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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

DAVID E. LEACH III, :
Regional Director of Region 22 :
of the National Labor Relations :
Board for and on behalf of the :
National Labor Relations Board, :

Petitioner, :

v. :

Civil No. 18-cv- 09160-BRM-DEA

LIFETIME BRANDS, INC., :

Respondent. :

PETITIONER'S REPLY BRIEF TO
RESPONDENT'S OPPOSITION TO THE PETITIONER'S AMENDED
PETITION FOR TEMPORARY INJUNCTION UNDER SECTION 10(j) OF
THE NATIONAL LABOR RELATIONS ACT

TABLE OF CONTENTS

A. Ordonez's and Sanchez's terminations caused irreparable harm to employee rights under the Act and to the Board's remedial authority. 1

B. Interim Reinstatement of Ordonez and Sanchez will Preserve the Board's Remedial Power 3

C. Interim Reinstatement of Ordonez and Sanchez Outweighs any Public Interest 4

TABLE OF AUTHORITIES

Cases

<i>Angle v. Sacks</i> , 382 F.2d 655 (10th Cir. 1967)	2
<i>Asseo v. Pan American Grain Co., Inc.</i> , 805 F.2d 23 (1st Cir. 1986).....	2
<i>Eisenberg v. Wellington Hall Nursing Home, Inc.</i> , 651 F.2d 902, 907 (3rd Cir. 1981)	1
<i>Frankl v. HTH Corp.</i> , 650 F.3d 1334 (9 th Cir. 2011).....	1, 3
<i>Hirsch v. Dorsey Trailers</i> , 147 F.3d 243, 248-49 (3rd Cir. 1998).....	4
<i>Kobell v. Suburban Lines, Inc.</i> , 731 F.2d 1076, 1091-92 (3rd Cir. 1984).....	4
<i>Kos Pharm v. Andrx Corp.</i> , 369 F.3d 700 (3rd Cir. 2004)	2
<i>Kreisberg v. Emerald Green Building Services, LLC</i> , 169 F. Supp. 3d 261, 273-74 (D. Mass 2015).....	4
<i>Lightner v. 1621 Route 22 West Operating Company d/b/a Somerset Valley Rehabilitation and Nursing Center</i> , 2012 WL 1344731, 11-cv-2007 (D.N.J. March 1, 2013)	5
<i>Miller v. California Pacific Medical Center</i> , 19 F.3d 449 (9th Cir. 1994)	3
<i>Moore-Duncan v. Aldworth Co., Inc.</i> , 124 F.Supp 2d 268 (D.N.J. 2000).....	4, 5
<i>NLRB v. Electro-Voice, Inc.</i> , 83 F.3d 1559 (6th Cir. 1996)	1, 3
<i>Pascarell v. Vibra Screw, Inc.</i> , 904 F.2d 874, 880 (3rd Cir. 1990)	1, 2, 4
<i>Pye v. Excel Case Ready</i> , 238 F.3d 69 (1st Cir. 2001).....	1, 2
<i>Seeler v. Trading Port</i> , 517 F.2d 33 (2nd Cir. 1975).....	3
<i>Sharp v. Webco Industries, Inc.</i> , 225 F.3d 1130 (10th Cir. 2000)	2
<i>Silverman v. Whittall & Shon, Inc.</i> , 125 LRRM 2150, 1986 WL 15735 (S.D.N.Y. 1986)	2

U.S. v. Sotomayor,
2015 WL 11022868 (E.D. Pa 2015) 2

U.S. v. Valenzuela-Alvarado,
39 F. Appx. 538 (2002)..... 2

University of Texas v. Comenisch,
451 U.S. 390 (1981)..... 2

Statutes

29 U.S.C. § 151 4

29 U.S.C. § 157 4

A. Ordonez's and Sanchez's terminations caused irreparable harm to employee rights under the Act and to the Board's remedial authority.

The discharge of two active and open union supporters has adversely impacted employees' interest in unionization and has caused irreparable harm to the collective bargaining process. See *Pascarell v. Vibra Screw, Inc.*, 904 F.2d 874, 880 (3d Cir. 1990) (“chilling effect” of retaliation is “patent” from the nature of the violation); *Eisenberg v. Wellington Hall Nursing Home, Inc.*, 651 F.2d 902, 907 (3d Cir. 1981) (discrimination against union activists “risk[s] a serious adverse impact on employee interest in unionization” (internal quotation omitted)); see also *Pye v. Excel Case Ready*, 238 F.3d 69, 74 (1st Cir. 2001). Ordonez's and Sanchez's discharges caused the expected “chilling” impact on other employees, hampered communication between the Union and employees, and sent the message that being an open and outspoken Union advocate results in discipline and termination. See *Pascarell*, 904 F.2d at 878–79, 881; see also *NLRB v. Electro-Voice*, 83 F.3d 1559, 1573 (7th Cir. 1996) (remaining employees “know what happened to the terminated employees, and fear that it will happen to them”). The remaining employees, especially those who were undecided about organizing, will not support the Union after seeing what happened to Ordonez and Sanchez. *Frankl v. HTH Corp.*, 650 F.3d 1334, 1363 (9th Cir. 2011). After seeing open activists like Ordonez and Sanchez discharged, no worker “in his right mind” will “participate in a union campaign.” *Pascarell*, 904 F.2d at 878-79 (“chilling effect” of retaliation may

outlast the curative effects of any remedial action the Board take”); *Silverman v. Whittall & Shon, Inc.*, 125 LRRM 2150, 2151, 1986 WL 15735, *1 (S.D.N.Y. 1986). Employee fear of employer retaliation after seeing union supporters discharged is “exactly the ‘irreparable harm’ contemplated by §10(j). *Pye*, 238 F.3d at 75; see also *Sharp v. Webco Industries, Inc.*, 225 F.3d 1130, 1135 (10th Cir. 2000).

Absent interim reinstatement, employees’ §7 rights will be irreparably harmed by the unlawful discharges of Ordonez and Sanchez. *Pascarell*, 904 F.2d at 879 (“[u]ltimate reinstatement may very well not vindicate the public interest in the integrity of the collective bargaining process”). By the time the Board issues a final order, “the employees ... may not wish to exercise the rights thus secured to them ... [interim] [r]einstatement of the illegally discharged employees is the best visible means of rectifying this.” *Angle v. Sacks*, 382 F.2d 655, 660–61 (10th Cir. 1967); see *Pascarell*, 904 F.2d at 878–79. Nothing short of interim reinstatement will suffice to counter-balance the message caused by the discharges.¹

¹ Respondent’s argument that the affidavits are unreliable hearsay because they were taken in English from Spanish-speaking affiants who cannot properly attest to the content of the affidavits is meritless and should be rejected. Respondent’s claim that no evidence was presented about the bilingual Board agent’s interpreting qualifications ignores that courts have upheld this method of taking affidavits so long as the affiant does not challenge the accuracy of the written statement or the oral Spanish translation provided to the affiant. *U.S. v. Valenzuela-Alvarado*, 39 F. Appx. 538 (2002); *U.S. v. Sotomayor*, 2015 WL 11022868, *6-7 (E.D. Pa 2015). Here, Respondent cannot point to any affiant who claims they did not understand the content of their affidavits or that the Board agent’s translation was lacking. Respondent merely relies on conjecture to object to the affidavits, rather than on actual evidence of unreliability and untrustworthiness. In any event, Respondent’s further objection to the affidavits as hearsay is equally meritless. District courts may properly admit hearsay testimony in §10(j) proceedings. See *University of Texas v. Comenisch*, 451 U.S. 390, 395 (1981). See also *Kos Pharm v. Andrx Corp.*, 369 F.3d 700, 718-720 (3rd Cir. 2004). This principle is equally applicable to § 10(j) proceedings. *Asseo v. Pan American Grain Co., Inc.*, 805 F.2d 23, 26 (1st Cir. 1986). In addition, the nature of § 10(j) proceedings further supports the use of



B. Interim Reinstatement will Preserve the Board's Remedial Power.

Respondent is wrong in asserting that its offers to remedy other violations alleged by the Petitioner in the underlying administrative complaint, but not the discharge of Ordonez and Sanchez, obviates the need for an injunction. (Resp. Br. 34). The discharge of these employees, especially that of leading activist Ordonez, is the main cause of the inhibitory impact on employees' willingness to continue union activity. This is evidenced by employees' statements citing Ordonez's discharge as a cause of their fear of retaliation. See Ordonez Supp. Affd. ¶ 14, ¶17. Respondent's voluntary remediation of the other violations is insufficient to fully prevent irreparable harm to employee organizing rights or to protect the Board's remedial authority.

The purpose of §10(j) relief is to preserve the Board's remedial power. *Frankl*, 650 F.3d at 1366 (citing *Miller v. Cal. Pac. Med. Ctr.*, 19 F.3d 449, 459-60 (9th Cir. 1994)). When unfair labor practices such as these threaten irreparable harm, the most effective way to protect the Board's remedial authority is for the courts to restore the lawful status quo. *Id.* Allowing the unlawful terminations to stand unremedied until the Board issues a final order threatens the Board's ability to enforce the Act, and inflicts irreparable harm to the national labor policy

hearsay evidence. A §10(j) proceeding is not a full trial on the merits of the underlying unfair labor practice. Thus, a district court should give the Regional Director deference on factual matters (*Seeler v. Trading Port*, 517 F.2d 33, 37 (2nd Cir. 1975) and refrain from weighing the credibility of witnesses (*Electro-Voice, Inc.*, 83 F.3d at 1570).

encouraging collective bargaining embodied in §1 of the Act (29 U.S.C. §151), and the employees' right to organize under §7 of the Act (29 U.S.C. §157).²

C. Interim Reinstatement is in the Public Interest

Respondent's argument that an injunction directing it to reinstate Ordonez and Sanchez poses a safety threat (Res. Br. 38–39) is unpersuasive. Neither employee has a disciplinary history of violating the safety policies in the workplace. The safety rule infractions for which they were assertedly discharged were minor, caused no harm, and were the type of incident that had never led Respondent to discharge an employee.³ Because there is no evidence that either

² The Respondent's argument (Res. Br. 35–37) that injunctive relief is inappropriate in light of Petitioner's "extreme delay" is equally meritless. Respondent missed multiple deadlines to provide the Region with responses to the numerous, successive allegations that Petitioner had to fully investigate before issuing the administrative complaint, the last of which were received on November 29 and 30, 2017. After complaint issued on January 30, 2018, Respondent further delayed by trying to obtain a piece-meal settlement with the Region. Delay is significant only if the harm has occurred and the parties cannot be returned to the status quo, such that a final Board order is likely to be as effective as interim relief. The Union is present and willing to reinvigorate the organizing campaign with the reinstatement of Ordonez and Sanchez—who are both willing to return and resume their union activity. *See Hirsch v. Dorsey Trailers*, 147 F.3d 243, 248-49 (3d Cir. 1998) (Region's 14-month delay in seeking 10(j) relief did not bar injunction); *Kobell v. Suburban Lines, Inc.*, 731 F.2d 1076, 1091–92 (3d Cir. 1984) (injunction is appropriated when the failure to grant interim relief likely would "prevent the Board, acting with reasonable expedition, from effectively exercising its ultimate remedial powers"), *Kreisberg v. Emerald Green Building Services, LLC*, 169 F.Supp. 3d 261, 273–74 (D.Mass 2015). Finally, to the extent there was any administrative delay attributable to the Petitioner, such delay was necessary to fully determine the nature of Respondent's unlawful conduct and seek authorization from the Board to institute §10(j) proceedings. *Pascarell v. Vibra Screw Inc.*, 904 F.2d 874, 879 & n.7 (3d Cir. 1990) ("courts must be deferential to the Board's determination that the integrity of the process needs interim protection"),

³ Regarding the discharges of Ordonez and Sanchez, this is a rare case where Respondent freely admits that it had knowledge of their activity and acknowledged that it had anti-union animus. (Res. Br. 13, fn. 14). The burden shifts to Respondent to provide evidence that it would have discharged the employees even absent their union activity. *Moore-Duncan v. Aldworth*, 124 F. Supp. 2d at 283. While Respondent asserts that Ordonez and Sanchez both violated the company's safety policies by training other employees without authorization, it produced scant evidence to show that it actually had a safety training program. Instead, Respondent's pretextual reason for the discharges is exposed by its own disciplinary records attached as Exhibit 9 to the Petitioner's Amended Memorandum on Points and Authorities. A cursory review of Exhibit 9 reveals Respondent pounced on Ordonez's and Sanchez's minor infractions while slapping other employees on the wrist for more serious safety violations. For example, Jose Cruz and Melvyn Delgado, who were involved in multiple safety violations, and Pedro Ramirez, who caused physical harm to another employee while operating the equipment, were either verbally or written warned and continue to work for Respondent, while Ordonez and Sanchez were swiftly and abruptly discharged. The severity of discipline

employee “present[s] a serious and immediate threat” to safe operations, in contrast to *Lightner v. 1621 Route 22 West Operating Company d/b/a Somerset Valley Rehabilitation and Nursing Center*, 2012 WL 1344731, 11-cv-2007 (D. N.J. Mar. 1, 2013), “the public interest in safeguarding the collective bargaining process outweighs the potential harm to the employer.” (Memo Op. at 122–23.) See also *Moore-Duncan v. Aldworth Co., Inc.*, 124 F.Supp 2d 268, 294 (D.N.J. 2000)(interim reinstatement is necessary to “demonstrate that the reprisals against pro-Union employees is unlawful and will send the message that anti-Union discrimination will not be tolerated.”)

Accordingly, this Court should grant Petitioner’s request for a temporary injunction directing Respondent to cease and desist its unlawful conduct, to immediately offer reinstatement to discharged union supporters Ordonez and Sanchez and to direct the remaining relief sought in the amended petition pending the final resolution of the administrative proceeding.

Respectfully submitted,

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issued to Ordóñez and Sanchez is disproportionate and evidenced disparate treatment. Thus, the record establishes that Ordonez and Sanchez would not have been terminated, but for their union activity. That is, the Petitioner overwhelmingly met its “low threshold of proof” satisfying its burden by presenting evidence supporting its “substantial and not frivolous” legal theory.