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Bodega Latina Corporation d/b/a El Super and United Food and Commercial Workers Union, Local 324. Case 21–CA–183276

December 3, 2018

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN
AND EMANUEL

On December 29, 2017, Administrative Law Judge Gerald M. Etchingham issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party each filed answering briefs, and the Respondent filed separate reply briefs to each answering brief. The Charging Party filed cross-exceptions and a supporting brief, the Respondent filed an answering brief, and the Charging Party filed a reply 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, cross-exceptions, and briefs and has decided to affirm the judge’s rulings,¹ findings,²

¹ We find it unnecessary to pass on whether the judge erred by drawing an adverse inference against the Respondent for failing to call former Anaheim store manager Jose Luna to testify about his authority to deny employee Mireya Karina Beltran-Pineda’s March 22, 2016 time-off request and his involvement in that decision. Regardless of whether the judge erred in this regard, other record evidence establishes that Luna had authority to and did participate in the decision to deny Beltran-Pineda’s request. For example, Vice President of Human Resources Victor Santillan testified that store managers played a key role in the vacation pay approval process. Moreover, Luna sent an email to Human Resources Manager Angelica Lima on March 29, 2016, in which he urged Lima to deny Beltran-Pineda’s vacation pay request because, in addition to other factors, she was “pro union.”

Additionally, we find it unnecessary to pass on whether the judge erred in precluding the Respondent from asking Beltran-Pineda whether she was under the influence of postsurgical medication during her March 25 or 26, 2016 telephone call with Luna, during which Luna informed Beltran-Pineda that her vacation pay request had been denied. As noted above, other record evidence establishes that Luna urged that Beltran-Pineda’s vacation pay request be denied because she was “pro union,” and there is no dispute that her vacation pay request was denied.

Finally, contrary to the Respondent’s exceptions, the judge did not err by including in the record his March 24, 2017 decision denying the Respondent’s motion for approval of a “full remedy” consent order, together with the motion papers and exhibits. The judge’s handling of this matter was consistent with the guidance for administrative law judges set forth in the NLRB Division of Judges Bench Book, Sec. 9-500. The Respondent’s reliance on Rule 408 of the Federal Rules of Evidence is misplaced. Rule 408 prohibits use of settlement offers “to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction.” Assuming for argument’s sake the applicability of Rule 408 to a respondent’s motion for a consent order, the judge did not rely on the Respondent’s proposed consent order for any of those purposes, and neither do we.

and conclusions and to adopt the recommended Order as modified and set forth in full below.³

AMENDED REMEDY

The Respondent excepts to the judge’s recommendation of extraordinary remedies, consisting of a broad order to cease and desist from violating the Act “in any other manner” and a public reading of the notice by a Board agent or responsible management official. We find merit in the exceptions. A broad cease-and-desist order is appropriate when a respondent has been shown to “have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees’ fundamental statutory rights.” *Hickmott Foods*, 242 NLRB 1357, 1357 (1979). And the Board has recognized that a notice-reading remedy may be warranted “where the violations are so numerous and serious that the reading aloud of a notice is considered necessary to enable employees to exercise their Section 7 rights in an atmosphere free of coercion, or where the violations in a case are egregious.” *Postal Service*, 339 NLRB 1162, 1163 (2003).

In this case, the Respondent violated Section 8(a)(3) and (1) of the Act by denying employee Beltran-Pineda’s request to receive accrued vacation pay and delaying payment of those funds because of her union support and violated Section 8(a)(1) by showing Beltran-Pineda a document indicating that her union support was a factor in its vacation-pay decisions. In recommending extraordinary remedies, the judge also relied on a March 10, 2016 formal settlement in Case 21–CA–160858. That formal settlement, which did not contain a non-admissions clause, resolved allegations that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to furnish the Union certain requested information relevant to the performance of its statutory duties. We find that the unfair labor practices found in this case and those formally settled in 21–CA–160858, taken together, do not warrant either of the judge’s recommended extraordinary remedies.⁴

² The Respondent has excepted to some of the judge’s credibility determinations. 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.

The judge inaccurately stated that the Respondent, the Charging Party, and bargaining unit employees were covered by a ratified collective-bargaining agreement. It is undisputed that, at all relevant times, the parties and bargaining unit employees were operating under the unilaterally imposed terms of the Respondent’s “last, best and final offer.” The judge’s misstatement has no impact on our disposition of this case.

³ We shall modify the judge’s recommended Order and substitute a new notice to conform to our amended remedy and the Board’s standard remedial language.

⁴ The General Counsel also attempts to rely on other cases where unfair labor practice allegations against the Respondent were resolved by informal settlement agreements. However, the only type of settle-

Also, the judge's recommended Order required that notices be posted at all seven of the Respondent's union-represented California stores. Multilocation posting may be appropriate where the Board finds considerable similarity in the nature of unfair labor practices committed by a respondent at multiple sites. See, e.g., *Wal-Mart Stores*, 350 NLRB 879, 885 (2007). Here, the effects of the violations were confined to one employee (Beltran-Pineda) at a single store (Anaheim). Consequently, we shall require the Respondent to post the notice only at the Anaheim store.⁵

The record establishes that Beltran-Pineda received all of the accrued vacation pay owed her on or about June 24, 2016. In agreement with the Charging Party's exception, we shall order the Respondent to make Beltran-Pineda whole for its unlawful delay in making this payment by paying her 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). See, e.g., *Hallmark-Phoenix 3, LLC*, 361 NLRB 1304, 1305 (2014) (awarding vacation pay plus interest accrued to date of payment), review granted in part on other grounds 820 F.3d 696 (5th Cir. 2016).

ORDER

The National Labor Relations Board orders that the Respondent, Bodega Latina Corporation d/b/a El Super, Anaheim, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Denying and/or delaying payments of employees' requests for vacation pay because of their union activities.
 - (b) Stating or implying that support for the Union would affect the Respondent's decisions to grant or deny employees' vacation pay requests.
 - (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) Make Mireya Karina Beltran-Pineda whole for the Respondent's denial of her March 22, 2016 vacation pay request and the resulting delay in payment of those funds until June 24, 2016, in the manner set forth in the amended remedy section of this decision.
 - (b) Within 14 days after service by the Region, post at its Anaheim, California facility copies of the attached

ment agreement that can be used to establish a proclivity to violate the Act is a formal settlement agreement without a non-admission clause. *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1189 (2011); *Teamsters Local 122*, 334 NLRB 1190, 1192 & fns. 9, 11 (2001), enfd. mem. No. 01-1513, 2003 WL 880990 (D.C. Cir. Feb. 14, 2003).

⁵ Because the discriminatee has limited ability to read in English and employees sometimes use Spanish in the Respondent's Anaheim store, we find it appropriate to require the Respondent to post the notice in English and Spanish.

notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 21, in English and Spanish, 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, 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 its Anaheim facility at any time since March 22, 2016.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 21 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. December 3, 2018

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO
Form, join, or assist a union

⁶ 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."

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 deny and/or delay payments of your requests for vacation pay because of your union activities.

WE WILL NOT state or imply that your support for the Union would affect our decisions to grant or deny your vacation pay requests.

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 make Mireya Karina Beltran-Pineda whole for our denial of her March 22, 2016 vacation pay request and the resulting delay in payment of those funds until June 24, 2016, by paying her the interest necessary to fully compensate her for that delay.

BODEGA LATINA CORPORATION D/B/A EL SUPER

The Board's decision can be found at <https://www.nlr.gov/case/21-CA-183276> 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.

Elvira T. Pereda, Esq., for the General Counsel.

Steven D. Wheelless, Esq. (Steptoe & Johnson LLP), for the Respondent.

Travis S. West, Esq. (Gilbert & Sackman), for the Charging Party.

DECISION

STATEMENT OF THE CASE

GERALD M. ETCHINGHAM, Administrative Law Judge, United Food and Commercial Workers Union, Local 324 (Charging Party or Union), filed the original charge in this case on August 30, 2016, and an amended charge on December 23, 2016. The General Counsel issued the complaint (complaint) on January 12, 2017, and the Respondent Bodega Latina Corporation d/b/a El Super (Respondent or Bodega Latina) answered the complaint on January 24, 2017.

This case involves Respondent's unlawful denial of union employee Mireya Karina Beltran-Pineda's (Mireya's or Beltran's) request to receive accrued vacation hours pay to cover emergency medical leave in late March 2016.¹ Respondent denies the essential allegations in the complaint and argues that Respondent's unrelated settlement payment to Beltran on April 8, 2016, is sufficient to deny and delay payment of Beltran's March 22 time-off request.

This case was tried in Los Angeles, California, on April 3 and 4, 2017. Closing briefs were submitted by the General

Counsel, the Charging Party, and the Respondent on

May 23, 2017. On the entire record,² including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Charging Party, and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The parties admit and I find that the Respondent, a corporation, is engaged in the retail grocery store business with its principal offices located in Paramount, California, and retail facilities in Anaheim, Arleta, Covina, Inglewood, Los Angeles, and Santa Fe Springs, California, where it annually derives gross revenues in excess of \$500,000 and purchases and receives goods valued in excess of \$5000 directly from suppliers outside the State of California. The Respondent further admits, and I further find, that its business activities were such that it meets the Board's retail jurisdictional standards and it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act. (GC Exh. 1(g); GC Exh. 1(i) at l.)³

II. UNFAIR LABOR PRACTICES

A. The Respondent's Operations

The Respondent operates retail grocery stores at 58 locations in five states including seven locations in Southern California. (Tr. 225.) Only Respondent's seven Southern California stores are unionized out of its 58 stores. (Tr. 225-226.) More than one Union local represents Respondent's employees at the 7 southern California unionized stores (collectively the Union Locals or the UFCW Locals). (Tr. 225-226; Jt. Exh. 1, fact #1.)

The Charging Party Union represents Respondent's employees at its Anaheim store (Store # 11) and also at its Santa Fe Springs store (Store # 16). (Jt. Exh. 1, fact #2.)

Respondent's human relations (HR) vice president, Victor Santillan (VP Santillan), testified for Respondent and has been with Bodega Latina since March 16, 2016. (Tr. 212, 216.) VP Santillan reports to his immediate manager, Respondent's general counsel Joe Angulo (general counsel Angulo). (Tr. 212-213, 225.) General counsel Angulo did not testify at hearing.

Respondent has 17 field HR representatives, internal HR clerks, and managers who report to VP Santillan. (Tr. 213.) VP Santillan also has responsibility for overseeing Respondent's compliance with the Health Insurance Portability and Accountability Act of 1996 (HIPAA).⁴ Id.

² The transcript in this case (Tr.) is mostly accurate, but I correct it as follows: Tr. 9, l. 9: "laches" should be "judge's;" Tr. 240: LL. 12, 16, 19 & 21: "August" should be "April;" Tr. 241, l. 8: "August" should be "April;" and Tr. 246, l. 8: "August" should be "April."

³ Abbreviations used in this decision are as follows: "Tr." for transcript; Jt. Exh." for joint exhibit; "R. Exh." for Respondent's exhibit; "GC. Exh." for General Counsel's exhibit; "GC. Br." for the General Counsel's brief; "R. Br." for the Respondent's brief; and "CP Br." for Charging Party's brief. Although I have included numerous citations to the record to highlight particular testimony or exhibits, my findings and conclusions are based not solely on the evidence specifically cited, but rather on my review and consideration of the entire record.

⁴ HIPAA's main focus is to prevent the wrongful disclosure of individually identifiable health information. Public Law 104-191 (1996). I find that for purposes of this decision, Beltran put her own individually identifiable health information at issue when the General Counsel and

¹ All dates are 2016 unless otherwise indicated.

Angela Lima (Supervisor Lima) also testified for the Respondent at hearing. Supervisor Lima has worked for Respondent for 4 years as an HR manager but she did not become associated with Respondent's store #11 in Anaheim until the week of March 27th. (Tr. 222, 226–227.)

Supervisor Lima opined that she has general responsibility over 2600 employees at 10 or 26 of Respondent's stores including all seven unionized stores in Southern California. (Tr. 225–226, 228, 261.) As stated above, Supervisor Lima first became responsible for matters at these seven unionized stores including store #11 in Anaheim on the week of March 27th. Id. Supervisor Lima helps resolve employee concerns, complaints, and questions, and at Respondent's seven unionized stores, she also helps with grievances. (Tr. 224–227.)

Jose Perez (Perez) testified at hearing in his capacity as a 17-year union representative for Local 324 who also enforces union contracts for the locations the union represents. (Tr. 31.) Perez represents the Union at Respondent's Anaheim grocery store# 11 and its Santa Fe Springs store# 16. (Tr. 31, 228.) Perez started working as a union representative for Local 324 at Respondent's store#11 in 2013. (Tr. 60.) Perez and Supervisor Lima have worked on union grievances that arise at store#11 starting on Supervisor Lima's arrival the week of March 27th. (Tr. 228.)

Beltran began work at Respondent's Anaheim store # 11 on April 9, 2010 and works there as a cashier. (Tr. 60, 102; Jt. Exh. 1, fact #3.) Beltran communicates in both Spanish and English while working as a cashier. Beltran has limited ability to read or write in English. (Tr. 45, 113.) Beltran speaks limited English to store customers and can read store coupons in English or read product labels for her work as cashier. (Tr. 113.) Beltran's primary language is Spanish and whenever Perez spoke to Beltran it was in Spanish given Beltran's limited ability to read, write or speak or understand English. (Tr. 45.)

In March 2016, Beltran's hours fluctuated between 30–40 hours per week but she was not considered a full-time employee. (Tr. 89–90.) Supervisor Lima, while not present in this case until approximately March 28, also knew that Beltran worked 30–40 hours per week. (Tr. 247.)

Beltran's anniversary date for leave purposes is based on her April 9, 2010 start date so it runs from April 9 – April 8. (Tr. 60; Jt. Exh 1, fact # 11.)

B. Respondent's Vacation Leave Policy

Respondent and the Union Locals implemented a ratified collective-bargaining agreement (CBA) with Respondent's last and final offer dated April 7, 2014. (Tr. 34–35, 56–57, 159–161; GC Exh. 2.) Perez and the Union have been relying on the CBA moving forward as Respondent's last, best, and final offer. (Tr. 57.) The CBA contains provisions for vacation eligibility, accrual, allotment, and pay, among other things. Id. The CBA also contains articles for sick leave and leave of absence.

Similarly, Respondent's employee handbook contains provisions for vacations, family and medical leave under the Family and Medical Leave Act (FMLA), notice of leave, leave as unpaid/substitution of accrued paid leave, and reporting absenteeism or tardiness. (Tr. 41–42, 159–161; GC Exh. 3.)

Basically, the vacation policy at Respondent for the Anaheim store# 11 unit members and all of the Union Locals provides

that an employee accrues vacation pay incrementally during their first year of employment—1 week's worth of vacation hours which becomes available for use from their anniversary date until the end of the next 12 months. (Tr. 35, 84–85, 93; GC Exh. 2.) If an employee does not use all of their accrued vacation hours by the second anniversary from accrual, Respondent pays it out to the employee for any unused accrued vacation hours remaining at that time. Id. Employees also get 2 weeks of vacation after their second year through their seventh year. Id.

Generally, an employee should request time off at least 30 days before they want to take time off from work. (Tr. 41–42, 66; GC Exh. 2 at 12–13; GC Exh. 3 at 10 and 13.) If an employee asks for time off with less than 30 days advance notice to Respondent, the employee should have a medical need or other emergency situation to be eligible to use accrued vacation hours for paid time off. Id. When an employee gives less than 30 days' notice, this type of time-off request is referred to as a "payout." (Tr. 259–260.) Payouts are treated the same whether or not an employee's time-off request falls under FMLA. (Tr. 275.)

In practice, however, in 2015 and 2016, a number of employees requested time off with vacation pay with less than 30 days' notice and these requests were all approved by the store's director/manager⁵ and paid to the requesting employee within 1–3 weeks, except Beltran's March 22 time-off request⁶ as discussed below. (See GC Exhs. 8–10.)

Family medical leave is generally unpaid but the CBA and handbook provide that family medical leave can be paid time off if the employee requests to use accrued vacation hours leave for medical time off. (Tr. 42, 66, 84; GC Exhs. 2 and 3.)

C. The Unrelated Settled ULPs Involving Respondent's Vacation Policy and Settlement Payments from Respondent to Union Employees Including Beltran

At some point prior to 2015, Respondent and the UFCW Locals disagreed over how accrued vacation leave was calculated under Respondent's vacation policy. (Tr. 86; Jt. Exh. 1, fact #4.) The UFCW Locals alleged that Respondent made a unilateral change to the calculation of benefits and an unfair labor practice charge was filed by the UFCW Locals against Respondent over the issue. (Tr. 86; Jt. Exh. 1, fact #5.)

The parties reached a settlement agreement regarding the dispute on August 7, 2015. Id.

The settlement referenced above called for Respondent to "payout" employees, including Beltran, for vacation pay the

⁵ Since both managers and directors maintain upper level management positions, I use director and manager interchangeably here as a store manager is the same as a store director, both positions being the highest store position at Respondent's 58 individual grocery stores separate from Respondent's corporate headquarters' management.

⁶ Respondent tries to distinguish between a time-off request that is either unpaid or paid using other than vacation pay or involve medical leave on the one hand, and time-off requests seeking pay using unused accrued vacation hours as Beltran requested on March 22 as described below. I find that the evidence in this case shows that there is no significant difference in any of these time-off requests as in 2015 and 2016, Respondent's store managers routinely approved practically all time-off requests made for unused accrued vacation hours less than 30-days out seeking vacation pay. See Tr. 217–219; GC Exh. 9 and 10. Consequently, reference to "time-off requests" include the variety of time-off requests referenced above including Beltran's March 22 time-off request where she sought vacation pay using her unused accrued vacation hours as of March 22, 2016.

the Charging Party Union subpoenaed Respondent for production of Beltran's doctor's note and her related March 22 time-off request submitted to Beltran's store manager, Luna.

employees should have been paid but for the alleged unilateral change. (Jt. Exh. 1, fact #6.) With respect to Beltran, this included her accrued, but unused vacation, that was due and owing as of April 9, 2015. Id.

The parties concluded the settlement agreement of the vacation payout dispute on August 7, 2015, but the first set of payouts, including the payout to Beltran, did not occur until April 8, 2016. (Tr. 157, 173; Jt. Exh. 1, fact #7.) The first set of payouts were based on calculations through August 29, 2015. Id.

On April 8, 2016, Beltran received two checks. (Jt. Exh. 1, fact #7.) The first check, for \$930.85, covered 72.27 hours of vacation pay accrued through April 8, 2014, and unused through April 8, 2015. (Tr. 86–87, 90; Jt. Exh. 1, fact #7; Jt. Exh. 2.) This April 8, 2016 payment from Respondent to Beltran was a result of the August 7, 2015 settlement and this is when Respondent finally paid Beltran.⁷

While the settlement moneys were owed by Respondent to Beltran and other union employees since August 7, 2015, Perez and the union employees, including Beltran, did not know exactly when Respondent would finally make payment of the settlement monies. (Tr. 87–88, 92, 97.) Supervisor Lima never told Perez that Beltran was going to receive her portion of the August 7, 2015 settlement from Respondent on April 8, 2016. (Tr. 92, 246.)

Respondent settled other alleged unfair labor practices charges raised by the Local Unions. The most recent formal settlement between the parties here was executed on March 11, 2016, and specifically states: “The Respondent agrees that this Settlement Stipulation may be used in any proceeding before the Board or an appropriate court *to show proclivity to violate the Act for purposes of determining an appropriate remedy.*” (GC Exh. 1(o) at 1; GC Exh. 1(l), at Exh. “I”, p. 4, par. 7.) (Emphasis added.)

Because Respondent’s settlement payout on April 8, 2016, was calculated as of the August 29, 2015 date, it did not include payment of vacation pay that became due and owing after August 29, 2015. (Jt. Exh. 1, fact #8.) Consequently, I find that Respondent’s April 8, 2016 settlement payment to Beltran is unrelated to Beltran’s charge in this Case 21–CA–183276.

The current vacation payout provision applicable to UFCW Local-represented employees requires that “The Employer shall pay the employee the vacation pay accrued during the employee’s anniversary year, either prior to taking the vacation or on the employee’s anniversary date.” (Jt. Exh. 1, fact #9.)

In an effort to complete the objective of getting all affected employees “caught up” on the payment of all owed vacation pay, Respondent made a “catch up” payment to affected employees for all vacation that became due and owing after August 29, 2015. (Jt. Exh. 1, fact #10.)

D. Beltran’s Known Union Activities

Beltran is one of the Local 324 union members at the Anaheim store# 11. (Tr. 31, 103.) Beltran has participated in a variety of union activities during the Local 324’s initial union contract campaign in 2015 and 2016. (Tr. 32, 104.) Beltran’s union activities include signing union petitions and participating in the Union’s gathering of signatures/petitions, her frequent wearing of union buttons uncovered on her blouse while

cashiering for Respondent, attending union meetings, attending union rallies, and Beltran’s participation in a 1day strike on December 16, 2015 at the Anaheim Store# 11 where Beltran was out with a number of her coworkers and union representatives, including Perez, in front of the Anaheim store # 11 carrying a picket sign⁸ (collectively these are Beltran’s “union activities”). (Tr. 32–33, 61, 104–107.)

Perez opined that Efrain B. and Succoro C. did not participate as much as Beltran in various union activities. (Tr. 62–63.) These two employees participated in a very limited way according to Perez. Also, Perez knows that, unlike Beltran here, Efrain B. and Succoro C. received accrued paid vacation hours from Respondent to cover their sick days off. (Tr. 65.)

Perez further opined that Beltran’s union activities were more open, vocal, and visible to Respondent’s management and the general public than Efrain B.’s union activities as Beltran always wore her union buttons while she worked as a cashier, and anytime that Perez asked Beltran for help in performing union activities, she was always willing to participate. (Tr. 91, 105.) Also, Perez explained that Beltran’s “union activities” were very different from Succoro C.’s union activities because Succoro was not a union activist and Succoro did not participate as much as Beltran in union activities. Id.

Jose Luna (Manager Luna), the store manager of Respondent’s Anaheim store# 11 in 2015 and part of 2016. Manager Luna was also Beltran’s immediate manager, and the store manager on duty at the Anaheim store# 11 and present to witness Beltran’s strike participation in December 2015. (Tr. 34, 197.) Respondent concedes that Manager Luna likely saw Beltran participate in the December strike and saw her wear her union buttons. (R.Br. 6.)

Assistant Supervisor Miguel Ruiz (Supervisor Ruiz) is the assistant store manager under Manager Luna at Respondent’s store# 11 in Anaheim and while working for Respondent for the past 8 years. (Tr. 175.) Supervisor Ruiz was not Beltran’s immediate supervisor. (Tr. 197.)

Beltran participated openly and in the front parking lot of Respondent’s store# 11 and the union strike on December 16, 2015, which lasted all day from 10–11 a.m. to 10:30 p.m. (Tr. 61, 104–105.) Beltran and the Union comprised of approximately 40–50 employees and union representatives carried picket signs against Respondent and gathered to demonstrate at the front of Respondent’s store# 11 in Anaheim on December 16, 2015. (Tr. 61–62, 107.)

On the day of the December 16, 2015 union strike at Respondent’s Anaheim store# 11, Manager Luna spent much of his time going back and forth at the store’s front entrance doors just surveilling the strike and immediate area around the store’s entrance and at times he would go out into the parking lot to grab shopping carts. (Tr. 34, 61, 107–108.)

Beltran also recounted a meeting with Manager Luna in January 2016 in Manager Luna’s office. (Tr. 105–107.) Manager Luna spoke to Beltran in Spanish and asked her *why she continued to wear her union buttons while cashiering at Respondent.* (Tr. 106.) (Emphasis added.)

Beltran responded telling Manager Luna that her union buttons said or represented “respect” to Beltran and Beltran further explained to Manager Luna that the Union’s collective-

⁷ A second check from Respondent to Beltran, for \$100.17, covered interest on this amount from the date owed until the April 8, 2016 date paid pursuant to the settlement. Jt. Exh. 1, fact #7; Jt. Exh. 3.

⁸ Perez opined that approximately 50 percent of all Anaheim store# 11 employees or approximately 40 employees participated in the December 2015 strike at Respondent’s Anaheim store# 11. Tr. 33.

bargaining agreement with Respondent “was a fair contract.” (Tr. 107.)

E. Manager Luna’s Past Custom and Practice of Approving Employee Time-Off Requests Made with Less Than 30 Days’ Notice

Prior to March 22, Manager Luna’s regular custom and practice was to use his discretion and almost always approved an employee’s request for paid vacation time off made in less than 30 days before the start of paid leave. (See GC Exhs. 7, 9, and 10.) In fact, the time-off request forms have a specific section for a store director/manager’s time-off approval and Manager Luna sent a number of email requests to Respondent’s payroll department to approve an employee’s requested paid time-off request. *Id.* All of these paid time-off requests were approved by Manager Luna despite their being requested with less than 30 days’ notice to Respondent. *Id.* The time-off request form does not give Respondent’s corporate payroll office the same authority to approve, disapprove, or have the employee withdraw a time-off request as is given to the specific store’s director/manager like Manager Luna. *Id.*

Moreover, Manager Luna’s email requests that payroll approve and pay an employee’s paid time-off request are all approved with no exception. As a result, I find that Manager Luna had full authority to approve or disapprove store# 11 employees’ paid time-off requests.⁹

For example, on *January 19, 2016*, Manager Luna signed off on and approved an Employee Time-Off Request for employee RB approving paid time off for January 24–30, 2016, and this employee received vacation pay for this time off on February 5. (GC Exh. 10 at 7–8.) On *April 6, 2016*, Manager Luna signed off on and approved an employee time-off request for employee RR approving paid time off for April 8, April 10–12, 2016, and this employee received vacation pay for this time off on April 22. (GC Exh. 10 at 9–10.) On *October 30, 2015*, Manager Luna signed off on and approved an employee time-off request for employee RR approving paid time off for November 1–7, 2015, and this employee received vacation pay for this time off on November 13. (GC Exh. 10 at 11–12.) On *February 28, 2016*, Manager Luna signed off on and approved an employee time-off request for employee BA approving paid time off for February 23–28, 2016, and this employee received vacation pay for this time off on March 6. (GC Exh. 10 at 13–14.) On *February 11, 2016*, Manager Luna signed off on and approved an

employee time-off request for employee FC approving paid time off for February 14–March 5, 2016, and this employee received vacation pay for this time-off on February 26, March 4, and March 11. (GC Exh. 10 at 15–19.) On *March 28, 2015*, Manager Luna signed off on and approved an employee time-off request for employee JN approving paid time-off for March 22–April 4, 2015, and this employee received vacation pay for this time off on April 3, April 8, and April 10. (GC Exh. 10 at 20–23.) On *December 7, 2015*, Manager Luna signed off on and approved an employee time-off request for employee CR approving paid time-off for December 13–19, 2015, and this employee received vacation pay for this time off on December 24. (GC Exh. 10 at 24–25.) On *August 14, 2015*, Manager Luna signed off on and approved an employee time-off request for employee CR approving paid time-off for August 16–23, 2015, and this employee received vacation pay for this time off on August 28. (GC Exh. 10 at 26–27.) On *March 3, 2016*, Manager Luna signed off on and approved an employee time-off request for employee BV approving paid time off for March 6–19, 2016, and this employee received vacation pay for this time off on March 18. (GC Exh. 10 at 28.) Again on *March 3, 2016*, Manager Luna signed off on and approved an employee time-off request for employee BV approving paid time-off for March 20–26, 2016, and this employee received vacation pay for this time-off March 28 and April 1. (GC Exh. 10 at 29–32.) On *May 2, 2015*, an unidentified store manager signed off on and approved an employee time-off request for employee MA approving paid time off for May 3–15, 2015, and this employee received vacation pay for this time off on May 15 and 22. (GC Exh. 10 at 4–6.) Also on *July 16, 2015*, another unidentified store manager signed off on and approved an employee time-off request for employee MB approving paid time off for July 19–August 2, 2015, and this employee received vacation pay for this time off on July 31 and August 7. (GC Exh. 10 at 1–3.)

The approved time-off requests show that Respondent’s employees receive their vacation pay with their regular paystub with no delay in payment despite the fact that these time-off requests occurred with less than 30 days’ notice to Respondent. VP Santillan admits that normally a vacation time-off request payment shows up in an employee’s paystub within 2–3 weeks after approval. (Tr. 218–219.) The approved time-off requests also show that employees, except Beltran, were routinely being paid their unused accrued vacation pay in March and April despite Respondent’s settlement with the Union Locals and Respondent’s eventual undisclosed payments to employees on April 8 and June 24. (GC Exh. 9 at 8; GC Exh 10 at 9–10; GC Exh. 10 at 20-23; and GC Exh. 10 at 28–32.)

Also, on *January 26, 2016*, Manager Luna sent a vacation approval email to Respondent’s payroll for an employee MR from his store# 11 for paid leave on February 7–13, 2016, which was also approved by Samuel Trevino (Trevino) on February 1, 2016. (GC Exh. 9 at 1.) On *September 29, 2015*, Manager Luna sent a vacation approval email to Respondent’s payroll for an employee OS from his Store# 11 for paid leave on October 11–31, 2015, which was also approved by Dora Gonzalez (Gonzalez) on October 1, 2015. (GC Exh. 9 at 2, 4.) On *January 21, 2016*, Manager Luna sent a vacation approval email to Respondent’s payroll for an employee MO from his store# 11 for paid leave on January 31–February 6, 2016, which was also approved by Trevino on January 22, 2016. (GC Exh. 9 at 3.) On *December 29, 2015*, Manager Luna sent a

⁹ I reject Supervisor Lima’s unsupported opinion that no one at store#11, including Manager Luna, had authority to approve or deny a vacation payout request as the preponderance of the evidence shows that Supervisor Lima was not even present at store#11 on March 22 when Manager Luna first denied Beltran’s paid time-off request before he rejected it a second time on March 25 or 26 in his telephone call to Beltran when she was at home recovering from her March 23 surgery. Supervisor Lima did not arrive to take responsibility of store# 11 until the week of March 27th. Before this time, Manager Luna frequently approved such leave or at least weighed in to Respondent’s corporate payroll department who agreed with Manager Luna each and every time with no exception. (Tr. 171, 176, 225–227; GC Exh. 9 and 10.) In addition, store#11 did not have another HR Supervisor in place after February 2016 and before Supervisor Lima showed up late in March 2016. (Tr. 226–227.) I find that Manager Luna was authorized and decided whether paid time-off requests would be approved or denied before Supervisor Lima came to store#11 and that Manager Luna denied Beltran’s March 22 time-off request twice due to Beltran’s pro union activities. See GC Exh. 6.

vacation approval email to Respondent's payroll for an employee VG from his store# 11 for paid leave on January 17—23, 2016, which was also approved by Trevino on December 30, 2015. (GC Exh. 9 at 5.) On October 12, 2015, Manager Luna sent a vacation approval email to Respondent's payroll for an employee VD from his store# 11 for paid leave on October 18–31, 2015, which was also approved by Trevino. (GC Exh. 9 at 6.) On March 11, 2016, Manager Luna sent a vacation approval email to Respondent's payroll for an employee LM from his store# 11 for paid leave on March 13–16, 2016, which was also approved by Trevino on March 14, 2016. (GC Exh. 9 at 8.) On October 20, 2015, Manager Luna sent a vacation approval email to Respondent's payroll for an employee MR from his store# 11 for paid leave on October 25–31, 2015, which was also approved by Samuel Trevino. (GC Exh. 9 at 9.) Finally, on December 18, 2015, Manager Luna sent a vacation approval email to Respondent's Payroll for an employee EC from his store# 11 for paid leave on December 27 —January 2, 2016, which was also approved by Trevino on December 19, 2015. (GC Exh. 9 at 10.)

None of the 18 above paid time-off vacation requests submitted less than 30 days out were ever denied after a Respondent store manager (mostly Manager Luna) approved them and submitted them for approval. As a result, I further find that Respondent does not require that there be 30 days out for a paid time-off request to be routinely approved. (Tr. 219.)

F. Beltran's March 22 Time-Off Request to Use Accrued Vacation Hours to Cover Her Emergency Medical Leave

Manager Luna had authority and handled Respondent's employees' time-off requests on and before March 22 for Respondent's store# 11 in Anaheim. (Tr. 171; GC Exh. 9, GC Exh. 10.) Supervisor Ruiz also admitted that some of his job duties include being responsible for processing employee vacation time-off requests. (Tr. 176.) Supervisor Ruiz described how managers have a yellow folder on the left side of their desk to provide employees with blank time-off vacation requests to fill out when they seek paid time-off using accrued vacation pay. (Tr. 180.) Supervisor Ruiz later confirms that rather than have the employee seeking paid time off bringing in their own slip, managers "hand it to them in the office" to fill out and hand in. (Tr. 184–185.) At no time did Supervisor Lima have responsibility for processing or approving employee vacation time-off requests of any type. (Tr. 224.)

On March 22, 2016, Beltran saw her doctor who told her she needed surgery and so she did not have to wait several months for his next opening, he told Beltran he could perform surgery on March 23. (Tr. 127.) As a result, Beltran met with her immediate supervisor Store Manager Luna and Supervisor Ruiz in Manager Luna's office and Beltran, speaking in Spanish with the others, prepared a handwritten time-off leave request and submitted it to Manager Luna with her doctor's note and requested 2 weeks emergency medical leave under the FMLA as Beltran's doctor ordered her to have surgery the next day on March 23.¹⁰ (Tr. 19–23, 108–111, 126–127, 139, 176–178,

¹⁰ Beltran's March 22 time-off request, her meeting with Manager Luna, and Beltran's doctor's note provide Respondent with Beltran's advance notice ahead of her March 23 surgery and related absences. I reject Respondent's unsupported argument that Beltran "gave no advance notice" to Respondent as deceptive. R. Br. 8.

181–182, 185–186, 194, 197–198, 280–281.)¹¹ Supervisor Ruiz estimated that the meeting lasted 3–5 minutes. (Tr. 177, 183.)

At this meeting, Beltran also received from Manager Luna a blank form to request time-off using her unused accrued vacation hours as compensation during her time-off. (Tr. 109, 127.) Beltran explained that this form had some boxes to put in the requested dates for her time-off, the date of the request, and a signature. (Tr. 109, 128; GC Exh. 7.)

Supervisor Ruiz admits that he does not know if Beltran and Manager Luna had communications regarding her doctor's note from March 22 or whether or not there was a request for paid time off made by Beltran to Manager Luna. (Tr. 197.) Supervisor Ruiz does not refute Beltran's testimony that Manager Luna handed Beltran a blank time-off request form for her to fill out on March 22. In fact, Supervisor Ruiz opines that in his experience, it is Respondent's common practice that a time-off request would get filled out when a doctor's note is being brought in by an employee. (Tr. 192, 199.)

Moreover, Supervisor Ruiz also admits that a Respondent employee's only access to these blank time-off request forms is from either a store manager or assistant manager as they are contained in a manager's computer, which computer is only accessible by a store manager like Manager Luna or an assistant store manager like Supervisor Ruiz. (Tr. 192, 197; GC Exh. 7.) As a result, I find that Beltran could only have obtained the blank time-off slip from Manager Luna or Supervisor Ruiz and she testified persuasively that Manager Luna handed her a blank time-off request form to fill out. (Tr. 109, 111, 126–127, 139; GC Exh. 7.)

Beltran did not know the exact number of vacation hours she had available to use on March 22 as she believed that she had about a week's worth of unused accrued vacation leave so that her emergency absence from March 23–28 would be partially paid depending on Beltran's accrued vacation leave balance as of March 23, 2016. (Tr. 108–110, 111, 126–127, 158; GC Exh. 7.) Beltran thought that out of her total request for time off, at least 1 week of the 2 requested would be paid. (Tr. 129–130.)

Beltran did not keep a copy of the doctor's note or the time-off slip she completed and handed to Manager Luna. (Tr. 109–110.) Beltran confidently explained that the time-off slip that Manager Luna handed her to complete looked identical to the time-off slip used by all employees and admitted as General Counsel's Exhibit 7 styled—"Employee Time-Off Request El Super." (Tr. 132, 184–185; GC Exh. 7; see also GC Exhs. 9

¹¹ Beltran confidently testified without hesitation that at this meeting she submitted to Manager Luna both her doctor's note referencing the need for Beltran's emergency surgery the next day on March 23 and Beltran's handwritten time-off request for vacation pay dated March 22. Tr. 109, 111, 126–127, 139. Respondent's counsel further proffered at hearing that he would stipulate that Beltran filled out and submitted a time-off request on March 22 if that was her testimony which, as referenced above, it is. (Tr. 23.) Supervisor Ruiz, however, provided contradictory testimony. I find that Beltran was more convincing than Supervisor Ruiz who testified for Respondent that Beltran did not submit a time-off request on March 22. Id. The time-off request form was in English and filled out by Beltran and submitted to Manager Luna. Id. None of these two documents were produced in a timely manner at hearing in response to a General Counsel and Charging Party Union's subpoena requesting these documents from Respondent. Supervisor Ruiz testified that Beltran's doctor's note would normally be kept at Respondent's store in Beltran's personnel file and not at its corporate offices. (Tr. 185–186, 189–190, 194–195, 197.)

and 10.)

Manager Luna told Beltran that he was going to send Beltran's signed time-off slip and doctor's note to Respondent's HR department to see whether they authorize Beltran's requested time off starting on March 23 to be paid with her unused accrued vacation time. (Tr. 110, 126–127.) Manager Luna did not tell Beltran that she needed to fill out any other forms and he did not ask Beltran to get anything else from her doctor. Id. Manager Luna next told Beltran that he would call her once he received a response from Respondent's HR department. Id.

G. Manager Luna's Denial of Beltran's March 22 Time-Off Request

Beltran confidently and without hesitation recalled that Manager Luna called her on March 25 or 26 and told her that her March 22 time-off request was not approved and had been denied by Respondent.¹² (Tr. 111–112, 148–152.) Manager Luna did not give Beltran any reason for Respondent's denial of Beltran's paid vacation request. Id. In addition, no one from Respondent ever told Beltran that her March 22 request for paid time off had been denied because Beltran either did not have any accrued vacation hours available to use for this leave or that she submitted the wrong time-off form. (Tr. 111–112, 128–129.)

Also, at no time did anyone from Respondent tell Beltran or Perez that Beltran's March 22 time-off request had been granted and at no time prior to the filing of the July charge in this case, had anyone from Respondent informed Beltran and/or Perez that Beltran's March 22 time-off request had been paid to her by Respondent's unrelated April 8, 2016 settlement payment from the August 7, 2015 settlement between the Respondent and the Local Unions. (Tr. 129.)

Beltran contacted Perez later on March 25 or 26, and told him that Manager Luna had called her and that Respondent was denying Beltran's 1week paid vacation time-off request. (Tr. 152.) Beltran also explained to Perez that she was seeking accrued and unused vacation pay from Respondent for her recent time off for medical reasons starting March 23. (Tr. 69–72, 152–153.) Beltran also told Perez that she was absent on March 23 to March 26. (Tr. 69–70, 152–153.)¹³

¹² Respondent objects to my ruling preventing his questions as to whether Beltran was on any particular medications on March 25 or 26 that would interfere with her recall at that time or cause her to “misremember” key facts. (R. Br. at 18–19.) Since Beltran testified without question, pause or uncertainty that Manager Luna had denied her March 22 time-off request when he called her at her home on March 25 or 26, I do not think it relevant to allow this line of questioning when these questions would be relevant if Beltran was testifying and testing her recall at hearing and displaying some uncertainty or ill effects from medication. Here, distinguishable from Respondent's citations, Beltran did not exhibit any memory lapses or misrecollection about making her March 22 time-off request, submitting her doctor's note and Manager Luna's subsequent call to her announcing the denial of her March 22 time-off request. (Tr. 111–128, 148–152.) Beltran's surgery was on March 23 and she clearly testified that by March 25 or 26, she had full recall that Manager Luna denied her March 22 time-off request. As a result, I find that asking about her medications back in March 2016 would not improve the record.

¹³ Perez did not recall whether Beltran told him that she had filed a time-off request before she left on medical time off in March 2016 but as mentioned above I find that Beltran met with Manager Luna and Supervisor Ruiz in Manager Luna's office on March 22 and Beltran prepared a hand-written leave request and submitted it to Manager Luna with her doctor's note and requested emergency

Perez told Beltran that he would contact Respondent's HR department about Beltran's March 22 time-off request status. (Tr. 152.) Perez knew that Beltran had some financial difficulties and that is why she needed the paid accrued vacation hours for her medical leave in late March. (Tr. 82.)

Later on March 25 or 26, Perez called Beltran back after speaking to Supervisor Lima and told Beltran that he had spoken to someone in Respondent's HR department and that Respondent had agreed to pay Beltran for 1 week as accrued vacation pay. (Tr. 153.)

On March 28, Perez sent an email inquiry to Supervisor Lima on Beltran's behalf either later the same day or 1–2 days after talking to Beltran over the telephone. (Tr. 42–43, 77, 229; GC Exh. 4.) Before Perez' March 28 email, Supervisor Lima had never heard of Beltran and had never been asked to process or approve a vacation payout request either before March 28 or again after Perez' request. (Tr. 232–233.)

Perez sent this email to Supervisor Lima because Beltran had reached out to Perez for help and told him that she had an earlier medical situation on March 23 that she needed to take time off and Beltran was asking if Perez would help get her paid time off using Beltran's unused accrued vacation hours as of March 23, 2016. Id.

The March 28 email with the Subject being “Mireya Beltran” and sent at 11:54 a.m. specifically provides that Perez is “reaching out to you [Supervisor Lima] regarding Mireya Beltran at store# 11. She had to take a week off for unforeseen reasons. She is having some financial difficulties. She is asking if you can pay her a week's vacation for this [missed March 23–28, 2016] week. Could you please help her out. I look forward to hearing from you regarding this employee's needs.” (Tr. 82; GC Exh. 4.)

Perez certainly did not know that Respondent would make an April 8 payment to Beltran related to the 2015 settlement when Perez sent his March 28 email to Supervisor Lima on Beltran's behalf as she was experiencing financial difficulties. (Tr. 82, 87–88, 92, 97.)¹⁴

Supervisor Lima responds to Perez' March 28 email later that day at 5:59 p.m. with Supervisor Lima saying: “I will request her [Beltran's] vacation balance to see if she has any accrued time and will circle back with you—thanks.” (GC Exh. 4.) Supervisor Lima admits that vacation requests are generally approved if the employee has “some” hours available

medical leave under the FMLA as Beltran's doctor ordered her to have surgery the next day on March 23. (Tr. 19–23, 72–80, 126–127.) In addition, Perez confidently explained that he did not elaborate on Beltran's specific medical leave surgery when he wrote to Supervisor Lima as his email simply references Beltran's late March absences being for “unforeseen reasons” because Perez did not want to get personal about Beltran's specific medical issues and Perez knew that Beltran was hesitant when she told him her specific medical condition that required emergency time off. (Tr. 80, 93.) This is in contrast to my finding that Beltran put her medical condition as of March 22 at issue at the time of hearing and Beltran's related waiver of any privacy concerns that Respondent may raise under HIPAA when Beltran's doctor's note and March 22 time-off request was subpoenaed from Respondent.

¹⁴ Perez further explains that the Union was told by Respondent that the August 7, 2015 settlement check would be paid on April 1, 2016, and when it was not, the Union was not exactly sure when the August 7, 2015 settlement checks would get issued by Respondent. (Tr. 92, 97.)

to use.¹⁵ (Tr. 266.)

No one at Respondent ever told Perez that Beltran did not have enough unused accrued vacation hours to cover her March 22 time-off request. (Tr. 92.)

Perez next responds to Supervisor Lima at 6:16 p.m. that same day saying: “I appreciate anything you can do to help her out.” (GC Exh. 4.)

Later on March 28 at 7:39 p.m., Respondent’s payroll supervisor, Norma Macias (Macias), sends Supervisor Lima an email with the subject being “Mireya Beltran” [Beltran] with a copy to Respondent’s Rodolfo Hernandez (Hernandez) and the Store Manager Luna at 11 Anaheim saying:

“Available vacation 95.53hours [sic].”

(GC Exh. 6.) Supervisor Lima admits that Manager Luna was the store director/manager at store #11 in Anaheim on March 28. (Tr. 232.)

I further find that because Beltran has unused accrued vacation hours totaling 95.53 hours as of March 28, when one subtracts out the 2015 settlement amount of 72.27 hours for unused accrued vacation hours, Beltran had a leftover balance of unused accrued vacation hours on March 22 of at least 23.26 [95.53-72.27] to be paid by Respondent in response to Beltran’s March 22 paid time-off request. (Tr. 247–249, 265; Jt. Exhs. 2–4; and GC Exh. 6.) Beltran did not receive her paid time-off vacation pay in a timely manner for these 23.26 unused accrued vacation hours as it was not contained in Beltran’s April 1 paycheck. As a result, Beltran did not receive the same payment within 1 to 3 weeks for her March 22 time-off request as other employees had when making the same requests. (GC Exhs. 8–10.)

At 8:21 a.m. on March 29, Supervisor Lima responds to Macias saying: “Thanks Norma [Macias]” and Supervisor Lima copies Hernandez and Manager Luna at Anaheim store# 11 with this email response. (GC Exh. 6.) Less than 10 minutes later, Manager Luna makes his forceful attack against Beltran with his own antiunion email. *Id.*

At 8:30 a.m. on March 29, Manager Luna sends an email regarding Beltran to Supervisor Lima with a copy to himself at 11 Anaheim and signed by Store Manager Jose Luna #11 saying:

Angelica [Lima],

Can you please call me tomorrow before *we* decide to pay her [Beltran]. The contract states she needs to give us 30 day [sic.] notice. She [Beltran] is pro-union and calls in sick on us a lot[.] (This March 29 email from Manager Luna to Supervisor Lima is hereafter known as the “Manager Luna antiunion email”).

(Tr. 235; GC Exh. 6.) (Emphasis added.) No one was copied with this Manager Luna antiunion email. *Id.*

At 10:40 a.m. on March 29, Supervisor Lima responds to the Manager Luna antiunion email regarding Beltran asking: “Why is the email below signed by [Manager . . .] Luna?” (GC Exh. 6.) No one was copied with this email. *Id.*

Supervisor Lima admits that she spoke to Manager Luna about Beltran on March 30, 2016. (Tr. 239.)

Beltran returned to work after her surgery sometime on about April 4, and because Beltran had not heard from Perez about

the status of her March 22 time-off request on her return to work, Beltran went to Manager Luna’s office with a question to him as to why her March 22 time-off request had been denied and what was her unused accrued vacation hours balance. (Tr. 136–137.)

In response to her questions, rather than look up Beltran’s unused accrued vacation hours balance from his email chain and simply tell Beltran that she had 95.53 unused accrued vacation hours, Manager Luna prints out and hands Beltran a copy of the Manager Luna antiunion email from Manager Luna. (Tr. 112–113, 137–138; GC Exh. 6.)

When he handed Beltran the antiunion email, Manager Luna says to Beltran: “That it was for 2 weeks that I [Beltran] had accrued, that it was 2 weeks plus some hours.” (Tr. 137.) Beltran was able to interpret the portion of Manager Luna’s antiunion email that references Beltran having her 2 weeks accrued 95.53 vacation hours on it which Beltran opines as her maximum 2 weeks accrued vacation hours. (Tr. 113–114, 137–138.) Beltran only glanced at the accrued vacation hours portion of the Manager Luna antiunion email as that was her main interest at this time in early April. (Tr. 114, 137–138; GC Exh. 6.)

Beltran took the Manager Luna antiunion email (GC Exh. 6) home with her. (Tr. 113–114.) Beltran did not understand the meaning of the entire Manager Luna’s antiunion email “very well” because it was written in English until her sister-in-law reads it and explains its meaning and context to Beltran sometime in early May. (Tr. 112, 114–115, 138–139.) Beltran’s sister-in-law speaks English and was born in the United States. (Tr. 114.)

Supervisor Lima also admits that she spoke to Respondent’s general counsel Angulo on April 5, 2016, about Beltran’s paid time-off request. (Tr. 239.) Supervisor Lima further admits that she did not know as of April 5 that Respondent was making its settlement payments for the August 7, 2015 settlement on April 8, 2016. (Tr. 246.)

An April 5, 2016 email with the Subject being “El Super # 11 [Respondent Anaheim store # 11]” and sent at 5:24 p.m. from Perez to Supervisor Lima specifically asks Supervisor Lima: “Would you please let me know when you’re available to meet. Also, were you able to get Mireya Beltran paid for last week as vacation hours?” (Tr. 240; GC Exh. 5.)

Supervisor Lima next responds to Perez on April 5 at 5:45 p.m. saying: “Mireya [Beltran] will not be paid for vacation. She’s on a medical LOA, she can apply for FMLA. Are you available Friday?” (GC Exh. 5.) Supervisor Lima did not give Perez any reason why Beltran’s March 22 paid time-off request was being denied by Respondent. (Tr. 263.)

Perez then responds to Supervisor Lima on April 5 at 6:20 p.m. saying: “There has [sic.] been other employees in the same predicament and were paid before. Why can’t you pay her [Beltran]? Friday will not work for me. What other day are you available?” (GC Exh. 5.) Perez believes that medical leave of absence is the same as any leave of absence request. (Tr. 92.)

At no time during the end of March or in April or May 2016, was Beltran paid by Respondent for her March 22 time-off request for her medical emergency leave from March 23–26, 2016, by applying Beltran’s unused accrued vacation hours to Beltran’s March 22 time-off request. (Tr. 130, 153–154; GC Exh. 8.¹⁶) Beltran was surprised that her accrued vacation pay

¹⁵ The reasonable expectation here on March 28 is that Supervisor Lima will approve Beltran’s March 22 time-off request as long as she has some unused accrued vacation hours.

¹⁶ Beltran’s paystub paid April 1, 2016 for the pay period beginning March 20 and ending March 26 shows regular pay of 12.82 hours at

for her missed days of March 23–26 was not in her paycheck as HR had originally told Perez. (Tr. 154.)

Instead, on April 8, 2016, Beltran received her portion of the unrelated August 7, 2015 settlement proceeds from Respondent, 72.27 unused accrued vacation hours from 2015. (Tr. 157, 173; Jt. Exh. 2 and Jt. Exh. 3.) Also, as stated above, Supervisor Lima never told Perez that Beltran was going to receive her portion of the August 7, 2015 settlement from Respondent on April 8, 2016. (Tr. 92, 97–98.) Furthermore, at no time did anyone at Respondent ever tell Perez that Beltran’s March 22 time-off request was denied because Beltran had not submitted the correct paperwork. (Tr. 92–93, 128–129, 267.)

Sometime in or around June 24, 2016, Local 324 unit employees received a cashed-out payment from Respondent for accrued but unpaid vacation hours in the amount of 298.41 for Beltran’s remaining unused accrued vacation hours from April 9, 2015 to April 8, 2016 totaling 22.71.¹⁷ (Tr. 49, 85, 265; Jt. Exh. 1, fact # 12; Jt. Exh. 4.) Perez understood this June 24 payment from Respondent to represent “hours that they [employees] had accrued the previous year and not used through her [Beltran’s] April 8, 2016 anniversary date, and so they were being paid out.” (Tr. 49.)

Perez also knows that Beltran also received this payment in June 2016. (Tr. 49.) Perez understands this June 24 payment to Beltran represent that Beltran actually had unused accrued vacation hours as of her April 9 anniversary date that were unused to the point that a June 24, 2016 payment was made of the accrued unused balance of them as of April 8, 2016 meaning that there were accrued unused hours available to Beltran when she made her March 22 time-off request. (Tr. 49–50.)

On June 24, 2016, Beltran received a “catch up” vacation payment that Respondent intended to bring her current for all accrued and unused vacation pay owed as of her last anniversary date of April 9, 2016. (Tr. 85; Jt. Exh. 1, fact #12.) This payment was for 22.71 vacation hours (accrued between April 9, 2014 and April 8, 2015, unused between April 9, 2015 and April 8, 2016, and due and owing as of April 9, 2016) in the amount of \$298.41.¹⁸ Id. No interest was paid on this amount. Id.

Consequently, Respondent’s June 24, 2016 payment to Beltran contained the *same accrued unused vacation pay* that Beltran requested be paid to her by her March 22 time-off request that Respondent had previously denied. Respondent delayed payment of Beltran’s March 22 time-off request for approximately 3 months until this June 24 payment.

Stated differently, Perez further confirms that the fact that Beltran received a check from Respondent on June 24 means that Beltran could have been paid accrued vacation hours in late March or early April 2016 for her March 22 time-off request

\$13.14 per hour for a total gross pay to Beltran of \$168.45 but does not contain any vacation pay, sick pay or any other pay for this week.

¹⁷ As discussed later in this decision, this random June 24 payment by Respondent to Beltran shows that Beltran had 22.71 vacation hours available to be paid as of March 22, 2016 when she requested her paid time-off request which Respondent denied in March and April and delayed payment to Beltran until June 24.

¹⁸ Perez admits that as of March 28, 2016, when he requested accrued but unused vacation pay for Beltran from Respondent, that Beltran did not have more than 22.71 vacation hours accrued or available at that time that Beltran could have used toward her March 22 time-off request for her emergency medical absences on March 23–26, 2016. (Tr. 19–23, 85, 108–111, 126–127, 139, 176–177–178, 181–182, 185–186, 194, 197–198, 280–281.)

for her emergency medical leave from March 23–26, 2016 because Beltran had unused accrued vacation hours in her payroll “bank” at Respondent so Respondent could have paid Beltran these accrued and unused vacation hours before June 24, 2016. (Tr. 50–51.) “Instead of paying them [to Beltran] in June, they [Respondent] could have been paid in March when she [Beltran] requested to be paid.” (Tr. 51.) Supervisor Lima agrees that if an employee is on medical leave and they have some unused accrued vacation hours available, generally, that employee’s request for paid accrued vacation is approved as long as they have hours available to use.¹⁹ (Tr. 266.)

In late June or July, Beltran takes the Manager Luna anti-union email to Perez. (Tr. 46, 115–116, 155.) Beltran went to Perez’ office to discuss with him the balance of her accrued vacation hours, whether the amount referenced on the Manager Luna antiunion email was the same amount of hours that Respondent was paying Beltran in the check amounts she just received from Respondent. (Tr. 116, 155; GC Exh. 6.)

At this time, Perez first sees Manager Luna’s antiunion email to Supervisor Lima which contains Manager Luna’s statement about Beltran saying: “Can you please call me tomorrow before we decide to pay her [Beltran]. The contract states she needs to give us 30 day [sic.] notice. She [Beltran] is pro union and calls in sick on us a lot[.]” (Tr. 44; GC Exh. 6.) Beltran brought the Manager Luna antiunion email to show Perez and union shop steward Raquel Cruz (Cruz) at the Union office in late July 2016. (Tr. 45–46, 117–118.)

Perez told Beltran that the Manager Luna Anti-Union Email “was pretty gross” after he read it. (Tr. 46.) Perez also told Beltran that he would file a grievance to the Manager Luna antiunion email because Perez believed that the email explained why the Union’s request to Respondent to get Beltran paid using her accrued vacation hours for her absence the week of March 22 had gone unanswered. Id.

Sometime between March 29, 2016 and August 4, 2016, Manager Luna voluntarily leaves his position as manager of Respondent’s store# 11 in Anaheim purportedly to work somewhere else in retail.²⁰ (Tr. 103.) Manager Luna was suc-

¹⁹ Respondent’s opening statement at hearing alleges that the evidence will show that Respondent denied Beltran’s March 22 time-off request for paid accrued vacation time off for Beltran’s absences on March 23–26, 2016 “because Respondent was about to pay Beltran her over 72 hours of her 95 accrued vacation hours on April 8, 2016.” Tr. 173. As explained herein, I find, instead, that Respondent denied Beltran’s March 22 time-off request due to Beltran’s “union activities” and that the April 8 payment is unrelated to Beltran’s March 22 time-off request since it is a settlement payment owed to Beltran and other union employees *since August 7, 2015* and finally paid with interest on April 8, 2016. Manager Luna first ignored Beltran’s March 22 paid time-off request by not processing it to payroll as was his normal custom and practice in 2015 and 2016. See GC Exhs. 9 and 10. In addition, Manager Luna denied Beltran’s March 22 time-off request again on March 25 or 26 when he called her at her home when she was recovering from her emergency surgery. When Perez got Supervisor Lima involved on her arrival as HR director of store# 11 on March 28 with Perez’ March 28 email, Manager Luna stepped in again and sent Supervisor Lima the Manager Luna antiunion email on March 29 which this time persuaded Supervisor Lima and Respondent to deny Beltran’s March 22 time-off request and delay payment of it until June 24, 2016.

²⁰ Respondent presented Supervisor Lima’s conflicting testimony with its R Exh. 2 showing that Manager Luna left Respondent voluntarily on April 7. I find Beltran’s testimony that Manager Luna was still working at Respondent in mid-April when he met with Beltran and

ceeded by Manager Joe Silva sometime before August 4, 2016. (Tr. 48, 102–103, 136–138, 249, 253; R. Exh. 2.)

On Approximately August 4, 2016, Perez met to Supervisor Lima and new Manager Jo at store#11 in Anaheim about the Manager Luna antiunion email. (Tr. 47–48, 242.)

Perez showed Supervisor Lima and Manager Jo a copy of the Manager Luna antiunion email. (Tr. 48.) Perez told Manager Jo and Supervisor Lima that he was pretty disgusted with the Manager Luna Anti-Union Email and that he was also disappointed as to how Beltran was being treated by Respondent due to her union activities. *Id.*

Supervisor Lima's initial response to Perez after being shown the Manager Luna Anti-Union Email by Perez was to ask him "how did she [Beltran] get ... [the Manager Luna Anti-Union] email [GC Exh. 6]?" (Tr. 48.)

Perez responded telling Supervisor Lima that Beltran had brought him the Manager Luna antiunion email. (Tr. 48.) Perez further explained that Manager Luna had given Beltran a copy of the Manager Luna antiunion email. *Id.*

Perez also opined that after he showed Supervisor Lima the Manager Luna Anti-Union Email, Supervisor Lima's demeanor "completely changed." (Tr. 48–49.) Perez observed that Supervisor Lima was shocked that the Union had a copy of the Manager Luna antiunion email and Supervisor Lima really did not say much to Perez about it other than that she would look into following up with Perez to get Beltran paid for some or all of her medical leave the week of March 22, 2016. (Tr. 49.)

Perez also explained that when he met with Supervisor Lima and Manager Jo at store #11 on August 4, Perez never discussed filing charges with the Board, the NLRB, and he never discussed not filing charges with the NLRB. (Tr. 283–284.) Perez concludes by adding that the NLRB was never discussed at this meeting in contradiction to Supervisor Lima's testimony. *Id.* I find Perez to be more believable on this subject after reviewing his demeanor as he testified without hesitation in a confident manner. Moreover, I find that even if these settlement discussions took place, they are inadmissible as taking place during settlement negotiations under Federal Rules of Evidence Rule 408.

Sometime in August 2016, Perez receives a response to his April 5 correspondence with Supervisor Lima from Supervisor Lima. (Tr. 44.) The response does not explain or properly respond to Perez' earlier April 5 email to Supervisor Lima [GC Exh. 5] as to why Beltran was not paid for her March 22 time-off request in a timely manner. (Tr. 50.)

As stated above, because the settlement payout to Beltran on April 8, 2016, was calculated as of the August 29, 2015 date, it did not include payment of unused accrued vacation pay that became due and owing *after* August 29, 2015. (Jt. Exh. 1, fact #8.)

Also, once again, the current vacation payout provision applicable to UFCW Local-represented employees requires that "The Employer shall pay the employee the vacation pay accrued during the employee's anniversary year, either prior to taking the vacation or on the employee's anniversary date." (Jt. Exh. 1, fact #9.) The preponderance of the evidence shows that Respondent's employees, other than Beltran, received their paid time-off requests within 1-3 weeks after submitting their time-off requests to the store manager. (Tr. 218; GC Exhs. 9 and

10.)

II. CREDIBILITY

1. Adverse inference

None of the parties called Manager Luna or General Counsel Angulo to testify at hearing. Respondent counsel says that Manager Luna has left Respondent and not returned "our calls," so "I don't have any access to him." (Tr. 140.) The General Counsel and the Charging Party counsel say that Respondent counsel could have easily subpoenaed Manager Luna to get him to the hearing. (Tr. 141–142.)

Manager Luna and general counsel Angulo are part of Respondent's management team during relevant events in this case, in admitted supervisory and agency capacities,²¹ from Respondent's store# 11 and its corporate headquarters, respectively. For this reason, Manager Luna and general counsel Angulo may reasonably be assumed to be favorably disposed toward Respondent. *International Automated Machines*, 285 NLRB 1122, 1123 (1987) (internal citations omitted), *enfd.* 861 F.2d 720 (6th Cir. 1988) ("while we recognize that an adverse inference is unwarranted when both parties could have confidence in an available witness' objectivity, it is warranted in the instant case, where the missing witness is a member of management"). This is particularly true where the witness is an agent of a party. *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006). Further, that Respondent employs general counsel Angulo and knows that Manager Luna voluntarily left Respondent in April 2016 to work at another retail employer, I find that Respondent should have exercised its power to call former Manager Luna and general counsel Angulo to trial. I therefore draw an adverse inference against Respondent, as "when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. In particular, it may be inferred that this witness, if called, would have testified adversely to the party on that issue." *Id.*

Thus, I infer that if Manager Luna and general counsel Angulo had been called, each of them would have testified adversely to Respondent's position that Manager Luna had no authority and was not involved in the decision to deny Beltran's March 22 time-off request. Moreover, I further infer that general counsel Angulo would have testified adversely to Respondent's claim that general counsel Angulo had no knowledge of Beltran's union activities as the ultimate decisionmaker denying Beltran's March 22 time-off request and despite the Manager Luna antiunion email being provided to Respondent's higher management on March 29.

Respondent did not provide any explanation as to why Manager Luna and General Counsel Angulo did not testify at hearing, did not show that either Manager Luna or Angulo was unavailable, and did not demonstrate that it tried to subpoena them to hearing. See *Flexsteel Industries*, 316 NLRB 745, 758 (1995) (failure to examine a favorable witness regarding factual issue upon which that witness would likely have knowledge gives rise to the "strongest possible adverse inference" regarding such fact); *Martin Luther King Sr. Nursing Center*, 231 NLRB 15, 15 fn. 1 (1977) (adverse inference appropriate where no explanation as to why supervisors did not testify); accord:

handed her his antiunion email much more believable than his departure on April 7. (Tr. 136–137, 249, 253; GC Exh. 6; R Exh. 2.)

²¹ Manager Luna is an admitted supervisor and agent under the Act. (GC Exh. 1(i) at 1.)

Graves v. United States, 150 U.S. 118, 121 (1893) (“if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable”). In particular, the Board will not hesitate to draw an adverse inference from a respondent’s failure to call as witnesses the decisionmaker to support its defense. *Dorn’s Transportation Co.*, 168 NLRB 457, 460 (1967) (failure of the decisionmaker to testify “is damaging beyond repair”), *enfd.* 405 F.2d 706, 713 (2d Cir. 1969); see also *Vista del Sol Health Services*, 363 NLRB No. 135, slip op. at 26 (2016); *Southern New England Telephone Co.*, 356 NLRB 883 (2011); *Government Employees (IBPO)*, 327 NLRB 676, 699 (1999).

2. Witness credibility

A credibility determination may rely on a variety of factors, including the context of the witness’ testimony; the witness’ demeanor; and the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), *enfd.* 56 Fed.Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness’ testimony. *Daikichi Sushi*, above at 622.

Beltran testified in a generally corroborative and credible manner exhibiting a straight-forward and no-nonsense demeanor that she turned in her doctor’s note to Manager Luna on March 22 and he handed her a blank time-off request form that she filled out, signed, and turned in to him to receive unused accrued vacation paid time-off for the dates March 23–26, 2016 because Beltran’s doctor instructed Beltran that she would need to miss 2 weeks work and have an emergency surgery on March 23. Beltran was much more believable than Supervisors Ruiz and Lima, who appeared overly rehearsed and self-serving, as to the key facts from March through August 2016 and Respondent’s procedures for approving or denying paid time-off requests and Manager Luna’s repeated authority to approve them or provide deciding input for employee time-off requests. The evidence here also shows that Beltran had not been disciplined by Respondent for excessive absences or sick leave use, late arrivals to work without notice, or anything else and any undocumented testimony to the contrary is rejected as false.

Supervisor Ruiz was a highly suspect witness when it came to his recollection of the March 22 meeting between Beltran, Manager Luna, and Ruiz. Supervisor Ruiz’ testimony is contrary to Beltran’s more forceful and believable testimony that Manager Luna handed Beltran a time-off request form and this completed time-off request form along with Beltran’s doctor’s note were both submitted to Manager Luna at the March 22 meeting by Beltran. (Tr. 178–179, 194, 197.) Supervisor Ruiz’ testimony that Beltran said nothing at the meeting, did not request vacation pay time-off, and did not hand in a completed time-off request form is rejected as contrary to Beltran’s testimony and Respondent’s stipulation that both Beltran’s doctor’s note and a vacation pay time-off request were submitted on March 22 even though neither was properly produced at hearing in a timely manner as part of the General Counsel’s and the

Charging Party Union’s subpoena requests. In addition, Supervisor Ruiz opined that it took Beltran at least 3 minutes to just hand in her doctor’s note to Manager Luna and leave without saying anything. (Tr. 183.) I find this statement is unbelievable as it is more reasonable to believe that on March 22, it took Beltran 3–5 minutes to fill out the time-off request form that Manager Luna provided her and hand in both this completed form and her doctor’s note. The large absence of confirming evidence in support of Supervisor Ruiz’ statements combined with a wealth of evidence contradicting his testimony require me to reject his lone testimony that Beltran did not submit a completed time-off request on March 22 when she met with Manager Luna and also handed in her doctor’s note excusing her from 2 weeks work due to her emergency need for surgery.

I also reject Supervisor Ruiz’ testimony that time-off requests are approved or denied at Respondent’s corporate office without any weight or material influence given by a store manager for input about the requesting employee as this contradicts the circumstances here where Manager Luna at first ignored and refused to process Beltran’s March 22 time-off request, then called Beltran at home 3–4 days later while she was recovering from her surgery on March 25 or 26 and told her that her time-off request was denied by Respondent’s HR department. The denial came about from Manager Luna’s input either denying the paid time-off request or persuading Respondent’s HR department that because Beltran was a prounion employee, Respondent should either deny or delay approval of Beltran’s March 22 time-off request. (See GC Exh. 6.) Manager Luna says to Supervisor Lima that she should know that Beltran is a prounion employee before “we” decide to deny or approve her March 22 time-off request. *Id.*

Moreover, I reject Supervisor Ruiz’ testimony that prior to March 22, Beltran had “excessive absences and had exceeded her sick leave pay that she had for the year” as it is the result of improper leading questions from Respondent’s counsel. (Tr. 195.) See, e.g., *H. C. Thomson*, 230 NLRB 808, 809 fn. 2 (1977) (answers to leading questions on direct examination not entitled to credence). I also reject Supervisor Lima’s testimony from pages 237 and 244 of the transcript as it is also the product of Respondent’s counsel’s further leading questions about Manager Luna’s role for approval of time-off requests and the intricacies of Respondent’s time-off request process asked to Supervisor Lima who earlier admits she does not have responsibility for processing or approving employee payout requests of any type. (See Tr. 224.) In addition, Manager Luna’s role approving store# 11’s employees’ time-off requests predated Supervisor Lima’s arrival at store#11 on or about March 28, 2016. (Tr. 245.)

VP Santillan testified primarily as to Respondent’s custom and practice for granting time-off requests and maintaining and producing documents for litigation. VP Santillan, like Supervisor Lima, joined Respondent in mid to late March 2016, after many of the key facts in this case occurred. I give little weight to their testimony about Respondent’s custom and practice before they became employed by Respondent except VP Santillan’s admission that store managers such as Manager Luna have the authority to grant employees’ time-off requests which is consistent with Beltran’s testimony as to Manager Luna’s call on March 25 or March 26 telling her that her March 22 time-off request had been denied and other documentary evidence showing that prior to Beltran’s March 22 time-off request, it was common practice for store managers and Manager

Luna, in particular, to authorize employees' time-off requests. (Tr. 11–112, 148–152, 217; GC Exhs. 6, 9 and 10.)

Other than this testimony from VP Santillan, I reject his further testimony and Supervisor Lima's testimony about their knowledge of Respondent's practice of approving time-off requests, the authority of store directors/managers to approve or influence time-off request approval, and Respondent's maintenance of employee records and personnel files prior to Manager Luna's departure from Respondent sometime after mid-April 2016. For example, VP Santillan testified about some elaborate process where employees' doctor's notes and medical time-off requests are sequestered and couriered away from a grocery store to be held under lock and key at Respondent's corporate headquarters. I find Supervisor Ruiz' testimony more believable on this subject that at least through the summer of 2016, Respondent's employee personnel files at each grocery store contained the employee's doctor's notes, related time-off requests, and other personnel records. (Tr. 194–195.) In addition, I reject VP Santillan's statement that medical time-off requests are treated differently by Respondent than other time-off requests because VP Santillan did not work at Respondent and did not participate in approving time-off requests in or before April 2016. (See fn. 6 above; Tr. 111–112, 148–152, 171, 219–220; GC Exhs. 9 and 10.)

In addition, Supervisor Lima testified that she did not get involved with store # 11 and the alleged facts in this case until late March 2016 and I find that she is unqualified to testify as to exact process for approving paid time-off requests especially ones that were requested prior to her arrival the week of March 27th. Beltran, Manager Luna, Trevino and Respondent general counsel Angulo would be the most reliable witnesses to testify about this process but Beltran was the only credible witness who testified at hearing.²² Moreover, I find that Supervisor Lima's incredible interpretation of Manager Luna's Anti-Union Email of March 29 is false and fabricated that Manager Luna "was unhappy that Ms. Beltran did not follow the 30-day notice" when at least 18 other time-off requests that Manager Luna approved and processed in 2015-2016 involved similar less than 30 days' notice and were paid within one-three weeks. (See Tr. 218, 259-260; GC Exhs. 9 and 10.) I further reject Supervisor Lima's interpretation that Manager Luna's reference to Beltran being "pro union" was not animus but, instead, meant that "the Union would probably support her [Beltran's time-off] request" because Perez and the Union were already assisting Beltran by March 29. (Tr. 235.) Manager Luna's direct reference to Beltran being "pro-union" is akin to his refer-

²² Specifically, I reject Supervisor Lima's opinion that store# 11 sends time-off requests to the payroll department to see if the employee has accrued vacation or not and then payroll goes to the vice president of HR (VP Santillan) or general counsel Angulo for approval or denial. (Tr. 224.) While the time-off requests do go to Payroll to determine whether an employee has any accrued vacation hours available, that is not in dispute here as Beltran had at least 22 accrued vacation hours to use from March 23–26, 2016. Tr. 247–249; Jt. Exhs. 2–4; and GC Exh. 6 and 8.) The preponderance of the evidence shows that in and before March 2016, Manager Luna routinely approved all paid time-off requests without any input from newly arrived VP Santillan or general counsel Angulo as Manager Luna's paid time-off request submittals were all approved and rubber-stamped by payroll in 2015–2016 until he voluntarily left Respondent sometime in April 2016. (See GC Exhs. 9 and 10.) Moreover, Supervisor Lima admits that vacation requests are generally approved if an employee has "some" hours available to use as Beltran had here on March 22. (Tr. 266.)

encing Beltran's skin color or religious affiliation to Supervisor Lima in his email. It is direct evidence of Manager Luna's discriminatory intent and retaliation against Beltran's union activities.

Respondent argues that Manager Luna had absolutely no authority to grant or deny a vacation payout request and that such authority rests only at Respondent's corporate office and not at an individual store like store # 11 in Anaheim. (Tr. 174, 252, 275.) I reject this argument and find that a preponderance of the evidence shows that with respect to Beltran's March 22 time-off request for a vacation payout for her absences on March 23-26 due to her medical emergency, Manager Luna either denied the request himself or the March 22 request was denied based primarily on Manager Luna's input that Beltran is a pro union employee. It is unreasonable to believe that general counsel Angulo has responsibility for day-to-day approval of Respondent's over 2,600 employees' time-off requests.

III. RESPONDENT'S DISCRIMINATORY DENIAL AND DELAY WITH BELTRAN'S RIGHT TO USE HER ACCRUED VACATION HOURS DUE TO HER UNION ACTIVITIES

The question is whether the Respondent denied Beltran's March 22 request for paid time off because of her union activities in violation of Section 8(a)(3) of the Act. Section 8(a)(3) provides that it is unlawful for an employer by discrimination in regard to any term or condition of employment to encourage or discourage membership in any labor organization. 29 U.S.C. § 158. Adverse actions, such as a denial and delay of paid time off when an employee has unused accrued vacation hours available because of their prounion activities, violate Section 8(a)(3) of the Act. *Id.* Moreover, when Beltran asked Respondent why she was denied her time-off request, Manager Luna handed her the Manager Luna antiunion email. The email makes it clear that Beltran had sufficient unused accrued vacation hours to get paid but the email also shows that the time-off request was denied because of Beltran's union activities. Also, Respondent routinely approved other employees' time-off requests other than Beltran who Manager Luna noted was prounion in his recommendation that Beltran's March 22 time-off request be denied.

In the mixed-motive context of this case, the Board applies the burden-shifting analysis set forth in *Wright Line* to determine whether an employer's adverse action against an employee is unlawful. 251 NLRB 1083 (1980), *enfd.* on other grounds 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Thus, the General Counsel must prove by a preponderance of the evidence: (1) union activity by the employee; (2) employer knowledge of that activity; and (3) anti-union animus by the employer to establish antiunion motivation of employer's conduct in violation of Section 8(a)(3) and (1). *Mesker Door, Inc.*, 357 NLRB 591, 592 fn. 5 (2011). Proof of an employer's motive can be based upon direct evidence or can be inferred from circumstantial evidence, based on the record as a whole. *Robert Orr/Sysco Food Services*, 343 NLRB 1183 (2004); *Ronin Shipbuilding*, 330 NLRB 464 (2000).

If the General Counsel successfully demonstrates that the protected union activity was a motivating factor for employer's adverse act, the burden then shifts to the employer to show that it would have taken the same action against the employee even absent the employee's protected activity. *Wright Line*, above at 1089. An employer does not meet its burden merely by show-

ing that it had a legitimate business reason for its action. Rather, it must persuasively demonstrate that it would have taken the same action in the absence of the protected conduct. See *Boothwyn Fire Co. No. 1*, 363 NLRB No. 191, slip op. at 7 (2016), citing authorities. If the evidence establishes that the proffered reasons for the employer's action are pre-textual—i.e., either false or not actually relied upon—the employer fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct. See *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003), citing *Limestone Apparel Corp.*, 255 NLRB 722 (1981).

Here, the complaint paragraphs 7, 9, and 10 allege, and I find, that beginning on March 22, 2016, or in about April 2016, Respondent refused employee Beltran's request to use accrued vacation hours to cover her emergency medical leave on March 23, 2016, because Beltran assisted the Union and engaged in union activities and to discourage employees from engaging in these activities and that these protected union activities resulted in Respondent discriminating in regard to the terms and conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(3) and (1) of the Act.²³

A. The General Counsel's Prima Facie Case

1. Beltran openly engaged in protected prounion activities

Beltran's open and vocal union activities were protected, concerted activities that were obvious to Respondent and include signing union petitions and participating in the Union's gathering of signatures/petitions, her frequent wearing of union buttons uncovered on her blouse while cashiering for Respondent, attending union meetings, attending union rallies, and Beltran's participation in a 1-day strike on December 16, 2015 at the Anaheim Store # 11 where Beltran was out with a number of her coworkers and union representatives, including Perez, in front of the Anaheim store# 11 carrying a picket sign (collectively these are Beltran's "union activities"). (Tr. 32–33, 61, 91, 104–107.) In addition, in January 2016, just a couple of months ahead of the alleged March 22 adverse action by Respondent, Beltran was called into Manager Luna's office where he asked her why she continued to wear her union buttons while cashiering at Respondent and Beltran responded telling Manager Luna that her union buttons said or represented "respect" and that the Union's collective-bargaining agreement with Respondent "was a fair contract." (Tr. 105–107.)

2. Respondent knew about and openly witnessed and complained about Beltran's protected prounion activities

Respondent denies that it knew about Beltran's union activities and that its decisionmakers were too far removed from Beltran to know about her union activities. I reject both of these arguments.

First, Manager Luna is an admitted supervisor and agent under Section 2(11) and (13) of the Act.²⁴ It is well established that a supervisor's knowledge of protected, concerted activities is imputed to an employer in the absence of credible evidence to the contrary. *State Plaza, Inc.*, 347 NLRB 755, 757 (2006); *Dobbs International Services*, 335 NLRB 972, 973 (2001). As previously discussed, I do not credit Supervisor Lima's or Supervisor Ruiz' statements that Manager Luna had no authority

to approve or deny employees' time-off requests. As stated above, Store managers freely approved employees' time-off requests at store#11 from 2015 through at least April 2016 and Respondent's payroll department's role was simply to rubber stamp the store managers' approvals as long as an employee had some unused accrued vacation hours. (Tr. 111–112, 148–152, 197, 217–218; GC Exhs. 9 and 10.) In addition, VP Santillan admitted that store managers, like Manager Luna, have the authority to grant employees' payout requests. (Tr. 217.) Moreover, when antiunion email on March 29, he wrote to her to call him the next day "before we decide to pay her [Beltran]." (GC Exh. 6.) I further find this shows that Manager Luna reasonably believed that he was part of the decision-making team for approving or denying time-off requests and at no time did Supervisor Lima refute this to Manager Luna.

Second, for reasons previously stated, I do not credit Supervisor Lima's testimony that VP Santillan or General Counsel Angulo were responsible for approving employees' time-off requests and not Manager Luna, and, once again, I credit VP Santillan's admission that store managers such as Manager Luna have the authority to grant employees' time-off requests which is consistent with Beltran's testimony as to Manager Luna's call on March 25 or 26 telling her that her March 22 time-off request had been denied and other documentary evidence showing that prior to Beltran's March 22 time-off request, it was common practice for store managers and Manager Luna, in particular, to authorize employees' time-off requests. (Tr. 11–112, 148–152, 217; GC Exhs. 6, 9 and 10.) I find that, instead, Supervisor Lima essentially rubber-stamped Manager Luna's March 22 and 25, or 26 denials of Beltran's time-off request, and the Board does not protect uninvolved employers who green light the animus-laden decisions of their inferiors. See *Dobbs International Services*, 335 NLRB 972, 973 (2001) (whether the general manager knew of employees' protected activity was immaterial insofar as the supervisors, who were involved in the adverse action, knew of employees' protected activity).

Given the rebuttable presumption that a supervisor's knowledge of protected union activities is imputed to the employer and given Manager Luna's regular active role in approving or denying Beltran's and other employees' time-off requests, I find that the General Counsel has carried its burden by a preponderance of evidence in demonstrating that Respondent had knowledge of Beltran's protected union activities. See *Club Monte Carlo Corp.*, 280 NLRB 257, 261 (1986), enfd. 821 F.2d 354 (6th Cir. 1987).

3. Respondent harbored animus toward Beltran's protected prounion activities

"The General Counsel must make a showing sufficient to support a conclusion that [animus toward] the protected conduct was a motivating factor in the employer's decision to suspend or discharge." *Id.* at 261–262. Direct evidence of unlawful motivation is seldom available and it may be established by circumstantial evidence. *Lucky Cab Co.*, 360 NLRB 271, 274–275 (2014); *Abbey Transportation Services*, 284 NLRB 698, 701 (1987). Persuasive evidence of pretextual reasons for discharge strongly supports a finding of animus. *Relco Locomotives, Inc.*, 358 NLRB 229, 229 (2012), enfd. 734 F.3d 764 (8th Cir. 2013); *Tidewater Construction Corp.*, 341 NLRB 456, 458 (2004). The evidence is replete with animus both direct and circumstantial.

²³ GC Exh. 1(g) and 2–3.

²⁴ GC. Exh. 1(i) at 1.

a. The Manager Luna antiunion email is direct evidence of Respondent's union animus and discriminatory motive

First, no stronger direct evidence of Respondent's union animus exists than Store Manager Luna's own March 29 antiunion email to Supervisor Lima which Store Manager Luna later shared with and flaunted before Beltran which specifically informs Supervisor Lima that Beltran is a prounion employee at Respondent so that Supervisor Lima can factor that unlawful remark into her decision whether or not to affirm Manager Luna's earlier denials on March 22, 25, or 26 of Beltran's March 22 time-off request.

Once again, Manager Luna's antiunion email of March 29 to Supervisor Lima provides:

Can you please call me tomorrow before we decide to pay her [Beltran]. The contract states she needs to give us 30 day [sic.] notice. She [Beltran] is pro union and calls in sick on us a lot[.]

The tone of this email, and the notion that Manager Luna would need to make Supervisor Lima aware of these issues directly contradict Manager Luna's prior policy and practice of approving employees' time-off requests that come to him with less than 30 days' notice,²⁵ points out to Supervisor Lima that Beltran's "pro-union" status is a factor to consider for approval or denial and infers that Beltran abuses her sick leave at Respondent.

As stated above, I find that Manager Luna's reference to Beltran being "pro-union" as part of his recommendation to deny Beltran's March 22 time-off request is strong direct evidence of unlawful motivation, retaliation, and Respondent's union animus. It is also direct evidence of Manager Luna's discriminatory intent when one views other employees' time-off requests that were routinely approved by Manager Luna and other store managers in 2015 and 2016. It is most apparent that Beltran has suffered disparate treatment by Respondent and has been discriminated against because of her union activities as she had at least 22 accrued unused vacation hours available for payment at the time of her March 22 time-off request.²⁶

In addition, the Board does not require that General Counsel demonstrate a causal "nexus" between an employee's protected activity and an employer's adverse action. *Neises Construction Corp.*, 365 NLRB No. 129, slip. op. at 1–2 fn. 6 (2017); *Nich-*

²⁵ If giving less than 30 days' notice is a factor in denying Beltran's time-off request, Respondent has violated the parties' interim CBA which does not require at least 30 days' advance notice for vacation requests using vacation as part of FMLA circumstances as Beltran requested on March 22. (See GC Exh. 2, Article 18, Section 3, pp. 12–13.)

²⁶ Respondent raises the issue whether Beltran actually suffered any adverse impact from the denial of her March 22 time-off request and the delayed payment for 3 months to June 24. Maybe Respondent and its counsel would like to wait 3 months to receive earned revenue or salary. I reject this argument as Beltran received an April 8 payment from Respondent that had been owed to her since August 2015 and that April 8 payment is unrelated to the matters at issue here. The delayed payment from late March or early April to June 24 deprived Beltran of the use of this money to put toward supporting herself while recovering from surgery in late March 2016. Beltran has lost opportunity costs not having access to her own money in the form of unused accrued vacation hours owed to her by Respondent. In addition, none of Respondent's other employees had to experience this same delayed payment as their time-off requests in March and April were approved and paid as part of their regular pay stubs. (GC Exhs 9 and 10.)

ols Aluminum, LLC, 361 NLRB 216, 224 fn. 7 (2014), set aside 797 F.3d 548 (8th Cir. 2015). However, Supervisor Luna's direct disclosure to Supervisor Lima of Beltran being "pro-union" in his March 29 Manager Luna antiunion email establishes a causal link and motivating factor between Beltran's prounion activities in late December 2015 and January 2016 and Manager Luna's denial of Beltran's March 22 time-off request. See *North Hills Office Services*, 346 NLRB 1099, 1166 fn. 11 (2006); *Libertyville Toyota*, 360 NLRB 1298, 1306 fn. 5 (2014); *Tschiggfrie Properties, Ltd.*, 365 NLRB No. 34, slip op. at 1 fn. 1 (2017).

b. There is sufficient circumstantial evidence of Respondent's union animus.

Further, I conclude that the strong evidence of pretextual reasons for Respondent's adverse discriminatory action against Beltran and the close timing of this adverse action in relation to the timing of Beltran's union activities also supports a finding of animus toward Beltran's protected union activity. I analyze the circumstantial evidence below.

- (i) Respondent's shifting characterization of the non-payment of Beltran's 22 unused accrued vacation pay in late March or early April 2016 in response to Beltran's March 22 time-off request

Beltran credibly testified that Manager Luna denied her March 22 time-off request by not processing it, as he usually did many times previously for Beltran and other store# 11 employees, on March 22, and by communicating his denial of her March 22 time-off request to Beltran when he called her at home on March 25 or 26, 2016.

Respondent's next position through testimony at hearing was that Beltran failed to properly submit a properly filled out time-off request form or other proper paperwork, Beltran's time-off request was untimely coming from Perez on March 28 and not before her emergency absence from Beltran herself, or that the time-off request came with less than 30 days' notice so it could not be processed in time for a late March or early April payment. (Tr. 178–179, 194, 197, 235; GC Exh. 6.)

Next on March 28, Supervisor Lima tells Perez that she will look into Beltran's March 22 time-off request by checking with Respondent's payroll department to see if Beltran has any unused accrued vacation pay to pay Beltran for her March 22 time-off request. (GC Exh. 4.) By April 5, Respondent's position changes again this time to Supervisor Lima telling Perez that Beltran "will not be paid for vacation. She's on a medical LOA [leave of absence], she can apply for FMLA." (GC Exh. 5.) On April 5, Supervisor Lima did not give Perez any reason why Beltran's March 22 paid time-off request was being denied by Respondent. (Tr. 263.)

Respondent's final position that it maintained at hearing and in its posthearing brief is that Respondent denied Beltran's March 22 time-off request for paid accrued vacation for Beltran's absences on March 23–26, 2016 "because Respondent was about to pay Beltran her over 72 hours of her 95 accrued vacation hours on April 8, 2016" due to Respondent's settlement with the Union Locals. (Tr. 173.) As stated above, this settlement amount of 72 hours vacation pay was owed to Beltran since August 2015 and should have been paid in a timely manner to Beltran and other employees and, more importantly, it is unrelated to Beltran's balance of at least 22 unused accrued vacation hours as of March 22. More importantly, I reject Respondent's argument because Respondent routinely approved

other time-off requests to employees other than Beltran in March and April despite the same Respondent settlement with the Union Locals and Respondent's future payments to employees of undisclosed timing on April 8 and June 24. (GC Exh. 9 at 8; GC Exh. 10 at 9-10, 20-23, and 28-32.)

As explained herein, I find, instead, that Respondent denied Beltran's March 22 time-off request due to Beltran's "union activities" and that the April 8 payment is unrelated to Beltran's March 22 time-off request since it is a settlement payment owed to Beltran and many other union employees *since August 7, 2015* and was finally paid with interest on April 8, 2016.

Manager Luna first ignored Beltran's March 22 paid time-off request by not processing it to payroll as was his normal custom and practice in 2015 and 2016. (See GC Exhs. 9 and 10.) In addition, Manager Luna denied Beltran's March 22 time-off request again on March 25 or 26 when he called her at her home when she was recovering from her emergency surgery. When Perez got Supervisor Lima involved on her arrival as HR Director of Store # 11 on March 28 with Perez' March 28 email, Manager Luna stepped in again and sent Supervisor Lima the Manager Luna antiunion email on March 29 which this time persuaded Supervisor Lima and Respondent to maintain Manager Luna's prior denials of Beltran's March 22 time-off request and delay payment of it until June 24, 2016.

These shifting positions are also indicative of animus. *Inter-Disciplinary Advantage, Inc.*, 349 NLRB 480, 509 (2007) (finding animus in the employer's raising a new explanation for discharge at hearing, and noting that "an employer's shifting explanation for disciplinary action taken supports an inference of pretext").

Respondent's attitude toward Beltran's pro-union status, the timing of her time-off request, and her use of sick leave is highly indicative of animus. See *Metropolitan Transportation Services*, 351 NLRB 657, 658-660 (2007) (finding, even while acknowledging that respondent had no written progressive disciplinary system, that respondent's willingness to "jump on" the employee's past missteps to justify a discharge, absent a single "formal reprimand" for those missteps, revealed that respondent's stated reason for discharging the employee was pretextual).

(ii) The timing of Manager Luna's denial of Beltran's time-off request to her union activities also shows antiunion motivation.

The Board has long held that a close timing between an employee's protected activity and an employer's adverse action is indicative of employer animus toward the protected activity. *Lucky Cab Co.*, 360 NLRB 271, 274 (2014); *ManorCare Health Services-Easton*, 356 NLRB 202, 225 (2010). Here, none of the reasons that Respondent gave for denying and delaying payment to Beltran of her 22 unused accrued vacation hours for her March 22 time-off request (Beltran used too much sick leave, she did not properly document her March 22 time-off request, and her request came in on less than 30 days' notice) were material enough to warrant denial or delay in payment—most, if not all, were false statements by Respondent.

Respondent's citing of *Southern Mail, Inc.*, 345 NLRB 644, 648-649 (2005); *Irving Tanning Co.*, 273 NLRB 6, 8 (1984); *Thom Brown Shoes, Inc.*, 257 NLRB 264, 268-269 (1981); *Qualitex, Inc.*, 237 NLRB 1341, 1344 (1978), etc., involve factual situations which are all distinguishable from the facts here as they present union activities occurring more than 2 months before an employer's adverse action which are determined to be too remote in time to sufficiently show anti-union

motivation. In contrast, here Beltran's active union activities were ongoing and did not cut-off with her strike participation in December 2015 as Beltran continued to wear her union buttons which, as referred to above, led to Beltran being summoned to a meeting by Manager Luna in his office in January 2016 where Manager Luna interrogated Beltran and asked her *why she continued to wear her union buttons while cashiering at Respondent*. (Tr. 105-107.) (Emphasis added.) Moreover, the cases cited by Respondent do not involve direct evidence of union animus or discriminatory intent as we have here with the Manager Luna antiunion email.

As such, I find that the close timing between Beltran's ongoing protected union activity and Respondent's March 22 adverse action denying Beltran's time-off request is also indicative of animus. See *Lucky Cab Co.*, 360 NLRB 271, 274 (2014).

B. Respondent Fails in Its Showing that It Would Have Denied and Delayed Payment of Beltran's March 22 Time-Off Request for Payment of Unused Accrued Vacation Hours in Any Event

I find that the General Counsel has put forth a prima facie case that the Respondent denied Beltran's March 22 time-off request because Respondent had knowledge of Beltran's open and obvious union activities and the Manager Luna antiunion email establishes that the Respondent was motivated by union animus when the March 22 time-off request was denied and payment delayed to Beltran.

Once the General Counsel carries its burden in showing by a preponderance of the evidence discrimination against Beltran and that Beltran's protected union activity played a motivating role in Manager Luna's denial or delay in payment of her March 22 time-off request, the burden then shifts to Respondent to show that it would have taken this same adverse action in the absence of such conduct. See *Boothwyn Fire Co. No. 1*, 363 NLRB No. 191, slip op. at 7 (2016). As Respondent's explanations for denial and delay in payment of Beltran's March 22 time-off request were pretextual, I find that Respondent fails to meet this burden. *Id.*; *Golden State Foods Corp.*, 340 NLRB at 385.

Further and finally, Manager Luna's March 29 antiunion email to Supervisor Lima specifically informs her that before the two of them make a final decision to affirm Manager Luna's original denial of Beltran's March 22 time-off request, Supervisor Lima should know that Beltran in a "pro union" employee, and this email provides Manager Luna openly admitting that Beltran's "pro-union" status would be factored into the denial and delay of payment of Beltran's March 22 time-off request. Respondent therefore cannot prove that they would have denied or delayed payment of Beltran's March 22 time-off request absent her protected union activity. Therefore, I find that Respondent's discrimination against Beltran and its denial and delay of payment of Beltran's March 22 time-off request was motivated by her ongoing protected union activities in violation of her rights under Section 8(a)(3) and (1) of the Act.

IV. RESPONDENT'S UNLAWFUL ACT OF HANDING BELTRAN AN EMAIL THAT DISCLOSES THAT BELTRAN'S UNION ACTIVITIES WOULD BE A FACTOR IN DETERMINING WHETHER OR NOT TO GRANT BELTRAN'S REQUEST TO USE HER ACCRUED VACATION HOURS FOR PAID TIME OFF

The complaint paragraphs 6 and 8 allege that in about April 2016, Respondent, by Manager Luna, denied employee Beltran's March 22 time-off request to use accrued vacation hours

to cover leave under the FMLA and that by this conduct Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act. Handing Beltran the Manager Luna antiunion email sent Beltran and other employees a clear message that employees' prouion activities could negatively impact their employment including the right to use their unused accrued vacation hours in violation of their Section 7 rights.

An employer violates Section 8(a)(1) if it communicates to employees that they will jeopardize their job security, wages, or other working conditions if they support the union. *Metro One Loss Prevention Services*, 356 NLRB 89, 89 (2010). Further, the Board in *Hall Construction*, 297 NLRB 816, 818 (1990), adopted a finding of an unlawful threat of blacklisting where employees were told that unionizing would mean "all of us guys would be blackballed from any work in the [the respective employers' field]. . ." *Flamingo Hilton-Laughlin*, 324 NLRB 72, 116 (1997). The law is well settled that the test for determining whether an employer's statements or actions violate Section 8(a)(1) of the Act is an objective one. The employer's intent or motive is irrelevant.

Here, by providing Beltran with the Manager Luna antiunion email in April after Manager Luna had already denied Beltran's March 22 time-off request, Manager Luna demonstrated to her the downside or negative repercussions that had, and would continue to come her way, if Beltran continued her union activities. This antiunion email includes Manager Luna's advocacy against Beltran's request to use her vacation towards her medical leave on the grounds that she "is pro union." (GC Exh. 6.) Any reasonable employee would interpret this email to show that Manager Luna was hostile toward Beltran's union activities and would take and continue to take adverse employment actions against Beltran and other employees on account of their union activities. I further find that Beltran's receipt of this antiunion email chain from Manager Luna—the highest-ranking manager at her store—and the email's communication that Manager Luna thinks that union support is a reason to deny Beltran's request for vacation leave, would tend to discourage further union support. Thus, by giving employee Beltran a copy of the antiunion email, Respondent interfered with, restrained, or coerced employees in the exercise of the rights guaranteed in Section 7. This violates Section 8(a)(1).

V. RESPONDENT'S DEFENSES ARE WITHOUT MERIT

In Its posthearing brief, Respondent asserts that any misconduct of Respondent toward Beltran was de minimis, Beltran suffered no adverse employment action, and any misconduct of Respondent did not rise to the level of a violation of the Act. (R. Br. p. 1, 10–11.) Respondent did not cite in its brief, however, any case law in support of this defense. I find that the non-payment of a vacation pay benefit, even if subsequently remedied, is not a de minimis violation of the Act. See *Georgia Hosiery Mills*, 207 NLRB 781, 781 (1973) (The discharge of an employee, even if subsequently remedied, is not a de minimis violation of the Act.).

Moreover, contrary to Respondent's argument, I find here that a denial of a vacation pay request, such as Beltran's March 22 time-off request, constitutes an adverse employment action within the meaning of the Act. Beltran's delayed receipt of approximately \$289 (\$13.14/hr. x 22 hours) was more than de minimis. This prong of the *Wright Line* test, the requirement of

an "employer's adverse action," is therefore satisfied as part of the General Counsel's prima facie case. Respondent did not present any evidence of proper motivation, legitimate and substantial business justification, or that some business exigency was to blame for the denial and delay in paying only Beltran's March 22 time-off request. See *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33–34 (1967) (Termination of vacation benefits was "inherently destructive" of the employees' Section 7 rights.). Instead, as found above, the evidence here shows that Respondent was motivated by anti-union animus and any allegation by Respondent that it had a legitimate business reason for its disparate treatment of Beltran here is pretext for its discrimination.

CONCLUSIONS OF LAW

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

2. United Food and Commercial Workers Union, Local 324 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. By implying that employees' support for the Union would be a factor in determining whether Respondent would grant or deny employees' requests for using accrued vacation hours, Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act and interfered with, restrained, and coerced Beltran in the exercise of the rights guaranteed in Section 7 of the Act.

4. By denying and delaying payment of employees' requests to use their unused accrued vacation hours because of their Union activities, Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act.

5. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

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

The complaint seeks an order requiring the notice to be read in English and Spanish to assembled employees at 7 specified stores. Most simply put, the General Counsel argues that the Respondent has a proclivity to violate the National Labor Relations Act (the Act), based on recent complaints that have been settled, warranting consideration of enhanced remedies. The Respondent asserts that prior settlements cannot serve as a basis to support the General Counsel's argument. While this generally true, the most recent settlement between the Respondent and the Union, executed on March 11, 2016, specifically states: "The Respondent agrees that this Settlement Stipulation may be used in any proceeding before the Board or an appropriate court to show proclivity to violate the Act for purposes of determining an appropriate remedy." (GC Exh. 1(o) at 1; GC Exh. 1(l), at Exh. "I", p. 4, par. 7.) (Emphasis added.) As such, the Respondent has waived its position as to the March 11, 2016 settlement.

In appropriate cases, including those involving recidivism, the Board may approve reading of notices. See *Pacific Beach Hotel*, 361 NLRB 709 (2014); *Bozzuto's, Inc.*, 365 NLRB No. 146, slip. op. at 5 (2017). Likewise, the Board has approved dissemination of notices to locations beyond the site of the unfair labor practice violations involved in a particular complaint where such dissemination is "necessary to dissipate fully

the coercive effects” of any unfair labor practices. See *S.E. Nichols, Inc.*, 284 NLRB 556 (1987) (remedy expanded to encompass all stores in the corporate division under a certain district supervisor).

In addition, a public reading of my remedial notice is appropriate here. The Respondent’s violations of the Act are sufficiently serious and Respondent is a recidivist Act violator that the reading of the notice is necessary to dissipate as much as possible any lingering effects of the Respondent’s unfair labor practices, and to enable employees to exercise their Section 7 rights free of coercion. See, e.g., *Sheraton Anchorage*, 363 NLRB No. 6, slip op. at 2 (2015); *Carey Salt Co.*, 360 NLRB 201, 202 (2014); *HTH Corp.*, 356 NLRB 1397, 1404 (2011), enfd. 693 F.3d 1051 (9th Cir. 2012); *Homer D. Bronson Co.*, 349 NLRB 512, 515 (2007), enfd. mem. 273 Fed.Appx. 32 (2d Cir. 2008). Also because Respondent admits that it has shown a proclivity to violate the Act, I further find that Respondent has a high disregard for the Act which is particularly powerful in undermining the employees’ free exercise of their Section 7 rights. Therefore, I will require that the remedial notice be read aloud to the Respondent’s employees by general counsel Angulo (or, if he is no longer employed by the Respondent, the current general counsel of Respondent) in the presence of a Board agent or, at the Respondent’s option, by a Board agent in that official’s presence at the 7 unionized Southern California grocery stores. Given that a significant number of the Respondent’s employees speak Spanish, I will require the notice to be read in both English and Spanish.

The Respondent shall also post the notice in accord with *J. Picini Flooring*, 356 NLRB 11, 15–16 (2010), at all seven of the unionized Southern California grocery stores. In accordance with *J. Picini Flooring*, the question as to whether an electronic notice is appropriate should be resolved at the compliance phase. *Id.* at 13.

On these findings of fact, conclusions of law, and upon the entire record, pursuant to Section 10(c) of the Act, I hereby issue the following recommended²⁷

ORDER

The Respondent, Bodega Latina Corporation, doing business as El Super, a corporation, with facilities in Arleta, Los Angeles, Anaheim, Santa Fe Springs, Inglewood, Covina, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Implying that employees’ support for the Union would be a factor in determining whether Respondent would grant or deny employees’ requests for using accrued vacation hours.

(b) Denying and delaying payment of employees’ requests to use their accrued vacation hours because of their union activities. (c) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative actions.

(a) Within 14 days from the date of this order, post at its 7 facilities in and around at 9170 Woodman Avenue, Arleta, California; 960 West Arrow Highway, Covina, California; 1301 East Gage Avenue, Los Angeles, California; 10531 South Car-

menita Road, Santa Fe Springs, California; 1100 West Slauson, Los Angeles, California; 650 North Euclid Street, Anaheim, California; and 3321 West Century Boulevard, Inglewood, California, copies of the attached Notice to Employees marked “Appendix.”²⁸ Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent’s authorized representative, shall also be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, 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. 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 March 22, 2016. Post copies of the notice to employees at Respondent’s retail stores located at 9170 Woodman Avenue, Arleta, California; 960 West Arrow Highway, Covina, California; 1301 East Gage Avenue, Los Angeles, California; 10531 South Carmenita Road, Santa Fe Springs, California; 1100 West Slauson, Los Angeles, California; 650 North Euclid Street, Anaheim, California; and 3321 West Century Boulevard, Inglewood, California, in English and Spanish, where notices to employees are customarily posted; maintain these postings during the Board’s administrative proceeding free from all obstructions and defacements; all employees shall have free and unrestricted access to said notice; translation of the Notice into Spanish shall be at Respondent’s expense, the translation to be approved by the Regional Director. 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 Respondent customarily communicates with its employees by such means.

(b) Read the notice to employees in English and in Spanish to assembled employees at each of the retail stores referred to above in paragraph 2(a) during paid working time.

(c) Grant agents of the Board reasonable access to Respondent’s retail stores referenced above in paragraph 2(a) in order to monitor compliance with the posting requirement.

(d) Within 21 days of the issuance of the administrative law judge’s Order, notify the Regional Director for Region 21, in writing, of the manner in which Respondent has complied with the terms of the Order, including how they have posted the documents required by the Order.

Dated, Washington, D.C., December 29, 2017

APPENDIX

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

²⁷ 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.

²⁸ 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.”

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.

YOU HAVE THE RIGHT to join with your fellow employees in concerted activities. These activities include:

Speaking to your coworkers about your wages, hours, and other terms and conditions of employment.

WE WILL NOT imply that employees' support for the Union would be a factor in determining whether Respondent would grant or deny employees' requests for using accrued vacation hours.

WE WILL NOT deny employees' requests to use their accrued vacation hours because of their union activities; and

WE WILL NOT in any other manner, interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act.

WE WILL within 14 days from the date of the Board's Order, take all actions to post and read this notice to employees.

BODEGA LATINA CORPORATION D/B/A EL SUPER

The Administrative Law Judge's decision can be found at <https://www.nlr.gov/case/21-CA-183276> 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.

