

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 29**

**BEST YET MARKET, INC.**

**and**

**Case No. 29-CA-242451**

**UNITED FOOD AND COMMERCIAL WORKERS  
INTERNATIONAL UNION**

**GENERAL COUNSEL’S OPPOSITION TO RESPONDENT’S  
MOTION FOR SUMMARY JUDGMENT**

On October 9, 2019, Best Yet Market, Inc. (“Respondent”) filed the attached Motion for Summary Judgment in the above case. Contrary to what Respondent asserts in its Motion, there are genuine issues of material fact that must be resolved before an Administrative Law Judge. The General Counsel therefore opposes Respondent’s Motion and urges that it must be denied.

Summary judgment is not appropriate in this case. Rather, summary judgment is only warranted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See, e.g., *Security Walls, LLC*, 361 NLRB 348 (2014). It is the burden of the moving party to establish that no genuine issue of material fact exists. *Conoco Chemicals Co.*, 275 NLRB 39, 40 (1985). As set forth in Section 102.24(b) of the Board’s Rules and Regulations, it is not necessary for the party opposing summary judgment to submit additional evidence to establish a factual dispute:

Neither the opposition nor the response must be supported by affidavits or other documentary evidence showing that there is a genuine issue for hearing. The Board in its discretion may deny the motion where the motion itself fails to establish the absence of a genuine issue, or where the opposing party’s pleadings, opposition and/or response indicate on their face that a genuine issue may exist.

Respondent, as the moving party, has clearly failed to meet its burden.

Contrary to what Respondent asserts in its Motion, there are genuine issues of material fact that require a hearing be held. Specifically, there are the two questions of material fact alleged by the General Counsel and denied by Respondent. As alleged in Paragraph 5(a) and (c) of the Complaint, the General Counsel asserts that alleged-discriminatee Angel Padro engaged in protected concerted activities, and that Respondent then transferred him because of those activities. In Paragraph 5 of its Answer, Respondent expressly denies both factual assertions in the Complaint. While Respondent admits in its Motion that “Padro was protesting the lawful discharge of a coworker,” Respondent still denies Padro’s protest was concerted in nature or that protected activity was the reason Respondent transferred him. Clearly, these are factual questions regarding whether Padro’s conduct in the events preceding his discharge was concerted. That legal conclusion can only be resolved by presenting witnesses before an ALJ so that the ALJ can make credibility determinations and determine the underlying facts surrounding Padro’s activity and Respondent’s conduct. A hearing must be held.

In addition to disregarding the factual issues that exist in this case, in its Motion, Respondent also misrepresents the relevant Board law. Respondent incorrectly asserts that employees do not have a protected right under the Act to protest the discharge of a coworker. This assertion is not supported by any of the cases Respondent cites and is contrary to Board law. See, *Silver State Disposal Service, Inc.*, 326 NLRB 84 (1998) (employees who engaged in a work stoppage to protest the lawful discharge of a coworker retained protection under the Act despite a no-strike provision in their contract). To the degree there are legal questions in this case, resolving the underlying factual questions becomes even more important. Consequently, Respondent’s Motion becomes even less appropriate.

As Respondent has failed to meet its burden of demonstrating that no genuine issues of material fact exist, and there are undoubtedly factual issues in dispute, the anticipated trial should proceed as scheduled. The General Counsel respectfully requests Respondent's Motion be denied.

Dated: October 18, 2019



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Brent Childerhose  
Counsel for the General Counsel  
National Labor Relations Board, Region 29  
Two Metro Tech Center, Suite 5100  
Brooklyn, NY 11201-3838

Attachments

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

BEST YET MARKET, INC.

and

Case 29-CA-242451

UNITED FOOD AND COMMERCIAL WORKERS  
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**BEST YET MARKET, INC.'S NOTICE OF MOTION FOR SUMMARY JUDGMENT**

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Respondent, Best Yet Market, Inc. (“Respondent”), by and through the undersigned counsel, pursuant to Section 102.24 of the Board’s Rules and Regulations, hereby moves for summary judgment. Respondent is entitled to summary judgment because, taking the undisputed facts in the light most favorable to the General Counsel, there is no support for the contention that Respondent’s employee, Angel Padro (“Padro”), engaged in protected, concerted activity. As explained more fully in Respondent’s Memorandum of Points and Authorities, the National Labor Relations Board (hereinafter “Board” or “NLRB”) has consistently held that engaging in the actions at issue in this Complaint (an after-the-fact complaint about a former employee) do not fall within the ambit of the National Labor Relations Act’s (hereinafter “NLRA” or the “Act”) protections. Padro did not engage in any actions in furtherance of a group interest for mutual aid or protection and, therefore, he is not entitled to protection under the Act. Respondent’s motion is based on this Notice of Motion, the accompanying Memorandum of Points and Authorities, the Affidavit of Michelle Straub In Support of Best Yet Market, Inc.’s Motion for Summary Judgment, the pleadings and papers on file herein, and any further material and arguments that may be presented to the Board.

Respectfully submitted this 9<sup>th</sup> day of October, 2019.

  
\_\_\_\_\_  
Thomas J. Birchfield  
Paul E. Goatley  
FISHER & PHILLIPS LLP  
220 West Main Street, Suite 1700  
Louisville, Kentucky 40202  
Phone: (502) 561-3986  
Fax: (502) 561-3991  
E-mail: [tbirchfield@fisherphillips.com](mailto:tbirchfield@fisherphillips.com)  
E-mail: [pgoatley@fisherphillips.com](mailto:pgoatley@fisherphillips.com)

COUNSEL FOR BEST YET MARKET, INC.

**AFFIDAVIT OF SERVICE**

It is hereby certified that the within document was filed electronically via the Agency's website, [www.nlr.gov](http://www.nlr.gov), on this the 9<sup>th</sup> day of October, 2019, effectuating service on the NLRB's Office of General Counsel. On this same date, paper copies of the within document were served via first class mail and electronic mail upon the following:

George Wiszynski, Esq.  
Associate General Counsel  
United Food and Commercial Workers  
International Union  
1775 K Street NW  
Washington, DC 20006-1502  
E-mail: [gwiszynski@ufcw.org](mailto:gwiszynski@ufcw.org)

Amanda Jaret, Esq.  
Assistant General Counsel, Legal Dep't  
United Food and Commercial Workers  
International Union, AFL-CIO, CLC  
1775 K St. NW  
Washington, DC 20006-1598  
E-mail: [ajaret@ufcw.org](mailto:ajaret@ufcw.org)

Brent E. Childerhose, Esq.  
National Labor Relations Board  
Region 29  
Two Metro Tech Center, Suite 5100  
Brooklyn, NY 11201  
E-mail: [Brent.Childerhose@nlrb.gov](mailto:Brent.Childerhose@nlrb.gov)

  
\_\_\_\_\_  
COUNSEL FOR BEST YET MARKET, INC.

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

BEST YET MARKET, INC.

and

Case 29-CA-242451

UNITED FOOD AND COMMERCIAL WORKERS  
INTERNATIONAL UNION

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**BEST YET MARKET, INC.'S MEMORANDUM OF POINTS AND AUTHORITIES IN  
SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

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**I. INTRODUCTION**

The General Counsel issued the Complaint in Case 29-CA-242451 on August 30, 2019. (Complaint attached hereto as Exhibit A). Respondent filed its Answer to the Complaint on September 12, 2019. (Answer attached hereto as Exhibit B). The Complaint alleges Respondent violated Section 8(a)(1) of the Act by transferring Padro to a different work location after he protested the *lawful* termination of a co-worker. (Complaint, ¶ 5). After Padro's co-worker was legitimately terminated for theft, Padro approached a non-involved supervisor and aggressively confronted her for not speaking up for the terminated employee. Apparently, Padro and the terminated employee were friends and Padro took issue with the supervisor's acquiescence to the termination.

In issuing the Complaint, the General Counsel disregards the salient principle that for conduct to be protected and concerted under the Act, it must be engaged in for the purpose of inducing or preparing for group action for mutual aid or protection. That is not what happened here. Padro's primary issue was with the supervisor's failure to defend a terminated employee.

Under the backdrop of protesting an employee's discharge, the Board has found that such conduct is protected only when the individual discharged was the protesting-employee's supervisor, not a co-worker. Respondent therefore respectfully requests the Board find there is no genuine issue of material fact as to the subject transfer and grant Respondent's motion for summary judgment in full.

## **II. STATEMENT OF FACTS**

### **A. Respondent's Business Operations**

Respondent is a regional supermarket chain with twenty five (25) stores in New York and New Jersey. Respondent focuses on selling fresh foods, such as produce, meat, seafood, deli and bakery items. Respondent employs a total of 2,318 employees, none of which are represented by the United Food and Commercial Workers International Union (or any other union) for purposes of collective bargaining. Respondent was acquired by Lidl US, LLC in January 2019.

### **B. Padro's Employment with Respondent and Events Leading to His Transfer**

Padro was hired by Respondent in June 2016 and currently works as a Deli Team Member at its Merrick, New York location ("Merrick"). (Affidavit of Michelle Straub in Support of Respondent's Motion for Summary Judgment ("Straub Aff. \_\_\_"), ¶ 3, attached hereto as Exhibit C). Prior to Merrick, Padro worked at Respondent's Franklin Square, New York location ("Franklin Square") from June 2016 to April 2019. (Straub Aff., ¶¶ 1-2). Padro has been employed in the same position in the deli department during his entire tenure with Respondent. (Straub Aff., ¶¶ 2-3).

On or around the evening of April 12, 2019, Padro entered Franklin Square – when he was off-duty – to confront Deli Team Leader, Michelle Straub ("Straub"), about the recent termination

of his co-worker, and fellow Deli Team Member, Alexis Ares (“Ares”).<sup>1</sup> (Straub Aff., ¶ 3). Padro approached Straub in the deli department to complain about the termination of Ares, shouting at Straub: “you should have stood up for her!” (*Id.*). After a few minutes of this confrontation, Padro left the deli department and walked out of the store.<sup>2</sup> (*Id.*). Padro was transferred to Merrick shortly thereafter. (*Id.*). Of note, Straub did not terminate Ares, nor was she involved in the decision to do so. (Straub Aff., ¶ 4).

### III. LEGAL ARGUMENT

#### A. Standard for Summary Judgment

Section 102.24 of the Board’s Rules and Regulations, permits a party to move for summary judgment in advance of a hearing. The Board, in its discretion, may grant the motion if the moving party establishes the absence of a genuine issue, or where the response by the opposing party (or lack thereof) indicates that no genuine issue of fact exists. (*Id.*) In considering a motion for summary judgment, the Board has indicated it will use the summary judgment standard adopted in Rule 56 of the Federal Rules of Civil Procedure. *See e.g. A.H. Hansen Sales Ltd.*, 302 NLRB 846, 846, n1 (1991); *United States Postal Service*, 300 NLRB 196, 200, n4 (1990).

Accordingly, summary judgment should be granted “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). In this matter, the material facts are not disputed and, as set forth below,

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<sup>1</sup> Ares was terminated earlier that day for stealing food from the deli counter – an infraction that leads to automatic termination under Respondent’s workplace policy. It was well known Padro and Ares were friends and frequently socialized outside of work. (Straub Aff., ¶ 5).

<sup>2</sup> While not germane to this motion, Padro exhibited an aggressive and hostile demeanor during his interaction with Straub. Straub was highly disturbed by the confrontation and the fact that Padro waited in the parking lot for her after work, and did not feel comfortable working with Padro moving forward - thus the reason for his transfer. (Straub Aff., ¶ 3).

Respondent is entitled to judgment as a matter of law on the grounds that the conduct engaged in by Padro does not constitute protected, concerted activity.

**B.     Protesting the Lawful Discharge of a Co-Worker, After the Fact, Is Neither Protected Nor Concerted Under the Act**

To establish an 8(a)(1) violation, the following four elements must be established: (1) the employee's activity was concerted, (2) the employer was aware of the concerted nature; (3) the activity was protected by the Act; and (4) the discharge or other adverse personnel action was motivated by the protected activity. *Craig Hosp.*, 308 NLRB 158, 164 (1992)(citing *NLRB v. Oakes Machine Corp.*, 897 F.2d 84, 88 (2nd Cir. 1990)).

To be protected under Section 7 of the NLRA, an employee's protected activity must be "concerted" in nature and pursued either for union-related purposes aimed at collective bargaining or for other "mutual aid or protection." "[A]ll concerted activity is not protected under Section 7. Protected activity must in some fashion involve employees' relations with their employer and thus constitute a manifestation of a 'labor dispute.' Section 2(9) of the Act defines a 'labor dispute' as '...any controversy concerning terms, tenure, or conditions of employment...'" *NLRB v. Leslie Metal Arch Co.*, 509 F.2d 811, 813 (6th Cir. 1975) (citing *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962)).

The Board held in *Diva, Ltd.*, the following is a proper summary of Board precedent regarding concerted activity:

Since *Meyers* [*Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), and *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986),] the Board has found an individual employee's activities to be concerted when they grew out of a prior **group** activity; when the employee acts, formally or informally, on behalf of the **group**; or when an employee solicits other employees to engage in **group** action, even where such solicitations are rejected. However, the Board has long held that, for conversations between employees to be found protected concerted activity, they must look toward **group** action and that mere 'griping' is not protected.

325 NLRB 822, 830 (1998) (emphasis added). “[A] conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least that it was engaged in with the object of initiating or inducing or preparing for *group action* or that it had some relation to group action in the interest of the employees.” *Mushroom Trans. Co. v. NLRB*, 330 F.2d 683, 685 (3rd Cir. 1964) (emphasis added). In other words, for a conversation to constitute concerted activity, there must be “some element or collective activity or contemplation thereof.” *Pioneer Natural Gas Co. vs. N.L.R.B.*, 662 F.2d 408, 418 (5th Cir. 1981).

Earlier this year, the Board made clear that to be concerted (and thus, protected), “activity must be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. *Alstate Maintenance, LLC (“Alstate”)*, 367 NLRB No. 68 (2019). Individual griping does not qualify as concerted activity under the Act. (*Id.*) To be concerted, an individual employee’s statement must either truly bring a *group* complaint regarding a workplace issue to management’s attention, or the totality of the circumstances must support a reasonable inference that in making the statement, the employee was seeking to initiate, induce or prepare for *group action*. (*Id.*) In *Alstate*, the Board provided the following factors that would tend to support the inference that a statement is concerted: (1) the statement was made in an employee meeting called by the employer to announce a decision affecting wages, hours or some other term or condition of employment; (2) the decision affects *multiple* employees; (3) the employee who speaks up in response to the announcement did so to protest or complain about the decision, not merely to ask questions about how the decision has or will be implemented; or (4) the speaker protested or complained about the decision’s *effect on the workforce*, not solely about its effect on the speaker himself. (*Id.* at 7); *see also NLRB v. Datapoint Corporation*, 642 F.2d 123, 128 (5th Cir. 1981). In *Datapoint*, an employee who protested an employer’s decision to layoff all but three

employees was found to not have engaged in concerted activity under the Act. (*Id.*) In finding the employee's conduct was not concerted, the Fifth Circuit articulated that if the speakers only purpose is "to advise an individual as to what he could or should do *without involving fellow workers* or union representation *to protect or improve his own status* or working position, it is an individual, not a concerted, activity, and, if it looks forward to no [group] action at all, it is more than likely to be mere 'gripping.'" (*Id.* at 128) (*citing Mushroom Transportation Co.*, 330 F.2d at 685).

Here, Padro protested (to a non-involved supervisor) Respondent's decision to terminate an employee caught stealing from the Company. Padro was not engaged in conduct with the "object of initiating or inducing or preparing for *group* action." *See NLRB v. Buddies Supermarkets, Inc.*, 481 F.2d 714, 718 (5th Cir.1973) (emphasis added); *see also NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 831 (1984) (although the term "concerted activity" is not defined in the Act, "it clearly enough embraces the activities of employees who have joined together in order to achieve common goals."). At best, Padro was acting as a proxy for Ares because of their friendship. His conduct was nothing more than an exhibition of frustration about Ares' termination and the fact Straub did not "stand up" for her. Indeed, there is no evidence that Padro engaged in such conduct for the purposes of inducing or preparing for group action, nor was it designed to achieve a common workplace goal. (*Id.*) Such behavior is the quintessential example of a "personal gripe" under Board precedent. *See e.g., Mushroom Transportation Co.*, 330 F.2d at 685. To be clear, Respondent's decision to terminate Ares did not impact Padro's employment in any respect - he was not implicated whatsoever in the events leading up to Ares' termination. Padro's gripe was limited to a single employment decision, impacting a single employee. It had absolutely nothing to do with the terms and conditions of Padro's employment.

Moreover, there is no factual dispute Padro was protesting the lawful discharge of a co-worker (after the fact), not the discharge of his supervisor or another individual who could potentially impact the terms and conditions of his employment. Such conduct is simply not protected under the Act. The Board has held that protesting the discharge of a *supervisor* can be protected under the Act, but has not afforded similar protection to employees who protest the discharge of a co-worker. *See e.g., Southern Pride Catfish*, 331 NLRB 618 (2000) (employee walkout over discharge of supervisor was concerted activity because the supervisor “dealt with the employees on her production line every day” and whether she remained the employee’s supervisor was clearly related to the terms and conditions of employment); *Puerto Rico Food Products Corp.*, 242 NLRB 899, 900 (1979) (“Board has consistently held that where facts establish that the identity and capability of the supervisor involved has a *direct impact on the employees’ own job interest* they are legitimately concerned with his identity and thereby have a protected right to protest his termination”) (emphasis added). Here, Respondent’s decision to terminate Ares had no impact on Padro’s job interest, nor did it impact the interests of other employees. Ares was a deli team member, with the same title and responsibilities as Padro. Padro was upset a co-worker and friend had been terminated. His subjective belief as to whether Ares should have been “stood up for” does not invoke the protections of the Act.

#### **IV. CONCLUSION**

Based on the foregoing, Respondent respectfully requests the Board grant its motion for summary judgment in full.

Respectfully submitted this 9<sup>th</sup> day of October, 2019.



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Thomas J. Birchfield  
Paul E. Goatley  
FISHER & PHILLIPS LLP  
220 West Main Street, Suite 1700  
Louisville, Kentucky 40202  
Phone: (502) 561-3986  
Fax: (502) 561-3991  
E-mail: [tbirchfield@fisherphillips.com](mailto:tbirchfield@fisherphillips.com)  
E-mail: [pgoatley@fisherphillips.com](mailto:pgoatley@fisherphillips.com)

COUNSEL FOR BEST YET MARKET, INC.

**AFFIDAVIT OF SERVICE**

It is hereby certified that the within document was filed electronically via the Agency's website, [www.nlr.gov](http://www.nlr.gov), on this the 9<sup>th</sup> day of October, 2019, effectuating service on the NLRB's Office of General Counsel. On this same date, paper copies of the within document were served via first class mail and electronic mail upon the following:

George Wiszynski, Esq.  
Associate General Counsel  
United Food and Commercial Workers  
International Union  
1775 K Street NW  
Washington, DC 20006-1502  
E-mail: [gwiszynski@ufcw.org](mailto:gwiszynski@ufcw.org)

Amanda Jaret, Esq.  
Assistant General Counsel, Legal Dep't  
United Food and Commercial Workers  
International Union, AFL-CIO, CLC  
1775 K St. NW  
Washington, DC 20006-1598  
E-mail: [ajaret@ufcw.org](mailto:ajaret@ufcw.org)

Brent E. Childerhose, Esq.  
National Labor Relations Board  
Region 29  
Two Metro Tech Center, Suite 5100  
Brooklyn, NY 11201  
E-mail: [Brent.Childerhose@nlrb.gov](mailto:Brent.Childerhose@nlrb.gov)



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COUNSEL FOR BEST YET MARKET, INC.

# Exhibit A

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 29

RECEIVED  
MAY 31 2019

**BEST YET MARKET, INC.**

and

Case 29-CA-242451

**UNITED FOOD AND COMMERCIAL WORKERS  
INTERNATIONAL UNION**

**COMPLAINT AND NOTICE OF HEARING**

This Complaint and Notice of Hearing is based on a charge filed by United Food and Commercial Workers International Union (Charging Party). It is issued pursuant to Section 10(b) of the National Labor Relations Act (the Act), 29 U.S.C. § 151 et seq., and Section 102.15 of the Rules and Regulations of the National Labor Relations Board (the Board) and alleges that Best Yet Market, Inc. (the Respondent) has violated the Act as described below.

1. The charge in this proceeding was filed by the Charging Party on May 29, 2019, and a copy was served on the Respondent by U.S. mail on May 31, 2019.

2. (a) At all material times, the Respondent has been a domestic business corporation with an office and place of business located at One Lexington Avenue, Bethpage, New York, and has been engaged in the retail sale of supermarket produce and goods at 696 Dogwood Avenue, Franklin Square, New York (Franklin Square store).

(b) In conducting its operations during its fiscal year ending February 28, 2019, which period is representative of its operations in general, the Respondent, at its Franklin Square store, derived gross revenues in excess of \$500,000, and purchased and received goods and materials valued in excess of \$5,000, directly from entities located outside the State of New York.

3. At all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

4. At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and/or agents of the Respondent within the meaning of Section 2(13) of the Act:

- (a) Michelle Straub - Franklin Square Deli Team Manager
- (b) Heather Bozza - Vice President of Human Resources
- (c) Brian Kix - Vice President of Store Operations
- (d) Wander Montero - Franklin Square Manager

5. (a) About April 9, 2019, the Respondent's employee Angel Padro engaged in concerted activities on behalf of other employees for the purposes of mutual aid and protection by protesting the Respondent's discipline of a coworker at the Franklin Square store.

(b) About April 12, 2019, the Respondent transferred Angel Padro to its Merrick store.

(c) The Respondent engaged in the conduct described above in paragraph 5(b), because Angel Padro engaged in the conduct described above in paragraph 5(a), and to discourage employees from engaging in these or other concerted activities.

6. By the conduct described above in paragraph 5(b) and 5(c) the 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.

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

#### ANSWER REQUIREMENT

The Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the complaint. The answer must be received by this office on or before September 13, 2019 or postmarked on or before September 12, 2019.

The Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

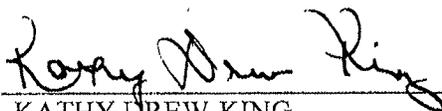
An answer may also be filed electronically through the Agency's website. To file electronically, go to [www.nlr.gov](http://www.nlr.gov), click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the complaint are true.

Any request for an extension of time to file an answer must, pursuant to Sections 102.22 and 102.24(a) of the Board's Rules and Regulations, be received by close of business on **September 13, 2019**. The request should be in writing and addressed to the Regional Director of Region 29.

**NOTICE OF HEARING**

PLEASE TAKE NOTICE THAT on **November 6, 2019, 9:30 a.m.** in a fifth floor hearing room at Two Metro Tech Center, Brooklyn, New York on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, the Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Dated: August 30, 2019



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KATHY DREW-KING  
REGIONAL DIRECTOR  
NATIONAL LABOR RELATIONS BOARD  
REGION 29  
Two Metro Tech Center  
Suite 5100  
Brooklyn, NY 11201-3838

Attachments

UNITED STATES GOVERNMENT  
NATIONAL LABOR RELATIONS BOARD  
NOTICE

Case 29-CA-242451

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end.

An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing. However, unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated. Postponements *will not be granted* unless good and sufficient grounds are shown *and* the following requirements are met:

- (1) The request must be in writing. An original and two copies must be filed with the Regional Director when appropriate under 29 CFR 102.16(a) or with the Division of Judges when appropriate under 29 CFR 102.16(b).
- (2) Grounds must be set forth in *detail*;
- (3) Alternative dates for any rescheduled hearing must be given;
- (4) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request; and
- (5) Copies must be simultaneously served on all other parties (listed below), and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

Heather Bozza , Vice President of Human  
Resorces  
Best Market  
1 Lexington Avenue  
Bethpage, NY 11714

George Wiszynski , ESQ., Associate General  
Counsel  
United Food and Commercial Workers  
International Union  
1775 K Street NW  
Washington, DC 20006-1502

Thomas Birchfield  
Thomas Birchfield and Paul Goatley Fisher  
Phillips LLP  
220 W Main St  
Suite 1700  
Louisville, KY 40202

Paul E Goatley , ESQ.  
FISHER & PHILLIPS LLC  
220 W. Main Street, Suite 1700  
Louisville, KY 40202-1329

## Procedures in NLRB Unfair Labor Practice Hearings

The attached complaint has scheduled a hearing that will be conducted by an administrative law judge (ALJ) of the National Labor Relations Board who will be an independent, impartial finder of facts and applicable law. **You may be represented at this hearing by an attorney or other representative.** If you are not currently represented by an attorney, and wish to have one represent you at the hearing, you should make such arrangements as soon as possible. A more complete description of the hearing process and the ALJ's role may be found at Sections 102.34, 102.35, and 102.45 of the Board's Rules and Regulations. The Board's Rules and regulations are available at the following link: [www.nlr.gov/sites/default/files/attachments/basic-page/node-1717/rules\\_and\\_regs\\_part\\_102.pdf](http://www.nlr.gov/sites/default/files/attachments/basic-page/node-1717/rules_and_regs_part_102.pdf).

The NLRB allows you to file certain documents electronically and you are encouraged to do so because it ensures that your government resources are used efficiently. To e-file go to the NLRB's website at [www.nlr.gov](http://www.nlr.gov), click on "e-file documents," enter the 10-digit case number on the complaint (the first number if there is more than one), and follow the prompts. You will receive a confirmation number and an e-mail notification that the documents were successfully filed.

**Although this matter is set for trial, this does not mean that this matter cannot be resolved through a settlement agreement.** The NLRB recognizes that adjustments or settlements consistent with the policies of the National Labor Relations Act reduce government expenditures and promote amity in labor relations and encourages the parties to engage in settlement efforts.

### I. BEFORE THE HEARING

The rules pertaining to the Board's pre-hearing procedures, including rules concerning filing an answer, requesting a postponement, filing other motions, and obtaining subpoenas to compel the attendance of witnesses and production of documents from other parties, may be found at Sections 102.20 through 102.32 of the Board's Rules and Regulations. In addition, you should be aware of the following:

- **Special Needs:** If you or any of the witnesses you wish to have testify at the hearing have special needs and require auxiliary aids to participate in the hearing, you should notify the Regional Director as soon as possible and request the necessary assistance. Assistance will be provided to persons who have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.603.
- **Pre-hearing Conference:** One or more weeks before the hearing, the ALJ may conduct a telephonic prehearing conference with the parties. During the conference, the ALJ will explore whether the case may be settled, discuss the issues to be litigated and any logistical issues related to the hearing, and attempt to resolve or narrow outstanding issues, such as disputes relating to subpoenaed witnesses and documents. This conference is usually not recorded, but during the hearing the ALJ or the parties sometimes refer to discussions at the pre-hearing conference. You do not have to wait until the prehearing conference to meet with the other parties to discuss settling this case or any other issues.

### II. DURING THE HEARING

The rules pertaining to the Board's hearing procedures are found at Sections 102.34 through 102.43 of the Board's Rules and Regulations. Please note in particular the following:

- **Witnesses and Evidence:** At the hearing, you will have the right to call, examine, and cross-examine witnesses and to introduce into the record documents and other evidence.
- 
- **Exhibits:** Each exhibit offered in evidence must be provided in duplicate to the court reporter and a copy of each of each exhibit should be supplied to the ALJ and each party when the exhibit is offered

**in evidence.** If a copy of any exhibit is not available when the original is received, it will be the responsibility of the party offering such exhibit to submit the copy to the ALJ before the close of hearing. If a copy is not submitted, and the filing has not been waived by the ALJ, any ruling receiving the exhibit may be rescinded and the exhibit rejected.

- **Transcripts:** An official court reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the ALJ for approval. Everything said at the hearing while the hearing is in session will be recorded by the official reporter unless the ALJ specifically directs off-the-record discussion. If any party wishes to make off-the-record statements, a request to go off the record should be directed to the ALJ.
- **Oral Argument:** You are entitled, on request, to a reasonable period of time at the close of the hearing for oral argument, which shall be included in the transcript of the hearing. Alternatively, the ALJ may ask for oral argument if, at the close of the hearing, if it is believed that such argument would be beneficial to the understanding of the contentions of the parties and the factual issues involved.
- **Date for Filing Post-Hearing Brief:** Before the hearing closes, you may request to file a written brief or proposed findings and conclusions, or both, with the ALJ. The ALJ has the discretion to grant this request and to will set a deadline for filing, up to 35 days.

### III. AFTER THE HEARING

The Rules pertaining to filing post-hearing briefs and the procedures after the ALJ issues a decision are found at Sections 102.42 through 102.48 of the Board's Rules and Regulations. Please note in particular the following:

- **Extension of Time for Filing Brief with the ALJ:** If you need an extension of time to file a post-hearing brief, you must follow Section 102.42 of the Board's Rules and Regulations, which requires you to file a request with the appropriate chief or associate chief administrative law judge, depending on where the trial occurred. You must immediately serve a copy of any request for an extension of time on all other parties and furnish proof of that service with your request. You are encouraged to seek the agreement of the other parties and state their positions in your request.
- **ALJ's Decision:** In due course, the ALJ will prepare and file with the Board a decision in this matter. Upon receipt of this decision, the Board will enter an order transferring the case to the Board and specifying when exceptions are due to the ALJ's decision. The Board will serve copies of that order and the ALJ's decision on all parties.
- **Exceptions to the ALJ's Decision:** The procedure to be followed with respect to appealing all or any part of the ALJ's decision (by filing exceptions with the Board), submitting briefs, requests for oral argument before the Board, and related matters is set forth in the Board's Rules and Regulations, particularly in Section 102.46 and following sections. A summary of the more pertinent of these provisions will be provided to the parties with the order transferring the matter to the Board.

# Exhibit B

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 29

BEST YET MARKET, INC.

and

Case 29-CA-242451

UNITED FOOD AND COMMERCIAL WORKERS  
INTERNATIONAL UNION

**ANSWER TO COMPLAINT AND NOTICE OF HEARING**

Respondent, Best Yet Market, Inc. (“Respondent”), pursuant to Sections 102.20 and 102.21 of the Rules and Regulations of the National Labor Relations Board, and Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 151, *et seq.* (the “Act”), submits the following as its Answer to the Complaint and Notice of Hearing (“Complaint”) issued by the Regional Director, Region 29, National Labor Relations Board, on August 30, 2019.

1. Respondent admits the allegations set forth in Paragraph 1 of the Complaint.
2. Respondent admits the allegations set forth in Paragraphs 2(a) and 2(b) of the Complaint.
3. Respondent admits the allegations set forth in Paragraph 3 of the Complaint.
4. Respondent admits the allegations set forth in Paragraph 4(a) of the Complaint. Respondent admits the allegations set forth in Paragraph 4(b) of the Complaint. Respondent admits the allegations set forth in Paragraph 4(c) of the Complaint. In response to Paragraph 4(d) of the Complaint, Respondent denies Wander Montero’s job title with Best Yet Market is “Franklin Square Manager.” Respondent admits the remaining allegations set forth in Paragraph 4(d) of the Complaint.

5. Respondent denies the allegations set forth in Paragraph 5(a) of the Complaint. Respondent admits the allegation set forth in Paragraph 5(b) of the Complaint. Respondent denies the allegations set forth in Paragraph 5(c) of the Complaint.

6. Respondent denies the allegations set forth in Paragraph 6 of the Complaint.

7. Respondent denies the allegations set forth in Paragraph 7 of the Complaint.

8. Respondent denies all factual and legal allegations of the Complaint not specifically admitted herein.

### **AFFIRMATIVE DEFENSES**

#### **FIRST DEFENSE**

The Complaint is invalid, in whole or in part, to the extent it contains allegations that were not included in a timely-filed, pending charge against Respondent.

#### **SECOND DEFENSE**

The Complaint is invalid, in whole or in part, to the extent the Regional Director has pled legal conclusions rather than required factual allegations.

#### **THIRD DEFENSE**

The Complaint is invalid, in whole or in part, to the extent it fails to state a claim upon which relief may be granted.

#### **FOURTH DEFENSE**

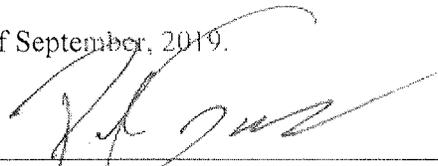
The Complaint is invalid, in whole or in part, to the extent any alleged supervisors or agents of Respondent are accused of committing acts that are ultimately determined to be outside the scope of their employment, or to the extent they were never directed, authorized or permitted thereby.

**FIFTH DEFENSE**

Respondent reserves the right to assert new and additional affirmative defenses upon discovery of facts not previously known.

**WHEREFORE**, Respondent, having fully answered the Complaint and having denied any and all alleged unlawful conduct, respectfully requests that the Complaint be dismissed in its entirety, that the Charging Party take nothing by way of this Complaint, and that the National Labor Relations Board award Respondent all other appropriate relief.

Respectfully submitted this 12th day of September, 2019.



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Thomas J. Birchfield  
Paul E. Goatley  
FISHER & PHILLIPS LLP  
220 West Main Street, Suite 1700  
Louisville, Kentucky 40202  
Phone: (502) 561-3986  
Fax: (502) 561-3991  
E-mail: [tbirchfield@fisherphillips.com](mailto:tbirchfield@fisherphillips.com)  
E-mail: [pgoatley@fisherphillips.com](mailto:pgoatley@fisherphillips.com)

COUNSEL FOR BEST YET MARKET, INC.

**CERTIFICATE OF SERVICE**

It is hereby certified that the within document was filed electronically via the Agency's website, [www.nlr.gov](http://www.nlr.gov), on this the 12th day of September, 2019, effectuating service on the NLRB's Regional Office. On this same date, paper copies of the Answer were served via first class mail upon the following:

George Wiszynski, Esq.  
Associate General Counsel  
United Food and Commercial Workers  
International Union  
1775 K Street NW  
Washington, DC 20006-1502



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COUNSEL FOR BEST YET MARKET, INC.

# Exhibit C

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

BEST YET MARKET, INC.

and

Case 29-CA-242451

UNITED FOOD AND COMMERCIAL WORKERS  
INTERNATIONAL UNION

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**AFFIDAVIT OF MICHELLE STRAUB IN SUPPORT OF BEST YET MARKET, INC.'S  
MOTION FOR SUMMARY JUDGMENT**

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I, Michelle Straub, having been first duly sworn, do hereby make of my own personal knowledge the following statement:

1. I work for Best Yet Market, Inc. ("Respondent") as a Deli Team Lead at its store in Franklin Square, New York ("Franklin Square"). I have been in this role since in or around September 2018. In my capacity as Deli Team Lead, I supervised Angel Padro ("Padro") when he worked at Franklin Square.

2. While I did not hire Padro, I reviewed his employment file and determined that he began his employment with Respondent as a Deli Team Member at Franklin Square in or around June 2016.

3. On or around the evening of April 12, 2019, Padro entered the Franklin Square store to confront me about the recent termination of Deli Team Member, Alexis Ares ("Ares"). Padro was not working, nor was he scheduled to work, at the time he entered the store. Padro approached me while I was standing behind the deli counter in an aggressive and hostile manner, shouting over and over: "you should have stood up for Alexis!" After a few minutes of this

confrontation, Padro left the deli department and walked out of the store. Padro was transferred to the exact same position (Deli Team Member) at Respondent's store in Merrick, New York shortly after this confrontation. I was very disturbed by this confrontation and did not feel comfortable working with Padro moving forward.

4. I did not make the decision to terminate Ares, nor did I make the decision to transfer Padro to a different store.

5. I am aware that Padro and Ares frequently socialized outside of work.

Further Affiant sayeth naught.

Date: 1017119

Michelle Straub

MICHELLE STRAUB

STATE OF New York )

) SS:

COUNTY OF Nassau )

ACKNOWLEDGED, SUBSCRIBED AND SWORN TO before me on this 7<sup>th</sup> day of October, 2019 by Michelle Straub, Affiant herein.

My Commission expires: May 29<sup>th</sup>, 2023

Daria L. Fischer

NOTARY PUBLIC

Daria L. Fischer  
Notary Public  
State of New York  
Suffolk County  
No. 01P18187251  
My Commission Expires: 5/29/2023