International Harvest, Inc. *and* Septival Bolt *and* Ashley Quezada. Cases 02–CA–138000, 02–CA–141056, and 02–CA–143992

November 2, 2018

DECISION AND ORDER

BY MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

On January 7, 2016, Administrative Law Judge Steven Davis issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed an answering brief.

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 and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the judge's recommended Order as modified and set forth in full below.[2]

ORDER

The National Labor Relations Board orders that the Respondent, International Harvest, Inc., Mt. Vernon, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promising wage increases and benefits to employees in order to discourage employees from selecting union representation.

(b) Discharging or otherwise discriminating against employees for supporting Amalgamated Industrial T & N Workers of America, Local 223, AFL–CIO or any other labor organization.

(c) In any like or related manner interfering with, 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 of the date of this Order, offer Ashley Quezada full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Ashley Quezada whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Compensate Ashley Quezada for the adverse tax consequences, if any, of receiving a lump sum backpay award, and file with the Regional Director for Region 2, 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 year.

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of Ashley Quezada, and within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her 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 designated 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 back pay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Mt. Vernon, New York, the attached notice

[1] The General Counsel has 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.

When summarizing the allegations in this case, the judge failed to include the allegation that the Respondent unlawfully discharged employee Ashley Quezada. We correct this inadvertent error.

No exceptions were filed to the judge's finding that the Respondent violated Sec. 8(a)(1) of the Act by promising to compensate employees Quezada and Septival Bolt if they abandoned their support of the Union, Amalgamated Industrial T & N Workers of America, Local 223, and violated Sec. 8(a)(3) and (1) by discharging Quezada.

[2] In accordance with our decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in rel. part 859 F.3d 23 (D.C. Cir. 2017), we shall order the Respondent to compensate Quezada for her search-for-work and interim employment expenses regardless of whether those expenses exceed 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,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010).

In accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), we shall also modify the judge's recommended tax compensation and Social Security reporting remedy.

We shall modify the judge's recommended Order to reflect these remedial changes and to conform to the Board's standard remedial language. We shall also substitute a new notice to conform to the Order as modified.

We do not rely on *Teamsters Local 25*, 358 NLRB 54 (2012), a decision cited in the remedy section of the judge's decision. See *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014).

marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the 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, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 1, 2014.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 2 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 complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. November 2, 2018

Lauren McFerran, Member

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[3] 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."

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 promise you wage increases and benefits in order to discourage you from selecting union representation.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Amalgamated Industrial T & N Workers of America, Local 223, AFL–CIO or any other labor organization.

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 Ashley Quezada full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges she previously enjoyed.

WE WILL make Ashley Quezada whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest, and WE WILL also make such employee whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Ashley Quezada for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 2, 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 year.

WE WILL within 14 days from the date of this Order, remove from our files any references to the unlawful discharge of Ashley Quezada, and WE WILL, within 3 days

thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

INTERNATIONAL HARVEST, INC.

The Board's decision can be found at www.nlrb.gov/case/02-CA-138000 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.

Jacqueline Tekyi, Tanya Khan, Karen Newman, and *Alan Rose, Esqs.,* for the General Counsel.
Michael R. Cooper and *Douglas J. Klein, Esqs. (Jackson Lewis, P.C.),* of New York, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based on charges filed by Septival (Patrick) Bolt in Cases 02–CA–138000 and 02–CA–143992 on October 2, 2014, and January 2, 2015, respectively, and based on a charge filed by Ashley Quezada in Case 02–CA–141056 on November 17, 2014, a complaint, as amended at the hearing, was issued against International Harvest, Inc. (the Respondent) on July 31, 2015.

The complaint alleges that the Respondent promised its employees a wage increase in order to discourage them from voting for the Union, and also promised them a $200 check or gift card if employees supported it in the election.

The complaint further alleges that Bolt concertedly complained to the Respondent regarding the wages, hours, and working conditions of the Respondent's employees by requesting information on the wage rates of the Respondent's employees, and that thereafter, the Respondent discharged Bolt for such conduct, and also discharged employee Denroy Burrell because it believed that he engaged in such conduct, and discharged Bolt and Burrell in order to discourage employees from engaging in those or other concerted activities.

The Respondent's answer, amended at the hearing, denied the material allegations of the complaint, and on September 17, 18, 21, and 25, and October 9, 2015, a hearing was held before me in New York, New York.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, having its facility and place of business at 606 Franklin Avenue, Mt. Vernon, New York, manufactures food, and imports and distributes organic food products which it sells to retail stores. Annually, the Respondent sells and ships from its facility, products valued in excess of $50,000 directly to locations outside New York State. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Respondent operates a bakery employing about 60 workers on two floors. One floor houses the warehouse, production, packaging, and shipping and receiving departments, and an industrial bakery where organic products are produced. Gluten free products are manufactured in another bakery in the basement.

The Respondent's president is Robert Sterling. Its chief operating officer, Justin Young, has wide responsibilities overseeing the entire operation including human resources, compliance with government food regulations, logistics, accounting, purchasing, sales, and customer relations. He reports to Sterling.

Several managers in different departments such as baking, production, and warehouse report to Young. Luz (Margo) Cordero[1] is the supervisor of production in the main bakery and Evelyn Minier is the supervisor of production in another bakery located in a separate building. George Adams is the supervisor in the baking department.

A. The Union's Organizing Campaign

Employee Quezada testified that in the early summer of 2014 she saw Union Agents Anthony and Alex who were associated with the Amalgamated Industrial T & N Workers of America, Local 223, AFL–CIO (the Union) across the street from the Respondent's facility. She spoke to them at that time in the presence of other workers. Their conversation included a description of the benefits they may receive from union representation. She was given literature and about six authorization cards. She signed a card the following day and gave the five others to her coworkers, including Denroy Burrell, in the building's parking lot. At first, her fellow employees were reluctant but then agreed to sign the cards. She noted that there are two surveillance cameras in the parking lot.

Employees Bolt and Burrell testified that they received cards from Quezada. Bolt spoke to the union agents on the street in front of the facility when he arrived at work, and also once or twice while on his break. Bolt stated that he gave cards to other workers in the bakery and returned the signed cards to Quezada.

Quezada also stated that a couple of days after she received the cards she spoke to her coworkers about the Union in the

[1] I have used "Margo" in this decision since she was referred to by that name during the hearing.

production area of the facility. She noted that there are four surveillance cameras in that area.

Young testified that there are surveillance cameras in the facility which record video images only, not audio, and that he could review the tape contained in the cameras. However, he stated that he did not use those cameras to determine whether employees were signing union cards. He added that the purpose of the cameras was to ensure the building's security.

Quezada attended three meetings with union agents. At the first meeting, a couple of weeks after she was given the cards, employee Milton Jimenez, Bolt, and four other workers were present. The second meeting occurred a couple of weeks later, attended by coworkers, and the third meeting took place 1 month after that, at which she was the only attendee, notwithstanding that she told other workers of the meeting.

On August 11, 2014, the Union filed a petition seeking to represent a broad unit of production and maintenance employees.

On the advice of its then attorney, Jane Jacobs, the Respondent hired National Labor Consultants, LLC (NLC) on August 14, 3 days after the petition was filed. The contract entered into between the Respondent and NLC that day states that NLC agreed to:

> Consult and advise management and employees regarding strategy, train employees and management in union issues and develop in them an awareness of their roles and responsibilities during the representation election campaign, interview and evaluate the current management/supervisory staff to determine the extent to which they may be utilized during the campaign as well as their perception of the issues, conduct regular informational meetings with management and employees as deemed necessary and appropriate by NLC, evaluate day-to-day activities, oversee and provide assistance in union petitions, certification, decertification, deauthorization elections or campaigns and/or other Union related activity, prepare appropriate informational materials, analyze data, review information, prepare reports, interview employees, provide training, prepare and provide consultation . . . meet one on one with employees as determined necessary by NLC, provide employee education and materials, and any other service deemed appropriate and necessary as determined by NLC.

NLC assigned two consultants, Dina Cordiano and Cesar (Luis) Alarcon, to perform the services described. Alarcon, being bilingual, spoke with the Spanish-speaking employees and he also spoke to English-speaking workers. Cordiano, who spoke English only, met with the English-speaking workers.

Alarcon did not attend the first meeting between the Respondent's officials and the consultants at which agreement was reached as to the services to be provided. However, he stated that he attended a later meeting at the facility where he, Cordiano and NLC President Keith Peraino met with Sterling and Young. According to Alarcon, Young spoke about the union petition, identifying Bolt, Quezada, Jimenez, and Jimenez' mother as union supporters.

Alarcon stated that Cordiano requested the personnel records of those employees "already seen as viewed by the employer as internal union organizers." Young asked her why she wanted them, and she said, [W]we need to look for dirt on any of their records." Alarcon stated that at that meeting they were told of a "rumor" that Bolt had been accused of sexually harassing female workers. Cordiano told Young to "find out more so we can put some dirt on Bolt."

Alarcon further recalled that Cordiano asked whether the Union held any meetings, the locations of those meetings, and other "logistical" matters, and whether any materials were given to the workers by the Union. She asked for a payroll list of the workers with their names, date of hire, rate of pay, and department. Sterling and Young agreed to provide the requested information.

Cordiano denied that she reviewed the personnel files of employees, nor did she ask management to do so to learn if any employees had prior union involvement, noting that that was not her responsibility, and, in any event, "who cares."

Young denied giving the consultants any information regarding the employees as it related to the organizing campaign. However, he researched the union affiliations of his employees. Thus, President Sterling testified that when union activity began, "we were wondering who were the union supporters so we looked at a couple of job applications and noticed that a couple of people came from a previously union shop and Jimenez was one of them; so we had a pretty good idea that he was the main union guy." Sterling noted that Young reviewed the employees' personnel files and advised him that Jimenez and one other worker were previously employed at a union bakery.

The two consultants were permitted to meet with employees on the work floor. Alarcon explained that based on their "education sessions," both in large groups and in smaller meetings with about four workers, he and Cordiano separately assessed—"got a gauge"—as to the union or company support of the employees. They shared their impressions and assigned numbers to their evaluation of the workers' union sympathies.

On September 2, the Respondent supplied a list of employees' names and job titles to Cordiano. Next to each name were three columns in which Cordiano and Alarcon recorded their assessments for three consecutive weeks. Numbers were inserted in each column which signified:

"1" —Loyal union supporter
"2" —Union cheerleader
"3"—Fence-sitter
"4" —Company supporter

Cordiano and Alarcon were present at the facility every day for about 20 hours per week. Cordiano stated that she and Attorney Jacobs trained the Employer's managers on the "do's and don'ts'" concerning permitted and prohibited statements to employees during the campaign. Cordiano described her task as providing "education for employees—NLRA training."

Alarcon, who was employed by NLC from November or December 2013 to May 2015, stated that his original duty was to translate, and not be involved with strategies. Rather, he was to follow Cordiano's instructions. However, the evidence, set forth below, supports a finding that Alarcon did more than translate Cordiano's words. He promoted, on his own, to Spanish-speaking and English-speaking employees the Respondent's message that a union was not needed. He also spoke, without Cordiano

present, at the first general meeting with workers who were both English-speaking and Spanish-speaking.

Cordiano and Alarcon met with large groups consisting of the entire work force, and also with smaller groups of about four employees on the work floor. Cordiano denied that they had one-on-one meetings with employees, but Alarcon said that he did, in an effort to persuade them to abandon their interest in the Union. I credit Alarcon's testimony, set forth below, that he met privately with Quezada. Further, Bolt testified that he had a 1-hour private conversation with Cordiano. Indeed, the Respondent's contract with NLC provides that NLC's consultants would "meet one on one with employees as determined necessary by NLC."

Further, Alarcon stated that he was asked by Cordiano to meet with employees individually, especially those who were in favor of the Union, in order to persuade them that the Union was "not a good deal" and not good for the Respondent. He stated that he evaluated them regarding their support for the Union and reported that information daily to Cordiano who made those reports to Young.

B. The Consultants' Meetings with Employees

Employee Evelyn Minier[2] stated that meetings were held with the two consultants during nearly all of August and most of September, until the election. She stated that Cordiano gave them much information about unions, especially Local 223, and whether unions could or could not provide jobs. Employee Katrina Clay said that the meetings consisted of Cordiano giving the "pros and cons" of unionization. Employee Quezada testified that she attended all four meetings conducted by the two consultants which took place after she signed her union card.

Bolt testified that that at the first meeting he attended, Cordiano told the workers that the Union would collect dues even if they were on strike. She further stated that the Union would decide what to do in behalf of the employees, and the workers could not tell the Union what action to take in their behalf. Bolt then asked her whether she was on the Respondent's "side" or the Union's side. Employees Clay and Minier then told him not to say anything to Cordiano. Bolt told them to keep quiet but when they persisted he cursed at them.

Bolt stated that at the second meeting he attended, Cordiano told the assembly that 6 percent of American employers are unionized. Bolt disagreed, saying that he was a secretary for a union bakery and he believed that most employees are represented by a union, adding that not all unions are bad.

Bolt testified that in late August or early September, Cordiano approached him and apologized for the two women who told him to be quiet at the first meeting, adding that in her native country of Jordan, women do not speak to men in that manner. Bolt stated that during their 1-hour private conversation, Cordiano told him that he appeared to be a leader, and that she first believed that he was a supervisor. She then said that she wanted him to "come over on this side of management and let us vote out the union" and she would arrange with Young that he would receive $200 per month by a gift card or check and that he would be a supervisor "once you help us to vote out the union." She added that once the Union was voted out "you guys could form a committee" which would act as a typical union but with no dues payment obligations by the employees. Cordiano offered to give him a "template" as a guide to the steps needed to form and run a committee. However, no template was given.

Cordiano conceded meeting with employees about 1 week before the election at which she explained the election procedure and encouraged them to vote. However, she denied promising to give Bolt a $200 check or gift card if he supported the Respondent in the election.

I do not credit Cordiano's denial. Bolt gave uncontradicted testimony that shortly after the election, Young told him that he would not be receiving a raise—a clear reference to Cordiano's promise of a $200-per-month payment to him. Further, it is undisputed that Cordiano spoke to Bolt about forming a committee.

Bolt testified that, based on Cordiano's offer of a monthly payment of $200 and a supervisor's position, he changed his point of view concerning his support for the Union. He decided to pursue forming a committee and oppose the Union's organizing campaign. He asserted that he and Cordiano were "enemies at first because I was for the union . . . after that, there was no problem. She spoke with me, get me on the same page as her."

Accordingly, at the employeewide third meeting he attended, Bolt announced to the workers that they would "give management a chance" and that hopefully something positive would result. He said that he was forming a committee which would meet with management and pursue matters that a union would normally seek. He then announced that Quezada, who was present, would be the only employee who would vote for the Union.

Alarcon noted that he and Cordiano met with Young every day and updated Sterling and Young two or three times per week. At such meetings, the consultants discussed their overall evaluations of the employees and informed the two company officials as to who they learned were in favor of the Union or were campaigning for or supporting it. According to Alarcon, Cordiano told Sterling and Young "what needed to be done with these employees," and also advised the two men what actions they would take toward "neutralizing the union organizing effort."

Cordiano stated, in contrast, that, at Sterling's request, she informed him only about twice as to how the campaign was progressing from the Respondent's point of view. Sterling corroborated that testimony. She denied giving him specifics but told him generally that "things are going well," advising him as to how their education sessions with the employees were progressing, that the workers were attending the sessions, and giving him a "general good sense" of the consultants' efforts. She told him that she was "optimistic." Sterling confirmed that Cordiano informed him that many of the employees were not in favor of the Union, which was Sterling's view from the beginning.

Young noted that he did not focus too much on the campaign as he had his own job duties to complete. He stated that his contact with the consultants was "minimal" and nonsubstantive. He

[2] The transcript contains various spellings of Minier's name. I have used the spelling that Minier gave in her statement to Young. GC Exh. 12.

denied receiving updates concerning the employees and denied that they told him how they believed the employees were likely to vote. He further stated that he did not speak with any employees concerning the campaign. Young's denial that he was told by the consultants that "things were going well" was specifically contradicted by Cordiano's statement that she told him that very thing.

In addition to speaking at meetings, Cordiano joined workers at their workstations, donning a hairnet and working with them for a short period of time. She stated that she did this in order to meet with them if they could not attend a meeting, or if they had questions but could not leave their work area.

C. The Election

An election was held on September 17, 2014. Quezada served as the Union's observer. Four votes were cast for the Union, and 48 were cast against it. There were three challenged ballots. No objections to the election were filed.

D. Discipline of Employees During the Campaign

Cordiano advised Sterling and Young not to threaten, interrogate, promise anything to employees, or spy on them. She and Alarcon told the Respondent's officials, managers, and supervisors not to campaign, but that they should leave the campaigning to the two consultants.

Cordiano counseled the Respondent's officials and managers to avoid disciplining or discharging employees during the election campaign, depending on the circumstances. She advised them to "stay away from anything that's not common practice. Try not to go through any of the disciplinary actions if you don't have to during that time, of course, within reason." She noted that "someone showing up late probably is not a reason to go through the headache of [the Board's reaction to that] but within reason. So, business as usual most of the time."

E. The Respondent's Harassment Policy

The Respondent's Harassment Policy, in relevant part, states as follows:

> International Harvest (I.H.) employees . . . are entitled to respectful treatment in the I.H. workplace. Being respected means being treated honestly and professionally, with your unique talents and perspectives valued. A respectful workplace is about more than compliance with the law. It is a working environment that is free of inappropriate behavior of all kinds and harassment because of . . . sex, sexual orientation or gender identity.
>
> Each of us should understand that incidents of harassment and inappropriate behavior will not be tolerated at I.H.
>
> Examples of harassment that may violate the law and will violate this policy include:
> Oral or written communications that contain offensive name-calling, jokes, slurs, negative stereotyping, or threats. This includes comments or jokes that are distasteful or targeted at individuals based on . . . sex, sexual orientation or gender identity.
>
> Sexual harassment is a form of harassment that is based on a person's sex or that is sex-based behavior. Although having a consensual romantic relationship with another I.H. employee is not harassment, harassment may occur as a result of the relationship if either person in the relationship engaged in conduct in the workplace that is inappropriate or unwelcome.
>
> Our goal is to have a work environment where we all treat each other respectfully and professionally. Any unprofessional or disrespectful behavior, even if not illegal, interferes with that goal and will not be tolerated.
>
> I.H. expects respectful and professional behavior at all times, no matter the situation. Be sensitive to how others may perceive your actions. Just because someone does not complain to you does not mean that they don't object to your behavior.
>
> Where there has been a violation of policy, I.H. will take appropriate action to try to avoid future violations. In appropriate cases, I.H. may take disciplinary action (up to and including immediate termination) against those violating the I.H. Harassment Policy.

F. Ashley Quezada

Quezada was employed from May 2013 to September 2014. She was supervised by Margo and worked in the orders and deliveries department. She picked orders, packed them, and sent them to the shipping department.

As set forth above, Quezada obtained authorization cards from the union agents as they stood outside the Respondent's facility. She solicited other employees, including Bolt and Burrell to sign them and she attended all four union meetings.

As noted above, as testified by Alarcon, Young told him and Cordiano that Quezada was a union supporter. Later, she was included in the spread sheet which analyzed the union support of the workers as being a "loyal union supporter" in all 3 weeks in which the study was made, and with the comment that she is "sleeping with union organizer and is pregnant with his child. "Quezada made this revelation to Cordiano, adding that the father of her child was Union Representative Alex. Alarcon testified that he and Cordiano discussed using that very intimate disclosure as a means to attempt to persuade her to abandon her interest in the Union.

Quezada stated that she attended the first meeting with the consultants at the Respondent's facility. She attempted to attend the second meeting but was told by Cordiano that she could not enter because she did not want to be recorded. Quezada protested that as an employee she was entitled to be present. Quezada stated that Cordiano's remark was prompted by Quezada's recording of Alarcon a couple of weeks earlier, in which he asked her why she was unhappy at work. She told him that she was supposed to receive a raise when she began work.

In this regard, Quezada testified that her starting pay rate was supposed to be $9 per hour but she was paid $8.50. She asked President Sterling why she was receiving a lower rate. He replied that the Respondent would observe her work and then raise her pay, but that did not occur. She stated that she told Alarcon about her unhappiness with her pay rate.

Quezada testified that, in response, Alarcon agreed that she was entitled to the raise, and told her that "if I give you the money that is owed to you and give you your raise, would you stop going to the Union?" Alarcon told her that she would have to wait until after the election to receive the raise. Quezada replied that she did not know but would think about it. Alarcon testified that he offered Quezada the raise "under Dina [Cordiano's] orders." Cordiano denied knowing whether Alarcon promised a wage increase to the workers to discourage them from supporting the Union but denied authorizing Alarcon to make such an offer.

At an employee meeting 1 week before the election, Bolt announced that he believed that Quezada would be the only employee who would vote for the Union.

Quezada requested and received three changes in her hours of work because of family obligations. At the time of her discharge, her shift was from 8:30 a.m. to 5 p.m.

Alarcon stated that he and Cordiano "checked on her attendance and lateness" with Young and learned that her attendance was a problem. According to Alarcon, Cordiano attempted to use that information to persuade Quezada to oppose the Union by offering to have her latenesses expunged from her attendance record. There was no evidence that she did this, however.

The Respondent was clearly interested in having Quezada leave her employment. Quezada testified that Cordiano met with her at her workstation and asked whether she found it hard to work, adding that she "should not work there . . . she could get something better."

Quezada further testified that 1 week before the election she was brought into a private meeting with Young and Cordiano. Cordiano asked her why she was "going for the Union" and why she was unhappy? She did not recall her answer. Young asked her where she saw herself in the future? Quezada replied that she wanted to go to school. Young offered to make some phone calls to have her admitted to a school, and indeed, he made one call during that meeting. Quezada did not recall who he called or what resulted from that call. Cordiano told her that if she joined the Union, Union Agent Anthony would use her monthly dues to get married and for other purposes.

Cordiano then told her that "Alex is not his real name . . . he's faking it . . . he's being used by the Union . . . he's not getting paid." Young asked if her son's father "is in his life" and she answered, "[N]o." One week later, Quezada served as the Union's election observer, and 2 weeks after that she was fired.

Young stated that following the election he knew that Quezada was a union supporter who had voted for it because she was the Union's election observer, but that during the campaign he was not informed by the consultants how any individual employee was likely to vote.

1. The warning notices

Young stated that he did not know if he issued any warnings prior to the warning of August 14, but there were no warnings prior to that date in her file.

a. August 14, 2014

The Respondent issued the first written warning ever to Quezada on August 14. The date is significant. It was 3 days after the Union's petition was filed and the very day that the consultants were retained, and at which the consultants were told that Quezada was a union supporter.

The warning notice stated that Quezada was being warned for not wearing a lab coat while in the production and packaging area. It stated that she had been warned twice in the past to always wear a lab coat.

Young testified that the two prior warnings were verbal, made by him and Supervisor Margo. He did not recall the dates on which the oral warnings were made, but that they took place in 2014, possibly in July or August. Significantly, this written warning states that a first warning was previously issued on August 14, 2014—the same date as the first written warning, which Young conceded does not establish that she was given an oral warning on any date prior to August 14. He further explained that that notation meant that he gave her an oral and written warning on August 14, adding that that did not mean that it was the first warning she received.

Young further stated that he issues many oral warnings to his staff—he just makes a "mental note of it" as advice that they have been given "chances."

Quezada denied receiving this notice but did recall an incident where Young noticed that she was not wearing a lab coat in the production area and told her that she was supposed to be wearing a coat and told her to put one on.

Quezada conceded that she was required to wear a lab coat as part of her work when she enters the production area, but she stated that she is "not really" required to do so since she works in shipping and receiving in the warehouse and she has seen other employees without lab coats pick up orders in the production area. However, in this instance, she stepped inside the production area for 1 minute where food products are manufactured in order to retrieve a product for an order that she was assembling. She conceded that she was supposed to don a lab coat before she entered the production area.

b. August 19, 2014

The second warning, dated August 19, stated that Quezada left the building for lunch and did not return for 2 hours without informing her supervisor why she had to leave. The notice state that Quezada "will be suspended or fired if this continues." Under "previous warnings" the form states that a written warning was issued on "8/18/14." Young conceded that her file did not contain a written warning on that date, and that he checked the wrong box, but then surmised that he gave her an oral warning on August 18 for the same offense.

Quezada received this notice and explained at hearing that during her lunchbreak her babysitter brought her son who Quezada then took to her mother's house. She stated that she could not inform her supervisor because her phone was not working. She returned to work and told Margo the reason for her 2-hour absence. Margo was "mad" at her but then said, "[O]kay."

c. September 22, 2014

The third warning stated that Quezada took an unauthorized smoking break and also without authorization, clocked out at 4:43 p.m., before the end of her 5 p.m. shift. Young noted on the form that if Quezada "is late without calling in she will be fired." The form noted that she had been previously warned orally and in writing on September 22, 2014.

Quezada was given this notice, explaining at hearing that she took a 5-minute "smoker's break." She stated that she has taken smoking breaks with other employees nearly every day. She testified that, prior to this instance, she had been seen by Supervisor Margo taking such a break and had never received a warning for such conduct. She stated that she left 15 minutes early that day because she was angry at Young for giving her a warning for such conduct when other employees who also took a smoker's break that day were not disciplined.

Employees receive a lunchbreak and one 15-minute break per day. The workers swipe an electronic timeclock at the start of their shift and when they begin and end their lunch period.

In addition to lunch and a 15-minute break, Quezada also took a 5-minute "smoker's break" once per day with other employees. She stated that she did not need permission to take that break. However, she stated that Supervisor Margo did not know that she took those breaks, but she saw her during such breaks. Nevertheless, Margo did not say anything to her about her smoking breaks.

Young and employee Jimenez stated that there is no policy permitting employees to take cigarette breaks. Jimenez testified that he saw Quezada occasionally take such breaks in addition to the lunch and the 15-minute breaks. He also stated that he saw her a few times per day smoking or using her cell phone when she was supposed to be working.

d. September 26, 2014

Quezada's fourth written warning, dated September 26, stated that she was being warned "for not working scheduled hours. She showed up today at 9:40 a.m." She was supposed to report to work at 8:30 a.m. The notice stated that "she gave no valid reason" and that she would be terminated on September 30. Quezada conceded being late to work on September 26.

2. Quezada's record of lateness

Quezada stated that in February 2014 her shift changed, at her request, to a start time of 7:30 a.m. From that time until her termination 7 months later, she conceded being 1 hour late up to three times per week. She attributed this poor record to difficulty with babysitting arrangements.

Quezada's final warning notice on September 26 which noted that she was 1 hour and 10 minutes late that day, stated that she would be fired on September 30.

Indeed, Quezada's attendance records establish that she was late on virtually every day she worked. In addition, she was more than 1 hour and 10 minutes late on 59 days from the start of her employment to the date the petition was filed on August 11, 2014.

Young testified that he can access employee time records from the Respondent's computer. He did not recall if he reviewed Quezada's records in 2014. However, even a brief glance at them would reveal an extreme case of excessive lateness throughout her tenure with the Respondent.

Quezada stated that she "mostly" notified Margo when she would be late, and was simply told, "[O]kay." She was not told that her absence was unacceptable. Despite her numerous latenesses she was not given a written warning for lateness until August 19, 8 days after the petition was filed. The four warning notices discussed above were the only notices that were issued to her.

Young testified that he did not believe that the Respondent had a policy regarding lateness or at what point in her arrival an employee is considered late. He stated that inasmuch as many of the employees have children, he tries to "work with" them to accommodate their arriving later than their scheduled worktime. In such cases, the changed time becomes their regular shift. However, they must inform their supervisors. Similarly, an employee who intends to be late must call someone at the facility.

President Sterling testified that Quezada was a "very poor worker." He described her as being "very slow"—a person who "went out of her way to avoid work," and who was the subject of complaints of laziness by her coworkers. He stated that Quezada was not fired prior to the election because he had been advised by his attorney that such an action would "look bad" to the Board during the election campaign. Inasmuch as her alleged poor, slow work was not relied on as a reason for her discharge I will not discuss it. Moreover, there was no credible evidence that she was an unproductive employee.

Young testified that he decided to discharge Quezada only because of her time and attendance record. He stated that "after giving her numerous chances, it was apparent to me—it was obvious to me that she needed to be let go because she would come and go as she pleased. She would not call in. She would leave for lunch, take 2-hour breaks. She would take a 15-minute break. The amount of smoke breaks she takes is just enough in itself; there's no such thing as a 5-minute smoke break. . . ."

G. Septival Bolt

1. Bolt's union activities

Bolt worked as a baker from June 2012 until September 26, 2014. As set forth above, Bolt stated that he was given several union cards by Quezada. He signed one and gave cards to his coworkers in the shop. They returned their signed cards to him and he gave them to Quezada. He also spoke to union agents outside the shop several times. Further, Bolt stated that Cordiano told him, in August, that she saw him speaking to Union Agent Anthony for 20 minutes.

Alarcon stated that he told Bolt that he [Alarcon] was a former union organizer who later believed that the Union was not helping employees. Bolt replied that he believed that the Union was good and would help the workers.

Alarcon testified, as set forth above, that at his first meeting with the Respondent, Young identified Bolt as a union supporter. Cordiano requested the personnel records of those employees viewed as being union organizers. Alarcon stated that they learned of a "rumor" that Bolt had been accused of sexual harassment. He stated that Cordiano told Young to "find out more so we can put some dirt on it." Cordiano suggested that such information be used as an "excuse to get rid of him."

Alarcon stated that Cordiano "took it upon herself to try to get Bolt," and she suggested to Young and Sterling at a meeting in late August or early September, that Bolt be promoted to supervisor and thereby lose the protection of the Act, making it much easier to discharge him. Alarcon stated that it was the practice of Cordiano and himself to promote an employee and then discharge him immediately after an election.

President Sterling testified that he believed that Bolt did not support the Union, explaining that as he walked through the lunchroom he heard Bolt telling employees that they should not vote for the Union. He denied telling other management agents or the consultants what he heard.

Bolt was rated in the first week as a "union cheerleader." He was also rated as a "fence-sitter" in week two, and a "loyal company supporter" in week three. The comment on the spread sheet stated that he was "preaching anti-union message. Still not trusted. Wants to be committee leader."

Cordiano testified that she wrote that Bolt was "still not trusted" because she became aware that he told the employees that the Union could not do anything for them, adding that they needed to be "together," quoting him as saying that if he became a manager and leader, he could "make this happen." Cordiano stated that she shared with others the fact that Bolt was vocal about supporting the Respondent and his interest in becoming a manager.

In contrast, however, Cordiano later testified that she wrote that Bolt was "still not trusted" because she felt unsafe and uncomfortable in his presence. She explained that when they spoke, he did not meet her eyes. Rather, he was looking at her body. She stated that he "made his intentions known" and she believed that he "wanted to have sex with me all the time."

As set forth above, Bolt stated that at the third meeting with the employees led by the consultants, he announced that they would give the Respondent "a chance" and that he would form a committee that would meet with management as a union would.

Bolt testified that Cordiano did not give him a template for the formation of a committee, but nevertheless he organized a committee by selecting one employee from each of three departments. They met on Tuesdays from 11:30 a.m. to 12 p.m. When one committee member told him that the meetings interfered with the work schedule, Bolt spoke to the three supervisors who agreed to release the employees in their departments to attend the meetings.

Bolt testified that after committee meetings had been held where solutions were sought to each employee's problem, he told bookkeeper Raymond White that once the committee "takes over" after voting out the Union, he would need a copy of all employees' wage rates in order to negotiate pay raises with management. White, who is still employed by the Respondent, did not testify.

Bolt held at least two meetings with the committee members. He stated that Alarcon, who was present at both, told the members that Bolt had been a union member in the past, knew what he was doing, and that forming a committee was "the way to go." Alarcon asked Bolt for a list of committee members and Bolt gave it to him.

Bolt stated that Cordiano also advised him that the committee was the "right way to go." Bolt then told her that the committee wanted to meet with management before the election. She denied his request. He replied that that was their "leverage because if management does not sit down and talk with us, then we probably are voting the union." Cordiano said that the committee could not meet with management so close to the election.

Bolt stated that on September 22, 5 days after the election, Young took him outside the building and cursed him. Bolt quoted him as saying, "[N]o more committee. I don't want to hear shit about any committee . . . you're not getting shit. No more committee, no raise, nothing. We, management, will form our own committee in due time." Young did not deny that conversation. Four days later, Bolt was fired.

2. The reason for the discharge

Young testified that he decided to fire Bolt at around the time of the election based on the written warnings given to him and the complaints he received concerning his sexual harassment of employees Antonique Abraham, Katrina Clay, Evelyn Minier, and Maria Revilla.

Cordiano testified that in September, during the election campaign, she spoke briefly with Bolt outside the shop. She stated that she was uncomfortable speaking with him because she believed that he was "undressing her with his eyes" and felt "violated by him in a sexually harassing way." This occurred each time she spoke with him. Immediately after this alleged latest instance, Cordiano related that she proceeded to the basement bakery looking over her shoulder because she feared being followed by Bolt. She added that her feeling was so intense that she did not want to be alone in a room with him or near him.

Cordiano testified that, when she arrived at the basement bakery at that time where Minier and Clay were working, Minier asked Cordiano, "[W]hat's going on." Cordiano replied that she felt violated by Bolt, that each time she spoke with him she felt that she was being undressed by him with his eyes, and "almost felt naked in front of him." That statement was corroborated by Clay.

In contrast, Clay testified that Cordiano's first remarks concerned the work environment—"how everyone worked together." Clay stated that Cordiano first mentioned Bolt—that she believed that he was "undressing her with his eyes." Clay and Minier then mentioned their experiences with Bolt.

Minier, a supervisory employee who is still employed by the Respondent, testified that Cordiano began the conversation by telling them that she felt very uncomfortable around Bolt, saying that it was "just hard to work with him." She could not recall if she said anything specific.

In this respect, Minier contradicted Clay's testimony that Cordiano first spoke about how everyone worked together, and instead used her allegedly inappropriate encounter with Bolt to prompt a conversation concerning their experiences with him.

When Cordiano mentioned her perception of Bolt, Minier responded that Cordiano had "no idea what we go through with that guy." Clay stated that she did not know the "half of it." Cordiano asked what they meant. Minier replied that she had been on a diet and had lost a great deal of weight. She told Cordiano that Bolt told her 2 weeks earlier that if she continued to reduce, he was "going to rape her by December."

Clay told Cordiano that everyone feels "naked and disgusting" in front of him. Clay told Cordiano that Bolt made her feel uncomfortable for 1-1/2 years.

Cordiano testified that she was shocked at these revelations and told the two women that they should not work where they believed that they were being sexually harassed, adding that "if you felt like this for so long, you should have brought it to someone's attention, union or no union petition. You need to tell

somebody." She advised them to tell Young exactly what Bolt said to them.

Cordiano, not waiting for the two women to advise Young, immediately visited him and told him that he may have a human resources issue and that he should speak to Clay and Minier—that it was in his "best interest" to speak to them as soon as possible. She did not specifically describe what they told her because she did not want to betray their trust if they chose not to pursue the matter. Nevertheless, Cordiano believed that she was required to ask Young to speak with them because she felt an obligation to them if something "should happen to them."

Young testified that he "pulled [Clay and Minier] in my office." Cordiano was present. Young asked them what happened, and Minier related Bolt's threat to rape her. Clay related her incident involving Bolt. Cordiano advised Young that what Bolt said to Minier was "very bad" and that he had to address it immediately. Minier's pretrial affidavit stated that she did not report Bolt's inappropriate comments until Young asked her to do so in August 2014, following her disclosure of Bolt's remarks to Cordiano. Minier stated at hearing that she regretted not reporting Bolt's threat when he made it.

At Young's request, Minier and Clay completed statements and sexual harassment forms on August 28 and 29.

Minier's statement related that on about August 20, 2014, she was speaking to coworker Jimenez when Bolt told her to "keep doing what you're doing" and asked whether she was eating well and exercising. Minier said she was. Bolt then said that "if you keep going like this by December I'm gonna rape you." Minier stated that she "got so incredibly furious," "experienced pure anger," and threatened to kill him.

Jimenez was a witness to Bolt's comments to Minier. He testified, describing Bolt as a "predator" who ogles women's bodies at work. He related the conversation more vividly. He quoted Bolt as saying that if he had sex with her, she would change her sexual preference. According to Jimenez, Minier replied to Bolt that he was very disrespectful and did not like him. Jimenez reprimanded Bolt for his comments as being "offensive." Bolt replied that he [Bolt] said such things to her in the past. Jimenez responded that Minier told him that she did not like his remarks.

As a witness to Bolt's comments to Minier, Young asked Jimenez to prepare a statement about what he heard, and Jimenez did so on September 22. The statement differed somewhat from his testimony, but its essence was the same—a recitation of Bolt's offensive remarks.

Bolt denied making those remarks to Minier.

Clay's statement recorded that she has "endured" inappropriate comments from Bolt including his detailed description of his penis, and his offer to take her to "hidden places" in the facility where he could "do things to her." Clay also related that in July 2014, Bolt told her about sexual activities he and another employee were having, and that in mid-August 2014, a coworker told her that Bolt asked another fellow employee to text her and "see how far I go." Also, in that week, a coworker told her that Bolt mentioned her name in a conversation about oral sex.

Clay testified that she had not notified Young, Minier, or any management personnel of Bolt's comments or of similar behavior. However, in the sexual harassment form she completed on August 28, 2014, she wrote that she told Minier of these comments "not sure of the dates in 2013 August 2014." Her pretrial affidavit stated that each time that she encountered Bolt he has made an inappropriate sexual remark to her, adding that she did not tell her supervisor or manager because she believed that it was better to keep her distance from him. Minier told her that she would not assign her to work in the building in which Bolt was employed.

In this regard, Clay testified that she was occasionally sent to work in the bakery where Bolt was employed. In January 2014, Clay told Supervisor Minier that she no longer wanted to work in Bolt's work area because she felt uncomfortable. Minier did not ask why she felt uneasy about working there and she did not tell her, but Minier no longer sent her to work where Bolt was located.

On September 22, Young asked Abraham to prepare a written statement regarding Bolt's comments to her. She related that a couple of months before, while she, Clay, Minier, Bolt, and six other employees were working, Clay mentioned that she was "good in bed" and asked Bolt about "making females' toes curl or something sexual along those lines." Bolt "being disgusting old men . . . replied . . . that she [Clay] is a kid or she isn't a professional. . . ." and offered to "teach her a few things and continued to explain what to do . . . ." Clay became angry and yelled at him and "from then has not really cared for him."

Employee Richard Freeman provided a statement to Young, also dated September 22, in which he quoted Bolt as saying that he had an argument with Clay about some sexual matter, and in which Bolt described Clay's sexual activities in a derogatory manner.

The sexual harassment form that Minier completed repeated Bolt's comments as set forth above. Paragraph 9 asked the following question:

> Have you previously complained about this or related acts of sexual harassment/discrimination to a company supervisor or official? If so, please identify the individual to whom you complained, the date of the complaint and the resolution of your complaint.

Minier answered, "[Y]es about Patrick [Bolt] like 2 years ago." She testified that she was referring to an incident 2 years before in which Bolt made a sexually inappropriate comment to Maria Revilla which made Revilla "feel extremely uncomfortable." At that time, Bolt asked Revilla to give him a photograph of her when she was younger so that he could see whether her buttocks were as large as they were at that time.

Minier's answer, set forth above, was crossed out and the word "no" inserted. Minier denied crossing out her answer and also denied writing "no."

On examination by the General Counsel, Young first, flatly denied that he wrote "no" in that space, adding that he did not know how the original comment in paragraph 9 "came to be scratched off." However, on examination by the Respondent's counsel, Young stated, "I'm not 100% sure, but it makes sense here—[Minier] testified that she didn't do it, I'm the only one that has access to the files now, so it could have been me could have put 'no.'" Young continues . . . "I'm not sure if I did it, but it only makes sense because . . . after hearing Evelyn's [Minier] statement, I'm the only one with the file that would contain this

document and the only one who could have had access to this document after I received it from Minier . . . so it only makes sense that I scratched it off."

On cross-examination, Young added that he altered the document when Minier told him that she was referring to Revilla. He then explained that the question related to Minier—not someone else, and he then crossed out her comment in her presence as not responsive to the question. Young stated that he crossed out the comment because it asked a "specific question—whether or not she [Minier], herself, complained about someone sexually harassing her, and she looks like she was mentioning the incident with Maria Revilla. It wasn't the response so the answer is no."

Young concluded that since Minier did not give the response called for in the question, he crossed it out.

I find that Young misinterpreted the question in paragraph 9, above. The question asked whether Minier previously complained about "this or related acts of sexual harassment. . . ." It did not ask whether the conduct related to Minier only. Thus, the question broadly asked whether she reported any related-sexual harassment. Minier's answer properly mentioned that Bolt had engaged in such harassment about 2 years before. The question was particularly relevant since Bolt was the alleged harasser in both instances—the incident related to her and with Revilla.

In crossing out Minier's answer, and writing "no, "Young improperly sought to give the impression that Minier had not complained about Bolt's prior sexual harassment. The reason for Young's deletion of Minier's response will be discussed below.

Revilla complained about this incident to Minier in May 2012. She was asked to make a written statement at that time which she did. Young testified that he received Revilla's written complaint but that he could not find it when he sought to use it 2-1/2 years later as support for his discharge of Bolt. Accordingly, he asked her to re-write the statement, which she did.

Thus, on December 24, 2014, following Bolt's discharge, Revilla submitted a statement to Young in which she stated that in May 2012, Bolt asked her to show him a picture of her when she was younger to "see if I had a 'butt' then like I do now." She said that his question made her very uncomfortable. Revilla stated that she told her Supervisor Minier at that time who told her "head supervisor." They asked her to write a statement about the matter, and the result was that she and Bolt were "separated and worked in different areas of the facility."

Bolt testified that he was never separated from Revilla in the plant.

Young was not certain whether he spoke to Bolt about the incident or issued a written warning, but no such warning was produced at hearing.

3. The warning notices

a. May 7, 2013

A warning notice dated May 7, 2013, signed by Young was received in evidence. It stated that Bolt refused to carry out orders, directions, assignments, and instructions given by a superior. It added that "failure to demonstrate immediate and sustained improvement may result in further disciplinary action up to and including dismissal."

Bolt first denied receiving this warning notice, but then admitted receiving it, as set forth below, Burrell conceded that he and Bolt had failed to clean the oven in March 2013, and Burrell admitted receiving a warning notice at that time concerning that incident.

b. July 2013

Employee Antonique Abraham submitted a written statement to Young in the summer of 2013. Abraham, a summer employee, related that Bolt told her that day that he could see her nipples though her lab coat. She stated that she felt disgusted and disrespected and informed Supervisor Margo and Young about that incident. Young lost that document in a move of the facility and asked Abraham, in 2014 (Young was not more specific as to the date of his request) to re-write the facts relating to it.

A warning notice dated July 2013, signed by Young, was received in evidence. It was apparently re-written by Young in 2014 based on Abraham's re-written statement in 2014. It stated, "[S]exual harassment and inappropriate comment to Abraham. Active investigation. Mr. Bolt was warned and given another handbook on sexual harassment and told to stay away from Antonique. If his comments continue he will be fired if true." Young stated that despite the form's note—"active investigation"—there was no investigation.

Young first testified that he was not certain whether he spoke to Bolt about that incident, but then said that he did speak to him, but did not undertake an investigation because Abraham left her employment that week, she did not want her complaint to proceed further, she was concerned about affecting Bolt's "livelihood," and that there were "no witnesses, no statements, no person who made the complaint."

Young further stated that he may have questioned one or two employees about the matter, but then said that he did not recall specifically speaking to anyone else. It should be noted that Abraham returned to work in 2014 in a different department, but no further action was undertaken concerning her complaint.

The warning notice states that it was refused by Bolt, but Bolt testified that he did not receive it. He further denied that anyone spoke to him in July 2013 regarding his alleged sexual harassment and denied receiving another handbook at that time. Nor was he told at that time that he was being investigated for this alleged conduct.

Bolt denied making the remarks attributed to him by Abraham. I do not credit his denial based on Abraham's credible written statement and the documentary trail which followed.

Young stated that the complaints of Minier and Revilla were serious and that he had to take action "right away." He further conceded that he was aware in 2012 and 2013 that Bolt was sexually harassing Abraham and Revilla. Nevertheless, no warning notice was issued regarding Revilla's complaint and only a warning notice, which Bolt denies receiving, was issued relating to Abraham's complaint.

Young explained that he did not believe that he was ignoring Bolt's sexual harassment by simply speaking to Bolt and explaining to him the Respondent's sexual harassment policy and what the Respondent expected of him.

c. August 19, 2014

Bolt received three warning notices dated August 19, 2014. All were signed by Young.

The first stated that Bolt left the premises without permission at noon on August 18 and without informing his supervisor. Bolt received the notice and admitted to this conduct but stated that he asked Margo for permission to leave because he had to be with his son. He made this explanation to Young but he refused to listen. Bolt stated that he had received permission to leave early from Margo in the past.

Bolt stated that following his receipt of that warning, he mentioned to coemployee Jermaine Everett, deliberately within Young's earshot, that he was surprised that he was written up for leaving early when he told Margo that he was doing so. Young responded that "you think you're important here and all. Well you're not important here. Go back to your work station."

The second notice stated that Bolt violated company policy by not wearing a hair net while working in the bakery. The notice stated that he wore a baseball cap which was not an authorized head covering, and that he had been warned "copious times" to wear a hair net. Bolt received the notice and testified that he was "at fault" for not wearing a hair net. However, he stated that Supervisor Margo saw him wearing a ball cap "all the time" and had never warned him for his improper headgear.

d. September 3, 2014

This notice states that on "9/3/14" Young "put Mr. Bolt on notice that he was under investigation for sexual harassment of two female . . . employees. Mr. Bolt refused to sign this notice. Active investigation." Two other places on the form bore the date "8/19/14" and one bore the date "8/9/14" but each of those three dates were overwritten. Another date of "8/19/14" in the section "warnings previously" is not overwritten.

Young testified that on August 19 he spoke to Bolt and that day wrote a memo, dated August 19, concerning their conversation. The memo stated that Young explained the Respondent's sexual harassment policy to him, and that Bolt signed another copy of the handbook. Young questioned him about the sexual harassment complaints and "officially put him on notice that he is under an active investigation." Young recorded Bolt's responses to the allegations. They were that he (a) denied knowing anything about the matter and asked if it had anything to do with the "unionization attempt"; (b) joked with Minier and Clay about Minier's sexual preference and "how I can make her like men in a joking way"; and (c) that he told Clay that "she looks good today."

Young testified that he "put Bolt on notice" through this warning, adding that he spoke to Bolt twice about the allegations, on about August 19, and on September 3.

Bolt denied that Young spoke to him about his alleged sexual harassment of Clay and Minier in August and denied seeing this notice at that time. He stated that he saw this form for the first time on September 3.

The testimony and documentary evidence related to Clay and Minier support Bolt's testimony that Young did not speak to him on August 19 about these allegations. The two women stated that after speaking with Cordiano, they met with her and Young and reported Bolt's offensive comments to him orally and in writing. Clay's statement, dated August 28, was given to Young that day. She gave the sexual harassment form to him a couple of days later.

Similarly, Minier's statement is dated August 29 which she gave to Young that day or the next day, and she completed the sexual harassment form within that week. Accordingly, Young could not have spoken to Bolt on August 19, as he testified. He first learned of the accusations by Clay and Minier on August 28.

Bolt testified that on September 3, 2014, he became aware, for the first time, that he was being investigated for sexual harassment. On that day, Young told him that he received a report from "two ladies" that he had sexually harassed them. Young did not identify them, but Bolt remarked that it must be Minier and Clay, the women who demanded that he not speak at the meeting conducted by Cordiano.

Young testified that he explained the Respondent's sexual harassment policy to Bolt and gave him a copy of that and the handbook, and he signed a receipt for them. Bolt signed the Respondent's sexual harassment policy set forth above on September 3. He acknowledged signing the same form on May 21, 2014.

Young asked him to write a statement in response to the charges of Clay and Minier. Bolt told Young that they had made sexually suggestive comments to him, and that he should be alleging that they sexually harassed him.

Bolt stated that prior to September 3, no company agent spoke to him concerning allegations against him for sexual harassment. However, it should be noted that, during cross-examination, he was asked about a memo written by an unemployment insurance agent who stated that Bolt told her by phone that Young was investigating him for sexual harassment in August 2014. Bolt's explanation was that during that conversation he was confused about the date that he had first spoken to Young about the investigation.

e. September 22, 2014

Young issued a warning to Bolt which stated that he "continues to violate company no cell phone in bakery policy. Mr. Bolt was hiding in the bakery closet while talking on his cell phone . . . ." The form stated that it was refused by Bolt, and Bolt denied receiving it.

4. Bolt's raises in pay

Bolt began work at the wage rate of $9 per hour. He received a $1 raise in 2013, another $1-per-hour raise in May 2013 when Burrell received his raise, and a final $2 raise, to $13 per hour in 2014.

Young denied giving Bolt his final $2–per-hour raise. He stated that if he is not in the facility, the employee goes "directly to the owner . . . and beg and plead for a raise and without consulting me, he usually . . . his knee-jerk reaction is call the accounting department and tell him to give him a raise. I don't find out till after the fact."

In contrast, Sterling testified that "Young handles the employees that come and ask for raises." Indeed, Young testified that he is in charge of the entire human resources operation.

5. Bolt is discharged

Bolt stated that on September 26, Young told him that "I investigated and found that you sexually harassed two ladies and you are fired." Bolt asked for a written letter of discharge which Young refused to supply. Young testified that when he fired Bolt he did not know that he was a supporter of the Union.

6. The timing of the discharge

Alarcon testified that Young told Cordiano that he wanted to discharge Bolt for sexual harassment, but Cordiano advised against it, saying that it was "very risky to fire someone before an election," and that such action could cause the election to be overturned.

Young stated that he did not fire Bolt after he received complaints from Clay and Minier regarding their being sexually harassed, because the Respondent's attorney, Jacobs, told him not to discipline or discharge any employee "for fear that it may throw off or compromise the election."

Young stated that he completed his investigation into Bolt's conduct after the election. He was waiting to interview and obtain a statement from Jimenez, who, according to Minier, was a witness to her sexual harassment by Bolt. That statement, which completed the investigation, was received on September 22. Bolt was fired 4 days later.

Young stated that he believed that Bolt was guilty of sexual harassment, and even if he had known that he was a union supporter, he would still have discharged him for such misconduct.

7. Bolt's defense

As set forth above, Bolt denied the specific allegations of sexual harassment testified to by Clay and Minier, and that involving Revilla. He stated that he had conversations of a "sexual nature" with Clay and Minier numerous times, "a regular thing," in all areas of the facility. For example, Bolt stated that they asked him what shoe size he wears, apparently a reference to his genitalia. He answered "size 8" and they laughed. Clay testified at this hearing and at Bolt's unemployment insurance hearing that there was a discussion about the size of his genitalia. At the unemployment hearing she stated that such conversations took place "over and over again." Bolt testified that Clay never asked him to cease his sexually-based conversations.

Employee Quezada also stated that it was "common" for employees to engage in conversations of a "sexual nature" at work. She stated that she heard it "24/7" in the production area.

H. Denroy Burrell

Burrell was hired in June 2012 and was employed as a baker in the baking department, working with Bolt and George Adams. He stated that there was no "designated supervisor "in the department, and he did not report to Adams. Rather, he believed that Margo was his supervisor to whom he submitted requests for vacation and to leave early. Nevertheless, he reported to Adams that he was taking a break if the ovens needed to be monitored.

Burrell testified that he first heard about the Union from Quezada. She gave him, Bolt and others union cards in the parking lot. He signed the card and returned it to Bolt who spoke to him in favor of the Union.

Burrell stated that he spoke with union agents outside the building during his 15-minute breaks. He stated that, in late August or early September, he saw Young looking at him speaking to the representatives from an upstairs window. He heard Young angrily tell Union Agent Anthony not to stand in front of the building. He was listed on the spreadsheet as a "fence-sitter," a "union cheerleader," and "fence-sitter" in the first 3 weeks that the records were kept.

Burrell attended the second Employer-sponsored meeting with Cordiano and Alarcon. The two consultants said that they had done extensive research and had concluded that the Union was a "rip-off" and that they should not join it. Burrell asked why the Union was "so bad," adding that he knew workers who were union members and had not complained about it. Cordiano repeated that she had studied the Union and had been a union member.

1. The warning notices

a. September 15, 2013

In 2013, Burrell received a written warning which stated that he was insubordinate, refused to carry out orders, directions, assignments, instructions, given by a superior, and that he failed to clean a work area before the end of his shift. The notice further stated that if Burrell failed to demonstrate immediate and sustained improvement, he may receive further disciplinary action up to and including discharge.

Burrell received the notice and conceded, at hearing, that he and Bolt did not clean the oven area at the end of their shift that day but denied the other alleged misconduct.

b. December 3, 2013

This warning notice stated that Burrell threatened Supervisor George Adams and did not follow his orders, adding that Burrell "continues to be insubordinate." The notice, completed by Young, states that Burrell refused to accept it.

Burrell denied seeing or receiving the notice or being spoken to about this incident. I credit Burrell's denial that he received this warning. The form appears to be irregular on its face. The date at the top of the page reads "12/3/13" with the year "13" overwritten to read "14." Similarly, the column reading "warnings previously" bears the same overwriting.

However, in two other places on the form, at the bottom one-third, and at the end of the page, the dates of the warning are clearly written as "12/3/13." Young could not recall the specific threat made by Burrell, and his only explanation for the overwriting was that "it's the wrong date."

The question then becomes why the admitted date of the warning, December 3, 2013, was overwritten to make it appear to be written 1-year later. The answer must be that Young altered and overwrote the dates to make it appear that Burrell was warned in December 2014, and ultimately discharged 1-month later allegedly for misconduct at that time, whereas he was, in fact, allegedly warned 1-year earlier and no action was taken as to this alleged misconduct.

As further support for this finding, Young testified that Adams first complained about Burrell's threats "a few years ago, 2012–2013." Young quoted Adams as saying that Burrell is "threatening me again. He's saying that he's inviting me outside; he's saying that he's going to twist me up and hit me with something."

Young testified that he asked Adams to document Burrell's threats, and he did so.

Adams testified that his first incident with Burrell was on December 3, 2013. At that time, Adams apparently mentioned to Bolt in the kitchen that certain things were not being done

properly in the kitchen. Adams left and Burrell entered the kitchen. Adams believed that Bolt said something to Burrell about Adams. Burrell exited the kitchen threatening and cursing Adams, calling him a "bitch," a "mother fucker," and telling him that he would smash his face with a stick and punch his face. Adams said that he walked backwards, not knowing whether Burrell would hit him. Adams returned to the kitchen and asked Bolt what he said to Burrell. Bolt turned away and left without comment. Adams' written statement, made contemporaneously with the event, essentially corroborated his testimony.

Adams reported this incident to Young who asked him to write a report. Adams did so and gave it to Young the following day. Adams' written statement, received in evidence, which he said was made contemporaneously with the event, stated that on December 3, 2013, Burrell cursed at him and threatened to hit him with a stick, and "disrespected him" in front of other employees. Burrell denied threatening to hit Adams with a stick and did not recall threatening him. Young conceded that he wrote the warning on December 3, 2013. Young stated that Adams told him he would quit following the December 3 threat.

Adams testified that he wrote the two reports on his computer at the time that he was asked to write up Burrell—first in December 2013 and then in August 2014. Both reports are on the same page.

c. August 10, 2014

This warning notice states that Burrell was "sleeping inside the bakery closet when on company time. Should be working . . . . He is not on break or lunch." The form states that it was refused by Burrell.

Burrell stated that he was not certain if he received this form, but then denied receiving it and also denied being caught sleeping in the closet.

d. August 13, 2014

This warning notice accused Burrell of "verbally attacking and threatening management." The form states that it was refused by Burrell.

Burrell denied seeing or receiving this form and stated that he never threatened or attacked a member of management. At hearing, when informed that Young testified that Adams was the alleged victim of the threats, Burrell stated that Adams was not a managerial employee.

e. August 14, 2014

This warning notice states "insubordination, misconduct, Burrell refused to follow directions from his supervisor George Adams. Burrell continues to threaten George. Burrell will be fired and replaced ASAP." The form states that it was refused by Burrell.

Young recalled that Burrell threatened to hit Adams. He also stated that he attempted to speak to Burrell about this incident but had no distinct recollection of their conversation.

Burrell denies receiving this form. However, he conceded having two verbal arguments with Adams, the first being in 2013, but no management person spoke to him about such conduct on either occasion.

According to Burrell, the arguments stemmed from Adams' routine of "walking around daily watching our every move." That conduct made Burrell uncomfortable. In the 2014 incident, while working, Burrell complained to Bolt about Adams' conduct. Apparently, Adams overheard the complaint, and, according to Burrell, approached him closely and appeared that he wanted to fight Burrell. Burrell wordlessly "spun around" to face him. Bolt intervened and the matter ended. Burrell stated that following that incident, no one from management spoke to him about it.

Adams testified that on August 14, 2014, he entered the kitchen and found Bolt and Burrell speaking in their Jamaican language. Burrell began cursing him and disrespecting him in front of the employees. Adams said that this has to stop and asked what the problem was. Burrell replied that he (Adams) was the problem. Adams pushed him back. Bolt intervened and told them both to stop.

Burrell testified that his complaint about Adams was that he supervises too closely. He stated that he approached Adams and asked, "[W]hy is it every single move we make you watches us and you go and tell Mr. Young. . . . You don't have to watching us like a female and go back to the boss." Burrell stated that Adams was upset by that remark.

Adams then told Young that he could not deal with this situation, it must stop, and threatened to quit. Young told Adams to write up Burrell again, adding that "we're going to fix this problem."

Bolt confirmed Burrell's version of the incident, but added that Adams, when approaching Burrell, challenged Burrell, saying that if he has something to say, "bring it." Bolt made a written report of the incident to Young, which he received, in which Bolt stated that Adams accused Bolt of causing trouble and noted that Margo and six other employees were witnesses to Adams' alleged threat. Young stated that he spoke to Adams about the matter but was not certain if he spoke with Margo. He did not obtain statements from Adams or the other witnesses.

f. August 28, 2014

This warning notice states that Burrell clocked in at work and then left the building for "hours at a time. Stealing hours from company. His absences are inexcusable." The form further states that Burrell "has been warned previously by Mr. Young that if this continues he will be let go/fired." Burrell denied being warned previously concerning this alleged misconduct. The form states that Burrell refused to accept it.

Burrell denied seeing or receiving this notice. He further denied leaving the building for hours at a time unless he received permission from Young and further denied leaving the building to engage in personal business without permission from Margo.

Burrell stated that on his last day of employment, September 26, 2014, Young told him that he was being discharged because he disrespected Manager Phil Morrow. Burrell denied doing so or having any confrontations with Morrow.

Young testified that he told Burrell that he was being discharged for harassing Adams and Morrow. There was no evidence concerning Burrell's alleged misconduct toward Morrow and Young admitted that he had no written documentation of such harassment toward him. Rather, Young stated that Morrow told him, before the election, that Burrell had threatened him but

conceded that he did not issue a written warning to Burrell. Morrow did not testify.

Young explained that he does not document every incident that he learns of because he would be "inundated" with such matters. Rather, he uses his judgment and issues written warnings if the allegations are "serious."

2. The reason for Burrell's discharge

Young testified that when he discharged Burrell he did not know him to be a union supporter. He stated that he fired Burrell because he made physical threats on "more than five occasions" to Adams. Young relied on Adams' reports of the threats and also on his own observation of Burrell's threat to Adams. He described the threats generally that Burrell offered to take Adams outside and beat him. On the one occasion that he heard that threat, Young stated that he "got involved and got between them." However, Adams denied that Young ever got between him and Burrell to break up an altercation.

Young did not recall when such threats were made but stated that it was a "non-stop thing" . . . over the course of his employment" with the Respondent. He further stated that he knew that Burrell had been threatening Adams over a "period of time" and that he spoke to Burrell "numerous times, so it didn't cease, he didn't stop. So, there would be no reason for me to continue to talk to him because he was already going to be dealt with as far as whether that be a suspension or a termination."

Young stated that Burrell made about 20 threats that were not documented, but only 2, the incidents of August 13 and 14, 2014, were the subject of written warnings.

3. Raises in pay

Burrell stated that his starting salary, in 2012 was $9 per hour. He received a $1 raise in 2013, and another $1 raise, given by Young, sometime before he was terminated.

I. George Adams

There was much testimony concerning Adams' supervisory status. The Respondent does not claim that he is a supervisor within the meaning of Section 2(11) of the Act. However, the evidence establishes that he is, at least, a working foreman, and has some supervisory authority including the assignment of work to Bolt and Burrell.

Adams has been employed by the Respondent since 2009. He described his title as pastry chef, manager, and supervisor. He supervises Bolt and Burrell in the bakery, assigning them work. Adams testified that Bolt "controlled" Burrell, noting that Bolt, who was more experienced, taught him how to produce the baked items.

Analysis and Discussion

The evidence establishes that the Respondent, through its agents, embarked on a well-planned and well-executed program to, in Alarcon's words "neutralize" the Union's organizing effort.

This effort took place during an intense, 1-month campaign during which consultants Alarcon and Cordiano were present at the facility each day. They spoke to the employees in one-on-one conversations, small meetings, large meetings, and while they were working. They recorded the employees' union sentiments, assigning each employee to one of four levels of union interest.

The Respondent's agents first obtained the names of the leading union supporters and then proceeded to get "dirt" on them by learning of their prior alleged misconduct and using that information to build a case against them.

Cordiano, recognizing and acknowledging Bolt as a "leader" and "supervisor," used his apparent leadership ability and offer of a monthly sum of money, to cause him to encourage his coworkers to abandon their interest in the Union. It persuaded him, through that offer, to form a committee to subvert the Union's effort to organize the workers. He readily embraced that role, accepting the arrangement, abandoning his support for the Union, and advising his fellow employees to give the Employer a "chance" through the creation of a committee to bargain with the Respondent. He then championed the Respondent's cause, encouraging his coworkers to vote against the Union.

The Respondent's deceit in this regard was amply shown by its refusal to permit Bolt or his committee to meet with the Respondent prior to the election, and then, having secured the Union's election loss, stripped him of his promised monthly payment, the committee, and his job.

The evidence establishes that the Respondent issued multiple warning notices to Bolt and Burrell, three on the same day, regarding their alleged and actual misconduct. This was contrary to its practice of not issuing warning notices prior to the election petition regarding the alleged misconduct it relied on as a basis for their discharge.

Accordingly, I find that the General Counsel has proven that the Respondent was motivated in discharging Bolt and Burrell because of their union and concerted activities.

Despite the strong showing that Bolt was discharged because of his union and concerted activities, nevertheless I find that the Respondent has met its burden of proving that it would have discharged him even in the absence of those activities. Both men violated the Respondent's harassment policy in egregious ways. Bolt repeatedly sexually harassed female employees. He was warned by the victims of such conduct that his comments were unwelcome and harassing. The Respondent's supervisor physically separated Bolt from his victims and warned him not to continue his misconduct. Such conduct was reported to Young by Minier, Revilla, and Abraham.

I also find that Burrell threatened his supervisor on two occasions which prompted his discharge.

Regarding Quezada, as Alarcon testified it would do, the Respondent used the very private information given Cordiano regarding Quezada's son's father to denigrate him in an effort to have her abandon her strong support for the Union. That took place in a conversation 1 week before the election in which Cordiano asked her why she was "going for the Union" and why she was unhappy. As set forth below, I find that the Respondent has not met its burden of proving that Quezada would have been discharged for her attendance even in the absence of her union activities.

I. CREDIBILITY FINDINGS

A. The Employee Witnesses

I credit the testimony of employee witnesses Clay, Minier, and Jimenez, and the written statements of Abraham and Revilla concerning the sexual harassment committed by Bolt. Their

accounts, set forth above, are too vivid, detailed, and specific in their offensiveness to be untrue. Certainly, the comments made by Bolt made a lasting impression on them.

Specifically, Bolt's threat to rape Minier only 2 weeks before her disclosure of that threat to Cordiano was recent enough in her memory, not that she could forget it, to accurately describe it to Cordiano and then to Young. His further comments to Minier about her sexual preference, corroborated by witness Jimenez, were equally outrageous and offensive.

Bolt made similarly sexually harassing comments in the past, as reported by Minier and Clay which lends support to a finding that their testimony is credible. Further, Abraham's written report of his harassment is further support for a finding that their testimony is credible. Moreover, Revilla's written statement that she was harassed by Bolt in a comparable manner adds further support to their truthfulness.

I cannot credit Bolt's denial that he made those comments to the women, or that he sexually harassed those women. His explanation, as recorded in Young's August 19 memo, was that he "joked with Minier and Clay about Minier's sexual preference," and "how I can make her like men in a joking way." If this memo is to be believed, Bolt admitted his comments to Minier.

On the other hand, I do credit Bolt's testimony concerning his exchanges with Alarcon, Cordiano, and Young. As set forth above, his testimony concerning the $200 raise promised in exchange for his support of the Respondent in the election is corroborated by his actions thereafter in forming a committee and supporting the Respondent, and in Young's later, uncontradicted, offensive remarks to him that he would not receive a raise or lead a committee.

I credit the testimony of Alarcon. As one of the two consultants and Cordiano's colleague in their efforts to thwart the employees' organizational effort, Alarcon was one-half of the team which engaged in such activities. He provided a unique "inside" look at the strategy employed by the Respondent and its agents to build cases against those who were most active in the union campaign.

Thus, as Alarcon testified, Cordiano obtained "dirt" on Bolt by initiating a conversation with Clay and Minier concerning his harassment of them. Alarcon's credibility is further supported by his testimony that it was the consultants' plan to use Quezada's relationship with Union Agent Alex to discredit her. They did that when, during Cordiano and Young's meeting with Quezada 1 week before the election, they referred to that relationship in a demeaning way. Alarcon was not at that meeting and therefore may not have known about it. But his advance knowledge of the plan bolsters his credibility.

B. The Respondent's Witnesses

I credit Adams' accounts of Burrell's threatening conduct. His testimony is consistent with his written, contemporaneous recitations of Burrell's menacing and intimidating confrontations.

I cannot credit the testimony of Cordiano. She gave various reasons for the spreadsheet remark that Bolt could not be trusted. First, because he was described as a union "cheerleader" but then preached an antiunion message. Second, because he looked at her in a sexually harassing way. The reason for the spreadsheet's notation is obvious. She did not trust him because of his change of stance from first being a union supporter, and then a company supporter. Clearly, she could not trust that he would not once again change his allegiance to the Union. The remark had nothing to do with her perception of Bolt as a harasser.

Further, I cannot credit either Cordiano or Young. They both testified that Cordiano did not share information about the employees with each other. Alarcon credibly testified that they did share such information with Young. For example, Alarcon was present at a meeting where Young told the two consultants that Bolt, Quezada, Jimenez, and Jimenez's mother were union supporters.

Cordiano's denial that she shared information is also contradicted by her meeting with Young and Quezada, at which Cordiano obviously shared with Young her knowledge of Quezada's relationship with Union Agent Alex and her maternal status. That information was admittedly given to Cordiano by Quezada and was set forth on the spreadsheet. Young used that information to inappropriately ask offensive and demeaning questions of Quezada about her son's father. Further, Young was present at that time when Cordiano asked Quezada why she was going for the Union.

In addition, Young was undoubtedly told by Cordiano that she offered Bolt a raise in pay of $200 per month if he would support the Respondent and form a committee. This is seen in Young's angrily telling Bolt between the election and his discharge that he would have no committee and no raise.

As set forth above, Young altered documents. Thus, the sexual harassment form that Minier completed in August 2014 noted that she complained to her supervisor about Bolt's harassment of Revilla 2 years before. Young crossed out her answer and wrote "no." He first flatly denied that he wrote "no" but then, fumbling to reply, answered that he was not 100 percent sure, but it makes sense—Minier testified that she did not write "no" and he was the only one who had access to the files, so he could have written "no." Finally, he admitted writing "no" explaining that Minier did not answer the question. As noted above, he incredibly claimed that the question asked whether she, Minier, had suffered the harassment, and since Revilla was the victim, Minier had incorrectly replied that she was the object of the harassment.

Of course, the question was broad—did you report this or related-sexual harassment? It did not ask if the harassment was directed at her. As noted above, the alteration of the document improperly changed Minier's statement and was designed to show that Minier had not reported the harassment 2 years before, thereby vindicating Young from taking action on the complaint since he allegedly had not known about it.

Similarly, in another instance of Young's alteration of documents, a warning notice concerning sexual harassment bore one date of September 3, one date of August 9, and two dates of August 19, 2014. The three dates were overwritten, with the original date being September 3. Young claims that he gave this notice to Bolt on August 19, but Bolt credibly denied speaking to Young on that date about the warning or receiving it on that date.

Bolt's testimony that he received the warning on September 3 is corroborated by the testimony and statements submitted by Clay and Minier that they wrote their statements on August 28 and 29. Accordingly, Young could not have written the notice on

August 19. Here again, Young attempted to show that he warned Bolt earlier than he had.

In yet another example of Young's alteration of documents, as set forth above, he wrote a warning notice based on a threat by Burrell on December 3, 2013. He overwrote the year on that document to read "2014." Adams testified that the incident occurred in 2013 and Young finally had to concede that the correct date was 2013. I cannot accept his testimony that he simply made a mistake in writing the year. I believe it was deliberately intended to leave the impression that the threat occurred 1 year later, closer to his discharge, in order to support Burrell's discharge. Despite this alteration, as noted herein, I find that Burrell was lawfully discharged for his threats to Adams, including the threat in 2013.

In an effort to disclaim that he gave Bolt and Burrell raises in pay, Young claimed that in his absence the employees "beg and plead" President Sterling for a raise which he granted without consulting Young. In contrast, Sterling testified that "Young handles the employees that come and ask for raises." Indeed, Young testified that he is in charge of the entire human resources operation. I accordingly cannot credit Young's testimony in this regard.

By denying any part in the awarding of their raises, Young attempted to show that, knowing of their misconduct, he would not have granted those raises. Rather, that Sterling did so without his knowledge. Certainly, as the head of human resources with access to their personnel files he would have known when and why the raises were given and who authorized them.

II. ALARCON'S AGENCY STATUS AND THE OFFER OF A RAISE TO QUEZADA

A. Alcaron's Agency Status

The issue of Alarcon's agency status relates to the question whether he was the Respondent's agent when he made the alleged offer of a raise to Quezada. The Respondent admits that Cordiano and Alarcon were its labor relations consultants. It also admits that Cordiano has been its 2(13) agent from about August 14, 2014, to October 2014 which encompasses the entire time of the election campaign and the discharges of Bolt, Burrell, and Quezada.

However, the Respondent admits only that Alarcon was retained to perform labor consulting and translation services for the Respondent, and did so from the last half of August, 2014 through September 17, 2014, the date of the election. Accordingly, the Respondent denies that Alarcon was its agent after September 17.

Alarcon stated that he was not an independent contractor for NLC. He stated that he was told by NLC President Peraino that he was an employee of NLC who was required to follow his orders. He denied working for the Union when he was performing services for NLC at the Respondent's facility.

> In determining whether a person is acting as the agent of another, the Board applies the common law principles of agency as set forth in the Restatement 2d of Agency. . . .Thus, agency may be established, inter alia, under the doctrine of apparent authority, when the principal's manifestations to a third party supply a reasonable basis of the third party to believe that the principal has authorized the alleged agent to do the acts in question. . . . Either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or the principal should realize that this conduct [the manifestation] is likely to create such belief. *Allegany Aggregates, Inc.*, 311 NLRB 1165, 1165 (1993).

Quezada's testimony, which I credit, was that upon complaining to Alarcon that she was not given the pay rate she was promised, Alarcon offered to raise her wage rate to the amount she was promised if she ceased her interest the Union, adding that the raise would be given after the election. Alarcon corroborated that offer, adding that he made it on Cordiano's instructions.

The promise was made prior to the election. Pursuant to the Respondent's stipulation that Alarcon was its agent until the election, I find that the Respondent was responsible for this promise of benefit made in its behalf by Alarcon since it was made prior to the election.

I further find that Alarcon was the Respondent's agent to October 2014, as was Cordiano. He acted in behalf of the Respondent in the same manner and to the same extent as Cordiano, an admitted agent, during their employment at the Respondent's facility. Their duties were the same—to speak with employees in order to "educate" them, according to the Respondent, ascertain their inclinations toward or against the Union, and act as "persuaders" as noted in the Respondent's brief, in an attempt to cause them to support the Respondent. Alarcon was specifically assigned to speak to the Spanish-speaking workers since Cordiano was not conversant in Spanish, and he evaluated and assessed their support for the Union. He also spoke to English-speaking and Spanish-speaking employees in the absence of Cordiano.

The Respondent gave both consultants unlimited freedom in the plant which they used to speak to employees in groups and in one-on-one private conversations. At the large group meetings, Supervisors Margo and Minier were also present. Quezada reported that Manager Morrow was present at the first meeting and told the assembled employees that union agents put sand in the gasoline tanks of trucks at a company he had previously worked for. There is no evidence that Morrow or Supervisors Margo or Minier disavowed any comments Alarcon may have made at the meetings.

It is clear that the Respondent held out Alarcon to its employees that he was its agent in the same manner and to the same extent as it held out Cordiano. It made no distinction between their respective roles, and there was no evidence that Alarcon spoke with less authority than Cordiano. Repeated assurances made to Sterling and Young by Cordiano and Alarcon that the campaign was "going well" were based on Cordiano's and Alarcon's assessments of the union sentiments of the workers. Indeed, those appraisals were quite accurate as proven by the 48 to 4 union loss of the election.

The Respondent, in permitting Alarcon and Cordiano unlimited access to speak to employees at any time, including while they were working, caused the employees to believe that they spoke in behalf of the Respondent.

The Respondent argues that, even assuming that Alarcon promised Quezada a wage raise, it was simply an effort to correct

an "oversight" by the Company in not giving her the raise she was supposed to receive when she was hired. It further posits that there was no evidence of any raise being given to Quezada after Alarcon made his offer.

I cannot agree. Alarcon's statement was not an effort to correct an oversight. He was acting pursuant to the Respondent's plan to encourage employees, particularly Quezada, to cease her interest in the Union. As set forth above, in promoting its program to dampen employees' interest in the Union, the Respondent was particularly aggressive in its approach to Quezada who it identified in all three weeks in its spreadsheet as a "loyal union supporter." The fact that the Respondent did not follow up on its promise of a raise does not negate the fact that the promise was made.

The Respondent further argues that Alarcon was "serving two masters" when he was in the Respondent's facility, urging from this that his testimony concerning the offer of money to Quezada offer is not credible. I have found above that Alarcon's testimony was credible.

I reject the Respondent's argument that Alarcon was not its agent following the election because he told Bolt that he could file a charge to challenge his discharge. Alarcon conceded that he told Bolt that he had a legal right to file a charge concerning his discharge if he believed that he was fired in violation of the Act. He wrote to Bolt that "I heard what happened to you and I am sorry that Justin [Young] messed up like this. If you want justice call the NLRB." Alarcon conceded that he may have told Bolt that he could file an 8(a)(1) and (3) charge and provided the phone number of the Board.

Alarcon's suggestions to Bolt constituted proper, lawful advice that Bolt had a right to pursue legal remedies to correct what they both believed was Bolt's unlawful discharge. Even assuming that there was something improper in Alarcon's recommendations, they were made after his promise of a wage raise to Quezada.

I accordingly find and conclude that the Respondent violated the Act by its agent Alarcon's promising a raise to Quezada if she abandoned her support for the Union. *Bruce Packing Co.*, 357 NLRB 1084, 1086 (2011); *Sodexho Marriott Services*, 335 NLRB 538, 538 (2001).

III. THE OFFER TO BOLT

As set forth above, Bolt credibly testified that in late August or early September, in their 1-hour private conversation, Cordiano flattered him, remarking that he appeared to be a leader and a supervisor.

Bolt credibly stated that Cordiano asked him to "come over" to management's "side," "vote out the union" for which he would be rewarded with a monthly $200 gift card or check and a supervisory position, adding that with the Union gone, he could form a committee.

I find that Cordiano made this offer. Support for this finding are the undisputed facts of Bolt's actions thereafter. He credibly testified that, based on Cordiano's offer, he abandoned his vocal and public support for the Union, formed a committee to meet with management, and announced that Quezada would be the only worker to vote for the Union, thereby publicly disavowing his previous support for the Union.

I reject Cordiano's denial that she made this promise to Bolt. He gave uncontradicted testimony that shortly after the election and shortly before his discharge, Young obscenely told him that "you're not getting shit. No more committee, no raise, nothing." In telling Bolt that he would not receive a raise, Young confirmed that Cordiano offered him such a raise.

Bolt accurately assessed Cordiano' s role in his changed his point of view concerning his support for the Union. He asserted that he and Cordiano were "enemies at first because I was for the union . . . after that, there was no problem. She spoke with me, get me on the same page as her." Cordiano' s offer undoubtedly placed him on the "same page" with her. I accordingly find and conclude that the Respondent, by its agent Cordiano, violated Section 8(a)(1) of the Act by promising money to Bolt if he would abandon his support for the Union. *Carnegie Linen Services, Inc.*, 357 NLRB 2222, 2228 (2011); *Storall Mfg. Co., Inc.*, 275 NLRB 220, 233 (1985).

IV. THE DISCHARGES

A. Pretext vs. Mixed Motivation

The General Counsel asserts that the reasons given for the discharges of Bolt and Burrell are pretextual. I disagree. In *Wright Line,* 251 NLRB 1083, 1084 (1980), the Board discussed the distinction between pretext and dual motive. It stated that a pretextual discharge is one in which the asserted justification is a "sham in that the purported rule or circumstance advanced by the employer did not exist, or was not, in fact, relied upon," adding that "no legitimate business justification for the discipline exists." In a pure dual motive case, there is a legitimate business reason and a "bad," unlawful, reason for the discharge.

I cannot find that the reasons given by the Respondent did not exist or were not relied upon. I further cannot find that no legitimate business justification for the discipline exists. As set forth below, the Respondent had legitimate reasons to discharge Bolt and Burrell. Accordingly, I will analyze this case pursuant to the *Wright Line* dual motive standard.

The question of whether the Respondent unlawfully discharged Quezada, Burrell, and Bolt is governed by *Wright Line*, above. Under that test, the General Counsel must prove by a preponderance of the evidence that union animus was a substantial or motivating factor in the decision to discharge them. The General Counsel must show union activity by the alleged dischargees, employer knowledge of such activity, and union animus by the Respondent.

Once the General Counsel has made the requisite showing, the burden then shifts to the Respondent to prove, as an affirmative defense, that it would have discharged the employees even in the absence of their union activity.

To establish this affirmative defense "an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have been taken even in the absence of the protected activity." *L.B.&B. Associates, Inc.*, 346 NLRB 1025, 1026 (2006). "The issue is, thus, not simply whether the employer 'could have' disciplined the employee, but whether it 'would have' done so, regardless of his union activities." *Carpenter Technology Corp.*, 346 NLRB 766, 773 (2006).

B. Ashley Quezada

As set forth above, Quezada was the first employee to become interested in union representation and was its strongest supporter. She obtained authorization cards from the Union's agents, signed one, and distributed them to and collected them from her coworkers. She attended union meetings and encouraged her fellow employees to join her. According to Alarcon's credited testimony, she was identified by official Young as being a union supporter.

It is clear that the Respondent knew of Quezada's union activities. She was identified by the Respondent's agents, Cordiano and Alarcon, as a "loyal union supporter" in each of the 3 weeks that they kept records concerning employees' union support, and Bolt announced at an employee meeting at which the consultants were present that Quezada would be the only employee voting for the Union. Young conceded that he was aware of her support for the Union when she served as its observer at the election.

The General Counsel has established that the Respondent bore animus toward the Union. It unlawfully promised Quezada a wage raise and offered Bolt the payment of money if he supported the Respondent in the election.

Further, the Respondent's animus toward the Union is amply demonstrated by the extent to which it went in order to dissuade Quezada, the Union's staunchest adherent, from supporting it. Only 1 week before the election, at a time when the consultants and President Sterling believed that the Union would lose the election, she was called into a meeting with Young and Cordiano.

Quezada told Cordiano that she was pregnant with the Union Agent Alex's child and Alarcon testified that they would use that very personal disclosure as a means to attempt to persuade her to abandon her interest in the Union. That is exactly what Young and Coradino did during that meeting. Young asked Quezada if the agent was in her son's life. Cordiano sought to denigrate Alex by saying that "Alex is not his real name . . . he's faking it . . . he's being used by the Union . . . he's not getting paid." Neither Young nor Cordiano denied that this conversation took place.

On September 30, only 2 weeks after she served as the Union's election observer, Quezada was discharged.

I accordingly find that the General Counsel has proven that animus toward Quezada because she supported the Union was a substantial or motivating factor in her discharge. *Wright Line*, above.

The Respondent's Defense

Quezada received a warning notice for not wearing a lab coat when she entered the production area. Inasmuch as she was discharged for her time and attendance record only, I will not discuss the lab coat infraction because it was not relied on as a reason for her discharge.

Quezada received warning notices for not returning to work for 2 hours during her lunchbreak, for taking an unauthorized smoking break, and for being 1 hour and 10 minutes late for work on September 26, 2014.

It must be noted that the warning notices, on August 19, September 22, and September 26 were the only time and attendance warnings issued to her. They were issued only after her activities in behalf of the Union became known to the Respondent, despite the fact that her lateness was extreme during her entire tenure with the Employer. It is clear that the Respondent tolerated Quezada's excessive latenesses throughout her career without warning her either orally or in writing until after the Union's petition was filed. It was only after the onset of the Union and her acting as the Union's election observer that her attendance became intolerable. *Link Mfg. Co.*, 281 NLRB 294, 300 (1986).

During her lunchbreak on August 19, Quezada credibly testified that she was given her son by the babysitter. She then had to take him to her mother's house. Although this is not an excuse for her absence, particularly since she did not notify her supervisor, no action other than a warning was issued to her for this infraction. Quezada testified that, in the past, she occasionally did not notify Margo that she would be late to work, and no discipline was issued.

In this regard, it must be noted that Young testified that he tries to "work with" employees who have children in order to accommodate their late arrivals. This was such a case. Although Quezada was not late to work that day, she was late in returning from lunch due to a problem with child-care arrangements.

On September 22, Quezada left work 17 minutes early because she became angry at receiving a warning for taking a smoking break. In this regard, Quezada credibly testified that a 5-minute smoking break had been routinely permitted, although not specifically authorized, in the past. Many employees took such a break, and Supervisor Margo saw her doing so in the past. This had been the only warning she received for taking such a break.

On September 26, Quezada was 1 hour and 10 minutes late. As set forth above, she was routinely and regularly late on virtually every day she worked. In addition, she was more than 1 hour and 10 minutes late on 59 days from the start of her employment to the date the petition was filed on August 11, 2014. Despite this dismal record of tardiness, and despite the fact that Young had ready access to her time records, he did not warn her prior to September 26. In addition, Young testified that he did not believe that the Respondent had a policy regarding lateness or at what point in her arrival an employee is considered late. Accordingly, the Respondent had no standard with which to measure her lateness.

Young further stated that he issues many oral warnings to his staff—he just made a "mental note of it" as advice that they have been given "chances." He later stated that after giving her "numerous chances" he decided to discharge her. His "mental notes" of the alleged chances he gave Quezada were just that—in his mind. He may have given her numerous chances, but he did not verbalize or write them. She received no warnings that she was unacceptably late until shortly before her discharge.

I reject the Respondent's argument in its brief that Quezada "would likely have been discharged prior to the election for poor performance if not for the advice of its former attorney Jacobs to avoid disciplining employees before an election." First, the Respondent did not rely on Quezada's "poor performance" in discharging her. Second, prior to the Union's petition being filed, it had not made any effort to discipline her for lateness in arriving to work despite her extreme record of lateness.

The Respondent further argues that the General Counsel did not adduce any evidence that other employees were late as often

as Quezada but were not discharged. That is true. However, the burden is the Respondent's to demonstrate that it did fire other employees who were as late as she.

The Respondent further argues that Jimenez, a known union supporter who was identified as a union "salt," was not disciplined and, in fact, was promoted to a supervisory position 1 year after the election. I reject this argument. The Board has long held that "an employer need not "weed out all other union adherents before he may be found guilty of discharging some in violation of the Act." *Well-Bred Loaf, Inc.*, 280 NLRB 306, 316 (1986).

I accordingly find and conclude that the Respondent has not established that it would have discharged Quezada even in the absence of her union activities. *Wright Line*, above.

C. Septival Bolt and Denroy Burrell

1. Septival Bolt

As set forth above, at his first meeting with the consultants, Young identified Bolt as a union supporter. He was listed as a "union cheerleader" in the first week the spreadsheet was kept.

In addition to the Respondent's early knowledge that Bolt was a union adherent, he contradicted Cordiano's statement about the value of unions and the percentage of American workers who were union members. He proclaimed that he was a union secretary and stated that most employees are union members and that "not all unions are bad."

Cordiano complimented Bolt by telling him that he appeared to be a leader, a supervisor, and then encouraged him to cross over to Respondent's "side" and form a committee to reverse the Union's effort to become the employees' representative. He embraced that view and, indeed, formed a committee, while at the same time telling his coworkers that they should give the Respondent "a chance" by negotiating with the committee and not with "people from the outside."

Bolt further engaged in concerted activity by forming that committee whose purpose was to negotiate better working conditions with the Respondent. Cordiano suggested that he create such a committee and he did so, meeting at least twice with employees. Alarcon also encouraged Bolt in his efforts. Bolt's concerted activity included requesting that bookkeeper White give him a list of the employees' wage rates so that he may negotiate with the Respondent when the committee was operating.

Company supervisors knew of the committee since Bolt asked them to excuse the workers for meetings. Finally, Young knew of Bolt's committee, telling him 4 days prior to his discharge, that there would be "no more committee. I don't want to hear shit about any committee . . . you're not getting shit. No more committee, no raise, nothing. We, management, will form our own committee in due time." Young did not deny that statement.

Alarcon testified that at his first meeting with company officials, he and Cordiano were told of a "rumor" that Bolt had engaged in sexual harassment of female workers. Such testimony is credible since the evidence establishes that Young had been informed in 2012 and 2013 that Bolt sexually harassed employees. Cordiano told Young that such misconduct would be used to get "dirt" on Bolt, and she did.

Cordiano's meeting with bakery workers Clay and Minier was clearly contrived to obtain those employees' statements regarding their harassment by Bolt. Cordiano testified that she joined the employees at their workstations, donning a hairnet and working with them for a short period of time. She stated that she did this in order to meet with them if they could not attend a meeting, or if they had questions but could not leave their work area.

I reject Cordiano's explanation for working with the employees. According to Bolt, he had no difficulty obtaining supervisors' permission to have committee members attend his meetings. It is clear that the Respondent would have readily agreed to Cordiano's request that employees be released to attend her meetings. It is obvious that Cordiano's purpose in working with the employees was to engage them in a friendlier environment where they would feel free to express their opinions about Bolt.

Cordiano testified that she encountered Bolt in a stairway and was upset when she arrived at the bakery to work with Clay and Minier. I cannot credit her testimony that she was fearful of Bolt, did not want to be near him, and avoided him. Bolt credibly testified to a 1-hour private meeting with her in which she sought to obtain his support for the Respondent in the election and in which they discussed the formation of a committee.

It is unlikely that Cordiano would have had that extensive discussion with Bolt if he was so abhorrent to her. Rather, it is more likely that she told the two women of her alleged discomfort with Bolt in order to persuade them to discuss their mistreatment by him. After their revelations she immediately contacted Young with such information which led to their writing statements concerning his misconduct, and his discharge.

The General Counsel has established that the Respondent bore animus toward the Union. It unlawfully promised Quezada a wage raise and offered Bolt the payment of money if he supported the Respondent in the election.

The Respondent argues that since Bolt publicly announced that he was supporting the Respondent in the election and actively campaigned against the Union, the General Counsel failed to establish that he was discharged for such activities. The Respondent further asserts that there was no scheme to discharge Bolt since he was viewed by it as being opposed to the Union.

I do not agree. Bolt was first viewed as a union supporter and was listed as a "union cheerleader" in the first week the spreadsheet was kept. Cordiano's comment in the spreadsheet that he was "preaching anti-union message, sill not trusted, wants to be committee leader" clearly was a reference to his initial union support followed by his antiunion "preaching." Thus, Cordiano did not trust his change of heart.

The Respondent and its consultant agents then engaged in a well-planned and well-executed program to manipulate Bolt into supporting the Respondent in the election 1 month later, and then to discharge him.

I accordingly find that the General Counsel has proven that animus toward Bolt because he supported the Union and engaged in concerted activities was a substantial or motivating factor in his discharge. *Wright Line*, above. Where the General Counsel presents a strong prima facie showing of discrimination, the Respondent's burden is substantial. *Vemco, Inc.*, 304 NLRB 911, 912 (1991).

The Respondent's Defense

As outlined above, I find that the General Counsel has presented a very strong prima facie case, but I find that the

Respondent has met its substantial burden of proving that it would have discharged Bolt even in the absence of his union and concerted activities.

First, the Respondent has a clear and broad harassment and sexual harassment policy. Bolt signed an acknowledgement that he received that policy in May 2014. There is no doubt that Bolt violated that policy on several occasions in an egregious manner, and that pursuant to that policy his conduct constituted valid grounds for his discharge.

As set forth above, I credit the testimony of employees Clay and Minier concerning their being victimized by Bolt's harassment, and the testimony of Jimenez as a witness to his harassment. I also credit the written statements of Abraham and Revilla as to Bolt's sexual harassment of them.

The Respondent relied on all the evidence of repeated instances of gross sexual harassment in deciding to discharge Bolt. It advised him on September 3, 2014, that he was being investigated for sexually harassing female coworkers and then fired him for that reason.

The argument that Young did not take action on any complaint is rejected. As to the threat to rape Minier, Young was notified of that threat shortly before Bolt's discharge. That, of course, was one reason among many instances of sexual harassment which resulted in Bolt's discharge. However, that serious threat was only the latest and yet the most egregious instance of his sexual harassment of employees.

Although there is some doubt about whether Young spoke to Bolt on any occasion in which he was alleged to have engaged in sexual harassment, I find that supervisor Minier told Bolt on August 20, when Bolt threatened to rape her, that she was furious and she, in turn, threatened to kill him. Clearly, Bolt was put on notice, at least at that time, that his comments were unwelcome and constituted harassment.

In addition, Supervisor Minier separated employees Clay and Revilla from Bolt by not assigning them to work in his area. Clay specifically told Minier that she was uncomfortable working near Bolt and was no longer assigned to work in his vicinity. Even though there was some doubt in her testimony as to whether Clay mentioned the specifics of Bolt's conduct as her reason for wanting to be distant from Bolt, it is clear that Minier, herself a victim of Bolt's sexual harassment, must have known the reason for Clay's request.

Repeated incidents of a sexual harassing nature are legitimate grounds for discharge. *Gallup, Inc.*, 349 NLRB 1213, 1305 (2007). In that case, as here, there was no evidence that Bolt was treated in a disparate manner. There was no evidence that other employees engaged in sexual harassment but were not discharged.

In *Fixtures Mfg. Corp.*, 332 NLRB 565, 566 (2000), the Board held that an employee's obscene, foul language which violated the employer's policy against harassment warranted his discharge. The Board in *PPG Industries*, 337 NLRB 1247 fn. 2 (2002), found that an employee was lawfully discharged after making vulgar, sexually explicit remarks to a female worker. A "history of inappropriate behavior" constitutes a proper ground for discharge. *Consolidated Biscuit Co.*, 346 NLRB 1175, 1181 (2006).

In *Allied Mechanical*, 349 NLRB 1327, 1332 (2007), the Board upheld the discharge of an employee for engaging in making a rude and obscene comment to a supervisor. The Board noted that in the absence of disparate treatment based on protected activity, the employer demonstrated that it has a rule prohibiting insubordinate and rude behavior, that the employee previously violated that rule, and that the rule had been applied to employees in the past. Here, although the Respondent's sexual harassment policy had not been applied to employees in the past, there is no evidence that any other employees had violated that policy before.

Bolt was admittedly warned about his sexual harassment on September 3. He was permitted to work for another three weeks and was discharged after the September 17 election. I do not find that the Respondent tolerated his misconduct by retaining him in its employ during the ensuing 3 weeks. The investigation was ongoing, and Young understandably was waiting for a statement from Jimenez concerning his being a witness to sexual harassment, and, heeding his attorney's advice, apparently did not want to discharge anyone during the election campaign.

As set forth above, Bolt denied the specific allegations of sexual harassment testified to by Clay and Minier, and that involving Revilla. He stated that he had conversations of a "sexual nature" with Clay and Minier numerous times—"a regular thing" in all areas of the facility. For example, Bolt stated that they asked him what shoe size he wears, apparently a reference to his genitalia. He answered, "size 8" and they laughed. Clay testified at this hearing and at Bolt's unemployment insurance hearing that there was a discussion about the size of his genitalia. At the unemployment hearing she stated that such conversations took place "over and over again." Bolt testified that Clay never asked him to cease his sexually-based conversations. Further, Quezada also stated that it was "common" for employees to engage in conversations of a "sexual nature" at work. She stated that she heard it "24/7" in the production area.

In addition, Young's memo reciting Bolt's defense to the charges recited that he "joked with Minier and Clay about Minier sexual preference, and how I can make her like men in a joking way" and that he told Clay that "she looks good today."

Sexual bantering and joking are specifically prohibited in the Respondent's sexual harassment policy which refers to misconduct as "offensive and distasteful jokes, slurs, negative stereotyping, and jokes that are distasteful or targeted at individuals based on . . . sex, sexual orientation or gender identity." Clearly, Bolt's remarks, even if made in a joking manner or were intended as jokes, violated that policy. Further, sexual bantering is one thing, unwelcome, offensive, demeaning comments, including a threat to rape, is quite another.

Taking into consideration the repeated nature of Bolt's sexual harassment, the severity of his remarks, the unwelcome nature of the comments causing employees to request that they not be assigned to his work area, the complaints that were made to supervisors, the requests by employees that he cease his misconduct, combined with his refusal to recognize that his ugly statements were repugnant to his victims, all lead me to conclude that the Respondent was justified in discharging Bolt for his sexual harassment of female employees.

I accordingly find and conclude that the Respondent has met its burden of proving that it would have discharged Bolt even in

the absence of his union and concerted activities. *Wright Line*, above.

2. Denroy Burrell

The Respondent denies that it was aware of any union activities engaged in by Burrell. However, the evidence is clear that Burrell was engaged in union activities and concerted activities and that the Respondent knew of such activity.

Thus, Burrell signed a union card and returned it to Bolt. He spoke with union agents outside the building, and he saw Young looking at him as he spoke to union agents on the sidewalk. In addition, he was listed on the Respondent's spreadsheet as a "fence-sitter" in the first week, a "union-cheerleader" in the second week, and a "fence-sitter" in the third week. Further, at an employer meeting at which Cordiano presided he contradicted her statement that the Union was a "rip-off" by stating that he knew union members who had not complained about it.

He concededly had a close working relationship and friendship with Bolt. They worked together and took their breaks together. They confided in each other concerning workplace complaints. Supervisor Adams stated that Burrell was "controlled" by Bolt. Given the close contact by the consultants with the employees in the facility they must have believed that Burrell shared Bolt's interest in the Union. The spreadsheet supports that the Respondent believed that Burrell was a union adherent.

As set forth above, I find and conclude that the General Counsel has proven that animus toward the Union was a substantial or motivating factor in Burrell's discharge. *Wright Line*, above.

The Respondent's Defense

The evidence established that Burrell threatened Adams with physical harm simply because Burrell objected to Adams' close supervision. Bolt and Burrell both testified as to Burrell's intolerance of Adams' watching him so closely and reporting his work performance to Young.

Evidence from Bolt and Burrell established that there were at least two confrontations involving threats by Burrell to hit Adams. Adams reported these confrontations which nearly became physical but for Bolt's stepping between them. In this regard I discount Young's exaggerated testimony that Burrell threatened Adams more than 5 times, and then 20 times, but issued no written warnings except in the two latest incidents.

Burrell violated the Respondent's harassment policy prohibiting threats and harassment. Written warnings were issued to him. Adams did not provoke Burrell's threat to hit him. Burrell simply objected to his supervisor's close monitoring—which is a supervisor's right to do. His discharge did not violate the Act.

In *Tri-City Fabricating & Welding Co.*, 316 NLRB 1096, 1096 (1995), the Board held that an employee's physical intimidation of his supervisor warranted his discharge. The employee conveyed to the supervisor that he was "ready to fight him." The Board noted that "physical intimidation of a supervisor is most serious."

As was the case with Bolt, there is no evidence that Burrell was treated in a disparate manner—in other words that other employees harassed their supervisors or any other employees but were not discharged. *Gallup, Inc.*, 349 NLRB 1213, 1305 (2007).

I accordingly find and conclude that the Respondent has met its burden of proving that it would have discharged Burrell even in the absence of his union and concerted activities. *Wright Line*, above.

CONCLUSIONS OF LAW

1. The Respondent, International Harvest, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated Section 8(a)(1) and (3) of the Act by discharging its employee Ashley Quezada.

3. The Respondent violated Section 8(a)(1) of the Act by promising its employees a wage increase in order to discourage them from voting for the Union.

4. The Respondent violated Section 8(a)(1) of the Act by promising its employees a $200 check or gift card if the employees supported the Respondent in the election.

5. The Respondent has not violated the Act by its discharge of Septival Bolt.

6. The Respondent has not violated the Act by its discharge of Denr oy Burrell.

7. The unfair labor practices set forth above are unfair labor practices affecting commerce within the meaning Section 2(6) and (7) of the Act.

THE REMEDY

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

The Respondent having discriminatorily discharged and refused to reinstate Ashley Quezada, it must offer her reinstatement to her former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges she would have enjoyed absent the discrimination against her. Further, I shall recommend that the Respondent make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her.

Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010), enf. denied on other grounds sub. nom. *Jackson Hospital Corp. v NLRB*, 647 F.3d 1137 (D.C. Cir. 2011). In accord with *Don Chavas, LLC d/b/a Tortillas Dan Chavas*, 361 NLRB 101 (2014), my recommended Order also requires the Respondent to (1) submit the appropriate documentation to the Social Security Administration so that when backpay is paid to Quezada, it will be allocated to the appropriate calendar quarters, and/or (2) reimburse her for any additional Federal and State income taxes she may be assessed as a consequence of receiving a lump-sum backpay award covering more than 1 calendar year.

In accordance with the Board's decision in *J. Piccini Flooring*, 356 NLRB 11, 13–15 (2010), I shall recommend that the Respondent be required to distribute the attached notice to members and employees electronically, if it is customary for the Respondent to communicate with employees and members in that manner. Also, in accordance with that decision, the question as to whether a particular type of electronic notice is appropriate

should be resolved at the compliance stage. Id. at 13–14. See *Teamsters Local* 25, 358 NLRB 54 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, International Harvest, Inc., Mt. Vernon, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because of their union and concerted activities.

(b) Promising its employees a wage increase in order to discourage them from voting for the Union in a Board-conducted election.

(c) Promising its employees money if the employees supported the Respondent in a Board-conducted election.

(d) In any like or related manner interfering with, 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 Ashley Quezada full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Ashley Quezada whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify Ashley Quezada in writing that this has been done and that the discharge will not be used against her in any way.

(d) Within 14 days after service by the Region, post at its facility in Mount Vernon, New York, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the 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, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 1, 2014.

(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 designated 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.

(f) Within 21 days after service by the Region, file with the Regional Director 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.

Dated, Washington, D.C. January 7, 2016

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 discharge you because of your union or protected, concerted activities.

WE WILL NOT promise you a wage increase in order to discourage you from voting for Amalgamated Industrial T & N Workers of America, Local 223, AFL–CIO (the Union) in a Board-conducted election.

WE WILL NOT promise you money if you support International Harvest, Inc., in a Board-conducted election.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

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

WE WILL within 14 days of the date of the Board's Order, make Ashley Quezada whole for any loss of earnings and other benefits suffered as a result of the discrimination against her.

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

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] 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."

and within 3 days thereafter notify Ashley Quezada in writing that this has been done and that the discharge will not be used against her in any way.

INTERNATIONAL HARVEST, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/02-CA-138000 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.