asked questions on September 4 that did not reflect the actual contents of the text message between Reichman and Ramirez. Despite Respondent's position that it gave Ramirez an opportunity to "come clean" during the investigation, I find that the investigation was not designed to do so and to find a basis for terminating Ramirez. Instead, it serves as evidence of animus and pretext.

Roadway Express, 271 NLRB 1238, 1239 (1984), also cited by Respondent, stated stealing business records for information is not protected. However, the business records the employees obtained were bills of lading: They were the employer's private business records, which was not available to employees. *Roadway* is distinguishable on two levels: First, no records were taken. Second, Respondent never shows that Ramirez' own records were not available to him.

Respondent contends that the employer is permitted to maintain order and respect in its workplace and Ramirez' activities exceeded the protection of the Act. For this proposition, it cites *Reef Industries, Inc. v. NLRB*, 952 F.2d 830, 837 (5th Cir. 1991), enfg. 300 NLRB 856 (1991). The concerted activity is not protected when it is "flagrant, violent or extreme as to render the employee unfit for service." As I rely upon a *Wright Line* analysis rather than *Burnip & Sims*,[17] *Reef* does not provide direction for Respondent's arguments. However, it is instructive in a different way: The Board and the Fifth Circuit left undisturbed the administrative law judge's finding that the employer engaged in a sham investigation of an employee who was terminated for protected concerted activities in an ongoing labor dispute. Id. at 834–835. The Fifth Circuit held the Board did not commit error in finding that the employer violated Section 8(a)(1) by terminating the discriminatee. Id. at 839.[18]

For the proposition that Ramirez was not engaged in protected activity because he lifted confidential employee information and lied under oath, Respondent cites *NLRB v. Brookshire Grocery Co.*, 919 F.2d 359 (5th Cir. 1990). Brookshire suspended an employee for copying confidential wage information and distributing it to employees. The Fifth Circuit's held that an employee's right to engage in Section 7 discussions about wages did not extend to taking company papers and copying confidential information. Id. at 365. However, the facts are differentiated as Ramirez never received any information and he only sought information to which he was entitled.

Respondent gives a blanket statement that lying during an investigation not protected. *Asarco, Inc. v. NLRB*, 86 F.3d 1401, 1409 (5th Cir. 1996), denying enf. in rel. part 316 NLRB 636 (1995). The case is not on point with what happened to Ramirez. In *Asarco*, the alleged discriminatee was the union president. The administrative law judge credited none of his testimony about a horseplay incident unless it was corroborated or not in dispute. 316 NLRB at 641. The judge also found that the alleged discriminatee engaged in horseplay that resulted in injuries to another employee and that the alleged discriminate lied about what he did. Id. at 641–642. In contrast, the evidence reflects that Ramirez did not engage in the conduct for which he was accused, actually stealing information, and Ramirez did not have an adequate opportunity to tell the truth due to Respondent's sham investigation.

For the proposition that lying during an investigation is not protected by the Act, Respondent also cites *Fresenius USA Mfg. Inc.*, 362 NLRB No. 130, supra. The investigation in *Fresenius* involved handwritten statements that female employees found offense, vulgar and threatening. At least one woman identified the handwriting as belonging to the alleged discriminatee. The alleged discriminate denied doing so. The company found the exemplars from the employee log and the alleged discriminatee's handwritten statements looked very close. The alleged discriminate also made an accidental telephone confession to company representatives and then denied doing so. The company terminated the alleged discriminatee for dishonesty. *Fresenius*, 358 NLRB at 1261–1262. Although some of the handwritten statements may have been protected, the Board determined that the company presented an independent reason for terminating the alleged discriminatee, his dishonesty during the investigation. *Fresenius*, 362 NLRB No. 130, slip op. at 1–2. The employer in *Fresenius* completed a significantly more detailed investigation into alleged wrongdoing and had a confession upon which the employee recanted. Respondent here did not give Ramirez an opportunity to review the text in question and was not looking for the truth when it delayed its investigation.

Ultimately, I find that Respondent's actions in discharging Ramirez pretextual. Respondent would have to prove it had a

[16] Respondent also failed to call Reichman in its case in chief. Like the failure to engage with her during the investigation, I take an adverse inference from its failure to call her.

[17] *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 24 (1984). General Counsel provided an analysis under *Burnup & Sims*. Given Respondent's rationales that Ramirez stole information (or tried to steal information) and lied during the investigation, *Wright Line* is better suited to this discussion.

[18] Respondent also cites *Slusher v. NLRB*, 432 F.3d 715 (7th Cir. 2005), revg. 343 NLRB 297 (2004). However, the court reinstated the administrative law judge's finding that the employer unlawfully terminated a strong union adherent, reversing the Board's dismissal of the complaint. The Board, without much explanation, reversed the administrative law judge and instead found the alleged discriminatee's supposed harassment of a dissident employee was not protected, so the termination could stand. 343 NLRB 287. Because of the lack of explanation in the Board's decision, as noted by the Seventh Circuit, I will not analogize *Slusher* to the current matter.

reasonable belief that Ramirez engaged in theft of information, even before it began to question him. *Midnight Rose Hotel & Casino*, 343 NLRB 1003, 1005 (2004). It did not have a reasonable belief that Ramirez stole information as Respondent's computer expert did not reveal anything was missing, as discussed above. The tardy investigation that followed was an effort to find another reason to terminate Ramirez. The treatment of other employees for theft was actual removal of goods or money, not information or presumed interest in removing information. An employer's failure to conduct a meaningful investigation and to give the alleged discriminatee an opportunity to explain demonstrate discriminatory intent. *Andronaco*, 364 NLRB No. 142, slip op. at 14, citing *inter alia*, *Ozburn-Hessey Logistics, LLC v. NLRB*, 609 Fed. Appx. 656, 658 (D.C. Cir. 2015), enfg. 357 NLRB 1632 (2011). Also see *Sociedad Esponanola de Auxilio Mutuo Y Benefencencia de P.R.*, 342 NLRB 458, 459–460 (2004), enfd. 414 F.3d 158 (1st Cir. 2005). Therefore, Respondent presented no conclusive evidence that Ramirez was treated similarly to other employees terminated for theft. *Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 219 (D.C. Cir. 2016), enfg. 361 NLRB 921 (2014) and 362 NLRB No. 118 (2015) (disparate treatment discussion).

Further, the Fifth Circuit enforced a Board decision to reinstate employees who were discharged in violation of the Act. *Convenience Foods Systems, Inc. v. NLRB*, 129 Fed.Appx. 57, 59 (5th Cir. 2005).

IX. CHARGING PARTY MORALES IS DISCHARGED

Rogelio Morales worked as a server at several of Respondent's locations. He spent three years at Churrascos Sugarland. He joined the FLSA lawsuit after speaking with Ramirez. Morales was among five employees to see the attorney handling the case when he signed up. His general manager, Rigo Romero, learned about his participation in the FLSA action in about August, when he asked HR Manager Quinonez which Sugarland employees were participating. (Tr. 1142.) Morales was terminated on August 18, 2015, two months after joining the collective action.

Morales noted in June that "management became more strict" and established new rules, including grounds for immediate termination. Respondent's stated reason for termination was that, on Sunday, August 16, Morales was involved in an offensive conversation with another server at the servers' well, located at the bar. A customer heard the conversation and complained. Respondent found the conversation was immediate grounds for termination and terminated Morales and the other server two days after the incident took place. (GC Exh. 6.)

A. Events at Sunday Brunch

The events leading to termination occurred while Morales worked a Sunday morning brunch shift. At this point, the versions of what happened diverge.

1. Morales' version

Morales was assigned table towards the back of the restaurant, with either big tables or heavier parties. Because he was serving brunch, duties included picking up plates constantly, resetting tables, giving drinks and refilling menus. Morales stated he was talking with the bartender, George Henderson, when another server, Bert Arnes came to the bar area. Arnes started using profanity, stating "[T]hese bitches . . . ." Morales maintained that he told him to be quiet and George hinted to be quiet. A female customer at the bar apparently heard Arnes and said, "Wow. What kind of language. Why are you using it?" Arnes continued to talk with the customer and Morales left the area to continue his work. Morales stated he and Arnes were approximately two feet away from the customer.

Morales stated the female customer had been at the bar for some time, drinking mimosas. She was slurring her words and sometimes laying on the bar. Morales was not her server. Morales is certified to serve drinks and is aware of signs of intoxication. He did not know how many drinks she had.

Morales later saw Assistant Manager Patricia Lopez talking with the customer and brought over Ares. According to the disciplinary record, Ares told the customer that she was trying to get free food. (R. Exh. 12 at 481.)

Lopez then came to Morales about the situation. According to Morales, Lopez asked him about what to do. Morales said he did not want to twist Arnes' words and that Lopez should speak to Arnes first. Morales later saw that Lopez talked with the customer and brought Arnes into the conversation. Morales could not hear this conversation, which took place between 2:30 and 3:30 p.m. However, based upon his experience as a manager, Morales believed that Arnes was given the opportunity to apologize to the guest, which is customary in the industry.

At the end of the shift, Lopez called both Morales and Arnes into the office for a discussion. Manager John Korber, who came to work between 2:30 and 3 p.m., after the incident, was present at the meeting. The meeting lasted only four to five minutes. Lopez said that the customer complained about Arnes' use of language and that Morales was involved. Morales denied involvement and emphasized that he walked away. Arnes said the customer was lying and said he never said anything. Arnes left. Morales remained and told them they should talk with Henderson, the bartender. The two said that they could not do anything until Manager Romero did something about it. In the meantime, Morales would be sent home until Tuesday, when Romero came back to work. Morales denied that Lopez asked for his side of the story. Morales told Henderson he was leaving and Henderson told him that he would testify to what happened. Morales also saw Arnes on his way out and told Arnes that he was sent home for Arnes' mistakes. Arnes said that he was a witness and would vouch for Morales.

2. The Customer's Version

Karen LeBlanc, the customer who was offended by the conversation, testified that she sat at the bar for brunch because she was alone. She had a 2 p.m. reservation and estimated that she was at the bar by 1 p.m. She said she heard Morales and another server (identified as Arnes, above) talking at the cash register. She heard the other server at the cash register talk about what he had done at a nightclub where a number of beautiful women were and that the only way he could get a girlfriend like that was to "roofie" them. The other server said, the previous night, he found a girl who was very drunk and put something in

her drink, then was able to put his hand up her skirt. LeBlanc said that the other server, each time he came to cash register while Morales was around, continued to talk about his experiences at the nightclub and told Morales he had to go with him to have fun. Morales allegedly asked questions, such as age of the person, whether the other server had fun, and then said that he would like to go sometime. LeBlanc said that they were laughing. LeBlanc was led to say that Morales and the other server gave each other a "high five" hand slap.[19] LeBlanc then said that Morales would say, "Yeah man, count me in," which upset her. LeBlanc stated she had not eaten very much and drank one entire mimosa (orange juice with champagne) and did not finish a second one. She asked the bartender to send a manager to speak with her, which he did. She spoke with the manager at the end of the bar with the cash register. The manager said she did not have to pay her check. The other server came behind LeBlanc and the manager and told wanted a free meal. Morales was not present for that exchange.

LeBlanc testified she was so upset that she had to get out of there, but then testified that she finished her second mimosa and her food. (Tr. 776.) She testified that she would not have drank more than 1 to 1 ½ mimosas because she was driving a new Mercedes. She also said that the exchange between the servers did not last long. (Tr. 778.) She also could not recall whether Morales was working at tables or trying to get back to their tables and further admitted that she was not really paying attention to what they were doing. She also was looking at her telephone and the menu and talking to the bartender. She was texting her boyfriend during the time and the television at the bar was broadcasting sports. She said she started paying attention when they were talking.

On redirect examination, LeBlanc testified that the other server used the term "roofie," but Morales did not. She testified that she did not start paying attention to them until she heard the term "roofie." Respondent also led LeBlanc to agree that Morales was "egging on" the other server.

LeBlanc did not give a written statement at the time of the events and was contacted by Respondent's attorney the week before the hearing. She has not been to Churasscos since that incident.

Lopez testified LeBlanc, at the time of the incident, reported the offending server (not Morales) said he had been out the previous night, it was easy to get the "hos" drunk, they were sluts and he took them home and "fucked the shit out them." No drugs were mentioned in the version LeBlanc gave to Lopez. Morales allegedly said, "Oh wow, that's cool." Lopez said that she never heard Morales curse in front of a customer.

3. The Bartender's Version

George Henderson was the bartender on duty when LeBlanc complained about Arnes and Morales. Henderson said he heard Arnes talking "bad about the customers," then Morales came up and "didn't really hear what was said." (Tr. 1113.) The customer asked for a manager and he got Patricia Lopez for the customer. Like Morales, Henderson did not call the manager either. Henderson remains employed as a senior bartender at the restaurant.

B. Respondent Relied Upon Customer's Version and Terminated Morales

On Sunday, Assistant Manager Lopez telephoned General Manager Romero, reporting that the two servers had "a sexual content conversation in front of a guest," who complained. (Tr. 1128.) Romero learned from HR Manager Quinonez that Morales joined the FLSA action in about July 2015.

On Monday, August 17, Romero telephoned Quinonez. He told her what happened and said he wanted to immediately terminate the two. Quinonez advised him to make sure he talked to all witnesses before he made his final decision. Quinonez also told Romero to be very careful because Morales was involved with the lawsuit, but if he violated company policy, Morales would not be treated any differently. (Tr. 425.)

On Tuesday, Romero, with John Korber present, held a meeting with Morales and Arnes in the office. Romero told Morales he "had to be terminated." Romero said his hands were tied because of the customer complaint. Arnes left angrily; Morales stayed and tried to explain himself and said he had a witness. Romero repeated that his hands were tied. Morales credibly denied that he ever used any foul language or inappropriate comments in front of a restaurant customer. He maintains that he told Romero to give him a chance to investigate, to talk with the bartender and any other witnesses. Romero testified that Morales asked for a second chance.

Romero testified that he talked with the two servers separately. Romero said that he asked why Morales would have this conversation in front of a guest. Morales denied talking and said he only laughed. Romero told him that he had been a manager and knew what things should not be done. He said Morales asked for a second chance, which Romero took as an admission of guilt.

After his termination, Morales called Henderson and asked whether Romero talked to him about the termination. Henderson told Morales that no one had even asked him about it. Henderson told Morales he was sorry "they fired him."

C. Morales' Disciplinary History

Morales signed a Respondent's Policy Review Acknowledgement and for receipt of the handbook in August 2013. (R. Exh. 3.) The handbook (at p. 12) included offenses for immediate termination, including discourtesy to a guest, including the use of vulgarity. It also contained a harassment and sexual harassment policy. Any employee engaged in harassment or discrimination could be subject to discipline, up to and including termination. (GC Exh. 15 at 16.)

In November 2014, while working as a manager, Morales was accused of sexual and racist comments and use of profanity while talking in front of employees. An employee, Matthew Pham, allegedly complained that Morales called him "Chi-

[19] On cross-examination, Morales denied that he heard Arnes mention "roofies" (slang for the drug rohyphenol, also known as the "date rape" drug)[19] or give him a "high five" hand slap; he also denied laughing about what Arnes said or encouraging him. Because of his duties, he did not have time to notify Assistant Manager Patricia Lopez.

nese,"[20] drew penises on his paycheck and made derogatory statements on the paycheck. General Manager Nicole Green gave him the discipline. Allegedly Pham was dating a hostess and the relationship became unfriendly. Morales said he had not seen any of the alleged issues until Green confronted him with the discipline. Morales was placed on probation and Respondent planned to check with staff each week to ensure the behavior stopped. (R. Exh. 2.)[21]

In contrast to the disciplinary form, Green sent an email, dated November 8, 2014, to HR Manager Quinonez and Manager Espinoza about Morales' alleged behavior. An investigation was held and, although no direct evidence of sexual harassment was found, Morales was coached and placed on probation. Green encouraged him not to joke as the jokes used obscenities. Towards the conclusion of the mail, Green notes that "without [sic] proof I can't fire [sic] anyone." (GC Exh. 10) The email of November 10 states Pham was calling and texting other staff members and notes that Pham was dating the hostess. Morales contended the hostess wrote the obscenities on the check and Morales did not mention it before because he did not want to get anyone in trouble. (GC Exh. 11.) Manager Romero was not aware of this incident when he terminated Morales as Quinonez did not mention it to him.[22] (Tr. 479.) Pham reported to Quinonez that others allegedly reported that Morales drew the penises on his checks, but no investigation was performed to verify the other reports. (Tr. 486.)

Respondent presented no further incidents of Morales' prior disciplinary actions.

D. Disparate Treatment Information

Respondent contended it fired employees who sexually harassed others. However, one was listed as "making a threat to a team member." In two additional situations, Respondent gave second chances to employees who sexually harassed other employees. (R. Exh. 12.) One of the employees who had a second chance was eventually terminated for another sexual harassment complaint from another employee. Respondent also terminated employees who talked back to customers, such as refusing a request for a child's menu. A female employee reported that a fellow employee touched her inappropriately, including that he grabbed her, kissed her and tried to separate her legs while in the liquor cabinet. Quinonez asked the female employee whether she wanted the offending employee terminated, and according to Quinonez, she did not; instead, the employees were supposed to work different schedules.[23]

In May 2014, a male employee was coached after he told a female employee he wanted to grab a "big chunk of her ass." Other employees reported the situation and an investigation was conducted, which resulted in the female employee saying she did not want the male employee fired. (GC Exh. 12.)

E. Analysis Regarding Morales

I credit Morales' version of the facts. Respondent contends that LeBlanc should be given more credence because she is a disinterested witness. While she may be disinterested, her testimony was internally inconsistent. *Overnite Transportation Co.*, 245 NLRB 423 fn. 1(1979) (judge upheld on not relying upon witness with internal consistencies in testimony). She said she would not drink more than 1 ½ mimosas, yet she finished two. She said she was so upset she could not eat, yet she finished her lunch. She also was not consistent with what she told Assistant Manager Lopez, and I credit Lopez' version of what LeBlanc told her. I am not required to give credence when the witness does not provide a coherent set of facts or is led to certain conclusions, such as "high fiving" or "egging on." *H.C. Thomson*, 230 NLRB 808, 809 fn. 2 (1977) (answers to leading questions on direct examination not entitled to credence). Henderson, who told Morales that he would support his story, gave no information about what occurred between the servers and what he heard. I credit that he called Lopez for LeBlanc, but for no other information.

As noted above, I apply *Wright Line* for the analysis of the termination. Morales was engaged in protected activities because of his involvement in the FLSA action. Romero, who wanted to terminate Morales, and Quinonez both knew of his involvement. The question is whether Respondent held any animus towards Morales' activities. I also do not rely upon Respondent's representation that Morales had previous disciplinary action: Green specifically remarked that Respondent could not prove Morales engaged in the alleged conduct.

General Counsel presents a case that lacks any strong evidence of animus. The only evidence of animus is timing of Romero's discovery of Morales' involvement in the FLSA action. Respondent also demonstrates that it would have terminated Morales for the conduct, regardless of his protected activities.

Respondent terminated Morales for a customer complaint and not upon his protected activities. Customer complaints have been found to be a lawful reason for termination. *Rent Me Trailer Leasing, Inc.*, 305 NLRB 1094, 1094 fn. 3 and 1096 (1992). Also see *Kennedy & Cohen of Georgia*, 218 NLRB 1175, 1177 (1975) (protected activity does not insulate from regular disciplinary measures for misconduct). The record demonstrates that Respondent did not tolerate complaints about employees from customers. In this case, Respondent terminated both employees about whom the customer complained. I shall recommend dismissal of this allegation.

X. ASSISTANT MANAGER NGUYEN WARNS EMPLOYEES "NOT TO BITE THE HAND" THAT FEEDS THEM WHILE TELLING EMPLOYEES THEY MIGHT NOT BE SCHEDULED IF NOT SIGNING THE ARBITRATION AGREEMENT

Around December, Respondent conducted a preshift meeting at Artista, in the mezzanine area, with approximately 15 employees, including Lewis and Bryan Hofman. Assistant Man-

[20] Morales testified he had permission to call Pham "Chinese."

[21] Pham left employment there shortly thereafter. Nothing in the record shows any documentation of the checks done each week to ensure no further behavior occurred.

[22] Quinonez said that if an employee signed a corrective action form, then the employee agreed with the discipline. However, the form makes no such indication. (Tr. 482–483.)

[23] This resolution flies in the face of Respondent's handbook, which requires immediate termination for a violent behavior of shoving and grabbing. (GC Exh. 15 at 19.)

ager Alex Nguyen conducted the meeting.[24] He provided the new arbitration agreement for employees to sign. Nguyen told the employees that Artista Manager Ambroa and Corporate Manager Fred Espinoza said the employees were required to sign or they would be removed from the schedule. During the meeting, Charging Party Lewis and employee Hofman complained that the papers were not legible. Hofman testified that the employees were told the document was legible enough for them to sign.

Lewis said, "I can't speak for everyone, but I can speak for myself. I know we can't be forced to sign a legal document without having legal counsel first." She said she objected to signing the form and, according to Hofman, was insistent on having legal counsel review the form first.

Nguyen appeared upset and said, "You can't discuss this in the open meeting. I know your concern is because of the lawsuit." Lewis responded, "Well, you presented it to us in an open meeting." Nguyen responded, "Well, personally, if it were I, I wouldn't bite the hand that feeds me." (Tr. 229, 336.)[25] He then said, "I would just go ahead and sign it."

After the meeting, Hofman asked Ambroa what would happen if they refused to sign the agreement. Ambroa said he was told the employees would be fired. Lewis also told Ambroa that she wanted to show the arbitration agreement to her attorney before signing it. Respondent asked Ambroa whether Lewis had a conversation with him about the arbitration agreement. He denied, to a leading question, whether he would take any action against Lewis about the arbitration agreement. However, Respondent left open whether he told employees they would be terminated or not scheduled if they failed to sign. (Tr. 962.) Ambroa did not deny that he made the statement to Hofman about termination for employees if they refused to sign.

The standard in determining whether a statement is threatening or coercive is objective. An unlawful statement reasonably tends to interfere with the free exercise of protected employee rights. *Lucky Cab Co.*, 360 NLRB 271 (2014). As noted in *EYM King of Missouri, LLC, d/b/a Burger King*, 364 NLRB No. 33, slip op. at 11 (2016), citing *Multi-Ad Services*, supra, even a "mere threat of an unspecified reprisal is sufficient to support a finding that the employer has violated Section 8(a)(1) of the Act." It has long been held that a warning not to "bite the hand that feeds you" is coercive. *Missouri Bag Co.*, 91 NLRB 385, 396–397(1950). Accord: *Joseph Chevrolet, Inc.*, 343 NLRB 7, 15–16 (2004), enfd. 162 Fed.Appx. 561 (6th Cir. 2006). Telling employees not to bite the hand that feeds them is a stark reminder to employees of their precarious situation as employees if the employer becomes displeased with them: They have the benefit of employment that is within the employer's control and the employer can easily take it away if the employer finds contrary employee conduct.

I agree with General Counsel that the arbitration agreement was a term of employment. Nguyen made it clear that failing to sign the agreement would lead to termination. Nguyen's statement was coercive not only because it included the warning of not opposing Respondent by "biting the hand," it occurred during a meeting in which Nguyen informed employees that they would not be employed if they failed to sign the arbitration agreement. Therefore the statement is coercive. *Missouri Bag*, supra.

XI. CHARGING PARTY LEWIS

Lewis worked at Respondent's restaurants as a server, server trainer and a VIP donor concierge. She began her employment on February 10, 2013. At the time of her termination, she worked at Artista. She was terminated on April 5, 2016.

The VIP donor concierges (VIP servers) serve donors to the arts. These donors contribute $25,000 to $25,000,000 each year. The VIP servers are selected from approximately 20 servers working at Artista; only six to eight are named VIP servers. The VIP servers are known for giving stellar service to their guests. According to Lewis, VIP donors are to have anything requested. Guests may request a specific server when they make a reservation, either by phone or by computer. When a guest makes a request, the request is kept in the computer. Lewis had a large number of parties requesting her as their server because she had an exceptionally high standard of service. (Tr. 1160, 1163.)

The assistant general manager is stationed primarily at the hostess stand. VIP guests are greeting by name. The assistant manager assigns the table and marks the table seating assignment for the VIP guests.

All positions in which Lewis worked required guest services, including suggestive selling, waiting on tables, and general restaurant services. As a trainer, Lewis trained new servers, including training in new expansion restaurants. She worked with food runners, who presented the orders to the diners. According to Lewis, the food runners spoke English and Spanish. If a food runner gives the food to the wrong diner at the same table, the server is supposed to correct the food runner or notify the kitchen manager, who also serves as the expediter on the server's side of the kitchen line. The expediter was always a member of management, such as General Manager Ambroa.

Lewis heard rumors of the suit and called Ramirez, with whom she had worked at another restaurant. Ramirez referred her to the attorney handling the case. Lewis joined the collective action in June 2015.

A. Lewis Maintains She Suffered a Loss of Assigned Tables and Scheduled Dates Due to Her Protected Concerted Activities

On September 14, Lewis emailed Manager Ambroa that she needed to work part-time. She identified that she would be able to work four nights per week and not limited to Broadway shows. She requested a Tuesday through Friday dinner only, which she believed would cover most of the VIP Donors, and requested to also work the VIP Intermissions. (R. Exh. 4.) Lewis testified that she worked this schedule through the first

[24] Employee Bryan Hofman testified that the meeting was conducted by Nguyen and Ambroa.

[25] Nguyen denied telling employees that the employees would be fired or not scheduled for failing to sign the agreement. I do not credit this denial as Hofman asked Ambroa the same question. However, Nguyen admitted to saying "generally", that he wouldn't bite the hand that "feeds me." (Tr. 1173.)

show in October.

About October, Lewis testified that she noticed that her assignments were changed at the last moment or patrons who requested her service were seated at other tables. Lewis verified in Open Table, the online reservation system, that these patrons requested her as their server.

Table assignments were normally handled by either the general manager or assistant general manager.[26] During this time, the assistant general manager, Alex Nguyen, usually made the schedule. A restaurant map with the assignments was posted usually about 4 p.m., before guests arrived. Servers are provided a copy of the map for the shift.

The map shows the different tables and their respective numbers. The name of the show appearing at the Hobby center is listed. The map is color coded to reflect tables for Artista VIPs, Hobby Center VIPs, and special occasions. The VIP servers, who are listed in red, are the only ones who are allowed to serve during the VIP donor intermission. The servers are labeled for certain areas on the map with their table assignments. The assignments for bussers include side work and housekeeping duties, such as vacuuming and trash. Servers also have side duties assignment at the bottom of the map. (GC Exh. 7.) If a large number of VIPs requested a server such as Lewis, Lewis and Artista General Manager Ambroa would discuss how to configure her section of tables and perhaps allow her to work with another server.

McMillon testified that servers are normally assigned four to five tables and the number of guests depends upon the number at each table. McMillon noted that when he returned from seating guests, sometimes the manager changed the assignments of which server would take guests.

McMillon notes that, on two to three occasions, Lewis was not given guests who requested her. He estimated that it happened more frequently to Lewis and started after Assistant Manager Reichman was no longer working at Artista. Lewis was normally assigned a four-table section and about 8 to 10 guests.

On November 20, Lewis noted that two VIP tables were not assigned to her. She said she checked with Nguyen about the matter and he said they were misassigned, despite guest notes in the computer system stating guests requested her as a server.

A couple of times per month, in the fall of 2015, Lewis stated she was on her way to work a shift and Nguyen would call her to not come in. However, Lewis, if working one day, would check the computer system to see the number of covers and sometimes check guest notes to prepare for the following day. When her shifts were cancelled, Lewis sometimes went to the restaurant to observe the number of parties. The following day, she asked workers if they "made good money" for her cancelled shift.

Lewis also noted that sometimes the "cover count" on the table assignments would reflect more than she actually had. She maintained an eye on cover counts because it not only reflected the number of guests she served, but also if she had sell-ups per guests. Before the changes, she normally had 15 to 20 guests per night; after the changes, she had 8 to 12 guests per night. These changes affected her gross earnings.

Lewis approached Nguyen[27] with her complaints about the table changes and that her guests were asking her why she was not serving them. She pointed out that the requests for her were in Open Table, and Nguyen said he did not pay attention. Lewis said after Nguyen told her the same thing a couple of times, she approached the general manager, Damian Ambroa. Lewis said he "blew [her] off" but said he would speak with Nguyen. After that, Nguyen also did not address her concerns either when she raised them.[28] Ambroa admitted that one time, she pointed out an error, but otherwise she was assigned to the main floor. Nguyen testified that he mistakenly failed to assign VIPs requesting her three or four times during Broadway show nights, which are very busy nights. He attributed his error to failing to note that he did not see the request in the computer reservation system and that some of the patrons had lengthy requests. (Tr. 1161.)

Ambroa testified that he asked Lewis once who she wanted as customers when too many patrons requested her as a server. (Tr. 862.) Ambroa, testifying about Lewis' assignments over the contested period, said that she was assigned VIPs almost every night that VIPs were in the restaurant and was not rotating as frequently as other servers to less desirable stations. Two other VIP servers are plaintiffs in the law suit and still employed by Artista.

Host McMillon testified that a couple of customers, when leaving the restaurant, complained that they were not seating in Lewis' section. McMillon apologized. The customers stated that they preferred Lewis to the assigned server because Lewis gave them better service.

Lewis also contended that she was sent home early seven to eight times from October to her termination, but did not present specific dates nor did she present her records. (Tr. 261.)

Artista's payroll records reflected that it employed less servers between October 2015 and March 2016. Ambroa confirmed that Artista suffered lower sales in that time. Lewis remained within the top five servers within the same period. Other servers, also members of the FLSA action, also had increases in pay while others not involved had decreases. (R. Exh. 17.)[29]

B. Charging Party Lewis is Discharged

On April 5, 2016, Respondent terminated Lewis for racial and derogatory comments. The termination process started

[26] Artista Host Keith McMillion testified that he assigned tables in the morning based upon a cover count, the amount of customers assigned to a section. The assistant manager, usually Nguyen, would assign the servers to the tables based upon the floor map.

[27] Host Keith McMillon testified that Nguyen sometimes would make changes without explanations. He further testified that Nguyen was "a jerk" to other employees.

[28] Respondent asked Lewis whether customers would be upset with the restaurant should they not be seating with the requested server. (Tr. 249–250.)

[29] Respondent also presented a lengthy exhibit about the assignment of tables on each date Lewis worked, which also showed the number of guests and the location of the tables. Ambroa stated for all assignments except the one specifically presented by Lewis, that she received a fair assignment.

with employees complaining to HR about the working atmosphere at Artista. The Human Resources Manager, Patricia Quinonez, conducted an investigation in which she interviewed the Artista employees. During the process, Lewis complained about another server, Cecilia Blanco. By this time, Blanco was terminated. Lewis said she complained about Blanco for a year about Blanco's cursing and rudeness.[30]

Ambroa did not receive any complaints in March 2016, but stated that employees called Human Resources. Quinonez called Ambroa about the complaints in mid to late February 2016 about the "hostile environment," created allegedly by Lewis and Blanco. However, Ambroa said employees did not complain because Blanco and Jeloni had an incident. (Tr. 941.)

About March 23, 2016, Quinonez, with Ambroa present, interviewed approximately 17 employees and typed her notes on March 24, 2016. (Tr. 441; R. Exh. 14.) The notes were returned to Artista, where the employees could review and sign their statements. The statements included information about Blanco as well as Lewis. A number of the statements discussed that Blanco cursed in front of guests. Many of the statements discussed Lewis' attitude, such as screaming to have glasses polished. One statement said Lewis was always recruiting employees for the lawsuit and talked about taking evidence of racism to an attorney. Some denied intimidation from Lewis, while others stated Lewis made racists statements to them. Yet others said Lewis and Blanco created significant stress because of their tempers. In regards to Lewis, the stress came from her screaming in the kitchen. One kitchen employee did not complain about either Lewis or Blanco, but only about the male employees.

Respondent contended that the investigation revealed that Lewis, who is African American, had difficulties getting along with Hispanic staff. These alleged difficulties included telling others that they should speak English, that she threatened to call immigration on them, and called them wetbacks and "lazy and stupid." In her testimony, Lewis categorically denied calling another employee a racially charged name. She denied that she was ever disciplined for calling another coworker a racially charge name or using a racial slur. She also testified at length that if she knew an employee did not understand English, she would ask a bilingual employee to translate for her.

For Lewis, Quinonez considered that Lewis had a previous warning for similar conduct involving derogatory racial comments. Quinonez discussed the finding of her investigation with Espinoza. They decided to terminate Lewis because of racial and derogatory comments. (Tr. 502.) Ambroa agreed because 15 employees told him about Lewis' behavior, her two earlier suspensions and the October incident in which Lewis received no discipline.

Quinonez telephoned Lewis for a meeting and Lewis went to her office at corporate headquarters. Quinonez presented Lewis with a Personnel Action Form noting the termination. The reasons for termination were stated as "Violation of Company Policy." The notes elaborated that Lewis made inappropriate comments to coworkers regarding national origin, race and color. It further stated she used derogatory terms to coworkers, such as wetbacks and Mexicans, confronted coworkers whether they spoke English, spoke rudely and unprofessionally to coworkers and was disrespectful towards supervisors and management. Lastly, it stated that she failed to improve behavior after counseling. (GC Exh. 8.)

Lewis was not told of these allegations during the investigation. Instead Quinonez set up a meeting in which Lewis was terminated. During the meeting, after some small talk, Quinonez told Lewis that an investigation of another employee revealed that Lewis also had made inappropriate comments to an employee. Quinonez told her the company decided to terminate Lewis and it was out of Quinonez' hands. Lewis was reading the termination notice and asked Quinonez to explain. Lewis said she had a multi-racial and ethnicity background and one parent was an immigrant. She asked if Quinonez was kidding and protested, "Patricia, you know me, I don't talk like this." Quinonez responded that she was just the messenger and that was what she was told. Lewis asked who told her these things. Quinonez said she received reports from several different kitchen employees and the company was working to rectify things. Lewis then asked if anyone else was terminated. Quinonez said no. Lewis asked for previous write-ups, which Quinonez said she could not provide due to privacy issues.

Some employees testified on behalf of Respondent about their statements. However, I give more credence to Quinonez' documented investigation summary. All witnesses testifying about Lewis' conduct demonstrated personal hostility towards Lewis. *Ingalls Steel Construction Co.*, 126 NLRB 584, 593 (1960). The employees testified about Lewis yelling at them, sometimes with the term "wetback" or allegedly threatening to call immigration. Not all of the statements taken by Quinonez supported these accusations. For example, Maria "Ruby" Garza testified that Lewis yelled at her in front of customers and the statements said the yelling was primarily in the kitchen. She told Quinonez that Lewis was trying to recruit employees for the lawsuit, but then testified she never made such a statement. Eduardo "Lalo" Vera, a kitchen manager, testified that Lewis frequently called kitchen workers stupid. His testimony was contradicted by Ambroa, who never heard Lewis make such statements.

Noelia Herrera, who worked at the salad station, testified that Lewis cursed at the kitchen help; however, her statement to Quinonez never mentioned Lewis cursing and instead only attributed cursing to Blanco. (Tr. 685, 695, 697; R. Exh. 14.) Herrera then discussed an incident from early 2015, which she reported Lewis to General Manager Ambroa; Respondent's counsel attempted to refresh her memory with a document that she admittedly never saw before Respondent presented it to her on the stand. (Tr. 687–690.) Herrera also stated she was afraid Lewis would hit her and Lewis threw things at her, which again is inconsistent with her statement to Quinonez. In one instance, Herrera testified Lewis threw a salad in the trash because the lettuce was not crisp; the statement did not discuss throwing the salad away, only that Lewis screamed about it by allegedly calling the employees wetbacks and saying they needed to return to their county because they do not speak English. (Tr. 691, 698, 700, 702; R. Exh. 14.)

[30] Blanco was terminated. She was not involved with the FLSA action.

Some of the employee witnesses testified that Lewis was not a good server, which flies in the face of her assignment as a VIP server and the testimony of management witnesses. Ambroa testified that Lewis was a very good server. (Tr. 855.)

Herrera said Lewis could not take care of her tables. How she knew about Lewis' ability to serve was not identified. On a 1 to 10 scale for her server abilities, Vera rated Lewis as a 5. Daniel Perez, a busser, also stated he did not report Lewis' threats to call immigration before Quinonez' investigation. Perez also stated that each day Lewis demanded that he perform duties such as bringing more forks or knives, or carrying heavy trays. I discredit his testimony as he had an ax to grind against Lewis, particularly when he discussed Lewis making him carry heavy trays, and he was inconsistent with Quinonez and the other employees about how he signed his statements.

Lucy Minnie Kline, who works as a hostess, server and sometimes caterer, worked at Artista with Lewis in late 2013 and a few months in 2014. She testified that, in 2013, Lewis assailed her about her role change based upon Kline's upcoming sex change operation/transition and she tried to avoid her after that incident. She said she reported the incident to Assistant Manager Reichman. (Tr. 795.) She said Lewis would pay bussers to reset her station when she first started and when the bussers refused, Kline heard Lewis say under her breath, "Fucking wetbacks." (Tr. 796.) She also claimed Lewis called her "faggot." Kline maintained that Lewis was the only person who called her names. However, I discredit that testimony. Her testimony involved a few months approximately three years before Lewis' termination. Kline said that she appeared voluntarily; however, she called Respondent's counsel her attorney and said she had to listen to him. The 2016 investigation into Lewis' conduct did not reveal any cursing (with the exception of Perez, who is discredited), so it was unlikely that Lewis did so in 2013. Morales, who worked with Kline before the transition, noted that a number of others also called Kline names in 2014; however, he did not know if anyone reported the name calling. (Tr. 1124–1125.)

Employee Hofman, who worked with Lewis frequently on evening shifts for at least two years, stated that she expected people to do their jobs and told them when they were not "pulling their weight." He said she was not arguing, but would tell servers or kitchen staff when they did not perform their work. Hofman gave an example of when she told kitchen staff how an item was to be done and it came out incorrectly, then she told them it was done incorrectly. Hofman said her behavior was "venting." He denied that he ever heard her use an ethnic slur, only hearing her say, "What an idiot" or "what a dummy." (Tr. 343–344.) She instead judged people on their work. (Tr. 348.) He heard her express frustration but said was not the only staff member to do so.

C. Lewis' Prior Disciplinary History

1. 2014 incidents

On March 9, 2014, Artista Assistant Manager Reichman wrote up Lewis after she witnessed Lewis and kitchen worker Noelia Herrera in an argument. Reichman could not recall whether Herrera was also written up. (R. Exh. 1.) Ambroa recalled that he gave Lewis a suspension because Lewis was screaming and "in [Herrera's] face." (Tr. 839–840.) The disciplinary action did not include a signature from a manager. Lewis stated that Herrera physically assaulted her and Ambroa testified that Herrera was only looking down and crying. Assistant Manager Reichman only recalled this one incident and testified that it did not relate to race.

On December 21, 2014, Assistant Manager Nguyen wrote up Lewis for alleged insubordination when she refused to move, replace and organize chairs at the end of a shift. I question the date as Nguyen was not promoted until Reichman was terminated in 2015. Lewis told Nguyen, who locked the doors to the facility, he could not hold the staff hostage and she exited through the back, which apparently was the only exit not locked. Nguyen believed her spoke with Lewis about the discipline, but did not testify to any specific recollections. (Tr. 1157–1158.) No disciplinary action was marked on the writeup and Lewis allegedly declined to sign when presented with it. (R. Exh. 6.)

2. October 2015 incident

Nguyen gave Lewis a second warning and suspension for yelling at another server for serving a spoiled dessert. (R. Exh. 7.) The disciplinary action form does not accurately reflect the events.

Lewis came into the kitchen, admittedly yelling for Kitchen Manager Eduardo "Lalo" Vera. The day after the incident, General Manager Ambroa, who was not present at the time, was apparently accosted by kitchen employees complaining about Lewis. He took five employee statements, which the employees signed. The employee statements were in English, although some spoke primarily Spanish and Ambroa translated the statements for them. Most of the statements show that Lewis said, "Y'all are looking at me like y'all don't speak my language." Employee Anjelica Franco, who said Lewis yelled "dumb foreigners," included an observation: "Everything for one dessert that a guest did not like." (R. Exh. 13.)[31]

HR Manager Quinonez and Ambroa met with Lewis. During this investigatory interview, Lewis was advised that other employees complained about her. Lewis had gone to the kitchen and yelled for Vera. Lewis testified that she never called anyone a "dumb foreigner." She also denied that she called anyone "stupid" but did use the word. She had an immediate concern about the guest and an additional concern that no other guest be served the spoiled dessert. Lewis denied that she criticized anyone for not speaking English and further denied that she called anyone "fucking dumb people." Lewis denied that she had a bad attitude. She denied that she was told this would be her last opportunity to improve and that any further insubordination would not be tolerated. She said she told the interviewers that she was yelling upstairs over the kitchen because the kitchen was loud and she needed to get the attention of the managers, whose offices were above the kitchen. She said Nguyen confirmed that she was not angry. According to Lewis, Quinonez said that it could have been due to a language barrier, miscommunication and some misunderstanding. (Tr.

[31] Ambroa's testimony about the statements included leading about the review of statements and obtaining signatures.

277–278.) Lewis testified that she was not offered a disciplinary form to sign and did not was not given a write-up and Quinonez never led her to believe that she could receive discipline for the incident. The disciplinary action form itself notes Lewis refused to sign the form. (R. Exh. 7.)

Quinonez testified that she received the handwritten notes taken of the investigation from Manager Ambroa. (Tr. 435; R. Exh. 13.) In the meeting, Quinonez discussed the accusations from the kitchen employees with Lewis at Artista. Lewis told her no one liked her. Quinonez testified that said she was not going to give Lewis a write-up but it was the last opportunity for her to stop this behavior. They hugged and Lewis left the room. (Tr. 435–437.) Quinonez later testified that she did not terminate her in October 2015 because she was involved with the lawsuit, was a great server and did not want to terminate her incorrectly. She instead coached her. (Tr. 462–462.)[32]

3. December 2015: Nguyen and Ambroa complain about Lewis' conduct

About the same time as Lewis raised the validity of the arbitration agreement, on December 9, 2015, Assistant Manager Nguyen sent to Ambroa an email about Lewis challenging his authority. The email, requested by Ambroa, confirms that Lewis complained about several items, including not receiving certain assignments, having to perform extra work when a previous server did not perform side work to her standards. Nguyen said she threatened to call the corporate offices to make them aware of the issues. Nguyen further stated she made "sporadic" accusations in front of other team members and he was feeling harassed because of her "petty, selfish issues inside and outside the restaurant." (R. Exh. 21.)[33]

On December 10, Ambroa forwarded Nguyen's email with his own comments to Espinoza and Quinonez. Ambroa said Lewis was late a couple of times each week; if he corrected her, she threatened to call her lawyer or would say it was because she was black or a woman. However, he then testified that he remembered "that incident."[34] Ambroa said Lewis always was assigned to the main floor and received her call parties. The email continued:

> This is very stressful for the whole team. SHE NEEDS TO GO!!
>
> I do understand the situation with her, but what we had to put up is intolerable. If she would be another staff member, she would have been fired 10 times already. The last incident that happened at the restaurant with the kitchen, when Patricia [Quinonez] came over, there was no correction action taken. This situation has to be stopped today, we cannot let her do whatever she wants just because she is part of a lawsuit. I can get 15–20 team members to testify against her, relating to all of her misconduct while at work.

(R. Exh. 21.)

Remarkably, nothing was mentioned about creating stress over race except for her allegation that actions were taken because she was black. Ambroa himself never heard Lewis use the language that the other employees claimed she used. (Tr. 976.) If she used language such as "fuck" or "shit," it was never directed towards anyone. (Tr. 990.) He heard her yell up to the office if she wanted to talk to him. He recalled an incident in which Lewis became rude with Perez for an incident with missing salad cards, which somehow were thrown away and Perez retrieved. However, he never testified that Lewis used racial epithets or threats during this incident.

4. Disparate treatment evidence

Respondent presented several terminations for alleged inappropriate conduct. In August 2015, Respondent terminated Kaveh Barazandeha, a server who had been employed two to three years, for rudeness towards another employee after Quinonez performed an investigation. Respondent provided no notes of investigation or statements of other employees who supposedly witnessed the incident. (R. Exh. 18.)[35] Quinonez said he was an average server. Another server, Jacob Avila, was terminated for "negative attitude" and lack of attentiveness to a customer; he also was on his "last strike" and the records do not reflect what the previous disciplines, if any, were. On June 5, 2015, a third employee allegedly made an inappropriate comment in front of a guest and refused to provide a children's menu. He too was terminated.

Anecdotal notes for a fourth employee indicate he was terminated in June 2015 for vandalism or destruction of property after he threw water on the computer sales system and threw other objects in the floor and yelled. His personnel action form records the termination as "inappropriate behavior" and throwing the water on the computer system.

In 2014, Lewis reported racial discrimination, including bussers making derogatory comments about the work ethic of black people. (GC Exh. 13.) Quinonez met with Lewis, although Manager Green conducted the investigation. In the meeting, Lewis told Quinonez that she declined to file a formal complaint and did not want to get anyone fired. (Tr. 504.) Lewis also emailed Green and thanked her for taking "swift action" on the matter. (R. Exh. 19.)

The records also reflect that Cecilia Blanco, who was investigated simultaneously with Lewis, was terminated for "misconduct" on March 23, 2016. Blanco's checkered history included "flipping birds" while on the work floor and cursing.

[32] Ambroa testified that he wanted her terminated at that time and Lewis said nothing in her own defense. He apparently had made up his mind before the meeting and cited the previous incidents with Lewis as reason enough to terminate her. (Tr. 855–856.) Given Lewis' history of standing up for herself, I find it difficult to believe that Lewis took the complaints without response. In addition, I discredit that Quinonez told Lewis she was on her last chance based upon Ambroa's December 10 email, in which Ambroa said no disciplinary action was taken.

[33] Nguyen testified that Lewis was respectful with most people but she would pound the bar if she did not obtain the drink order, even if she made the mistake in entering the order, or she would demand food quickly and out of order from the kitchen. He was not specific in when these events occurred.

[34] Neither Ambroa nor Nguyen gave Lewis discipline for tardiness. (Tr. 859.)

[35] Quinonez twice started to say, "And he had previous . . ." then changed to talk about conducting an investigation. (Tr. 463.)

D. Analysis

1. Lewis' additional protected concerted activity and Respondent's knowledge

Lewis had two additional incidents of protected concerted activity: the first, her statements in the meeting about the arbitration agreement; and second, the statement of another employee reporting her for recruiting fellow employees for the FLSA action against Respondent.

When employees make a complaint to fellow employees, it is "inherently concerted because it involves a speaker and listeners." *Belle of Sioux City*, 333 NLRB 98, 2015 (2001). Also see C*omponent Bar Products, Inc.*, 364 NLRB No. 140 (2016). When an employee enlists the support of fellow employees in a group-meeting context, "'a concerted objective may be inferred from the circumstances.'" *Cibao Meat Products*, 338 NLRB 934 (2003), citing *Whittaker Corp.*, 289 NLRB 933, 934 (1988). Also see: *AdvoServe of New Jersey, Inc.*, 363 NLRB No. 143 (2016); *CKS Tool & Engineering Inc. of Bad Axe*, 332 NLRB 1578, 1285–1586 (2000); *MPMc Inc. v. NLRB*, 813 F.3d 475, 483 (3d Cir. 2016). Although a statement in a meeting may have a selfish interest, that interest does not make a concerted action unprotected. *Boothwyn Fire Co. No. 1*, 363 NLRB No. 191, slip op. at 7 (2016), citing *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 154–156 (2014).

Lewis' comments at the pre-shift meeting about the arbitration agreement to Nguyen were protected and concerted. Despite prefacing her remarks about not speaking for other employees, Lewis' statements were not just personal gripes, but issues relevant to the future employment of all employees attending the meeting. Another employee joined in supporting her concerns, including questioning whether to seek advice from an attorney before signing and obtain a legible copy of the agreement, which reflects the true nature of concerted activity. *MPMc v. NLRB*, 813 F.3d at 485.

The second incident is revealed during Quinonez' investigation in March 2016: Lewis was recruiting employees to participate in the FLSA action. As noted above, participating in a suit or arbitration about wages is protected. Asking employees to participate is also protected.

2. Alleged decrease in assigned tables for Lewis does not violate Section 8(a)(1) of the Act

I find that General Counsel did not demonstrate that Respondent significantly changed Lewis' tables and guest assignments from October 2015 through her termination in March 2016. Nguyen admitted to a few mistakes and Ambroa testified to the assignments in that period, which appeared to be equitable. Lewis' testimony about other employees saying Artista was busy during certain times when she was cancelled was not corroborated.

3. Respondent's discharge of Lewis violates Section 8(a)(1) of the Act

General Counsel presented a prima facie case. Respondent's reasons for termination are pretextual in light of its long history of tolerating Lewis' alleged conduct.

i. Additional credibility determinations

I credit Ambroa never heard Lewis use the language for which she was accused. Further, Respondent did not establish that Ambroa would not have had an opportunity to hear any offending language. He worked as an expediter in the kitchen yet denied hearing any of the language the kitchen employees claimed. This information corroborates Lewis' claim that she did not use that language directed toward other employees. The December 9–10 email from Nguyen and Ambroa also fail to mention any of the alleged racial comments for which Lewis was terminated; they instead concentrated on her demands and temperament. Again, the failure to mention that conduct supports a finding that Lewis was not engaged in making such racially charged statements for which she was ultimately terminated.

I also credit Hofman's testimony about Lewis' conduct. His testimony is forthright and clear. He also is a current employee testifying against pecuniary interests, which makes his testimony particularly reliable. *Rocky Mountain Eye Center*, 363 NLRB No. 34, citing, inter alia, *Unarco Industries*, 197 NLRB 489, 491 (1972); *Gateway Transportation Co.*, 193 NLRB 47, 48 (1971); *Georgia Rug Mill*, 131 NLRB 1304 fn. 2 (1961).

Ultimately, I credit Lewis' denials of such conduct. *Ozburn-Hessey Logistics, LLC*, 833 F.3d at 220–222. She was straightforward in her testimony and did not waiver. Nguyen said that he thought she sometimes wanted too much perfection in her service, and that I can believe: Her testimony demonstrated she was all about putting the customers first and giving service beyond any expectations. See generally *Transport America*, 320 NJLRB 882, 887–888 (1996).

ii. Respondent's actions demonstrate animus and pretext

Respondent argues that the only evidence of animus is its general opposition to the FLSA action. A noted previously, evidence of pretext also serves as evidence of animus.

The investigation into Blanco, based upon Lewis' complaints, turned into an investigation of Lewis. The investigation revealed to Quinonez that Lewis was recruiting other employees to participate in the FLSA action. As previously noted, participation in the FLSA action is protected concerted activity, and talking with others to join the suit has the same result. *Alternative Energy Applications, Inc.*, 361 1203, 1206 fn. 10 (2014).

Respondent relies heavily upon the information gleaned in its March 2016 investigation. The evidence from these incidents is non-specific. The incidents could be before October 2015, or refer to the same incidents. The testimony provided by employees did nothing to clarify when the incidents occurred.

In addition, Ambroa's December 10, 2015 email stated that he had 10 to15 employees who would testify against her. He apparently relied upon these same employees for the March 2016 investigation, but Respondent waited approximately 3 months before taking any action. Timing indicates that Respondent, which tolerated Lewis' actions for at least three months, now decided termination was necessary to prevent her from making certain statements or recruiting other employees. This toleration lends itself to a finding of animus. *Andronaco*

Inc., d/b/a Andronaco Industries, 364 NLRB No. 142, slip op. at 13 (2016). It also shows Respondent had a tolerance for Lewis' alleged conduct problems. Id.[36] Also see *Compuware Corp.*, 320 NLRB 101, 102 (1995), enfd. 134 F.3d 1285 (6th Cir. 1998), cert. denied 523 U.S. 1123 (1998) (employer terminated an employee already engaged in protected activities because of a perception that the employee might continue to do so); *Lou's Transport, Inc.*, 361 NLRB 1446 (2014).

I can only conclude that Respondent terminated Lewis, not because of the claimed racially insensitive remarks, but because it noted she was engaged in further efforts to recruit fellow employees in the FLSA action and in other protected activities, such as speaking out at employee meetings. *Alternative Energy Applications, Inc.*, 361 NLRB 1203; *Paraxel Int'l.*, supra. Also see *Andronaco*, 364 NLRB No. 142, slip op. at 1 fn. 1. Timing of Respondent's last discovery that Lewis was recruiting others to join the FLSA action, during the investigation, persuades me that Respondent did not want any more recruitment of employees for the FLSA action. *Conley Trucking*, 349 NLRB at 323 (timing of Respondent's conduct as indicator of animus).

For the March 2016 investigation, Respondent simply accepted complaints about Lewis and never gave her a chance to explain or defend herself. When an employer fails to conduct a meaningful investigation and fails to give the alleged discriminatee an opportunity to explain herself, both demonstrate discriminatory intent. *Andronaco*, 364 NLRB No. 142, slip op. at 14, citing *inter alia*, *Ozburn-Hessey Logistics, LLC v. NLRB*, 609 Fed. Appx. 656, 658 (D.C. Cir. 2015), enfg. 357 NLRB 1632 (2011). Also see *Sociedad Esponanola de Auxilio Mutuo Y Benefencencia de P.R.*, 342 NLRB 458, 459–460 (2004), enfd. 414 F.3d 158 (1st Cir. 2005). As noted in the credibility section, the complaints about Lewis' behavior do not say when they occurred and Ambroa's December email already said he had over 10 people to testify against her.

Respondent contends that its termination of Blanco, who was not involved with the FLSA action, demonstrates that it took the same action regardless of protected activity. I disagree as I discredit the complaints about Lewis.

Respondent also contends that it terminated employees for complaints about behavior. In examining the complaints, at least two were terminated for guest complaints, not other employee complaints. The employee who threw items, including water on the computer system, is not analogous to the conduct for which Respondent terminated Lewis. (R. Exh. 18).

I therefore find that Respondent violated Section 8(a)(1) by terminating Lewis.

CONCLUSIONS OF LAW

1. Respondent Cordúa Restaurants, Inc. is an employer within the meaning of Section 2(2), (6) and (7) of the Act.

2. The following are supervisors within the meaning of Section 2(11) of the Act and/or agents within the meaning of Section 2(13) of the Act:

3. Respondent maintained the following handbook provisions that are overly broad and violate Section 8(a)(1):

a. Under Standards of Conduct, a provision that states "conduct that is disruptive, non-productive . . . , is strictly prohibited.

b. Prohibiting "solicitation on Company premises" without designating areas in which solicitation would be permitted or when solicitation would be permitted.

c. Prohibiting employees from engaging in Section 7 activities by "leaving Company premises or work location during working hours without permission of your supervisor".

d. Prohibiting employees from engaging in Section 7 activities by threatening discipline for "Committing other acts which tend to bring the Company into disrepute."

e. Prohibiting employees from engaging in Section 7 activities by prohibiting "Arguing."

f. Prohibiting employees from talking about wages, hours and terms and conditions of employment to the media and press;

g. Prohibiting employees from bringing cellular telephones and pages onto the premises, which prohibits Section 7 activities during breaks and in non-working areas, and prohibit recording in Company facilities.

4. Since about September 29, 2015, Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining an arbitration agreement that precluded employees from concertedly participating in the protected activities of class action or collective action lawsuits and/or arbitrations.

5. About December 2015, Respondent violated Section 8(a)(1) of the Act by telling employees they should not bite the hand that feeds them while requiring employees to sign an arbitration agreement.

6. On September 10, 2015, Respondent violated Section 8(a)(1) of the Act when it terminated Charging Party Steven Ramirez because he concertly complained about wages, hours and terms and conditions of employment by filing a class action lawsuit.

7. On April 5, 2016, Respondent violated Section 8(a)(1) of the Act when it terminated Charging Party Shearone Lewis for concertly complaining about wages, hours and terms and conditions of employment by joining Ramirez' FLSA action, for speaking out at employee meetings, and for recruiting employees to join the FLSA action.

8. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent Cordúa Restaurants, Inc. has engaged in certain unfair labor practices I find it must be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act.

The standard affirmative remedy for maintenance of unlawful work rules is immediate rescission of the offending rules; this remedy ensures that employees may engage in protected activity without fear of being subjected to the unlawful rule. *Schwan's Home Service*, supra, citing *Guardsmark, LLC*, 344 NLRB 809, 812 (2005), enfd. in rel. part 475 F.3d 369 (D.C.

[36] Respondent argues that Lewis' alleged statements to Kline in 2013 demonstrate Lewis began such conduct shortly after her hire. Even if I credited Kline's testimony, Respondent did nothing to correct the situation for a number of years.

Cir. 2007). Respondent may comply with the Order by rescinding the unlawful handbook rules and republishing its employee handbook without the, and rescinding the provisions found unlawful.

Companywide notice posting is appropriate because the record shows that the Respondent's unlawful arbitration agreement and unlawful work rules contained in the employee handbook apply to employees at all of the Respondent's restaurants. "[W]e have consistently held that, where an employer's overbroad rule is maintained as a companywide policy, we will generally order the employer to post an appropriate notice at all of its facilities where the unlawful policy has been or is in effect." *MasTec Advanced Technologies*, 357 NLRB 103, 109 (2011) (quoting *Guardsmark, LLC*, 344 NLRB at 812). I shall order that the Respondent post a notice at all locations where the arbitration agreement and overly broad employee work rules were in effect. Because of the transfers between the facilities, the companywide posting will include rescission of the disciplinary actions.

The make whole remedy shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with the interest at the rate prescribed in *New* Horizons, 283 NLRB 1173 (1987), and compounded daily as prescribed in *Kentucky River Medical* Center, 356 NLRB 6 (2010). In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), Respondent shall compensate Steven Ramirez and Shearone Lewis for search-for-work and interim employment expenses regardless of whether those expenses exceed his interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center,* supra. Additionally, Respondent shall compensate Steven Ramirez and Shearone Lewis for the adverse tax consequences, if any, of receiving a lump-sum backpay award. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014). In accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director of Region 16 a report allocating the backpay awards to the appropriate calendar year for each employee. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and manner.

Respondent shall also be required to remove from its files any and all references to the unlawful discipline imposed on these employees, and within 3 days thereafter to notify them in writing that this has been done and that the discipline will not be used against them in any way

General Counsel also asks that the remedy for the discriminatees include consequential costs. As the Board has not determined that these are compensable, I decline to so rule.

ORDER

Respondent Cordúa Restaurants, Inc., by its officers, agents, successors and assigns, shall:

1. Cease and desist from:

a. Maintaining the following unlawful rules in its employee handbook:

i. Under Standards of Conduct, a provision that states "conduct that is disruptive, non-productive . . . , is strictly prohibited.

ii. Prohibiting "solicitation on Company premises" without designating areas in which solicitation would be permitted or when solicitation would be permitted.

iii. Prohibiting employees from engaging in Section 7 activities by "leaving Company premises or work location during working hours without permission of your supervisor".

iv. Prohibiting employees from engaging in Section 7 activities by threatening discipline for "Committing other acts which tend to bring the Company into disrepute."

v. Prohibiting employees from engaging in Section 7 activities by prohibiting "Arguing."

vi. Prohibiting employees from talking about wages, hours and terms and conditions of employment to the media and press.

vii. Prohibiting employees from bringing cellular telephones and pages onto the premises, which prohibits Section 7 activities during breaks and in non-working areas.

b. Promulgating and maintaining a mandatory arbitration program that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

c. Telling employees that they should not bite the hand that feeds them and threatening them with lack of scheduling if they fail to sign a new arbitration agreement;

d. Discharging employees because they engage in protected concerted activities.

e. In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

a. Rescind the following unlawful rules contained in Respondent's employee handbook:

i. Prohibiting "solicitation on Company premises" without designating areas in which solicitation would be permitted or when solicitation would be permitted.

ii. Prohibiting employees from engaging in Section 7 activities by "leaving Company premises or work location during working hours without permission of your supervisor".

iii. Prohibiting employees from engaging in Section 7 activities by threatening discipline for "Committing other acts which tend to bring the Company into disrepute."

iv. Prohibiting employees from engaging in Section 7 activities by prohibiting "Arguing."

v. Prohibiting employees from talking about wages, hours and terms and conditions of employment to the media and press.

vi. Prohibiting employees from bringing cellular telephones and pages onto the premises, which prohibits

Section 7 activities during breaks and in non-working areas, and prohibiting recording on Company premises.

b. Furnish employees with inserts for the current employee handbook that (1) advise that the unlawful provisions have been rescinded, or (2) provide lawfully worded provisions on adhesive backing that will cover the unlawful provisions; or publish and distribute to employees revised employee handbooks that (1) do not contain the unlawful provisions, or (2) provide lawfully worded provisions.

3. Rescind the mandatory arbitration program in all of its forms, or revise it in all of its forms to make clear to employees that the arbitration program does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forms.

a. Notify all applicants and current and former employees who were required to sign or otherwise become bound to the mandatory arbitration program in any form that it has been rescinded or revised and, if revised, provide them a copy of the revised program.

b. Within 14 days from the date of the Board's Order, offer Steven Ramirez and Shearone Lewis full reinstatement to their former jobs or, if that job no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

c. Make Steven Ramirez and Shearone Lewis whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

d. Within 14 days from the date of the Board's Order, remove from its files any

reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

e. Compensate Steven Ramirez and Shearone Lewis for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 16 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year for each employee.

f. Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Steven Ramirez and Shearone Lewis and within 3 days thereafter, notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

g. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designed by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

h. Within 14 days after service by the Region, post at its metropolitan Houston, Texas facilities copies of the attached notice marked "Appendix."[37] The notices shall be posted in English, Spanish and any other language deemed necessary by the Regional Director. Copies of notice, on forms provided by the Regional Director for Region 16, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an internet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If Respondent has gone out of business or closed any of its restaurants, Respondent s hall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by Respondent at any time since March 24, 2015.[38]

4. It is further ordered that the Complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated Washington, D.C., December 9, 2016

APPENDIX

NOTICE TO EMPLOYEES

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you by telling you not to bite the hand that feeds you.

WE WILL NOT maintain a rule that restricts you in your rights to engage in protected concerted activities by telling you that conduct that is disruptive or non-productive is strictly prohibited.

WE WILL NOT maintain a rule that restricts you in your rights to engage in protected concerted activities by telling you that solicitation on Company premises is prohibited.

WE WILL NOT maintain a rule that restricts you in your rights to engage in protected concerted activities by prohibiting you from leaving Company premises or work location during work-

[37] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[38] The first charge was filed on September 24, 2015 and Respondent maintained its unlawful handbook rules since 2014. The 10(b) period is applied.

ing hours without the permission of your supervisor.

WE WILL NOT maintain a rule that restricts you in your rights to engage in protected concerted activities by prohibiting you from committing acts which tend to bring the Company into disrepute.

WE WILL NOT maintain a rule that restricts you in your rights to engage in protected concerted activities by prohibiting you from arguing with fellow employees.

WE WILL NOT maintain a rule that restricts you in your rights to engage in protected concerted activities by prohibiting you from talking to the media and/or the press.

WE WILL NOT maintain a rule that restricts you in your rights to engage in protected concerted activities by prohibiting you from bringing cellular telephones or pagers on Company premises, or prohibit recording on Company premises.

WE WILL NOT promulgate and maintain a mandatory arbitration program that requires our employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT terminate you because you engaged in protected concerted activities, including participating or recruiting employees to participate in a collective wage lawsuit or arbitration proceeding or speaking out about wages, hours, and terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind and/or revise the unlawful rules as stated above.

WE WILL furnish you with inserts for the current employee handbook that (1) advise that the unlawful provisions have been rescinded, or (2) provide lawfully worded provisions on adhesive backing that will cover the unlawful provisions; or WE WILL publish and distribute revised employee handbooks that (1) do not contain the unlawful provisions, or (2) provide lawfully worded provisions.

WE WILL rescind the mandatory arbitration program in all of its forms, or revise it in all of its forms, or revise it in all of its forms to make clear that the arbitration program does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums.

WE WILL, within 14 days from the date of the Board's Order, offer Steven Ramirez and Shearone Lewis full reinstatement to their former jobs or, if that job no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Steven Ramirez and Shearone Lewis whole for any loss of earnings and other benefits resulting from their unlawful discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Steven Ramirez and Shearone Lewis, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

CORDÚA RESTAURANTS, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/16-CA-160901 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.