

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

TITO CONTRACTORS, INC.,

Respondent

Cases: 5-CA-119008

and

5-CA-119096

5-CA-119414

5-CA-123265

**INTERNATIONAL UNION OF PAINTERS
AND ALLIED TRADES, AFL-CIO
DISTRICT COUNCIL 51**

5-CA-129503

5-CA-131619

5-CA-134285

Charging Party

**COUNSEL FOR THE GENERAL COUNSEL'S
MOTION FOR PARTIAL SUMMARY JUDGMENT**

Counsel for the General Counsel (General Counsel) respectfully requests that the National Labor Relations Board (the Board) grant its Motion for Partial Summary Judgment against Tito Contractors, Inc. (Respondent) for, in numerous instances, filing a response to the Compliance Specification that is insufficient to constitute an Answer under the requirements of Section 102.56 of the National Labor Relations Board's Rules and Regulations. In addition, the General Counsel respectfully requests, that the Board deem admitted certain allegations in the Compliance Specification, grant partial summary judgment with respect to those allegations, and preclude Respondents from introducing evidence during the compliance hearing challenging the allegations deemed admitted, for the reasons set forth below.

Procedural Background

1. On March 29, 2018, the Board issued a Decision and Order finding, in pertinent part, that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (Act) by: (1) discharging, laying off, or otherwise discriminating against Maria Sanchez (M.Sanchez) ,

Aracely Ramos Catalan (Ramos Catalan) , Reyna Sorto-Garcia (Sorto-Garcia), Yasmin Ramirez (Ramirez), Maria Chavez (Chavez), Hernan Latapy (Latapy) , Jose Lopez-Bautista (Bautista),¹ and Nestor Sanchez (N.Sanchez); (2) encouraging Maryland Environmental Services (MES) to request the removal of M. Sanchez, Ramos Catalan, Sorto-Garcia, Ramirez, and Chavez from a jobsite;² and (3) disciplining and suspending Jose Amaya (Amaya). The Board further found that Respondent violated Section 8(a)(1) of the Act by disciplining employee Norberto Araujo (Araujo) and others pursuant to its discriminatory overtime policy. *See* Exhibit 1.

2. In its Decision and Order, the Board ordered Respondent to remedy the 8(a)(3) violations by: (1) making whole Sanchez, Ramos Catalan, Sorto-Garcia, Ramirez, Chavez, Latapy, Sanchez, Bautista, and Amaya for any loss of earnings and other benefits suffered as a result of the discrimination against them; (2) removing from its files any reference to the unlawful discharges, layoffs, and/or discipline issued to these discriminatees and notify them in writing that this has been done and that the unlawful discrimination will not be held against them in any way; and (3) compensating these discriminatees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 5, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee. To remedy the 8(a)(1) violation, the Board ordered Respondent to remove from its files any reference to the unlawful discipline of Araujo, and any other employees disciplined pursuant to its

¹ At the unfair practice hearing, he testified that his name is Jose Mauricio Lopez Bautista. The Administrative Law Judge's Decision and Order and the Board Decision and Order refer to him as Mauricio Bautista. In the Compliance Specification, he is referred to as Mauricio Bautista and Jose Lopez-Bautista. In Respondent's Amended Answer of Tito Contractors, Inc. to Compliance Specification, Respondent refers to him as Jose Lopez Bautisla. In this Motion, he is referred to by his correct legal name which is Jose Lopez-Bautista.

² Pursuant to a contract between Maryland Environmental Services and Respondent, these five discriminatees worked at the Montgomery County Recycling Center in Shady Grove, Maryland.

discriminatory overtime policy, and notify them in writing that this has been done and that the discipline will not be held against them in any way.

3. On May 24, 2019, the United States Court of Appeals for the District of Columbia Circuit issued its judgment enforcing the Board's Decision and Order. *See* Exhibit 2.

4. Controversy still exists over the amount of backpay owed. As a result, on August 3, 2020, the Regional Director, on behalf of the Board, issued a Compliance Specification and Notice of Hearing alleging the amount owed. The Compliance Specification explicitly advised Respondent that:

As to all matters set forth in the compliance specification that are within the knowledge of Respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial is not sufficient. See Section 102.56(b) of the Board's Rules and Regulations, a copy of which is attached. Rather, the answer must state the basis for any disagreement with any allegations that are within the Respondent's knowledge and set forth in detail Respondent's position as to the applicable premises and furnish the appropriate supporting figures

...

If the answer fails to deny allegations of the compliance specification in the manner required under Section 102.56(b) of the Board's Rules and Regulations, and the failure to do so is not adequately explained, the Board may find those allegations in the compliance specification are true and preclude Respondent from introducing any evidence controverting those allegations.

See Exhibit 3.

Respondent's Answers

5. On August 13, 2020, Respondent filed a response to the Compliance Specification. *See* Exhibit 4.

6. On August 26, 2020, the General Counsel sent a letter, by email, to Respondent's counsel informing him that the response did not meet the requirements of Section 102.56(b) of the Board's Rules and Regulations because it failed to admit or deny each and every paragraph

of the Compliance Specification, attempted to relitigate settled issues, and contained general denials and conclusionary statements without setting forth the basis for such disagreement with appropriate supporting alternative figures on all issues alleged in the Compliance Specification. The letter also notified him that, if Respondent failed to file an Amended Answer that complied with the Rules and Regulations by the close of business on September 2, 2020, the General Counsel would file a motion for summary judgment, in whole or in part. *See* Exhibit 5.

7. On September 1, 2020 Respondent filed Amended Answer of Tito Contractors, Inc. to Compliance Specification (Amended Answer). *See* Exhibit 6.

Motion for Partial Summary Judgment

8. In certain instances, Respondent's Amended Answer does not comply with the Board's specificity requirements for an answer to a compliance specification as set forth in Section 102.56 of the Board's Rules and Regulations. Section 102.56(b) of the Rules states, in relevant part:

As to all matters within the knowledge of the Respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial will not suffice. As to such matters, if the Respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the Answer must specifically state the basis for such disagreement, setting forth in detail the Respondent's position and furnishing the appropriate supporting figures.

Where a respondent neglects to meet these requirements, summary judgment is appropriate. *See, e.g., Yonkers Associates*, 340 NLRB 1237, 1238 (2003); *Active Fire Sprinkler Corp.*, 331 NLRB No. 13, slip op. at *3 (2000).

9. Section 102.56(c) of the Board's Rules and Regulations further provides that if a respondent files an answer to a compliance specification that fails to deny an allegation in the manner required by Section 102.56(b) of the Rules, and the failure is not explained, "such an

allegation will be deemed admitted as true, and may so be found by the Board without the taking of evidence supporting such allegation, and the Respondent will be precluded from introducing any evidence controverting the allegation.”

10. Paragraphs 1(a)-(c) of the Compliance Specification allege the respective backpay period starting and ending dates for Latapy, Bautista, and N. Sanchez. Respondent’s Amended Answer generally asserts that the backpay periods for Latapy and Lopez-Bautista ended prior to the dates alleged in the Compliance Specification and fails to provide any alternative ending dates for their backpay periods as required by Section 102.56(b). Nor has the Respondent provided any explanation for its failure to do so. In addition, Respondent has failed to respond at all to the allegations relating to N. Sanchez’s backpay period. Based on the foregoing, the General Counsel seeks summary judgment on paragraphs 1(a)-(c).

11. Paragraphs 1(d)(i)-(v) of the Compliance Specification allege the respective backpay period starting and ending dates for the five employees who were employed at a recycling center pursuant to a contract between Respondent and MES - M. Sanchez, Ramos Catalan, Sorto-Garcia, Ramirez, and Chavez. In its Amended Answer, Respondent improperly attempts to argue that there is no back pay period owing to any of these discriminatees because MES would not allow them to return to this facility, or any MES facility, at any time after their discharge. It likewise argues that Respondent had no control over this decision and that MES’ refusal to allow them to return to work eliminates Respondent’s backpay liability. However, this issue has already been addressed by the Board in its underlying decision and it is well-settled that a respondent in a compliance proceeding may not relitigate issues previously decided in an unfair labor practice proceeding. *M.D. Miller Trucking & Topsoil, Inc.*, 363 NLRB No. 49, slip op. at 2 (2015) (citing *Convergence Communications, Inc.*, 342 NLRB 918, 919 (2004)) *Willis Roof*

Consulting, Inc., 355 NLRB No. 48 (2010); See also *Paolicelli*, 335 NLRB 881 (2001); *Artie Framing*, 313 NLRB 798 (1994); *Gold State Acoustics*, 310 NLRB 557 (1993). Indeed, in its decision, the Board unequivocally affirmed “the judge’s findings that the Respondent violated Section 8(a)(3) and (1) by encouraging [MES] to remove and require the termination of recycling center employees.” See 366 NLRB No. 47, slip op. at 5 (2000).³ As a result of this finding, Respondent’s backpay obligation is not tolled by the fact that Respondent was able to persuade MES to participate in its unlawful scheme to rid itself of these employees for engaging in protected conduct. Given Respondent’s clearly impermissible effort to relitigate this issue, the General Counsel seeks summary judgment with respect to paragraphs 1(d)(i)-(v) and requests that any attempt by Respondent to introduce evidence, whether by testimony, documents, or argument, regarding the correctness of the Board’s Decision and Order in the underlying unfair labor practice case should be precluded.

12. Paragraph 2 of the Compliance Specification alleges that an appropriate measure of gross backpay for the discriminatees is the amount they would have earned if continually employed by Respondent during the backpay period, based on the earnings of comparable employees who worked during the backpay period. In its Amended Answer, Respondent did not offer any alternative gross backpay formula and stated that it agreed with the allegations contained therein other than the backpay period. As a result, the General Counsel requests that

³ In his decision, the Administrative Law Judge specifically found that “MES would not have requested the removal of Maria Sanchez, Aracely Ramos, Reyna Sorto, and Yasmin Ramirez but for the involvement of Respondent. I find that this involvement was motivated by Respondent’s animus towards the known or suspected union activity and/or other protected activity (complaining about the goggles). Respondent has not shown that MES would have, independently, without its involvement, have sought the removal of the five alleged discriminatees from the Shady Grove jobsite.” See 366 NLRB No. 47, slip op. at 23-24.

summary judgment be granted based on Respondent's admission regarding the gross backpay formula set forth in paragraph 2.

13. Paragraph 3 of the Compliance Specification alleges the formula for calculating the calendar quarter gross backpay of the discriminatees and outlines each of their regular hours, overtime hours, hourly wage rates, and regular wage increases they would have received during the backpay period based on wage increases provided to comparable employees. Respondent's Amended Answer does not dispute the hourly wages set forth in this paragraph, but generally denies the discriminatees would be entitled to annual wage increases.⁴ Based on Respondent's unexplained failure to set forth in detail its position as to the applicable premises upon which calendar quarter gross backpay should be based and furnish appropriate supporting figures as required by Section 102.56(b), the General Counsel seeks summary judgment for paragraph 3.

14. Compliance Specification paragraph 4's first sentence alleges that calendar quarter interim earnings are the wages the discriminatees received from interim employers during the backpay period, computed on a quarterly basis. In its Amended Answer, Respondent does not address the first sentence in paragraph 4. As Respondent did not address how calendar quarter interim earnings are calculated, the General Counsel seeks summary judgment for paragraph 4's first sentence.

The second sentence in paragraph 4 alleges the discriminatees' interim earnings are set forth in Exhibits 1 through 8 of the Compliance Specification. Respondent's Amended Answer disputes the interim earnings amounts and contends the alleged discriminatees failed to make reasonable efforts to seek and hold interim employment. This constitutes a sufficient response.

⁴ In its Amended Answer, Respondent responded to paragraph 1 of the Compliance Specification by generally stating that it avers that the overtime calculations are speculative as it does not take into account seasonability of the business and business needs which necessarily affect hours worked. No alternative formulas, supporting figures, or calculations were provided.

Thus, the General Counsel does not seek summary judgment with respect to paragraph 4's second sentence. .

15. Compliance Specification paragraph 5's first sentence alleges that the calendar quarter net backpay is the difference between the calendar quarter gross backpay and calendar quarter interim earnings. In its Amended Answer, Respondent does not address the first sentence in paragraph 5. As Respondent did not address how calendar quarter net backpay is calculated, the General Counsel seeks summary judgment for paragraph 4's first sentence.

The second sentence in paragraph 5 alleges calendar quarter net backpay due is set forth in Exhibits 1 through 8. Respondent does not dispute the formula for calculating calendar quarter net backpay, but generally denies the accuracy and reasonableness of the net back pay set forth in the Compliance Specification based on the discriminatees' alleged failure to mitigate, changed circumstances and employee disqualification (i.e. MES allegedly did not allow Sanchez, Ramos Catalan, Sorto-Garcia, Ramirez, and Chavez to return to work at its facilities after their discharges). Based on Respondent's admission that the stated formula is correct, the General Counsel seeks summary judgment with respect to paragraph 5's second sentence. It also bears pointing out that Respondent's reference to "changed circumstances and employee disqualification" is nothing more than another attempt to relitigate an issue that has already been decided by the Board and provides a separate basis for granting summary judgment.

16. Paragraph 6 of the Compliance Specification alleges that Norberto Araujo is entitled to reimbursement for mileage as a result of Respondent revoking his use of its vehicle and provides a formula for determining an appropriate measure of reimbursement owing to him. The exact amount of reimbursement he is entitled to is set forth in Exhibit 9. Here, Respondent simply makes a blanket assertion that Araujo is not entitled to reimbursement for mileage on his

personal use of his vehicle. Without providing an explanation, alternative figures or calculations, Respondent has failed to comply with Section 102.56(b). Accordingly, the General Counsel seeks summary judgment for paragraph 6. Additionally, it appears Respondent may be trying to relitigate the Board's findings that Araujo was entitled to reimbursement for mileage. To the extent Respondent is trying to relitigate findings of the Board, the General Counsel seeks summary judgment for paragraph 6.

17. Paragraph 7 of the Compliance Specification alleges that, in accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), the discriminatees are entitled to be compensated for the adverse income tax consequences of receiving make-whole relief in a lump sum when the backpay owed is for a period over one year. The adverse tax consequences include excess taxes paid on the lump sum as well as incremental taxes due on the excess tax amount. Contrary to well-established law, Respondent asserts that it is not responsible for any adverse tax consequences and that this is the responsibility of the employee. As Respondent's argument would involve relitigating an issue the Board has already decided, the General Counsel seeks summary judgment for paragraph 7.

18. Paragraph 8 of the Compliance Specification alleges the method for calculating the excess tax award. Due to Respondent's failure to respond to this paragraph, the General Counsel seeks summary judgment for paragraph 8.

19. Paragraph 9 of the Compliance Specification alleges the method for calculating the amount of federal and state taxes owing on each discriminatees' backpay if the monies were paid when they were earned throughout the backpay period. Other than to argue that none of the discriminatees are entitled to backpay, Respondent's Amended Answer inexplicably provides no alternative basis for calculating the federal and state taxes due. Based on Respondent's failure to

adequately comply with Section 102.56(b), the General Counsel seeks summary judgment for paragraph 9.

20. Paragraph 10 of the Compliance Specification alleges the total amount of the lump sum award that is subject to this excess tax award, rounded to the nearest whole dollar, for each discriminatee. In Respondent's Amended Answer, it once again simply argues that the discriminatees are not entitled to backpay and fails to provide alternative figures. As a result, Respondent has not adequately complied with Section 102.56(b) and thus, the General Counsel seeks summary judgment for paragraph 10.

21. Paragraph 11 of the Compliance Specification alleges the amount of federal and state taxes owed on the lump sum amounts set forth paragraph 9, if it was paid in 2020. Here, Respondent does not dispute the tax calculations, but continues to argue that the discriminatees are not entitled to backpay and fails to provide any alternative figures. As a result, Respondent has again not adequately complied with Section 102.56(b) and thus, the General Counsel seeks summary judgment for paragraph 11.

22. With respect to paragraphs 12, 13, and 14 of the Compliance Specification, Respondent does not dispute the allegations contained therein. Based on Respondent's unqualified admission, the General Counsel seeks summary judgment for these three paragraphs.

23. Paragraph 15 of the Compliance Specification alleges that each discriminatee is entitled to payment for the increased tax he or she will pay on the interest received. Although the amount of interest is unknown as it continues to accrue until date of payment, the amount of excess tax liability and incremental tax liability on the interest payment will be calculated according to the formulas set forth above in paragraphs 9 through 14. Respondent generally denies that the discriminatees are entitled to an increased tax payment without providing any

explanation, alternative figures or calculations. Based on the fact that Respondent has failed to comply with Section 102.56(b), the General Counsel seeks summary judgment for paragraph 15. Additionally, it appears Respondent's denial is an attempt to relitigate the Board's finding that the discriminatees are entitled to payment for the increased tax he or she will pay on any interest received. As Respondent's argument would involve relitigating an issue the Board has already decided, the General Counsel seek summary judgment for paragraph 15.

24. Paragraph 16 of the Compliance Specification alleges that Respondent should be required to submit to the Region the appropriate documentation to provide the Social Security Administration so that when backpay is paid, it will be allocated to the appropriate periods. Paragraph 17 further alleges that General Counsel seeks, as part of the make whole remedy to the discriminatees, that Respondent be required to submit the W-2 reflecting backpay paid to the discriminatees to the Regional Director. Due to Respondent's failure to respond to paragraphs 16 and 17, the General Counsel seeks summary judgment with respect to both of them.

25. Paragraph 18 of the Compliance Specification alleges that Respondent has failed to comply with non-financial aspects of the Board's Order, enforced by United States Court of Appeals for the District of Columbia, by failing to remove from its files any reference to the unlawful discharges, suspension, and/or discipline issued to: M. Sanchez, Ramos Catalan, Sorto-Garcia, Ramirez, Chavez, Latapy, N. Sanchez, Bautista, Amaya, and Araujo (as well as any other employees disciplined pursuant to its discriminatory overtime policy). It further alleges that Respondent has failed to notify all of these discriminatees, in writing, that this has been done and that their discharges, suspension and/or discipline will not be held against them in any way. In its Amended Answer, Respondent denies these allegation without any explanation such that it

has failed to comply with Section 102.56(b). Therefore, summary judgment should be granted with respect to paragraph 18.

26. Paragraph 19 of the Compliance Specification summarizes that the obligation of Respondent to make whole the discriminatees under the Board's Order will be discharged by the payment to the discriminatees in the amount of \$249,185.00, in back wages, less appropriate withholdings, plus interest accrued to date of payment, compounded daily, and Employer's share of FICA contributions; and by payment of compensation for the adverse tax consequences of receiving a lump-sum payment. It further provides that the outstanding non-financial obligations of Respondent to comply with the Board Order will be discharged by sending a letter to each discriminatee to notify them that their respective discharges, suspensions and/or disciplines have been removed from its files, with a copy to the Region. In its Amended Answer, Respondent generally denies this paragraph and once again improperly attempt to relitigate an issue that has already been decided by the Board by arguing that there is no back pay period owing to M. Sanchez, Ramos Catalan, Sorto-Garcia, Ramirez, and Chavez because MES would allegedly not allow them to work at any of its locations after the date of their discharges. In addition, Respondent asserts that none of the discriminatees in this case are entitled to any backpay since they failed to mitigate their damages. Based on Respondent's failure to provide any alternative method or figures for calculating the total amount owing to the discriminatees and its clearly impermissible effort to relitigate a settled issue, the General Counsel seeks summary judgment with respect to paragraph 19, subject only to Respondent's right to try to meet its legal burden at a hearing by proving additional interim earnings and other facts that may mitigate the loss resulting from its unlawful actions. *M.D. Miller Trucking and Topsoil*, 363 NLRB at 5; *Mastro Plastics Corp.*, 136 NLRB 1342, 1346 (1962)

Based on the foregoing, the General Counsel respectfully requests that the Board grant its Motion for Partial Summary Judgment. No hearing on the General Counsel's calculation of gross backpay in this matter is necessary, and it is appropriate for the Board to issue a Decision and Order as to gross backpay. Respondent should be precluded from challenging Region 5's backpay figures in the upcoming hearing, with the *only* issue being Respondent's affirmative burden to prove the discriminatees' interim earnings.

DATED at Chicago, Illinois, this 17th day of November 2020.

/s/ J. Edward Castillo
J. Edward Castillo
Counsel for the General Counsel
National Labor Relations Board
Region 13
219 S. Dearborn St., Suite 808
Chicago, IL 60604

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Counsel for the General Counsel's Motion for Partial Summary Judgment was electronically filed with the National Labor Relations Board on this 17th day of November 2020, and true and correct copies of the document have been served on the parties in the manner indicated below on the same date.

VIA E-MAIL:

Jonathan W. Greenbaum, Esq.
Coburn & Greenbaum, PLLC
1710 Rhode Island Avenue, N.W., Second Floor
Washington, DC 20036
jg@coburngreenbaum.com

Kim Jandrain Esq.
Coburn & Greenbaum, PLLC
1710 Rhode Island Avenue, N.W., 2nd Floor
Washington, DC 20036
kj@coburngreenbaum.com

Christopher R. Ryon, Esq.
Kahn, Smith & Collins, P.A.
201 North Charles Street, 10th Floor
Baltimore, MD 21201
ryon@kahnsmith.com

/s/ J. Edward Castillo
J. Edward Castillo
Counsel for the General Counsel
National Labor Relations Board
219 South Dearborn Street, Suite 808
Chicago, Illinois 60604

Exhibit 1

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Tito Contractors, Inc. and International Union of Painters and Allied Trades, AFL-CIO District Council 51. Cases 05-CA-119008, 05-CA-119096, 05-CA-119414, 05-CA-123265, 05-CA-129503, 05-CA-131619, and 05-CA-134285

March 29, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND EMANUEL

On November 4, 2014, Administrative Law Judge Arthur J. Amchan issued the attached decision. The General Counsel and the Respondent both filed exceptions and a supporting brief. The General Counsel also filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions²

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). The judge properly based his credibility findings on the weight of the respective evidence, including the admission or absence of documentary exhibits, adverse inferences, and uncontested facts. We have carefully examined the record and find no basis for reversing the findings.

In the absence of exceptions, we adopt the judge's findings that the Respondent violated Sec. 8(a)(1) by: (1) telling employee Jose Amaya that he should think about his family before joining an unpaid overtime lawsuit, telling employee Geremias Berganza that the Respondent could sue him for defamation and fire him for complaining to the Union about unpaid overtime wages, telling employees Berganza, Domingo Zamora, and others that employees participating in the unpaid overtime lawsuit would not be permitted to work overtime in the future, telling employee Hernan Latapy that the Respondent "was going to fire all those son-of-a-bitch after everything finishes with the lawsuit," and telling employee Nestor Sanchez that he could get work if he "fix[ed] it" with the Respondent by withdrawing from the unpaid overtime lawsuit; (2) informing a group of employees at a mandatory meeting that workplace issues could be resolved if they voted against the Union, that prounion employees Mauricio Bautista and Zamora were "rotten apples," and that the Respondent could be closed or employees' work subcontracted if the Union continued bothering the Respondent; (3) ordering employee Norbert Araujo to return his company vehicle because he engaged in union or other protected concerted activities; and (4) instructing employees not to take complaints outside their "chain of command" and threatening them with discipline for doing so. Also, in the absence of exceptions, we adopt the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) by disciplining and suspending employee Amaya.

and to adopt the judge's recommended Order as modified and set forth in full below.³

1. On October 18, 2013,⁴ several employees filed a class action and collective action lawsuit against the Respondent under the Fair Labor Standards Act (FLSA) for unpaid overtime wages due under State and Federal laws. The employees also began an organizing campaign with District Council 51 of the International Union of Painters and Allied Trades, AFL-CIO (Union). The complaint alleges that, upon learning of the employees' actions, the Respondent committed numerous violations of Section 8(a)(1). The General Counsel excepted to the judge's failure to make findings with respect to several of those allegations. We find merit in seven of these exceptions.

First, we find that Owner and President Maximo Pierola violated Section 8(a)(1) on October 11, 2013, by equating employees' protected activities with disloyalty towards the Respondent. In particular, Pierola told employee Geremias Berganza, "[W]hat you guys are, are a stabber; you guys are stabbing me in my back." After Berganza refused to disavow the unpaid overtime lawsuit when Pierola asked him if he was with or against the Respondent, Pierola added, "I don't want stabbers in the company. If you don't like my company, if you didn't like it, there's thousands of jobs outside." See *Hialeah Hospital*, 343 NLRB 391, 391 (2004).⁵

Second, we find that Project Field Superintendent Manual Alarcon violated Section 8(a)(1) by telling employee Domingo Zamora that an overtime policy memo distributed by the Respondent provided that those who joined an unpaid overtime lawsuit against the Respondent could not work overtime. See *Sambo's Restaurant, Inc.*, 260 NLRB 316, 319 (1982) (unlawful threat where employer told employee that neither he nor his coworker would work overtime if employee filed a grievance over the assignment of overtime).

Third, Supervisor Tomas Berganza violated Section 8(a)(1) on October 31, 2013, by creating an impression of surveillance of employee Aracely Ramos's union activities when, after notifying Ramos of her termination, Berganza stated, "I noticed that you have been speaking with Mr. Sandro from the Union. Now that you are with the Union, call Sandro. Call him to find you a job." See

² The judge failed to include in his decision a "Conclusions of Law" section setting out the specific violations he found. We shall correct this inadvertent omission.

³ We have amended the remedy and modified the judge's recommended Order consistent with our legal conclusions. We shall substitute a new notice to conform to the Order as modified.

⁴ All dates hereinafter are in 2013 unless otherwise indicated.

⁵ The judge found Pierola's statements unlawful, but did not specifically address the General Counsel's contention that the statements equated protected activities with disloyalty.

Flexsteel Industries, 311 NLRB 257, 257 (1993) (employer unlawfully created an impression of surveillance of employee's union activity by telling employee about hearing of his union activity without revealing the source).⁶

Fourth, we find that Supervisor Tomas Berganza violated Section 8(a)(1) on December 18, 2013, by interrogating employees individually about their union activities and support. See *Hudson Neckware, Inc.*, 302 NLRB 93, 95 (1991) (unlawful interrogation where employer asked employee if she had signed a union authorization card). We note that the Respondent does not dispute the judge's factual finding that these interrogations occurred.

Fifth, we find that Supervisor Tomas Berganza violated Section 8(a)(1) on December 18, 2013, by threatening employees with immigration-related consequences and discharges for engaging in union activities. On December 2, 2013, construction employee Mauricio Bautista testified on behalf of the Union at a representation-case hearing to determine the appropriate unit for a Board election. According to Berganza, on December 18, during a meeting with the recycling center employees, he distributed and read to the assembled employees one page from Bautista's testimony in which Bautista explained that he picks up the maintenance orders for the Respondent from the Arlington County Courthouse because the Respondent "does not have many employees with papers, I mean good papers. There are approximately 15 percent of us that have good papers. As a re-

sult, I am sent to the Arlington County Courthouse." Recycling center employee Elcy Bargas testified that Berganza told employees during the meeting, referring to U.S. Immigration and Customs Enforcement by the acronym ICE, that the high percentage of undocumented workers employed by the Respondent "will affect us because Tito Contractors would give our information to ICE. Then in case the Union will win, ICE will come into the company and they will get us arrested." Similarly, recycling center employee Maria Guerra testified that Berganza told the employees that "[i]f the Union wins, then ICE will go into the office, and they will check the papers" and those without papers would lose their job. See *North Hills Office Services*, 346 NLRB 1099, 1102 (2006) ("[T]hreats involving immigration or deportation can be particularly coercive. Such threats place in jeopardy not only the employees' jobs and working conditions, but also their ability to remain in their homes in the United States.").⁷

Sixth, we find that Owner and President Maximo Pierola violated Section 8(a)(1) on February 27, 2014, by soliciting employees' grievances, indicating that they could be resolved through private mediation, and, after employee Norberto Araujo interjected that Pierola had made empty offers about resolving employee grievances for the past 25 years, promising that this would change. See *ManorCare Health Services-Easton*, 356 NLRB 202, 202 fn. 3, 220 (2010) (employer unlawfully solicited grievances and expressly promised to remedy them during an organizational campaign), *enfd.* 661 F.3d 1139 (D.C. Cir. 2011). Araujo, whom the judge found credible in other respects, testified without contradiction that Pierola told the employees that the private mediator could be used to discuss their unpaid overtime claims and that employees therefore would not need to support the Union. Hernan Latapy similarly testified that Pierola said that "we did not need the Union in order to reach an agreement with them, that we could find a mediator in order to resolve the internal problems." We note that the Respondent does not dispute the judge's factual finding that Pierola made these statements about employees' grievances.

⁶ In finding this violation, we note that the judge found that Berganza, who disputed Ramos's account of this conversation, was not a credible witness generally. The judge relied on that finding to discredit Berganza's denial of having told employee Maria Sanchez, at the time he fired her, that he had heard that she had communications with the Union. We similarly find it appropriate to rely on the judge's credibility finding to reject Berganza's denial of having told Ramos, during her termination meeting, that he knew of her communications with the Union. See *Regency at the Rodeway Inn*, 255 NLRB 961, 962 (1981) (although the judge neither ruled on the alleged statutory supervisory status of an individual nor set out credibility resolutions, he "generally credited" the testimony of the alleged supervisor and "generally discredited" the testimony of two other witnesses in other respects; given those circumstances, the Board credited the alleged supervisor's testimony that she lacked supervisory status over the contrary testimony of the other two witnesses) (emphasis in original); cf. *Newsday, Inc.*, 274 NLRB 86, 86 fn. 2 (1985) (finding that although the judge did not specifically rule on an alleged threat made by a supervisor to an employee, the supervisor's denial of threatening an employee was credible because the judge had found the supervisor to be a "generally reliable" witness and discredited the employee's testimony when it conflicted with the supervisor's).

Member Emanuel does not pass on this allegation. He notes that another witness, whose testimony the judge did not address, corroborated Berganza's denial. In these circumstances, he finds the judge's credibility resolutions insufficient to determine whether Berganza actually made the allegedly unlawful statement to Ramos.

⁷ Berganza denied telling the recycling center employees that they would have problems with ICE if they voted for the Union. We find the judge's finding that Berganza was not a credible witness generally to be a sufficient basis for resolving the conflicting accounts. Moreover, even if we were to rely solely on Berganza's own testimony, the employees reasonably understood the Respondent's message that immigration-related consequences would result from engaging in union activities. After all, as the judge found, Berganza distributed and read Bautista's testimony about employees' precarious immigration status on the same day he had interrogated employees about their union support.

Seventh, we find that Owner and President Pierola violated Section 8(a)(1) on February 27, 2014, by disparaging employee Jose Amaya at an employee meeting. At that meeting, Amaya asked Pierola whether another employee had been fired because she supported the Union. Pierola then singled out Amaya as a friend of employee Mauricio Bautista (whom Pierola had just called a “rotten apple” for supporting the Union), became suspicious that Amaya was recording the meeting, and called Amaya a “maricon” (faggot). See *Milkin Enterprises*, 361 NLRB 283, 290 (2014) (employer unlawfully encouraged the dissemination of a disparaging picture of prounion employee).⁸

2. The judge found that the Respondent violated Section 8(a)(3) and (1) by promulgating and discriminatorily enforcing an overtime policy requiring employees to obtain advance management approval for overtime because of employees’ union and other protected concerted activities. We agree.

Prior to October 2013, the Respondent’s employees routinely worked overtime without advance management approval. On October 24, 6 days after the employees filed the overtime lawsuit, the Respondent distributed a memo to employees setting forth its overtime policy, which, for the first time, required employees to receive advance management approval for overtime.⁹ The next day, October 25, Owner and President Pierola held a mandatory employee meeting during which he expressed surprise about the overtime lawsuit and stated that he would now need to cut employees’ hours. Following the

meeting, however, Pierola told employee Norberto Araujo that nothing would change with respect to his overtime hours because he had not joined the lawsuit. Also that same day, the Respondent’s project superintendent, Manual Alarcon, informed employee Domingo Zamora that the Respondent’s overtime policy memo “says that those of you that are in the lawsuit cannot work” overtime. In addition, on separate occasions throughout October 2013, Respondent Field Superintendent Fermin Rodriguez told employees Zamora, Geremias Berganza, and Hernan Latapy, with other employees present, that the new overtime policy applied only to those who joined the lawsuit.

Under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), in order to establish a violation of Section 8(a)(3), the General Counsel must first show that the Respondent’s action was motivated by animus against protected activity. If he makes that showing, the Respondent has the burden of showing that it would have taken the same action even absent the protected activity.

The General Counsel has unquestionably met his initial burden here. The quoted statements by management officials, made to employees when the new policy was promulgated and thereafter, establish that the underlying discriminatory purpose behind the policy was to retaliate against those employees who participated in the lawsuit. It thus became the Respondent’s burden to establish that it would have issued the new overtime policy even absent its intent to retaliate against the employees for filing the overtime lawsuit. In order to meet that burden, the Respondent cannot simply “present a legitimate reason for its actions,” but must instead prove that the actions were “‘predicated solely on those grounds, and not by a desire to discourage [protected] activity.’” *Toll Mfg. Co.*, 341 NLRB 832, 847 (2004), quoting *NLRB v. Symons Mfg. Co.*, 328 F.2d 835, 837 (7th Cir. 1964); see, e.g., *Key Food*, 336 NLRB 111, 112 (2001); *W. F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), review denied 70 F.3d 863 (6th Cir. 1995), enfd. mem. 99 F.3d 1139 (6th Cir. 1996).

The Respondent contends that it issued the new overtime policy solely for the lawful purpose of reducing its future liability for overtime pay. As already noted, the Respondent’s contemporaneous statements to employees show that the new policy was formulated and issued for the sole purpose of punishing Section 7 activity. In addition, by telling employees that it would only apply the new policy to participants in the lawsuit, the Respondent negated any possible inference that its only purpose was for a legitimate reason—to reduce its overtime liability. Had that been the objective, employees would have been

⁸ The General Counsel also excepts to the judge’s failure to find that the Respondent violated Sec. 8(a)(1) by conveying to employees that unionization would be futile when Supervisor Tomas Berganza told employee Elyc Bargas, using a coffee pot as a prop, “pretend that [the Respondent’s] money was inside that pot of coffee . . . the Union cannot go and grab that money in order to increase” employees’ wages. We find insufficient evidence in the record to establish this violation and dismiss the allegation. We find it unnecessary to pass on the General Counsel’s exceptions to the judge’s failure to find additional coercive interrogations or his failure to find that the Respondent, through Pierola, violated Sec. 8(a)(1) by implicitly threatening to withhold employee benefits on April 28, 2014. Those additional violations would be cumulative and would not affect the remedy.

⁹ The Respondent asserts that this overtime policy was in effect prior to the filing of the overtime lawsuit, but was enforced only sporadically. As the judge found, however, there is no evidence that any employees had been informed that such a policy existed prior to the filing of the lawsuit. To the contrary, multiple employees testified that the Respondent had not previously notified them that there was an overtime policy and that they regularly worked overtime without receiving management approval. Moreover, the Respondent’s office manager, Davys Ramos, testified that it was only after October 24 that the Respondent required employees to submit a work authorization form in which a management official authorizes an employee to work a specific amount of overtime. The Respondent has accordingly failed to show that it had an overtime policy prior to October 2013.

told that the policy applied to all of them. And, as explained below, the Respondent in fact did *not* apply the policy to all of them.

In sum, the evidence shows that, even though the Respondent's written overtime policy was facially valid, the Respondent promulgated it for the unlawful purpose of retaliating against those employees who engaged in union and other protected concerted activities by participating in the overtime lawsuit. See *Youville Health Care Center, Inc.*, 326 NLRB 495, 495 (1998) (presumptively valid rule unlawful if adopted for a discriminatory purpose).¹⁰ The Respondent has accordingly not met its *Wright Line* burden.¹¹

Our finding here does not suggest that an employer could never lawfully respond to an FLSA lawsuit by issuing a policy limiting employees' unauthorized overtime work. Such a policy, if motivated solely by legitimate business concerns, would be lawful. Here, however, the Respondent's own statements and actions reveal instead that its overriding motivation was unlawful animus against Section 7 activity, not reducing its overtime exposure. The Respondent's promulgation of its new policy therefore violated Section 8(a)(3).¹²

We also find that the Respondent, true to its word, discriminatorily enforced the overtime policy by refusing to authorize overtime for employees who joined the overtime lawsuit. During the first full pay period after the filing of the overtime lawsuit, the Respondent assigned overtime to various employees, but none to the original seven, named plaintiffs.¹³ This was in stark contrast to the six pay periods immediately preceding the filing of the lawsuit, from July 14 through October 5, when the

seven discriminatees were assigned an average of at least 10 hours of overtime per pay period, with a few working substantially more. Moreover, as the judge found, the Respondent did not lack overtime work during the pay period ending on November 2. The seven employees who were assigned overtime during that pay period worked a significant number of overtime hours. Furthermore, the evidence demonstrates that the Respondent also discriminated against other employees who it suspected would join—and just a few weeks later did join—the overtime lawsuit.¹⁴ Tellingly, in addition to the disparate treatment evinced by the Respondent's payroll records, the Respondent's Vice President Alexander Pierola was unable to explain at the hearing why the Respondent suddenly shifted the overtime hours of the plaintiffs in the lawsuit to other employees who had not joined the lawsuit.¹⁵

¹⁴ The General Counsel excepts to the judge's failure to find that the Respondent discriminatorily enforced its overtime policy against employees Jose Amaya, Jose Diaz, Luis Palacios, Hernan Latapy, and Nestor Sanchez, all of whom joined the lawsuit on November 13. We find merit in this exception. The payroll records show that the Respondent significantly reduced the overtime hours of each of these employees. For instance, over the six pay periods prior to the lawsuit, their average overtime worked per pay period was as follows: Amaya, 9.29 hours, Diaz, 5.13 hours, Palacios, 26.29 hours, Latapy, 26.92 hours, and Sanchez, 9.71 hours. Over the six pay periods after the filing of the lawsuit, the average overtime were: Amaya and Diaz, 0 hours, Latapy, 1 hour, and Sanchez, 2.5 hours. Although Palacios worked a total of 33 overtime hours during the next four pay periods, thereby averaging 8.25 hours per pay period, that was still substantially less than his average, over the six preceding pay periods, of 26.29 hours of overtime per pay period. Once they joined the lawsuit, nearly 4 weeks after it was first filed, these five employees, like the seven initial plaintiffs, immediately saw a sharp decline in their overtime hours. The evidence further supports a finding that the reduction in hours was similarly motivated by the Respondent's hostility toward their involvement in the overtime lawsuit. For instance, upon learning that Amaya was one of the employees who had initially met with the attorneys filing the lawsuit, Pierola bluntly and unlawfully warned Amaya to think about his family before joining the lawsuit. Moreover, the Respondent knew that these employees had previously engaged in protected activities. In 2012, Sanchez, Palacios, Latapy, and Diaz all worked together on a construction project at the Mount Pleasant library in Washington, D.C., for which the Respondent did not pay them the correct wage rate. At that time, Sanchez and Palacios complained about the underpayment and the Respondent terminated them. The Respondent rehired Sanchez and Palacios only after they contacted the Union, which in turn spoke on their behalf with Respondent General Manager Kenneth Brown.

¹⁵ The judge noted that the evidence suggested that the discriminatory withholding of overtime did not stop after the first full pay period following the filing of the overtime lawsuit. We agree with the judge that the evidence shows continued discrimination against the initial seven plaintiffs after the first pay period, as well as Amaya, Diaz, Palacios, Latapy, and Sanchez. We leave to compliance the determination of the extent to which the Respondent discriminated against the plaintiffs in subsequent pay periods.

¹⁰ See also *Bigg's Foods*, 347 NLRB 425, 425 & fn. 6 (2006) (similar); *Lincoln Center for the Performing Arts*, 340 NLRB 1100, 1110–1111 (2003) (similar); *Ward Mfg., Inc.*, 152 NLRB 1270, 1271 (1965).

¹¹ Given the Respondent's statements to its employees, the violation may be found here without a *Wright Line* analysis. Where an employer takes adverse action against employees for the explicit purpose of retaliating against their protected activity, further analysis of its motive for the action is unnecessary. E.g., *Neff-Perkins Co.*, 315 NLRB 1229, 1229 fn. 2 (1994) (unnecessary to apply *Wright Line* where employer admits to discriminating against employees because of their protected activity); *Mast Advertising & Publishing*, 304 NLRB 819, 819–820 (1991) (same). It is sufficient, however, for us to find that the Respondent's motive in this case was unlawful under *Wright Line*.

¹² Member Emanuel agrees that the Respondent's promulgation of the new overtime policy violated Sec. 8(a)(3) and (1). Although the Respondent is directed to rescind that policy, this does not preclude it from establishing a new overtime policy that is genuinely intended to assist it in avoiding violations of the FLSA and is not used to deny overtime opportunities against employees who engage in protected activity.

¹³ The original seven named plaintiffs to the overtime lawsuit were Roberto Ayala, Mauricio Bautista, Geremias Berganza, Hector Delgado, Sabino Diaz, Jose Jimenez, and Domingo Zamora.

We also find that the Respondent separately violated Section 8(a)(1) by disciplining employees for working overtime without advance management approval pursuant to the Respondent's discriminatory overtime policy. For instance, employee Norberto Araujo consented to joining the lawsuit on February 10, 2014, and on February 27 expressed dismay to Vice President Pierola about the Respondent not having resolved employee grievances over the past 25 years. On February 28, the Respondent disciplined Araujo for working overtime without advance management approval, despite Araujo having done so repeatedly in the past without discipline. The Respondent also issued written warnings to other unnamed employees for not receiving advance management approval prior to working overtime.¹⁶

3. We affirm the judge's findings that the Respondent violated Section 8(a)(3) and (1) by encouraging Maryland Environmental Services (MES) to remove and require the termination of recycling center employees Maria Sanchez on October 30, Aracely Ramos on October 31, Reyna Sorto on November 14, Yasmin Ramirez on December 6, and Maria Chavez on December 13. Applying *Wright Line*, above, the judge found that the Respondent terminated these five employees because of their union and other protected concerted activities.¹⁷ On exception, the Respondent disputes the judge's findings that it knew of Sanchez', Ramos', and Sorto's union and other protected concerted activities and harbored union animus against them. The Respondent also contends that the terminations were for legitimate performance and behavior issues. We disagree.

The judge properly imputed Supervisor Berganza's undisputed knowledge of Sanchez', Ramos', and Sorto's

union activity to the Respondent.¹⁸ The judge also appropriately based his finding of animus on the "Respondent's obvious discrimination against several of its prouction employees," which includes numerous simultaneous 8(a)(1) and (3) violations. Moreover, in agreement with the judge, we reject the Respondent's purported explanations for the employees' terminations. The performance and behavior issues cited by the Respondent as the reasons for the terminations were pretextual, as evidenced by the Respondent's disparate treatment of those employees. For instance, although the Respondent issued multiple warnings to other employees about the need to improve their performance, Sanchez, Ramos, and Sorto were summarily terminated for purported inadequate work performance. Not only was there no credited evidence to support this, but Ramos and Sorto performed the best on a productivity test conducted by the Respondent at their facility. Similarly, although Ramirez and Chavez were each purportedly discharged for a one-time negative interaction with another employee, neither received a warning for such misbehavior or for any other deficiency. The Respondent, however, warned another employee about her inappropriate behavior, including physical abuse of coworkers, on repeated occasions, and eventually terminated her only for job abandonment.

We note, however, that although the judge properly applied *Wright Line* in determining that the Respondent's terminations of Sorto, Ramirez, and Chavez were unlawfully motivated, it was unnecessary for him to apply that analysis with respect to the terminations of Sanchez and Ramos. As previously noted, Supervisor Berganza explicitly referenced their union activities when terminating them. Immediately before he fired Sanchez, Berganza told her that he had heard that she had been talking to the Union. Likewise, when Ramos asked why she was being fired, Berganza told her that he noticed she had been speaking with the Union, and that she could call the Union to find her a new job. These direct statements connecting Sanchez' and Ramos' terminations to their union activity are independently sufficient to demonstrate unlawful discrimination. See *Quality Control Electric, Inc.*, 323 NLRB 238, 238 (1997) (employer statement to

¹⁶ The judge incorrectly stated that Araujo's discipline was not pled as a violation. Paragraph 17 of the complaint alleged that the Respondent issued written and/or oral warnings for violating the overtime policy to employees whose identities were unknown at the time of the filing of the complaint, which would include Araujo's February 28, 2014 discipline. Moreover, we shall order the Respondent to rescind the unlawful disciplines issued to Araujo and other unnamed employees for violating the discriminatory overtime policy. See *National Steel Supply, Inc.*, 344 NLRB 973, 977 fn. 16 (2005) (unnamed discriminatees entitled to make-whole relief where the General Counsel has alleged and proven discrimination against a defined and easily identifiable class of employees), *enfd.* 207 Fed.Appx. 9 (2d Cir. 2006). The identity of those employees shall be ascertained at the compliance stage. *Id.*

¹⁷ Contrary to the judge's suggestion, proving that an employee's union activity was a motivating factor in the employer's adverse employment decision does not require the General Counsel to show particularized animus towards the employee's own union activity. The elements commonly required to support a finding of discriminatory motivation are union activity by the employee, employer knowledge of the activity, and union animus on the part of the employer. See *Libertyville Toyota*, 360 NLRB 1298, 1301 fn. 10 (2014), *enfd.*, 801 F.3d 767 (7th Cir. 2015); *Mesker Door, Inc.*, 357 NLRB 591, 592 & fn. 5 (2011).

¹⁸ Berganza initially supported the Union, but the judge found, based in part on credibility determinations, that Berganza began opposing the Union prior to Sanchez' October 30 termination. The judge also found that Berganza "at least suspected that all five discriminatees supported the Union before they were discharged." Indeed, when he terminated Sanchez, Berganza told her he had been informed that she "had communication with the Union." He similarly told Ramos that he knew she had been speaking with the Union when he fired her and made comments about the Union to Sorto at her termination meeting. The Respondent does not dispute that it knew of Ramirez's and Chavez' union activities.

prospective applicant about his union membership constituted affirmative evidence of unlawful motivation that was “more than *Wright Line* requires” to establish unlawful motive); *District #1, Pacific Coast District, Marine Engineers Beneficial Association*, 259 NLRB 1258, 1258 fn. 2 (1982) (employer statements to employee at time of discharge about her union activity establish unlawful discharge), enf. 723 F.2d 97 (D.C. Cir. 1983).

4. We also affirm the judge’s finding that the Respondent violated Section 8(a)(3) and (1) by laying off construction employees Hernan Latapy and Nestor Sanchez on April 25, 2014, and terminating Latapy on June 25, 2014. The Respondent knew that Latapy and Sanchez supported the Union and were plaintiffs in the overtime lawsuit. On May 1, 2014, Field Superintendent Rodriguez told Latapy that there was work for him as a subcontractor if he disassociated himself from the lawsuit. Rodriguez implored Latapy “not to be a fool” and “lose that opportunity” because “at the end, when the lawsuit ends, [Pierola is] going to fire all those sons-of-a-bitches from the company.” Although Project Superintendent Alarcon texted Latapy about a work assignment in June 2014, Latapy testified that he understood that this was an attempt by the Respondent to give him work as a subcontractor. The Respondent never contacted Latapy about returning to his former position as an employee. Also in June 2014, Field Superintendent Rodriguez told Sanchez that there was plenty of work for Sanchez but that he should go “fix it with [Pierola] or with the lawyers” regarding the lawsuit. Sanchez responded that he had nothing to discuss with the Respondent’s lawyers, and the Respondent never contacted him again about working on any future projects despite Sanchez’ repeated efforts to obtain work. The judge properly found that Rodriguez’ statements alone constituted evidence of discrimination against Latapy and Sanchez. We note again, however, that the judge’s application of *Wright Line* was unnecessary here as well, because the Respondent explicitly linked the employees’ union and other protected activities to its withholding of their future work assignments and ultimately to their termination or layoff. See *Quality Control Electric, Inc.*, above; *District #1, Pacific Coast District, Marine Engineers Beneficial Association*, above.¹⁹

¹⁹ Member Emanuel agrees that the Respondent violated Sec. 8(a)(1) by laying off Latapy and Sanchez and terminating Latapy for initiating and participating in the FLSA lawsuit. He finds it unnecessary to pass on whether the Respondent’s conduct also violated Sec. 8(a)(3) because finding this additional violation is cumulative and does not affect the remedy.

CONCLUSIONS OF LAW

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

2. District Council 51, International Union of Painters and Allied Trades, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By telling employee Jose Amaya that he should think about his family before engaging in protected concerted activities because he joined the unpaid overtime lawsuit, the Respondent violated Section 8(a)(1) of the Act.

4. By equating employee Geremias Berganza’s protected concerted activities with disloyalty towards the Respondent, the Respondent violated Section 8(a)(1) of the Act.

5. By threatening employees Domingo Zamora, Geremias Berganza, and others that the Respondent would not permit employees participating in the unpaid overtime lawsuit to work overtime in the future, the Respondent violated Section 8(a)(1) of the Act.

6. By telling employee Domingo Zamora that, under the overtime policy memo distributed by the Respondent, those who joined the overtime lawsuit against the Respondent cannot work overtime, the Respondent violated Section 8(a)(1) of the Act.

7. By threatening to discipline employees who took complaints outside their “chain of command,” the Respondent violated Section 8(a)(1) of the Act.

8. By creating an impression of surveillance of employee Aracely Ramos’s union activities, the Respondent violated Section 8(a)(1) of the Act.

9. By interrogating employees individually about their union activities and support, the Respondent violated Section 8(a)(1) of the Act.

10. By telling a group of employees at a mandatory meeting that their workplace issues could be resolved if they voted against the Union, that prounion employees Mauricio Bautista and Domingo Zamora are “rotten apples,” and that it could close or subcontract employees’ work if the Union continued bothering it, the Respondent violated Section 8(a)(1) of the Act.

11. By threatening employees with immigration-related consequences and discharges for engaging in union activities, the Respondent violated Section 8(a)(1) of the Act.

12. By soliciting employees’ grievances and promising to no longer disregard them, the Respondent violated Section 8(a)(1) of the Act.

13. By disparaging employee Jose Amaya during a meeting for his support of the Union, the Respondent violated Section 8(a)(1) of the Act.

14. By disciplining employee Norberto Araujo and others pursuant to its discriminatory overtime policy, the Respondent violated Section 8(a)(1) of the Act.

15. By threatening employee Geremias Berganza that the Respondent could sue him for defamation and fire him for complaining to the Union about unpaid overtime wages, the Respondent violated Section 8(a)(1) of the Act.

16. By ordering employee Norbert Araujo to return his company vehicle because he engaged in union or other protected concerted activities, the Respondent violated Section 8(a)(1) of the Act.

17. By telling employee Hernan Latapy that the Respondent “was going to fire all those son-of-a-bitch after everything finishes with the [overtime] lawsuit,” the Respondent violated Section 8(a)(1) of the Act.

18. By telling employee Nestor Sanchez that he could get work if he “fix[ed] it” with the Respondent by withdrawing from the overtime lawsuit, the Respondent violated Section 8(a)(1) of the Act.

19. By promulgating and discriminatorily enforcing an overtime policy against employees Roberto Ayala, Mauricio Bautista, Geremias Berganza, Hector Delgado, Sabino Diaz, Jose Jimenez, Jose Amaya, Jose Diaz, Hernan Latapy, Luis Palacios, Nestor Sanchez, and Domingo Zamora because of their union or other protected concerted activities, the Respondent violated Section 8(a)(3) and (1) of the Act.

20. By discharging, laying off, or otherwise discriminating against employees Maria Sanchez, Aracely Ramos, Reyna Sorto, Yasmin Ramirez, Maria Chavez, Hernan Latapy, Nestor Sanchez, and Mauricio Bautista because of their union or other protected concerted activities, the Respondent violated Section 8(a)(3) and (1) of the Act.

21. By encouraging Maryland Environmental Services to request removal of employees from a jobsite because the employees engaged in union or other protected concerted activities, the Respondent violated Section 8(a)(3) and (1) of the Act.

22. By disciplining and suspending employee Jose Amaya because he engaged in union or other protected concerted activities, the Respondent violated Section 8(a)(3) and (1) of the Act.

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

AMENDED REMEDY

Having found that the Respondent engaged in certain unfair labor practices, we shall order the Respondent to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Having

found that the Respondent committed numerous violations of Section 8(a)(1) of the Act, we shall order the Respondent to cease and desist from engaging in such conduct.

Having found that the Respondent violated Section 8(a)(3) and (1) by promulgating and discriminatorily enforcing an overtime policy against employees because they engaged in union or protected concerted activities, including participating in a collective-action lawsuit, we shall order the Respondent to make Roberto Ayala, Mauricio Bautista, Geremias Berganza, Hector Delgado, Sabino Diaz, Jose Jimenez, Jose Amaya, Jose Diaz, Hernan Latapy, Luis Palacios, Nestor Sanchez, and Domingo Zamora whole for any loss of earnings and other benefits suffered as a result of the unlawfully withheld overtime. Backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), *enfd.* 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). We shall also order the Respondent to rescind its unlawful overtime policy requiring advance management approval and notify its employees in writing that it has done so. In addition, we shall order the Respondent to remove from its files any reference to the unlawful discipline taken against Norberto Araujo and any other employees who were disciplined pursuant to its discriminatory overtime policy and notify them in writing that it has done so and that any such discipline will not be used against them in any way.

Having found that the Respondent violated Section 8(a)(3) and (1) by laying off and/or terminating employees Maria Sanchez, Aracely Ramos, Reyna Sorto, Yasmin Ramirez, Maria Chavez, Hernan Latapy, Nestor Sanchez, and Mauricio Bautista because of their union and other protected concerted activities, we shall order the Respondent to offer them immediate reinstatement to their former jobs, or if those jobs no longer exist, to a substantially equivalent position, without prejudice to their seniority or any other rights and privileges previously enjoyed. We shall also order the Respondent to make Maria Sanchez, Aracely Ramos, Reyna Sorto, Yasmin Ramirez, Maria Chavez, Hernan Latapy, Nestor Sanchez, and Mauricio Bautista whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, above, compounded daily as prescribed in *Kentucky River Medical Center*, above.

Having found that the Respondent violated Section 8(a)(3) and (1) by suspending employee Jose Amaya for engaging in union or protected concerted activities, we shall order the Respondent to make him whole for any loss of earnings and other benefits suffered as a result of the unlawful suspension. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, above, compounded daily as prescribed in *Kentucky River Medical Center*, above.

In accordance with our recent decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), we shall also order the Respondent to compensate affected employees for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

In addition, in accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), we shall order the Respondent to compensate all of the discriminatees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 5, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year for each employee.

ORDER

The National Labor Relations Board orders that the Respondent, Tito Contractors, Washington, D.C., its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Discharging, laying off, or otherwise discriminating against employees for supporting District Council 51, International Union of Painters and Allied Trades, AFL-CIO, or any other labor organization, or for engaging in other protected concerted activities, including participating in a collective-action lawsuit.
 - (b) Encouraging Maryland Environmental Services to request removal of employees from a jobsite because the employees engaged in union or other protected concerted activities.
 - (c) Threatening employees with discharge, closure of their work facility or subcontracting of their work, filing a defamation lawsuit against them, withholding of overtime and other benefits, or any other adverse actions if they engage in union or other protected concerted activities, including participating in a collective-action lawsuit.

- (d) Promulgating a policy requiring high-level management advance approval of overtime work in response to employees engaging in protected concerted activities, and discriminatorily enforcing such a policy.

- (e) Disciplining employees for engaging in union or other protected concerted activities, including participating in a collective-action lawsuit.

- (f) Equating employees' protected concerted activities, including participating in a collective-action lawsuit, with disloyalty.

- (g) Maintaining a rule which prohibits employees from taking complaints about their working conditions outside their "chain of command."

- (h) Creating an impression of surveillance of employees' union or other protected concerted activities.

- (i) Coercively interrogating employees about their union or other protected concerted activities.

- (j) Threatening employees with immigration-related consequences, including discharge, for engaging in union activities.

- (k) Soliciting grievances from employees and promising to remedy them in order to discourage employees from supporting the Union.

- (l) Disparaging employees to their coworkers for engaging in union or other protected concerted activities.

- (m) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

- (a) Within 14 days from the date of the Board's Order, offer Maria Sanchez, Aracely Ramos, Reyna Sorto, Yasmin Ramirez, Maria Chavez, Hernan Latapy, Nestor Sanchez, and Mauricio Bautista full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

- (b) Within 14 days from the date of the Board's Order, notify Maryland Environmental Services in writing that it requests the reinstatement of Maria Sanchez, Aracely Ramos, Reyna Sorto, Yasmin Ramirez, and Maria Chavez to their former jobs at its Shady Grove (Derwood), Maryland facility or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

- (c) Make Maria Sanchez, Aracely Ramos, Reyna Sorto, Yasmin Ramirez, Maria Chavez, Hernan Latapy, Nestor Sanchez, Mauricio Bautista, and Jose Amaya whole for any loss of earnings and other benefits suffered as a

result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges and discipline of Maria Sanchez, Aracely Ramos, Reyna Sorto, Yasmin Ramirez, Maria Chavez, Hernan Latapy, Nestor Sanchez, and Mauricio Bautista, and within 3 days thereafter, notify them in writing that this has been done and that their unlawful discharges and disciplines will not be used against them in any way.

(e) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful suspension and discipline of Jose Amaya, and within 3 days thereafter, notify him in writing that this has been done and that the suspension and discipline will not be used against him in any way.

(f) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discipline of Norberto Araujo and any other employees disciplined pursuant to its discriminatory overtime policy, and within 3 days thereafter, notify them in writing that this has been done and that any such discipline will not be used against them in any way.

(g) Make Roberto Ayala, Mauricio Bautista, Geremias Berganza, Hector Delgado, Sabino Diaz, Jose Jimenez, Jose Amaya, Jose Diaz, Hernan Latapy, Luis Palacios, Nestor Sanchez, and Domingo Zamora whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in having overtime hours withheld, in the manner set forth in the remedy section of this decision.

(h) Compensate affected employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 5, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(i) Rescind the overtime policy requiring advance management approval of overtime work and notify employees in writing that it has done so.

(j) Rescind the rule prohibiting employees from taking complaints about their working conditions outside their "chain of command" and notify employees in writing that it has done so.

(k) Within 14 days from the date of the Board's Order, restore to Norberto Araujo the use of a company vehicle comparable to the vehicle he drove prior to April 2014.

(l) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place desig-

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

(m) Within 14 days after service by the Region, post at its Washington, D.C. office and the Shady Grove (Derwood), Maryland recycling facility, copies of the attached notice marked "Appendix" in both English and Spanish.²⁰ Copies of the notice, on forms provided by the Regional Director for Region 5, 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 the intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, as its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 11, 2013.

(n) Within 14 days after service by the Region, hold a meeting or meetings during working hours, which shall be scheduled to ensure the widest possible attendance of employees, at which time the attached notice is to be read to employees in English, Spanish, and in any additional languages, if the Regional Director decides that it is appropriate to do so, by a responsible management official in the presence of a Board agent and an agent of the Union if the Region or the Union so desires, or, at the Respondent's option, by a Board agent in the presence of a responsible management official and, if the Union so desires, an agent of the Union.

(o) Within 21 days after service by the Region, file with the Regional Director for Region 5 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.

²⁰ 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."

Dated, Washington, D.C. March 29, 2018

Mark Gaston Pearce, Member

Lauren McFerran, 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

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge, lay off, or otherwise discriminate against you for supporting District Council 51, International Union of Painters and Allied Trades, AFL-CIO, or any other union, or for engaging in other protected concerted activities, including participating in a collective-action lawsuit.

WE WILL NOT encourage Maryland Environmental Services to request your removal from a jobsite because you engaged in union or other protected concerted activities.

WE WILL NOT threaten you with discharge, closure of your work facility or subcontracting of your work, filing a defamation lawsuit against you, withholding of overtime and other benefits, or any other adverse actions if you engage in union or other protected concerted activities, including participating in a collective-action lawsuit.

WE WILL NOT promulgate a policy requiring high-level management advance approval of overtime work in response to you engaging in protected concerted activities, and discriminatorily enforcing such a policy.

WE WILL NOT discipline you for engaging in union or other protected concerted activities, including participating in a collective-action lawsuit.

WE WILL NOT equate your protected concerted activities, including participating in a collective-action lawsuit, with disloyalty.

WE WILL NOT maintain a rule which prohibits you from taking complaints about your working conditions outside your "chain of command."

WE WILL NOT create the impression that we are surveilling your union or other protected concerted activities.

WE WILL NOT coercively interrogate you about your union or other protected concerted activities.

WE WILL NOT threaten you with immigration-related consequences, including discharge, for engaging in union activities.

WE WILL NOT solicit grievances from you and promise to remedy them in order to discourage you from supporting the Union.

WE WILL NOT disparage you to your coworkers for engaging in union or other protected concerted activities.

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

WE WILL, within 14 days from the date of the Board's Order, offer Maria Sanchez, Aracely Ramos, Reyna Sorto, Yasmin Ramirez, Maria Chavez, Hernan Latapy, Nestor Sanchez, and Mauricio Bautista full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board's Order, notify Maryland Environmental Services in writing that we request the reinstatement of Maria Sanchez, Aracely Ramos, Reyna Sorto, Yasmin Ramirez, and Maria Chavez to their former jobs at its Shady Grove (Derwood), Maryland facility or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Maria Sanchez, Aracely Ramos, Reyna Sorto, Yasmin Ramirez, Maria Chavez, Hernan Latapy, Nestor Sanchez, Mauricio Bautista, and Jose Amaya whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest, and WE WILL also make such employees whole for reasonable search-for-work and interim employment expenses, plus interest..

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

ful discharges and discipline of Maria Sanchez, Aracely Ramos, Reyna Sorto, Yasmin Ramirez, Maria Chavez, Hernan Latapy, Nestor Sanchez, and Mauricio Bautista, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that their unlawful discharges and disciplines will not be used against them in any way.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension and discipline of Jose Amaya, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the suspension and discipline will not be used against him in any way.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discipline of Norberto Araujo and any other employees disciplined pursuant to our discriminatory overtime policy, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that any such discipline will not be used against them in any way.

WE WILL make Roberto Ayala, Mauricio Bautista, Geremias Berganza, Hector Delgado, Sabino Diaz, Jose Jimenez, Jose Amaya, Jose Diaz, Hernan Latapy, Luis Palacios, Nestor Sanchez, and Domingo Zamora whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in having their overtime hours withheld, plus interest.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 5, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL rescind the overtime policy requiring advance management approval of overtime work, and WE WILL notify you in writing that we have done so.

WE WILL rescind the rule prohibiting you from taking complaints about your working conditions outside your "chain of command," and WE WILL notify you in writing that we have done so.

WE WILL, within 14 days from the date of the Board's Order, restore to Norberto Araujo the use of a company vehicle comparable to the vehicle he drove prior to April 2014.

TITO CONTRACTORS, INC.

The Board's decision can be found at <https://www.nlrb.gov/case/05-CA-119008> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Re-

lations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



Letitia F. Silas and Pablo A. Godoy, Esqs., for the General Counsel.

Jonathan W. Greenbaum and Kimberly Jandrain, Esqs. (Coburn & Greenbaum, PLLC, Washington, D.C.), for the Respondent.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Washington, D.C. on the following dates: August 4–8, 12–14, 18, and September 11–12, 2014. The International Union of Painters and Allied Trades, District Council 51 filed the charges pertaining to this case between December 16, 2013, and August 6, 2014. The General Counsel issued the initial complaint on July 11, 2014. He filed the complaint in case 05-CA-134285 on August 28, 2014, and I consolidated that case with the others.

This case involves a host of alleged 8(a)(1) violations, including alleged threats, interrogations, solicitation of grievances and promises predicated on eschewing union activity. It also involves a number of alleged 8(a)(3) and (1) violations, including: withholding overtime in retaliation for protected activity, retaliatory warnings and a suspension, and the terminations of the following employees: five of Respondent's employees working at the Montgomery County Recycling Center: Maria Sanchez, Aracely Ramos, Reyna Sorto, Yasmin Ramirez, and Maria Chavez.¹ This case also involves the termination and/or lay-offs of Tito Contractors construction employees Hernan Latapy, Nestor Sanchez, and Mauricio Bautista and allegedly depriving Norberto Araujo of use of a company vehicle.

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

FINDINGS OF FACT

I. JURISDICTION

Respondent, Tito Contractors, a corporation, has its primary office in the District of Columbia. It provides construction services and labor mainly to state and local governmental entities in Maryland and Virginia. The construction services include carpentry, painting, drywall installation and snow remov-

¹ In this decision I will ignore the Latin American custom of referring to individuals by the father's last name and mother's last name. Thus I will refer to Aracely Ramos rather than Aracely Ramos-Garcia.

al. Respondent also provides labor to the Maryland Environmental Services Department (MES) at several recycling centers. Respondent performed services in excess of \$50,000 outside of the District of Columbia in 2013. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, International Union of Painters and Allied Trades, District Council 51 is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Introduction: Respondent's hierarchy

The highest ranking official at Tito Contractors is Maximo "Tito" Pierola, its president and owner. The next highest ranking officials are his son Alex Pierola, vice-president and General Manager Kenneth Brown. Next in the hierarchy in the construction side of Respondent's business are a number of project superintendents including Edward Vivas, Manuel Alarcon and Jorge Ramos. Below these project superintendents are field superintendents such as Fermin Rodriguez. Below the field superintendents are on-site crew leaders, including some of the alleged discriminatees. It has not been established that the crew leaders are supervisors or agents of Tito Contractors within the meaning Section 2(11) and 2(13) of the Act.

On the other hand, Respondent in its July 24, 2013 Answer to the Amended consolidated complaint, admitted that Maximo Pierola, Alex Pierola, Kenneth Brown, Manuel Alarcon, and Fermin Rodriguez were supervisors pursuant to Section 2(11) of the Act. I also find that they were agents pursuant to Section 2(13) of the Act. Whenever any of these individuals spoke to rank and file employees about matters relevant to this case, the employees reasonably understood that these individuals were speaking on behalf of Tito Contractors and were reflecting company policy, *Community Cash Stores*, 238 NLRB 265 (1978).

At the Montgomery County Recycling Center, Respondent's top on-site supervisor was Tomas Berganza. In its July 24, 2013 answer, Respondent admitted that Berganza was at all relevant times a supervisor pursuant to Section 2(11) of the Act. I find that he was also an agent of Respondent pursuant to Section 2(13) for the reasons stated above with regard to the construction supervisors. At times relevant to this case, Berganza reported directly to Maximo Pierola, Alex Pierola, and Office Manager Davys Ramos.

The events regarding the allegations concerning the recycling center are somewhat confusing because Tomas Berganza at least initially appeared to support the Union and signed a union authorization card. However, as discussed below, at some point Berganza realized that he was a statutory supervisor and acted entirely in the interests of Respondent and as its agent.

Berganza knew of the union activity amongst the recycling employees and at least suspected that all five discriminatees supported the Union before they were discharged. However, Berganza signed a union authorization card on October 18 and at least outwardly supported the Union until sometime in November. He was identified as a union supporter in the Union's letter to Respondent dated November 14, 2013.

At some point in time, Tomas Berganza learned that he was a statutory supervisor and thus not protected by most of the provisions of the Act. Berganza testified he learned that from Respondent's counsel between Thanksgiving and Christmas 2013 (Tr. 472). However, I do not credit that testimony and infer that he became aware of this much earlier. He testified that at some point he stopped cooperating with the Union, for example, by not answering telephone calls from the union organizers. I infer that Berganza began operating in Respondent's interests in opposing union organizing before Maria Sanchez's discharge on October 30 (Tr. 333). This may have been due to his realization that he was a statutory supervisor or for other reasons.

The basis for my factual findings

In making factual findings, I am generally loath to take either parties' self-serving testimony at face value, unless it is uncontradicted or supported by non self-serving evidence in the record. I would note in this regard that Maximo "Tito" Pierola and Manuel Alarcon, who are alleged to have committed unfair labor practices, did not testify at all. Other of Respondent's supervisors and/or agents were called as witnesses by the General Counsel but not by Respondent, such as Fermin Rodriguez, Tomas Berganza, and Alex Pierola. Respondent relied principally on the testimony of its general manager, Kenneth Brown, who in many instances had no first-hand knowledge regarding the facts of the case. Thus, much, if not all, of the testimony of the General Counsel's witness testimony regarding unfair labor practices pertaining to Respondent's construction employees is uncontradicted. Where that it the case, this testimony is credited.

The record with regard to Respondent's recycling operations is quite different. Tomas Berganza, Respondent's supervisor at the Shady Grove or Derwood, Maryland recycling center, was called by the General Counsel and contradicted the testimony of the discriminatees. Also, the General Counsel called MES supervisors David Wyatt and Mark Wheeler as witnesses, who were generally supportive of the Respondent's position. The part of the case involving the recycling employees thus requires resolution of the contradictory testimony of witnesses.

As to those instances in which there is a conflict in testimony, I find no basis for resolving the credibility of the witnesses by virtue of their demeanor when testifying. Thus, I base these credibility determinations on 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, *Daikichi Sushi*, 335 NLRB 622 (2001).

As early as October 11, 2013, Maximo "Tito" Pierola learns his construction employees are filing a class action suit against Respondent. Respondent's construction employees file suit pursuant to the Fair Labor Standards Act on October 18, 2013;

About a dozen or so of Respondent's construction employees met with union officials in September 2013. Among the subjects discussed was employees' belief that they were not being paid for overtime work as required under federal law. The Union facilitated contact between these employees and the law firm of Latham and Watkins, which is representing the employees on a pro bono basis. Six employees met with the firm's

attorneys on September 16, 2013 (GC Exh. 96).

A number of employees met with the firm's attorney prior to October 11. The law firm filed a class action suit against Respondent for failing to pay Roberto Ayala, Mauricio Bautista, Geremias Berganza,² Hector Delgado, Sabino Diaz, Jose Jimenez, and Domingo Zamora in conformity with the requirements of the Fair Labor Standards Act on October 18, 2013. On November 13, 2013, Francisco Campos, Cesar Rodriguez, Nestor Sanchez, Milton Vega, Miguel Padron, Manuel Rodriguez, Luis Palacios, Jose Granado, Jose Berganza, Jose Amaya, Jose Diaz, Vitalano Berganza, and Hernan Latapy joined the suit. On November 22, 2013, Manuel Medrano joined the suit. Among the others joining the suit in 2014 was Norberto Araujo on May 5.³

Respondent's owner, Maximo Pierola was aware that the suit was going to be filed as early as October 11. On that day he called two employees and expressed his feelings about the lawsuit.

Pierola called employee Jose Amaya and told Amaya that he was very disappointed that the employees or that Amaya personally had taken legal action against his company. Pierola told Amaya that he should think about his family before he decided to do the things he was doing. (Tr. 1138–1142.)⁴

Maximo Pierola also called Geremias Berganza on October 11 (Tr. 818). He told Geremias that he could not believe that Geremias was doing this to him. Maximo told Geremias that "you guys are stabbing me in my back." He also told Geremias that it was never too late to reverse his decision to file suit. Further, Pierola said to Geremias that he did not want backstabbers in the company. Also, he said that if Geremias did not like his company, there were thousands of jobs elsewhere (Tr. 820–821).

Fermin Rodriguez tells employees that those participating in the FLSA lawsuit will not work overtime

On one or more occasions in October 2013, Fermin Rodriguez, one of Respondent's superintendents, told employees, including Domingo Zamora and Geremias Berganza, two of the original seven FLSA plaintiffs, that Respondent would not allow those employees who participated in the FLSA lawsuit to work overtime. Although not pled as a violation, this evidence is relevant to the fact, as discussed later, that, at least in one pay period, Respondent discriminated against the original seven

plaintiffs in assigning overtime work.⁵

October 18, 2013: First contact between Respondent and the Union in 2013

There was interaction between the Union and Respondent in 2012 when Sandro Baiza, a union organizer, spoke or attempted to speak with Respondent's General Manager Kenneth Brown, on behalf of three employees who had been fired (Tr. 1328–139). Respondent reinstated all three. Baiza spoke directly to Respondent's owner, Maximo "Tito" Pierola in January 2013 on behalf of one of these employees, who still had a wage dispute with Respondent.

The first contact between the Union and Respondent's management regarding an organizing drive in 2013 occurred on October 18, 2013, the same day on which the FLSA suit was filed. On that day, Tomas Berganza,⁶ Respondent's supervisor at the Shady Grove, Maryland (also referred to as the Derwood facility) recycling plant met with union organizer Sandro Baiza and one of Respondent's construction employees, Mauricio Bautista. At the time Berganza and Bautista, who had been in contact with the union for several months, were close personal friends. Berganza signed a union authorization card at that meeting.

As discussed below, Berganza, on behalf of Respondent, engaged in a number of unfair labor practices. It is unclear whether he was in fact interested in joining the Union in October. However, he was no longer interested in joining the Union or assisting it by early November. Tomas Berganza may have changed his mind when he learned that he was a statutory supervisor and thus unprotected by the provisions of the NLRA.

In October, Baiza asked Tomas Berganza to assist him in getting other Tito employees at the recycling center to sign cards. Berganza asked Baiza which of Tito's employees at the recycling center had already signed cards (Tr. 332). Within a week of October 18, Berganza had a phone conversation with organizer Baiza. Baiza asked Berganza if a certain four employees had signed authorization cards. Berganza informed him that they had not. Then Berganza asked Baiza if Yasmin Ramirez, Maria Chavez, Reyna Sorto, Aracely Ramos, and Elizabeth Lemus, had signed cards.⁷

² Berganza is not related to Respondent's supervisor Tomas Berganza, but is a cousin of Respondent's supervisor Fermin Rodriguez.

³ Although beyond the scope of this proceeding, it is clear that Respondent did not pay employees time and a half for hours worked outside of normal business hours for Arlington County. Respondent's general manager, Kenneth Brown testified that Owner Maximo "Tito" Pierola did not read his contract with Arlington closely enough and did not realize that he could bill Arlington time and half for hours worked outside of normal business hours (Tr. 1301).

⁴ Although Amaya did not join the suit until November, his testimony about his October 11 conversation with Maximo Pierola is uncontradicted. I therefore credit it. I infer that Pierola found out that Amaya was one of the employees who met with the Latham and Watkins attorneys earlier.

⁵ The complaint alleges that Rodriguez and Manuel Alarcon told employees that the plaintiffs could not work overtime without the approval of senior management. In fact, the record shows that Rodriguez told employees that the plaintiffs would not get overtime work. I find that the statements made by Rodriguez violated Sec. 8(a)(1). There is no due process issue here as the gravamen of the violation is the same, a statement that Respondent would discriminate on the basis of protected activity. Moreover, Respondent did not avail itself of the opportunity to seek a contradiction from Fermin Rodriguez, when he was called a witness by the General Counsel.

⁶ Whenever I refer to Berganza without a first name, I am referring to Tomas. Other employees with the same last name will be referred to by their first and last names, or simply their first name.

⁷ I credit the testimony of Maria Guerra, a current employee, who overheard this conversation in Baiza's car (Tr. 163–164). Moreover, Berganza admitted that he asked Union Organizer James Coats whether specific employees had signed union cards, including Elizabeth Lemus and Maria Chavez (Tr. 333–334). Coates told Berganza that an employee named Maria had signed a card. Although there were several

Tito's work at the Montgomery County Recycling Center

At the Montgomery County Recycling Center in Shady Grove, 29 Tito employees work on a conveyor belt separating recycling materials into different categories, e.g. glass, clear plastic, colored plastic, etc. These employees work at the recycling center pursuant to a contract between the State of Maryland Environmental Services Department (MES) and Tito Contractors. Two or 3 employees of MES, including Juana Rosales and Norma Garcia, also work on the sorting line. Part of their responsibilities is to oversee the work of the Tito employees. The contract between MES and Respondent gives MES the right to request that Respondent remove any of Respondent's employees from the site. Respondent is required to comply with this request (GC Exh. 95, sec. 3.3.2).⁸

The senior MES employees at Shady Grove are Field Operations Supervisor David Wyatt and Mark Wheeler, the operations manager. Wheeler reports to Wyatt. Neither Wheeler nor Wyatt are proficient in understanding spoken Spanish. Respondent's on-site supervisor, Tomas Berganza, often serves as the translator between, Wheeler or Wyatt and the Tito rank and file employees at the recycling center.

A Montgomery County employee, Thomas Kusterer, a project manager in the County Division of Solid Waste, is also responsible for the recycling center. The center produces plastic water bottles from recycled materials. Thus, it produces income for the county, which is dependent on the production of the Tito recycling employees.

Respondent's productivity tests for its recycling employees

At some point in the late summer of 2013, Tom Kusterer, Montgomery County's project manager, told MES' supervisors, Wyatt and Wheeler that the production of plastic bottles at the Shady Grove recycling center had declined. Wheeler discussed this with Tomas Berganza, who devised a productivity test for Tito's employees at the request of MES and Kusterer. Each employee was tested on the number of hoppers they could fill on two test days at station 37a. These tests were conducted between September 9 and November 27, 2013; the results were provided to MES.

None of the five alleged discriminatees, who were later fired by Respondent in the fall of 2013, was a particularly low scorer. Maria Chavez was the top performer. Aracely Ramos and Reyna Sorto were also among the top performers. No action was taken against the poorer performers on the test (GC Exh. 14). In fact, it appears nobody made any use of the test results. Mark Wheeler's day planner for the months of October and November indicates that he monitored the performance of alleged discriminatees Reyna Sorto and Yasmin Ramirez closely, but did no monitoring of the poorer performers on the productivity test, such as Sylvia Sandino, Adriana Villavicencio, Miri-

Tito employees named Maria at the recycling center, Berganza suspected or knew Coates was talking about Maria Chavez. (Tr. 333-337).

Four of these five employees, excluding Lemus, were fired by Respondent within the next 2 months.

⁸ The section provides: "MES shall have the right to request that the Contractor replace certain of the Contractor's employees. The Contractor will replace such employees by the start of the next business day following verbal notification from the MES supervisor."

am Meija and Estella Rodriguez. (GC Exh. 48(a), GC Exh. 14).⁹ Chavez' performance was consistent with the fact she was most skilled sorter at the facility, Tr. 725.

October 25, 2013: Respondent issues new policy on overtime for its construction employees

A week after being informed of FLSA lawsuit, Maximo Pierola conducted a meeting for all his construction employees. He announced that henceforth all overtime work would have to be approved in advance by either himself, his son Alex Pierola, or General Manager Kenneth Brown. Superintendent Manual Alarcon had made a similar announcement to employees in Virginia the day before. Although, Respondent contends such a policy existed prior to the filing of the lawsuit, such a policy was not strictly enforced. At the October 25 meeting, a memo setting forth the policy was distributed to all construction employees.

On October 25, after the meeting ended, Norberto Araujo approached Maximo to complain that he had not been paid enough for work he had performed at the University of Maryland. Pierola told him that Respondent "would fix that." Araujo asked Pierola about the memorandum. Pierola told Araujo that since he had not joined the lawsuit,¹⁰ nothing would change with respect to his overtime hours. At some point, Respondent's field superintendent, Fermin Rodriguez, also told employees that the new or newly enforced overtime policy only applied to those employees who joined the lawsuit.

October 30, 2013: Respondent discharges Maria Sanchez

In 2013 one of the MES employees working on the production line at the Shady Grove recycling center was Juana Rosales. She is and was highly valued by MES. On about October 30, Rosales was told that a Tito employee had called her a whore. Another employee told Rosales that the employee who called Rosales a whore was Maria Sanchez. Sanchez had worked at the recycling center for 6 months, although she had worked for Tito Contractor's construction division before that.

Rosales complained to Tomas Berganza, who told her to tell MES Operations Manager Mark Wheeler (Tr. 1388-1392). However, Wheeler was not at work when Sanchez was fired and testified that he had no involvement in requesting Sanchez's removal (Tr. 689).¹¹

Tomas Berganza testified that Rosales complained to Wyatt. However, Rosales did not testify that she went to Wyatt or anyone else at MES about Sanchez.

⁹ Villavicencio and Meija are identified as union supporters in the Union's November 14 letter to Respondent. Wheeler's first notation about the performance of any alleged discriminatee during the relevant time period was on October 10, 2013, the day before Maximo Pierola called Jose Amaya and Geremias about the FLSA suit. The notation is about Yasmin Ramirez, whose husband, Jose Jimenez, was one of the original FLSA plaintiffs. This is a further indication the MES' removal requests were related to the protected and union activity of the discriminatees.

¹⁰ Araujo joined the suit in 2014.

¹¹ Thus, it is clear that all the post-it notes in Wheeler's day planner (GC Exh. 48(a)), one of which recounts the reasons Respondent requested removal of Sanchez from the jobsite, are not contemporaneous with the event recorded.

Wyatt's testimony regarding Sanchez is as follows:

Q. Are you familiar with someone by the name of Maria Raquel Sanchez?

A. Yes.

Q. And who was she?

JUDGE AMCHAN: Well, I mean, I know who all these people

are. He knows who they are. What do you want him to

—

Q. BY MS. SILAS: Did you request her removal?

A. Yes.

Q. Why?

A. Performance, I believe.

Q. What was it about her performance?

A. Picking slowly.

Q. Did Tomas tell you that?

A. I can't remember if Tomas or Norma or Juana came to me.

Q. I see. And any other reason for her removal?

A. I can't remember if it was Sanchez that was teasing the coworkers, or which lady it was.

Tr. 751.

Since Rosales did not testify that she complained to Wyatt about Sanchez and he could not recall whether or not she did, I find that she did not do so. Since Norma Garcia did not testify, I find there is no credible evidence that she complained to Wyatt about Sanchez' work performance.

It is unclear why David Wyatt and Mark Wheeler were so eager to support Respondent in this case. However, neither of them is a credible witness. Given the ambiguity of Wyatt's testimony, there is absolutely no credible evidence that there was anything wrong with Sanchez's performance or that anyone told Wyatt that there was. Tomas Berganza testified that he talked to Sanchez once about working too slowly (Tr. 350). He did not testify that he complained about this to Wyatt or Wheeler.

I find that any information that Wyatt received about Sanchez came from Berganza and was motivated by Respondent's desire to thwart the organizing drive and/or to get rid of employees who complained about working conditions in concert.

Rosales had a troubled relationship with a number of Tito employees, but Sanchez was not one of them. There is no credible evidence that Sanchez called Rosales a whore or anything else derogatory.

On October 30, Respondent, by Alex Pierola fired Sanchez, on Berganza's recommendation. Respondent had never disciplined Sanchez prior to October 30.¹² The termination letter signed by Alex Pierola does not mention Sanchez calling Rosales any derogatory names; it says MES requested her re-

¹² Sanchez testified that Berganza told her that he had heard she'd been talking to the Union just before he fired her, as well as complaining about her performance on the job. She had not received any prior warnings about her performance. Berganza denied mentioning the Union to Sanchez. I find Berganza not to be a credible witness generally. Thus, although self-serving, I credit Sanchez.

moval for "unsatisfactory work behavior."

Respondent discharges Aracely Ramos on October 31, 2013

Aracely Ramos had worked for Respondent at the Montgomery County recycling center for three years before she was fired on October 31, 2013. During that period she had received one disciplinary warning in June 2013 for calling Tomas Berganza unfair and a racist.

Juana Rosales, on one occasion, reported to Berganza that Aracely Ramos left the production line without first informing Rosales. She was unable to testify as to when this occurred or relate this incident in any way to the date of Ramos' termination (Tr. 1385-1388).

David Wyatt testified that he requested that Ramos be removed because her performance was very low (Tr. 752). As in the case of Sanchez, there is no credible evidence to support such a contention. In an affidavit given to the Board during its investigation of the union's charges, Wyatt stated that sometime in October 2013 Norma Garcia and Juana Rosales told him that Ramos was letting materials bypass her on the sorting line to bother coworkers. Rosales not did testify to saying any such thing to Wyatt; Garcia did not testify and I find that the statement is false.

Wyatt went on to state in his sworn affidavit that he spoke to Berganza about this. Wyatt told Berganza to tell Ramos that if this happened again, she would no longer be employed at the recycling center (GC Exh. 17). Berganza testified that Ramos "admitted" that she was letting materials pass her station to bother her coworkers (Tr. 366). Ramos denies telling Berganza this and I credit her testimony. There is no reason why Ramos would make such a confession to Berganza. In any event Berganza told Wyatt that Ramos was letting materials pass to bother her coworkers.

Wyatt testified that either Berganza or Wheeler advised him of problems with Ramos' production. However, Wheeler did not testify to making any complaints about Ramos. Indeed, he was on vacation when she was fired. I conclude that all of Wyatt's information about Ramos came from Berganza. Rosales testified that she spoke to Berganza about Ramos. She did not testify about discussing Ramos with Wyatt or Wheeler.

Berganza's email (GC Exh. 17), indicates that Wyatt as of 10:49 a.m. on October 31, Wyatt had not requested Ramos' removal from the jobsite. In General Counsel's Exhibit 18, Berganza's note to Alex Pierola and Davys Ramos, indicates that between 10:49 and 12:35 a.m., Wyatt did so after talking to Berganza again. Respondent then discharged Ramos.

Respondent discharges Reyna Sorto on November 14, 2013

On November 1, 2013, the day after Respondent discharged Ramos and two days after it discharged Sanchez, Tomas Berganza sent an email to Office Manger Davys Ramos stating that he had been watching Reyna Sorto for a week and that Sorto was working very slowly. He stated further that he had not discussed this with Sorto and hoped to talk to Mark Wheeler when he returned from vacation (GC Exh. 20).

Mark Wheeler's testimony is inconsistent with Berganza's contemporaneous email and thus not completely credible. He testified that he started monitoring Sorto himself the entire month of October and discussed her work performance with

Berganza in October (Tr. 711–712). He also testified that Berganza told him in October that he had talked to Sorto about her work habits, which is also inconsistent with the Berganza November 2 email.

Mark Wheeler testified that he noticed that Reyna Sorto's production had declined. On November 1, 2013, Berganza called Reyna Sorto to his office and asked her why she was working slowly. Sorto told him her left arm hurt. Berganza told Sorto to get a doctor's note within the next 2 weeks. Berganza spoke to Mark Wheeler about Sorto's production on November 8. Wheeler, who generally observed the Tito employees on the sorting line three times a day, said he would watch Sorto. Wheeler noticed that Sorto worked considerably slower when she was not aware he was watching her.

Regardless of whether this was true or not, there is no evidence as to how Sorto's production compared to that of other employees. Based on the productivity tests it is likely that even when Sorto was not working to her full capacity, she was working faster than the employees who scored much lower on the test and who were never monitored by Wheeler or removed from the jobsite.

In late October, Berganza also informed Wheeler that another employee, Alba Ruanda, told him that Sorto was telling employees to slow down on the production line. Neither party called Rauda to testify, so there is no credible evidence that this was true. On or about November 14, Wheeler directed Respondent to remove Sorto from the recycling center.

November 15, 2013: Filing of Representation Petition

On November 15, the Union filed a representation petition with the NLRB seeking to represent Respondent's recycling employees at Shady Grove (aka Derwood, MD), Cockeysville Maryland and its construction employees.

The day before the petition was filed, the Union sent Respondent a letter identifying 35 union supporters in Respondent's workforce. Among those named were a number who are alleged to the victims of discriminatory conduct by Respondent. These included five recycling employees who were terminated between October 30 and December 13, 2013: Maria Sanchez, Yasmin Ramirez, Reyna Sorto, Aracely Ramos, and Maria Chavez. It also included Mauricio Bautista, Hernan Latapy, who were discharged by Respondent in 2014, Nestor Sanchez, who was laid off and 12 employees who were allegedly denied the opportunity for overtime work. Recycling Supervisor Tomas Berganza was also named as a union supporter in the letter.

December 2, 2013: Representation Hearing

On December 2, 2013, the Board conducted a representation hearing to determine the appropriate unit for an election. Mauricio Bautista testified in this proceeding on behalf of the Union.

Respondent discharges Yasmin Ramirez on December 6, 2013

Yasmin Ramirez worked for Respondent for 6 years and at the recycling center for four years. During that time, she had been disciplined once in 2011 for failing to wear safety glasses. In early October 2013 one of Respondent's employees, Martha Serpas, complained to Tomas Berganza that Yasmin Ramirez had been teasing her and calling her old and stupid (Tr. 393).

Mark Wheeler joined Berganza and Serpas on this occasion. Berganza translated for Serpas, who speaks little or no English, and Wheeler, who speaks only a little Spanish. Wheeler told Berganza that he would watch Ramirez.

It is unclear why Wheeler decided to monitor Ramirez's work performance because Serpas' complaint was not about Ramirez's work. This decision could well be related to Respondent's desire to retaliate against Ramirez's husband, Jose Jimenez, one of the original FLSA plaintiffs. Wheeler testified that he watched Ramirez for the entire month of November. He noticed Ramirez scooping material on occasions on the recycling line, which is improper, on October 10 and on October 27 or 28. If Wheeler noticed her scooping material on any other day, he did not consider it significant enough to make a contemporaneous note in his day planner.

As noted earlier, the post-it notes in General Counsel's Exhibit 48(a), Wheeler's day planner, are not contemporaneous with the event recorded. I do not credit his post-it notes indicating that Juana Rosales chastised Ramirez for scooping material or that Wheeler observed Ramirez scooping material on any date in November. Indeed, his testimony at transcript 729 and 731 indicates, contrary to his post-it note, that Wheeler had no idea whether anyone chastised Ramirez for scooping material. Tomas Berganza did not testify to discussing this with Ramirez. Even Wheeler's day planner notes are suspect in that there are two versions, one showing that he observed Ramirez scooping material on Sunday, October 27, and the other with that date blank.¹³

Rosales testified about discriminatees Sanchez, Chavez and Ramos, but did not say word one about Yasmin Ramirez. There is no credible evidence that anyone chastised Ramirez about scooping material. Respondent's exhibits indicate that if it had any issues with Ramirez it involved her relationship with other employees, not the manner in which she performed her job.

For reasons not explained in this record, according to his day planner, Mark Wheeler, met with Martha Serpas on November 27, 2013.¹⁴ Berganza apparently acted again as translator. Serpas apparently complained about comments Ramirez made to her a month earlier. It is unclear whether Serpas made any complaints about Ramirez that were more recent. Afterwards, on the same day, Tomas Berganza sent an email about this meeting to Maximo and Alex Pierola and Respondent's office manager, Davys Ramos (GC Exh. 27). The email stated that Serpas complained that Ramirez teased her and recounted an incident that occurred in late October.

Wheeler testified that he requested that Respondent remove Ramirez from the Shady Grove site. On December 2, Berganza sent Alex Pierola and Davys Ramos an email stating that

¹³ Wheeler's post-it notes also recount that Ramirez would work faster when she was being watched than when she was not being watched. This is the same accusation he made about Reyna Sorto. He did not repeat this contention about Ramirez when testifying at the hearing. There is no indication about this in his contemporaneous day planner notes. This casts doubt in my mind as to whether either accusation was true.

¹⁴ Serpas did not testify in this proceeding.

Wheeler and Wyatt requested that Respondent remove Ramirez because she had no respect for her co-workers. He did not mention anything about scooping material or about Ramirez's work performance in any other respect.

That Berganza did not think Ramirez was a bad employee is established by the fact that he called Davys Ramos, then Respondent's office manager, and asked if Ramirez could be transferred to Respondent's recycling operation at Cockeysville, near Baltimore.¹⁵ Berganza's notes to Davys Ramos and Alex Pierola (GC Exh. 28) say nothing about Ramirez scooping material or any other problem with her work. Berganza only mentioned Ramirez' problems with Martha Serpas and other coworkers as reasons for MES request for her removal, which may have occurred over a month previously.

Davys Ramos called him back and told Berganza that Alex Pierola, Respondent's vice president, rejected this suggestion. There is no evidence in this record as to the reasons Respondent declined to transfer Yasmin Ramirez. She was fired instead.

The Regional Director issues a decision and direction of election on December 13, 2013

On December 13, 2013, the Regional Director for Region 5 issued a decision and direction for election, Case 05-RC-117169. The Regional Director found that an employer-wide bargaining unit, one that included Respondent's recycling employees and construction employees was appropriate. This finding was contrary to Respondent's contentions. The Regional Director also rejected Respondent's contention that a number of Respondent's crew leaders, who had the title of supervisor, were supervisors within the meaning of Section 2(11) of the Act.¹⁶

Respondent discharges Maria Elena Chavez on
December 13, 2013

Maria Elena Chavez worked for Respondent for about 10 years. She was generally considered one of, if not the most productive of Respondent's employees at the Shady Grove recycling center (Tr. 725). It appears that she was generally respected, but that some employees found her to be somewhat intimidating.

In September and October, a number of Respondent's employees were upset about the goggles they had been provided to protect their eyes. These goggles were apparently too big and caused employees to develop headaches. Chavez and Aracely Ramos complained to Berganza about the goggles on September 25. A group of five employees, including Yasmin Ramirez, complained to Berganza about the goggles on another occasion. Chavez also complained directly to MES personnel about the

¹⁵ Tomas Berganza's effort to have Yasmin Ramirez transferred from Shady Grove to Cockeysville, is somewhat inconsistent with the notion that MES' request that Ramirez be removed from Shady Grove originated with him. However, the unprecedented nature and number of the MES removal requests during the organizing drive leads me to conclude that none of these requests would have been made without the involvement of Respondent.

¹⁶ Respondent appears to have abandoned this contention in this unfair labor practice proceeding. Assuming that it hasn't abandoned it, Respondent failed to establish that any of the crew leaders or discriminatees in this case are statutory supervisors.

goggles.

On October 10, Chavez went to Berganza again to complain about the goggles. She said she wanted to talk to Mark Wheeler and David Wyatt about the goggles. Berganza told Chavez she was not permitted to complain about the goggles directly to MES. Chavez insisted on speaking to Wyatt and Wheeler. Berganza called them and they came to his office. Chavez made her complaints about the goggles to Wyatt and Wheeler in Spanish. Berganza translated her complaints into English. Wheeler promised to do something about the goggles.

Later that day Stedson Linkous, Respondent's safety manager, came to the recycling center. Linkous told Chavez that she was prohibited from contacting MES directly and that she would be suspended for seven days unless she apologized for going over the head of her supervisor. Linkous also told Chavez that if did something like this again she would be fired (Tr. 558).¹⁷

Respondent, as a general matter, forbids its employees to take complaints directly to MES. Other employees have also been disciplined pursuant to his rule.¹⁸

On December 10, at the end of the workday, Chavez had a verbal altercation with Juana Rosales, the MES employee working and supervising the recycling line. Someone swept cold dirty water onto Chavez, who was working a level below them. Chavez blamed another employee. Rosales claimed that she swept the water and may have been implying that Chavez was making the story up. Although Chavez was very angry, she did not touch Rosales and Rosales was not afraid that she would do so (Tr. 1364).

At some point Rosales complained to Berganza and the altercation came to the attention of MES Supervisor David Wyatt. Wyatt told Berganza that it was up to Respondent as to whether or not Chavez remained an employee at the Shady Grove recycling center. Neither Wyatt nor Wheeler requested nor recommended that Chavez be removed from the Shady Grove site.¹⁹

Berganza requested Chavez' personnel file from Respondent's main office. He reviewed that file and then decided that Chavez be removed from the site. One of the documents he reviewed was his October 10 memo chastising Chavez for complaining directly to MES about the goggles. Respondent

¹⁷ Linkous did not testify. Chavez's account of this incident is uncontradicted.

¹⁸ In complaint par. 14, the General Counsel alleged that Tomas Berganza violated the Act by instructing employees not to speak to representatives of MES concerning their working conditions and that Respondent violated the Act by threatening them with discipline for doing so. Restricting employees from taking complaints about working conditions outside of their "chain of command" is a clear violation of the Act, *Kinder Care Learning Center*, 299 NLRB 1171 (1990); *Guardsmark, LLC*, 344 NLRB 809-810 (2005) enfd. in relevant part 475 F. 3d 369 (D.C. Cir. 2007); *Trinity Protection Services*, 357 NLRB 1382 (2011); *Greenwood Trucking*, 283 NLRB 789, 792 (1987); *Central Security Services*, 315 NLRB 239, 253-254 (1994).

¹⁹ Wheeler's testimony at Tr. 723 that he requested Chavez's removal is, as demonstrated by Wyatt's testimony, clearly inaccurate.

then, by more senior management, discharged Chavez.²⁰

December 18, 2013: Tomas Berganza interrogates Respondent's recycling employees

On December 18, Tomas Berganza summoned each of Respondent's recycling employees at Shady Grove to his office. There he interrogated them individually. He asked at least some of them if they had signed union cards and how they intended to vote in the union election. At about the same time, he handed out a packet intimating that if the union won the representation election there would be closer scrutiny of the employees' immigration status.

December 24, 2013 meeting in Baltimore²¹

On December 24, 2013, Maximo Pierola met with construction employees at a worksite in Baltimore. He spoke against union representation and suggested that employees would fare better by negotiating directly with the company. Pierola passed out copies of a page from Mauricio Bautista's testimony at the representation case proceeding. In that testimony Bautista testified that many of Respondent's employees did not have bona fide documentation to work in the United States.

January 10, 2014: Respondent requests Board Review of the Regional Director's December 13, 2013 Decision and Direction for Election

In its request for review, Respondent challenged the Regional Director's determination that an employer-wide bargaining unit was appropriate. It also challenged the Regional Director's determination that its crew leaders were not statutory supervisors.

Respondent warns, then suspends, Jose Amaya for failing to submit daily job reports on time

As mentioned previously, on October 11, 2013, Maximo Pierola called Jose Amaya at work after learning that Amaya and other employees were thinking of suing him. Pierola told Amaya "that before he [Amaya] decided to do the things that he was doing, to think about his family" (Tr. 1141). On November 15, 2013, the Union advised Respondent that Amaya was one of its supporters.

On November 22, 2013, Respondent instructed its superintendents, project managers and crew leaders that at the end of each work day, they must email a report to the company office with the following information: job name, purchase order number, a summary of the work done, pictures of the job before work started and after it finished and the names of the employees who worked on the job (GC Exh. 39).

On December 11, Amaya submitted this report for the prior day somewhat late. Maximo Pierola administered a discipli-

nary warning to Amaya. He issued another such warning on December 16, to Amaya and Roberto Ayala, which he cancelled the next day.

On December 24, Maximo Pierola met with some employees at the Lakeland Recreation Center in Baltimore. He distributed copies of testimony given by Mauricio Bautista at the representation hearing of December 2, implying that many of Respondent's employees did not have bona fide immigration papers. He told employees not to trust Bautista. Pierola then proceeded to ask several employees their reaction to Bautista's testimony. Amaya defended Bautista and Pierola got angry with Amaya.

At this meeting, Pierola also suggested that he and the employees could settle their differences informally—without the Union.

On January 10, 2014 Respondent suspended Amaya for 7 days for his failure to submit daily job reports for work performed January 7–9. Amaya had notified Respondent that his cellphone was not working on January 9. One of Respondent's office secretaries informed all Respondent's managers to contact Mauricio Bautista, who was working with Amaya, instead of Amaya.

Amaya submitted the reports for all three days on January 10 at 3:43 a.m. and minutes thereafter. Amaya worked from 6 a.m. on January 8, until 2:30 a.m. on January 9. He also worked from 6 a.m. on January 9 until 2:30 a.m. on January 10.

No other employee has been suspended for failing to submit the daily job reports or for submitting them late, or was given any other discipline aside from possibly Mauricio Bautista.

Other employees either failed to submit daily reports or submitted them late without being disciplined. These include Norberto Araujo—before Respondent was aware of his joining the FLSA suit or any other protected activity, and Henry Castellon, for whom there is no evidence of any protected activity (GC Exh. 108(b)).

Mandatory employee meeting of February 27, 2014: Mail Ballot Election February 28 to March 14, 2014²²

The Board conducted a mail ballot representation election amongst Respondent's construction and recycling employees between February 28 and March 14, 2014. The day before balloting began, Respondent held a mandatory meeting for entire bargaining unit at its facility at Sligo, Maryland. Two employees, Mauricio Bautista and Domingo Zamora, were not invited to the meeting.

Maximo Pierola encouraged employees to vote against union representation. He described Bautista and Zamora as "rotten apples" and stated that the other employees should not listen to them (Tr. 971). In response to a question, Pierola stated that if the Union kept bothering him, he could either close the compa-

²⁰ The General Counsel contends that Respondent by Tomas Berganza made the decision to remove Maria Chavez from the Shady Grove recycling center without reference to her personnel file. This is not entirely clear. Certainly, Berganza and Alex Pierola were aware of the contents of her personnel file by the time she was terminated on December 13. I find that it was relied upon and moreover, as explained herein, Chavez' removal from the jobsite and termination violated the Act regardless of whether Respondent considered her personnel file.

²¹ Complaint par. 11.

²² The Region's Order of August 1, 2014, consolidating Case 5–CA–131619 with the prior matters alleges that Respondent violated Sec. 8(a)(1) of the Act in several respects at the February 27, 2014 meeting (GC Exh. 1-BB).

ny, get subcontractors or go bankrupt (Tr. 972).²³

Maximo Pierola also suggested that the employees' grievances could be resolved with resort to private mediation between the company and its employees. Norbert Araujo responded that Maximo Pierola had been promising to resolve employee grievances for the past 25 years, but never did so. Pierola responded that this would change.

The election was conducted as scheduled. However, the ballots were impounded and apparently have not yet been tallied (Tr. 57–58).

Araujo receives a warning for working overtime
without permission²⁴

The day after Araujo spoke up at the February 27 meeting, Respondent issued him a written warning for working overtime without permission. Since the October 25 memo was issued, Araujo had worked overtime on numerous occasions without getting permission from Maximo Pierola, Alex Pierola, or Kenneth Brown. He was not disciplined on any of those occasions.

April 2014 conversation between Maximo Pierola and Geremias Berganza²⁵

In February 2014, Geremias Berganza was assigned to work at the MES recycling center in Cockeysville, Maryland. While working there, he sustained an injury to his eye. Afterwards, he performed work at the home of Alex Pierola, Maximo's son. Respondent paid Geremias in cash for this work. Geremias believed he was not paid properly and complained to Union Organizer Sandro Baiza.

In April 2014 Maximo Pierola called Geremias. He told him that he could sue him for defamation and that he would fire him in person.

April 23, 2014: Respondent orders Norbert Araujo to return his company truck (complaint par. 21)

Norbert Araujo signed a consent form to join the FLSA class action suit on February 10, 2014 (GC Exh. 67). He testified that he informed Alex Pierola of that fact on March 6, after Alex Pierola had given him a written warning for working overtime without approval (Tr. 980–983). Araujo's testimony is uncontradicted and therefore credited. Araujo's consent form was filed with the United States District Court on May 5, 2014 (GC Exh. 13).

On April 23, Alex Pierola ordered Araujo to return his company van. The General Counsel alleges that this was done to retaliate against Araujo assumedly for joining the FLSA suit and challenging Maximo Pierola at the February 27, 2014 employee meeting. Prior to April 23, Respondent had provided Araujo with a company van to drive from home to work since 1992. In April 2014 that van was a Ford Araujo had been driving for 4–5 years.

Kenneth Brown testified that he attended a manager's meeting at which it was decided to reduce the number of company

²³ One company to which Respondent subcontracts is Z Maxim, which is owned by Maximo Pierola's daughter.

²⁴ This was not pled as a violation of the Act. I assume that Araujo's testimony about this warning was elicited to establish discriminatory animus towards him.

²⁵ Complaint par. 12.

vehicles at the Arlington County courthouse/detention center from 5 to 4. He did not testify when this meeting occurred or why it was determined that Araujo, as opposed to another employee, should lose use of his company truck. It also appears that at some unspecified point in time, Respondent could have reassigned the truck driven by Manuel Medrano, rather than that driven by Araujo (Tr. 1330–1331). In the absence of any explanation for why it was Araujo who lost use of the company vehicle, I find this action was discriminatorily motivated.

Lay-offs and terminations of Nestor Sanchez and
Hernan Latapy

Between January 21, 2014 and April 25, 2014 Tito employees Nestor Sanchez and Hernan Latapy were performing painting work at the Washington D.C. Convention Center. Sanchez was one of three employees fired by Respondent in 2012 and then reinstated, in part due to the efforts of Union Organizer Sandro Baiza.

On April 25, 2014, Manuel Alarcon informed Norbert Araujo, who had been working in Arlington County, that he was going to be assigned to the Convention Center and that Latapy was going to be sent to paint in Maryland. Nestor Sanchez would be sent to work in Arlington.

Latapy told the D.C. Government supervisor, Juan Jimenez, about the change. Jimenez insisted that Latapy stay at the Convention Center. Respondent insisted on the change. As a result, either the D.C. Government kicked Respondent off the job, or Respondent abandoned the project. Araujo stayed at Arlington and Respondent did not give Latapy or Sanchez any more work as employees of Tito Contractors. In June 2014, Respondent's superintendent, Fermin Rodriguez, told Sanchez that there was plenty of work and suggested that he "fix it with Tito or with the lawyers" (Tr. 887). Kenneth Brown's testimony at transcript 1324–1325 and 1650, as well as Milton Antezana's at transcript 1741–1744, also indicates that Respondent had plenty of work for Latapy and Sanchez in the summer of 2014.

Fermin Rodriguez called Latapy on May 22 or 23, and offered him employment as a subcontractor of Respondent, or as an employee of a subcontractor. Fermin Rodriguez operates a company called RDI Construction which performs some or all of its work pursuant to a subcontract with Respondent. Some employees of Respondent have performed work for RDI, including drywall and plumbing work at Kenmore Middle School in Arlington, Virginia. This record also establishes that individuals who worked as Tito employees prior to the summer of 2014, such as Jose Granados and Angel Alvarado, were removed from Respondent's payroll but continued to perform work for Respondent at other sites, such as the Candlewood School in Maryland, either as subcontractors or employees of a subcontractor (GC Exh. 10(b) and R. Exh. 30).

Latapy declined to work for Respondent as a subcontractor. During this conversation Fermin Rodriguez encouraged Latapy to accept Respondent's offer because after the lawsuit was finished, Maximo Pierola "would fire all those son-of-a-bitches," (Tr. 1088–1089).

On June 25, 2014, Respondent terminated Latapy, ostensibly for refusing to report to work at a job site in Howard County,

Maryland. There is no evidence that Respondent ordered Latapy to report to such a jobsite. Thus, I credit his testimony that this never happened (Tr. 1095).

New or strictly enforced policy requiring prior high level approval of overtime work in advance

On October 25, 2013, Respondent issued to its construction employees a memorandum stating that, prior to working overtime, employees must get prior approval from either Maximo or Alex Pierola or Kenneth Brown. Alex Pierola testified that Respondent had a policy requiring prior approval for overtime from top management prior to the filing of the FLSA lawsuit. However, he admitted that this policy was not strictly enforced until after the suit was filed (Tr. 1435). There is no evidence that any construction employees had ever been informed that such a policy existed prior to the filing of the FLSA suit.

Discriminatory and/or retaliatory withholding of overtime work

The General Counsel alleges that Respondent has been withholding overtime work from certain employees in a discriminatory manner, and/or to retaliate against them for their protected activities.

The General Counsel and Respondent in their briefs focus on different portions of Respondent's payroll records in arguing whether or not there was any discrimination against the FLSA plaintiffs. Much of this evidence is amorphous. However, I find that Respondent violated the Act in discriminating against the 7 employees who were identified as plaintiffs prior to November 2, 2013, by withholding overtime work from them during the pay period ending on that date. Indeed, the chart attached to Respondent's brief as exhibit A establishes discrimination in assigning or allowing overtime work. Not one of the construction employees who had been named in the initial FLSA complaint (Roberto Ayala, Mauricio Bautista, Geremias Berganza, Hector Delgado, Sabino Diaz, Jose Jimenez, and Domingo Zamora) worked an hour of overtime that pay period.²⁶

General Counsel Exhibit 10 and well as Respondent's chart establishes that many of Respondent's employees, who either had not yet joined the suit, or never joined, worked many hours of overtime during that pay period. These include: Hector Cortez, 42 hours of overtime; Norberto Araujo, 38 hours; Henry Castellon 34 hours; Jose Granados, 33 hours; Leonel Rosales 23 hours; Manuel Medrano, 52 hours; and Manuel Rodriguez 21 hours. There is no explanation in this record for this disparity. Thus, as more fully discussed in the analysis section of this decision, I find it was discriminatorily motivated consistent with the threats from Respondent's managers that the company would discriminate against the plaintiffs.

I leave to compliance whether or not there was discriminatory allocation of overtime in other pay periods. There is evidence that suggests as much. Certain employees, for example, Robert Ayala, a party to the FLSA suit, have experienced a dramatic drop in the number of overtime hours they have worked since the suit was filed. Respondent has not offered any explanation as to why this is so (Tr. 1443-1446, GC Exh. 10, p.

²⁶ Respondent was not aware that Luis Palacios had joined the lawsuit until November 13, 2013.

8).

In July 2014 Respondent prohibited any overtime work at the Arlington County detention center and courthouse. Maximo Pierola and Manual Alarcon instructed Project Superintendent Jorge Ramos that if employees had to work on a Saturday, they would have to take a day off on a weekday (GC Exh. 104).

Respondent discharges Mauricio Bautista²⁷ on August 1, 2014 (Case 05-CA-134285)

Mauricio Bautista worked for Tito Contractors from June 30, 2004, until August 1, 2014. Ever since 2006, he had worked primarily at the Arlington County detention center, almost always as a crew leader. Prior to July 25, 2014, Respondent had never disciplined Bautista.

On July 23, Respondent replaced Bautista as crew leader at Arlington with Jose Amaya, after Bautista refused to sign a document stating his liability if his company cell phone was either lost or damaged. Respondent's superintendent, Jorge Ramos, also found Bautista's crew taking a coffee break on the jobsite when they may not have been authorized to do so.²⁸

On July 24, Amaya informed Bautista that he was being transferred to the Candlewood Elementary School in Rockville, Maryland the next day. According to Respondent's position statement (GC Exh. 202), this was to be a temporary assignment. Bautista was to return to Arlington upon completion of his assignment at Candlewood. Unlike other temporary assignments of this nature, Respondent did not provide Bautista with a company vehicle to get to the Candlewood jobsite.

Maximo Pierola decided to transfer Bautista from Arlington to Candlewood. Jorge Ramos, Respondent's superintendent overseeing the Arlington contracts, did not want Bautista transferred (GC Exh. 206). Ramos was concerned as to whether employees slated to replace Bautista had the proper clearances to work inside the detention center. Manual Alarcon, who apparently outranked Jorge Ramos, insisted that Bautista, not any other employee, go to Candlewood. There is no explanation for this insistence. Bautista was not happy with this transfer since it doubled his commuting time, a fact of which Respondent was most likely aware (GC Exh. 206).

At Candlewood, Respondent's employees were hanging double doors in door frames. Contrary to the suggestions of Respondent, the record establishes that hanging the double doors at Candlewood was not a routine task that any of Respondent's experienced employees could perform. Milton Antezana, Respondent's jobsite superintendent at Candlewood, testified as to how Bautista ended up at his project:

Well, I called the office because we need someone who knows to install the continuing hinge. You cannot make the mistake, because if you made mistakes, that hinge is not good anymore.

And I was specific when I called out to say I need a carpenter who knows. And they told me I got one person who he has a lot of experience in this. And, okay, I say fi-

²⁷ Bautista's full name is Jose Mauricio Lopez Bautista. In Respondent's payroll records (GC Exh. 10(b)), he is listed as Lopez Bautista, Jose M.

²⁸ Jorge Ramos did not testify in this proceeding.

ne, then that will be great for me. So that's when they sent him.

(Tr. 1685–1686; also see Tr. 1690–1691, 1726.)

Antezana also testified that the reason he asked for someone who knew how to install a continuous hinge was that Jose Granados, who worked at the site from January to July made a lot of mistakes (Tr. 1719–1720, 1733).²⁹

In fact Bautista did not have any experience in installing doors with a continuous hinge. There is no evidence that Respondent made any effort to determine whether Bautista or any of its other employees has the experience and skills that Antezana was seeking. After Respondent terminated Bautista, it did not send Antezana a carpenter to replace him (Tr. 1717–1718). This suggests that it was not imperative to transfer Bautista to Candlewood and that the decision to send him to Candlewood was a “set up” designed to provide an excuse to terminate him.³⁰

Bautista did not report to Candlewood on Friday, July 25 as directed. He emailed Superintendent Manual Alarcon at 5:56 a.m. that he was ill and could not report to work. Pursuant to Alarcon's direction, Bautista forwarded his email to the job superintendent, Milton Antezana.

Bautista reported to Candlewood on Monday, July 28. Antezana told him to hang a double door on the building exterior. Bautista told Antezana he had never erected a door like this before. The door has a 79-inch continuous hinge. Bautista had hung doors before, but only the type with several 4 ½ inch hinges. Moreover the double door did not come with a pre-manufactured door frame which corresponding holes already drilled. The installer had to line up the holes in the hinge and drill properly aligned holes into the door frame, before installing the screws through the holes in the hinge and the door frame.

²⁹ Jose Granados worked at Candlewood as late as July 18, 2014, R. Exh. 30. Granados was an employee of Tito Contractors through June 14 and then apparently began working for Respondent as a contractor, rather than as an employee (GC Exh. 10 (b)). Respondent's payroll records show that Granados worked as a Tito employee doing carpentry work at Candlewood (Job # OMD –C-13001 500X050, GC Exh. 102, p. 19) as early as the pay period ending December 28, 2013 and through the pay period ending June 14, 2014. His wage rate was \$15.50 per hour. Bautista's wage rate was \$17 per hour. Angel Alvarado, who performed carpentry work at Candlewood from as early as April 19, through July 2014 was paid \$13 and then \$14 per hour. After the pay period ending July 12, 2014, Alvarado also appears to have worked at Candlewood as a subcontractor because he no longer appears on Respondent's payroll records.

I note that GC Exh. 10 and 10(a) are Respondent's payroll records from pay periods prior to December 14, 2013. GC Exh. 10(b) are the payroll records for the pay period ending December 14, 2013 through August 9, 2014. In the bound exhibits, GC 10 (a) and (b) are in a separate binder from GC Exh. 10, which is for exhibits admitted at the September 11 and 12 sessions. The manner in which they are bound makes it very difficult to read the dates. However, this can be done more easily from the electronic version of the exhibits.

³⁰ There is also no explanation for why other employees, such as Francisco Garza, who had performed carpentry work at Candlewood between December 2013 and March 2014, were not sent to that site in July, instead of Bautista, or to replace Bautista (GC Exh. 10(b)).

On July 28, Bautista and Angel Alvarado hung 2 double doors. The next day, Tuesday, July 29, Bautista hung one double door by himself. At least one of the screws attaching the door hinge to the door frame was not properly aligned. At some point neither of the two chargers for his drills were charged. On Wednesday, when Bautista reported to work, Antezana told him he was not supposed to be there. However, Antezana then asked Bautista if he would help install some door frames. Bautista declined on the grounds that he was not authorized to be at the site that day. Later that day, Bautista spoke to Superintendent Fermin Rodriguez, who offered to seek authorization for Bautista to work that day at Candlewood. Bautista told Fermin that he was already too far from Candlewood and did not want to go back.

On Thursday, July 31, Antezana gave Bautista two doors to hang. After drilling the holes for the screws and installing the screws, Bautista asked Antezana for help in lifting the doors. The screws were not properly aligned and Antezana had difficulty getting one screw out.

Antezana told Bautista that he would have to tell Respondent's office that no doors had been erected that day. He also handed Bautista a warning for being absent on July 25 and not providing a doctor's note.

At 5:30 p.m. on July 31, Manual Alarcon called Bautista and told him that Antezana did not want him working at Candlewood because he didn't know how to hang doors. On August 1, 2014, Respondent's superintendent, Alfonso Caviedes, called Bautista and told him he had been terminated. Caviedes read Bautista a letter signed by Respondent's general manager, Kenneth Brown. The letter stated that Maximo Pierola directed Brown to terminate Bautista because of “his failure to perform basic carpentry duties such as installing door frames and hanging doors at your last job assignment.” (GC Exh. GC 188(a).)

Analysis

III. THE ALLEGED SECTION 8(A)(3) AND (1) VIOLATIONS

General Principles

Each of the alleged violations must be analyzed independently; however, the context in which they occurred must also be considered. Related unfair labor practices are highly relevant in determining both the credibility of witnesses and Respondent's motive with regard to a particular allegation. Unlawful discrimination against one prounion employee based on anti-union animus often supports an inference that the same animus motivated its actions against other prounion employees, *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003). This is particularly true where, as in this case, Respondent's obvious discrimination against several of its prounion employees establishes hostility to unionization and employees' Section 7 rights, See *NLRB v. DBM, Inc.*, 987 F. 2d 540 (8th Cir. 1993); *Reeves Distribution Service*, 223 NLRB 995, 998 (1976).

In order to prove a violation of Section 8(a)(3) and (1), the General Counsel must generally make an initial showing that (1) the employee was engaged in protected activity; (2) the employer was aware of the activity; and (3) that animus towards the protected activity was a substantial or motivating reason for the employer's action.

However, it is not always the case that the General Counsel

must establish that an individual discriminatee engaged in union or other protected activity or that a Respondent was aware of an individual employee's union activity. For example, where an employer institutes an unprecedented mass discharge in the context of a union organizing campaign, knowledge of each employee's protected activity is unnecessary for the General Counsel in proving illegal discrimination. Indeed, the knowledge of any of the individual's protected activities may be unnecessary, as in this case, when the employers is aware of union or other protected activity, and has, as in this case, suspicions as who is involved and bears considerable anti-union animus, *Hunter Douglas, Inc.*, 277 NLRB 1179 (1985), enfd. 804 F.2d 808 (3d Cir. 1986). Moreover, in the context of an organizing drive, it is a violation of Section 8(a)(3) to discharge a neutral employee in order to facilitate or cover-up discriminatory conduct against known union supporters, See *Bay Corrugated Container*, 310 NLRB 450, 451 (1993), enfd. 12 F. 3d 213 (6th Cir. 1993).

Once the General Counsel makes this initial showing, the burden of persuasion shifts to the Respondent to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity, *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981); *La Gloria Oil & Gas Co.*, 337 NLRB 1120 (2002).

Respondent makes much of the fact that many of its employees who joined the FLSA suit are not alleged discriminatees. However, it is well established that an employer's failure to take adverse action against all union supporters, or employees who engaged in other protected activity, does not disprove discriminatory motive, otherwise established, for its adverse action against a particular employee, See *NLRB v. Nabors*, 196 F. 2d 272, 276 (5th Cir. 1952); *Master Security Services*, 270 NLRB 543, 552 (1984); *Volair Contractors, Inc.*, 341 NLRB 673, 676 fn. 17 (2004). Moreover, according to Fermin Rodriguez's statement to Hernan Latapy at Tr. 1088–1089 that Maximo Pierola would fire all the SOBs when the lawsuit was over, this may just be a matter of time and opportunity.

The 8(a)(3) allegations involving Respondent's construction employees

All of the alleged discriminatees who worked in Respondent's construction division, Mauricio Bautista, Jose Amaya, Roberto Ayala, Jose Diaz, Geremias Berganza, Hector Delgado, Sabino Diaz, Jose Jimenez, Hernan Latapy, Luis Palacios, Nestor Sanchez, and Domingo Zamora engaged in protected activity both by joining in the class action lawsuit against Respondent under the FLSA and by supporting the Union.³¹ Respondent was aware of the protected activity of all of these employees.

Moreover, the record is replete with evidence of Respondent's animus to these employees and their protected activities. For example, Hernan Latapy's testimony that Fermin Rodriguez told him that Respondent's owner, Maximo Pierola "would fire all those son-of- a-bitches," after the lawsuit is

finished, is uncontroverted. Fermin Rodriguez, when called as a witness by the General Counsel, neither denied making this statement nor testified that he had no basis for making the statement. I infer that Maximo Pierola informed Fermin Rodriguez that this is precisely what he intended to do.

On this basis alone, I find that the General Counsel has met his initial showing of discrimination with regard to all the alleged adverse actions. Moreover, largely because Respondent put on no evidence to prove an affirmative defense in many of these instances I find that Respondent violated the Act as alleged. To the extent Respondent has offered an explanation for the adverse actions taken against the alleged discriminatees, I find these explanations to be pretextual.

As to specific employees, the record shows as follows:

Mauricio Bautista: Respondent offered no testimony as to why it decided to terminate Mauricio Bautista as opposed to transferring him back to his job at Arlington which he had performed acceptably for years. Moreover, the record establishes that Respondent treated Bautista disparately than other employees who mishandled a particular assignment. Even with regard to the Candlewood project, it is clear that Jose Granados and others performed shoddy work and were not disciplined at all. At a jobsite in Alexandria, several employees, particularly Francisco Garza, did such poor work that Respondent lost its contract. However, there is no evidence that any of them was disciplined. Finally, this record makes it very clear that Maximo Pierola's animus toward the protected activity of all employees was particularly focused on the "rotten apples, spoiling the whole bunch," Bautista and Domingo Zamora.

Hernan Latapy and Nestor Sanchez: There is absolutely no evidence that Respondent did not have work for Latapy and Sanchez. Indeed, the record strongly suggests just the opposite.

Norberto Araujo: There is no evidence as to why a company vehicle was taken away from Araujo as opposed to other employees the Arlington project. Moreover the timing of this action strongly suggests discriminatory motive.

Jose Amaya: Respondent's disparate treatment of Amaya's filing job reports late as opposed to its inaction with regard to other employees who also filed the reports late strongly suggests discriminatory motive.

As to the withholding of overtime from the alleged discriminatees: the uncontradicted evidence shows that Respondent told these employees it would discriminate against them and that it did so.

I find that Respondent violated the Act as alleged with regard to each of these employees.

By restricting the overtime of its employees, and instituting a policy requiring the advance approval of overtime by Respondent's top management, Respondent violated Section 8(a)(3) and (1)

Respondent has a facially appealing defense to the allegation that it violated the Act by instituting the policy requiring top

³¹ Concertedly filing and maintaining a lawsuit under the FLSA is concerted activity protected by the NLRA, *U Ocean Palace Pavilion, Inc.* 345 NLRB 1162 (2005).

management approval of all overtime. Of course, Respondent had to insure that it was in compliance with the FLSA regardless of whether or not it complied with this statute before its employees sued it. However, under Board law, specifically *Wright Line*, 251 NLRB 1083 (1980), it is not enough for an employer to present a legitimate reason for its actions. Once, as in this case, where the General Counsel has made an initial showing that discrimination and or retaliation for protected activity was a motivating factor in an adverse employment action, the respondent employer must establish that it would have taken the steps it took regardless of the protected activity.

The Act does not allow an employer to substitute “good reasons” for the “real reasons.” In order to meet its burden, once the General Counsel has made his initial showing of discrimination, it is not enough for the Respondent to show that it *could have* taken action for a non-discriminatory reason, it must establish that it in fact took the action for such legitimate purpose, *Structural Container Industries*, 304 NLRB 729,730 (1991); *Yellow Ambulance Service*, 342 NLRB 804, 805–806 (2004); Also see *Watsonville Register-Pajaronian*, 327 NLRB 957–961 (1999) [compliance with the FLSA did not necessitate the employer taking the actions it took in violation of Section 8(a)(5)].

Here, there is no question that Respondent bore tremendous animus towards the protected activity of its employees, and indeed took discriminatory action against some of the employees who participated in the FLSA lawsuit. Respondent has put forth one possible way of complying with the FLSA. It has put forth no evidence as to why it chose this manner of complying with that statute, as opposed to, for instance, paying them the wages they were entitled to under the FLSA.

Alleged Independent 8(a)(1) violations regarding the construction employees

The test of whether a statement violates Section 8(a)(1) is whether Respondent’s conduct would reasonably tend to interfere with, threaten, or coerce employees in the exercise of their Section 7 rights, *Alliance Steel Products*, 340 NLRB 495 (2003); *Southwestern Bell Telephone Co.*, 251 NLRB 625, 631–632 (1980). I find that the following statements by Respondent are violative under this standard:

Superintendent Fermin Rodriguez’ statements to Domingo Zamora, Geremias Berganza, and others in October 2013 that employees who participated in the FLSA lawsuit would not be allowed to work overtime.

Owner Maximo Pierola’s statements to Jose Amaya on October 11, 2013, that he should think about his family before taking legal action against Respondent;

Owner Maximo Pierola’s statements to Geremias Berganza on October 11, that employees were stabbing him in the back by filing the FLSA lawsuit and that he did not want backstabbers in his company and that there were thousands of jobs elsewhere.

Maximo Pierola’s statements to employees on December 24, 2013, indicating that their workplace issues could be resolved if they eschewed union representation.

Owner Maximo Pierola’s February 27, 2014, characterization of Mauricio Bautista and Domingo Zamora as “rotten apples” which was based on their union and other protected activ-

ity.

Owner Pierola’s threat on February 27 to close his company or subcontract out most or all of his work.

Maximo Pierola’s statement to Geremias Berganza that he could sue him for defamation and would fire him in person.

Fermin Rodriguez’ statement to Nestor Sanchez indicating that he could get work if he “fixed it” with Tito or his lawyers. This was an attempt to coerce Sanchez from withdrawing from the lawsuit.

Fermin Rodriguez’ statement to Hernan Latapy that Maximo Pierola would fire all the SOBs when the lawsuit was over.

Legal Analysis with regard to the 5 discharges of employees at the Shady Grove Recycling Center

In an approximately 6-week period from October 30, 2013, to December 13, 2013, Respondent discharged 5 of its employees at the Shady Grove recycling center. These discharges occurred during the Union’s organizing campaign and all five engaged in union activity. Four of these employees were removed from that site at the request of MES, which had the contractual right to request their removal. The number of discharges and requests for removal of employees by MES was unprecedented.

The record shows that MES rarely requested that Respondent remove an employee prior to October 30. Mark Wheeler had been MES’ operations manager at Shady Grove for 11 years. He could specifically recall requesting the removal of only one employee, Sandra Melgar between 2010 and October 30, 2013.³² The discriminatees in this case were treated in a much different manner than was Melgar. Wheeler’s day planner shows that he became concerned about her performance on January 7, 2013. He noted further complaints about Melgar’s performance on February 18, 2013, but did not ask for her replacement until April 18, 2013.

Wheeler’s conduct with regard to Keila Diaz in July 2011 also offers a sharp contrast with the conduct of Wyatt and Wheeler with regard to the discriminatees. Diaz was found sleeping in her car during work time on July 5, 2011. He emailed Berganza’s predecessor that this type of behavior would not be tolerated, but did not request her removal (R. Exh. 2).

There is no evidence that David Wyatt, Wheeler’s superior, had ever requested that Respondent remove an employee prior to October 30, 2013. As set forth below, I find that MES’ request for the removal of 4 of Respondent’s employees during a union organizing drive was not a coincidence.

It is true that during the period in question, MES had concerns about productivity at the Shady Grove facility. In part (GC Exh. 14). The 5 discriminatees were not the low producers on those tests. Indeed, Maria Ellen Chavez was the highest producer and Reyna Sorto and Aracely Ramos were also among the high producers. There is no convincing nondiscriminatory explanation for why Mark Wheeler started monitoring Reyna

³² Andrea Monroy abandoned her job on January 18, 2013 (GC Exh. 82). There is no evidence that MES requested her removal. Moreover, Monroy received three warnings for misconduct, while some of the discriminatees in this case were removed from the site and discharged without warning.

Sorto's and Yasmin Ramirez' productivity as opposed to the employees whose productivity was low even when they knew they were being tested, such Sylvia Sandino, Miriam Mejia, and Adriana Villavicencio.³³ There is absolutely no non-discriminatory correlation between MES' productivity concerns and its requests for the removal of the discriminatees.³⁴

There is no evidence that Respondent positively knew of the union activities of any of the discriminatees until November 15, 2013, when the Union identified them in a letter to Respondent. By that time Maria Sanchez and Aracely Ramos had already been discharged. Reyna Sorto may also have been discharged before Respondent knew for sure that she supported the Union. Respondent had been informed of Yasmin Ramirez' and Maria Ellen Chavez' support for the Union before it discharged them.

As stated earlier, Tomas Berganza, Respondent's supervisor at Shady Grove knew of union activity and at least suspected that all five discriminatees supported the Union before they were discharged. Also as discussed at the outset of this decision, I find that Berganza began operating as Respondent's agent in opposing union organizing before Maria Sanchez's discharge on October 30, 2013.

Consistent with the *Wright Line* analysis above, I find that MES would not have requested the removal of Maria Sanchez, Aracely Ramos, Reyna Sorto, and Yasmin Ramirez³⁵ but for the involvement of Respondent. I find that this involvement was motivated by Respondent's animus towards the known or suspected union activity and/or other protected activity (complaining about the goggles).

Respondent has not shown that MES would have, independently, without its involvement, have sought the removal of the five alleged discriminatees from the Shady Grove jobsite. This record shows that all the information that Mark Wheeler and David Wyatt, both of whom speak little or no Spanish, based their removal requests, came from Tomas Berganza. Thus, each of these requests was influenced by Respondent's antiunion animus.

I find that the Respondent's termination of these employees, the removal of Maria Chavez from the Shady Grove site and her termination were also motivated at least in part by the discriminatees' union and other protected activity (e.g. Chavez' complaining directly to MES about the goggles).

³³ Mejia and Villavicencio are identified as union supporters in the Union's November 14, 2013 letter to Respondent.

³⁴ There is a correlation, however, between Respondent's awareness of the FLSA suit and MES' monitoring of Yasmin Ramirez. I find that the impetus for this monitoring came from Respondent and was related to her husband's participation in the FLSA suit. Discrimination against an employee's family members in such circumstances violates the Act, *PJAX*, 307 NLRB 1201, 1203-1205 (1992), enfd. 993 F.2d 378 (3d Cir. 1993).

³⁵ Tomas Berganza's effort to have Yasmin Ramirez transferred from Shady Grove to Cockeysville, is somewhat inconsistent with the notion that MES request that Ramirez be removed from Shady Grove originated by him. However, the unprecedented nature and number of the MES removal requests during the organizing drive leads me to conclude that none of these requests may have made without the involvement of Respondent.

REMEDY

The Respondent, having discriminatorily discharged five of its recycling employees, must offer them reinstatement and notify the Maryland Department of Environmental Services in writing that it has no objection to their reinstatement to their former positions or substantially equivalent positions at the Shady Grove recycling center. Respondent must also make them whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatee(s) for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Don Chavas d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³⁶

ORDER

The Respondent, Tito Contractors, Washington, D.C., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, laying-off or otherwise discriminating against any employee for supporting International Union of Painters and Allied Trades, District Council 51, or any other union, or for engaging in other protected concerted activity, including participating in a class action lawsuit.

(b) Coercively interrogating any employee about the union support or union activities of that employee or any other employee.

(c) Coercing employees regarding their participation in protected concerted activity such as participating in a class action lawsuit.

(d) Promising benefits to employees if they refrain from engaging in union or other protected activity, such as a class action lawsuit.

(e) Threatening to withhold overtime from employees who engage in protected activity, including participating in a class action lawsuit.

(f) Withholding overtime from employees who participate in a class action lawsuit.

(g) Initiating a policy requiring high-level management advance approval of overtime work in response to protected activity, or strictly enforcing such a policy which had not been enforced prior to the filing of a collective- action lawsuit or other protected activity.

(h) Maintaining and enforcing a rule which prohibits em-

³⁶ 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.

ployees from taking complaints about their working conditions outside their "chain of command."

(i) Taking any action to encourage employees of the Maryland Environmental Services Department to request removal of employees from a jobsite in retaliation for any suspected or actual union or other protected concerted activity.

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

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

(a) Within 14 days from the date of the Board's Order, offer Maria Sanchez, Aracely Ramos, Reyna Sorto, Yasmin Ramirez, and Maria Chavez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Within 14 days from the date of the Board's Order notify the Maryland Environmental Services Department in writing that it has no objection to the reinstatement of Maria Sanchez, Aracely Ramos, Reyna Sorto, Yasmin Ramirez, and Maria Chavez to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and request their return to the Shady Grove (Derwood), Maryland facility.

(c) Within 14 days from the date of the Board's Order, offer Mauricio Bautista, Hernan Latapy, and Nestor Sanchez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Make Maria Sanchez, Aracely Ramos, Reyna Sorto, Yasmin Ramirez, Maria Chavez, Mauricio Bautista, Hernan Latapy, Nestor Sanchez, and Jose Amaya whole for any loss of earnings and other benefits suffered as a result of the discrimination against them as specified in the remedy portion of this decision.

(e) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges, removal from the Shady Grove jobsite and discipline of Maria Sanchez, Aracely Ramos, Reyna Sorto, Yasmin Ramirez, and Maria Chavez and within 3 days thereafter notify them in writing that this has been done and that their discharges and illegal discipline and removals will not be used against them in any way.

(f) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges or other discipline or adverse action concerning Mauricio Bautista, Hernan Latapy, Nestor Sanchez, and Jose Amaya and within 3 days thereafter notify them in writing that this has been done and that their discharges and illegal discipline and lay-offs will not be used against them in any way.

(g) Within 14 days from the date of the Board's Order, restore to Norberto Araujo the use of a company vehicle comparable to the vehicle he drove prior to April 2013.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause

shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its Washington, D.C. office and the Shady Grove (Derwood), Maryland recycling facility, copies of the attached notice marked "Appendix"³⁷ in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on the intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, as its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 11, 2014.

(j) Within 14 days after service by the Region, hold a meeting or meetings during working hours, which will be scheduled to ensure the widest possible attendance of employees, at which time the attached notices marked "Appendix" is to be read to its employees by a Board agent in English, Spanish and any other language spoken by more than three employees in the presence of Respondent's President/Chief Executive Office or highest ranking human resources official.

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

Dated, Washington, D.C., November 4, 2014.

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.

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge, lay-off or otherwise discriminate against any of you for supporting International Union of Painters and Allied Trades, District Council 51, or any other union, or for engaging in other protected concerted activity, including participating in a class action lawsuit.

WE WILL NOT coercively question you about your union support or activities or the protected activities of you or other employees.

WE WILL NOT promise you benefits if you refrain from union or other protected concerted activity, such as participating in a class action lawsuit.

WE WILL NOT otherwise coerce you with regard to your union or other protected activities by (1) threatening to withhold overtime work; (2) actually withholding overtime work; or (3) instituting or strictly enforcing a rule requiring you to seek high-level management approval before working overtime.

WE WILL NOT coerce, restrain, or interfere with you communicating with our clients or other third parties about your wages, hours or other terms and conditions of employment.

WE WILL NOT discipline you or threaten to discipline you for doing so.

WE WILL NOT do anything to encourage employees of the Maryland Environmental Services Department, or any other entity to request your removal from a job or jobsite in retaliation for any suspected or actual union or other protected concerted activity.

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

WE WILL rescind our rule that prohibits you from speaking to representatives of the Maryland Environmental Services Department, or any other entity regarding your wages, hours and terms and conditions of employment.

WE WILL, within 14 days from the date of this Order, offer full reinstatement to Maria Sanchez, Aracely Ramos, Reyna Sorto, Yasmin Ramirez, and Maria Chavez their former jobs or, if those jobs no longer exist, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL request in writing that the Maryland Environmental Services Department reinstate Maria Sanchez, Aracely Ramos, Reyna Sorto, Yasmin Ramirez, and Maria Chavez to their former jobs at the Shady Grove (Derwood), Maryland recycling station and state that we have no objection to their being returned to these positions.

WE WILL, within 14 days from the date of this Order, offer full reinstatement to Mauricio Bautista, Hernan Latapy, and Nestor Sanchez to their former jobs or, if those jobs no longer exist, to a substantially equivalent position, without prejudice to

their seniority or any other rights or privileges previously enjoyed.

WE WILL make Maria Sanchez, Aracely Ramos, Reyna Sorto, Yasmin Ramirez, and Maria Chavez whole for any loss of earnings and other benefits resulting from their discharges and other discrimination, less any net interim earnings, plus interest compounded daily.

WE WILL make Mauricio Bautista, Hernan Latapy, Nestor Sanchez, and Jose Amaya whole for any loss of earnings and other benefits resulting from their discharges and other discrimination, less any net interim earnings, plus interest compounded daily.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge or layoffs and discipline of Maria Sanchez, Aracely Ramos, Reyna Sorto, Yasmin Ramirez, Maria Chavez, Mauricio Bautista, Hernan Latapy, Nestor Sanchez, and Jose Amaya and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges, layoffs and discipline will not be used against them in any way.

WE WILL NOT restore to Norberto Araujo the use of a company vehicle comparable to the vehicle he drove prior to April 2013.

TITO CONTRACTORS, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/05-CA-119008 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



Exhibit 2

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-1107

September Term, 2018

FILED ON: MAY 24, 2019

TITO CONTRACTORS, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, AFL-CIO, DISTRICT COUNCIL 51,
INTERVENOR

Consolidated with 18-1119

On Petition for Review and Cross-Application
for Enforcement of an Order of the
National Labor Relations Board

Before: GARLAND, *Chief Judge*, KATSAS, *Circuit Judge*, and SILBERMAN, *Senior Circuit Judge*.

J U D G M E N T

The petition for review and the cross-application for enforcement were considered on the record from the National Labor Relations Board and on the briefs of the parties. The Court has given the issues full consideration and determined that they do not warrant a published opinion. *See* Fed. R. App. P. 36; D.C. Cir. R. 36(d). For the reasons stated below, it is

ORDERED and **ADJUDGED** that the petition for review be denied and the cross-application for enforcement be granted.

Tito Contractors challenges the Board's finding that it engaged in unfair labor practices by firing five employees and by creating and enforcing a stricter overtime policy in response to union and other protected activities. Tito also argues that the Board improperly delayed consideration of backpay issues until compliance proceedings.

Section 8(a) of the National Labor Relations Act (NLRA) prohibits employers from engaging in unfair labor practices, which include interfering with protected union activities and discriminating against employees based on those activities. 29 U.S.C. § 158(a)(1), (3). In mixed-

motive cases, the Board's General Counsel may prove that the employer took an action motivated in part by improper animus, in which case the employer may avoid liability only by proving that it would have taken the same action regardless. See *Wright Line*, 251 N.L.R.B. 1083, 1089 (1980). The Supreme Court has approved this administrative interpretation of the NLRA, *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393 (1983), and Tito does not challenge it here.

Substantial evidence supports the Board's finding that the terminations in this case were motivated by improper animus. For example, Tomas Berganza, a Tito supervisor, "explicitly referenced [the first two employees'] union activities when terminating them," and he "made comments about the Union to [the third employee] at her termination meeting." *Tito Contractors, Inc.*, 366 N.L.R.B. No. 47, 2018 WL 1559885, at *5 n.18, *6 (Mar. 29, 2018). Further, Tito does not dispute that it knew of the final two employees' union activities.

Tito argues that it would have fired the employees in any event because of misconduct or low productivity. The Board reasonably rejected these justifications as pretextual, because Tito treated the fired employees worse than others similarly situated. *Tito Contractors*, 2018 WL 1559885, at *5. Tito challenges the credibility determinations of the administrative law judge on this point, but it fails to show that they were patently unsupportable.

The Board also had substantial evidence to find that Tito's creation of a policy requiring advance approval for overtime was an unfair labor practice. The Board noted statements by Tito's owner and several of its supervisors that the new overtime policy would apply only to employees who joined a lawsuit under the Fair Labor Standards Act (FLSA). *Tito Contractors*, 2018 WL 1559885, at *3. These statements provided adequate grounds both to find an impermissible motive and to reject Tito's argument that it would have created the new policy even absent that motive.

In addition, substantial evidence supports the Board's finding that Tito impermissibly discriminated against the FLSA plaintiffs in implementing the overtime policy. First, the Board cited payroll data showing that, "[d]uring the first full pay period after the filing of the overtime lawsuit, [Tito] assigned overtime to various employees, but none to the original seven, named plaintiffs." *Tito Contractors*, 2018 WL 1559885, at *4. This allocation of work "was in stark contrast" to the allocation in past pay periods "when the seven discriminatees were assigned an average of at least 10 hours of overtime pay per pay period, with a few working substantially more." *Id.* Second, the Board reasonably rejected Tito's arguments that it would have made the same overtime assignments for legitimate reasons; as the Board explained, Tito "did not lack overtime work." *Id.*

Tito further argues that the Board erred by "leav[ing] to compliance the determination of the extent to which [Tito] discriminated against the plaintiffs" beyond the first pay period after the lawsuit was filed. *Tito Contractors*, 2018 WL 1559885, at *4 n.15. The Board did not improperly delay this determination, for "compliance proceedings provide the appropriate forum where the [parties] will be able to offer concrete evidence as to the amounts of backpay, if any." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902 (1984).

The Board seeks summary enforcement of the rest of its order. Because Tito's opening brief does not challenge these parts of the order, we grant the Board's request.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing *en banc*. See Fed. R. App. P. 41(b); D.C. Cir. R. 41(a)(1).

PER CURIAM

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

Exhibit 3

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

TITO CONTRACTORS, INC.

and

INTERNATIONAL UNION OF PAINTERS
AND ALLIED TRADES, AFL-CIO,
DISTRICT COUNCIL 51

Cases 5-CA-119008
5-CA-119096
5-CA-119414
5-CA-123265
5-CA-129503
5-CA-131619
5-CA-134285

**COMPLIANCE SPECIFICATION
AND NOTICE OF HEARING**

The National Labor Relations Board, herein called the Board, issued its Decision and Order (366 NLRB No. 47) on March 29, 2018, finding that Tito Contractors, Inc., herein referred to as Respondent, had engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act. The Board ordered that Respondent, inter alia:

- A. Offer Maria Sanchez, Aracely Ramos, Reyna Sorto, Yasmin Ramirez, Maria Chavez, Hernan Latapy, Nestor Sanchez, and Mauricio Bautista full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.
- B. Notify Maryland Environmental Services in writing that it requests the reinstatement of Maria Sanchez, Aracely Ramos, Reyna Sorto, Yasmin Ramirez, and Maria Chavez to their former jobs at its Shady Grove (Derwood), Maryland facility or, if those jobs no longer exist, to substantially equivalent positions,

without prejudice to their seniority or any other rights or privileges previously enjoyed.

- C. Make Maria Sanchez, Aracely Ramos, Reyna Sorto, Yasmin Ramirez, Maria Chavez, Hernan Latapy, Nestor Sanchez, Mauricio Bautista, and Jose Amaya whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.
- D. Remove from its files any reference to the unlawful discharges and discipline of Maria Sanchez, Aracely Ramos, Reyna Sorto, Yasmin Ramirez, Maria Chavez, Hernan Latapy, Nestor Sanchez, and Mauricio Bautista, and notify them in writing that this has been done and that their unlawful discharges and discipline will not be held against them in any way.
- E. Remove from its files any reference to the unlawful suspension and discipline of Jose Amaya, and notify him in writing that this has been done and that the suspension and discipline will not be held against him in any way.
- F. Remove from its files any reference to the unlawful discipline of Norberto Araujo, and any other employees disciplined pursuant to its discriminatory overtime policy, and notify them in writing that this has been done and that the discipline will not be held against them in any way.
- G. Make Roberto Ayala, Mauricio Bautista, Geremias Berganza, Hector Delgado, Sabino Diaz, Jose Jimenez, Jose Amaya, Jose Diaz, Hernan Latapy, Luis Palacios, Nestor Sanchez, and Domingo Zamora whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in having overtime hours withheld.

- H. Compensate affected employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 5, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.
- I. Rescind the overtime policy requiring advance management approval of overtime work and notify employees in writing that it has done so.
- J. Rescind the rule prohibiting employees from taking complaints about their working conditions outside their “chain of command” and notify employees in writing that it has done so.
- K. Restore to Norberto Araujo the use of a company vehicle comparable to the vehicle he drove prior to April 2014.
- L. Make available all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of the Order.
- M. Post the Notice to Employees.
- N. Conduct a reading of the Notice to Employees.

The United States Court of Appeals for the District of Columbia, entered its Judgment enforcing in full the Order of the Board on May 24, 2019. Respondent has complied with the Order of the Board, except as set forth below.

Controversy having arisen over the amounts of backpay due under the terms of the Board’s Order, the undersigned Regional Director of the National Labor Relations Board for the

Fifth Region, pursuant to the authority duly conferred upon him by the Board, hereby issues this Compliance Specification and alleges the following.

1. The backpay period for each discriminatee begins and ends on the dates set forth below.

(a) The backpay period for Hernan Latapy begins on April 25, 2014, and ends on April 10, 2015, the date on which he would have been laid off for lack of work.

(b) The backpay period for Jose Lopez-Bautista begins on August 1, 2014, and ends on July 18, 2015, the date on which he would have been laid off for lack of work.

(c) The backpay period for Nestor Sanchez begins on April 25, 2014, and ends on April 10, 2015, the date on which he would have been laid off for lack of work.

(d) Respondent lost its contract with Maryland Environmental Services for services at the Derwood recycling facility at which Maria Chavez, Yasmin Ramirez, Aracely Ramos Catalan, Maria Sanchez, and Reyna Sorto-Garcia were employed. Accordingly, the backpay period for those individuals ends on April 16, 2016, the date Respondent's contract with Maryland Environmental Services ended.

(i) The backpay period for Maria Chavez begins on December 13, 2013, and ends on April 16, 2016.

(ii) The backpay period for Yasmin Ramirez begins on December 6, 2013, and ends on April 16, 2016.

(iii) The backpay period for Aracely Ramos Catalan begins on October 31, 2013, and ends on April 16, 2016.

(iv) The backpay period for Maria Sanchez begins on October 30, 2013, and ends on April 16, 2016.

(v) The backpay period for Reyna Sorto-Garcia begins on November 14, 2013, and ends on April 16, 2016.

2. An appropriate measure of gross backpay for the discriminatees is the amount they would have earned if continually employed by Respondent during the backpay period, based on the earnings of comparable employees who worked during the backpay period.

3. (a) The calendar quarter gross backpay the discriminatees would have earned is defined as the sum of calendar quarter regular earnings and overtime earnings and is set forth in Exhibits 1 through 8, inclusive.

(b) Regular earnings are computed by multiplying the number of regular hours each discriminatee would have worked in the calendar quarter by the appropriate wage rates, as set forth in paragraphs 3(f) through 3(i).

(c) Overtime earnings are computed by multiplying the number of overtime hours each discriminatee would have worked by the appropriate wage rates in paragraphs 3(f) through 3(i) and multiplying by one and one half (1 ½).

(d) Regular hours are based on the average regular hours worked per week by comparable employees during the backpay period. All named discriminatees would have worked 40 regular hours per week during their respective backpay periods described in paragraph 1(a) through 1(d).

(e) Overtime hours are based on the average number of overtime hours worked per week by comparable employees during the backpay period and are set forth below and in Exhibits 1 through 8, inclusive:

(i) Maria Chavez, Yasmin Ramirez, Aracely Ramos Catalan, Maria Sanchez, and Reyna Sorto-Garcia would have worked an average of 6.62 overtime hours per week through June 25, 2015.

(ii) Hernan Latapy and Nestor Sanchez would not have worked any overtime hours during the backpay period described in paragraphs 1(a) and 1(c).

(iii) Jose Lopez-Bautista would have worked an average of 3.4 overtime hours per week during the backpay period defined above in paragraph 1(b).

(f) Maria Chavez, Yasmin Ramirez, Aracely Ramos Catalan, Maria Sanchez, and Reyna Sorto-Garcia were entitled to regular wage increases effective in July of each year during the backpay period based on evidence of wage increases provided to comparable employees in the records provided by Respondent. The appropriate hourly wage rates for Maria Chavez, Yasmin Ramirez, Aracely Ramos Catalan, Maria Sanchez, and Reyna Sorto-Garcia are:

Through June 30, 2014	July 1, 2014 – June 30, 2015	July 1, 2015 – April 16, 2016
\$13.95	\$14.15	\$14.35

(g) The appropriate hourly wage rate for Hernan Latapy is \$18.00.

(h) The appropriate hourly wage rate for Nestor Sanchez is \$12.50.

(i) The appropriate hourly wage rate for Jose Lopez-Bautista is \$17.00.

4. Calendar quarter interim earnings are the wages the discriminatees received from interim employers during the backpay period, computed on a quarterly basis. The discriminatees' interim earnings are set forth in Exhibits 1 through 8, inclusive.

5. The calendar quarter net backpay is the difference between the calendar quarter gross backpay and calendar quarter interim earnings. The calendar quarter net backpay due is set forth in Exhibits 1 through 8, inclusive.

6. Norberto Araujo is entitled to reimbursement for mileage as a result of Respondent revoking his use of Respondent's vehicle. An appropriate measure of the reimbursement due to Araujo is to multiply the number of miles he drove in his own vehicle by the appropriate mileage rate during the reimbursement period as set forth below.

(a) The reimbursement period is April 23, 2014, the date on which Respondent removed Araujo's use of a company vehicle, through November 29, 2014, the date on which Araujo ceased working for Respondent.

(b) The IRS mileage rate during the period described in paragraph 6(a) is \$0.56 per mile.

(c) The approximate number of miles, one-way, from Araujo's residence and Respondent's job site during this period was 44.5 miles.

(d) The amount of reimbursement due to Araujo during this period is set forth in Exhibit 9.

COMPENSATION for ADVERSE TAX CONSEQUENCES

7. In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), the discriminatees are entitled to be compensated for the adverse income tax consequences of receiving make-whole relief in a lump sum when the backpay owed is for a period over one year. The adverse tax consequences include excess taxes paid on the lump sum as well as incremental taxes due on the excess tax amount. If not for the unfair labor practice committed by Respondent, the backpay award for the discriminatees would have been paid in 2013, 2014, 2015, and 2016, rather than in 2020.¹

¹ All information, including the amounts owed, will need to be updated to reflect the actual year of payment.

8. In order to determine what the appropriate excess tax award should be, the amount of federal and state taxes needs to be calculated for the backpay as if the monies were paid when they were earned throughout the backpay period, as described below in paragraph 9. Additionally, the amount of federal and state taxes that will be paid on the lump sum payment needs to be calculated, if the payment is made in 2020, as described below in paragraph 9. The excess tax liability is the difference between the amounts described in paragraph 9 and paragraph 11.

9. The amount of taxable income for each year is based on the amount of backpay due to the discriminatees, summarized above in this compliance specification and set forth in Exhibits 1 through 8, inclusive.

(a) The amount of taxable income due to each discriminatee is set forth below and in Exhibits 10 through 17, inclusive.

	2013	2014	2015	2016
Maria Chavez	\$1,393	\$0.00	\$7,507	\$2,060
Yasmin Ramirez	\$2,090	\$21,488	\$13,816	\$1,713
Aracely Ramos Catalan	\$5,572	\$27,979	\$20,293	\$5,261
Maria Sanchez	\$5,850	\$14,429	\$9,794	\$1,915
Reyna Sorto-Garcia	\$4,179	\$30,522	\$5,815	\$0.00
Hernan Latapy		\$7,665	\$7,953	
Jose Lopez-Bautista		\$16,101	\$12,936	
Nestor Sanchez		\$17,500	\$5,345	

(b) Using this taxable income above for the appropriate years, federal and state taxes were calculated using the federal and state tax rates for the appropriate years.² The federal rates are based on each discriminatee's filing status and filing state as described below.

² The actual federal tax rates were used, while the state's average tax rate was used for these previous years.

	Filing Status	Filing State
Maria Chavez	Single	MD
Yasmin Ramirez	Single	MD
Aracely Ramos Catalan	Married, Joint	MD
Maria Sanchez	Single	MD
Reyna Sorto-Garcia	Married, Joint	MD
Hernan Latapy	Single	MD
Jose Lopez-Bautista	Married, Joint	MD
Nestor Sanchez	Single	MD

(c) The amount of federal taxes each discriminatee would have paid on the total amount of backpay for each year within the backpay period is set forth below and in Exhibits 10 through 17, inclusive.

	Federal Tax 2013	Federal Tax 2014	Federal Tax 2015	Federal Tax 2016
Maria Chavez	\$139	\$0	\$751	\$206
Yasmin Ramirez	\$209	\$2,769	\$1,611	\$171
Aracely Ramos Catalan	\$557	\$3,289	\$2,121	\$526
Maria Sanchez	\$585	\$1,711	\$1,008	\$192
Reyna Sorto-Garcia	\$418	\$3,671	\$582	\$0
Hernan Latapy		\$767	\$795	
Jose Lopez-Bautista		\$1,610	\$1,294	
Nestor Sanchez		\$2,171	\$535	

(d) The amount of state taxes each discriminatee would have paid on the total backpay amount each year in the backpay period is set forth below and in Exhibits 10 through 17, inclusive.

	State Tax 2013	State Tax 2014	State Tax 2015	State Tax 2016
Maria Chavez	\$59	\$0	\$331	\$91
Yasmin Ramirez	\$88	\$947	\$609	\$75
Aracely Ramos Catalan	\$235	\$1,233	\$894	\$232
Maria Sanchez	\$246	\$636	\$432	\$84
Reyna Sorto-Garcia	\$176	\$1,345	\$256	\$0
Hernan Latapy		\$338	\$350	
Jose Lopez-Bautista		\$709	\$570	
Nestor Sanchez		\$771	\$236	

10. The lump sum amount is the total amount of backpay due as described in this specification and set forth in Exhibits 1 through 8, inclusive. The total amount of the lump sum award that is subject to this excess tax award, rounded to the nearest whole dollar, for each discriminatee is set forth below and in Exhibits 10 through 17, inclusive.³

	Lump-Sum Amount
Maria Chavez	\$10,960
Yasmin Ramirez	\$39,107
Aracely Ramos Catalan	\$59,105
Maria Sanchez	\$31,988
Reyna Sorto-Garcia	\$40,516
Hernan Latapy	\$15,618
Jose Lopez-Bautista	\$29,037
Nestor Sanchez	\$22,845

³ The lump sum amount does not include interest on the amount of backpay owed. Interest should be included in the lump sum amount, however, interest continues to accrue until the payment is made. The lump sum amount will need to be adjusted when the backpay is paid to the discriminatee to include interest.

11. The amount of taxes owed on the lump-sum amounts described in paragraph 9 in 2020 is based on the current federal and state tax rates and on each discriminatee's filing status and filing state as described above in Paragraph 8(b).⁴

(a) The amount of federal taxes owed on the lump sum amounts, if paid in 2020, will be the amounts set forth below and in Exhibits 10 through 17, inclusive.

	Federal Tax on Lump-Sum
Maria Chavez	\$1,118
Yasmin Ramirez	\$4,495
Aracely Ramos Catalan	\$6,698
Maria Sanchez	\$3,641
Reyna Sorto-Garcia	\$4,467
Hernan Latapy	\$1,677
Jose Lopez-Bautista	\$3,089
Nestor Sanchez	\$2,544

(b) The amount of state taxes owed by each discriminatee on the lump sum, if paid in 2020, will be the amounts set forth below and in Exhibits 10 through 17, inclusive.

	State tax on Lump-Sum
Maria Chavez	\$483
Yasmin Ramirez	\$1,723
Aracely Ramos Catalan	\$2,604
Maria Sanchez	\$1,409
Reyna Sorto-Garcia	\$1,785
Hernan Latapy	\$688
Jose Lopez-Bautista	\$1,279
Nestor Sanchez	\$1,007

12. The adverse tax consequence is the difference between the amount of taxes on the lump sum amount being paid in 2020, and the amount of taxes each discriminatee would

⁴ The actual federal rates were used for the current year, while an average state tax rate for the current year was used.

have paid in 2013, 2014, 2015 and 2016 and is set forth below and in Exhibits 10 through 17, inclusive.

	Adverse Tax Consequence
Maria Chavez	\$25
Yasmin Ramirez	\$4
Aracely Ramos Catalan	\$215
Maria Sanchez	\$157
Reyna Sorto-Garcia	\$8
Hernan Latapy	\$115
Jose Lopez-Bautista	\$186
Nestor Sanchez	\$0

13. The excess tax liability payment that is to be made to the discriminatee is taxable income which will result in additional tax liabilities. This amount is called the incremental tax liability. The incremental tax includes all of the taxes the discriminatee will owe on the excess tax liability payment. The incremental tax is determined based on the federal tax rate used for calculating taxes on the backpay award and the average state tax rate for 2020. The amount for each discriminatee is set forth below and in Exhibits 10 through 17, inclusive.

	Incremental Tax Amount
Maria Chavez	\$5
Yasmin Ramirez	\$1
Aracely Ramos Catalan	\$42
Maria Sanchez	\$31
Reyna Sorto-Garcia	\$2
Hernan Latapy	\$23
Jose Lopez-Bautista	\$36
Nestor Sanchez	\$0

14. The total adverse tax consequence due to the discriminatee is determined by adding the excess tax liability and the incremental tax liability. The total adverse tax

consequence currently due to each discriminatee is set forth below and in Exhibits 10 through 17, inclusive.

	Total Adverse Tax Compensation
Maria Chavez	\$29
Yasmin Ramirez	\$5
Aracely Ramos Catalan	\$257
Maria Sanchez	\$189
Reyna Sorto-Garcia	\$10
Hernan Latapy	\$137
Jose Lopez-Bautista	\$222
Nestor Sanchez	\$0

15. Each discriminatee is also entitled to payment for the increased tax he or she will pay on the interest received. The amount of interest is unknown as it continues to accrue until date of payment. The amount of excess tax liability and incremental tax liability on the interest payment will be calculated according to the formulas set forth above in paragraphs 9 through 14.

REPORT OF BACKPAY PAID TO SOCIAL SECURITY ADMINISTRATION

16. Respondent should be required to submit to the Region the appropriate documentation to provide the Social Security Administration so that when backpay is paid, it will be allocated to the appropriate periods.

17. The General Counsel further seeks, as part of the make whole remedy to the discriminatees above, that Respondent be required to submit the W-2 reflecting backpay paid to the discriminatees to the Regional Director.

OUTSTANDING NON-FINANCIAL REMEDIAL OBLIGATIONS

18. Respondent has failed to comply with non-financial aspects of the Board's Order enforced by United States Court of Appeals for the District of Columbia. Taking into account the remedial steps already taken by Respondent, Respondent is still required to:

(a) Remove from its files any reference to the unlawful discharges and discipline of Maria Sanchez, Aracely Ramos, Reyna Sorto, Yasmin Ramirez, Maria Chavez, Hernan Latapy, Nestor Sanchez, and Mauricio Bautista, and notify them in writing that this has been done and that their unlawful discharges will not be held against them in any way.

(b) Remove from its files any reference to the unlawful suspension and discipline of Jose Amaya, and notify him in writing that this has been done and that the suspension and discipline will not be held against him in any way.

(c) Remove from its files any reference to the unlawful discipline of Norberto Araujo, and any other employees disciplined pursuant to its discriminatory overtime policy, and notify them in writing that this has been done and that the discipline will not be held against them in any way.

SUMMARY

19. (a) Summarizing the facts and calculations specified above and on Exhibits 1 through 9, inclusive, the obligation of Respondent to make whole the discriminatees under the Board's Order will be discharged by the payment to the discriminatees in the amount of \$249,185.00, in back wages, less appropriate withholdings, plus interest accrued to date of payment, compounded daily, and Employer's share of FICA contributions; and by payment of

compensation for the adverse tax consequences of receiving a lump-sum payment as described in Exhibits 10 through 17.⁵

(b) Summarizing the facts specified above, the outstanding non-financial obligations of Respondent to comply with the Board Order will be discharged by sending a letter to each discriminatee listed above to notify each that their respective discharges, suspensions and/or disciplines have been removed from its files, with a copy to the Region.

20. The Regional Director, or his designee, reserves the right to amend any or all provisions of this Specification by inclusion of information not now known to the Regional Director.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Section 102.56 of the Board's Rules and Regulations, it must file an answer to the compliance specification. The answer must be **received by this office on or before August 17, 2020.** Respondent must also serve a copy of the answer on each of the other parties.

An answer must be filed electronically by using the E-Filing system on the Agency's website. In order to file an answer electronically, access the Agency's website at <http://www.nlr.gov>, click on E-Gov, then click on the E-Filing link on the pull-down menu. Click on the "File Documents" button under "Regional, Subregional and Resident Offices" and then follow the directions. 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

⁵ The amount of excess tax liability would need to be updated to reflect the actual date of payment.

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 such answer be signed and sworn to by the respondent or by a duly authorized agent with appropriate power of attorney affixed. See Section 102.56(a). 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 compliance specification is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature 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 be accomplished in conformance with the requirements of Section 102.114 of the Board's Rules and Regulations. The answer may not be filed by facsimile transmission.

As to all matters set forth in the compliance specification that are within the knowledge of Respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial is not sufficient. See Section 102.56(b) of the Board's Rules and Regulations, a copy of which is attached. Rather, the answer must state the basis for any disagreement with any allegations that are within the Respondent's knowledge and set forth in detail Respondent's position as to the applicable premises and furnish the appropriate supporting figures.

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 compliance specification are true. If the answer fails to deny allegations of the compliance specification in the manner required under

Section 102.56(b) of the Board's Rules and Regulations, and the failure to do so is not adequately explained, the Board may find those allegations in the compliance specification are true and preclude Respondent from introducing any evidence controverting those allegations.

NOTICE OF HEARING

PLEASE TAKE NOTICE that commencing at a time, date, and place to be determined, and 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, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this compliance specification. 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 at Baltimore, Maryland this 3rd day of August 2020.

(SEAL)

/s/ SEAN R. MARSHALL

Sean R. Marshall, Regional Director
National Labor Relations Board, Region 5
Bank of America Center – Tower II
100 South Charles Street, Suite 600
Baltimore, Maryland 21201

Maria Chavez Backpay Calculation

Quarter	Wage Rate	Regular Hours/Week	Overtime Hours/Week	Gross Backpay	Interim Earnings	Net Backpay
4Q 2013	\$13.95	40.00	6.62	\$1,393.00		\$1,393.00
1Q 2014	\$13.95	40.00	6.62	\$9,055.00	\$10,607.00	\$0.00
2Q 2014	\$13.95	40.00	6.62	\$9,055.00	\$10,607.00	\$0.00
3Q 2014	\$14.15	40.00	6.62	\$9,185.00	\$10,607.00	\$0.00
4Q 2014	\$14.15	40.00	6.62	\$9,185.00	\$10,608.00	\$0.00
1Q 2015	\$14.15	40.00	6.62	\$9,185.00	\$6,447.00	\$2,738.00
2Q 2015	\$14.15	40.00	6.62	\$9,185.00	\$6,446.00	\$2,739.00
3Q 2015	\$14.35	40.00	0.00	\$7,462.00	\$6,447.00	\$1,015.00
4Q 2015	\$14.35	40.00	0.00	\$7,462.00	\$6,446.00	\$1,016.00
1Q 2016	\$14.35	40.00	0.00	\$7,462.00	\$5,788.00	\$1,674.00
2Q 2016	\$14.35	40.00	0.00	\$1,722.00	\$1,336.00	\$386.00
Total						\$10,961.00

Yasmin Ramirez Backpay Calculation

Quarter	Wage Rate	Regular Hours/Week	Overtime Hours/Week	Gross Backpay	Interim Earnings	Net Backpay
4Q 2013	\$13.95	40.00	6.62	\$2,090.00		\$2,090.00
1Q 2014	\$13.95	40.00	6.62	\$9,055.00		\$9,055.00
2Q 2014	\$13.95	40.00	6.62	\$9,055.00	\$4,997.00	\$4,058.00
3Q 2014	\$14.15	40.00	6.62	\$9,185.00	\$4,997.00	\$4,188.00
4Q 2014	\$14.15	40.00	6.62	\$9,185.00	\$4,997.00	\$4,188.00
1Q 2015	\$14.15	40.00	6.62	\$9,185.00	\$4,869.00	\$4,316.00
2Q 2015	\$14.15	40.00	6.62	\$9,185.00	\$4,869.00	\$4,316.00
3Q 2015	\$14.35	40.00	0.00	\$7,462.00	\$4,869.00	\$2,593.00
4Q 2015	\$14.35	40.00	0.00	\$7,462.00	\$4,870.00	\$2,592.00
1Q 2016	\$14.35	40.00	0.00	\$7,462.00	\$6,070.00	\$1,392.00
2Q 2016	\$14.35	40.00	0.00	\$1,722.00	\$1,401.00	\$321.00
Total						\$39,109.00

Aracely Ramos Catalan Backpay Calculation

Quarter	Wage Rate	Regular Hours/Week	Overtime Hours/Week	Gross Backpay	Interim Earnings	Net Backpay
4Q 2013	\$13.95	40.00	6.62	\$5,572.00		\$5,572.00
1Q 2014	\$13.95	40.00	6.62	\$9,055.00	\$2,125.00	\$6,930.00
2Q 2014	\$13.95	40.00	6.62	\$9,055.00	\$2,125.00	\$6,930.00
3Q 2014	\$14.15	40.00	6.62	\$9,185.00	\$2,125.00	\$7,060.00
4Q 2014	\$14.15	40.00	6.62	\$9,185.00	\$2,125.00	\$7,060.00
1Q 2015	\$14.15	40.00	6.62	\$9,185.00	\$3,250.00	\$5,935.00
2Q 2015	\$14.15	40.00	6.62	\$9,185.00	\$3,250.00	\$5,935.00
3Q 2015	\$14.35	40.00	0.00	\$7,462.00	\$3,250.00	\$4,212.00
4Q 2015	\$14.35	40.00	0.00	\$7,462.00	\$3,250.00	\$4,212.00
1Q 2016	\$14.35	40.00	0.00	\$7,462.00	\$3,400.00	\$4,062.00
2Q 2016	\$14.35	40.00	0.00	\$1,722.00	\$523.00	\$1,199.00
Total						\$59,107.00

Maria Sanchez Backpay Calculation

Quarter	Wage Rate	Regular Hours/Week	Overtime Hours/Week	Gross Backpay	Interim Earnings	Net Backpay
4Q 2013	\$13.95	40.00	6.62	\$5,850.00		\$5,850.00
1Q 2014	\$13.95	40.00	6.62	\$9,055.00	\$4,500.00	\$4,555.00
2Q 2014	\$13.95	40.00	6.62	\$9,055.00	\$5,850.00	\$3,205.00
3Q 2014	\$14.15	40.00	6.62	\$9,185.00	\$5,850.00	\$3,335.00
4Q 2014	\$14.15	40.00	6.62	\$9,185.00	\$5,850.00	\$3,335.00
1Q 2015	\$14.15	40.00	6.62	\$9,185.00	\$5,874.00	\$3,311.00
2Q 2015	\$14.15	40.00	6.62	\$9,185.00	\$5,875.00	\$3,310.00
3Q 2015	\$14.35	40.00	0.00	\$7,462.00	\$5,875.00	\$1,587.00
4Q 2015	\$14.35	40.00	0.00	\$7,462.00	\$5,875.00	\$1,587.00
1Q 2016	\$14.35	40.00	0.00	\$7,462.00	\$5,906.00	\$1,556.00
2Q 2016	\$14.35	40.00	0.00	\$1,722.00	\$1,363.00	\$359.00
Total						\$31,990.00

Reyna Sorto-Garcia Backpay Calculation

Quarter	Wage Rate	Regular Hours/Week	Overtime Hours/Week	Gross Backpay	Interim Earnings	Net Backpay
4Q 2013	\$13.95	40.00	6.62	\$4,179.00		\$4,179.00
1Q 2014	\$13.95	40.00	6.62	\$9,055.00		\$9,055.00
2Q 2014	\$13.95	40.00	6.62	\$9,055.00		\$9,055.00
3Q 2014	\$14.15	40.00	6.62	\$9,185.00		\$9,185.00
4Q 2014	\$14.15	40.00	6.62	\$9,185.00	\$5,957.00	\$3,228.00
1Q 2015	\$14.15	40.00	6.62	\$9,185.00	\$5,850.00	\$3,335.00
2Q 2015	\$14.15	40.00	6.62	\$9,185.00	\$6,704.00	\$2,481.00
3Q 2015	\$14.35	40.00	0.00	\$7,462.00	\$8,675.00	\$0.00
4Q 2015	\$14.35	40.00	0.00	\$7,462.00	\$8,676.00	\$0.00
1Q 2016	\$14.35	40.00	0.00	\$7,462.00	\$8,220.00	\$0.00
2Q 2016	\$14.35	40.00	0.00	\$1,722.00	\$1,897.00	\$0.00
Total						\$40,518.00

Hernan Latapy Backpay Calculation

Quarter	Wage Rate	Regular Hours/Week	Overtime Hours/Week	Gross Backpay	Interim Earnings	Net Backpay
2Q 2014	\$18.00	40.00	0.00	\$6,480.00	\$4,509.00	\$1,971.00
3Q 2014	\$18.00	40.00	0.00	\$9,360.00	\$6,513.00	\$2,847.00
4Q 2014	\$18.00	40.00	0.00	\$9,360.00	\$6,513.00	\$2,847.00
1Q 2015	\$18.00	40.00	0.00	\$9,360.00	\$2,467.00	\$6,893.00
2Q 2015	\$18.00	40.00	0.00	\$1,440.00	\$380.00	\$1,060.00
Total						\$15,618.00

Jose Lopez-Bautista Backpay Calculation

Quarter	Wage Rate	Regular Hours/Week	Overtime Hours/Week	Gross Backpay	Interim Earnings	Net Backpay
3Q 2014	\$17.00	40.00	3.40	\$6,134.00		\$6,134.00
4Q 2014	\$17.00	40.00	3.40	\$9,967.00		\$9,967.00
1Q 2015	\$17.00	40.00	3.40	\$9,967.00	\$4,168.00	\$5,799.00
2Q 2015	\$17.00	40.00	3.40	\$9,967.00	\$4,168.00	\$5,799.00
3Q 2015	\$17.00	40.00	3.40	\$2,300.00	\$962.00	\$1,338.00
Total						\$29,037.00

Nestor Sanchez Backpay Calculation

Quarter	Wage Rate	Regular Hours/Week	Overtime Hours/Week	Gross Backpay	Interim Earnings	Net Backpay
2Q 2014	\$12.50	40.00	0.00	\$4,500.00		\$4,500.00
3Q 2014	\$12.50	40.00	0.00	\$6,500.00		\$6,500.00
4Q 2014	\$12.50	40.00	0.00	\$6,500.00		\$6,500.00
1Q 2015	\$12.50	40.00	0.00	\$6,500.00	\$1,868.00	\$4,632.00
2Q 2015	\$12.50	40.00	0.00	\$1,000.00	\$287.00	\$713.00
Total						\$22,845.00

Mileage Reimbursement Calculation to Norberto Araujo

Quarter	Mileage One- Way	Mileage Round Trip per Day	Work Days per Quarter	Mileage rate	Reimbursement
2Q 2014	44.5	89	49	\$0.56	\$27.44
3Q 2014	44.5	89	65	\$0.56	\$36.40
4Q 2014	44.5	89	43	\$0.56	\$24.08
Total					\$87.92

NLRB Backpay Calculation

Case Name: Tito Contractors, Inc.

Case Number: 05-CA-119008

Backpay period: 12/13/2013 - 4/16/2016
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Interest calculated to: 7/1/2020

Claimant: **Maria Chavez**

Week End	Reg Hours	OT Hours	Hourly Rate	Gross Backpay	Quarter Interim Earnings	Net Backpay	Interim Expenses	Medical Expenses	Net Backpay & Expenses
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Adjusted Taxes for Lump Sum Backpay

Case Name: **Tito Contractors, Inc.**

Case Number: **05-CA-119008**

Claimant: **Maria Chavez**

Year	Taxable Income (Backpay)	Filing Status	State	Federal Tax	State Tax
2013	1,393	Single Filer	MD	139	59
2014	0	Single Filer	MD	0	0
2015	7,507	Single Filer	MD	751	331
2016	2,060	Single Filer	MD	206	91
2017	0	Single Filer	MD	0	0
Taxes Paid:				1,096	480
(Sum)					
Sum 2000 to 2017	10,960	Single Filer	MD	1,118	483
2020	0				
				Excess Tax on Backpay: 22	3
				Incremental Tax on Backpay: 5	
				Total Excess Tax on Backpay:	29

NLRB Backpay Calculation

Case Name: Tito Contractors, Inc.
Case Number: 05-CA-119008
Claimant: Yasmin Ramirez

Backpay period: 12/6/2013 - 4/16/2016	Interest calculated to: 7/1/2020
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Year	Qtr	Gross Backpay	Quarter Interim Earnings	Net Backpay	Interim Expenses	Medical Expenses	Net Backpay & Expenses
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Adjusted Taxes for Lump Sum Backpay

Case Name: **Tito Contractors, Inc.**
Case Number: **05-CA-119008**
Claimant: **Yasmin Ramirez**

Year	Taxable Income (Backpay)	Filing Status	State	Federal Tax	State Tax	
2013	2,090	Single Filer	MD	209	88	
2014	21,488	Single Filer	MD	2,769	947	
2015	13,816	Single Filer	MD	1,611	609	
2016	1,713	Single Filer	MD	171	75	
2017	0	Single Filer	MD	0	0	
Taxes Paid:				4,761	1,719	
(Sum)						
Sum 2000 to 2017	39,107	Single Filer	MD	4,495	1,723	
2020	0					
				Excess Tax on Backpay:	0	4
				Incremental Tax on Backpay:		1
				Total Excess Tax on Backpay:	5	

Case Name: Tito Contractors, Inc.
Case Number: 05-CA-119008

Backpay period: 10/31/2013 - 4/16/16
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Claimant: **Aracely Ramos Catalan**

Interest
calculated to

Year	Qtr	Week End	Reg Hours	OT Hours	Hourly Rate	Gross Backpay	Quarter Interim Earnings	Net Backpay	Interim Expenses	Medical Expenses
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Adjusted Taxes for Lump Sum Backpay

Case Name: **Tito Contractors, Inc.**
Case Number: **05-CA-119008**
Claimant: **Aracely Ramos Catalan**

Year	Taxable Income (Backpay)	Filing Status	State	Federal Tax	State Tax
2013	5,572	Jointly/Widower	MD	557	235
2014	27,979	Jointly/Widower	MD	3,289	1,233
2015	20,293	Jointly/Widower	MD	2,121	894
2016	5,261	Jointly/Widower	MD	526	232
2017	0	Jointly/Widower	MD	0	0
Taxes Paid:				6,494	2,593
(Sum)					
Sum 2000 to 2017	59,105	Jointly/Widower	MD	6,698	2,604

2020 0

Excess Tax on Backpay: 204 11
Incremental Tax on Backpay: 42

Total Excess Tax on Backpay: 257

Case Name: Tito Contractors, Inc.
Case Number: 05-CA-119008
Claimant: **Maria Sanchez**

Backpay period: 10/30/2013 - 4/16/2016	Interest calculated to
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Year	Qtr	Gross Backpay	Quarter Interim Earnings	Net Backpay	Interim Expenses	Medical Expenses
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Adjusted Taxes for Lump Sum Backpay

Case Name: **Tito Contractors, Inc.**
Case Number: **05-CA-119008**
Claimant: **Maria Sanchez**

Year	Taxable Income (Backpay)	Filing Status	State	Federal Tax	State Tax
2013	5,850	Single Filer	MD	585	246
2014	14,429	Single Filer	MD	1,711	636
2015	9,794	Single Filer	MD	1,008	432
2016	1,915	Single Filer	MD	192	84
2017	0	Single Filer	MD	0	0
Taxes Paid:				3,495	1,398
(Sum)					
Sum 2000 to 2017	31,988	Single Filer	MD	3,641	1,409
2020	0				
				Excess Tax on Backpay: 146	11
				Incremental Tax on Backpay:	31
				Total Excess Tax on Backpay:	189

NLRB Backpay Calculation

Case Name: Tito Contractors, Inc.

Case Number: 05-CA-119008

Backpay period:

Claimant: Reyna Isabel Sorto-Garcia

11/14/2013 - 4/16/2016

Qtr	Week End	Reg Hours	OT Hours	Hourly Rate	Gross Backpay	Quarter Interim Earnings	Net Backpay	Interim Expenses	Medical Expenses
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Adjusted Taxes for Lump Sum Backpay

Case Name: **Tito Contractors, Inc.**

Case Number: **05-CA-119008**

Claimant: **Reyna Isabel Sorto-Garcia**

Year	Taxable Income (Backpay)	Filing Status	State	Federal Tax	State Tax	
2013	4,179	Jointly/Widower	MD	418	176	
2014	30,522	Jointly/Widower	MD	3,671	1,345	
2015	5,815	Jointly/Widower	MD	582	256	
2016	0	Jointly/Widower	MD	0	0	
2017	0	Jointly/Widower	MD	0	0	
(Sum)				Taxes Paid:	4,670	1,777
Sum 2000 to 2017	40,516	Jointly/Widower	MD	4,467	1,785	

2020 0

Excess Tax on Backpay: 0 8

Incremental Tax on Backpay: 2

Total Excess Tax on Backpay: 10

NLRB Backpay Calculation

Case Name: Tito Contractors
Case Number: 05-CA-119008
Claimant: **Hernan Latapy**

Backpay period: 4/25/2014 - 4/10/2015	Interest calculated to: 7/1/2020
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Year	Qtr	Week End	Reg Hours	OT Hours	Hourly Rate	Gross Backpay	Quarter Interim Earnings	Net Backpay	Interim Expenses	Medical Expenses	Net Backpay & Expenses
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Adjusted Taxes for Lump Sum Backpay

Case Name: **Tito Contractors**
Case Number: **05-CA-119008**
Claimant: **Hernan Latapy**

Year	Taxable Income (Backpay)	Filing Status	State	Federal Tax	State Tax
2014	7,665	Single Filer	MD	767	338
2015	7,953	Single Filer	MD	795	350
Taxes Paid:				1,562	688
(Sum)					
Sum 2000 to 2019	15,618	Single Filer	MD	1,677	688
2020	0				
				Excess Tax on Backpay: 115	0
				Incremental Tax on Backpay:	23
				Total Excess Tax on Backpay:	137

NLRB Backpay Calculation

Case Name: Tito Contractors				Backpay period:				
Case Number: 05-CA-119008				8/1/2014 - 7/18/2015		Interest calculated to		
Claimant: Jose Mauricio Lopez Bautista								
Week End	Reg Hours	OT Hours	Hourly Rate	Gross Backpay	Quarter Interim Earnings	Net Backpay	Interim Expenses	Medical Expenses

Adjusted Taxes for Lump Sum Backpay

Case Name: Tito Contractors						
Case Number: 05-CA-119008						
Claimant: Jose Mauricio Lopez Bautista						
Year	Taxable Income (Backpay)	Filing Status	State	Federal Tax	State Tax	
2014	16,101	Jointly/Widower	MD	1,610	709	
2015	12,936	Jointly/Widower	MD	1,294	570	
				Taxes Paid:	2,904	1,279
		(Sum)				
Sum 2000 to 2019	29,037	Jointly/Widower	MD	3,089	1,279	
2020	0					
				Excess Tax on Backpay:	186	0
				Incremental Tax on Backpay:		36
				Total Excess Tax on Backpay:	222	

NLRB Backpay Calculation

Case Name: Tito Contractors
Case Number: 05-CA-119008

Backpay period: 4/25/2014 - 4/10/2015
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Claimant: **Nestor Sanchez**

Interest calculated to

Year	Qtr	Week End	Reg Hours	OT Hours	Hourly Rate	Gross Backpay	Quarter Interim Earnings	Net Backpay	Interim Expenses	Medical Expenses
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Adjusted Taxes for Lump Sum Backpay

Case Name: **Tito Contractors**
Case Number: **05-CA-119008**
Claimant: **Nestor Sanchez**

Year	Taxable Income (Backpay)	Filing Status	State	Federal Tax	State Tax
2014	17,500	Single Filer	MD	2,171	771
2015	5,345	Single Filer	MD	535	236
(Sum)				Taxes Paid:	
Sum 2000 to 2019	22,845	Single Filer	MD	2,544	1,007
2020	0				
				Excess Tax on Backpay:	0
				Incremental Tax on Backpay:	0
Total Excess Tax on Backpay:					0

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.

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, 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.

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
NOTICE

Cases 5-CA-119008, 5-CA-119096,
5-CA-119414, 5-CA-123265,
5-CA-129503, 5-CA-131619,
5-CA-134285

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.

COUNSEL FOR RESPONDENT:

Jonathan W. Greenbaum, Esq.
Coburn & Greenbaum, PLLC
jg@coburngreenbaum.com

Kim Jandrain, Esq.
Coburn & Greenbaum, PLLC
kj@coburngreenbaum.com

COUNSEL FOR CHARGING PARTY:

Christopher R. Ryon, Esq.
Kahn, Smith & Collins, P.A.
ryon@kahnsmith.com

RESPONDENT:

Mr. Alexander Pierola
Business Administrator
Tito Contractors, Inc.
info@titocontractors.com

CHARGING PARTY:

Mr. Sandro Baiza
International Union of Painters and Allied
Trades, District Council 51, (AFL-CIO)
sbaiza@verizon.net

Exhibit 4

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

TITO CONTRACTORS, INC.

and

INTERNATIONAL UNION OF PAINTERS
AND ALLIED TRADES, AFL-CIO,
DISTRICT COUNCIL 51

Cases 5-CA-119008
5-CA-119096
5-CA-119414
5-CA-123265
5-CA-129503
5-CA-131619
5-CA-134285

**ANSWER OF TITO CONTRACTORS, INC.
TO COMPLIANCE SPECIFICATION**

Tito Contractors, Inc. ("Tito") hereby responds to the Compliance Specification and Notice of Hearing as follows:

1-5. Tito denies the back-pay period for the discriminatees. For the discriminatees who were discharged at the MES facility there is no back pay period because MES would not allow them to return to the facility, and any MES facility, at any time after their discharge. Under the MES-Tito contract, Tito had no control over this and the fact that MES would not allow the discriminatees to return to work at any MES facility necessarily eliminates back-pay. The MES employees were recycling employees. Tito had no other recycling jobs outside MES at the time (and has no recycling employees at this time).

Nonetheless, Tito denies any of the discriminatees are entitled to any back-ay because each has not mitigated their damages if any. With respect to the back-pay calculations, Respondent does aver that the overtime calculations are speculative as it does not take into account seasonality of the business and business needs which necessarily affect hours worked. Respondent also denies

discriminatees received regular pay increases each year noted. With respect to the two non MES discriminatees, Hernan Latapy's back pay period ends prior to April 10, 2015. Jose Lopez Bautisla back pay period ends prior to July 18, 2015. Neither of them mitigated their back pay and/or they were in fact working during the time alleged (and not reporting their income). Maria Chavez' back pay period ended December 13, 2013 as MES would not permit her to work at an MES facility, let alone enter an MES facility after that date. Yasmin Ramierz' back pay period would have ended December 6, 2013 as MES would not permit her to work at an MES facility, let alone enter an MES facility after that date. Arcely Ramos' back pay period ended as of October 31, 2013 as MES would not permit her to work at an MES facility, let alone enter an MES facility after that date. Maria Sanchez' back pay period would have ended October 30, 2013 as MES would not have permitted Ms. Sanchez to work at an MES facility after that date, let alone enter an MES facility after that date. Lastly, Reyna Sorto-Garacia's back pay period would have ended November 14, 2013 as MES would not have permitted her to work at an MES facility after that day, let alone enter an MES facility.

As such, none of the MES discriminatee's are entitled to back pay.

6. Noberto Araujo is not entitled to reimbursement for mileage for his personal use of his vehicle for non- work use.

7. Denied. As a matter of law, Tito is not responsible for any taxes which are the responsibility of the employee.

8. Denied.

9. Denied. Because the discriminates are not entitled to back pay, and their failure to mitigate, Tito denies each is entitled to the amounts set forth in paragraph 9.

10. Denied (see 9 above).

11. Denied.
12. Denied.
13. Denied.
14. Denied.
15. Denied.
16. Paragraph 16 requires no answer and is otherwise denied.
17. Paragraph 17 requires no answer ad is otherwise denied.
18. Respondent denies it has failed to comply with the non-financial remedial obligations.

19. Respondent denies the summary contained in paragraph 19. With respect to the MES discriminatees there is no back pay as such discriminatees were precluded from working at any MES location after the date of their discharge. Tito had no control over this and Tito had no other recycling work. Latopy and Bautista failed to mitigate their damages, if any. Work they performed during their claimed unemployment was off the books work which they did not report.

For its affirmative defenses, Respondent submits that each discriminatee failed to mitigate their back-pay if any; any specification compliance with respect to discriminatees who worked at MES facilities is impossible; laches, and estoppel.

Respectfully submitted,



Jonathan W. Greenbaum
COBURN & GREENBAUM, PLLC
Second Floor
1710 Rhode Island Avenue, NW
Washington, DC 20036

Telephone: 202.744.5003
Facsimile: 866.561-9712
Email: jg@coburngreenbaum.com

Cc: Counsel for District Council 51
NLRB counsel

Exhibit 5



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 5
BANK OF AMERICA CENTER, TOWER II
100 S. CHARLES STREET, STE 600
BALTIMORE, MD 21201

Agency Website: www.nlr.gov
Telephone: (410)962-2822
Fax: (410)962-2198

Agent's Direct Dial: (410)962-2880

Agent's E-mail: Heather.Keough@nlrb.gov

August 26, 2020

Via e-mail only: jg@coburngreenbaum.com
Jonathan W. Greenbaum, Esq.
Coburn & Greenbaum, PLLC
1710 Rhode Island Avenue, N.W., Second Floor
Washington, DC 20036

RE: Tito Contractors, Inc.
Case 05-CA-119008 et al.

Dear Mr. Greenbaum:

Please be advised that the Answer to Compliance Specification you filed in the referenced matter on August 13, 2020 is deficient under the Board's Rules and Regulations. The Answer is deficient principally because it does not comport with the specificity requirements of Section 102.56(b) of the Board's Rules and Regulations as it relates to topics within Respondent's knowledge. Specifically, your Answer fails to admit or deny each and every paragraph of the Specification, attempts to relitigate settled issues, and further contains general denials and conclusionary statements without setting forth the basis for such disagreement with appropriate supporting alternative figures on all issues alleged in the Specification but for mitigation and employees' interim earnings. Accordingly, pursuant to Section 10652.2 of the Board's Casehandling Manual, Part III, you may file an amended answer to the Compliance Specification by no later than the close of business **September 2, 2020**. If you fail to file an amended answer by that date, or you file an amended answer that continues to be deficient under the Board's Rules and Regulations, the Region may file with the Board a motion for summary judgment in whole or in part. Please contact me at the above number if you have any questions. Thank you.

Very truly yours,

/s/ Heather Keough (DT)

Heather Keough
Compliance Officer

Exhibit 6

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

TITO CONTRACTORS, INC.

and

INTERNATIONAL UNION OF PAINTERS
AND ALLIED TRADES, AFL-CIO,
DISTRICT COUNCIL 51

Cases 5-CA-119008
5-CA-119096
5-CA-119414
5-CA-123265
5-CA-129503
5-CA-131619
5-CA-134285

**AMENDED ANSWER OF TITO CONTRACTORS, INC.
TO COMPLIANCE SPECIFICATION**

Tito Contractors, Inc. (“Tito”) hereby responds to the Compliance Specification and Notice of Hearing as follows:

The Compliance Specification and Notice of Hearing states that under the March 29, 2018 Decision and Order (366 NLRB No. 47) the Board ordered Respondent to notify Maryland Environmental Services (“MES”) that it requested reinstatement of Maria Sanchez, Aracely Ramos, Reyna Sorto, Yasmin Ramirez, and Maria Chavez to their former jobs at the MES facility, or if such jobs no longer existed to a substantially equivalent position. MES controlled who was allowed to work at its facility. Respondent’s contract with MES explicitly requested this. Indeed, the Respondent-MES contract stipulated that based on a verbal order by MES Tito had to remove any of Respondent’s employees at the MES facility. Such directive had to be followed without explanation. Indeed, MES was well aware of the ALJ’s Order of Reinstatement of the 5 MES employees and affirmatively stated to Tito that it would not permit the 5 employees to return to an

MES facility to work. MES' decision was not based on any information Respondent provided. MES did not permit the 5 employees to return, and MES controlled access to its facilities.

1. Tito denies the back-pay period for the discriminatees. For the discriminatees who were discharged at the MES facility there is no back pay period because MES, a state governmental agency, would not allow them to return to the facility, or any MES facility, at any time after their discharge. Under the MES-Tito contract, Tito had no control over this and the fact that MES would not allow the discriminatees to return to work at any MES facility eliminates Tito's back-pay liability based on the employee's actions precluding reinstatement, as determined by MES which was outside the termination decisions, and changed circumstances. The MES employees were recycling employees. Tito had no other recycling jobs outside MES at the time (and has no recycling employees at this time). The Board (and the ALJ) superficially noted MES' role in any remedial order, MES' role in the back-pay remedy is implicated by the Board's decision.

Tito also denies any of the discriminatees are entitled to any back pay because each has not mitigated their damages if any. There were abundant substantially similar jobs in the relevant labor market during the period at issue and the discriminatees failed to take diligent efforts to secure comparable employment. With respect to the back-pay calculations, Respondent does aver that the overtime calculations are speculative as it does not take into account seasonability of the business and business needs which necessarily affect hours worked. Moreover, MES, not Tito, determined the overtime hours worked by employee. Respondent also denies discriminatees received regular pay increases each year noted, other than the MES provided COLA. With respect to the two non MES discriminatees, Hernan Latapy's back pay period ended prior to April 10, 2015. Jose Lopez Bautisla back pay period ends prior to July 18, 2015. Neither of them mitigated their back pay and/or they were in fact working during the time alleged (and not reporting their

income). Maria Chavez' back pay period ended December 13, 2013 as MES would not permit her to work at an MES facility, let alone enter an MES facility after that date. Yasmin Ramierz' back pay period would have ended December 6, 2013 as MES would not permit her to work at an MES facility, let alone enter an MES facility after that date. Arcely Ramos' back pay period ended as of October 31, 2013 as MES would not permit her to work at an MES facility, let alone enter an MES facility after that date. Maria Sanchez' back pay period would have ended October 30, 2013 as MES would not have permitted Ms. Sanchez to work at an MES facility after that date, let alone enter an MES facility after that date. Lastly, Reyna Sorto-Garcia's back pay period would have ended November 14, 2013 as MES would not have permitted her to work at an MES facility after that day, let alone enter an MES facility.

2. Paragraph 2 of the Compliance Specification is a statement of law which requires no answer. Other than the back-pay period, Respondent agrees with the remaining statements in paragraph 2.

3. Respondent does not dispute the hourly wages set forth in paragraph 3. Respondent denies the discriminatees would be entitled to yearly raises, other than raises mandated by the MES contract. (and denies they would have received such raises).

4. Respondent disputes the interim earnings amounts set forth in paragraph 4 of the Compliance Specification as insufficient. In addition, the alleged discriminatees failed to make reasonable efforts to seek and hold interim employment. The alleged discriminatees did not commence their job searches within a reasonable period of time and did not account for all earnings. During discriminatees alleged unemployment period, there was abundant substantially equivalent jobs in relevant geographic area.

5. Paragraph 5 requires no answer although based on Respondent's prior answers it denies the accuracy and reasonableness of the net back pay set forth in the Compliance Specification based on failure to mitigate, changed circumstances and employee disqualification (MES did not allow MES discriminatees to return to work at MES facilities). The alleged MES discriminatees actions precluded back pay as MES, would not allow their return to work.

As such, none of the MES discriminatee's are entitled to back pay.

6. Noberto Araujo is not entitled to reimburse for mileage on his personal use of his vehicle.

7. Denied. As a matter of law, Tito is not responsible for any taxes which are the responsibility of the employee, and of which employee is eligible for a tax refund.

8. Paragraph 8 requires no answer or response.

9. Denied. Because the discriminates are not entitled to back pay, and their failure to mitigate, Tito denies each is entitled to the amounts set forth in paragraph 9.

10. The discriminatees failed to mitigate their back-pay, if any, as set forth in the preceding responses and, as such, Tito denies the lump sum amounts set forth in paragraph 10 of the Compliance Specification.

11. Tito does not dispute the tax calculations set forth in Paragraph 11, but does dispute the underlying lump sum amount.

12. Tito does not dispute the statement set forth in paragraph 11.

13. See 12 above.

14. Paragraph 14 requires no answer. Tito does not take issue with the statement contained in Paragraph 14.

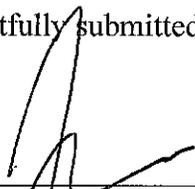
15. Respondent denies the discriminatees are entitled to an increased tax payment.

- 16. Paragraph 16 requires no answer.
- 17. Paragraph 17 requires no answer.
- 18. Respondent denies it has failed to comply with the non-financial remedial obligations.

19. Respondent denies the summary contained in paragraph 19. With respect to the MES discriminatees there is no back pay as such discriminatees were precluded from working at any MES location after the date of their discharge. In addition, said MES discriminatees failed to mitigate their back-pay damages, if any. Tito had no control over MES' refusal to permit the former MES employees to return to their jobs and Tito had no other recycling work. Latopy and Bautista failed to mitigate their damages, if any. Work they performed during their claimed unemployment was off the books work which they did not report.

For its affirmative defenses, Respondent submits that each discriminatee failed to mitigate their back-pay if any; any Specification Compliance with respect to discriminatees who worked at MES facilities is impossible; laches, and estoppel.

Respectfully submitted,



Jonathan W. Greenbaum
COBURN & GREENBAUM, PLLC
Second Floor
1710 Rhode Island Avenue, NW
Washington, DC 20036
Telephone: 202.744.5003
Facsimile: 866.561-9712
Email: jg@coburngreenbaum.com

cc: Counsel for District Council 51