UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CORDUA RESTAURANTS, INC.,	§	
	§	
Petitioner/Cross-Respondent,	§	
	§	No. 19-60630
v.	§	
	§	Board Case Nos.
NATIONAL LABOR RELATIONS BOARD,	§	16-CA-160901 *et al.*
	§	
	§	
Respondent/Cross-Petitioner.	§	

PETITIONER/CROSS-RESPONDENT CORDUA RESTAURANTS, INC.'S
PETITION FOR PANEL REHEARING

Petitioner/Cross-Respondent Cordua Restaurants, Inc. ("Cordua") files this petition for a panel rehearing of the decision rendered by the panel in the above-captioned matter by opinion filed January 11, 2021 (the "Opinion"). This petition for panel rehearing is necessary to direct the Court's attention to errors of fact and law that have been overlooked or misapprehended, as set forth below.

I. On review, Cordúa argues that the Board "erred by finding that Ramirez's attempt to acquire other employees' payroll information, without their permission, and lying to the COO about it, was protected activity." The Board did not in fact make such a finding. (Excerpt from Opinion, at 11.)

The Board took this position when it stated that "Espinoza pried into Ramirez's protected activity by asking if he requested Reichman to obtain employees' payroll information. Ramirez was entitled to "shield [this] Sec. 7 activity from [the Respondent], even by lying." ROA.1787 n. 5. Espinoza asked Ramirez

this question in response to a report from Reichman that Ramirez had illegally asked her to "get other [] peoples payrolls." ROA.1488. The Board characterized this request to "Reichman to obtain employees' payroll information" as Section 7 activity. The Board further stated that Ramirez was entitled to shield this "Section 7 activity" by lying to Espinoza. The Board adopted this finding in its supplemental order. ROA.1825 n. 18.

This error is significant because Ramirez's misconduct is a central issue in this case. Mischaracterizing this conduct as protected activity allows the Board to find retaliation and pretextual motives where they do not exist. Cordua terminated Ramirez for attempting to misappropriate other employees' payroll information and for lying about it, not for his protected activity. This error is also significant because if the Board's ruling stands, its legal precedent will specifically define attempting to obtain payroll information belonging to other employees – without such employees' consent – as protected activity, and employees will be entitled to lie about it.

II. Ambroa claimed that he opened Reichman's text conversation with Ramirez because he saw on the preview screen that two messages "were mentioning [his name]." However, the only message in Reichman and Ramirez's conversation mentioning Ambroa's name was not a recent message (the most recent text messages in the thread concerned an unrelated scheduling issue) and was too long for Ambroa's name to have appeared on the preview screen. (Excerpt from Opinion, at 13.)

It is a factual error to state what message could have appeared on the phone's preview screen. There is no evidence that the most recent text messages between

Reichman and Ramirez were photographed by Ambroa or included in the record. The phone preview screen is also not in the record. It is pure speculation to opine whether the most recent text message contained Ambroa's name. Accordingly, it is also pure speculation to state that the preview screen message did not contain Ambroa's name. This error is important because this erroneous factual conclusion is used to detract from Ambroa's credibility and create animus.

III. Cordúa argues that surveillance is not unlawful absent "accompanying interference, coercion, or restraint of Ramirez's protected rights." Here, though, the surveillance *did* interfere with protected rights, as it was used by Cordúa to gain general information about Ramirez's collective action-related conversations with Reichman. (Excerpt from Opinion, at 14.)

The conclusion that the surveillance interfered with protected rights is an error of law. The opinion does not cite to legal precedent indicating that interference with protected rights includes "gaining general information" about protected activity. Upon review, legal precedent indicates the opposite is true. In one case, the Fifth Circuit considered whether illegal surveillance took place when a manager attended a union organizational meeting. *N.L.R.B. v. Computed Time Corp.*, 587 F.2d 790, 794 (5th Cir. 1979). The Fifth Circuit noted that the surveillance itself was not illegal unless it interfered with, restrained, or coerced employees in the exercise of their Section 7 rights. *Id.* The Fifth Circuit found that the Board did not have substantial evidence that the manager's presence interfered with protected rights, because there was no evidence from any witness indicating that the surveillance had a coercive

impact or effect, nor that the manager was not at the meeting at the direction of the company. *Id.* at 795. The fact that the manager gained information by attending the meeting was not a factor in consideration.

Likewise, in this case, there is no evidence of a coercive impact or effect stemming from Ambroa viewing the text messages, no evidence of any resulting interference with the collective action, and no evidence that Ambroa viewed the text messages at the direction of Cordua. In fact, his testimony indicates that he made the decision of his own accord.

This error is important because it is used to justify a finding of animus. This error is compounded because the information Cordua discovered also related to matters that were not protected, including Reichman's stated intent to store company files that included employee records, without the consent of the company or employees, on flash drives without the company's knowledge – a matter which would concern any company.

IV. Cordúa investigated and fired Ramirez just weeks after its management learned of Ramirez's involvement in the lawsuit and of Ramirez's wage-related conversation with Reichman. Ramirez's protected activities—participating in the FLSA lawsuit, discussing wage issues with co-workers, and requesting his payroll information—were ongoing and occurred close in time to the investigation and termination. (Excerpt from Opinion, at 15-16.)

The determination that the timing of Ramirez's protected activity indicates unlawful motive is a legal and factual error. Espinoza, the person who made the decision to terminate Ramirez, had been aware of Ramirez's involvement in the

collective action for eight months. ROA.1025:19-21. The termination occurred eight months after Espinoza learned that Ramirez filed the lawsuit, not several weeks.

With respect to the protected activity of Ramirez requesting his own payroll information, the Board has never contended that Cordua held animus toward or retaliated against Ramirez on the basis that Ramirez requested his own payroll information. Instead, the Board has contended that Cordua held animus toward Ramirez for filing a collective action lawsuit and encouraging others to join. This activity had been ongoing and known to Cordua, and to the decision-maker Espinoza, for eight months. This fact weighs *against* a finding of animus:

> Notably, while the Board has long recognized that the timing of a respondent's action in relation to learning of protected activity can provide reliable evidence of unlawful motivation, in this case the timing shows the opposite. [Employee's] protected activity of complaints about the dues structure (and a few other issues) had been ongoing for many years, was known to the Respondents, yet [Union Representative] assisted [Employee] with grievances and referrals during that time. Nothing in [Employee's] conduct or the Unions' reaction explains what would suddenly trigger retaliation against [Employee] in December 2011 through May 2012.

Dist. Council 91, Int'l Union of Painters & Allied Trades, Afl-Cio & Its Affiliated Int'l Union of Painters & Allied Trades Nw. Indiana, Local 460, & Brenton Cook, an Individual., 197 L.R.R.M. (BNA) ¶ 1173 (N.L.R.B. Div. of Judges Mar. 15, 2013); *see also In Re Bashas', Inc.*, 28-CA-18482, 2003 WL 22680919 (N.L.R.B. Div. of Judges Nov. 4, 2003) (explaining that the timing of an employee's transfer did not support a link to his protected activity, despite the fact that his ongoing protected activity was extensive, because his class action discrimination lawsuit had

been filed ten months earlier and there was nothing particularly significant happening about the time of the transfer).

Likewise, in this case, Ramirez's involvement in the lawsuit was known to Cordua for eight months. During that time, Cordua continued to transfer Ramirez between restaurants, granting Ramirez exposure to more potential plaintiffs that he could encourage to join the lawsuit. His last transfer occurred in June 2015, *after* multiple employees joined the lawsuit in April and May 2015. ROA.35:24-36:3, 1392, 1404. Ramirez's termination was only triggered when Cordua received information that Ramirez had attempted to surreptitiously take payroll records belonging to other employees.

This error is significant because the legal precedent *heavily* weighs in favor of negating any inference of unlawful motivation when the timing between the start of the protected activity and the termination is so distant.[1]

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[1] *See The New York Hosp. Med. Ctr. of Queens, Respondent & Paris Young, an Individual*, 29-CA-136515, 2015 WL 9592399 (N.L.R.B. Div. of Judges Dec. 31, 2015), *adopted sub nom. The New York Hosp. Med. Ctr. of Queens & Paris Young*, 29-CA-136515, 2016 WL 555915 (N.L.R.B. Feb. 11, 2016) (stating that the four-month gap in time between employee's protected activities and the alleged discrimination against him is too remote to support an inference of a connection); *Consol. Biscuit Co. & Bakery, Confectionary, Tobacco Workers & Grain Millers Int'l Union, Afl-Cio, Clc*, 346 NLRB 1175, 1180 (N.L.R.B. 2006), *order enforced sub nom. N.L.R.B. v. Consol. Biscuit Co.*, 301 Fed. Appx. 411 (6th Cir. 2008) (dismissing complaint because the timing of employee's termination, 5 months after engaging in protected activity, does not support an inference of unlawful motive); *Cent. Valley Meat Co.*, 346 NLRB 1078, 1092 (N.L.R.B. 2006) (timing of schedule change suggested Respondent was not motivated by protected activity where employee's schedule changed 6 months after his union activity and 2 months after filing a wage and hour lawsuit); *MECO Corp. v. N.L.R.B.*, 986 F.2d 1434, 1437 (D.C. Cir. 1993) (stating that "the eight-month gap between the employees' last concerted activities and their discharge strongly militates against any inference of anti-union motivation"); *NLRB v. Esco Elevators, Inc.,* 736 F.2d

V. As the Board found, Cordúa's asserted concerns about Ramirez's fitness and trustworthiness as an employee, particularly with respect to handling confidential credit card information, are undermined by Cordúa's failure to speak with Ramirez about these concerns for nearly six weeks. (Excerpt from Opinion, at 16.)

It is a factual error to state that Cordua was particularly concerned with Ramirez handling credit card information. When Espinoza mentioned credit card information, it was in response to Board counsel questioning Espinoza in general about why he needed to trust his 150-200 servers, as follows:

Q Why -- you said you had 750 employees, right?
A Give or take, 725.
Q How many of them are servers?
A I would say between 150 to 200.
Q What justification do you have for needing to trust someone who's just a server?
A Well, they handle cash, they handle certificates, they handle credit card information. They interact with our guests, they are presenting the features of the day, and features of the day are sometimes X-price. They are supposed to be telling the guest what the price of the feature is so guests don't get surprised at the end of the meal with that because some guests get upset and don't come back if you're not being honest and forthcoming with that. So there's a myriad of --
Q Do you have a stricter honesty test for servers than bussers?
A Honesty is honesty, period. Okay? It's for every employee. You can be a waiter but you can be a back of the house employee, you can be a cook and there is product, there is materials, there is stuff there too.

ROA.1067:19-1068:14.

Espinoza provided a general response to a broad question about servers in general, and mentioned credit cards once along with many other items.

295, 299 & n. 4 (5th Cir. 1984) (six-month time lapse between job action and employee's discharge "weighs heavily against a finding" of anti-union motivation).

This factual error is important because the Court finds that this mistaken concern "supports an inference of discriminatory motive." (Opinion, at 16.) It is also important because, while Ramirez would have continued to have access to credit card information during the six-week investigation, Ramirez did not have access to his coworkers' payroll information without Reichman. Reichman did not work at Cordua during the six-week investigation. Cordua's decision to permit Ramirez to work during the six-week investigation did not demonstrate a discriminatory motive. It was a reasonable decision, since Ramirez no longer had access to his coworkers' payroll information due to Reichman's termination. It was also a decision that was favorable to Ramirez, indicating lack of animus.

VI. The Board discredited Reichman's text message to Ambroa asserting that Ramirez had asked her to obtain other employees' confidential records because this statement was not corroborated by the actual text message conversation between Reichman and Ramirez. (Excerpt from Opinion, at 18.)

This credibility determination is inherently unreasonable and self-contradictory. It is inherently unreasonable to assert that Ramirez's request to obtain other employees' confidential records must have occurred or been referenced during the short text message conversation photographed by Ambroa. Reichman does not state the method of communication used by Ramirez when he made the request to obtain other employees' payroll information. His request could have been made verbally, sent via text message, Facebook message, or Snapchat. It is inherently

unreasonable to hold that Ramirez's request must be referenced in one specific, short text conversation, in order for Reichman's report of the request to be credible.

Additionally, this credibility finding is inherently unreasonable because it requires Cordua to present photographic evidence of misconduct. It assumes that if Cordua cannot present the conversation between Reichman and Ramirez, Cordua cannot rely upon a participant's report of that conversation. Herein also lies the self-contradiction. The Board alleges animus based on the surveillance of Ramirez's conversation, but also would require Cordua to conduct additional corroborating surveillance to credit Reichman's report.

This error is important because it goes directly to Cordua's affirmative defense. Cordua's affirmative defense is rejected partially on the basis that Cordua lacked "credible evidence" to support its conclusion that Ramirez attempted to access other employees' records, rendering the reason to terminate Ramirez pretextual. Yet, Reichman's text message was credible evidence to Cordua. The Board's determination that the text message was not credible was inherently unreasonable and contradictory.

VII. The Board's credibility determination as to Ramirez's testimony that he only sought to obtain his own payroll records is also not inherently unreasonable or self-contradictory. . . We agree with the Board that [Ramirez's] testimony does not undermine Ramirez's credibility as a witness. Inconsistencies or conflicts in a witness's testimony, standing alone, are insufficient to establish perjury. *Koch v. Puckett*, 907 F.2d 524, 531 (5th Cir. 1990); *see also Fairfax v. Scott*, No. 93-8853, 1994 U.S. App. LEXIS 42267, at *3 (5th Cir. 1994) (per curiam) (unpublished). (Excerpt from Opinion, at 19.)

The conclusion that inconsistent testimony is insufficient to undermine a witness's credibility is legal error.[2] *See Overnite Transportation Co.*, 245 NLRB 423 fn. 1 (1979) (upholding non-reliance upon witness with internal consistencies in testimony); *Hussain v. Lynch*, 638 Fed. Appx. 305, 307 (5th Cir. 2016) (inconsistent testimony of witnesses undermined their credibility); *Sanchez v. Young County, Tex.*, 956 F.3d 785, 793 (5th Cir. 2020), cert. denied sub nom. Young County, TX v. Sanchez, 20-465, 2020 WL 7132337 (U.S. Dec. 7, 2020) (noting that inconsistent testimony presents questions of credibility).

Additionally, the reliance on the inapposite cases cited in the Opinion is misplaced. *Koch v. Puckett*, 907 F.2d 524, 531 (5th Cir. 1990) is a criminal case that states the standard for a criminal defendant to make an allegation of perjured testimony: he must show that the prosecution knowingly presented materially false evidence to the jury. The criminal defendant had no evidence to support his perjured testimony claim, other than his own testimony that the other witnesses lied. *Fairfax v. Scott*, 39 F.3d 319 (5th Cir. 1994) is another case where the criminal defendant contended that the prosecution knowingly used perjured testimony to obtain his conviction. To prove a due process violation because of perjured testimony, a

[2] Inconsistent standards are applied to Ramirez and Espinoza. Before Ramirez knew there was a recording of the interview between himself and Espinoza, Ramirez testified under oath that Espinoza asked him about other employees who joined the lawsuit. This is deemed a mere "lapse in memory." Yet, when Espinoza asks during the interview whether there were texts "to" Reichman (instead of "from" Reichman or "with" Reichman), this is deemed a "misleading" question that is evidence of pretext, not a "lapse in grammar."

criminal defendant must show that the testimony was false, that the prosecutor knew that it was false, and that it was material to the issue of guilt. *Id.* at 531. A criminal defendant cannot show this merely by presenting contradictory testimony from witnesses, inconsistencies within a witness's testimony, and conflicts between reports, written statements, and the trial testimony of prosecution witnesses. *Id.*

Cordua is not required to meet the criminal due process standard outlined in these cases. Instead, an NLRB case is more instructive. In *Mccotter Motors Co.*, 291 NLRB 764, 768 (N.L.R.B. 1988), an employee admitted that he had provided false statements in an affidavit. That was sufficient for the NLRB to find that his uncorroborated testimony was "inherently unreliable and, absent corroboration, should not be the basis for finding a violation of the Act." Like the untruthful employee in *McCotter*, Ramirez has also admitted that he did not give truthful responses under oath. ROA.1195:1-1196:17, 1197:16-23. Additionally, before he was aware that there was a recording of the interview between Ramirez and Espinoza, Ramirez falsely testified about the substance of the interview. ROA.51:11-21; ROA.1655-62.

Because the Board's legal precedent establishes that the testimony of an individual who lies under oath is "inherently unreliable," it was inherently unreasonable and self-contradictory of the Board to rely solely upon Ramirez's testimony that he only sought to obtain his own payroll records. Ramirez's testimony was not simply "uncorroborated," it was directly contradicted by evidence from

another employee stating that Ramirez attempted to illicitly obtain coworkers' payroll information. ROA.397, 824-36, 1488.

This error is significant because it affects the Board's prima facie case and Cordua's affirmative defense. The Board relies upon Ramirez's testimony both in establishing animus and contending that the decision to terminate Ramirez for attempting to misappropriate other employees' payroll information was pretextual.

VIII. As established, the record does not support Cordúa's allegations that Ramirez committed misconduct or perjury. We give the "greatest deference" to the Board's choice of remedy and will not reverse this decision unless it is shown to be a "patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the NLRA." *In-N-Out Burger, Inc. v. NLRB*, 894 F.3d 707, 720 n.7 (5th Cir. 2018). (Excerpt from Opinion, at 21-22.)

For the reasons given above, the record supports Cordua's allegations that Ramirez committed misconduct and perjury, and thus this finding is error. Additionally, providing reinstatement and back pay to an employee who has attempted to misappropriate records belonging to his employer that contained confidential employee information, lied to his employer, and later lied about his employer under oath, does not effectuate the policies of the NLRA, and it is a legal error to hold otherwise.

The proposed remedy must be tailored to the unfair labor practice it is intended to redress. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900, 104 S.Ct. 2803, 81 L.Ed.2d 732 (1984). Accordingly, the Fifth Circuit has the ability to vacate portions of orders issued by the Board when the facts do not support the severity of the order.

See Denton County Elec. Coop., Inc. v. Nat'l Labor Relations Bd., 962 F.3d 161, 172-75 (5th Cir. 2020) (vacating portion of order issued by the Board that was not supported by precedent, and portion of order issued by the Board that was unwarranted by the facts). Recently, the Fifth Circuit vacated a portion of the Board's order that required the employer to read remedial notices aloud to its employees. *Id.* Although the Board's position was that notice-reading should apply when an employer's unfair labor practices are serious and widespread, even if the employer is not a repeat offender, the Fifth Circuit disagreed. *Id.* at 174.

Similarly, the facts in this case do not support the Board's proposed remedy of backpay and reinstatement. The facts establish that Ramirez engaged in serious misconduct by attempting to misappropriate records from Cordua containing confidential information about his coworkers, without his coworkers' consent. The Supreme Court has explained that previous precedent "expressly did not address whether the Board could award backpay to an employee who engaged in serious misconduct unrelated to internal Board proceedings, [] such as … stealing from an employer." *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 146 (2002). Regardless of the Board's conclusion that Cordua had additional unlawful motives for Ramirez's termination (which Cordua did not), the fact remains that Ramirez lied under oath about his COO, fabricating unlawful questioning that did not occur. Requiring an employer to reinstate an employee after that employee has lied under oath in order to feign unlawful behavior by his COO is unwarranted and amounts to

punitive measures. The Board is precluded from imposing punitive remedies. *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 152 n. 6 (2002). The remaining sanctions, including notice posting, are significant and sufficient. *Id.* at 152 (explaining that orders to cease and desist violations of the NLRA, and conspicuous notice postings, are significant sanctions and are sufficient to effectuate national labor policy regardless of whether the "spur and catalyst" of backpay accompanies them). Accordingly, backpay should not be awarded (or at least should be cut off as of the hearing, when Ramirez committed perjury and admitted to lying to his supervisor) and reinstatement should not be awarded.

PRAYER

Cordua respectfully requests a panel rehearing to direct the Court's attention to errors of fact and law that have been overlooked or misapprehended, as set forth above.

Respectfully submitted,
MONTY & RAMIREZ LLP

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CERTIFICATE OF COMPLIANCE

1. Required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13.

2. This motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 3,605 words, as determined by the word-count function of Microsoft Word 2010.

3. This motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

/s/ Daniel N. Ramirez
DANIEL N. RAMIREZ

CERTIFICATE OF SERVICE

I do hereby certify that on March 11, 2021, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I certify that the foregoing document will be served via the CM/ECF system on all parties or their counsel of record.

/s/ Daniel N. Ramirez
DANIEL N. RAMIREZ