

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.**

FRESH & EASY NEIGHBORHOOD
MARKET INC.

and

Cases 21-CA-38882
21-CA-39100

UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL UNION,
REGION 8 - WESTERN

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RESPONDENT'S EXCEPTIONS**

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I. PROCEDURAL BACKGROUND

On June 3, 2010, Administrative Law Judge William G. Kocol ("ALJ") issued his decision in this matter, making findings of fact and conclusions of law that Respondent violated Section 8(a)(1) of the National Labor Relations Act by promulgating and maintaining discriminatory rules prohibiting employees from talking about the Union, or working conditions (discipline), while they are working, but not prohibiting talking about other subjects. The ALJ also held that Respondent violated Section 8(a)(1) of the Act by inviting employees to quit their employment in response to their protected concerted activities.

On July 1, 2010, Respondent filed exceptions to the ALJ's decision, and a brief in support, challenging the ALJ's findings, credibility resolutions,¹ and legal conclusions.

II. OVERVIEW

Respondent (Fresh & Easy Neighborhood Market Inc.) operates a retail grocery store in Spring Valley, California.

The Union (United Food and Commercial Workers International Union, Region 8 - Western) has been engaged in an organizing drive of the store's employees.

Prior to the relevant events in this case, Respondent permitted its employees to engage in conversations with each other while on the clock, or on the sales floor, involving both work-related and non-work-related subjects.

¹ Respondent submits that for purposes of its exceptions, it will "accept" the ALJ's credibility resolutions and that it is not excepting to those resolutions. However, and inconsistent with this position, Respondent advances exceptions and arguments in support of those exceptions that would call for the Board to set aside the ALJ's credibility resolutions about what was said or what occurred on the dates in question. Also, Respondent asks the Board to discredit employee Shannon Hardin, a witness who was credited by the ALJ.

However, and after employee Shannon Hardin informed her store manager, James Tillinghast, that she supported the Union, and that she would talk with other employees about the Union, Tillinghast announced a rule that employees could not talk about the Union while on the clock or on the sales floor. On a later occasion, and in response to Hardin's complaints about working conditions, Tillinghast repeated the same rule to her.

During this period of time, Respondent's supervisor at the Spring Valley store, Syliva Soliz, overheard a conversation between Hardin (a known Union supporter) and Hardin's co-worker, during which the two were complaining about terms and conditions of employment. Soliz interjected herself into that conversation, suggesting that if she were them, she would quit. Later the same day, Hardin approached Soliz and told her that she could not afford to quit or to be out of work. At that point, and with no reference to any kind of lawful basis or reason, Soliz initiated and engaged in a discussion with Hardin about whether she (Hardin) will receive unemployment benefits if she is fired in the future.

Finally, and on a later date, Tillinghast met with Hardin to issue her discipline. During that conversation, Hardin gave reasons why she thought the discipline was unfair. At the end of their discussion, Tillinghast told Hardin that she could not discuss her discipline with other employees while she was working or on the sales floor.

By engaging in the above conduct, the ALJ concluded that Respondent violated Section 8(a)(1) by: (a) promulgating and maintaining a discriminatory rule prohibiting employees from talking to each other about the Union, but not other subjects, while working; (b) inviting employees to quit their employment as a response to their protected

concerted activities; and (c) promulgating and maintaining a discriminatory rule prohibiting employees from talking about their discipline with other employees, but not other subjects, while working.

For reasons described more fully below, the ALJ's findings and conclusions are supported by the record evidence and Board law. Respondent's exceptions are without merit and should be rejected.

III. STATEMENT OF THE ISSUES

- Did Respondent violate Section 8(a)(1) of the Act by promulgating and maintaining a rule that prohibits employees from talking about the Union while they are working, but not about other subjects?

- Did Respondent violate Section 8(a)(1) of the Act by inviting employees to quit their employment in response to their protected concerted activities?

- Did Respondent violate Section 8(a)(1) of the Act by promulgating and maintaining a rule that prohibits employees from talking about discipline with each other while working, but not about other subjects?

IV. STATEMENT OF THE FACTS²

A. Background.

Respondent operates a retail grocery store in Spring Valley, California, the only store involved herein. The store is open to the public 7 days a week, from 8:00 a.m. to

² Respondent's brief in support of its exceptions contains a section called "Statement of Facts," but this title is a misnomer. In this regard, and therein, Respondent sets forth conclusory summaries of the material conversations, conjecture, legal argument, and cites to discredited testimony that Respondent is purportedly not challenging.

10:00 p.m. During the relevant events in this case, James Tillinghast ("Tillinghast") was Respondent's Store Manager, and Sylvia Soliz ("Soliz") was one of Respondent's Team Leads (supervisors). (ALJD 1; GCx. 1(w)(paragraphs 2(a) and 5 of the consolidated amended complaint); GCx. 1(y)(Respondent's answer to paragraphs 2(a) and 5; Tr. 17-18, 20).³

Shannon Hardin is an employee (customer associate) at Respondent's store. She has worked at the store since it first opened in February 2008. (ALJD 3; Tr. 17-18). Respondent's customer associates⁴ perform a wide range of duties at the store, including stocking shelves, assisting customers, collecting shopping carts, cleaning, and overseeing the store's customer self-checkout system. (ALJD 2; Tr. 18).

It is undisputed that prior to the relevant events in this case, and since the store first opened to the public in February 2008, Respondent has permitted its customer associates to engage in conversations with each other while working, as long as they did not stop working altogether while doing so. These conversations would take place on a daily basis on the sales floor, i.e. in the aisles or anywhere else in the store the customers may be shopping, as well as by the cash registers at the self-checkout area. These conversations have taken place in the presence of, and with the knowledge of, supervisors and the Store Manager. The conversations involve both work-related and non-work-related subjects, e.g. kids, health, sports, etc. (ALJD 2; Tr. 21-22).

Prior to the relevant events in this case, Union organizing had been taking place at the Spring Valley store. Before June 11, 2009, Hardin had engaged in certain Union

³ Throughout the remainder of this brief, all citations to the ALJ's Decision will be referred to as "ALJD" followed by the appropriate page number. Citations to the transcript will be referred to as "Tr." followed by the appropriate page number. General Counsel's exhibits will be referred to as "GCx." and Respondent's exhibits will be referred to as "Rx." followed by the appropriate exhibit number.

⁴ There are anywhere from 2 to 4 customer associates working during any given shift. (ALJD 2; Tr. 19).

activities, including signing an authorization card, talking with the Union on the phone, and talking privately with other customer associates. (ALJD 3; Tr. 22-23; 48).

B. Respondent's Store Manager (Tillinghast) announces and promulgates a rule that employees may not talk about the Union while on the clock or the sales floor.

On June 11, 2009,⁵ Hardin approached Tillinghast in the employee lounge (break room) of Respondent's store, and told him that in case there was any doubt, she wanted him to know that she supported the Union. Tillinghast told Hardin that this had been obvious to him for quite some time. (ALJD 3; Tr. 23).

Hardin then told Tillinghast that she would be talking with the other employees about the Union, but assured him that she would not stop working during those conversations. (ALJD 3; Tr. 23-24).

In response to her stated intention, Tillinghast told her that she is not allowed to talk about the Union while she is on the clock⁶ or the sales floor. Hardin protested, arguing that if employees can talk about the Chargers, or their kids, then they should be able to talk about the Union. (ALJD 3; Tr. 24).

Tillinghast then asked Hardin, "Well are you going to solicit and sell season tickets for the Chargers?" Hardin said no, that she did not have season tickets for the Chargers. Tillinghast did not respond to her answer to his question. Hardin then asked him whether this was his rule or if it was from corporate. Tillinghast said it was from

⁵ Unless otherwise noted, all dates hereinafter are in 2009.

⁶ The General Counsel is not arguing that the Respondent's use of the term *on the clock* is unlawful. In this regard, and as the record evidence reveals, Respondent's employees equate the use of that term (on the clock) with working time. Thus, the use of that term is not unlawfully overly broad.

corporate, and that he would have someone from corporate contact her the next day. That ended the conversation. (ALJD 3; Tr. 24).

Later that same day, Hardin sent an e-mail to Tillinghast, reiterating to him that she supported the Union, and that she intended to discuss the Union with her co-workers. (Rx. 1). Tillinghast immediately forwarded this e-mail to Paula Agwu,⁷ Respondent's Corporate Human Relations Manager, and Agwu came to the store the next day to speak with Hardin. (ALJD 3-4; Tr. 25).

On June 12, Hardin was summoned to the employee lounge, where she met with and spoke to Agwu. Agwu started by telling Hardin that she (Agwu) understood that Hardin supported the Union, and told Hardin that there would be no retaliation. Agwu then told Hardin, however, that she would not be allowed to solicit while she was on the clock or the sales floor. (ALJD 4; Tr. 25-26).

Hardin asked Agwu to define the term "solicit." Agwu, visibly agitated, grabbed some papers off of a table and told Hardin that she could not hand out paperwork or brochures while on the clock or the sales floor. Hardin said she knew that, and that she would not do that. Hardin said that she would, however, discuss the Union with her co-workers. (ALJD 4; Tr. 25-26).⁸

⁷ Although Agwu is not named in the Consolidated Amended Complaint, Respondent was on notice that testimony regarding the conversation between Agwu and Hardin would be introduced into evidence. Respondent also stipulated that Agwu was a supervisor within the meaning of Section 2(11), and agent within the meaning of 2(13). (Tr. 7-10).

⁸ During this same conversation, Agwu asked Hardin why she supported the Union. Hardin told Agwu that previously issued unfair discipline was among the reasons. (Tr. 26). It should also be noted that Hardin testified that it had been her impression, and the opinion of others, that the Store Manager did not like her. (Tr. 43). The relevance of this evidence will be discussed later in this brief.

- C. *During a conversation between two employees in which they are complaining about working conditions, Respondent's supervisor (Soliz) interjects and tells the employees that if she were them, she would quit.*

On August 1, Hardin was issued a verbal warning for having yelled across the store to her co-worker to collect shopping carts on July 31. (ALJD 4; Tr. 26-27; GCx. 2). Soliz issued Hardin the warning on August 1, after consulting with and getting the approval of Store Manager Tillinghast. (Tr. 105).

Hardin argued to Soliz that the warning was unfair because Respondent did not have an intercom system; the bell used to get someone's attention did not work; and that yelling across the store had not been an issue in the past. (ALJD 4; Tr. 27-28).

The next day, August 2, Hardin was working at the store, by the cash registers in the self-checkout area, when she saw and spoke with a co-worker named Zuri. Zuri was off-duty at the time, either shopping or there to pick up his check. (ALJD 4; Tr. 29).

During this conversation, Hardin told Zuri that she had been written up the day before for yelling across the store to a co-worker to collect shopping carts, but that she and others had been yelling for help for the last year-and-a-half. Zuri asked her if she was serious, and further agreed with Hardin that the discipline was ridiculous. (ALJD 4; Tr. 30-31).

During their conversation, for some reason unknown to Hardin, Soliz had walked up to where Hardin and Zuri were talking. (Tr. 32). After hearing part of their conversation, Soliz interjected and said that if she had a manager that didn't like her, she would take her check and walk out. (ALJD 4; Tr. 32). Because customers were coming up to the register at that point, Hardin did not have an opportunity to respond to Soliz' comment. (Tr. 32-33).

Later that day, however, Hardin saw Soliz in an aisle and approached her to continue the previous conversation. She told Soliz that with the way the economy was, she (Hardin) could not afford to quit. Hardin said she had bills to pay, and that she just can't leave and hope to find another job. In response, Soliz said, "well, that's true." (ALJD 4; Tr. 33-34).

At that point, Soliz said, "well if you get fired, at least you would get unemployment." Hardin responded that she (Hardin) did not think that that was always the case, that it depends on the reason a person gets fired as to whether they would receive unemployment. Soliz responded to this by saying, "well, I am sure in this case, I think you would qualify for it." Hardin then walked away, and that ended the conversation. (ALJD 4; Tr. 34).

D. *Respondent's Store Manager (Tillinghast) repeats to Hardin that employees may not talk about the Union while on the clock or the sales floor.*

On August 3, Hardin had a conversation with Tillinghast in the receiving area at the back of the store. During that conversation, Hardin told him that the August 1st warning that had been given to her was unfair — and that she believed it was the first step in him trying to get rid of her because she supported the Union. Tillinghast denied the allegation. (ALJD 5; Tr. 35).

However, Tillinghast reiterated to Hardin that she may not talk about the Union while on the clock or the sales floor. Hardin argued that he was wrong — that she believed she could talk about the Union as long as she kept working while she did so. She told him that she knows she can't hand out literature or ask employees to sign an

authorization card, but that she believes she can talk about the Union with co-workers. Tillinghast then said, "Well okay, but if I have a couple of employees coming to me and telling me that you are harassing them . . .," at which point Hardin cut him off and said that she was not there to harass people. (ALJD 5; Tr. 35-36).

E. *Respondent's Store Manager (Tillinghast) tells Hardin that she can not discuss discipline she received with other employees while working on the sales floor.*

On September 26, 2009, Tillinghast issued Hardin a written warning entitled Performance Improvement Plan ("PIP"), following an alleged incident that occurred on September 17, 2009. (ALJD 5; Tr. 36-37; GCx. 3).

In response, Hardin complained that the warning was unjustified; that what is written in the PIP is not what happened; that he had an incorrect date on the PIP; and that she wanted to be shown what prior write-ups there were that would support placing her under a PIP. (ALJD 5; Tr. 37-38).

At the end of their conversation, Tillinghast told Hardin that he was not playing games anymore, and that she was not allowed to talk about the PIP while on the clock or the sales floor. He further warned Hardin that he has instructed his supervisors to write her up if she was seen talking with her co-workers about the PIP. (ALJD 5; Tr. 38, 53-54).

V. ARGUMENT

- A. *The ALJ properly concluded that Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining a discriminatory rule that prohibits employees from talking about the Union while employees are on the clock or the sales floor.*

An employer violates Section 8(a)(1) of the Act when it announces and maintains a discriminatory rule that prohibits employees from talking about unions while working, but permits conversations regarding other subjects unrelated to work, particularly when the prohibition is announced in specific response to employees' union and/or protected concerted activities. See generally Teledyne Advanced Materials, 332 NLRB 539 (2000), and the cases cited therein; see also President Riverboat Casinos of Missouri, Inc., 329 NLRB 77, 82 (1999).

First, the Board's rationale is that such a rule is overly broad, inasmuch as it extends to conversations that do not rise to the level of solicitation. Next, announcing the rule in response to union and/or protected concerted activity, and permitting employees to engage in conversations about other subjects, renders the rule unlawfully discriminatory. Teledyne, supra at 539; President Riverboat, supra at 82. See also Emergency One, 306 NLRB 800 (1992)(employer's ban on talking about the union, without reference to any other subject, unlawful, since employer had previously permitted employees to discuss any topic they wanted as long as it did not interfere with their work duties).

Here, the ALJ properly concluded that Respondent, by Tillinghast, on June 11 and then again on August 3, announced and promulgated a discriminatory rule by telling Hardin that she could not talk about the Union while on the clock or the sales floor.

This rule is overly broad, inasmuch as it would encompass any kind of conversations about the Union, even ones that do not rise to the level of solicitation.⁹ Furthermore, the rule was announced in direct response to Hardin's stated support of the Union, and Tillinghast did not mention any other subjects that were similarly banned. Accordingly, the ALJ properly concluded that the announcement and promulgation of the rule violated Section 8(a)(1) of the Act.

In its exceptions, Respondent argues that Tillinghast confined the announced rule to solicitation; and/or that Hardin knew or should have known (from her conversations with Tillinghast and Agwu) that she did not have to comply with the announced rule; and/or that the Board should deem Respondent's conduct as being isolated and ambiguous. Although Respondent suggests otherwise, the arguments advanced by Respondent amount to an attack on the ALJ's credibility resolutions regarding what was or was not said during conversations between Tillinghast and Hardin. Because Respondent is asking the Board to reach a different conclusion about what was or was not said, Respondent is calling for the Board to set aside the ALJ's credibility resolutions. Given that Respondent concedes that it did not file exceptions to the ALJ's credibility resolutions in this matter, however, Respondent has waived its right to challenge those credibility determinations.

Assuming *arguendo* that Respondent had filed exceptions to the ALJ's discrediting of Tillinghast's testimony that he confined his rule to solicitation, the

⁹ Note also that Respondent's rule, as announced, does not just prohibit conversations while employees are on the clock, but additionally (and separately) prohibits conversations (at anytime) about the Union while employees are on the store floor. Prohibiting conversations on the sales floor, at anytime, would therefore encompass periods of time in which employees are not working or on the clock. This makes Respondent's rule additionally overly broad and unlawful. See generally *Republic Aviation Corp. v. NLRB*, 324 US 793 (1945) (rule presumptively invalid if it prohibits solicitation during employees' own time).

argument would be without merit in any event. It is established Board policy not to set aside an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that they are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951).

There is no basis to set aside the ALJ's credibility resolutions because they are based on his observations of the witnesses' demeanor, and the record evidence. Specifically, the ALJ concluded that Hardin's testimony was the more detailed, her demeanor was more impressive, and that her testimony "rang true." (ALJD 3). Conversely, the ALJ concluded that Tillinghast's testimony seemed less certain, and that his demeanor was less impressive. (ALJD 3).

The record evidence supports the ALJ's credibility resolutions. In this regard, Hardin's testimony was the much more specific of the two. Her recounting was detailed and specific, including testimony regarding back-and-forth exchanges between the two involving her arguments that he was unfairly limiting talking about Union when other subjects may be talked about. In fact, her arguments about why the rule was unfair support her assertions that the rule he announced was a rule banning talking about the Union.

Next, and as the ALJ noted, there is not just one conversation in which Tillinghast makes an unlawful statement. Rather, the General Counsel presented evidence about a number of conversations involving Tillinghast and Hardin (June 11, August 3, and September 26), and Tillinghast and former employee Debra Kalilimoku,¹⁰ during which Tillinghast acts consistent with his unlawful exchanges with Hardin by announcing the discriminatory rules.

¹⁰ Her testimony is discussed below.

Next, it is more likely that Hardin would remember the events at issue, especially the conversation on June 11th. That day she went to her Store Manager to tell him that she supported the Union. This was a significant undertaking on her part, and so she is more likely than he is to recall how he reacted to her statements.

Furthermore, it is more believable that Tillinghast, who was not expecting to have the kind of conversation he had with Hardin on June 11, reacted to her stated intention to *talk* with other employees. This reaction was to tell her that she can not *talk* with other employees during work time. It is unlikely that he reacted by telling her the carefully and artfully worded no-solicitation policy he purports to have told her. If he had, the back-and-forth exchange between Hardin and him, as well as the discussion they had on August 3, would not make sense.

Next, Tillinghast's assertions during the trial that he explained the rule in the context of solicitation, and that he always uses the term "solicit" when discussing or explaining such rules to employees (Tr. 137) was specifically rejected by the ALJ, especially in light of the credited testimony of former employee Deborah Kalilimoku.

Kalilimoku testified that during a conversation Tillinghast had with her and other employees in or about October 2008, in which he was addressing the Union organizing taking place outside the store at the time, he told the employees that they are not allowed to be talking about the Union in the store, or with each other. He made no reference to his rule being limited to solicitation. (Tr. 184-185).¹¹ This credited testimony (ALJD 3), which Tillinghast was not recalled to address or otherwise rebut, supports Hardin's testimony that Tillinghast announced rules that banned employees from talking about the

¹¹ This conversation took place outside the 10(b) period. However, this evidence is still relevant in assessing the credibility of Tillinghast.

Union at all during working time or on the sales floor. See, similarly, Teledyne Advanced Materials, supra at 539 (Board rejecting respondent-employer's argument that supervisor had merely communicated its no-solicitation policy to employees).¹²

In light of the above, there is no basis to set aside the ALJ's credibility resolutions.

Respondent's arguments that strictly under Hardin's credited testimony, the Board should conclude that Tillinghast confined his rule to solicitation; and/or that Hardin should have understood that she did not have to comply with his announced rules, are similarly unpersuasive. Hardin's testimony makes clear that Tillinghast did not confine his rule to solicitation.

Next, and during their conversation on June 11, Tillinghast asked Hardin whether she planned on soliciting and selling Charger tickets. Hardin answered that she didn't own Charger tickets. Tillinghast did not respond to that answer.

This exchange, contrary to Respondent's arguments, does not support a conclusion that Tillinghast either announced a lawful no-solicitation policy, or sufficiently disclaimed the discriminatory rule he previous told her about.

Similarly, Hardin's conversation with Agwu on June 12th, wherein they discussed (in a very limited nature) the word solicit, did not constitute a sufficient disclaimer of the rule Tillinghast had announced on June 11th - which extended to all speech, especially in light of the fact that Tillinghast repeated the same overly broad and discriminatory rule on August 3rd.

While Respondent tries to string together or boot strap certain statements made by Tillinghast (on June 11 or August 3), and/or by Agwu (on June 12), and argue that Hardin

¹² Arguments by Respondent about what is, or is not, its written no-solicitation policy are irrelevant. This is especially true given that Respondent is not challenging the ALJ's credibility resolutions regarding what was said by Tillinghast on the dates in question.

should have been able to piece all these things together and determine a lawful rule despite what Tillinghast had told her, that argument should be rejected. The burden is on Respondent, not Hardin, to clearly communicate lawful rules, or to clearly disclaim previously announced unlawful rules. In this case, Respondent did neither.

Respondent's arguments about Hardin's e-mail to Tillinghast on June 11th, and his response on June 22nd, are similarly without merit. With respect to Hardin's e-mail to Tillinghast, the e-mail does not contradict her testimony about the conversation of June 11th.

Next, the circumstances regarding the e-mail Tillinghast sent Hardin on June 22, which e-mail was purportedly responding to the e-mail Hardin had earlier sent Respondent on June 11, reflect that the e-mail should be given no weight. First, on the day Hardin sent her e-mail to Tillinghast (June 11th), he "immediately" forwarded it to Paula Agwu. Agwu then came to the store the next day on June 12th to meet with Hardin about her support for the Union and intention to talk with co-workers about the Union. In light of these facts, Respondent was clearly concerned about what Hardin had said. Next, Hardin did not, in her e-mail, ask for an e-mail response; nor does the message in her e-mail suggest a response is expected. (Rx. 1).

Tillinghast forwarded the e-mail to Agwu on June 11th, and Agwu came to the store in response on June 12th. Neither Tillinghast nor Agwu ever told Hardin that they were working on a response to her June 11th e-mail. Furthermore, Respondent did not send an e-mail response to Hardin at anytime during June 11th through June 15. During that time period, the Union filed a charge on June 12, which was served on Respondent on June 15. (See GCx. 1(a), (b), (c)).

On June 22, Respondent e-mailed Hardin a carefully crafted response to her e-mail, stating that whatever she wanted to do was fine with Respondent.

Given the above facts and timeline, it is clear that Respondent's June 22nd e-mail was not really a response to Hardin's e-mail. Rather, it represented Respondent's carefully constructed response to receiving a copy of an NLRB charge in the mail. As such, no weight should be given to this e-mail.

Finally, Respondent argues that the Board should conclude that the announcement and promulgation of these rules were isolated events. However, this was not an isolated occurrence, or innocuous comment. Rather, the announced and promulgated rule, the purpose and timing of which was specifically tied to the Union organizing and Hardin's stated support of the Union, was announced and repeated. Furthermore, Tillinghast announced similarly discriminatory rules prior to (i.e. the testimony by Kalilimoku) and after these conversations (i.e. September 26th conversation, discussed below). Thus, the conduct can not be deemed be isolated or innocuous.¹³

Based on the Board precedent and arguments described above, the ALJ properly concluded that Respondent, on June 11, and again on August 3, violated Section 8(a)(1) of the Act by announcing and promulgating a discriminatory rule that employees may not talk about the Union, but not other subjects, while they are on the clock or the sales floor.

¹³ For these same reasons, arguments in Respondent's brief that Respondent's violations are *de minimus* should be rejected.

B. *The ALJ properly concluded that Respondent violated Section 8(a)(1) of the Act by inviting an employee (Shannon Hardin) to quit her employment in response to her protected concerted activities.*

An employer violates the Act when it invites an employee to quit or go somewhere else in response to union and/or protected concerted activities. McDaniel Ford, Inc., 322 NLRB 956, 956 n. 1, 962 (1997)(employer's remark that if employees were unhappy they should look for a job somewhere else, made in response to employees' protected activities, unlawful); Kenrich Petrochemicals, 294 NLRB 519, 531 (1989)(invitation to quit, in response to protected concerted complaints about working conditions, unlawful); Stoody Co., 312 NLRB 1175, 1181 (1993)(suggestion that employees who complain about detrimental actions taken should seek other employment unlawful); Rogers Electric, Inc., 346 NLRB 508, 515 (2006)(statement that employees who were unhappy "can just exit" unlawful); Kroger Co., 311 NLRB 1187, 1200 (1993)(employer's statement that if employees did not like working for the company, they should quit, deemed unlawful).

Here, the ALJ concluded that in direct response to a protected concerted discussion between two employees (Hardin and Zuri) about the fairness of recently issued discipline,¹⁴ Soliz interjected herself into that conversation and said that if she had a manager that did not like her, she would quit.

In light of this, the ALJ concluded that Soliz violated Section 8(a)(1) of the Act. The ALJ's conclusion is supported by his credibility resolution (in favor of Hardin),¹⁵ and the record evidence.

¹⁴ Later in this brief are citations to Board precedent, which make clear that discussion between co-workers about discipline is protected concerted activity.

¹⁵ Because Respondent's position about whether it is attacking the ALJ's credibility resolutions is unclear, the General Counsel will address the ALJ's credibility resolutions on this allegation herein. However, the

As an initial matter, there can be no doubt that Soliz overheard the conversation between Hardin and Zuri, which conversation was limited to complaints about working conditions, and that Soliz was directing her comments specifically to them and their conversation. She was within a few feet of them, she directed her comments to them, there is no evidence of anyone else being around at the time she made the comments, and her comments are a response to what the employees were doing at the time.

Soliz' statement, when objectively viewed, was an invitation to the employees to quit their jobs. This is precisely how Hardin construed it, as she later explained to Soliz in response that she (Hardin) can't afford to quit, and that quitting was not an option.¹⁶

Since the invitation to quit was made to at least one known Union supporter, and/or in direct response to a protected concerted discussion about working conditions involving two employees, the statement conveys the message that those activities are incompatible with continued employment, and therefore implicitly threatens discharge. The statement is additionally coercive because it conveys the message that employees do not want to engage in activities that will result in the Store Manager not liking them.

At the hearing, Soliz not only denied making the statement at issue, but she also denied ever having any kind of conversations along the lines to which Hardin testified.

General Counsel remains of the position that Respondent has waived its right to challenge the ALJ's credibility resolutions by not specifically excepting to them. Furthermore, Respondent's arguments involving the Soliz allegations are additionally improper because Respondent, in its brief in support of exceptions, refers to what Soliz' purported motivation was in making the unlawful statements. However, Soliz denied that she ever had any kind of conversation along the lines testified to by Hardin. Thus, there is no record evidence from Soliz about her purported motivation in making the comments.

¹⁶ The ALJ concluded that the two conversations between Soliz and Hardin on August 2nd should be considered as a single violation, as opposed to separate violations. In any event, the second conversation (concerning Hardin qualifying for unemployment benefits) confirms that Soliz' invitation to quit was directed at Hardin's protected concerted activities. In this regard, Soliz makes no reference to any kind of lawful reason for Hardin being terminated in the future. In fact this would be impossible inasmuch as a future valid reason would not have yet occurred. Therefore, Soliz' statements additionally convey the message that protected concerted activities are incompatible with continued employment. What other basis or reason would an employee in Hardin's place objectively believe to be the reason that Soliz is referring to?

In resolving this credibility resolution, the ALJ concluded that Hardin's testimony was more consistent and believable. Conversely, the ALJ concluded that Soliz' recollection of the events "seemed hazy and her (Soliz') demeanor appeared uncertain." Thus, the ALJ credited Hardin. (ALJD 4).

The ALJ's credibility resolutions are supported by the record evidence. First, it should be noted that Hardin's testimony about the events of August 2nd are not of the type to suggest that they are fabricated. Why would this conversation be made up?

Furthermore, the timing of the conversation with Zuri, Hardin's accounting of the conversation, along with Soliz' interjection, strongly support the crediting of Hardin that the conversation happened and the comment was made. Soliz' denials are either self-serving, or she simply doesn't remember that day or conversation because it was not important to her.

Arguments by Respondent that Soliz' denial should be credited because Soliz is no longer employed by Respondent or because Soliz was subpoenaed to appear at the hearing, should be rejected. First, Soliz was Respondent's supervisor at the relevant time, and the record reveals that she was still employed in that capacity when Respondent first investigated this allegation as a result of the unfair labor practice charge. Thus, she would have had a self-serving interest at the time to deny making the alleged threat.

Next, there is nothing to suggest she is an adverse witness to Respondent in this proceeding. In this regard, she voluntarily engaged in pre-trial preparation with Respondent's counsel. In fact, she acknowledged on cross-examination that she has recently been calling the store to try and get her job back. Thus, she would still have a

motivation to testify consistently with her initial denial of having made the threat, and in a manner that serves Respondent's interests.

Based on the above, the ALJ properly concluded that Respondent, by Soliz, violated Section 8(a)(1) of the Act by inviting Hardin to quit in response to her protected concerted activities.

C. The ALJ properly concluded that Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining a discriminatory rule that prohibits employees from discussing discipline with each other while working, or on the sales floor.

It is well established that an employer violates Section 8(a)(1) of the Act by prohibiting employees from discussing terms and conditions of employment, including wages, hours, and working conditions, in the absence of a substantial and legitimate business justification. See, e.g., Pontiac Osteopathic Hospital, 284 NLRB 442, 465-466 (1987) (rule limiting discussion of terms and conditions of employment); Kinder-Care Learning Centers, 299 NLRB 1171, 1171-1172 (1990) (same); Aroostook County Regional Ophthalmology Center, 317 NLRB 218 (1995), enf. denied in part 81 F.3d 209 (D.C. Cir. 1996) (rule limiting discussion of grievances).

The Board has made it clear that the imposition or maintenance of a rule prohibiting employee discussion of employer disciplinary actions "constitutes a clear restraint on employees' right to engage in concerted activities for mutual aid and protection concerning undeniably significant terms of employment." Verizon Wireless, 349 NLRB 640, 658 (2007), quoting Westside Community Mental Health Center, 327 NLRB 661, 666 (1999). The Board explained that "[i]t is important that employees be permitted to communicate the circumstances of their discipline to their coworkers so

that their colleagues are aware of the nature of discipline being imposed, how they might avoid such discipline, and matters which could be raised in their own defense." Id.

On September 26, and after issuing Hardin discipline that she contended was unfair, Tillinghast told Hardin that she could not discuss her discipline with other employees while she was working or on the sales floor. The ALJ concluded that my announcing and promulgating the discriminatory rule, Respondent violated Section 8(a)(1) of the Act.

In light of the above Board precedent, as well as the earlier precedent and arguments set forth in this brief regarding overly broad and discriminatory rules, the ALJ properly concluded that the announcement and promulgation of this rule by Tillinghast was unlawful.

At trial, Tillinghast denied that he told Hardin that she could not discuss her discipline with other employees. However, and for reasons previously discussed,¹⁷ the ALJ concluded that Hardin's testimony should be credited over the testimony of Tillinghast.

The ALJ's credibility resolutions should be upheld because they are supported by the clear preponderance of the record evidence.¹⁸ First, Hardin's testimony about Tillinghast's announced rule is entirely consistent with his previous conduct of attempting

¹⁷ In making this credibility resolution, the ALJ stated that he again concludes that Hardin's testimony was the more accurate of the two. Earlier in his decision, he set forth reasoning as to why Hardin should be credited over Tillinghast. Thus, it is clear that the ALJ's use of the term again is a reference to his earlier explanations on credibility. Thus, the Board should reject Respondent's arguments that the ALJ did not provide any basis for his credibility resolution on this issue. Nevertheless, and for reasons explained next, the ALJ's credibility resolution is supported by the record evidence.

¹⁸ Respondent appears to both except and waive excepting to the ALJ's credibility resolution over this conversation. In this regard, compare Respondent's Exception Nos. 9 and 10 (excepting to resolution) with Respondent's brief in support of Exceptions at page 6, footnote 6 (waiving exception to resolution). Again, given the confusion and inconsistency with Respondent's positions and arguments regarding the credibility resolutions, this Answering Brief will address the ALJ's credibility resolution.

to ban certain speech altogether. Second, given Respondent's knowledge of Hardin's Union support, and desire to talk to employees about unfair discipline and the need for a Union, Tillinghast would be motivated to try and restrict her speech as much as he thought possible. Finally, Hardin believed that receiving the PIP was serious. Thus, she is more likely to remember the events of that day than Tillinghast, who conversely testified during the hearing that the PIP was nothing and not a big deal.

With respect to Respondent's arguments that Hardin was emotional on the date in question, and therefore may not have accurately heard the things she testified to in light of her condition, the record does not reflect that her emotions reached some kind of level that it inhibited her ability to hear and understand.

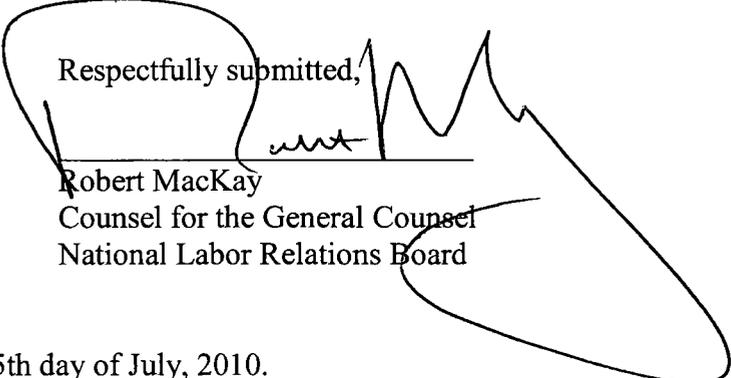
Furthermore, the ALJ rejected Tillinghast's testimony that he told Hardin to control her emotions before she returned to the sales floor. Rather, the ALJ credited Hardin's testimony that what he told her was that she could not discuss her discipline with her co-workers while she was working. Thus, arguments by Respondent that Tillinghast was purportedly concerned about Hardin's emotional state, or had reason to be concerned about her emotional state, are not supported by the credited testimony.

Respondent's arguments that this was an isolated and/or innocuous comment should be rejected for the same reasons described above. Furthermore, Respondent's advancing of this same "isolated" or "de minimus" argument, for each and every one of the allegations in this case, actually undercuts its arguments of isolated conduct.

Based on the above, the ALJ properly concluded that Respondent violated Section 8(a)(1) of the Act by announcing and promulgating a discriminatory rule that prohibits employees from talking about discipline while working or on the sales floor.

VI. CONCLUSION

Based on the record evidence, the ALJ's credibility resolutions, and established Board precedent, the General Counsel respectfully submits that Respondent's exceptions are without merit and should be rejected.

Respectfully submitted,

Robert MacKay
Counsel for the General Counsel
National Labor Relations Board

Dated at Los Angeles, California, this 15th day of July, 2010.

STATEMENT OF SERVICE

I hereby certify that a copy of **Counsel for the General Counsel's Answer Brief to Respondent's Exception** was submitted for E-filing to the Division of Judges of the National Labor Relations Board on July 15, 2010.

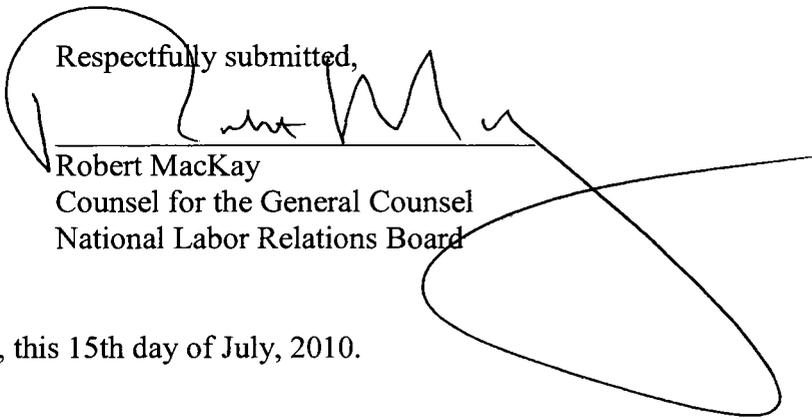
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Dated at Los Angeles, California, this 15th day of July, 2010.