Preferred Building Services, Inc. and Rafael Ortiz d/b/a Ortiz Janitorial Services, Joint Employers *and* Service Employees International Union Local 87. Case 20–CA–149353

August 28, 2018

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On September 9, 2016, Administrative Law Judge Mary Miller Cracraft issued the attached decision. Respondents Preferred Building Services, Inc. (Preferred) and Rafael Ortiz d/b/a Ortiz Janitorial Services (OJS) filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondents filed a reply brief. The General Counsel also filed exceptions and a supporting brief, the Respondents filed an answering brief, and the General Counsel filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] only to the extent consistent with this Decision and Order.[2]

This case arises in the context of picketing activity by employees of OJS, who perform janitorial services pursuant to subcontracts between OJS and Preferred. The judge found that Preferred jointly employs these employees. She further found that the Respondents committed several of the unfair labor practices alleged in the complaint, all of which occurred in reaction to the employees' picketing activity, including cancelling contracts and discharging, threatening, interrogating, and surveilling the employees. In doing so, the judge rejected the Respondents' affirmative defense that the employees lost the protection of the National Labor Relations Act (the Act) because they engaged in picketing with a secondary object prohibited by Section 8(b)(4)(ii)(B).[3] For the reasons discussed below, we find merit in the Respondents' defense, and thus the Respondents' reaction to the employees' unprotected picketing did not violate the Act. Accordingly, we dismiss the complaint in its entirety.

I. FACTS

As more fully recounted in the judge's decision, Preferred contracts with building management companies in the San Francisco Bay Area to provide janitorial services. Preferred fulfills the contracts by either providing its own labor or subcontracting the work to one of 22 subcontractors. Lauren Squeri is an account manager at Preferred.

During the fall of 2014,[4] Preferred contracted with building management company Harvest Properties to service a building located at 55 Hawthorne Street. Preferred, in turn, subcontracted its work cleaning the offices of building tenants at 55 Hawthorne Street, including KGO Radio and Cumulus Media, to OJS, one of Preferred's regular subcontractors.

OJS, which is owned by Rafael Ortiz, employed Balbina Mendoza, Joel Banegas, Yunuen Useda, and Claudia Tapia, among others, as janitors at 55 Hawthorne Street and other locations. At various times that fall, these four employees complained about their working conditions to Olga Miranda, president of the Service Employees International Union Local 87 (Union), and to Karl Kramer and David Frias, directors of the San Francisco Living Wage Coalition (SFLWC).

To publicize their complaints, Mendoza, Banegas, Useda, and Kramer picketed in front of 55 Hawthorne Street on October 29.[5] The picketers marched in front of the lobby chanting slogans like, "up with the union, down with exploitation." They carried signs, some of which displayed the Union's name and some of which variously stated, "PREFERRED BUILDING SERVICES

[1] We have amended the judge's conclusions of law and modified the judge's recommended Order consistent with our findings herein.

[2] The Respondents have 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). We have carefully examined the record and find no basis for reversing the findings. In addition, the Respondents contend that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondents' contentions are without merit.

No exceptions were filed to the judge's dismissal of the complaint allegation that on October 29, 2014, the Respondents engaged in surveillance, or her dismissal of additional 8(a)(1) allegations that the General Counsel moved to add to the complaint at the end of the hearing.

[3] The judge also rejected the Respondents' affirmative defenses that the employees' picketing was unprotected, either because the picketing had a recognitional object prohibited by Sec. 8(b)(7)(C) or because the picketers made defamatory statements, and that the "unclean hands" doctrine prohibited the Union from prosecuting this case. Given our findings below, we need not pass on these additional defenses. We also find no need to pass on the issue whether Preferred is a joint employer of the OJS employees.

[4] Unless otherwise noted, all dates are in 2014.

[5] Miranda and Tapia did not participate in this picketing; it is unclear whether Frias participated.

UNFAIR!" and "WE PREFER NO MORE SEXUAL HARASSMENT."[6] The picketers also distributed leaflets, which stated in relevant part:

> Who Needs a Minimum Wage Increase?
>
> We do.
>
> We work for Preferred Building Services which cleans the offices of KGO radio. We get paid the San Francisco minimum wage of $10.74 per hour. We endure abusive and unsafe working conditions and sexual harassment. The work involves heavy lifting and the risk of serious injury. A foreman arbitrarily cut hours from eight hours per day to six hours and said that any additional hours would need to include sexual favors. The company does not provide paid sick days that are required by San Francisco law or pay medical bills for injuries on the job as required by workers compensation.
>
> We are calling on KGO radio to take corporate responsibility in ensuring that their janitors receive higher wages, dignity on the job, respect, their rights to sick pay and workers compensation, and full legal protections against sexual harassment and retaliation for asserting their rights.
>
> Vote yes on Prop J on Nov. 4 to raise the city minimum wage.
>
> Join us for a picket line outside the offices of KGO radio.

Neither OJS nor Harvest Properties was mentioned by name on the signs or leaflets. However, the leaflet's reference to a "foreman" appears from the record to be a reference to Ortiz.

Though not recounted by the judge, the uncontradicted record evidence establishes that, a few days after the picketing concluded, Miranda met with Banegas, Mendoza, and Useda to discuss the "reactions and responses" of the tenants at 55 Hawthorne Street. The picketers reported that the tenants were "upset by what they had learned."[7]

On November 19, employees Mendoza, Banegas, Useda, and Tapia, in addition to SFLWC Directors Kramer and Frias and Union President Miranda, picketed in front of 55 Hawthorne Street. While marching in front of the building, the picketers carried signs, distributed leaflets, and chanted slogans similar to those used on October 29.[8]

Though not recounted by the judge, the uncontradicted record evidence establishes that, at some point that day, Miranda, Kramer, Mendoza, Useda, and Tapia had a meeting with Harvest Property Manager Benjamin Maxon.[9] According to Maxon, Miranda and Kramer told him "they were going to keep showing up until we made changes, more specifically to the wage." They also complained about poor working conditions. Further, Miranda testified that she told Maxon "we were picketing outside and it just seemed inappropriate that [Ortiz] was still here, knowing what they knew since October." During this conversation, Maxon announced that Harvest intended to substitute a unionized contractor for Preferred. In his testimony, Maxon characterized the reaction of those who attended the meeting as "happy."

That day, SFLWC Director Frias also filmed a video entitled: "It's Time for a Living Wage." At one point, the video displayed a handful of picketers in the building lobby along with a caption stating: "Inside the lobby of 55 Hawthorne Bldg to speak to the building manager on behalf of the janitors who work there." The video later showed employee Useda announcing to the picketers outside that "it seems to me that the negotiations . . . were successful and we gained a victory . . . the person that we wanted to leave it seems has been let go. What I like most is that Lauren [Squeri] from Preferred was present and saw that we're not playing . . . I'm very pleased to see . . . the support that the union has brought out . . . ." At another point in the video, employee Mendoza stated, "[W]e are here to get results from what[']s been happening to us with our supervisor . . . . [W]e spoke with the building manager and he suspended our employer and promised there will be changes and respect for us." The video aired on local television and was posted on SFLWC's YouTube page.

Concerned about the picketers' allegations, Maxon provided Preferred a copy of the leaflet and requested

[6] Some signs stated in small print at the bottom: "This is NOT a strike. It is an informational picket line. We are NOT calling for a boycott of this building. We are in a labor dispute with the cleaning contractor at this building." At the hearing, the judge observed that, although she used a "pretty powerful magnifier" to view these words on a photograph of the signs, it was possible that a passing pedestrian might have been able to read them.

[7] This in fact appeared to be the case. In response to the picketing, KGO at some point asked Harvest to ensure that certain of KGO's rooms not be cleaned by Preferred employees. KGO told Harvest that it had sensitive documents and wanted to be "extra cautious," given that the leaflets "directly labeled" KGO.

[8] Among the differences, the leaflets here called "on KGO radio and Cumulus Media as the major tenant[s] to help in getting Preferred Building Services to listen to [the employees'] demands and not ignore [them]," and the signs and leaflets here did not seek support for the city minimum wage initiative.

[9] The record suggests that Preferred Account Manager Squeri was also present.

that it conduct an investigation.[10] He also told Preferred that, until the investigation was completed, Ortiz was not to enter the premises. Instead of conducting an investigation, however, Preferred gave Maxon notice of its intent to cancel the cleaning contract with Harvest, effective the following month. Preferred also notified OJS that it intended to cancel their corresponding subcontract.

Ortiz discharged Mendoza and Banegas when they reported for work that evening. The contract between Preferred and Harvest, and the subcontract between Preferred and OJS, ended in mid-December, sometime before December 18. Useda and Tapia, among other employees, were discharged as a result. Harvest replaced Preferred with a unionized contractor.[11]

II. JUDGE'S DECISION

The Respondents argued at the hearing that the employees engaged in secondary picketing prohibited by Section 8(b)(4)(ii)(B), which caused them to lose the protection of the Act. Citing *National Packing Co. v. NLRB*, 352 F.2d 482 (10th Cir. 1965), the Respondents further argued that the unprotected nature of the employees' picketing was a complete defense to the unfair labor practice allegations in the complaint.

During the hearing, the judge limited the Respondents' right to question the General Counsel's witnesses regarding this affirmative defense, explaining that the Respondents could recall the witnesses during their case-in-chief and/or make proffers. Before the Respondents presented their case-in-chief, however, the judge issued a written order rejecting the affirmative defense and precluding further evidence in support.[12] She determined that she was not bound by the Tenth Circuit's holding in *National Packing*.

Despite having rejected the Respondents' affirmative defense during the hearing, the judge acknowledged in her decision that "[c]ertainly there are circumstances in which an employer may lawfully discharge an employee for participating in an unlawful strike." On the merits, she found that the picketers did not engage in picketing prohibited by Section 8(b)(4)(ii)(B) because, although they engaged in coercive picketing,[13] they did not have a prohibited secondary object. She found that the picketing complied with the four criteria set forth in *Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 NLRB 547 (1950),[14] in particular because the signs clearly labeled Preferred as the primary employer, which she found to be a joint employer with OJS.[15] Further, the judge found no independent evidence of a prohibited secondary object.[16]

Having rejected the Respondents' secondary picketing defense on the merits, the judge went on to find many of the violations alleged against the Respondents.

III. ANALYSIS

A. The Judge Prematurely Rejected the Affirmative Defense

We find that the judge erred by rejecting the Respondents' defense at the time it was raised and further erred by preventing the Respondents from presenting evidence concerning it.

In *National Packing*, the Tenth Circuit found that the Board failed to consider the employer's defense that the alleged discriminatees lost the protection of the Act by engaging in picketing prohibited by Section 8(b)(7)(B). If they lost protection, the court explained, the employees "should not be able to use the Act to compel reinstatement." 352 F.2d at 485. On remand, the Board determined that the employees' picketing lacked a prohibited object, and thus that it did not need to address the scenario presented by the court. 158 NLRB 1680, 1683, 1685–1687 (1966), enf. denied 377 F.2d 800 (10th Cir. 1967). In subsequent cases, however, where Section 8(a)(1) and (3) complaint allegations were premised on an employer's response to employee picketing, the Board has held that those allegations must be dismissed where it determines that the employees had engaged in unprotected picketing. See, e.g., *Martel Construction*, 302 NLRB 522, 522 (1991) (remanding to judge to consider employer's Section 8(b)(4) secondary picketing defense on the ground that, if the defense had merit, "not all elements of the alleged 8(a)(1) and (3) violations would

[10] The judge credited Maxon's testimony that he sought the investigation on his own volition.

[11] Additional picketing activity occurred at other locations on and after December 18. As these pickets took place after the Respondents committed the alleged unfair labor practices, we need not discuss them.

[12] The judge refused to admit evidence regarding, among other things, why the leaflets were drafted as they were and whether the picketers blocked access to the building.

[13] No party excepts to this finding.

[14] The four criteria are: (a) the picketing is strictly limited to times when the situs of the dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the situs; (c) the picketing is limited to places reasonably close to the situs; and (d) the picketing discloses clearly that the dispute is with the primary employer.

[15] The judge explained that the "only evidence of record remotely relevant" was the leaflet's request that KGO Radio assist the janitors in obtaining better working conditions, but she noted that the signs' disclaimer disavowed that the picketing had any secondary object.

At times, the judge misstated that the picket signs also referred to KGO.

[16] According to the judge, there was no evidence that the picketers asked Harvest, a secondary employer, to end its contract with Preferred or for any other action as a quid pro quo for removal of the pickets. She thus found that the pickets were, in effect, little more than informational in nature.

have been established"), after remand 311 NLRB 921 (1993), enfd. mem. 35 F.3d 571 (9th Cir. 1994); *Rapid Armored Truck Corp.*, 281 NLRB 371, 382 (1986) (holding that because employees engaged in proscribed picketing, "it follows that the additional alleged unfair labor practices of [r]espondent, all of which occurred as a result of the illegal picketing, and without which the alleged unfair labor practices would not have occurred . . . must be dismissed").[17]

The principles from those cases apply here. Accordingly, we find that the judge erred by rejecting the Respondents' secondary picketing defense and restricting their ability to present evidence relevant to that defense.

B. The Judge Erroneously Rejected the Affirmative Defense on the Merits

Despite the judge's error in limiting the Respondents' ability to litigate their defense, we find that the evidence in the record is nonetheless sufficient to establish that the employees engaged in conduct prohibited by Section 8(b)(4)(ii)(B). In relevant part, Section 8(b)(4)(ii)(B) prohibits threatening or coercive conduct that has an object to force a secondary employer—a neutral—to cease doing business with a primary employer, i.e., the employer with whom a labor dispute exists. See, e.g., *Food & Commercial Workers Local 1996 (Visiting Nurse Health System)*, 336 NLRB 421, 426–428 (2001). In *NLRB v. International Union of Operating Engineers Local 825, (Burns and Roe, Inc.)*, 400 U.S. 297, 304 (1971), the Supreme Court acknowledged that "[s]ome disruption of business relationships is the necessary consequence of the purest form of primary activity." However, the Court found that the "clear implication" of the picketers' demands in that case was to require the secondary employer to either force a change in the primary employer's policy of not assigning work to the Operating Engineers or to terminate the primary employer's subcontract. Id. at 305. The Court explained that to find these "most serious disruptive effects" lawful would be "largely to ignore the original congressional concern." Id.

The Board has found that, in cases involving multiple employers at a common situs, there is a strong rebuttable presumption that picketing is unlawful if it fails to comply with the *Moore Dry Dock* criteria. See *Service Employees Local 87 (Trinity Maintenance)*, 312 NLRB 715, 744 (1993), enfd. 103 F.3d 139 (9th Cir. 1996). However, even if picketing complies with those criteria, it will still be found unlawful if there is independent evidence that it had the secondary object prohibited by Section 8(b)(4(ii)(B). *Teamsters Local 560 (County Concrete Corp.)*, 360 NLRB 1067, 1067–1068 (2014). To make that determination, the Board examines the picketers' "entire course of conduct." Id. at 1068.

We find, contrary to the judge, that the picketing at issue in this case did not meet the *Moore Dry Dock* criteria because it failed to clearly disclose that the dispute was with the Respondents.[18] It is true that the picket signs named Preferred. However, the leaflets distributed on October 29 requested that KGO ensure that "their" janitors obtain better working conditions. By this language, the picketers led the public to believe that KGO—who was not involved in the dispute—was their employer and had the ability to adjust their working conditions.[19]

Even assuming arguendo that the picketing complied with the *Moore Dry Dock* criteria, we find, contrary to the judge, that there is independent evidence that an object of the picketing was impermissible. As we explain below, the picketing was intended to "serious[ly] disrupt[]" the business relationship between the Respondents and secondary employer Harvest. See *Burns and Roe*, 400 U.S. at 305.

Significantly, at their meeting with Harvest Property Manager Maxon on November 19, the picketers demanded changes to working conditions that Maxon, as Harvest's property manager, was uniquely positioned to effectuate. Union President Miranda told Maxon it was "inappropriate" that Ortiz was still working there. Miranda and SFLWC Director Kramer ratcheted up the

[17] When judging an employer's defense that an employee engaged in prohibited picketing, the Board considers whether the individual employees (as opposed to the union) engaged in prohibited conduct. E.g., *Brown & Root USA, Inc.*, 319 NLRB 1009, 1009 & fn. 5, 1112 (1995) (finding refusal to consider and hire unlawful where employees did not engage in unprotected activity and employer did not rely on it).

[18] As previously stated, we find it unnecessary to pass on the judge's finding that Preferred is a joint employer of OJS's employees. If the Respondents are *not* joint employers, the picketers plainly manifested a prohibited object, as they were employed only by OJS but targeted Preferred (among others). See *Trinity Maintenance*, 312 NLRB at 753 fn. 113. Assuming arguendo they are joint employers, however, the picketing still had a prohibited secondary object for the reasons discussed below.

[19] The leaflets distributed on November 19 did not claim that KGO employed the picketers. However, those leaflets requested that KGO and Cumulus, as the "major" building tenants, encourage Preferred to meet the picketers' demands.

The judge noted that the disclaimer in small print on the picket signs disavowed that the picketing had any secondary intent. In the event that pedestrians were able to read the disclaimer, it does not provide a safe harbor given the independent evidence of a secondary object. Cf. *County Concrete Corp.*, 360 NLRB at 1070 (finding a Sec. 8(b)(4)(ii)(B) violation where independent evidence of a secondary object contradicted the union's letter to employers stating that it had only a primary object); *Minneapolis Building & Construction Trades Council*, 229 NLRB 98, 103–104 (1977) (finding Sec. 8(b)(7)(A) and (C) violations where independent evidence of an organizational, recognitional, or bargaining object contradicted the unions' disclaimer of such an object).

picketers' pressure on Maxon when they warned him that they would "keep showing up until [Maxon] made changes" to employees' wages. In the SFLWC video filmed that same day, employee Useda confirmed the picketers' intent to pressure Maxon to initiate change to settle their dispute with the Respondents. Useda announced to her fellow picketers that it was their "negotiations" that pressured Maxon to suspend Ortiz. Useda plainly believed that these negotiations would affect Harvest's relationship with Preferred: she told the picketers that what she "like[d] most" was that Preferred Account Manager Squeri "was present and saw that we're not playing." Employee Mendoza further confirmed the picketers' focus on pressuring Maxon to initiate change. In the video, Mendoza reported that the picketers "spoke with *the building manager* and *he* suspended our employer and promised there will be changes" (emphasis added). Maxon recalled the picketers' "happy" reaction when he said he was searching for a unionized contractor. Indeed, when Preferred cancelled its contract with Harvest, Maxon hired a unionized contractor. That Preferred, not Harvest, cancelled the contract is irrelevant in these circumstances. The fact remains that an object of the picketers was to pressure Harvest, a neutral employer, to cease doing business with Preferred unless it increased wages for janitorial employees working in that building and removed Ortiz.[20]

Finally, employees' reports to Miranda that neutral tenants were "upset" further supports our finding that the picketers had a prohibited secondary object. See *Service Employees Local 525 (General Maintenance Co.)*, 329 NLRB 638, 665, 680 (1999) (in finding secondary object, relying on union agent's comments on radio broadcast that neutral tenants were "upset" and "sympathetic" about the picketing and asked the building owner to settle the dispute), enfd. mem. 52 Fed. Appx. 357 (9th Cir. 2002).

In light of our finding that the picketers lost the protection of the Act, we further find that the complaint must be dismissed in its entirety because all the complaint allegations involve the Respondents' reactions to that unprotected picketing. See *Martel Construction*, 302 NLRB at 522; *Rapid Armored Truck Corp.*, 281 NLRB at 382.[21]

AMENDED CONCLUSIONS OF LAW

1. The Respondents are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Service Employees International Union Local 87 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondents did not violate Section 8(a)(1) and Section 8(a)(3) and (1) of the Act as alleged in the complaint.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. August 28, 2018

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Carmen Leon, Esq., for the General Counsel.
Norma G.Pizano, for the Regional Director.
Tyler M. Paetkau, Esq., for Preferred Building Services, Inc.
Eric P. Angstadt. Esq., for Ortiz Janitorial Services.

DECISION

STATEMENT OF THE CASE

MARY MILLER CRACRAFT, ADMINISTRATIVE LAW JUDGE. Respondent Preferred Building Services, Inc. (Preferred) and its subcontractor Respondent Ortiz Janitorial Services (OJS) pro-

[20] To the extent the judge and General Counsel contend that this was informational activity protected by Sec. 8(b)(4)'s publicity proviso, we disagree. The picketing activity here plainly does not implicate that proviso. Sec. 8(b)(4) protects, under certain circumstances, truthful publicity, other than picketing, that products are made by a primary employer and are distributed by another employer. See *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 582 (1988); *Painters District Council 9 (We're Associates)*, 329 NLRB 140, 143 (1999) (union's reliance on the Sec. 8(b)(4) publicity proviso "misplaced" where its activities included picketing).

[21] In reaching this conclusion, we certainly do not condone the abhorrent conduct in which the picketers alleged Ortiz engaged, and we fully recognize that employees chose to picket, at least in part, to protest this alleged misconduct. As explained above, however, the Act prohibits picketing that has an object of forcing a secondary employer—i.e., a neutral employer, such as Harvest—to cease doing business with the primary employer. The only question before us is whether the picketers' actions were protected by the Act, and we find that they were not. For the reasons explained above, those actions crossed the line that separates lawful primary picketing from unlawful secondary picketing. As the Agency charged with enforcing the Act, we cannot excuse this conduct, regardless of our genuine concern for the employees' plight.

vide janitorial services in the greater San Francisco Bay area. The General Counsel alleges that they are joint employers and that they committed various independent violations of Section 8(a)(1) of the National Labor Relations Act (the Act). Further, the General Counsel alleges that after employees demonstrated with signs and leaflets from the San Francisco Living Wage Coalition (SFLWC) and from Service Employees International Union, Local 87 (SEIU Local 87 or the Union), employees were terminated in violation of Section 8(a)(3) and (1) of the Act. Finally, the General Counsel asserts that motivated by a reasonably foreseeable purpose to chill unionism at its remaining contract locations, Respondents violated Section 8(a)(3) and (1) of the Act by terminating a contract and a subcontract for janitorial services.

Complaint issued on December 30, 2015, and was amended further at the hearing.[1] The hearing was held in San Francisco throughout March and April 2016. On the record[2] as a whole,[3] and after thorough consideration of briefs filed by all parties, the following findings of fact and conclusions of law are made.

A. Jurisdiction

Preferred, a closely-held California corporation, provides building maintenance and janitorial services to commercial and residential buildings. It has an office located in South San Francisco, California. OJS is a sole proprietorship owned by Rafael Ortiz (R. Ortiz) with an office located in San Pablo, California. During calendar year 2014, Preferred and OJS admit that they satisfied one of the Board's jurisdictional standards.[4] I find that Preferred and OJS are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[5] Thus the National Labor Relations Board (the Board) has jurisdiction of this controversy pursuant to Section 10(a) of the Act.[6]

B. Labor Organization Status

Although Preferred and OJS deny that SEIU Local 87 is a labor organization within the meaning of Section 2(5) of the Act,[7] the evidence of record clearly indicates that it is an organization that exists to deal with employers regarding employee wages, rates of pay, and conditions of work. Thus, I find that SEIU Local 87 is a labor organization within the meaning of Section 2(5) of the Act.

C. Credibility

Specific credibility resolutions will be made throughout this decision. In making these determinations, the following general principles have been relied upon. First, each witness' testimony has been considered "in context, including, among other things, ;lkher/his demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole." *Double D. Construction Group*, *Inc.,* 339 NLRB 303, 305 (2003). Second, it is quite common to believe some but not all of a witness' testimony. *Daikickhi Corp.,* 335 NLRB 622 (2001), citing *NLRB v. Universal Camera Corp.,* 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951); accord: *General Fabrications Corp.*, 328 NLRB 1114 fn. 1 (1999), enfd 222 F.3d 218 (6th Cir. 2000). Third, testimony which is contrary to a witness' economic or self-interest will be accoded added significance. *Flexsteel Industries,* 316 NLRB 745 (1995) (testimony of current employees which is adverse to their employer's interests has inherent reliability). Finally, when a witness testifies in contradiction to a prior sworn statement or with additional evidence not contained in a prior sworn statement, all the relevant facts and circumstances on the record as a whole will be considered in determining the credibility of testimony at the hearing.

After consideration of their demeanors, established or admitted facts, and inherent probabilities, it is generally found that Yunuen Useda (Useda), Balbina Mendoza (Mendoza), Joel Banegas (Banegas), Claudia Tapia (Tapia), and Rosa Franco (Franco) were highly credible witnesses. The testimony given by each of them contained incredibly sensitive facts. At times, recesses were required due to emotional or volatile testimony. These incidents appeared sincere—not contrived. For instance, one witness was reluctant to use "bad" words. One became sick and incapacitated. Another broke down in tears. Moreover, these witnesses corroborated each other's testimony in an unrehearsed but authoritative manner. R. Ortiz and his wife Veronica (V. Ortiz), on the other hand, provided general denials and less than full recollection of events. The general denials were flat recitations without any specificity. When in conflict with

[1] The underlying unfair labor practice charge and the first and second amended charge were filed by SEIU Local 87 on April 1, April 16, and May 27, 2015, respectively.

[2] An order correcting the transcript issued on August 31, 2016.

[3] Specific credibility resolutions have been made based upon a review of the entire record and all exhibits in this proceeding. Witness demeanor and inherent probability of the testimony have been utilized to assess credibility. Testimony contrary to the factual findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

[4] Preferred admits that it provided janitorial services valued in excess of $50,000 directly to customers located outside the State of California. Ortiz admits it provided services in excess of $50,000 to Preferred within the State of California. The Board has limited its statutory jurisdiction to cases having a substantial impact on commerce. Annual outflow or inflow, direct or indirect, across state lines of at least $50,000 is the current discretionary jurisdictional standard for nonretail enterprises. *Siemons Mailing Service*, 122 NLRB 81 (1959).

[5] Sec. 2(2) of the Act, 29 U.S.C. §152(2), sets out inclusions to and exclusions from the term "employer." Sec. 2(6), 29 U.S.C. §152(6), defines the term "commerce" to mean, inter alia, interstate trade, traffic, commerce, transportation, or communication. Sec. 2(7) of the Act, 29 U.S.C. §152(7), defines "affecting commerce" to mean "in commerce, or burdening or obstructing commerce or the free flow of commerce . . . ."

[6] Sec. 10(a) of the Act, 29 U.S.C. §160(a), provides, inter alia, that the Board is empowered to prevent any person from engaging in any unfair labor practice affecting commerce.

[7] Sec. 2(5) of the Act, 29 U.S.C. §152(5), provides, inter alia, that the term "labor organization" may be an organization of any kind which exists in whole or in part, to deal "with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

the testimony of Useda, Mendoza, Banegas, Tapia or Franco, their testimony is generally discredited. Specific credibility resolutions are below.

D. Alleged Joint Employer Status

1. Background

Preferred was established in 1991 by Gregory Dellanini (G. Dellanini) and Robert Squeri (R. Squeri). Preferred supplies janitorial, window washing, and carpet cleaning maintenance services in the San Francisco Bay area. Many of its clients are located in the financial district of downtown San Francisco. The CEO and president of Preferred is G. Dellanini. The executive vice president is Pete Dellanini (P. Dellanini). R. Squeri is the CFO. These individuals manage the business with assistance from General Manager Rob Nave (Nave) and Lauren Squeri (L. Squeri),[8] account manager and executive sales and marketing director. Both R. Squeri and his daughter L. Squeri are admitted supervisors and agents of Preferred within the meaning of Section 2(11) and 2(13) of the Act.[9]

OJS is a sole proprietorship owned by R. Ortiz, an admitted supervisor and agent of OJS within the meaning of Section 2(11) and (13) of the Act. Preferred and OJS deny that R. Ortiz' wife, V. Ortiz, is a supervisor or agent of OJS. The Contra Costa County "fictitious business name statement" signed by R. Ortiz at the time he began doing business lists R. Ortiz and V. Ortiz as registered owners of OJS. R. Ortiz testified that he listed V. Ortiz as an owner only because someone in the county clerk's office told him he had to list a second name on the statement. The listing of V. Ortiz on the county registration is given little weight as the peripheral purpose of the filing does not in and of itself prove that V. Ortiz is an owner.

After a number of leading questions, objected to by Preferred, employee Useda recalled that in a conversation in November 2014, V. Ortiz said she was the boss. Useda agreed that V. Ortiz did not schedule Useda's hours, hand out pay checks, provide cleaning supplies or adjust working problems. This single statement, which occurred during a heated exchange, elicited through leading questions, is given slight weight. The record reflects that V. Ortiz and R. Ortiz sometimes performed rank and file janitorial work together and were typically seen together, including at meetings with employees. Given these circumstances and on the record as a whole, I find insufficient evidence that V. Ortiz was an agent or supervisor within the meaning of the Act.[10]

2. Contractual relationships

In early 2014, Preferred employed around 100 individuals, 90 percent of them as janitors.[11] Preferred has service contracts throughout the Bay area. Some of the service contracts are entered into between the building owner and Preferred. Others are between Preferred and a building management company. Preferred fulfills these service contracts either using its own employees or by subcontracting. Preferred had 22 subcontractors in early 2014. When it subcontracts the work, Preferred remains contractually responsible for the performance of its contract with the Preferred client—either the building owner or a building management company. Preferred janitors wear a black, short-sleeved polo shirt with the Preferred logo on the left front of the shirt.

According to R. Squeri's undisputed testimony, Preferred and OJS do not and have never shared office space, tools or equipment. Preferred has "buying power" and maintains a supplier relationship for over 25 years. Pursuant to a resale license, it makes its purchased supplies available to its subcontractors at a 10 percent markup. Preferred does not share bank accounts with any subcontractors. Preferred has separate accounting records and personnel files from OJS.

One of Preferred's service contracts, dated April 2, 2012, was captioned DivcoWest Real Estate Services Service Agreement—Janitorial Services. It stated that it was entered into between DWF III Hawthorne, LLC and Preferred for day and night janitorial services for the period May 1, 2012 through April 30, 2013 at 55 Hawthorne. This service contract was renewed in 2013 and 2014. At some point during this period, the adjoining building at 631 Howard was added to the service contract. In 2014, 55 Hawthorne and 631 Howard were sold. The new owner engaged Harvest Properties to manage both buildings. In a letter to Preferred of July 17, 2014, Harvest Properties stated that all valid service contracts with the prior owner would be honored by the new owner. During this period, Preferred also had contracts at other locations, including but not limited to, One Kearny, One Hawthorne, 74 New Montgomery, Yerba Buena Lofts, One Rincon, and 77 Geary/30 Grant.

R. Ortiz became an employee of Preferred in 2001. He initially worked as a janitor and eventually established OJS as a sole proprietorship in 2012. No cash funding was necessary to start the business. Preferred does not own any equity in OJS. R. Ortiz consulted with Nave of Preferred about how to start the enterprise. Nave told him he would need a license[12] and insurance.[13] R. Ortiz paid for the business license and insurance. No one from Preferred ever gave him any money to help him start his business. According to P. Dellanini, the two companies do not share any tools or equipment. They do not share bank ac-

[8] L. Squeri's married name is Lauren Carrigan. However, she was generally referred to as "Lauren" or "Miss Squeri" throughout the transcript. Her married name was not utilized generally.

[9] Sec. 2(11) of the Act, 29 U.S.C. §152(11), provides, inter alia, that in general the term "supervisor" means any individual with authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline employees or responsibly direct them. Sec. 2(13) of the Act provides that in determining whether any person is an "agent" of another person, the question of whether the specific acts performed were actually authorized or subsequently ratified are not controlling.

[10] As to the General Counsel's argument that V. Ortiz possessed apparent authority to make certain statements, this will be addressed below.

[11] At one point in the transcript, R. Squeri testified pursuant to FRE 611(c) that there were about 100 employees in 2014. At another point in the transcript, R. Squeri testified that currently (meaning April 28, 2016) there are between 150–200 employees, 95–98 percent janitors. The exact number and percentage need not be resolved.

[12] R. Ortiz applied for his business license in March 2012.

[13] R. Ortiz obtained a commercial general liability policy with workers compensation and employer's liability coverage dated January 2014.

counts or accounting records. This testimony is undisputed and credited.

R. Ortiz procured equipment such as mops, brooms, and vacuums as well as cleaning supplies. He also purchased uniform shirts. According to R. Ortiz, he only purchased shirts that said "Janitorial." OJS does not share equipment with Preferred. One method for his purchasing of equipment, supplies, and shirts was to place an order with Preferred. Preferred ordered such supplies from its distributor and sold them to OJS and other subcontractors with a mark up for Preferred's profit. Even with this mark up, the prices offered by Preferred were competitive, according to R. Squeri. All of OJS' business has come from subcontracts with Preferred. Preferred and OJS do not share office space and have no shared supervisory personnel. There is some dispute regarding whether OJS provided uniform shirts to its employees which said "Preferred." However, the remainder of R. Ortiz' testimony set forth in this paragraph is undisputed and credited.

Pursuant to an October 2012 "Building Maintenance Service Agreement (Independent Contractor)" (referred to here as the subcontract agreement), OJS agreed to provide office janitorial cleaning "with standards established by [Preferred] from time to time" at properties identified in the appendix, which "may be modified from time to time to add or remove particular PREMISES." The subcontract provided that it was nonexclusive and the subcontractor bore the risk of loss as well as potential for profitability. It further provided that OJS "accepts this engagement and undertakes to perform the SERVICES and all related duties and obligations at all times independently, actively, diligently and continuously in compliance with the terms of this Agreement."

The subcontract sets out an independent contractor relationship as follows:

> *Independent Contractor*. [OJS] is not a partner, joint venture, agent or employee of [Preferred] for any purpose whatsoever, but is an independent contractor. [OJS] shall have sole responsibility for and control over the manner and means of performing the SERVICES in conformance with all legal, governmental and regulatory requirements. [Preferred] is interested only in the results of the SERVICES performed by [OJS]. [Preferred] has no right to, and does not, control the manner or prescribe the method or means used by [OJS] to provide the SERVICES. Without in any way limiting the generality of the foregoing, by initialing below, [OJS] acknowledges its familiarity with and ability to satisfy the following conditions required by [Preferred]:
>
> . . . .
>
> *Profit or Loss*. The potential for profitability and the risk of loss resulting from [OJS'] performance of the SERVICES under this Agreement are entirely for [OJS'] own account. The manner of performing the SERVICES is determined solely by [OJS]. [Preferred] offers no assurance with respect to [OJS'] profitability and assumes no responsibility or liability for any losses suffered by [OJS]. [Preferrred] may, in its sole discretion, from time to time offer [OJS] new job assignments. [OJS] has the right to accept or decline any such offer. [Preferred] may take [OJS'] history of such acceptances and refusals into account in offering new assignments.
>
> *Expenses and Disbursements*. All expenses and disbursements, including, but not limited to those for labor, materials, equipment, supplies, travel and maintenance, office rental, clerical assistance, and general overhead and administrative costs, that may be incurred by [OJS] in connection with this Agreement shall be borne wholly and completely by [OJS]. [Preferred] shall not be obligated to advance any such amounts nor shall [Preferred] be in any way responsible or liable therefor.
>
> . . . .
>
> *No Supervision or Control by [Preferred]*. [Preferred] does not supervise or regulate [OJS] other than as required by any governmental authority or regulation. Neither [OJS] nor any [OJS] REPRESENTATIVE is required to attend any training or employee meetings conducted by [Preferred]. [Preferred] does not exercise any disciplinary authority or control over [OJS] or [OJS'] REPRESENTATIVES. [Preferred] does not require [OJS] to provide any mandatory training.

"OJS REPRESENTATIVES," a subcontract term, refers to OJS employees, agents, servants, contract workers and representatives." The subcontract provides that OJS "has sole discretion to hire or engage these individuals. The subcontract further provides that OJS is "solely responsible" for the supervision and control of its employees, agents, etc. and Preferred has no power or authority over OJS' "selection, hiring, firing, the setting of wages, hours and working conditions and the adjustment of grievances." Preferred does not supervise OJS and does not exercise any disciplinary authority or control over OJS employees.[14] OJS agrees to indemnify Preferred for any claims regarding wages, salaries, expenses, or any other form of compensation.

Under the terms of the subcontract, OJS is solely responsible for "the direction, supervision and control" of OJS employees including their "selection, hiring, firing, the setting of wages, hours and working conditions and the adjustment of their grievances." Further, OJS is responsible for determining the method, means, and manner of ensuring that all services are performed in accordance with applicable laws including payment of wages and withholdings, workers' compensation, the Service Contract Act of 1965, nondiscrimination laws, and work authorization status.

According to the subcontract, OJS is responsible for providing all equipment, materials, and supplies at its own expense. In practice, Preferred sells most equipment, materials and supplies to its subcontractors at a savings to open market prices. OJS is responsible for care and maintenance of its equipment. To the extent OJS leases equipment from Preferred, OJS is responsible for any damage or loss. Further, the subcontract provides that OJS may not submit any claim for payment directly to the building owner or management company.

A separate appendix for each subcontract provided a description of the services to be performed by the subcontractor and

[14] This statement amalgamates provisions in two separate portions of the subcontract, Secs. 3(e) and 4(c).

specified the supplies, materials, and equipment to be furnished by the subcontractor. For instance on November 16, 2012, Preferred and OJS executed a 45-day appendix for 55 Hawthorne Street. The terms required that OJS furnish all janitorial and cleaning supplies and equipment. A similar appendix was executed on November 1 between Preferred and OJS for 631 Howard. Both of these appendices provided for a day porter at a set monthly fee and for janitorial services billed on a set amount "per square foot" basis. Both expired on December 31, 2012. Both were replaced by appendices for the period January 1 through December 31, 2013. Further appendices replaced the 2013 appendices, these for January 1 through December 31, 2014.

R. Ortiz agreed that he simply signed the Appendix A subcontracts that Preferred offered him. There is no evidence that he bid the contracts or negotiated the terms. R. Ortiz explained that Preferred already has a contract with the building for specified cleaning services and as a subcontractor, he must follow those terms as set out in the janitorial specifications. OJS also submits monthly invoices to Preferred for extra work performed. When Preferred pays OJS, it sends a list of all the jobs he has performed itemizing each payment. L. Squeri is OJS' account manager.

L. Squeri began managing the account at 55 Hawthorne-631 Howard in April 2012. The work was subcontracted initially to Miguel Lemis and then to Smart Janitorial, owned by Giovanni [last name unknown]. In October or November 2012, Preferred subcontracted this property to OJS. In July 2014, new building management, Harvest Properties, took over. Ben Maxon (Maxon) was their property manager. OJS continued to perform pursuant to the subcontract with Preferred after Harvest Properties assumed management.

3. Hiring, firing, and discipline

According to R. Ortiz, Preferred did not refer any applicants for employment to OJS. Preferred conducts its own background checks for its direct janitorial employees. It does not conduct background checks on its subcontractors' employees. This testimony is uncontested by any other record testimony and is credited.

R. Squeri testified that Preferred does not give feedback or direction to its subcontractors regarding employment or personnel matters. R. Ortiz has never consulted with R. Squeri regarding employee issues. Preferred does not advise its subcontractors like OJS on who or how long to schedule employees. This is up to the subcontractor. This general testimony is not credited due to specific conflicting testimony from L. Squeri, R. Ortiz, Useda, Mendoza, and Banegas.

According to P. Dellanini, Preferred has never given OJS any input on hiring, firing, discipline, staffing, or number of hours and shifts of OJS employees. He also testified that Preferred has never been involved in disciplining or counseling subcontractor employees. "Employment Responsibilities," in Preferred's subcontract with OJS, provides that OJS has sole responsibility for "direction, supervision, and control" of OJS employees. Referring to this section, P. Dellanini testified that it accurately described the actual relationship between Preferred and OJS regarding selection, hiring, firing, wages, hours, and working conditions as well as adjustment of grievances. This may have been P. Dellanini's understanding. However, as will be seen below, the specific day-to-day facts as related by L. Squeri, R. Ortiz, Useda, Mendoza, and Banegas belie P. Dellanini's assertion. Thus, P. Dellanini's general testimony that Preferred played no part in OJS' selection, hiring, firing, disciplining or counseling, wages, hours, and working conditions as well as adjustment of grievances is not credited.

In July 2014, janitor Useda took a backpack from a donation bin in the lobby of 55 Hawthorne. Prior to taking the pack, it is undisputed that Useda thought she had received permission from a building clerical to take it. On the following day, R. Ortiz was waiting for Useda in the lobby when she reported to work. R. Ortiz said that Useda was suspended[15] because she had stolen a backpack. He said "those were L. Squeri's orders and that he could not do anything for me." Coworker Franco was present during this conversation and recalled that R. Ortiz said, "it was the order of the female boss that he should dismiss her." On cross-examination, Franco agreed that the female boss was named "Lauren" and also agreed that she had never met "Lauren."

According to R. Ortiz, after Useda was removed, L. Squeri and the building manager investigated the incident. L. Squeri told R. Ortiz that there was a video of the incident. R. Ortiz did not review the video or speak to building management about the incident. L. Squeri did view the video and speak to the building clerical. She determined that there had been a misunderstanding. In an email dated July 23, 2014, L. Squeri wrote to the property manager,

> In reviewing the video footage and after speaking to the [building clerical], everyone was aware of the situation strongly felt it was a misunderstanding and that [Useda] did not act maliciously. . . . Preferred does have a policy that nothing be removed from the work place without my authorization. However, given the circumstances as well as the length of time (over 2 years), consistency and care [Useda] has put into her job I felt it was best to reinstate her. However, I did tell [Useda] along with every other custodian at the building that if another violation of removing something from the building occurs without my permission it will result in immediate termination . . . no questions asked.

A week after the incident, R. Ortiz called Useda and told her that she could return to work, "And he said that Lauren said that she was going to give me another opportunity." According to R. Ortiz, he and L. Squeri both arrived at the same conclusion. That is, that Useda should be removed from the building after taking the backpack.

L. Squeri testified that she was not the decision maker but merely relayed communications from the tenant to R. Ortiz. Thus, the tenant emailed L. Squeri about the backpack being taken from a charity bin in the tenant's suite. L. Squeri relayed this to R. Ortiz who reported back that Useda believed she had been given permission to take the backpack. L. Squeri con-

[15] On direct examination, Useda testified that R. Ortiz fired her. On cross-examination, she agreed that she had been suspended for one week.

veyed this to the tenant who reported back that there may have been a miscommunication due to a language barrier. Thus, the tenant had no objection to Useda continuing to work with them. L. Squeri reported this to R. Ortiz: "So I just passed that on to Rafael and he chose to reinstate her." L. Squeri's testimony that she was merely a conduit for information is not credible and is not supported by R. Ortiz' testimony or by the email she sent during the investigation. Rather, it appears that L. Squeri alone investigated the matter and made the decision to return Useda to work. This is what R. Ortiz told Useda in Franco's presence.

Useda was a solid witness who exhibited recall of events without hesitation and withstood lengthy cross examination in an equable manner with focus on the actual underlying events. She was forthright and consistent on direct and cross. Her testimony regarding the backpack incident was thorough and straight forward. Moreover, it is consistent with the emails of L. Squeri that R. Ortiz told Useda that L. Squeri made the decision to give Useda another opportunity. Thus, Useda's testimony, corroborated by Franco and consistent with the undenied statements attributed to R. Ortiz, is credited.

Moreover, there is no evidence that R. Ortiz took part in the investigation of the backpack incident. He did not testify that he and L. Squeri communicated about whether to reinstate Useda or not. Additionally, it is telling that R. Ortiz considered L. Squeri his supervisor. In light of the uncontroverted testimony that L. Squeri alone investigated this incident, Useda's highly believable testimony that she was told that L. Squeri made the decision to reinstate her is credited. Thus, the record as a whole indicates with regard to the backpack incident that Preferred was involved in suspension, investigation, and reinstatement of Useda, an OJS janitor.

On September 19, 2013, janitor Mendoza was terminated at 55 Hawthorne. "Mr. Rafael told me that Mrs. Lauren said that she didn't want me there because I had been using the computer." Apparently Mendoza's son, who accompanied her to work on that occasion, was the individual who had used the computer. Mendoza attempted to speak to L. Squeri but did not reach her. According to R. Ortiz, the office manager and L. Squeri investigated this matter. In an email to building management dated September 19, 2013, L. Squeri stated,

> I have already let go of the janitor that authorized her son to enter the building, and I will be speaking to the rest of the crew to remind them of our rules and to make sure that they all understand the repercussions of bringing unauthorized individuals into the building, so this does not happen again.

L. Squeri, on the other hand, testified that she merely reported this matter to R. Ortiz and he investigated the matter. She did not speak to Mendoza about this incident. L. Squeri testified that R. Ortiz reported back that Mendoza's son was on site and had used a computer in a tenant's office. L. Squeri explained that the building management at 55 Hawthorne knew that a subcontractor cleaned their building. Nevertheless, L. Squeri explained, "even though they did know that the subcontractor, I am the face and I deal with strictly the property managers. So that's the explanation for the language [in the email]. As far as they're concerned, their contract is with us and that's who they deal with." According to L. Squeri, she "strictly move[s] information."

Mendoza testified over the course of two days about events which occurred from the fall of 2013 through early 2015. Her demeanor over this period of time was exceptional and her testimony highly credible, even when repeating sensitive conversations. Her testimony that R. Ortiz told her that L. Squeri did not want her working in the building anymore is thus highly credible. Further, it is supported indirectly by L. Squeri's email that she has "let go of the janitor." Accordingly, with regard to this unauthorized guest/computer incident, it is found that Preferred investigated it and determined that the OJS janitor should be discharged.

In October 2013, Mendoza began working at 631 Howard. According to Mendoza, "Mr. Rafael [Ortiz] called me to tell me that Mrs. Lauren [Squeri] said there was another building and asking me if I wanted to work there." Mendoza's schedule at 631 Howard was Monday through Friday from 10 a.m. to 2 p.m. On her first day at 631 Howard, Mendoza was greeted by Ortiz and L. Squeri. According to Mendoza, L. Squeri said she was happy to see that Mendoza was going to be working for "them" again. Both L. Squeri and R. Ortiz explained Mendoza's duties to her. Due to a BART strike, Mendoza gave up this job within a month. Mendoza's testimony that L. Squeri was involved in rehiring her and explaining her duties to her is credited. Thus it is found that L. Squeri of Preferred was involved in rehiring Mendoza at 631 Howard and explaining her duties to her.

In early June 2014, R. Ortiz called Mendoza and said, "there was a new opportunity or a job and he said that Mrs. Lauren wanted to know if I would take it." Mendoza took the job at One Kearny beginning June 9, 2014. Her schedule was 5 p.m. to 1 a.m. Monday through Friday for the first month. Mendoza's testimony that R. Ortiz told her on two occasions that L. Squeri wanted to know if Mendoza would accept employment is credited for the reasons stated above. Thus, it is found that on yet another specific occasion, Preferred took part in hiring an OJS employee.

4. Supervision, direction of work, and hours

R. Ortiz testified that no one from Preferred ever gave OJS employees instructions or directions on how to perform their work. P. Dellanini testified that Preferred does not instruct OJS employees when and where to report to work, when to take breaks, and does not monitor OJS employees hours of work. According to P. Dellanini, Preferred and OJS do not share any employee handbook or any other written employment policies. P. Dellanini testified that Preferred has no input into OJS' rates of pay or work schedules, except that some buildings do not allow janitorial services until after 6 p.m. Finally, P. Dellanini testified that Preferred and OJS maintain separate personnel files.

Consistent with P. Dellanini's testimony, there is no evidence that Preferred instructs OJS employees on when and where to report to work and when to take breaks. There is no evidence that Preferred and OJS routinely share tools or equipment. There is no evidence of shared bank accounts, accounting records, employee handbooks, or other written employment policies. There is no evidence that Preferred has input into OJS'

rates of pay or work schedules. There is no evidence that OJS and Preferred share personnel files.

However, the general testimony from R. Ortiz and from P. Dellanini, an executive who does not deal on a day-to-day basis with OJS, goes only so far. Specific testimony paints a different picture regarding Preferred instructing and directing OJS employees on how to perform their work.

On June 9, 2014, R. Ortiz signed a subcontract for One Kearny. He recalled that L. Squeri told him there was an opportunity there and they arrived at a verbal agreement after she gave him the square footage and the number of people needed was decided. In his deposition, R. Ortiz stated that L. Squeri told him that two employees were needed for the contract. After reconsidering, R. Ortiz stated that his deposition was correct. Thus, the deposition statement is credited and it is concluded that L. Squeri of Preferred determined the number of OJS employees to handle the job.[16]

R. Ortiz denied that he ever referred to L. Squeri as a supervisor. However, R. Ortiz agreed that in his pre-trial deposition he stated: "She is the one that gives me the jobs, she is the one that—she is the one that goes with me walking through in the building. She—she is—to me, she's like a supervisor so I can tell the employees what they have to do. She is a supervisor just for myself." This deposition testimony is credited.

Further, R. Ortiz agreed that he discussed customer complaints with L. Squeri. He usually spoke with L. Squeri on a daily basis. R. Ortiz let L. Squeri know if one of his janitors would be absent for the day. He also let her know if he would be absent from his day porter position at 55 Hawthorne and adjoining building 631 Howard. R. Ortiz did not communicate directly with the building representatives of 55 Hawthorne, 631 Howard, 74 New Montgomery and One Kearny, where he had subcontracts. Communications went through L. Squeri and she relayed them to R. Ortiz.

Mendoza reported to R. Ortiz, who initially introduced himself as a Preferred manager: "When I met him, he said he was going to stay as a manager and that he worked for the company, Preferred." Mendoza testified that R. Ortiz reported to L. Squeri. She based this conclusion on R. Ortiz' telling her, "that he had to give her report all the reports and she was the one who was going to let us know what we needed to do." Mendoza also testified that whenever she needed permission for leave, R. Ortiz would check with L. Squeri first.

These facts are not indicative of sole management of employee supervision, direction of work and hours by OJS. Rather, these facts support a finding that Preferred was involved in formulating and directing the duties of OJS employees. Thus, contact between R. Ortiz and L. Squeri was on a daily basis as boss to subordinate. Such contact goes far beyond telling a subcontractor what its duties are and allowing the subcontractor to effectuate these duties. Based on these facts, it is concluded that Preferred was involved in the supervision and direction of OJS janitors.

When OJS took over the subcontract at 55 Hawthorne in late 2012, R. Ortiz spoke to Useda and told her that he would be supervising her. Useda testified that R. Ortiz said, "That we were going to be better [than the prior subcontractor], that we were going to have work for the company, for Prefer." Useda noticed that whenever she asked for permission to miss work, R. Ortiz responded that he would notify L. Squeri. About one week after R. Ortiz began, he told Useda that L. Squeri had authorized only six hours and he had been paying for a seventh hour. R. Ortiz said he was not going to continue paying the extra hour.

R. Ortiz recalled that this reduction in hours was due to tenants moving out and consequently there being less space to clean. R. Ortiz denied that L. Squeri ever told him to reduce the work hours of his employees. P. Dellanini testified that he was unaware of any instruction from Preferred to reduce OJS employee hours.

Useda's testimony that R. Ortiz told her that L. Squeri told him to reduce hours of work is credited. Both P. Dellanini and R. Ortiz testified about this matter in general while Useda recalled a specific conversation. Her testimony is this regard was highly believable, open, and consistent. Further, this testimony is consistent with that of janitor Banegas, whose hours were similarly reduced. Based upon this testimony, it is concluded that Preferred was involved in setting the hours of OJS janitor Useda.

In about July 2014, about one month after Banegas began working at One Kearny, R. Ortiz reduced his hours from seven to six hours per day. R. Ortiz told Banegas that "Lauren" told R. Ortiz it was too little work for too much time. R. Ortiz recalled this reduction in hours and attributed the reduction to space becoming vacant. Banegas' testimony is credited. Banegas testified over a period of two days in a convincing and consistent manner with a highly credible demeanor. He readily admitted when he could not recall specific dates. As to the reduction in hours, Banegas' testimony that R. Ortiz stated that L. Squeri told him to reduce hours is credited. Thus, it is concluded that Preferred was involved in setting the hours of OJS janitor Banegas.

Similar to her prior placement at 55 Hawthorne, after she began working at One Kearny, Mendoza was told by R. Ortiz when she needed permission or when there was a complaint, "that he needed to let Mrs. Lauren know about it." A text from R. Ortiz on September 18, 2014, asked Mendoza to reply stating what time she finished her shift so he could tell L. Squeri. This testimony is similar to other testimony above that consistently indicates that R. Ortiz consulted with L. Squeri when OJS janitors were absent or needed to leave work. Thus, it is concluded that Preferred was involved in scheduling OJS janitor Mendoza's hours of work.

Mendoza cleaned the bathrooms and kitchens on the second and fourth through tenth floors as well as the lobby at One Kearny. After Mendoza's first month working at One Kearny, around July 2014, R. Ortiz told Mendoza and the other workers

[16] At hearing, Respondent Preferred objected to use of R. Ortiz' deposition testimony because Preferred was not allowed to be present at the deposition. Apparently, according to counsel for the General Counsel, when alleged joint employers do not admit that they are joint employers, the General Counsel's policy is to not allow representatives of the alleged joint employer to be present during investigation of witnesses produced by the other alleged joint employer. However, there is no evidence that OJS' attorney was not allowed representation during the investigatory deposition. Thus, the objection was overruled.

including Banegas, "that Mrs. Lauren said that she was going to take away 2 hours because there was not enough work for all the time that we were working." R. Ortiz said he would pay for 1 extra hour so employees could work 7 hours rather than 6. This is consistent with the testimony of Banegas and Useda and is credited. Thus, it is concluded that Preferred was involved in setting the number of hours of work for OJS janitors.

On arriving each day, Mendoza signed in with the security guard at One Kearny and wrote "Preferred" in the column next to her name, as did all janitorial employees at One Kearny. Mendoza testified that R. Ortiz told employees to write "Preferred" in that column. Mendoza's coworker Banegas confirmed that he also was told by R. Ortiz to fill out the form by writing "Preferred" in the column after his name.

According to P. Dellanini, Preferred did not require any of the OJS employees to sign in and out. R. Ortiz explained that the security at this building required janitors to sign in to keep track of who had been given keys. R. Ortiz understood that the form was created by building security. OJS did not receive a copy of the sign-in sheet. R. Ortiz did not testify regarding whether he told employees to write "Preferred" after their name. On the whole, the testimony regarding the sign-in sheets warrants the conclusion that OJS held out its employees as those of Preferred in directing them to sign in referencing Preferred.

On January 3, 2014, OJS renewed its subcontract for 631 Howard Street without any change to the terms of its prior subcontract. No specific hours were set out for the day porter.[17] That information was given to R. Ortiz verbally. No specific amount of money is set out for the evening shift but the subcontract appendix states that it will be paid at a certain amount per square foot. The square footage of the building was given to R. Ortiz verbally. L. Squeri agreed that she made recommendations on the number of hours needed to clean a space based on the square footage of the space. When reminded that she had previously testified in a Labor Commission hearing that she recommended the number of custodians to be hired, she explained, that, "it's essentially hours, so I'm providing my recommendation on how much time you need to clean square footage." It is concluded that Preferred recommended the number of employees for this subcontract.

In October 2013, Tapia was hired to work at 631 Howard from 11 a.m. to 3 p.m., Monday through Friday. Eventually her hours were extended to 6 hours per day and then to eight hours per day. Both R. Ortiz and L. Squeri were waiting in the lobby for her when she arrived on her first day. L. Squeri told Tapia that she was happy she had come back "to work for them."[18] At the time Tapia was hired, L. Squeri said that Tapia would receive T-shirts to wear and told Tapia that, "she was like the boss, the boss of Mr. Rafael Ortiz as well." L. Squeri and R. Ortiz showed Tapia the building and various suites that she would clean. Thus, it is concluded that jointly Preferred and OJS greeted Tapia, stated they were happy she would be working for them again, and showed her the duties she would perform. The inference to be drawn from this uncontroverted testimony is that Tapia was working both for Preferred and OJS. At a minimum, it is concluded that Preferred participated in instructing Tapia on her duties.

L. Squeri receives numerous emails from property management. For example, she is notified of special events which may require that the building show at its best condition. She is notified when plastic bags are placed in recycling bins. She is notified when the cleaning crew leaves the lights on all night. She also notifies tenants if the day porter will be absent. L. Squeri testified that when she learns of special concerns or services needed in a particular building which OJS subcontracts, she passes these directions along to R. Ortiz. L. Squeri explained that when she stated in an email regarding cleaning a refrigerator, "I will let the crew know they shouldn't throw anything away," she meant that she would relay this to R. Ortiz. She testified that she never speaks to the janitors—she just relays information through R. Ortiz. Similarly, when One Kearny property managers reported problems with janitors mixing recycling and trash in the recycling bins, L. Squeri reported this to R. Ortiz.

At another building, 55 Hawthorne, when the tenant of a suite complained about the back door being left unlocked and that the cleaning had been inadequate, L. Squeri responded by email of April 16, 2014:

> There is a relatively new custodian handling this suite. Rafael [Ortiz] checked in with Linda this afternoon to get the specifics, and we will both talk to Rosa [the new custodian] this evening to ensure we get this all taken care of right away. Thank you for bringing this all to my attention.

The emails and the other communications give the impression to building management that the janitors cleaning their buildings are employed by L. Squeri's employer Preferred or jointly by Preferred and OJS. These communications do not directly prove that the impression is correct or incorrect but, in light of employee elucidation, an inference is warranted that the impressions are correct.

In 2014, janitor Banegas, who had worked directly for Preferred since 2008, received a call from Viscarra (a Preferred subcontractor) asking him to work at One Hawthorne. Banegas accepted and worked Saturday and Sunday from 8 a.m. to 2 p.m. Banegas also covered for other employees of One Hawthorne during the week. He saw L. Squeri visiting the building on Tuesdays or Wednesdays when he worked during the week. About five months later, R. Ortiz took over from Viscarra. After speaking with R. Ortiz, Banegas began working 8 a.m. to 4:30 p.m. on Saturday and Sunday. R. Ortiz told Banegas that if any of the clients in the building asked him who he worked for, he should respond that he worked for Preferred. Banegas sometimes could not report for work. On those occasions, he called R. Ortiz. According to Banegas, R. Ortiz routinely responded, "let me talk to Lauren." This testimony is credited.

[17] According to an investigative deposition, R. Ortiz testified that the contract sets forth how many hours the employee has to be there. The General Counsel offered this deposition testimony as a prior inconsistent statement. It is definitely an inconsistent recollection of a written document but the issue of whether R. Ortiz accurately recalled the terms of this written document are not relevant.

[18] Tapia filled in for R. Ortiz as day porter on Fridays at 55 Hawthorne. She continued these duties for another month after beginning work at 631 Howard.

In June 2014, R. Ortiz placed Banegas at One Kearny from 5 p.m. to 12:30 a.m., Monday through Friday. Banegas' coworkers at One Kearny were Mendoza and Rafael, Jr., the son of V. and R. Ortiz. Banegas continued working at One Hawthorne on the weekend. Banegas testified that when he called R. Ortiz to tell him he could not report for work due to back pain, R. Ortiz responded that was fine and that he would let L. Squeri know. For the reasons stated above, Banegas' testimony is credited.

Banegas interacted with R. Ortiz when something additional was wanted by a customer. For example, he recalled that R. Ortiz told him to vacuum an area under a large white table on the second floor. R. Ortiz told Banegas that L. Squeri had asked for that. Another time, R. Ortiz told Banegas to go back to the ninth floor hallway and re-vacuum because L. Squeri had texted him about it. R. Ortiz testified that he did not recall receiving any such text from L. Squeri. Banegas' testimony is credited on this matter.

5. Wages

There is no evidence that Preferred set wage rates for OJS employees. P. Dellanini confirmed that the two companies have separate payroll records. The record clearly reflects that even though employees Mendoza, Franco, and Useda testified that they were employed by Preferred, these employees were not on Preferred's payroll and were paid for their employment by OJS.

6. Other terms and conditions of employment

Many of OJS' employees testified that they worked for Preferred. For instance, Mendoza testified that she began working for Preferred at 55 Hawthorne in October 2012. Similarly, Useda testified that she began working for Preferred at 55 Hawthorne in September 2012. Franco testified that she began working for Preferred in March 2014. However, Mendoza and Franco and other OJS employees agreed that they were paid by OJS. The testimony of these employees is not discredited. The record indicates that employees of OJS were sometimes held out as Preferred employees and some of them were told to sign "Preferred" on sign-in sheets. Thus the testimony that they were Preferred employees is consistent with actions of Preferred and OJS. However, it is concluded that Preferred and OJS did not share any employees. Rather, by their actions, the two entities blurred the employment relationship to building management and employees.

A further factor creating such confusion was the logo on OJS janitors' shirts. Sometimes OJS janitors wore black T-shirts that had the word "*JANITORIAL*" written in all green capital italics on the upper left front portion of the shirt. Sometimes OJS janitors wore black polo shirts with the word "Preferred" printed in black on a green sideways diamond with the further words in small print "BUILDING SERVICES" printed on the two bottom facets of the diamond shape. At the time she was hired to work at 631 Howard in October 2013, OJS janitor Mendoza was given four shirts that said "Preferred" on them. Mendoza's testimony that she was given shirts with the "Preferred" logo on them is credited and consistent with employee production of similar "Preferred" shirts at hearing.

When janitor Tapia received her shirts, they had the "Preferred" logo on them. She also received a jacket that said "Preferred" and a sweater that said, "Janitor." When Tapia observed R. Ortiz working as day porter, he wore a black shirt that had the "Preferred" logo on it. L. Squeri testified that the only shirts Preferred sold to its subcontractors said "Janitorial" on them. When Mendoza began work in 2013 at One Kearny, she was given four black shirts from R. Ortiz. The shirts said "Janitorial." In around November 2013, R. Ortiz gave Useda two more shirts. One said "Janitorial" and one said "Preferred." Neither of these shirts fit her so she asked for another size. R. Ortiz gave her the new size of shirts later and they said "Janitorial." R. Ortiz denied that he purchased any shirts that said "Preferred."

Mendoza wore both the black "Preferred" shirts and the black "Janitorial" shirts while she worked at One Kearny. Banegas received four shirts from R. Ortiz. Two of the shirts said "Preferred." The other two said "Janitorial." Banegas wore these shirts at One Kearny and One Hawthorne but not at One Rincon. The shirts were mandatory. On one occasion, Banegas forgot his black T-shirt and R. Ortiz told him to always wear the shirt as a means of identification. The testimony of Mendoza, Useda, Franco, and Banegas is credited and it is found that R. Ortiz furnished them with some shirts that said "Preferred."

According to Nave, repairs of equipment by Preferred for its subcontractors are handled similarly to supplies. That is, Preferred takes care of the repair and charges the subcontractor a marked-up price over actual expense. R. Ortiz agreed that he sent the vacuum to Preferred for repair since he bought the vacuum from Preferred.

According to employees, supplies and equipment for 55 Hawthorne were in the fourth floor storage area. The invoices on these supplies showed billing to "Preferred." Some of the boxes in which supplies were kept also were labeled "Preferred." Once Useda saw one of the vacuum cleaners that showed a repair on the vacuum cleaner and it was billed to "Preferred" with L. Squeri as the contact.

The janitors at One Kearny obtained their supplies from a basement storage room. These supplies arrived in shipping boxes showing they were shipped to Preferred. At One Hawthorne, supplies were kept in a janitor's closet in the lobby. Supplies were dropped off in the closet with invoices on the boxes addressed to Preferred. Employees did not have any knowledge about who ultimately paid for these supplies and repairs. R. Ortiz testified that he bought OJS supplies and equipment both from Preferred and from other sources.

Upon execution of his first subcontract with Preferred, R. Ortiz continued his duties as day porter at 55 Hawthorne and 631 Howard. Now, however, instead of working directly for Preferred, he was working for his sole proprietorship OJS as the day porter. His day porter duties and pay did not change. Because he had many other duties with his new company, L. Squeri suggested and he agreed in 2013 that a separate day porter position for 631 Howard should be created rather than R. Ortiz continuing as day porter for both buildings. The new subcontract specified the number of hours for the day porter position.

7. Applicable analytical framework

In *BFI/Newby Island Recyclery,* 362 NLRB No. 186, slip op. at 15 (2015), the Board restated its joint employer test as fol-

lows:

> We return to the traditional test used by the Board (and endorsed by the Third Circuit in *Browning-Ferris [NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.,* 691 F.2d 1117, 1123 (3d Cir. 1982)]: The Board may find that two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment. In evaluating the allocation and exercise of control in the workplace, we will consider the various ways in which joint employers may "share" control over terms and conditions of employment or "codetermine" them, as the Board and courts have done in the past. [Footnote omitted.]

Thus, the Board no longer requires that an alleged joint employer directly or actually controls essential terms and conditions of employment. It is sufficient that the putative joint employer has authority to do so.[19] Terms of employment such as hiring, firing, disciplining, supervising and directing employees as well as wages and hours are examined to determine whether such authority exists. Other examples include dictating the number of workers, controlling scheduling, seniority and overtime, assigning work, and determining the manner and method of work. Id.; see also, *Retro Environmental, Inc.,* 364 NLRB No. 70, slip op. at 5 (2016).

8. Analysis

Considering the existence, extent, and object of Preferred's control in the context of factors relevant to determination of an employment relationship, the preponderance of the evidence indicates that Preferred and OJS are joint employers. Thus, employees of OJS performed services under Preferred's actual control and direction and were hired, fired, and disciplined by Preferred. Further, the credible evidence indicates that Preferred and OJS shared or codetermined hours, scheduling, assignment of work, and determination of the manner and method of work. Finally, at times both OJS and Preferred held out OJS employees as Preferred employees. These facts warrant a conclusion that Preferred and OJS are joint employers.

Preferred played a part in hiring, firing and discipline of the alleged discriminatees and other employees of OJS. This factor must surely be heavily weighted in that it is a central factor in an employee's work life.[20]

> In July 2014, R. Ortiz told Useda that L. Squeri told him to suspend her for stealing a backpack from the lobby at 55 Hawthorne. The investigation which ensued was conducted solely by L. Squeri and building management. R. Ortiz did not view the video of the incident. L. Squeri did view the video. Following L. Squeri's investigation, she concluded there had been a misunderstanding between Useda and a building clerical about whether Useda could take the backpack. L. Squeri's email regarding the investigation belies her assertion that she was merely a conduit between building management and R. Ortiz. Thus, her email stated, "**I** felt it was best to reinstate her. However, **I** did tell [Useda] along with every other custodian at the building that if another violation of removing something from the building occurs without **my** permission it will result in immediate termination." (Emphasis added.)
>
> Similarly, Preferred investigated the incident involving 55 Hawthorne janitor Mendoza in September 2013. R. Ortiz did not take part in the investigation. L. Squeri reported to building management, "**I** have already let go of the janitor. . . ." (Emphasis added.) "**I** will be speaking to the rest of the crew to remind them of our rules . . . ." (Emphasis added.) L. Squeri explained that the reason for the language in the email is that she is the "face" for janitorial services and interacts with building management although they know a subcontractor provides the janitorial service. This explanation is unavailing and appears to be an afterthought. It does not alter the plain fact that L. Squeri conducted the investigation. R. Ortiz did not. There is no evidence that R. Ortiz made a decision regarding appropriate discipline of Mendoza. L. Squeri made the decision.
>
> Later, in October 2013, Mendoza was rehired in a different building located at 631 Howard. R. Ortiz and L. Squeri met her to explain her duties. L. Squeri told Mendoza she was happy that Mendoza would be working for "them" again. In June 2014, Mendoza was placed at One Kearny. R. Ortiz told Mendoza that L. Squeri wanted to know if she would take the position at One Kearny.

The record also reflects that Preferred and OJS shared or codetermined matters governing the essential terms and conditions of employment. Preferred's dictation of the number of workers to be supplied is indicative of control over mandatory terms and conditions of employment.[21] Dictation of the number of hours employees may work is indicative of joint employer status.[22]

> When awarding work to OJS to clean One Kearny, L. Squeri told him the square footage and the number of janitors needed to fulfill the subcontract.
>
> On several occasions, R. Ortiz told the janitors that L. Squeri had authorized only six-hour shifts but he had been paying them to work a seventh hour. R. Ortiz told the janitors he was not going to continue paying the extra hour and they would now work six hours per shift.

Preferred was involved in supervision and direction of work of OJS janitors. Direction of the manner and method of work

[19] Thus the Board overruled prior precedent to the extent those cases held that mere authority to control employees' terms and conditions of employment was an inadequate indicia of joint employer status unless the authority was exercised directly and immediately and not in a limited and routine manner. *BFI,* supra, slip op. at 16.

[20] See, *Aldworth Co*., 338 NLRB 137, 139 (2002) (relevant facts involved in joint employer determination must be given weight commensurate with significance in employee's work life), cited in *BFI*, 362 NLRB No. 186, slip op. at 15, fn. 81.

[21] See, *D&F Industries*, 339 NLRB 618, 649, fn. 77, cited in *BFI*, 362 NLRB No. 186 slip op. at 15, fn. 85.

[22] See Sec. 8(d) of the Act, 29 U.S.C. §158(d), defining the duty to bargain in good faith over mandatory terms of employment such as wages and hours. *BFI*, 362 NLRB No. 186, slip op. at 15, fn. 82.

performance is indicative of joint employer status.[23]

> R. Ortiz and L. Squeri usually spoke on a daily basis. In his investigative deposition, R. Ortiz agreed that he stated, "She—she is—to me, she's like a supervisor so I can tell the employees what they have to do. She is a supervisor just for myself." Thus, it must be reasonably concluded that directions given to OJS employees by R. Ortiz were directly from Preferred's L. Squeri.
>
> If one of the janitors was going to be absent, R. Ortiz let L. Squeri know. Control of scheduling is another indicia of joint employer status.[24]

In making the joint employer finding, the fact that supplies were labeled with Preferred's name and the fact that Preferred provided repair services for OJS equipment have not been relied upon. The record adequately documents the sale of these supplies and services to OJS as an arm's-length transaction.

On the other hand, credible testimony and documentation from OJS employees that they were given Preferred shirts to wear by R. Ortiz and were told to identify themselves, and in some instances to sign in, as Preferred employees lends support to a finding of joint employer.[25]

Further, the numerous written documents underlying the subcontract relationship between Preferred and OJS are of little value in determining whether a joint employer relationship exists. Thus, the fact that a written document provides that the subcontractor has "sole responsibility for and control over the manner and means of performing" the services; that Preferred "does not exercise any disciplinary authority or control" over OJS; that OJS has "sole discretion" over supervision and control of its employees and Preferred "has no power or authority" over hiring, supervision, direction, discipline, selection, etc. cannot override the actual facts of the relationship. Thus, the written documents do not overcome the weight of the credible testimony of record that L. Squeri did exercise disciplinary authority or control, did supervise OJS employees, and was involved in setting number of hours per shift and number of employees per shift.

Finally, the general testimony of P. Dellanini, who was not actively involved with subcontractor matters, that Preferred has never provide OJS any input regarding hiring, firing, wages, hours and working conditions is belied by the more specific testimony of L. Squeri, R. Ortiz, and the alleged discriminatees. Thus, this general testimony has been disregarded in favor of the more specific testimony of those actually involved in such matters.

Preferred argues that *BFI* requires that there be either actual or reserved control over the physical conduct of an alleged employee and that the Board stressed that under the new test, a simple service under an agreement to accomplish results such as an independent contractor agreement does not form an employment relationship. (Preferred Br. at 2) This argument is rejected. As found above, the preponderance of the evidence reveals a different relationship than a mere contractor/subcontractor agreement. The evidence indicates, rather, that Preferred actually directed the work of OJS employees; participated in hiring, discipline, and discharge; and set terms and conditions of employment.

Preferred contends that it did not exercise or have reserved authority to exercise physical control over OJS employees citing to the California Labor Commission (CLC) which Preferred claims constitutes a finding that it was not the common law employer of OJS employees.

Preferred argues that utilizing the common law standard embodied in *BFI,* a CLC Hearing Officer concluded by decisions of January 6, 2016 that Preferred was not the employer of the alleged discriminatees Banegas, Mendoza, and Useda. Preferred and OJS conceded these decisions did not have a preclusive effect.[26] The decisions defined the term "employer" as "any person who directly or indirectly, or through any agent or other person, employs or exercises control over wages, hours or working conditions of any person."[27] The term "employ" was defined in the decision as "to engage, suffer, or permit to work."[28] The decisions concluded that each alleged discriminatee had failed to establish that there was an employment relation between her/himself and Preferred. As stated in the Banegas decision, page 6; Mendoza decision, page 6; and Useda decision, pages 5–6:

> The preponderance of the evidence suggests that Defendant Ortiz was Plaintiff's employer. Consequently, the application of the terms "employ" and "employer" lead to the conclusion, in this matter, that the Plaintiff was not an employee of . . . Preferred.

As Preferred correctly noted at hearing, there is no preclusive effect from these holdings.[29] Thus, having thoroughly considered the potential materiality beyond the ultimate holding of the CLC hearing officer, it is found that the CLC decision has no probative value.

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[23] *DiMucci Const. Co. v. NLRB*, 24 F.3d 949, 952 (7th Cir 1994) (supervision of employees' day to day activities, issuance of work assignments are among factors to be considered), cited in *BFI*, 362 NLRB No. 186, slip op. at 15, fn. 86.

[24] *Continental Winding Co.*, 305 NLRB 122, 123 fn. 4 (1991), cited in *BFI*, 362 NLRB No. 186, slip op. at 15, fn. 84.

[25] See, e.g., *Whitewood Oriental Maintenance Co.*, 292 NLRB 1159, 1162 (1989) (decided under *NLRB v Browning-Ferris Industries,* 691 F.2d 1117 (3d Cir 1982), cited by General Counsel: fact that janitors wore badges of alleged joint employer and that company used alleged joint employer's stationary for transacting business relied upon in finding joint employer status.

[26] We are "not offering it for preclusive effect, but as a factor, relevant factor, issue of joint employment, not collateral estoppel." (Tr. 1282:13–15).

[27] Decision of the Labor Commissioner, p. 5, citing State Industrial Welfare Commission Order 5-2001.

[28] Id.

[29] When the General Counsel is not a party to prior litigation, the Board's general rule is that the government is not precluded from litigating the same issue. *Precision Industries*, 320 NLRB 661, 663 (1996), enfd. 118 F.3d 585 (8th Cir. 1997); see also *Field Bridge Associates*, 306 NLRB 322 (1992), enfd. sub nom. *Service Employees Local 32B-32J v. NLRB*, 982 F.2d 845 (2d Cir. 1993), cert. denied 509 U.S. 904 (1993).

E. Alleged Unfair Labor Practices

1. Background: Events leading to a demonstration on October 29, 2014

In late summer and early fall, janitors Useda, Mendoza, and Banegas began attending meetings with San Francisco Living Wage Coalition (SFLWC) codirectors Karl Kramer (Kramer) and David Frias (Frias). At all of these meetings, the employees complained to Kramer and Frias about low wages, heavy working conditions, and sexually inappropriate statements made to them by R. Ortiz.

Useda was the first of the employees to seek assistance. The reason she did so was because of statements made to her by R. Ortiz. On one occasion in the fall of 2014,[30] Useda complained to R. Ortiz about there being too much work for the time allowed and she also complained about having to move rolling heavy garbage bins (she estimated 300 pounds). Both V. Ortiz and co-worker Franco were present during this conversation. Useda told R. Ortiz that things were different than when Amilia [last name unknown] and Giovanni [last name unknown] supervised. According to Useda, R. Ortiz became upset and responded: "that if I wanted to know why Giovanni paid more—was because he was going to bed with a co-worker . . . And if it was like that, then he could pay up to 20 an hour." According to Useda, R. Ortiz also said that when this co-worker quit her employment, she bared her breasts. Franco recalled this conversation vaguely and remembered that Useda told R. Ortiz he should not talk about women like that.

Useda agreed on cross-examination that these conversations were not in her affidavit given to the NLRB. She stated that she was tired when she gave the affidavit and although she read it before signing it, she did not request that the conversations be added to the affidavit. Similarly, when she re-read the affidavit shortly before testifying, she also noticed that there were things that needed to be added. She did not call this to anyone's attention prior to testifying. Even though the statement was not included in her affidavit, Useda's testimony, corroborated by Franco, is credited. Based upon her demeanor, it is found that Useda was not embellishing the facts but was truthfully relating the conversation as she recalled it. [31]

According to Useda, these comments by R. Ortiz led her to seek help from SFLWC. She spoke to Kramer and Frias about the heavy work and R. Ortiz' comments about women. After meeting with SFLWC, Useda told her co-worker Mendoza about the meeting with SFLWC. Mendoza was not interested in going to SFLWC with Useda but ultimately changed her mind and joined Useda at the next meeting with SFLWC.

Mendoza testified that R. Ortiz informed Mendoza while she was on the sixth floor that she needed to go back to the eighth floor to clean a sink. Mendoza protested that she had already cleaned it but there were still people working in the building who must have used it after she cleaned it. According to Mendoza, "He told me that his wife has given him permission to stick his dick in any rear end but that he had to use a condom." After these comments, Mendoza began attending the SFLWC meetings.[32]

Banegas recalled a day in September when Mendoza was sick at work. After giving Mendoza permission to leave work, R. Ortiz reported to the building to cover for her. When Banegas let R. Ortiz into the building, R. Ortiz asked if Mendoza had left already. Banegas replied that she was vomiting and had left. R. Ortiz responded, "Oh. So you got her pregnant already." This comment was "the last straw" according to Banegas. He began attending meetings at SFLWC on October 9 after learning of the meetings through coworkers Mendoza and Useda.

Mendoza corroborated Banegas' testimony about her illness. In September, Mendoza reported for work one day and was vomiting a lot. She called R. Ortiz to let him know she was vomiting and needed to go home. He said he would call her back after checking. When R. Ortiz called back, he told her to go home and he would cover for her. R. Ortiz agreed that he joked with Banegas about getting Mendoza pregnant.

On the following day, when Mendoza went to the basement storage to pick up her supplies, coemployee Banegas was already there. Banegas reported to Mendoza that R. Ortiz had said, "So you got the lady pregnant, that's why she has that nausea . . . ." R. Ortiz testified that Mendoza complained to him about three days afterwards that Banegas told her about his statement that Banegas had gotten her pregnant. R. Ortiz told Mendoza that it was a joke and it would not happen again. These actions caused Mendoza to change her mind about joining Useda and in September Mendoza began attending the SFLWC meetings with Useda and Banegas.[33]

At the suggestion of SFLWC, the employees also sought the assistance of SEIU Local 87. The employees agreed to meet SEIU Local 87 president Olga Miranda (Miranda) on October 21. At the meeting at SEIU Local 87 offices, Useda, Mendoza, and Banegas recounted their working conditions and statements they claimed were made to them by R. Ortiz. Miranda asked if the employees would agree to participate in a picket. The employees agreed to do so and the date of October 29 was set for this demonstration.

2. October 29 demonstration at 55 Hawthorne

On October 29, a demonstration took place on the sidewalk in front of 55 Hawthorne Street beginning around 10 a.m. The employees, including Useda, Mendoza, and Banegas, and members of SFLWC as well as members of SEIU Local 87

[30] Unless otherwise referenced, all further dates are in 2014.

[31] See, e.g., *Genwal Coal Co.,* 275 NLRB 528 (1985)*; Standard Forge & Axel Co.*, 170 NLRB 764, 786 fn. 8 (1968): "What a prospective witness will tell a prehearing investigator will often depend upon how searching the questions of the investigator are." Cf., *Giovanni's*, 259 NLRB 233 (1981) (trial testimony discredited as embellishment because investigative affidavit taken four days after incident, when memory was fresher, did not contain those details).

[32] R. Ortiz denied telling anyone that his wife told him it was okay to have sex with other women as long as he wore a condom. He denied using the word "condom" in any conversation with any employees. This denial is not credited.

[33] Ortiz denied ever talking about an alleged affair or a personal relationship between Giovanni and an employee. He also denied ever stating that the reason Giovanni paid a higher hourly wage was because a worker provided sexual favors to him. Ortiz denied that he ever told anyone that he would pay up to $20 per hour if an employee provided sexual favor or agreed to sleep with him. These denials are not credited.

walked in circles on the sidewalk in front of the building carrying placards and chanting statements such as, "Up with the union, down with exploitation" and "We want justice." "When?" "Now." During the demonstration, leaflets were handed out with pictures of Useda[34] and Mendoza,[35] stating:

Who Needs a Minimum Wage Increase?

We do.

We work for Preferred Building Services which cleans the offices of KGO radio. We get paid the San Francisco minimum wage of $10.74 per hour. We endure abusive and unsafe working conditions and sexual harassment. The work involves heavy lifting and the risk of serious injury. A foreman arbitrarily cut hours from eight hours per day to six hours and said that any additional hours would need to include sexual favors. The company does not provide paid sick days that are required by San Francisco law or pay medical bills for injuries on the job as required by workers compensation.

We are calling on KGO radio to take corporate responsibility in ensuring that their janitors receive higher wages, dignity on the job, respect, their rights to sick pay and workers compensation, and full legal protections against sexual harassment and retaliation for asserting their rights.

Vote yes on Prop J on Nov. 4 to raise the city minimum wage.

Join us for a picket line outside the offices of KGO radio.

Wednesday, October 29
10 a.m.
55 Hawthorne St, San Francisco
(between Howard and Folsom, parallel to 2nd and 3rd Streets)
San Francisco Living Wage Coalition
For more information, contact 415-863-1225, sflivingwage@riseup.net

In addition to handing out these leaflets and chanting, the picketers carried placards which were purple and gold. At the top of the placard, the initials "SEIU" appeared in white and at the bottom, the initials appeared again in the left corner with "Leading the Way" underneath the initials and to the right of the initials, in white, appeared, "Service Employees International Union, AFL–CIO, CLC. In the center of the placard, a blue notice stated "PREFERRED BUILDING SERVICES UNFAIR!" Above this language was the SEIU logo (upper left) and a San Francisco cityscape (upper right). At the bottom, underneath the capitalized language, the blue notice stated in small print, "This is NOT a strike. It is an informational picket line. We are NOT calling for a boycott of this building. We are in a labor dispute with the cleaning contractor at this building."

P. Dellanini testified that he received the flyer via email from 55 Hawthorne Property Manager Maxon, who asked P. Dellanini what he was going to do about the protest. P. Dellanini replied that he did not plan to do anything. According to P. Dellanini, Maxon said that Preferred should get rid of R. Ortiz and P. Dellanini told Maxon, "no." P. Dellanini understood from the wording on the flyer that the women who were pictured on the flyer were complaining about sexual harassment. He also understood that these women said they worked for Preferred. P. Dellanini had no knowledge regarding the statements on the flyer and did not conduct any investigation into the allegations.

Maxon recalled this conversation with P. Dellanini or a similar conversation after a subsequent demonstration. Maxon recalled recommending that R. Ortiz be removed pending investigation into the allegations. Maxon also requested that R. Ortiz's wife be removed from the building pending investigation. Maxon denied that he told P. Dellanini to get rid of R. Ortiz. According to L. Squeri, when she arrived at 55 Hawthorne, Maxon requested that she remove R. Ortiz from the building. She did not have any further opportunity to speak with Maxon. Maxon's testimony is credited based on his forthright and thoughtful demeanor as well as the fact that L. Squeri's testimony tends to support Maxon's version of the conversation between himself and P. Dellanini.

On October 30, Kramer received a call from R. Ortiz. R. Ortiz told Kramer that he had lost his job and his contracts had been cancelled. R. Ortiz asked Kramer who made the accusations of sexual harassment and Kramer responded that the women had said R. Ortiz made inappropriate sexual remarks. According to Kramer, R. Ortiz said, "well, that's just the way we Mexicans talk to each other." R. Ortiz recalled a conversation with Kramer on October 30. R. Ortiz testified that he asked him, "why are they talking about me" and told Kramer that the picketers were his workers, not Preferred's, and "the only thing that they were going to achieve is that the contract might be cancelled and everyone was going to be left without work."

3. Protected, concerted, and union activity

Concerted activity includes not only activity that is engaged in with or on the authority of other employees, but also activity where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management. *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 153 (2014).[36] If the employee or employees who are acting in concert are seeking to improve terms and conditions of employment, their actions are for mutual aid and protection of all employees within the meaning of Section 7. Id., at 153, 155–156.

Thus, when Useda, Mendoza, Banegas and others attended meetings with SFLWC to discuss their wages and working conditions, they were acting in concert to try to improve their terms and conditions of employment on behalf of themselves

[34] Under Useda's picture, the text stated: "Yunuen is raising two teenagers on the city minimum wage of $10.74 per hour."

[35] Under Mendoza's picture, the text stated: "Balbina is raising three teenagers and a four year old on $10.74 per hour."

[36] See also *Meyers Industries*, 268 NLRB 493, 497 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 971 (1985), supplemented *Meyers Industries*, 281 NLRB 882, 887 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), supplemented *Meyers Industries,* 281 NLRB 882, 887 (1980), affd. sub nom. *Prill v. NLRB,* 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988

and other employees. When these employees agreed to seek assistance from the Union, they were engaging in union activity.

Respondents have consistently argued that the employees were not engaged in activity protected by the Act. The bases for this assertion are that the demonstrations were unlawful in violation of Section 8(b)(4)(B) and (7) of the Act and that the banners and leaflets set forth unlawful, malicious defamatory statements. These assertions are rejected because it is found that the demonstrations were not unlawful secondary or recognitional picketing and the banners and leaflets did not set forth any statements that were deliberately or maliciously false or made with reckless disregard for the truth.

(i) Affirmative defense: employees were engaged in an unlawful strike in violation of Section 8(b)(4)(B) of the Act

Respondents claim that the demonstrations had an unlawful secondary objective in violation of Section 8(b)(4)(B) of the Act. Thus Respondents argue that an objective of the picketing was to put pressure on Preferred and the tenants at 55 Hawthorne including KGO radio to force building management to terminate its contract with Preferred thus forcing Preferred to terminate its subcontract with OJS, even though the dispute was solely with OJS. There is no evidence that a secondary objective existed. Thus, this defense is rejected.

As relevant here, Section 8(b)(4)(B) provides that a labor organization commits an unfair labor practice by threatening, coercing, or restraining any person engaged in commerce where an object is to force or require any person to cease doing business with any other person. Thus there are two requirements: (1) a threat, coercion, or restraint and (2) a cease doing business objective.

As the Board explained in *Carpenters Local 1506 (Eliason & Knuth of Arizona),* 355 NLRB 797, 799–800 (2010) (footnote omitted):

> Congress adopted this provision and the other provisions of Section 8(b)(4) with the objective of "shielding unoffending employers" from improper pressure intended to induce them to stop doing business with another employer with which a union has a dispute. *NLRB v. Denver Building Trades Council*, 341 U.S. 675, 692 (1951). Congress did not, however, intend to prohibit all conduct of labor organizations that might influence or persuade such "unoffending employers" to support the unions' cause. The Supreme Court explained:
>
> Whatever may have been said in Congress preceding the passage of the Taft-Hartley Act concerning the evil of all forms of 'secondary boycotts' and the desirability of outlawing them, it is clear that no such sweeping prohibition was in fact enacted in § 8 (b)(4)(A). The section does not speak generally of secondary boycotts. It describes and condemns specific union conduct directed to specific objectives.
>
> *Carpenters Local 1976 v. NLRB (Sand Door)*, 357 U.S. 93, 98 (1958).

Picketing, "generally involves persons carrying picket signs and patrolling back and forth before an entrance to a business or worksite."[37] The confrontation resultant from picketing constitutes, necessarily, some form of confrontation between a union and customers or suppliers who are trying to enter an employer's premises. Thus such confrontational picketing "threatens or coerces" within the prohibition of Section 8(b)(4)(B). *Chicago Typographical Union (Alden Press, Inc.),* 151 NLRB 1666, 1668–1669 (1965), adopting the Second Circuit's test in *NLRB v. Furniture Workers,* 337 F.2d 936, 940 (2d Cir. 1964). The Union, SFLWC, and employees of OJS patrolled in circles in front of the lobby of 55 Hawthorne. This patrolling or picketing satisfies the first requirement of Section 8(b)(4)(B).

However, there is no evidence which satisfies the second requirement of 8(b)(4)(B), that is, an inducement to cease doing business with another employer with which a union has a dispute. The only evidence of record remotely relevant to this factor is the picket sign itself. As relevant here, the sign stated,

> We are calling on KGO radio to take corporate responsibility in ensuring that their janitors receive higher wages, dignity on the job, respect, their rights to sick pay and workers compensation, and full legal protections against sexual harassment and retaliation for asserting their rights.

Further, the sign stated, albeit in smaller lettering, "This is NOT a strike. It is an informational picket line. We are NOT calling for a boycott of this building. We are in a labor dispute with the cleaning contractor at this building."

Activity intended only to educate consumers or neutral employers or employees, and perhaps even cause them to take action is lawful unless the action taken is cessation of work by neutral employees. *Carpenters Southwest Regional Council Locals 184 &1498 (New Star),* 356 NLRB 613, 615 (2011):

> Section 8(b)(4)(i)(B), in particular, is violated by picketing or other activity that induces or encourages the employees of a secondary employer to stop work, where an object is to compel that employer to cease doing business with the struck or primary employer. Unless both of those elements are demonstrated, no violation of the Act may be found. Activity intended only to educate consumers, secondary employers, or secondary employees, and even prompt them to action—so long as the action is not a cessation of work by the secondary employees—is lawful.

In evaluating whether a secondary objective is present, it must be noted that 55 Hawthorne is a multi-story office building with multiple tenants. These tenants are neutral employers regarding the Union's dispute with Respondents. These tenants were engaged in their own primary activities and did not per-

[37] Eliason, supra, at 802, citing *Mine Workers District 2 (Jeddo Coal Co.)*, 334 NLRB 677, 686 (2001); *Service Employees Local 87 (Trinity Building Maintenance)*, 312 NLRB 715, 743 (1993), enfd. 103 F.3d 139 (9th Cir. 1996); see also *NLRB v. Retail Store Union Local 1001*, 447 U.S. 607, 618–619 (1980) (Safeco) (Justice Stevens, concurring) (picketing "involves patrol of a particular locality") (quoting *Bakery Drivers v. Wohl*, 315 U.S. 769, 776–777 (1942) (Justice Douglas, concurring)); Overstreet v. Carpenters Local 1506, 409 F.3d 1199, 1213 (9th Cir. 2005) ("Classically, picketers walk in a line and, in so doing, create a symbolic barrier.")

form any work for Respondents. When pickets are present at a common situs, that is, a location where both primary and neutral employers are present, the picketing is presumptively lawful if (1) the picketing is strictly limited to times when the situs of the dispute is located on the neutral employer's premises; (2) at the time of the picketing, the primary employer is engaged in its normal business at the situs; (3) the picketing is limited to places reasonably close to the location of the situs; and (4) the picketing discloses clearly that the dispute is with the primary employer. *Sailors' Union of the Pacific (Moore Dry Dock Co.*), 92 NLRB 547, 549–551 (1950).

These standards were clearly met. Respondents' daytime employees were performing their normal duties at the time of the picketing. R. Ortiz was, in fact, in the lobby at the time. The picketing was just outside the lobby, thus reasonably close to the situs of the dispute. Finally, the picket signs clearly disclosed Preferred as the primary employer. The fact that OJS was not mentioned on the signs is due to the fully documented lack of information that employees and the Union had regarding what entity was the actual employer of the employees. Moreover, because Preferred and OJS have been found joint employers, there can be no argument that identifying Preferred as the primary employer fails to meet the fourth *Moore Dry Dock* requirement.

Thus, given the access points to the property and the lack of any precise location which could have assured that only primary employees would be present, the picketing on public sidewalks outside the lobby was not conducted in a manner allowing an inference of a secondary objective.[38] Rather, the opposite is true. It is found that all of the *Moore Dry Dock* factors were satisfied. Thus, compliance with the *Moore Dry Dock* standards creates a presumption that the picketing was lawful

Further, there is no independent evidence of an unlawful secondary objective to rebut that presumption. Although the picket signs sought KGO's assistance in aiding janitors to receive better wages, sick pay, workers compensation, and protection against sexual harassment, there was no request that KGO cease doing business with Respondents. The appeal to KGO did not seek a specific affirmative action as a quid pro quo for the removal of pickets. Further, Harvest Properties building manager Maxon, whose testimony is credited, sought an investigation into the allegations on the picket signs of his own volition. There is no evidence that he was asked to do this by the Union or that he was asked to cease doing business with Respondents by the Union.[39] Thus, Respondents' affirmative defense that the picketing was unlawful secondary activity is rejected.

(ii) Affirmative Defense: Employees were engaged in unprotected strike in violation of Section 8(b)(7)(C) of the Act

Respondents argue that the actions of Useda, Banegas, Mendoza, and others at the October 29 and November 19 demonstrations and at similar later demonstrations were unprotected. First, relying on *National Packing Co. v. NLRB,* 352 F.2d 482, 485 (10th Cir. 1965), Respondents claim that the employees' should not be allowed to use the Act to compel reinstatement after discharge which followed picketing in violation of Section 8(b)(7)(C).

Section 8(b)(7)(C) provides, as relevant here, that it is an unfair labor practice for a labor organization to picket any employer where an object is to force or require an employer to recognize or bargain with a labor organization as the representative of its employees unless the labor organization is already certified, where no representation petition is filed within a reasonable period of time not to exceed 30 days from the start of the picketing. Two provisos to Section 8(b)(7)(C) exist. The first proviso sets out an expedited election process if a representation petition is filed. The second proviso exempts informational picketing from a finding of violation if there is no intent to induce any individuals not to pick up, deliver or transport goods or not to perform any services. Thus, in general, in order to prove that a violation of Section 8(b)(7)(C) occurred, the evidence must indicate that picketing occurred, that it had a recognitional or organizational object, and that no petition for representation was filed within a reasonable time.

On October 29 and November 19, employees marched in circles in front of the building where Respondents provided janitorial services. While marching, the employees carried placards, distributed leaflets, and shouted slogans. There is no dispute and it has been previously found that this activity constituted picketing and satisfies the "restraint or coercion" requirement. Further, there is no dispute that a petition for recognition has not been filed.[40] The object of the picketing may be determined, of course, by actual admissions or direct evidence of an unlawful objective.[41] In the absence of direct evidence, the nature of the objective may be evident from the overall conduct.[42]

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[38] See, e.g., *ElectricAl Workers IBEW Local 640 (Timber Buildings, Inc.)*, 176 NLRB 150, 151–152 (1969) (where union furnished with untrue information regarding presence of primary, *Moore Dry Dock* inference not affected by failure to picket at time primary actually present); *Electrical Workers IBEW, Local 441 (Suburban Development Co.)*, 158 NLRB 549, 552–553 (1966) (accommodation of competing interests is maintained where *Moore Dry Dock* standards are applied to minimize impact on neutral employees without substantial impairment of effectiveness of picketing in reaching primary).

[39] Either before or around the time of the picketing, Harvest Properties began searching for a unionized cleaning contractor. There is no evidence to connect this search to the picketing. Eventually, Preferred notified Harvest Properties that it was cancelling its contract to clean 55 Hawthorne.

[40] For purposes of this analysis, it is assumed that sporadic picketing over a period exceeding 30 days satisfies the 30-day requirement that a petition for recognition be filed. Here, the picketing occurred on October 29, November 19, and December 18.

[41] For instance, in *Hotel & Restaurant Employees Local 681(Crown Cafeteria),* 135 NLRB 1183 (1967), a sign that stated that the employer does not employ members of a labor organization or does not have a contract with the picketing labor organization would imply an objective for recognition.

[42] *Mine Workers Local 5926 (Sunrise Mining)*, 291 NLRB 644 (1988) (fact that some members of union took part in picketing insufficient to show picketing was union endorsed organizational effort where picketing began as community protest and continued as such without evidence of a recognitional object); *Teamsters Local 618 (S & R Auto*

Respondents argue that the recognitional objective is satisfied where a union attempts to dictate a change in working conditions of employees it does not represent. Respondent Preferred cites *Congress of Independent Unions v. NLRB,* 620 F.2d 172, 176 (8th Cir. 1980), and *NLRB v. Electrical Workers IBEW Local 265,* 604 F.2d 1091, 1097 (8th Cir. 1979). These cases are inapposite because both took place in the context of organizational activity.

In *CIU,* the court of appeals reversed the Board and found that the picketing arose in a 2-year atmosphere of recognitional activity, followed by a disclaimer of recognitional interest and immediate picketing with signs limited to substandard wage claims. However, the circumstantial evidence of past recognitional attempts convinced the court that a recognitional object was present. Such facts are not present here. Here the language regarding wages must be viewed literally because no other surrounding circumstances provide a recognitional object.

Similarly, in *IBEW,* in a letter to the employer the union demanded area standards wages and offered to provide area standards information to the employer in order to reach agreement. The court affirmed the Board's finding that an object was recognition based on the letter and the union's past attempts to organize the employees. Thus the court held that the union's efforts extended well beyond a request to merely comply with area standards. That is not the case here.

Here there is no evidence of a prohibited object, either by action or statement. The picket signs and leaflets were directed to the public rather than to employees.[43] There were no requests that employees join the Union made in connection with the picketing.[44] There is no evidence of a contemporaneous demand for recognition[45] and no evidence that a contract was tendered at the time of picketing,[46] or that cessation of picketing was conditioned on signing a contract.[47] The evidence indicates that the purpose of the picketing was to inform the public and protest working conditions of the employees. The second proviso to Section 8(b)(7)(C) specifically excludes such informational picketing from the coverage of the section. Thus, to the extent Respondents argue that employees lost the protection of the Act by engaging in unlawful recognitional picketing, the argument is rejected because the evidence of record fails to show that the picketing was unlawful.

(iii) Affirmative Defense: Employee activity was unprotected because picket signs and leaflets contained unlawful, malicious defamation

Additionally, Respondents aver that because the picket signs and leaflet statements regarding R. Ortiz contained unlawful, malicious defamation, the alleged discriminatees' conduct is unprotected. In this connection, Respondents claim that the statements regarding abusive, unsafe working conditions and sexual harassment were knowingly false or made with reckless disregard of the truth. This contention is also rejected.

In general, employees may engage in communications with third parties in order to obtain the third parties' assistance where the communication is related to a legitimate, ongoing labor dispute between the employees and their employer and where the communication does not constitute a disparagement or vilification of the employer's product or its reputation. *Allied Aviation Serv. Co. of N.J.*, 248 NLRB 229, 230 (1980), enfd. 636 F.2d 1210 (3d Cir. 1980); see also, *Sierra Publishing v. NLRB,* 889 F.2d 210 (9th Cir. 1989), enfg. 291 NLRB 540 (1988). Thus, employee appeals to third parties in an ongoing labor dispute are protected if they are "not so disloyal, reckless, or maliciously untrue [as] to lose the Act's protections." *Emarco, Inc.*, 284 NLRB 832, 833 (1987); see, generally, *NLRB v. Electrical Workers IBEW Local 1229 (Jefferson Standard Broadcasting Co.),* 346 U.S. 464, 477 (1953) (employee disparagement of an employer's product unrelated to a labor dispute is not protected while employee publication of a labor dispute is protected).

The picket signs and leaflets at issue here publicized a labor dispute and were directly related to protected, concerted activity in progress.[48] The leaflets stated that employees endured "abusive and unsafe working conditions and sexual harassment." The leaflets also stated that hours were cut and "a foreman" told employees "additional hours would need to include sexual favors." These leaflet statements made particular reference to treatment of employees, wages, and conditions of employment. The leaflets appealed to the public for support and sympathy. Thus, the leaflets clearly referred to an ongoing labor dispute and were inextricably intertwined with the employees' concerted activities.

In the credibility section above, it is found that the witnesses who made the statements in support of the leaflet and picket sign language were highly credible witnesses. There is nothing

Parts), 193 NLRB 714, 717 (1971) (disclaimers cannot prevail over intent and effect of actions).

[43] See, e.g., *Retail Clerks Local 635 (Mays, Inc.)*, 145 NLRB 1091, 1093 (1964) (Where signs stated, "Mays Employees Your Right to Join Retail Clerks is Protected by Federal Law. . . . Mays Employees There is Nothing to Fear But Fear Itself. Join. Join. Join Retail Clerks," there was no doubt that a recognitional objective was present.)

[44] See, e.g., *Retail Clerks Local 345 (Gem of Syracuse)*, 145 NLRB 1168, 1172 (1964) (union statements that picketing would cease if employer cooperated in organizational efforts indicated recognitional object); *Philadelphia Window Cleaners (Atlantic Maintenance Co.)*, 136 NLRB 1104, 1105–1106 (1962) (recognitional object shown where picket signs told public to read the circulars handed out at the picketing; circulars requested that employees join the union).

[45] In *Electrical Workers (IBEW) Local 265 (R P & M Electric)*, 236 NLRB 1333, 1334–1335 (1978), enfd 604 F.2d 1091 (8th Cir. 1979), the union specifically demanded recognition. See also, *Gem of Syracuse*, supra.

[46] In *Retail Clerks Local 899 (Giant Food)*, 166 NLRB 818, 823 (1967), the union demanded not only area standards but also equivalent benefits to those negotiated in collective-bargaining agreement; see also *Retail Clerks Local 212 (Maxam Buffalo*), 140 NLRB 1258, 1265 (1963) (numerous discussions about contract details in attempt to obtain agreement).

[47] *Maxam Buffalo*, supra (references to warfare and repeated statements about need for haste in context of presentation of contract details indicative of picketing ceasing upon recognition); see also–-980 (1963) (union stated pickets would be removed when there was a certified representative for the employees or if the employer hired union members).

[48] Sec. 2(9) of the Act defines "labor dispute" to include "any controversy concerning terms, tenure or conditions of employment." The picket signs and leaflets referenced working conditions and wages.

to suggest otherwise. Thus, it is not found that any of the accusations on the leaflets, which were repeated on the witness stand by highly credible witnesses, albeit with great difficulty and unease due to the sensitive nature of the subject matter, were "deliberately or maliciously false" or made with "reckless disregard for the truth." Thus, the communications on leaflets and picket signs were protected under *Jefferson Standard* and Respondents' argument that the employees were engaged in unprotected activity on this basis is rejected.

4. Alleged violations which have been briefed by the General Counsel but are not set forth in the complaint

Some of the matters briefed by the General Counsel relate to allegations not contained in the complaint as amended. Generally, the General Counsel requests that these allegations be included in this litigation pursuant to a motion to conform the pleading to the proof made at the close of the hearing. This motion was granted only as to minor matters. [49] In ruling on a motion to amend, the judge's discretion is guided by factors such as whether there was surprise or lack of notice, whether there is a valid excuse for the delay in moving to amend, and whether the matter was fully litigated. *Rogan Brothers Sanitation, Inc.,* 362 NLRB No. 61, slip op. at 3, fn. 8 (2015).

A motion made at the beginning of hearing arising from and closely related to existing complaint allegations may appropriately be granted. *Folsom Ready Mix,* 338 NLRB 1172 fn. 1 (2003). However, a motion to amend the complaint made at the end of hearing may add additional substantive allegations of unfair labor practices to the complaint only if the parties have fully and fairly litigated such matters.[50] However, when the newly alleged matters have not been fully and fairly litigated, allowing amendment after the record has closed denies due process of law. See, e.g., *The Dalton School,* 364 NLRB No. 18, slip op. at 2 (2016):

> We find merit, however, in the Respondent's exception to the judge's finding that the Respondent unlawfully interrogated Brune on March 11, 2014. This allegation, which was not contained in either the charge or the Complaint, was not fully litigated at the hearing, as required by *Pergament United Sales,* 296 NLRB 333, 334 (1989), enfd 920 F.2d 130 (2d Cir. 1990). The Respondent was not put on notice that the facts pertaining to the March 11 meeting would be used to prove a separate interrogation violation, and therefore the Respondent did not have the opportunity to mount a defense. Under these circumstances, we find that the interrogation allegation was not fully and fairly litigated. See *Dilling Mechanical Contractors, Inc.*, 348 NLRB 98, 105 (2006).

Specific findings will be made regarding each of the unalleged matters in the general discussion that follows.

5. On or about October 29, R. Ortiz, by phone conversation, told employees who were picketing not to return to work (complaint par. 8(a)(i)) unpled allegation regarding interrogation during same conversation

(a) Facts

After the picketing, Mendoza testified that she received a call from R. Ortiz who stated, "lady, I'm here with Lauren [Squeri] and with Robert [Squeri]. And we wanted to know what's going to happen. And asking why was I present there. And because I have there present I was not going to be working anymore." R. Ortiz denied telling employees who were picketing not to return to work. As mentioned in prior sections, Mendoza was a highly credible witness. Her testimony in regard to this conversation was open and consistent. Thus, her testimony that R. Ortiz asked her what was going to happen and why she was present at the demonstration and told her she would not be working anymore is credited over the denial of R. Ortiz.

(b) Analysis

(i) Instruction to not return to work

Section 8(a)(1) of the Act provides that it shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of rights guaranteed by Section 7 of the Act. As relevant here, those rights include the right to self-organization, to form, join, or assist labor organizations, and to engage in other concerted activities for mutual aid or protection.

Statements made by an employer to employees may convey general and specific views about unions or unionism or other protected activity as long as the communication does not contain a "threat of reprisal or force or promise of benefit." *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 618 (1968). Statements are viewed objectively and in context from the standpoint of employees over whom the employer has a measure of economic power. See, e.g., *Mesker Door, Inc.,* 357 NLRB 591, 595 (2011). When an employer tells employees that they will jeopardize their jobs, wages, or other working conditions by supporting a union or engaging in concerted activities, such communication tends to restrain and coerce employees if they continue to support a union or engage in other concerted activities in violation of Section 8(a)(1). *Noah's Bay Area Bagels, LLC,* 331 NLRB 188 (2000).

The clear import of the credited testimony is that because Mendoza took part in the demonstration, she was not going to be working anymore. These words constitute a threat of discharge for protected activity.[51] Although the complaint alleges

[49] A motion made at the end of the hearing to conform the pleadings to the proof may be granted as to minor matters such as dates and names See, e.g., *Coplay Cement Co.,* 292 NLRB 309, 315 (1989) (minor matters such as errors in dates); *Centre Engineering, Inc.,* 246 NLRB 632, 633 fn. 3 (1979) (names of alleged agents reversed).

[50] See, e.g., *Desert Aggregates,* 340 NLRB 289, 292–293 (2003), modified on other grounds, 340 NLRB 1389 (2003), (posthearing motion to amend the complaint to allege an additional 8(a)(1) statement by a manager denied because respondent did not have fair notice that the manager's statement would be alleged as a violation because the manager's testimony about the statement emerged incidentally during the General Counsel's cross-examination, and, consequently, was not fully litigated); *Sheet Metal Workers Local 91 (Schebler Co.)*, 294 NLRB 766, 774–775 (1989), enfd. in part and remanded in part 905 F.2d 417 (D.C. Cir. 1990) (posthearing request to amend the complaint to allege an additional 8(b)(3) theory properly denied).

[51] See, e.g., *Publix Super Markets, Inc.,* 347 NLRB 1434, 1435–1436 (2006) (unretracted threat to discipline or discharge employees for

that R. Ortiz stated that she did not need to return to work, the testimony that he said she was not going to be working anymore is substantially similar to the allegation to be encompassed within the pleading. Thus, it is concluded that by telling an employee who was picketing that she was not going to be working anymore, Respondents violated Section 8(a)(1) of the Act.

(ii) Unpled allegation of interrogation

The complaint does not allege that the questions asked during this conversation (What's going to happen? Why were you there [at the demonstration]?) constitute unlawful interrogation.[52] As only minor matters may be included in the motion to conform the pleading to the proof, adding an allegation of interrogation to the complaint allegation of a threat does not qualify as a minor matter appropriately handled by a motion to conform the pleadings to the proof.

Nevertheless, if the matter is closely related to the allegations of the complaint and fully and fairly litigated, it may be litigated. Here, the matter was not fully litigated even through Mendoza was asked one question on cross-examination about the conversation.[53] As the Board stated in *Mine Workers District 29,* supra, 308 NLRB at 1157, quoting *NLRB v. Quality C.A.T.V., Inc*., 824 F.2d 542, 547 (7th Cir. 1987),

> [T]he simple presentation of evidence important to an alternative claim does not satisfy the requirement that any claim at variance from the complaint be ''fully and fairly litigated'' in order for the Board to decide the issue without transgressing [the respondent's] due process rights.

Thus, it is concluded that because the factual and legal matter regarding the questions asked during this conversation were not fully and fairly litigated, the alleged interrogation is not before me. See, *The Dalton School,* supra, 364 NLRB No. 18, slip op. at 2; *Piggly Wiggly Midwest, LLC,* 357 NLRB 2344, 2345 (2012).

6. On October 29, R. Ortiz engaged in surveillance of employees by taking photos of employees engaged in union activities (Complaint par. 8(a)(ii))

(a) Facts

The complaint alleges that R. Ortiz engaged in surveillance of the October 29 picketing at 55 Hawthorne by taking pictures of the employees. At the time of this demonstration, R. Ortiz worked in the lobby and other parts of 55 Hawthorne as the day porter. While picketing, Mendoza and Useda observed R. Ortiz in the lobby. Banegas also observed R. Ortiz in the lobby of the building holding a cell phone and extending his arm outward and moving it around as if taking pictures or video. R. Ortiz denied that he ever took any photos or videos of employees. R. Ortiz agreed that he saw Mendoza, Useda, and Banegas picketing on October 29.

(a) Analysis

It is not alleged in the complaint that R. Ortiz' observation of employee picketing from inside the lobby violates the Act. Rather, it is his alleged photography or videography of employee activity that is at issue, as framed by the complaint. However, as briefed by the General Counsel (GC Br. 81-82), it is the open, prolonged, conspicuous presence of R. Ortiz in the lobby watching the demonstration, laughing and talking with people and appearing to take photos which violates the Act.

As to the complaint allegation, absent proper justification, photographing or videotaping employees as they engage in protected concerted activity violates Section 8(a)(1). *Saigon Gourmet,* 353 NLRRB 1063, 1066 (2009). The action of holding a cell phone out and moving it around appears to indicate that a photo or video is being taken.

Both Mendoza and Useda testified only that they saw R. Ortiz in the lobby on October 29. They did not testify that they saw him holding his cell phone as if videotaping or photographing the picketing activity. Banegas alone testified about this observation. Based on the failure of Mendoza and Useda to confirm his observation, and Banegas admitted difficulty with dates, this specific portion of Banegas' testimony is discredited. R. Ortiz denial is credited. I find that on October 29 R. Ortiz' did not give the impression of taking photos or videos of picketing employees.

As to the argument that R. Ortiz' open, prolonged, conspicuous presence constituted unlawful surveillance, this allegation is rejected as unsupported by the record. As day porter, R. Ortiz took care of cleaning needs during the day time such as collecting trash, polishing rails, dusting, and cleaning water fountains. This work sometimes required that he be in the lobby. Although he had been cautioned about taking breaks in the security area of the lobby, he was required as part of his duties to be present in the lobby area. According to Mendoza, R. Ortiz was on his phone when she initially saw him in the lobby. Then he left the area. Useda observed R. Ortiz in the lobby. She did not testify that she observed him for any specific length of time. Banegas observed R. Ortiz in the lobby for about five minutes and then lost sight of him. Kramer testified that R. Ortiz was pointed out to him on October 29. Kramer observed this person sitting in the lobby with the security guard. No specific time was given for the length of this observation. Mere observation of open activity from a workplace site does not rise to the level of surveillance. *F. W. Woolworth,* 310 NLRB 1197 (1993) (employer's mere observation of employees' open, public union activity on its premises does not violate the Act). Thus, paragraph 8(a)(ii) of the complaint is dismissed.

7. Further statements of October 29 which the General Counsel

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attempting to assist a coworker in dealing with management regarding work hours reasonably tended to deter employees from engaging in Sec. 7 activities).

[52] Par. 8(b)(ii) alleges interrogation of Mendoza and Banegas on October 30 at One Kearny. This allegation is clearly about a different incident than the one discussed here. When Respondents asked R. Ortiz during their case-in-chief, "On October 30, did you ask employees why they were engaging in union activity and ask them to stop or they would be terminated?" they were clearly referencing the allegation of October 30. Accordingly, there can be no finding that Respondents attempted to litigate this unpled allegation of October 29.

[53] On cross-examination, Mendoza was asked whether during this postdemonstration conversation, R. Ortiz asked why he was being accused of sexual harassment. Respondents did not ask any further questions of Mendoza on the substance of the conversation either regarding the alleged threat or the unalleged interrogation.

contends violated Section 8(a)(1) of the Act even though they are not alleged in the complaint

The General Counsel argues on brief (pp. 70–72) that further unalleged violations of Section 8(a)(1) occurred on October 29. First, the General Counsel refers to a pre-demonstration phone call between R. Ortiz and Mendoza in which Mendoza testified that R. Ortiz told her not to go to the demonstration. Second, the General Counsel refers to a postdemonstration conversation between R. Ortiz and Useda in which R. Ortiz asked why the employees participated in the demonstration. R. Ortiz further stated, according to Useda, that the contract would be over anyway. Useda asked if R. Ortiz would relocate her and R. Ortiz responded that Useda should ask the Union for help warning her that she should be careful and asking if she knew what she was getting into. Further, the General Counsel refers to another statement during a postdemonstration meeting on October 29 in which R. Ortiz told Banegas and Mendoza that he would fire the employees if they continued demonstrations. Banegas testified regarding this statement. Mendoza did not.

None of these October 29 statements are alleged in the complaint as violations of the Act. Under the circumstances of this case, the General Counsel's request that the complaint be amended to add these three additional violations is denied. The General Counsel has provided no reason for a posthearing amendment of the complaint. No notice was given to the Respondents that these further statements would be argued on brief as violations of the Act. None of them arise from the same conversation as an allegation set forth in the complaint. Rather, these are discrete occurrences in separate settings. Respondents did not question their witnesses or the General Counsel's witnesses on cross-examination about whether these statements were made. [54]

Thus it is not possible to find that these allegations were fully and fairly litigated. Allowing amendment at this late stage of the proceedings denies Respondents due process of law. See, e.g., *The Dalton School,* supra, 364 NLRB No. 18, fn. 2 (2016) (unpled allegation which was not fully and fairly litigated may not be heard as Respondents had no notice and no opportunity to mount defense); see also, *Piggly Wiggly Midwest, LLC,* supra, 357 NLRB at 2345 (no amendment allowed where respondent was not on notice that it faced liability for this specific conduct and it had no reason at the hearing to attempt to dispute the unpled conduct).

[54] Specifically, as to the predemonstration phone call between Mendoza and R. Ortiz, Mendoza was not asked about it on cross-examination by Respondents and R. Ortiz was not asked about it when he testified in Respondents' case-in-chief. Regarding the conversation between Useda and R. Ortiz after the demonstration, Useda was not cross-examined about the conversation and R. Ortiz was not asked about it. As to the post-demonstration statements attributed by Banegas to R. Ortiz when addressing Banegas and Mendoza, Banegas was not asked about this on cross-examination and R. Ortiz was not asked about this conversation at all.

8. About October 30, R. Ortiz asked employees at One Kearny for employment verification (Complaint par. 8(b)(i))

(a) Facts

At a meeting held around October 31, Mendoza and Banegas were asked by R. Ortiz to furnish their employment re-verification. According to Banegas, R. Ortiz routinely asked him to complete his application including verification and he had not done so. Mendoza testified that in early November she received a followup call from R. Ortiz. He told her that her green card, her work permit, was expired. According to Mendoza, she told him he would have to wait until her husband gave her money to renew it. R. Ortiz said he was not going to pay Mendoza unless she brought it in. R. Ortiz continued to pay Mendoza's wages after this call.[55] Mendoza's testimony is credited for the reasons stated above.

(b) Analysis

The Immigration Reform and Control Act of 1986 (IRCA) requires that an employer, by reviewing documentation, verify the identity and employment eligibility status of any person hired by that employer. IRCA's I-9 form sets out the types of documents that an employer may accept for verification purposes. An employer is required to record on the I-9 form the issuing authority and expiration date for the documents produced. IRCA provides for civil and criminal penalties if an employer knowingly hires an undocumented worker.

An employer's statements regarding immigration status must be carefully scrutinized as they are likely to instill fear among employees. See *Labriola Baking,* 361 NLRB 412, 413–414 (2014); *Nortech Waste,* 335 NLRB 554, 554–555 (2001) (rejecting employer's argument that its review of immigration status was normal compliance with IRCA and finding that it was used as a "smokescreen" in retaliation for union activity).[56] As the General Counsel argues, when an employer requests employment documentation in retaliation for union or protected activity, the employer discourages union or concerted activity in violation of Section 8(a)(1).[57]

Here, it must be determined whether the documentation was

[55] Banegas had been given an application to complete when he was hired but he never completed it. According to Banegas, R. Ortiz did not ask him to complete it again until the time of the demonstration The record is less than clear regarding whether completion of an application requires submission of I-9 documents. Respondents' attorneys stated that I-9 documents were part of the application process. Thus, it is not clear that requesting that Banegas complete an application is synonymous with requesting I-9 documentation. In any event, the General Counsel does not suggest on brief that requesting Banegas to submit an application is relevant to this particular allegation.

[56] See also, *Rivera v. NIBCO, Inc.*, 364 F. 3d 1057, 1065 (9th Cir. 2004) (workers may be intimidated by the perception of focus on their immigration status in that, "their immigration status would be changed, or that their status would reveal the immigration problems of their family or friends; similarly, new legal residents or citizens may feel intimidated by the prospect of having their immigration history examined in a public proceeding.") cert. denied 544 U.S. 905 (2005).

[57] See *North Hills Office Services,* 344 NLRB 1083 (2005); *Victor's Café 52, Inc.*, 321 NLRB 504, 514–514 (1996); *Del Rey Tortilleria, Inc.*, 272 NLRB 1106 (1984), cited by General Counsel.

requested as a normal record-keeping matter or was requested in retaliation for participation in the demonstration. The timing of the request, just two days after the October 29 demonstration is suspicious. However, there is no other evidence than timing to suggest that the request was retaliatory. In fact, there is no dispute that Mendoza's documents were expired and that Banegas had not furnished his. The General Counsel asserts that Respondent OJS did not establish a legitimate business reason for the request. However, this assertion misses the point. It was the General Counsel's burden to establish that the request was made for a retaliatory reason in the first place. Under these circumstances, no violation is found and complaint paragraph 8(b)(i) is dismissed.

9. About October 31, R. Ortiz asked employees at One Kearny why they were engaging in union activity and asked them to stop or they would be terminated (complaint par. 8(b)(ii))[58]

About October 31, V. Ortiz threatened employees at One Kearny with lodging a complaint against them and other unspecified reprisals (Complaint paragraph 8(b)(iii)

(a) Facts

Banegas and Mendoza were met by R. and V. Ortiz on October 30 or 31[59] while they were working at One Kearny. V. Ortiz explained that her purpose for the meeting was: "I wanted them to clarify, to explain to me what was on the paper" She wanted proof of the allegations. R. Ortiz asked Banegas why he brought a claim against OJS, referring to the accusations set forth in the demonstration leaflets, and asked how much money he wanted. During a lengthy exchange of grievances on both sides, Benagas testified that V. Ortiz told him that she was going to sue him because he was harassing Mendoza.[60] V. Ortiz denied this statement. According to Banegas, V. Ortiz stated that the employees did not know who they were dealing with. V. Ortiz further stated that Preferred had lawyers and millions and employees should be grateful for their employment. V. Ortiz denied making any threats. According to Banegas, R. Ortiz said that Preferred was demanding that the employees publicly apologize or they would lose their jobs.

Mendoza testified that around October 31, 2014, she spoke with R. Ortiz and his wife V. Ortiz. Banegas was also present. During the conversation, V. Ortiz became upset and yelled that the employees "didn't know with whom they were dealing—that Preferred had lawyers and millions and that we should be thankful because they were giving us work."

As mentioned before, in general, Mendoza's testimony was highly credible. Although Banegas admitted that he had difficulty remembering exact dates, his testimony about this meeting was equally credible, with consistency and exactness of recollection. Mendoza did not recall the meeting with as great specificity as did Banegas. However, it appears that much of the conversation was directed at Banegas. Accordingly, his recollection would be quite accurate in this regard. To the extent V. Ortiz generally denied making threats, her testimony is discredited. In general, V. Ortiz' testimony was lacking in detail and conclusory. Similarly, R. Ortiz' recollection lacked specificity. Moreover, the record as a whole reflects that the period of time surrounding the demonstrations was a highly emotional period of time for R. and V. Ortiz. Accordingly, it is more probable than not that these statements were made as Mendoza and Banegas recalled and they are credited for that reason as well as their overall credible demeanors.

(b) Analysis

(i) Interrogation, threat of discharge, threat of filing lawsuit, threat of unspecified reprisal

Questioning an employee about protected activity is not a per se violation of the Act but is evaluated considering the background, the nature of the information sought, the identity of the questioner, the place and method of the interrogation, and whether the employee is an open and active union supporter.[61] Shortly after the October 29 demonstration, R. Ortiz, in the presence of his wife and co-worker Mendoza, asked Banegas why he brought a claim against Respondents. Banegas' activity in demonstrating may be considered open and active. The nature of the information sought (more or less, why are you doing this?) is somewhat beside the point as the leaflets and signs fully set forth this information. However, as will be seen below, the question was accompanied by other statements which violated the Act. Thus, under these circumstances, questioning employees about why they brought a claim would reasonably tend to restrain and coerce the Section 7 right to act together in concert to obtain better wages and terms and conditions of employment.

The statement by R. Ortiz that Preferred said that employees must publicly apologize for the statements in the leaflets distributed during the demonstration or they would lose their jobs tends to restrain protected, concerted activity and union activity and clearly constitutes a threat of discharge for protected activity.[62] The statement by R. Ortiz to be careful about going to the Union and to SFLWC constituted a threat of unspecified reprisal for engaging in union or protected, concerted activity.[63]

[58] The General Counsel states in her brief that the complaint does not allege that during the meeting of October 31, R. Ortiz violated the Act by asking Banegas why he was bringing a claim against OJS and how much he wanted. (GC Brief at 75, fn. 71: "Not currently alleged."). However, par. 8(b)(ii) clearly alleges a violation of Sec. 8(a)(1) on October 30 by asking employees why they were engaging in union activity.

[59] Some parties identified the events covered by complaint allegations 8(b)(ii) and 8(b)(iii) as occurring on October 31 rather than on October 30, as alleged. Others identified the events as occurring on October 30. It is obvious that all witnesses were discussing the same meeting regardless of which date they used.

[60] R. Ortiz did not remember his wife making this statement.

[61] *Norton Audubon Hospital*, supra, 338 NLRB at 320–321.

[62] See, e.g., *Publix Super Markets*, supra, 347 NLRB at 1345–1346.

[63] An employer violates Sec. 8(a)(1) if it communicates to employees that they will jeopardize their job security, wages or other working conditions if they support the union. *Metro One Loss Prevention Services Group*, supra, 356 NLRB at 89–90 (employer statement that employees should be grateful for their years of service and pay rates and warning that it could get much worse if a union came in constituted unlawful threat). The mere threat of an unspecified reprisal is sufficient to support a finding that the employer has violated Sec. 8(a)(1). See, e.g., *SDK Jonesville Division, LP*, 340 NLRB 101, 101–102 (2003) (unspecified threat that it was not in employee's best interest to be

As to the threat of filing a lawsuit against employees and the threat of unspecified reprisals by V. Ortiz, the General Counsel avers that whether or not V. Ortiz was a supervisor or agent of OJS, under all the circumstances, employees would reasonably believe that V. Ortiz was reflecting company policy and speaking and acting with apparent authority for management when she attended the post-October 29 demonstration meeting with her husband.[64] The Board applies the common law principles of agency in determining whether an individual is acting with apparent authority.[65] Thus, there must be a manifestation by the principal that creates a reasonable belief that the principal has authorized the purported agent to make the statement at issue.[66] By speaking to employees together and representing the management point of view, V. Ortiz possessed apparent authority. Employees would reasonably believe that she was speaking for management. Moreover, even in the absence of actual or apparent authority, a principal may be bound by the actions of an individual where the principal ratifies those actions by silence.[67] Here, V. Ortiz made the statement while accompanying her husband and OJS' owner R. Ortiz to a meeting with employees. R. Ortiz who was present at the time of the statement, did not controvert V. Ortiz' statement. By his silence, he ratified the statement.

In the context of discussion about the October 29 demonstration, the statement of V. Ortiz to Banegas and Mendoza that they did not know who they were dealing with referencing the access to lawyers and financial resources enjoyed by Preferred also constituted a threat of unspecified reprisals. Finally, threatening to file a lawsuit against an employee in retaliation for protected activity tends to restrain and coerce Section 7 rights.[68] The statement to Banegas by V. Ortiz that she was going to sue him for harassing Mendoza was certainly a reaction to the employee demonstration. Thus, the record fully supports a finding that the threat of discharge for engaging in the demonstration, the threats of unspecified reprisals for engaging in protected activity, and the threat of filing a lawsuit against Banegas would reasonably tend to chill Section 7 activity.

(ii) Unpled allegation of promise of wage increase for rejection of Union

In addition to these complaint allegations of interrogation, threat of termination, threat of filing a lawsuit, and threats of unspecified reprisals, the General Counsel asserts a further statement during the October 31 conversation violates the Act. That is, in asking Banegas how much money he wanted, R. Ortiz in essence promised a wage increase for cessation of picketing.[69] This matter was not called to Respondents attention until posthearing briefing and was not fully litigated. Allowing amendment at this late stage of the proceedings denies Respondents due process of law. See, e.g., *The Dalton School,* supra, 364 NLRB No. 18, fn. 2 (2016); *Piggly Wiggly Midwest, LLC,* supra, 357 NLRB at 2345.

10. About October 30, R. Ortiz told employees that their working conditions had changed due to their union activity (complaint par. 8(c))

(a) Facts

Two days after the October 29 demonstration, R. Ortiz told Useda that she would not be able to clean three offices that she usually cleaned because, "he was upset at me because of the picket." Useda's testimony is uncontradicted and is credited.

(b) Analysis

This statement clearly indicates that R. Ortiz told Useda that her working conditions were changed due to her union and protected, concerted activities. Such a statement would tend to chill Section 7 activity and constitutes a violation of the Act. Thus, Respondents violated Section 8(a)(1) of the Act by threatening to reduce Useda's work hours because she engaged in protected, concerted and Union activities.

On or about November 1, R. Ortiz told employees at 55 Hawthorne he would *lose or had lost the Preferred contract because of employees' union activity.(complaint par. 8(d)(i))*

(c) Facts

Around November 1, R. Ortiz recalled telling janitors that "they were my employees, that the only thing they were accomplishing was that I would lose the contract because they're my employees." This statement was made in relation to the employees' demonstration of October 29.

(d) Analysis

The comment clearly constitutes a statement that the employees' demonstration was going to cost him his cleaning subcontracts with Preferred. Such a statement tended to chill employee Section 7 by specifically warning employees that their demonstration would cause OJS to lose it contracts. Thus, the statement constitutes a violation of Section 8(a)(1).

involved with the union found violative, citing *Keller Ford*, 336 NLRB 722 (2001), enfd. 69 Fed.Appx. 672 (6th Cir. 2003), a supervisor unlawfully advised an employee not to talk to other employees about insurance copayments, because it could be "hazardous to [his] health;" *Long Island College Hospital*, 327 NLRB 944, 945 (1999), a supervisor unlawfully told employees to proceed with caution in taking a work related issue to the union, because one of the employees was getting an unfavorable reputation with management.)

[64] The General Counsel cites *Mid-South Drywall Co*., Inc., 339 NLRB 480 (2003) (if employees would reasonably believe under all the circumstances that individual speaks on behalf of management, employer has vested individual with apparent authority); *Zimmerman Plumbing & Heating Co.*, 325 NLRB 106 (1997), enfd. in relevant part, 188 F.3d 508 (3d Cir. 1999) (same).

[65] *Pan-Oston Co.,* 336 NLRB 305 (2001).

[66] *Pan-Oston,* supra, 336 NLRB at 305–306.

[67] *Service Employees Local 87 (West Bay Maintenance),* 291 NLRB 82, 83 (1988).

[68] See *Network Dynamics Cabling*, 351 NLRB 1423, 1427 (2007), (threat to sue an employee would objectively reasonably tend to interfere with, restrain or coerce an employee's Sec. 7 activity.)

[69] Banegas' credited testimony was that R. Ortiz asked him how much money he wanted. This was implicitly a promise of a wage increase to get rid of the demonstrations. Because there was no proferred legitimate reason for a wage increase, it may be inferred that the offer was motivated by an unlawful purpose to interfere with concerted activity. See *Network Dynamics Cabling,* supra*,* 351 NLRB at 1424.

12. Unalleged claims of unlawful conduct prior to November 19

The General Counsel asserts that further unalleged violations occurred after November 1 and before November 19. In order to include them, the General Counsel requests amendment of the complaint to include these allegations pursuant to her motion made at the end of the hearing to conform the pleadings to the proof. The motion to conform was granted as to minor matters and does not afford a basis for adding these new allegations to the case. Further, examination of the litigation record reveals that none of these matters was fully and fairly litigated.

First, the General Counsel urges that around November 17, R. Ortiz interrogated Tapia regarding whether she made the complaints leading to the October 29 demonstration and promised her a raise if he kept the contracts and she kept her job. Tapia's testimony is credited. Tapia was a highly credible witness who exhibited excellent recall. Her overall demeanor was that of concentration on listening to the questions and answering with the facts. She had difficulty testifying about her encounters with R. Ortiz but was generally forthright and clear. R. Ortiz was asked during Respondents' case-in-chief if he ever asked Tapia about any of the allegations in the flyer. R. Ortiz responded that he had not. Although Respondents had no notice that the General Counsel intended to seek to add this conversation to the complaint, Respondents did question R. Ortiz about the November 17 encounter. Respondents did not question Tapia about this conversation on cross-examination. However, merely asking questions about a conversation does not warrant a conclusion that the matter was fully litigated.[70] Failure to question Tapia does not necessarily indicate that the matter was not fully litigated. Under these circumstances, it is not possible to conclude that Respondents had notice that this questioning would be at issue. Thus, it is found that the matter was not fully litigated. See, e.g., *The Dalton School,* supra, 364 NLRB No. 18, fn. 2 (2016); *Piggly Wiggly Midwest, LLC,* supra, 357 NLRB at 2345

As to the promise of a raise if R. Ortiz was able to keep his contracts, R. Ortiz was not asked about this and there was no notice that this allegation would be raised. Just as above, it is not clear that this matter was fully and fairly litigated. Therefore, it will not be added to this litigation.

13. Demonstration of November 19 at 55 Hawthorne

On November 10 at a meeting at SFLWC, Mendoza, Banegas, Useda, and Tapia met with Kramer and Frias. Useda reported a conversation she had with R. Ortiz and his wife. Tapia told those present that R. Ortiz confronted her after the October 29 demonstration and asked if she was the person who made the accusations of sexual harassment. This was Tapia's first meeting and she related her prior treatment by R. Ortiz at this meeting. [71] Useda, Banegas, Tapia, and Mendoza agreed to a second picket.

On November 19, another demonstration took place on the sidewalk in front of 55 Hawthorne Street. The employees walked in circles on the sidewalk in front of the building chanting slogans such as "Up with the Union. Down with exploitation." Flyers distributed at this demonstration with pictures of five OJS employees naming the employees by first name: "Yunuen" [Useda], "Claudia" [Tapia], "Balbina" [Mendoza], "Amalia [last name unknown], and "Joel" [Banegas]. The text was similar to that on the flyer distributed on October 29. The flyer stated above the pictures, "We want our voices to be heard." Between and below the pictures, the flyer stated:

> We work for Preferred Building Services which cleans the offices of KGO radio. We get paid the San Francisco minimum wage of $10.74 per hour. We endure abusive and unsafe working conditions and sexual harassment. The work invovlves heavy lifting and the risk of serious injury. A foreman arbitrarily cut hours from eight hours per day to six hours and said that any additional hours would need to include sexual favors. The company does not provide paid sick days that are required by San Francisco law or pay medical bills for injuries on the job as required by workers compensation.
>
> We are calling on KGO radio and Cumulus Media as the major tenant to help in getting Preferred Building Services to listen to our demands and not ignore us.
>
> Join us for a picket line outside the offices of KGO radio.
>
> Wednesday, November 19
> 10 a.m.
> 55 Hawthorne St, San Francisco
> (between Howard and Folsom, parallel to 2nd and 3rd Streets)
> San Francisco Living Wage Coalition
> For more information, contact 415-863-1225, sflivingwage@riseup.net

With the exception of the blue area above, the same placards carried on October 29 were also carried on November 19. The picketers shouted the same messages as at the October 29 demonstration such as we want a union, not exploitation and we want justice now.

[70] *Mine Workers District 29,* 308 NLRB 1155, 1158 ("opportunity to cross-examine does not qualify as fully litigating an issue.")

[71] Tapia explained that in April, in the basement at the exit closest to the elevator, R. Ortiz told her he had seen a picture of Tapia on Facebook and asked her if she had "those large breasts" under her uniform. She testified that on another occasion he told her she could have a longer break if she would go out with him to a women's strip venue. "And I said no, but he was always making dirty comments and saying sex-related things." He also stated, according to Tapia, "that his wife told him that he could put it anywhere as long as he used a condom." Tapia said that she protested about his behavior but he told her, "that things were done the way that he said and that all his female employees were whores." R. Ortiz denied each of these statements. There is no evidence that Tapia shared such experiences with other employees until November. Rather, she testified that when these things occurred, she sought the assistance of a friend to find another job. She further testified that when R. Ortiz found out about this, he threatened her with discharge. At another time, Tapia testified, she left a message for L. Squeri but did not receive a reply.

14. On or about November 19,[72] R. Ortiz threatened employees at 55 Hawthorne with unspecified reprisals (complaint par. 8(d)(ii); V. Ortiz threatened employees at 55 Hawthorne with unspecified reprisals (Complaint par. 8(d)(iii))

(a) Facts

When Useda reported to work at 8:30 p.m. on November 19, R. Ortiz met her on the 11th floor. R. Ortiz asked Useda why she had "done that with the Union." Useda asked for co-worker Franco to come to the meeting. Useda went to the 5th floor while R. Ortiz retrieved Franco. When Franco arrived, Useda responded that she went to the Union because she was tired and did not like his behavior. R. Ortiz protested that he was not guilty of the accusations and he did not like the accusations of harassment. R. Ortiz told Useda that Banegas was the one harassing Mendoza. Then, according to Useda, "He just left angry and he said that the contract would be over like dismissing it." According to Useda, R. Ortiz added, "He just told me to be careful with what I was doing whether I knew what I was doing. That Karl Kramer was not even an attorney. He was just an activist." When R. Ortiz asked why Kramer was present, Useda replied, "We asked for help."

Franco recalled this meeting as well. While she was on the tenth floor working, R. Ortiz asked her to come to the fifth floor for a meeting. While they were in route to the meeting, R. Ortiz asked Franco if she was involved in the demonstration. She replied that she was not. Franco's testimony is credited. When they were on the fifth floor, according to Franco, R. Ortiz addressed Useda and asked "why has it arrived to this point." Useda responded, "I told you. You didn't pay any attention." At this point, according to Useda, V. Ortiz asked her why she came back to work then and reminded Useda that she had already been fired once for being a thief. Useda responded that she was not a thief. R. Ortiz did not recall his wife making this statement to Useda.

At the meeting, V. Ortiz recalled she asked if Useda had proof of the accusations in the flyers. Useda asked to have employee Franco join the meeting and Franco was called into the meeting by R. Ortiz. Then according to R. Ortiz, Useda said, "there was nothing against me, it was against Preferred." V. Ortiz recalled this meeting: "I remember that we got there and we—with that paper, thing from that thing that they were doing, so that Yunuen [Useda] would clarify for me what they were accusing my husband of and whether they had proof." V. Ortiz testified that there was no threat that anyone would be fired. She did not accuse Useda of being a thief or words to that effect. When V. Ortiz asked for proof, Useda asked for Franco to join them but after Franco joined the group, neither Useda nor Franco said anything else about the allegations on the flyer. Although she worked in the building once or twice a week, no janitor had ever complained to her about inappropriate comments made by her husband. For the reasons stated above, Useda's testimony is credited.

(b) Analysis

R. Ortiz told Useda that she had better be careful about participating in the demonstrations. V. Ortiz told Useda, in the context of discussing the leaflets, that Useda had already been fired once. In the context of this conversation, V. Ortiz had apparent authority to make the statement. Just as in the analysis of complaint paragraphs 8(b)(ii) and (iii) above, the statements of R. Ortiz and V. Ortiz contain threats of unspecified reprisals. Thus, these statements violated Section 8(a)(1).

15. Unpled allegations regarding postdemonstration meeting of November 19

The General Counsel alleges in her brief that R. Ortiz' questioning of Franco on their way to meet with Useda on November 19 constitutes an unlawful interrogation. Although Franco's testimony that on the way to the meeting R. Ortiz asked her if she was involved in the demonstration is credited, this issue was not litigated by the parties either explicitly or implicitly. Thus, this attempt to amend the complaint is denied. See, e.g., *The Dalton School,* supra, 364 NLRB No. 18, fn. 2 (2016); *Piggly Wiggly Midwest, LLC,* supra, 357 NLRB at 2345.

Franco and R. Ortiz spoke on the sixth floor after the meeting with Useda on November 19. V. Ortiz was present during this conversation. According to Franco, R. Ortiz continued, "because of the protest and Yunuen's [Useda's] fault, and the employees of the other building, he said he or they were going to lose their contracts, and they were going to send them to hell, he said." R. Ortiz also told her that the last day of work would be on the 15th.[73] R. Ortiz explained to Franco that his "female boss" was upset with the employees and that "he or they were going to lose the contract." R. Ortiz concluded, "why do they need to get the Union involved in this when it has nothing to do with the Union." For the first time, the General Counsel argues in her brief that telling employees that their union activities were to blame for losing the contract chills Section 7 rights. Respondents had no notice that this was to be litigated. The legality of these statements was not fully litigated and is thus not properly presented. See, e.g., *Dalton School,* supra, 364 NLRB No. 18, fn. 2; *Piggly Wiggly Midwest, LLC,* supra, 357 NLRB at 2345.

During a postmeeting encounter a few days later between R. Ortiz and Franco, Franco testified that R. Ortiz told her he lost or was going to lose his cleaning contracts because of the stupidity of what Useda and others were up to. The General Counsel alleges for the first time on brief that this statement constituted a violation of the Act. This matter similarly was not fully and fairly litigated and no finding may properly be made. See, e.g., *Dalton School,* supra, 364 NLRB No. 18, fn. 2 (2016); *Piggly Wiggly Midwest, LLC,* supra, 357 NLRB at 2345.

[72] The complaint alleges that this conduct occurred on November 1. Witnesses uniformly placed the meeting as on November 19. The complaint is corrected as to this date pursuant to the General Counsel's motion at the end of the hearing to conform the pleading to the proof.

[73] Presumably December 15 as this conversation was after the November 19 demonstration.

16. On or about November 19, R. Ortiz told employees they were fired and could no longer work because of their union activity and asked employees if they were happy because they were fired because of their union activity (complaint par. 8(e)(i) and (ii))

(a) Facts

When Mendoza arrived for work on November, 19, she was told by the security guard to wait in the lobby. R. Ortiz arrived, handed Mendoza an envelope that contained her final check, and said, "Now you're happy that's what you wanted. I didn't expect that from you." Mendoza's testimony is credited for the reasons stated above.

(b) Analysis

The legality of the discharges of Mendoza and Banegas on November 19 is discussed in a later section of this decision. Thus, only the allegations regarding statements made in connection with the discharge are at issue in complaint paragraphs 8(e)(i) and (ii). R. Ortiz' statement about Mendoza being happy clearly relates her participation in the demonstration to her discharge. Thus, the statement, in essence, is a statement that Mendoza is discharged for her union activity. Clearly such a statement chills union activity and violates Section 8(a)(1) of the Act.

17. Alleged surveillance (complaint par. 8(f))

(a) Facts

On November 19, Mendoza observed R. Ortiz and L. Squeri in the security area of the lobby. L. Squeri was extending her cell phone as if taking pictures. Kramer also observed the woman pointed out to him as L. Squeri apparently taking photos with her cell phone. He called to her to get her attention but she left the area. Useda observed L. Squeri walking around outside 55 Hawthorne. L. Squeri was holding a cellphone pointed towards the picketers. Tapia made this same observation. Banegas observed L. Squeri in the lobby with her cell phone in her hand taking pictures or videos. R. Ortiz was with L. Squeri. L. Squeri agreed that she took photos and a video at this demonstration. R. Squeri testified that he asked L. Squeri to take the pictures in order to preserve information about who was picketing and what was on the signs in case it became important at some point.

(b) Analysis

There is no dispute that L. Squeri took photos and a video of the demonstration and that demonstrating employees observed her doing so. Absent proper justification, photographing or videotaping employees as they engage in protected concerted activity violates Section 8(a)(1). *Saigon Gourmet,* supra, 353 NLRRB at 1066. The justification offered here is that R. Squeri wanted information preserved in the event it became important at some point in the future. There is no evidence that Respondents anticipated any violence during the demonstration or blocking of ingress and egress. Accordingly, taking the photos and a video reasonably tended to chill employee activity and violates Section 8(a)(1) of the Act.

18. Statement at 240 Golden Gate that employees were discharged because of their union activity (Complaint par. 8(g))

(a) Facts

On about November 20, Miranda called R. Ortiz on speaker phone from the Union's office at 240 Golden Gate in the presence of Useda, Banegas, and Mendoza. Miranda asked R. Ortiz why he fired employees and he responded, according to Miranda, that it was because they wanted a union and Lauren did not want to see any of them anymore. R. Ortiz said that he had lost the building. Miranda recalled that R. Ortiz told her that Banegas and Mendoza were fired because he was told to fire them by "Leslie" at Preferred. R. Ortiz said he had warned Mendoza and Banegas to stop making so much noise. "They were tired of all this negative noise." Miranda protested that R. Ortiz had to place the janitors somewhere and he responded that Mendoza had not turned in a green card. Miranda told R. Ortiz that he should look for a lawyer.

According to Banegas, R. Ortiz responded to Miranda's questioning about why the employees were discharged stating that Mendoza's green card was expired and Banegas had not filled out an application for employment. Miranda asked R. Ortiz who he worked for and he responded that he worked for Preferred. Miranda said, be careful, "that Preferred Building Services wiping their butt with him [R. Ortiz]." After exhausting Banegas' recollection about the phone conversation, Banegas was asked if R. Ortiz referenced the protests. He responded that when Miranda asked why the employees were fired, "yes, [R. Ortiz] said that we were also making noise. They were making a scandal."

R. Ortiz agreed that he received the phone call from Miranda. He recalled that she asked why he fired Banegas and Mendoza and he responded that Banegas was discharged for failure to provide documentation to work and Mendoza was not doing her job well. Miranda asked why R. Ortiz was paying minimum wage and he responded that he was not making enough money to pay more. R. Ortiz, when led, also recalled that Miranda said that Preferred was using him. R. Ortiz recalled that Miranda suggested that he get a lawyer because he was in serious trouble. R. Ortiz denied that he stated during this phone call, "that's the way us Mexicans talk to one another" or words to that effect. R. Ortiz agreed he might have said that to Kramer in "these conversations." R. Ortiz denied that he told Miranda that Banegas and Mendoza were terminated for engaging in the demonstration or picketing. R. Ortiz denied that he told Miranda that L. Squeri was his boss.

The testimony of Banegas and Miranda is credited over the testimony of R. Ortiz when there is divergence in their recollections. Thus I find that on November 20, by phone conversation, R. Ortiz stated that he fired Mendoza and Banegas because they wanted a union, they were making a scandal, or words to that effect. Further, R. Ortiz stated during the conversation that Mendoza was discharged because of deficient performance of her work and Banegas, for failure to complete his employment application.

(b) Analysis

A statement that employees were discharged, in part, for their protected, concerted or union activity reasonably tends to

chill protected, concerted or union activity. Thus, the statement that Banegas and Mendoza were discharged due to this activity violates Section 8(a)(1) of the Act.

19. Unpled allegation in December

The General Counsel claims that a further, unpled violation of the Act occurred on December 11 at 2:01 p.m. At that time, Tapia and R. Ortiz began the following text exchange:

> Ortiz: Tomorrow is last day.
>
> Tapia: What do you mean?
>
> Ortiz: The contract is over. I think you know that's why I was taken out, because you wanted to the have the union.
>
> Tapia: I don't know what you mean. You haven't told me anything about this. Overnight you're leaving me without a job. There are no cleaning fluids here no rags and you as the person in charge should have brought what we needed. There are no gloves nor anything. Obviously, they were going to take the contract away. When are you going to pay me the days I worked? Or are you going to give me a job elsewhere?
>
> Ortiz: When you did the protest they took the job away and I think they let you know that I wasn't going to be there anymore and they cancelled my contracts.
>
> Tapia: No, they didn't let me know anything. It was you obligation as a company to let us know, but now you're dismissing me overnight. But that's fine, just tell me when are you going to give me my paycheck.

The General Counsel claims that this exchange constitutes a violation of Section 8(a)(1) because it constitutes a blanket statement that the contract was over because of employee protected activity. For the reasons set forth in section E.4., no violation is found for these unalleged statements. Respondents had no notice that this text message would be alleged to violate the Act. It was not fully and fairly litigated and to include it in the case now would violate due process of law. See, e.g., *Dalton School,* supra, 364 NLRB No. 18, fn. 2 (2016) (unpled allegation which was not fully and fairly litigated may not be heard as Respondents had no notice and no opportunity to mount defense); see also, *Piggly Wiggly Midwest, LLC,* supra, 357 NLRB at 2345 (no amendment allowed where respondent was not on notice that it faced liability for this specific conduct and it had no reason at the hearing to attempt to dispute the unpled conduct).

20. Alleged unlawful termination of Mendoza and Banegas (Complaint par. 9)

(a) Facts

Mendoza reported for work after the November 19 picketing and was told by the security guard that she was not working and she should wait in the lobby for R. Ortiz. When he arrived, R. Ortiz handed Mendoza an envelope with her final check in it and told her, "Now you're happy. That's what you wanted. I didn't expect that from you."

When Banegas reported to work on the evening of November 19, R. Ortiz told him to leave, that he was fired. Banegas asked why and R. Ortiz responded, according to Banegas, "because you're making noise and you're making the company, Preferred Building Service, look bad." Banegas' testimony is credited for the reasons stated above.

Banegas agreed that he never completed his employment application which R. Ortiz gave him sometime after he began working at One Kearny. According to Banegas, "when we started with the protests, [R. Ortiz] started asking me for the application."

At hearing, R. Ortiz testified that the reason Banegas was discharged was due to "the quality of the work and because he never gave me the application or paperwork to work." R. Ortiz explained that he requires legal documentation of any new hired employee. R. Ortiz testified that he had given Banegas numerous opportunities to provide his documentation – four or five different times and each time Banegas gave an excuse. This occurred from at least May 2014, when R. Ortiz took over One Hawthorne, through November 2014 when Banegas was terminated. R. Ortiz did not take action until November, "just to be nice because we all need to work."

On cross-examination, R. Ortiz agreed that he did not require documentation from four janitorial employees who are his family members who work for OJS. After Banegas and Mendoza were terminated, R. Ortiz and his wife took over the janitorial duties at One Hawthorne.

According to R. Ortiz, Mendoza's performance became "worse" after the demonstrations. For instance, on several occasions "they" would put plastic trash bags in the recycling bins after I told "them" not to do that because he would get fined by the city. R. Ortiz explained that this was not only Mendoza but also the behavior of Banegas. R. Ortiz testified he also had to tell Banegas on several occasion to go back and vacuum where he had missed. R. Ortiz testified that he told Mendoza she could be suspended if the quality of her work did not improve or that he would have to replace her. R. Ortiz' testimony regarding the reason for Banegas' discharge appeared to be an afterthought. Initially, he relied solely on Banegas' failure to complete his paperwork. Then he added that Banegas was not performing his work properly.

(b) Wright Line analysis

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the Board established a framework for deciding cases turning on employer motivation. To prove an employer's adverse employment action is discriminatorily motivated, the General Counsel must first establish, by a preponderance of the evidence, that an employee's protected or union activity was a motivating factor in the employer's decision.

The elements commonly required to support such a showing are union or protected, concerted activity by the employee, employer knowledge of the activity, and antiunion animus on the part of the employer. Proof of animus and discriminatory motivation may be based on direct evidence or inferred from circumstantial evidence.[74] Several factors, including evidence

[74] *Robert Orr/Sysco Food Services,* 343 NLRB 1183, 1184 (2004); *Ronin Shipbuilders, Inc.*, 330 NLRB 464, n. 5 (2000.

of suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct, departures from past practices, and disparate treatment of the discharged employees support inferences of animus and discriminatory motivation.[75]

If the General Counsel establishes a prima facie case of discriminatory motivation, the burden of persuasion shifts "to the employer to demonstrate the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra at 1089; see also, *Hogan Transports, Inc.,* 363 NLRB No. 196, slip op. at 5 (2016); *Manno Electric*, 321 NLRB 278, 283 fn. 12 (1996), enfd. mem. 127 F.3d 34 (5th Cir. 1997).

Regarding the General Counsel's prima facie case, the record amply reflects that Mendoza and Banegas engaged in both Union and protected, concerted activity by joining together with other employees and with SFCLW and SEIU Local 87 to improve their wages, hours, and working conditions. These efforts were open and observed by Respondents' representatives L. Squeri and R. Ortiz. Numerous unlawful statements indicate that Respondents harbored animus toward the employees' demonstrations. Explicit statements of Respondents also indicate that this was the reason they were fired.[76] Additionally, the timing of their discharges on the evening of the second demonstration supports an inference of discriminatory motivation. Thus, the General Counsel has shown by a preponderance of the evidence that the protected activity of Mendoza and Banegas was a motivating factor in their discharges.

The burden of persuasion then shifts to Respondents whose burden it is to show that they would have taken the same action absent the protected, concerted and Union activity of Mendoza and Banegas. R. Ortiz testified that Banegas was discharged for failure to complete his employment application and Mendoza was fired for poor work performance. R. Ortiz also stated that Mendoza had failed to provide employment re-verification.

The record suggests that an integral part of completing an employment application is providing I-9 documentation of authorization to work. Banegas testified that he had been asked repeatedly to complete his employment application with supporting documentation and he had never done so. R. Ortiz agreed that he asked Banegas for his completed application on numerous occasions but until November 19, 2014 had not fired him for failure to complete the application because "everyone needs a job." Mendoza told R. Ortiz that she would update her credentials when her husband gave her the money to do so. It was not until after the second demonstration that these reasons were put forth by R. Ortiz for discharge.

The record reflects that R. Ortiz did not require his family members to provide employment documentation. The record further reflects that other employees were not given applications immediately or did not complete them immediately. Due to this disparate treatment, to the extent Respondents rely on failure to complete employment application or re-verify appropriate documentation, it must be concluded that this reason is pretextual.

Moreover, to the extent Respondents relied on poor work performance to discharge Mendoza and Banegas, there is a failure to show that either of them performed poorly at any time and specifically around the time of the discharges. Thus, this reason is also found to be a pretextual reason. Moreover, it is noted that R. Ortiz' testimony regarding speaking to Banegas and Mendoza about their work performance, even if true, did not rise to the level of a reprimand or warning that better work needed to be performed or there would be consequences. Both Banegas and Mendoza had a long history of working in these buildings without drawing criticisms of inadequate performance. Finally, the timing of the discharges on the date of the second demonstration as well as explicit statements that the employees were discharged due to the demonstrations strongly indicates that the true reason for these discharges was the union and protected activity of Mendoza and Banegas and those put forth at hearing are pretextual.

Due to reliance on pretextual and disparate treatment, Respondents have failed to carry their burden to show that they would have discharged Banegas and Mendoza on November 19 in any event. Thus the record as a whole clearly indicates that Banegas and Mendoza were discharged on November 19 for their protected, concerted and Union activity in violation of Section 8(a)(3) and (1) of the Act.

Respondents argue that Mendoza and Banegas were discharged due to their participation in unlawful pickets. Certainly there are circumstances in which an employer may lawfully discharge an employee for participation in an unlawful strike. *Rapid Armored Truck Corp.,* 281 NLRB 371 fn. 1, 382 (1986) (employer did not violate Act by discharging employees engaged in unlawful 8(b)(7)(C) strike). However, as found above, the demonstrations did not have an unlawful recognitional or secondary intent. Further, there is not a shred of evidence that Respondents relied on the asserted unlawfulness of the demonstrations or the "malicious, unlawful defamation" as grounds for discharging Mendoza and Banegas. Rather, the asserted reasons deal with lack of proper I-9 documentation and work performance. Therefore, these defenses are an after-thought and were not utilized in determining whether to discharge Mendoza and Banegas. Thus, these defenses are rejected. See, e.g., *Brown & Root USA, Inc.,* 319 NLRB 1009, 1009–1010 (1995) (employer did not rely on any picketing activity of applicants in refusing to hire them and evidence failed to show that applicants engaged in disqualifying secondary activity).

In conclusion, it is found that Respondents discharged Mendoza and Banegas for their protected, concerted, and Union activity in violation of Section 8(a)(3) and (1) of the Act.

21. Termination of cleaning contract for 55 Hawthorne Street and 631 Howard Street allegedly to chill union activity and causing termination of mployees (complaint par. 10(a), (b), and (c))

(a) Facts

P. Dellanini of Preferred testified he received a November 19 email from 55 Hawthorne property manager Maxon stating that if Preferred got rid of R. Ortiz, "the problem would go away."

[75] *Medic One, Inc.*, 331 NLRB 464, 475 (2000); see also, *Masland Industries*, 311 NLRB 184, 197 (1993), citing *NLRB* v. *Rain-Ware, Inc.,* 732 F.2d 1349, 1354 (7th Cir. 1984).

[76] Such statements include two admissions by R. Ortiz that employees were fired for taking part in the demonstrations.

The November 19 email exchange between P. Dellanini and Maxon does not contain such verbiage. Maxon's email asks P. Dellanini to give him a call about the protest. A bit later, Maxon emailed a copy of the flyer. When they spoke by phone, according to P. Dellanini, Maxon insisted that he do something about the demonstration. P. Dellanini told him there was nothing he could do. Maxon testified that he expected Preferred to perform an investigation into the allegations of the picketers. In the meantime, Maxon banned R. Ortiz from the building.

About an hour later, at 11:33 a.m. on November 19, P. Dellanini sent an email to Maxon, stating:

> Ben,
> In the best interest of 55 Hawthorne/631 Howard & Preferred Building Services, we are terminating our service agreement for Janitorial and Day Porter services. Please consider this our 30 [day] notice. Our last day of service will be 19 December 2014. Should your company or building ownership decide to terminate sooner, Preferred agrees to cooperate with that action and will not impede the transition decision. Please feel free to call me with any questions.

R. Squeri explained that he understood that on November 19 Maxon had requested that R. Ortiz be removed from 55 Hawthorne and that Maxon speaking on behalf of Harvest Properties wanted the demonstrations to stop. R. Squeri testified that the he terminated the contract:

> because we're not we were not going to throw Rafael [R. Ortiz], who'd been with us for a long time, under the bus without due process. I mean, he really didn't these accusations that they wanted the demonstrations to go away, of which we had no control over. So we simply said no, we're not going to terminate our contract with Rafael Ortiz.

Preferred and the property managers at 55 Hawthorne-631 Howard later determined it would be better to terminate the contract as of December 15. On December 10, Useda received a text from R. Ortiz stating that December 14, would be her last day. Later Useda asked R. Ortiz if he had other work for her and he said he had no other work because he had lost all jobs because employees asked the union for help. He said that Preferred, "had destroyed him, that they had fired him."

On December 11 at 2:01 p.m., Tapia received the following text exchange from R. Ortiz:

> Ortiz: Tomorrow is last day.
> Tapia: What do you mean?
> Ortiz: The contract is over. I think you know that's why I was taken out, because you wanted to the have the union.
> Tapia: I don't know what you mean. You haven't told me anything about this. Overnight you're leaving me without a job. There are no cleaning fluids here no rags and you as the person in charge should have brought what we needed. There are no gloves nor anything. Obviously, they were going to take the contract away. When are you going to pay me the days I worked? Or are you going to give me a job elsewhere?
> Ortiz: When you did the protest they took the job away and I think they let you know that I wasn't going to be there anymore and they cancelled my contracts.
> Tapia: No, they didn't let me know anything. It was your obligation as a company to let us know, but now you're dismissing me overnight. But that's fine, just tell me when are you going to give me my paycheck.

On or about December 12, R. Ortiz and his wife V. Ortiz spoke to Franco and told her that her last day would be the 15th. R. Ortiz said there were no open janitorial positions "because the contract had all been lost and that they didn't have any place to put me because now there was no more work because the contract was done." Franco called R. Ortiz about two months later looking for work and he told her that he was cleaning kitchens and there was nothing available.

The employees continued to meet at SFLWC once a week. Usually Kramer and Frias were present as well as Useda, Banegas, Tapia, and Mendoza. Initially, the employees planned a third demonstration, this one at One Kearny. They also decided to seek the support of other janitors.

On December 18, 2014, the third demonstration took place on the sidewalk in front of One Kearny Street in San Francisco, California. During the demonstration, participants distributed a flyer identical for the most part to the flyer distributed on November 19. The same five pictures and the same text were repeated on the top half of the flyer. However, after the text regarding workers compensation, the December 18 text was different, as follows:

> We have picketed outside the offices of KGO radio, which we clean, and on December 2, we filed charges with the federal government for sexual harassment. The supervisor has retaliated by cutting the shifts for one worker at One Kearny and 74 New Montgomery. At another building, the supervisor's relatives overburdened a worker who is pregnant, requiring her to go to the hospital and almost causing a miscarriage.
>
> We are calling on tenants and clients to tell Preferred Building Service to listen t our demands and not ignore us. Contact the building manager of One Kearny, Derrick Change, at 415-778-1133 or dfchang01@gmail.com. We are demanding $15 per hour, a full 8-hour day and the right to organize without retaliation.
>
> Join us for a picket line.
> Thursday, December 18
> 11 a.m.
> One Kearny, San Francisco (between Geary and Market)
> San Francisco Living Wage Coalition
> For more information, contact 415-863-1225, sfliv-ingwage@riseup.net

The employees carried the same placards and shouted the same slogans as at previous demonstrations.

Throughout December 2014 and January 2015, the former OJS janitors visited other buildings which they believed had contracts with Preferred. For instance, after asking for Jesus Madris at 77 Geary, Mendoza, Useda, and Tapia spoke with janitors Freddie and Jorge who worked for Preferred, according to Mendoza. Madris was not available. Mendoza knew Freddie

from working with him at One Kearny. He would come there sometimes for supplies and Mendoza had been directed by R. Ortiz on occasions to take supplies to Freddie if he was waiting outside One Kearny. Mendoza asked if Freddie knew she had been fired and he said that he did. She and Tapia asked Freddie "if he was okay to seek the Union." According to Mendoza, Freddie clarified that he worked for L. Squeri. He said he was interested but he didn't want to lose his job. According to Tapia, Freddie said he did not know if he would support the union and asked them to come back at a later time. When they returned, Freddie said he and his partner did not want to talk with them anymore.

Eventually, Mendoza reached her husband's cousin Jesus Madris who told her that she should not try to contact her because R. Ortiz told her that she would be fired if she joined the employees.

According to Useda, she spoke by phone with Rafael [last name unknown], who worked at 55 Hawthorne and also worked for Preferred at Millennium. She told him that she lost her job and he asked, "why did you ask for the union?" Banegas remembered visiting Millennium with Useda and speaking with someone named Effain, who said he was interested in the union. They gave him some flyers and asked him to sign one but he said he could not sign it.

In December at Opera Plaza, Useda spoke to two unnamed janitors who told her they worked for Preferred. Useda told them that she had been fired because she asked for help from the union. She asked if they wanted to join the effort and they told her they had to think about it and asked Useda to come back on the following day. On the following day, Useda, Mendoza, Banegas, and Tapia returned. The unnamed janitors told them to leave because if they were seen talking with them, they could lose their jobs.

At One Rincon, Useda, Tapia, and Mendoza spoke to a janitor, at one point identified as male, at another point identified as female, but finally identified as Antonio. Useda told this janitor about "what was happening to us" and asked "whether she had any problems she could reach out to the union, that the union was going to help us." The individual was not interested. Useda and Banegas also visited an adjacent building, Green Rincon, at this same time in December and spoke to a male who said he would think about their invitation to join the union. Banegas remembered this janitor's name as Jonathan.

Banegas recalled visiting a building on Folsom known as Yerba Buena and speaking to Alex, who worked for Preferred. Banegas told Alex that he was fired for protesting with the union and he believed it was unfair. Banegas urged Alex to support the union or one day the same that happened to him might happen to Alex. Although Alex said he was interested in the union, he did not sign the form and said he wanted to think about it. On the following day, Banegas returned and Alex said he could not fill out the form.

In January 2015, Mendoza spoke with Faustino at 74 Montgomery. Faustino refused to join the employees because he could get fired. Mendoza also spoke with the engineer at 74 Montgomery, Oscar Trejo. Rejected Offer of Proof: Tapia recalled visiting Millennium with Mendoza and Useda. They spoke to a female janitor about the Union but she stated that although she was interested, she did not feel comfortable discussing this at work. When the group returned to Millennium on the following day, the female janitor did not come out to speak with them. She told security to let them know that she could not speak with them.

According to Useda, she and her co-workers visited about 20 sites where Preferred had the cleaning contract. They spoke to about 25 employees. P. Dellanini testified that Preferred has never subcontracted to OJS at Millennium Towers, Opera Plaza, or One Rincon.

(b) Analysis

The General Counsel's theory regarding Preferred's cancellation of its contract with Harvest Properties for 55 Hawthorne-631 Howard and the resulting cancellation of OJS' subcontract for those properties is that this action constituted a partial closing to chill unioinism under *Textile Workers v. Darlington Mfg. Co.,* 380 U.S. 263 (1965). The General Counsel claims that as a result of this partial closure, employees C. Cruz, J. Cruz, Franco, Flores, Tapia, Useda, and others similarly situated were unlawfully discharged.

In *Darlington,* the Court sanctioned complete cessation of business even when motivated by vindictiveness toward a union.[77] However, it held that a partial closing is an unfair labor practice if motivated by a purpose to "chill unionism" in remaining locations.[78] As the Court explained,

> If the persons exercising control over a plant being closed for anti-union reasons (1) have an interest in another business, whether or not affiliated with or engaged in the same line of commercial activity as the closed plant, of sufficient substantiality to give promise of their reaping a benefit from the discouragement of unionization in that business; (2) act to close their plant with the purpose of producing such a result; and (3) occupy a relationship to the other business which makes it realistically foreseeable that its employees will fear that such business will also be closed down if they persist in organizational activities, we think that an unfair labor practice has been made out.

Because direct evidence of motive is unusual, circumstantial evidence may be utilized to permit inferences of "chilling"motivation. *DeSoto, Inc.,* 278 NLRB 788, 806 (1986); *Joint Industry Board,* 238 NLRB 1398, 1401 (1978). Such circumstantial evidence includes contemporaneous union activity at the employer's remaining facilities, geographic proximity of the employer's facilities to the closed operation, the likelihood that employees will learn of the circumstances surrounding the employer's unlawful conduct, and representations made by employer agents and supervisors to other employees. *Bruce Duncan Co.,* 233 NLRB 1243, 1243 (1977), modified on other grounds, 590 F.2d 1304 (4th Cir. 1979).

In determining whether an employer's motive is to chill unionism in its remaining operations, the *Wright Line* test is applied to examine the timing and manner of the closure in relation to employee protected conduct. *Real Foods Co.,* 350

[77] *Darlington*, 380 U.S. at 272.
[78] *Darlington*, 380 U.S. at 275.

NLRB 309, 312 (2007). As the Board explained:

> Under this test, the General Counsel must first prove, by a preponderance of the evidence, that the decision was motivated by the employees' protected concerted activity. To carry his initial burden, the General Counsel must show that the employees had engaged in protected activity and that the employer knew of the activity. The General Counsel also must establish that the activity was a substantial or motivating reason for the employer's action. If the General Counsel meets this burden, then the burden of persuasion shifts to the employer to prove that it would have taken the same action even in the absence of the protected conduct. [footnote omitted]

Individualized proof is unnecessary in the context of cessation of operations. Where an employer takes adverse action against an entire body of employees due to their protected activity, it "manifests its animus toward all of them." *Igramo Enterprise, Inc.,* 351 NLRB 1337, 1339 (2007), review denied 310 Fed.Appx. 452 (2d Cir. 2009). See also *W. E. Carlson Corp.,* 346 NLRB 431, 433 (2006) (knowledge of individual employee's protected activity is "immaterial" where employer bears animus against protected activity by an entire group of employees).

Further, it is not necessary to prove that remaining employees were actually "chilled" in their union activities. Rather, the General Counsel may show that a chilling effect was foreseeable based on the fair inferences arising from the totality of the circumstances. *George Lithograph,* 204 NLRB 431, 431–432 (1973) (a finding of one antiunion motive to close does not ipso facto prove another to chill unionism at other locations but supports a logical inference).

Focusing on the timing and manner of the closure in relation to employee Union activity, there is no dispute that concerted activity and Union activity began among OJS employees in September and October. The employees initially involved in this activity worked at One Kearny, One Hawthorne, and 55 Hawthorne. OJS and Preferred learned of this activity on October 29 when employees picketed with signs and leaflets advertising their concerted and union activity. The record contains substantial evidence of animus to this activity. Further, explicit, contemporaneous statements of R. Ortiz link the demonstrations to loss of the 55 Hawthorne contract. R. Ortiz told Franco on December 15 that he had lost his subcontract because of the nonsense the employees were doing. Around this same time, R. Ortiz told Useda that because the employees asked the Union for help, he had lost all his jobs.

Thus, the record amply supports a finding that employee protected, concerted and union activity was a substantial or motivating reason for cancellation of the contract with Harvest Properties. As R. Squeri explained, he cancelled the contract in order to end the demonstrations. The General Counsel has therefore satisfied the burden to show, by a preponderance of the evidence, that the decision to cancel the contract was motivated by the employees' protected, concerted activity.

There is an absence of evidence to rebut this prima facie showing. The sole reason advanced was that the contracts were cancelled to stop the demonstrations. There is no evidence of a plan to cancel prior to that time. Rather, Respondents engaged in a series of events to thwart the employee activity including numerous threats of retaliation and discharge of two of the demonstrators. Thus, Respondents have failed to establish that they would have made the same decision within the same timeframe in the absence of employee protected, concerted, and union activity.

There is no dispute that Respondents' other cleaning contracts besides those at 55 Hawthorne-631 Howard encompassed numerous direct contracts with buildings or building management as well as numerous subcontracts to clean buildings. Many were located in a small geographic area. Family and friends of Respondents' employees were also employed by Respondents cleaning offices in other downtown buildings. The record indicates that many of them were aware of Respondents' antiunion activities. There exists a strong likelihood that by cancelling the 55 Hawthorne-631 Howard contract, Respondents would discourage similar activity at these other locations. Closing one operation because of protected, concerted and Union activity was an object lesson, a realistically foreseeable consequence for other employees warning them that further demonstrations would result in further contract cancellation.

Accordingly, it is found that Respondents cancelled the contract to clean 55 Hawthorne-631 Howard and the subcontract between Preferred and OJS to perform the cleaning service in order to chill union activity at its other locations and Respondents could reasonably have foreseen this likely result. It is found that Respondents motivation was to chill unionism in its remaining locations. This chilling effect was entirely foreseeable and, hence, intended. The result was that employees C. Cruz, J. Cruz, Franco, Flores, Tapia, Useda, and any other similarly situated employees were unlawfully discharged in violation of Section 8(a)(3) and (1) of the Act.

22. Since about December 14, Respondents have failed to offer employment opportunities to its employees Tapia and Useda (Complaint par. 10(d))

(a) Facts

The General Counsel alleges that Tapia and Useda were not only unlawfully discharged in connection with the unlawful cancellation of the contract but Respondents did not offer them available positions thereafter because of their Union and protected, concerted activities. In other words, absent their protected activity, Respondents would have placed them in other locations where janitorial positions were available. The General Counsel points to two vacancies at One Kearny due to the discharge of Mendoza and Banegas. The General Counsel also relies on evidence that at least one new employee was hired for 77 Geary-33 Grant on January 14, 2015. The General Counsel notes that the record contains numerous incidents of employee fluidity in moving employees from one building to another. Relying on the fact that Preferred has over 100 direct employees with high turnover rate, the General Counsel also urges that Preferred had the capacity to continue Tapia and Useda as direct employees.

(b) Analysis

In *FES*, 331 NLRB 9 (2000), supplemented by 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002), the Board set forth

the following framework to analyze allegations of discriminatory failures to hire. The General Counsel has the burden to prove: (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. If the General Counsel establishes these criteria, the burden shifts to the employer to prove it would not have hired the applicants even in the absence of their union activity.

There is no dispute that Tapia and Useda were qualified for any job openings as they had years of experience in janitorial positions. Similarly, there is no dispute that substantial antiunion animus was present at the time of the December 15 contract ending date. Thus, in order to show that Respondents refused to rehire or transfer Tapia and Useda at the time of cancellation of the 55 Hawthorne-631 Howard contract and subcontract, the General Counsel must first show that Respondents had concrete plans to hire or were hiring at that time.

The record does not present a clear picture in this regard. For instance, the record indicates that in November, Jorge Cervantes, V. Ortiz' brother, who worked at 55 Hawthorne, was transferred to a different building, thus avoiding layoff. The record further indicates R. Ortiz and his wife took over the positions at One Kearny when Mendoza and Banegas were unlawfully discharged.[79] Flores, a co-worker of Tapia and Useda at 55 Hawthorne, worked for R. Ortiz at another subcontracted building one or 2 days after the layoff. Finally, the record indicates that OJS hired a new employee, Saul Lopez (Lopez) on December 1 at 77 Geary-33 Grant and transferred him to a new location on January 1, 2015.

For purposes of analysis, one may find there was at least a 1- to 2-day position which was filled by Flores following termination of the 55 Hawthorne contract and subcontract and potentially a position vacated by Lopez at 77 Gear-33 Grant on January 1, 2015. It is not entirely clear that the transfer of Lopez from 77 Geary-33 Grant opened a position that was filled. In fact, Respondent OJS employment records do not establish that it was. The other openings all predate the December 15 termination date and were filled prior to that time. Moreover, speculation that Respondent Preferred, with high turnover and approximately 100 employees, might have been able to place Useda and Tapia is rejected without evidence of an actual job vacancy and hiring to fill the vacancy.

Against this backdrop, the record further fails to establish that Tapia and Useda were any more qualified than Flores and Lopez or would have been hired instead of Flores and Lopez but for their protected, concerted activity, and union activity. The record is devoid of any evidence regarding the qualifications of Flores and Lopez. It is, accordingly, impossible to determine whether Respondents failed to adhere uniformly to generally known applicant requirements, or that any requirements were themselves pretextual or were applied as a pretext for discrimination. Thus, due to failure to sustain the burden of proving a violation, complaint paragraph 10(d) is dismissed.

[79] The record does not reflect whether Banegas performed Saturday and Sunday work at 74 New Montgomery and One Hawthorne at the time he was discharged. If he did, these positions were potentially available after November 19. Mendoza worked Saturdays at 74 New Montgomery until she was discharged. Thus, this Saturday work may have become available after November 19.

CONCLUSIONS OF LAW

1. Respondents Preferred Building Services, Inc. and Rafael Ortiz d/b/a Ortiz Janitorial Services are joint employers.

2. By the following acts and conduct, they have violated Section 8(a)(1) of the Act.

(a) Telling employees who were picketing they were not going to be working anymore.

(b) Asking employees who were engaging in protected, concerted activity, and union activity why employees were making claims against Respondents, telling them to stop or they would be terminated, telling them they would be sued, and telling them to be careful about going to the Union.

(c) Telling employees that their working conditions had changed because they engaged in union activity.

(d) Telling employees that OJS would lose or had lost the Preferred contract because of employees' union activity.

(e) Threatening employees to be careful with what they were doing, and asking whether they knew what they were doing.

(f) Telling employees when giving them their final check that they were fired and could no longer work because of their union activity and asking employees if they were happy because they were fired due to their union activity.

(g) Surveilling employees' demonstration by photographing and videoing their activities.

(h) Stating that employees were terminated because of their union activity.

(i) By the following acts and conduct, Respondents have violated Section 8(a)(3) and (1) of the Act.

(j) Discharging Balbina Mendoza and Joel Banegas because they assisted SEIU Local 87 and engaged in concerted activities and to discourage employees from engaging in these activities.

(k) Terminating its contracts with Harvest Properties for providing janitorial cleaning services at 55 Hawthorne and 631 Howard Street in San Francisco, California in order to chill union activity at the remaining facilities where Respondents held janitorial service contracts.

(l) Terminating the subcontract between Preferred and OJS for janitorial cleaning services at 55 Hawthorne and 631 Howard Street in San Francisco, California because employees assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities and in order to chill union activity at the remaining facilities where Preferred held janitorial service contracts.

(m) Based on termination of the contracts, discharging employees Carlos Cruz (C. Cruz), Juana Cruz (J. Cruz), Flores, Franco, Tapia, Useda, and any other similarly situated employees because employees assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, they are ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, as to unlawfully threatening, coercing, and restraining employees in violation of Section 8(a)(1), it is recommended that Respondents be ordered to cease and desist from that activity.

Having found that Respondents unlawfully discharged Mendoza and Banegas, Respondents must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the dates of discharge to the date of proper offers of reinstatements less any net interim earnings, as prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest as computed in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010).

In addition, Respondents must compensate Mendoza and Banegas for the adverse tax consequences, if any, of receiving a lump-sum backpay award and Respondents shall file a report with the Regional Director for Region 20, within 21 days of the date backpay is fixed, either by agreement or Board order, a report allocating the backpay to the appropriate calendar years. *AdoServ of New Jersey,* 363 NLRB No. 143 (2016); *Don Chavas, LLC d/b/a Tortillas Don Chavas,* 361 NLRB 101 (2014).

As to the unlawful discharges of C. Cruz, J. Cruz, Flores, Franco, Tapia, Useda, and any other similarly situated employees, caused by cancellation of the 55 Hawthorne-631 Howard contracts, the General Counsel requests that these discriminatees by reinstated. Such a remedy would require restoration of the contract between Preferred and Harvest Properties and, in turn, restoration of the subcontract between OJS and Preferred unless the evidence indicates that such a remedy would be unduly burdensome.[80] It does not. There is no evidence that these contracts were unprofitable. There is no evidence that a substantial capital outlay, equipment, or other investment is necessary. Accordingly, it is further recommended that Respondents be required to seek restoration of their contract with current building management to provide janitorial services at 55 Hawthorne-631 Howard and restoration of the subcontract between Preferred and OJS to handle these properties. Respondents shall be allowed at the compliance stage of the proceedings to provide evidence any previously unavailable evidence that the restoration remedy is unduly burdensome.[81]

Further, it is recommended that Respondents, having discriminatorily cancelled the contract with Harvest Properties and the subcontract for that property between Preferred and OJS, thus causing the discharge of employees C. Cruz, J. Cruz, Flores, Franco, Tapia, Useda, and any other similarly situated employees, must offer them reinstatement either at 55 Howthorne-631 Howard or at other substantially similar work locations and make them whole for any loss of earnings and other benefits computed on a quarterly basis from the dates of discharge to the date of proper offers of reinstatement less any net interim earnings, as prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest as computed in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010).

The General Counsel also seeks an order requiring that the Respondents reimburse all unlawfully discharged employees for search-for-work and work-related expenses regardless of whether they received interim earnings for a particular quarter. In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), the Respondent shall compensate employees affected by the above unlawful discharges for their search-for-work and interim employment expenses regardless of whether those expenses exceed their 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 light of the serious and pervasive nature of the unfair labor practices committed by the Respondents, a broad cease and desist order is appropriate. *Evergreen America Corp.*, 348 NLRB 178, 264 (2006), enfd. 531 F.3d 321 (4th Cir. 2008); *Michael's Painting, Inc.*, 337 NLRB 860 fn. 3 (2001), enfd. 85 Fed.Appx. 614 (9th Cir. 2004); and *Hickmott Foods*, 242 NLRB 1357 (1979).

As Respondents' employees are predominantly Spanish-speaking, it is recommended that the Notices be in English and Spanish. Because the findings herein encompass activity at many of Respondents' work sites, the Notice shall be posted not only at Respondents' offices but in all supply or storage areas or other appropriate areas utilized by Respondents throughout the greater San Francisco Bay Area.

On these findings of fact and conclusions of law and on the entire record, the following recommended order is submitted.[82]

ORDER

The Respondents Preferred Building Services, Inc. and Rafael Ortiz d/b/a Ortiz Janitorial Services, their officers, agents, and representatives, shall

1. Cease and desist from

(a) Telling employees who were picketing they were not going to be working anymore.

(b) Asking employees who were engaging in protected, concerted activity and Union activity why employees were making claims against Respondents, telling them to stop or they would be terminated, telling them they would be sued, and telling them to be careful about going to the Union.

(c) Telling employees that their working conditions had changed because they engaged in union activity.

(d) Telling employees that OJS would lose or had lost the Preferred contract because of employees' union activity.

[80] See, e.g., *We Can, Inc.*, 315 NLRB 170 (1994), citing *Lear Siegler, Inc.,* 295 NLRB 857, 861 (1989).

[81] *Ferragon Corp*., 318 NLRB 359 (1995) (employer may present previously unavailable evidence, if any, to demonstrate that restoration remedy is unduly burdensome).

[82] 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.

(e) Threatening employees to be careful with what they were doing, and asking whether they knew what they were doing.

(f) Telling employees when giving them their final check that they were fired and could no longer work because of their union activity and asking employees if they were happy because they were fired due to their union activity.

(g) Surveilling employees' demonstration by photographing and videoing their activities.

(h) Stating that employees were terminated because of their union activity.

(i) Discharging Balbina Mendoza and Joel Banegas because they assisted SEIU Local 87 and engaged in concerted activities and to discourage employees from engaging in these activities.

(j) Terminating its contracts with Harvest Properties for providing janitorial cleaning services at 55 Hawthorne and 631 Howard Street in San Francisco, California in order to chill union activity at the remaining facilities where Respondents held janitorial service contracts.

(k) Terminating the subcontract between Preferred and OJS for janitorial cleaning services at 55 Hawthorne and 631 Howard Street in San Francisco, California because employees assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities and in order to chill union activity at the remaining facilities where Preferred held janitorial service contracts.

(l) Based on termination of the contracts, discharging employees Carlos Cruz, Juana Cruz, Zenayda Flores, Rosa Franco, Claudia Tapia, Yunuen Useda, and any other similarly situated employees because employees assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities.

(m) In any other manner interfering with, restraining, or coercing employees in the rights guaranteed to 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 this Order, offer Joel Banegas, Carlos Cruz, Juana Cruz, Zenayda Flores, Rosa Franco, Balbina Mendoza, Claudia Tapia, Yunuen Useda, and any other similarly situated employees 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 and make them 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.

9b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful actions against these employees and within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

(c) 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 electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at their facilities in the greater San Francisco California Bay Area, copies of the attached notice marked "Appendix."[83] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondents' authorized representative, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceeding, the Respondents have gone out of business or closed any operations involved in these proceedings, or sold the business or facilities involved herein, the Respondents shall duplicate and mail at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since October 29, 2014.

(e) 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 Respondents have taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington D.C. September 9, 2016

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 you because you engage in concerted actions such as picketing for better wages and working conditions or seeking assistance from the San Francisco Living Wage Coalition or Service Employees International Union Local 87.

WE WILL NOT terminate janitorial contracts because you engaged in concerted activities or in order to chill union activity at other facilities where we have janitorial contracts.

[83] 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."

WE WILL NOT restrain or coerce your Section 7 rights by telling employees who were picketing they were not going to be working anymore; asking employees who were engaging in protected, concerted activity and union activity why employees were making claims against Respondents; telling them to stop or they would be terminated; telling them they would be sued and telling them to be careful about going to the Union; telling employees that their working conditions had changed because they engaged in union activity; telling employees that Ortiz Janitorial Services would lose or had lost the Preferred Building Services, Inc. contract because of employees' Union activity; threatening employees to be careful with what they were doing by demonstrating and asking whether they knew what they were doing; telling employees when giving them their final check that they were fired and could no longer work because of their Union activity and asking employees if they were happy because they were fired due to their Union activity; surveilling employees' demonstration by photographing and videoing their activities; stating that employees were terminated because of their union activity.

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

WE WILL compensate Joel Banegas, Carlos Cruz, Juana Cruz, Zenayda Flores, Rosa Franco, Balbina Mendoza, Claudia Tapia, Yunuen Useda, and any other similarly situated employee for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings plus interest.

WE WILL compensate Joel Banegas, Carlos Cruz, Juana Cruz, Zenayda Flores, Rosa Franco, Balbina Mendoza, Claudia Tapia, Yunuen Useda, or any other similarly situated employee for any adverse income tax consequences of receiving a lump-sum backpay award and WE WILL file with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

WE WILL compensate Joel Banegas, Carlos Cruz, Juana Cruz, Zenayda Flores, Rosa Franco, Balbina Mendoza, Claudia Tapia, Yunuen Useda, and other similarly situated employees for search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the discharges of Joel Banegas, Carlos Cruz, Juana Cruz, Zenayda Flores, Rosa Franco, Balbina Mendoza, Claudia Tapia, Yunuen Useda, or any other similarly situated employee and WE WILL within 3 days thereafter, notify them in writing that this has been done and this discharge will not be used against them in any way.

PREFERRED BUILDING SERVICES, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/20-CA-149353 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.