

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

MOYER PACKING COMPANY

and

Case No. 4-CA-35131

JOBS WITH JUSTICE

*Jennifer Spector, Esq., & Margarita Navarro-Rivera, Esq.*  
for the General Counsel.  
*Thomas W. Scrivner, Esq. & Lucinda Schetter, Esq.*  
for the Respondent.  
*Robert Curley, Esq.*, for the Charging Party.

DECISION

Statement of the Case

**GEORGE ALEMÁN**, Administrative Law Judge. Pursuant to a complaint issued on May 21, 2007, by the Regional Director for Region 4 of the National Labor Relations Board (the Board) against Moyer Packing Company (the Respondent), a hearing in this matter was held in Philadelphia, Pennsylvania from August 6-10, and September 18-20, 2007.<sup>1</sup> The complaint, and amendments subsequently made thereto, alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by discharging employees Geovanny Guzman, Maria Garcia, Jency Olivo-Muñoz (herein Olivo), Maximo Franklin Mercado Peralta (herein Mercado Peralta), and Armando Ortiz de Jesus (herein DeJesus)<sup>2</sup> for engaging in protected concerted activity, and by advising an employee he need not attend the hearing in this matter, and threatening him with discipline if he did so. In a timely filed answer, the Respondent admits discharging the above employees, but denies engaging in any unlawful conduct.

All parties at the hearing were afforded a full and fair opportunity to be heard, to present oral and written evidence, to examine and cross-examine witnesses, and to argue orally on the record. Based on the entire record in this proceeding, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent,<sup>3</sup> I make the following

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<sup>1</sup> All dates herein are in 2007, unless otherwise indicated. The unfair labor practice charge underlying the complaint was filed by the Charging Party, Jobs for Justice, on January 17.

<sup>2</sup> Mercado Peralta was also known at the facility by the nickname "Puerto Plata," and DeJesus was known as "Cuba."

<sup>3</sup> The parties' briefs are herein identified as "GCB" for the General Counsel's brief and "RB" for the Respondent's brief, followed by the page number(s). Reference to testimonial evidence is identified by the transcript (Tr.) page number(s), and exhibits are identified as "GCX" for a General Counsel exhibit, and "RX" for a Respondent exhibit, followed by the exhibit number(s).

The General Counsel and the Respondent both have filed separate motions to correct certain inaccuracies and typographical errors in the record, as well as some limited objections to certain changes to the record proposed by the other side. Thus, the Respondent proposes, but

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## Findings of Fact

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## I. Jurisdiction

10 The Respondent, a Pennsylvania corporation, is engaged in the processing and rendering of beef products at a plant located in Souderton, PA. During the past year, the Respondent sold and shipped goods valued in excess of \$50,000 from its Franconia Township plant directly to points outside the Commonwealth of Pennsylvania. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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## II. Alleged Unfair Labor Practices

## A. Factual Background

## 1. Respondent's operations

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The Respondent operates two facilities at its Souderton, PA location, one a meat packing plant with some 1,100 employees, the other a "rendering" facility with some 200 employees approximately a mile away. At its meat packing plant, the Respondent employs some 250 employees in its Slaughter or "kill floor" department, and about 500 employees at its

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the General Counsel opposes, that on transcript page 885, line 15, and page 888, lines 11, 13, 15, the name "Maritza" as shown therein be changed to read, "Marisol," and that on Transcript page 969, line 6, the name "Hernando" be changed to read, "Armando." Given the General Counsel's opposition thereto, and as the Respondent has not demonstrated that the record, as it currently stands, is incorrect with respect to these particular changes, the Respondent's motion to change "Maritza" to "Marisol" and "Hernando" to "Armando" on the above specified pages is denied. In all other respects, and in the absence of further objection, the Respondent's motion to correct is hereby granted. As to the General Counsel's motion, the Respondent takes issue with or responds to certain of the changes proposed by the former. The General Counsel, thus, seeks to change on Transcript page 57 the word "Yelled" to "Cried Out." I find no basis for making any such change, and note that, as pointed out by the Respondent, the words "Cried out" are already included on the transcript number and page line referenced by the General Counsel. The General Counsel also seeks to change "Ms. Spector" to "Mr. Scrivner" on Transcript page 273, line 18, which change is opposed by the Respondent who argues that the correction should read, "Margarita Navarro-Rivera." I find the change unwarranted as it is, as noted, opposed by the Respondent and as the change will have no bearing whatsoever on the findings and conclusions reached in this matter. The Respondent also opposes the General Counsel's proposal to make the following changes to the record: The words "Be quiet" to "Shut up" on Transcript page, 293, lines 11, 12; the words "A desirable" to "Undesirable" on page 327, line 23; the word "Indiscernible" to "Fab" on page 335, line 20; the word "Weren't" to "Were" on page. 427, line 5; and the phrase "To the hearing" to "To the evidence adduced at the hearing" on page 639, line 13. Other than its mere request to make these changes, the General Counsel has not demonstrated, with respect to the changes opposed by the Respondent, that the record as it now stands is incorrect. Absent such a showing, and in light of the Respondent's opposition thereto, the General Counsel's motion to change the record in the manner just described is denied. In all other respects, and absent further opposition thereto, the General Counsel's motion to correct the record is hereby granted.

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Fabrication department. Elliott Keller, an admitted agent of the Respondent under Section 2(13) of the Act, is Vice-President of Operations and has overall responsibility for the operations at the Souderton facility. Kelly Romaniello, an admitted supervisor within the meaning of Section 2(11) of the Act, is Respondent's Director of Human Resources. Marisol Avila, an admitted agent of the Respondent, and Evelyn Abreu, an admitted supervisor and agent, were, during the relevant time period herein, employed respectively as a benefits coordinator and generalist in the Human Resources (HR) department. Jose "Poli" Rivera, (herein Rivera) also an admitted Section 2(11) supervisor, is slaughter superintendent and oversees the operation of the Slaughter department. Below Rivera in the Slaughter department supervisory hierarchy is Ramon Collazo, the Slaughter department general foreman, an admitted Section 2(11) supervisor. Jaime Acosta, an admitted Section 2(11) supervisor, is the Fabrication department superintendent. Another individual, Jorge ("Bombi") Berios, (herein Berios) also worked as a Section 2(11) supervisor in the Slaughter department during the relevant time period herein, and retired in May 2007.

The record reflects that the Slaughter or "Kill Floor" department employees generally get staggered 15-minute morning breaks starting around 9:30 a.m. In essence, those employees who work at the top of the slaughter line begin their break when the last animal carcass passes their work station; the break process is repeated throughout the line and lasts about one hour at the end of which all employees in the department would have taken their breaks and been back at work by 10:30 a.m.

## 2. The 2006 holiday bonus

The discharges in this case arose from an approximately 90-minute work stoppage that took place inside the Respondent's facility on the morning of December 15, prompted by the Respondent's failure to distribute Christmas bonuses to employees that morning.<sup>4</sup> The record, and in particular testimony from various employee and management witnesses, makes patently clear that, notwithstanding the Respondent's implicit suggestion to the contrary (RB: 3), the Respondent regularly handed out bonuses around Christmas time every year.

Garcia began working for Respondent in January 2002, and testified she received Christmas bonuses in 2003, 2004, and 2005. She testified that a few days before the December 15, work stoppage, she asked Collazo if employees would be receiving a bonus with their scheduled December 15, paychecks. The practice, she explained, was for bonuses to be included in the last paycheck preceding the Christmas holiday. Collazo, she contends, replied that he did not know, that employees might possibly receive a bonus consisting of 10 hours pay, but that it didn't matter to him because he had his \$2,500 in his pocket. Garcia answered that it mattered to her. Collazo denied having any such conversation with Garcia that week regarding bonuses, or receiving a bonus himself. (Tr. 681-682).

According to Romaniello, as of the Fall of 2006, the Respondent had not planned on distributing Christmas bonuses that year. It subsequently changed its mind and decided, a few days before December 15, to distribute half of the usual yearly bonus, or a 10-hour bonus. Romaniello was informed of the decision late December 13, and had intended to prepare a memo to employees notifying them of the bonus, but failed to do so before employees received their paychecks on December 15. (Tr. 1098; 1100).

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<sup>4</sup> As discussed infra, the work stoppage began at 9:45 a.m., when employees whose break period was scheduled to end at that time refused to return to work.

## 3. The work stoppage

## (a) The first cafeteria episode

5 At 9:30 a.m. on December 15, Garcia picked up her paycheck and went to the  
Company's cafeteria to begin her 15-minute morning break. On entering the cafeteria, Garcia  
observed some 20-25 employees already there presumably taking their breaks. She recalled  
that when she joined this group, there was some discussion going on about the absence of a  
Christmas bonus in the paychecks, and remarks being made about not returning to work until  
10 employees received an explanation as to why the bonuses were not distributed.

Quality Assurance employee Nereida Roman, a Respondent witness, recalled being in  
the cafeteria around the same time and noticing a small group of about five employees,  
including Garcia, seated at a table and not returning to work after their break period ended. She  
15 claims she asked the group why they were not returning to work, and that all responded  
collectively that they were not going up because of the bonus issue. Roman contends that she  
then saw a supervisor, identified as Eric, nearby and told him to call Berios and Rivera and let  
them know not to resume the "kill" floor production line because employees from the department  
were not planning to return to work. (Tr. 1015). A short while later, she saw Rivera entering the  
20 cafeteria, walked over to him and told him, as he was by the doorway entrance to the cafeteria,  
of the conversation she had just had with the employees. Rivera then went over and began  
speaking to the employees.

Garcia testified that when Rivera asked why they were not returning to work, she and  
25 other employees replied they were staying put until they received an explanation from  
management as to why they had not received Christmas bonuses. Garcia contends that Rivera  
told him he could not answer their questions, and yelled at them to return to work, stating that  
they were not doing anything by sitting around, and that this was not the way to address the  
bonus issue. Rivera, she contends, then called security on his handheld radio. "Kill Floor"  
30 employee Manuel Cruz recalled Rivera simply asking why employees had not returned to work,  
and then instructing them, collectively at first, and then individually, that they should go back to  
work. When they refused to do so, he called security on his radio and remarked, "You're out of  
here." Hernandez similarly recalled Rivera telling employees to return to work, employees  
insisting that they wanted an explanation regarding the bonuses, and Rivera responding that if  
35 they were not going to return to work, they should go back to their houses. Hernandez  
interpreted Rivera's remark to mean that if they did not go back to work, they would be fired.  
Rivera, according to Hernandez, then called security on his handheld radio. Villar offered  
similar testimony, testifying that when employees told Rivera they were not going back to work  
until the bonus issue was resolved, Rivera answered that they should return to work or leave the  
40 premises. Rivera, he contends, then asked each employee individually if they were returning to  
work.<sup>5</sup> (Tr. 429; 484; 519; 526)

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45 <sup>5</sup> Hernandez, Cruz and Villar, all of whom were subpoenaed to testify, were still in the  
Respondent's employ when they testified at the hearing. Villar explained that he would not  
have testified had he not been subpoenaed. During Hernandez' direct examination, the General  
Counsel moved to amend the complaint to allege, based on Hernandez' testimony, that the  
Respondent, through Collazo, further violated Section 8(a)(1) of the Act by telling Hernandez  
50 that he did not have to honor the subpoena, and by threatening to issue him a warning if he  
complied with the subpoena. The motion was granted and the Respondent amended its answer  
to deny the allegation. (Tr. 500-503).

Kill floor employee Evelin Navarro, another Respondent witness, testified she was on break in the cafeteria when the work stoppage began. She realized at the time that something unusual was happening when some five or so employees in the cafeteria stated they were not returning to work. Rivera, she contends, showed up a short while later and tried to calm the employees down, whom she described as being excited, by urging them to return to work, and telling them that a meeting would be held to discuss the bonus. The employees, however, replied that they were not returning to work. According to Navarro, alleged discriminatees DeJesus and Mercado Peralta were also present, along with Garcia, in the cafeteria when the work stoppage began.<sup>6</sup> (Tr. 1038-1039; 1051)

Rivera offered a different version of his discussion with employees in the cafeteria that morning. Thus, he testified that when employees told him they were not returning to work, he assured the group they were getting a 10-hour bonus. The employees, he contends, refused to take his word and insisted on speaking with some higher management official. He purportedly told employees that they should return to work and that he would talk to the higher official sought by the employees and schedule a meeting to discuss the bonus. He also recalls instructing them to either return to work or leave the plant. Rivera described Garcia as the most outspoken employee in the group during this exchange, and perceived her to be the employees' representative. Roman's recollection on cross-examination, that Garcia was "the only person" in the group of cafeteria employees she could remember saying they would not return to work because they did not receive their Christmas bonus, like Rivera's above testimony, makes patently clear that Garcia served as the employees' principal spokesperson at the onset of the work stoppage. (Tr. 867; 797; 1033).

Garcia disputed Rivera's claim that he told employees in the cafeteria they would be getting a 10-hour bonus or that a meeting would be held with employees to discuss the bonus issue. None of the General Counsel witnesses, e.g., Cruz, Hernandez, or Villar, who testified to being present in the cafeteria when Rivera spoke to them, made any mention in their testimony of hearing Rivera refer to a 10-hour bonus for employees, or suggesting that a meeting could be held after work to discuss the bonus issue. Notably, the two Respondent witnesses who testified to being in the cafeteria when Rivera spoke to employees, Roman and Navarro, likewise made no mention in their testimony of hearing Rivera tell employees they were getting a 10-hour bonus, although, unlike Garcia, Cruz, Hernandez, and Villar, they did recall hearing Rivera tell employees they could have a meeting after work to discuss the bonus issue. I find, as claimed by Garcia, which claim is bolstered by both the General Counsel's and the

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<sup>6</sup> Navarro was confused in describing which of the discriminatees was present during the first cafeteria episode. As noted, she named Garcia, DeJesus, and Mercado Peralta, among others, as having been present. However, she also claimed that employee "Puerto Plata" was present, along with Mercado Peralta. Both "Puerto Plata" and Mercado Peralta, as noted, are one and the same person, "Puerto Plata" being Mercado Peralta's nickname. Although afforded an opportunity on cross-examination by the General Counsel to clarify her answer, Navarro insisted that "Puerto Plata" and Mercado Peralta are different persons. I am convinced that Navarro had no idea who "Puerto Plata" aka Mercado Peralta was, and that she lied in claiming to have seen both Puerto Plata and Mercado Peralta in the cafeteria when the work stoppage first began, since it is beyond dispute, that Puerto Plata and Mercado Peralta are one and the same. Further undermining Navarro's testimony in this regard is the fact that she was the only witness to have placed DeJesus and Mercado Peralta in the cafeteria when the work stoppage began, and the fact that the Respondent itself readily concedes, on brief (RB:5) that neither DeJesus nor Mercado Peralta were in the cafeteria at the time Navarro claimed to have seen them.

Respondent's witnesses, that Rivera did not mention the 10-hour bonus to employees during his discussion with them in the cafeteria. Rivera, I am convinced, simply lied about having done so.

5 Garcia also identified Berios, who voluntarily resigned in May 2007, but was a supervisor at the time of the December 15, work stoppage, as having been present in the cafeteria soon after the work stoppage began. Rivera did not recall seeing Berios in the cafeteria that morning, or, for that matter, during the hallway episode discussed below. Garcia recalled Berios asking employees to return to work, and employees responding that they would not return to work until someone "big" came down to speak with them on why they did not receive bonuses. Berios, 10 she recalled, assured employees they would receive an answer, but again requested that they return to work.

15 Berios, a General Counsel witness, testified that, at around 9:45 a.m. on December 15, he became aware that several kill floor employees who began their break at 9:30 a.m. had not yet returned to the production floor. Soon thereafter, he received word from one of his leadpersons, and from supervisor Geraldo Cisnero, that something was happening in the cafeteria. Berios then went to the cafeteria where he found Rivera exiting the cafeteria. As he was exiting the cafeteria, Rivera, Berios contends, told him that "Whoever don't go back to work is going to get fired." Rivera denied making any such statement to Berios or to the employees 20 in the cafeteria, and, in fact, denied seeing Berios at all either in the cafeteria during this first episode or during the hallway episode discussed below. Villar and Cruz also claimed to have seen Berios in the locker room right after employees left the cafeteria, and to hearing Berios ask employees to come out into the hallway because Keller wanted to speak with them. I credit Berios and Garcia and find that Berios was in the cafeteria at the early stage of the work stoppage and, at some point, encountered Rivera in the cafeteria. Further, from my personal 25 observation of his demeanor as a witness, and his overall testimony, Rivera struck me as someone who would have made the comment attributed to him by Berios about firing employees who refused to return to work.<sup>7</sup> (Tr. 579; 801; 835; 42). Rivera, as noted, was not

30 <sup>7</sup> Berios, who was subpoenaed to testify, voluntarily left his 28-year employment with the Respondent in May 2007, testifying that he did so because he could no longer put up with the way Rivera and Collazo treated employees. The Respondent, through testimony from Rivera, sought to portray Berios as a former disgruntled employee who quit only because he was about to be fired, and argues that his testimony is biased and should be discredited. (RB:31, fn. 8). 35 Rivera's testimony in this regard is that, from time to time in 2007, he, Keller, and Collazo discussed performance problems Berios was having, and that he discussed these problems with Berios, although he could not recall when. Berios denied having had any such discussions with Rivera. Rivera also claimed that he was planning to meet and discuss another performance-related problem with Berios at the end of the latter's shift a day before Berios quit 40 but that the latter did not show up for the meeting. He further contends that when Berios showed up the following day, he informed Berios he was suspended and could go home and would be called in. Berios resigned soon thereafter. Rivera claims that Berios was about to be fired before he left, intimating in his testimony that the decision to terminate Berios may have been discussed between himself, Romaniello, and Fisher (Tr. 857). However, other than 45 Rivera's questionable testimony, the Respondent produced no documentary or testimonial evidence to corroborate Rivera's claim that Berios was having performance-related problems and was about to be terminated. Thus, neither Keller or Collazo, both of whom, according to Rivera, took part in discussions regarding Berios' poor performance, provided any testimony regarding Berios' alleged poor performance. Nor, for that matter, were Romaniello or Fisher 50 questioned on whether, as implicitly suggested by Rivera, they had at any time discussed terminating Berios. Further, no written or other documentary evidence, such as performance

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being truthful in claiming to have told employees in the cafeteria that they would be receiving a 10-hour bonus.

5 This first cafeteria episode lasted some 15 minutes. This group of employees, which Rivera contends, had grown to some 20-25, then exited into a hallway adjacent to the cafeteria which provides access to employee locker rooms and other production areas of the facility. Some of the employees apparently went directly to the locker rooms, yelling, hooting, and hollering as they did so, according to Rivera. The situation, however, did not end there but rather resumed shortly thereafter in the locker room hallway. The alleged misconduct which led to the eventual discharge of the named discriminatees purportedly began in the hallway. (Tr. 10 795-798).

(b) The hallway episode

15 Berios testified that after leaving the cafeteria, the employees went through the hallway into the locker rooms, presumably preparing to leave the facility because, on entering the locker room after them, he saw them changing out of their uniforms and into street clothes. Berios urged employees to step out into the hallway so he could discuss their concerns with them. Cruz recalled seeing Berios in the locker room and asking employees to come out to the 20 hallway because Keller wanted to speak with them (Tr. 527).<sup>8</sup> On exiting the locker room into the hallway, Berios observed that Rivera and Collazo were already there.

Rivera recalled following the group from the cafeteria into the hallway, believing they were going home, and seeing Keller arrive on the scene soon thereafter. He claims that he 25 went up to Keller and explained what had just transpired in the cafeteria moments earlier, at which point Keller decided to introduce himself to, and to speak with, the employees. (Tr. 727; 801). Rivera recalled seeing Collazo in the hallway, along with Avila, and Romaniello for a brief moment, as well as Security captain Bryan Bednar, although he did not know when Bednar arrived on the scene.

30 Keller testified that he first learned employees were in the cafeteria refusing to work over the bonus issue from Romaniello at around 10:05 that morning, a claim that was not substantiated by Romaniello.<sup>9</sup> On arriving at the hallway, Keller found some 30-50 employees

35 write-ups or ratings, were produced to corroborate Rivera's claim that Berios was not performing up to par and was on the verge of being terminated just before he voluntarily resigned. On redirect examination by the General Counsel, Berios pointed out that he had, in fact, received during all of 2006 and in the first quarter of 2007, several plaques along with a cash bonus of \$500 for his overall performance. Although the plaques were never actually produced, the 40 Respondent did not contest or refute Berios' claim in this regard. I credit Berios and find that he indeed received the performance awards mentioned in his testimony. I further reject as not credible Rivera's assertion that Berios was having performance problems and was about to be fired before voluntarily resigning.

45 <sup>8</sup> Berios' assertion that he told employees to come out of the locker room as he wanted to speak with them, as noted, differs somewhat from Cruz' and Villar's recollection that Berios told them Keller wanted to speak with them. I credit the mutually corroborative account provided by Cruz and Villar.

50 <sup>9</sup> Romaniello testified that she learned of the employee protest from Avila around 10:00 a.m., and that, when she and Avila went to investigate, they found Keller already in the hallway addressing the employees. Romaniello made no mention in her testimony of having notified Keller of the situation. Her testimony suggests, implicitly, that Keller was already aware of the

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heading towards the locker room, with Rivera behind them. Rivera, he contends, then explained to him that, while in the cafeteria, employees had insisted on knowing where their bonuses were, and demanded a 20-hour bonus, as had been paid in the past. He further recalled Rivera saying that he had told employees they would be receiving a 10-hour bonus, and that, if they were not satisfied, a meeting would be held after hours to discuss and resolve the issue. Finally, Keller claims that Rivera told him that when employees refused to return to work, he (Rivera) told employees they would have to either return to work or leave the premises.

Like his uncorroborated assertion that Romaniello told him of the work stoppage, part of Keller's claim as to what Rivera told him had occurred or was said in the cafeteria also lacks corroboration. For example, as found above, Rivera never told employees in the cafeteria they were getting a 10-hour Christmas bonus, making it highly likely, therefore, that Rivera would have made such a representation to Keller, unless, of course, Rivera misrepresented the facts to Keller. However, it bears noting that Rivera never actually testified to having made this specific statement to Keller, for when asked what he and Keller talked about that morning in the hallway, Rivera replied, without being specific, that he only told Keller "what had happened in the lunchroom, and what the issue was with the employees."<sup>10</sup> Keller's further claim, that Rivera told him employees in the cafeteria had demanded a 20-hour bonus, also finds no support in Rivera's testimony, or in the testimony of the other witnesses who were in the cafeteria during Rivera's exchange with the employees. Thus, in describing what occurred between him and the employees in the cafeteria, Rivera never stated that employees had demanded a 20-hour bonus. Nor did Garcia, Cruz, Villar, Hernandez, Roman, or Navarro, mention in their testimony hearing employees demand a 20-hour bonus. Rather, their testimony, for the most part, reflects only that employees were refusing to return to work until they received an explanation from upper management as to why they had not received any Christmas bonuses. Accordingly, I find Keller's above description of what Rivera purportedly told him occurred or was said in the cafeteria not to be true. Rather, I find it more likely than not that Keller simply embellished on what Rivera may have told him in an effort to bolster the Respondent's position in this matter.

After speaking with Rivera, Keller began addressing the employees in both Spanish and English, with some interpreting help at times from Rivera. He recalled that he and Rivera were next to each other in the midst of, and surrounded by, the 30-50 employees in the hallway. The crowd, he contends, grew at one point to between 80-120 employees as other employees entered the hallway. Keller claims that he introduced himself to the employees, told them he understood they were upset about not getting a Christmas bonus, and then informed them they would be receiving a 10-hour bonus, but that he was not at liberty or had the authority to make any changes to the bonus amount, or to discuss it at that time.<sup>11</sup> He purportedly told employees

protest by the time Romaniello arrived on the scene, and that someone other than Romaniello must have notified him of what was transpiring. (Tr. 1101).

<sup>10</sup> Rivera testified that during the hallway episode, Keller explained to employees "the same thing I explained, which would have been the 10-hour bonus." (Tr. 814). This rather vague and ambiguous assertion by Rivera is insufficient to support a finding that Rivera told employees in the cafeteria that they were getting a 10-hour bonus. Rivera's statement in this regard does not make clear where and when Rivera made this representation to employees. As noted, none of the other employees who testified in this proceeding as having been present in the cafeteria testified to hearing Rivera make any such "10-hour bonus" comment to employees.

<sup>11</sup> The Respondent's claim on brief (RB:7), that the employees demanded a 20-hour bonus in response to Keller's assurance they would be getting a 10-hour bonus, lacks evidentiary support. The Respondent bases its claim in this regard on testimony provided by Cruz.

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that he could hold a meeting after work to discuss the matter. Two employees, whom he subsequently identified as Mercado Peralta and Olivo, and occasionally DeJesus, yelled and shouted aloud and prevented him from addressing the group as a whole. He recalled hearing these employees remark that “the bonuses are right, we’re not animals, we’re human beings, you owe us the bonus and we’re not leaving here until we get it,” and observing DeJesus banging on lockers. (Tr. 731)

Keller claims that as he continued trying to tell employees that a meeting would be held to resolve the bonus issue, Mercado Peralta, DeJesus, and Olivo repeatedly interrupted him with their yelling and shouting while other employees expressed interest in hearing what he had to say. Both Keller and Rivera claim that Mercado Peralta, Olivo, and DeJesus stood only about 12 inches from them during this entire hallway episode. They both contend that on several occasions, DeJesus would come up to them, get in their faces and yell out loud, and turn and walk away while he banged on lockers. Rivera recalls seeing these three employees raise clenched fists in the air as they shouted and yelled. However, despite their alleged close proximity, e.g., 12 inches, to these three employees, both Keller and Rivera claimed not to have understood what these three employees were saying to them because they were yelling and shouting so loud, and that their yelling and shouting prevented him from communicating with other employees in the hallway. (Tr. 731-735). This latter claim by Keller and Rivera about being unable to communicate with employees in the hallway due to this alleged shouting and screaming is undermined by Roman who testified that she was able to hear Keller clearly because he has a strong voice which carried over the employees’ voices. Having heard him testify at the hearing and observed his demeanor, I am satisfied that Roman’s description of Keller as having a strong voice was accurate, and am further convinced that, as suggested by Roman’s testimony, Keller was capable of, and in all likelihood did, effectively communicate his message to the crowd of employees in the hallway.

It is undisputed that Keller, at one point, directed Bednar to remove Olivo from the scene. Keller testified that he became frustrated at Olivo’s refusal to let him communicate his message to employees, explaining that for a period of about 10-15 minutes, Olivo stood only 6-12 inches from his face and yelled and spoke very aggressively. However, as found above, Keller’s professed inability to communicate his message to employees due to the noise allegedly created by Olivo and other employees in the hallway is simply not credible. According to Keller, as Bednar stepped forward to escort Olivo out, several employees, including Mercado Peralta, DeJesus, and Garcia encircled both Olivo and Bednar to prevent the removal. Keller claims that, as employees did so, he “believes” he heard them say, “No, you’re not going to take him, we stand together.” He contends that on hearing these comments, it became apparent to him that “there would have been a fight...if [Bednar] had proceeded with removing [Olivo] from the group.” Concerned for Bednar’s, as well as Rivera’s and his own, safety, Keller claims he directed Bednar to step back out of the crowd. Bednar, as more fully discussed below, gave a somewhat different version of this event. Bednar, it should be noted, makes no mention in his testimony of being ordered by Keller to step away from the crowd. Rather, he testified that

However, Cruz’ testimony on this matter was ambiguous. For example, in answer to a question by Respondent’s counsel on whether Keller told employees there would be a 10-hour bonus, Cruz replied, “Yes, but the employees were demanding 20-hours bonus.” However, a few questions later, when Respondent’s counsel again asked Cruz if the “workers were demanding a 20-hour bonus,” the latter answered, “No, that is what they usually gave.” (Tr. 558; 560). Cruz’ rather ambiguous response to this particular question simply does not support the Respondent’s assertion on brief that employees had expressly demanded a 20-hour bonus when told by Keller they would be receiving a 10-hour bonus.

when employees began encircling Olivo, he simply put his hand up and backed away from the crowd on his own.

5 Called as a witness for the Respondent, kill floor employee Angela Boyrie testified that she went on break at around 10:40 a.m. and witnessed some of the events that were occurring in the hallway. She claimed that when she got there at 10:40 a.m., there were some 100-200 employees gathered in the hallway yelling and screaming that they wanted their bonuses, that “they don’t give a shit on what was going on,” and “didn’t want to hear any more excuses.” She contends that certain employees were “just cursing and yelling and pointing fingers.” According to Boyrie, Rivera and Collazo were already there trying to calm the employees down, and Keller arrived some 15 minutes later, which, if Boyrie is to be believed, would place Keller’s arrival in the hallway at around 10:55 a.m. However, Keller, as noted, testified he arrived in the hallway some 50 minutes earlier, at 10:05 a.m., long before Boyrie’s arrival. Boyrie’s claim that Keller arrived some 15 minutes after she did is rejected as not credible since it contradicts not only Keller’s testimony but that of almost all other witnesses who testified to being present in the hallway that morning.

20 Boyrie further testified that, during the exchanges that occurred in the hallway that morning between Mercado Peralta, Olivo, and other employees on the one hand, and Keller and Rivera on the other, she stood some five feet behind Keller and Rivera. Yet, unlike Keller and Rivera, who as noted, claimed not to have understood what the employees were saying, Boyrie was able to hear and understand what Mercado Peralta, Olivo, and other employees were saying. She recalled, for example, hearing Guzman complain that “they shouldn’t be treated like dogs or nothing like that because they work too hard for them not to be getting a bonus.” (Tr. 989; 1004).<sup>12</sup>

Boyrie further testified that Mercado Peralta and others, including Guzman, repeatedly

30 <sup>12</sup> Boyrie’s assertion that she was able to hear and understand what Mercado Peralta, Guzman, and the other employees were saying to Keller and Rivera stands in sharp contrast to Keller and Rivera’s professed inability to understand what the employees were saying. Both Keller and Rivera were apparently standing closer to these employees than was Boyrie during these exchanges. Clearly, if Boyrie, who was further away, could hear and understand what Mercado Peralta, Olivo, Guzman and other employees involved in these exchanges were saying to Keller and Rivera, it is reasonable to assume that the latter should likewise have had no problem understanding what was being said by the employees, particularly since, by Boyrie’s own account, most of the other employees in the hallway were “quiet most of the time.” I reject as not credible Keller’s and Rivera’s claim that they could not understand what Mercado Peralta, Olivo, DeJesus, or any other employee who spoke up that day were saying. The evidence makes clear that both Keller and Rivera are conversant in, and understand, Spanish, making it highly unlikely that their alleged failure to understand what these employees were saying was due to a language barrier. Neither Keller nor Rivera, in any event, has made that claim. Rather, their testimony is that, despite allegedly being only 12 inches from them, they could not understand what Mercado Peralta, Olivo, DeJesus and others were saying because the latter were simply yelling and shouting too loudly. Paradoxically, Rivera, as noted, was able to testify as to what Keller said to employees, but oddly enough, could not do the same regarding the employees’ remarks even though he was standing close to both Keller and the employees. Boyrie’s testimony undermines their claim in this regard. Further, it simply defies logic and common sense to believe that, while allegedly standing only 12 inches from them, Keller and Rivera were unable to make out, much less hear, what any of these employees was trying to convey to them, even if, as they contend, these employees were speaking loudly or shouting.

yelled and cursed and pointed fingers at Rivera and Keller, a claim denied by Mercado Peralta, Olivo, and Garcia, which denial is supported by Villar, Hernandez, and Cruz.<sup>13</sup> (Tr. 437; 488; 531-532). Berios also denied hearing any curse words or profanity used by any of the alleged discriminatees. Further, while claiming that Mercado Peralta, Olivo, and DeJesus were loud and disruptive in the hallway, neither Keller nor Rivera claimed in their testimony to have heard cursing or profanity used by the alleged discriminatees in the hallway or at any time during the work stoppage. Boyrie's claim, therefore, of having heard profanity and curse words being used by the alleged discriminatees in the hallway that morning strikes me as a gross exaggeration, if not outright fabrication, unworthy of belief.

Roman testified that after leaving the cafeteria, she joined the other employees as they congregated in the hallway. She recalled seeing Rivera, Collazo, and Keller, along with other supervisors in the hallway, but did not recall if Berios was present. Her recollection is that employees were all talking at the same time and loudly. She recalled hearing DeJesus complain that they had not been told about the bonus and they intended to fight for their rights. Keller, she contends, was responding to employee questions and told them to calm down, that they were going to have a meeting after work to discuss the bonus issue. Employees, she contends, were "kind of excited...and talking at the same time." She recalled hearing Keller tell employees to please calm down and return to work, that there would be a meeting after work to address the bonus issue. She contends that while employees were all together talking louder than Keller, she nevertheless was able to hear Keller over the noise of the crowd because Keller has a strong voice which carried over the employees' voices. At one point, Roman's supervisor, Jose Raspaldo, instructed her to return to the production area, which she did. She testified that when she left the hallway to return to work, everybody was already calm. (Tr. 1020-1023).

Navarro's account of the hallway episode is that after employees left the cafeteria, they went into the hallway where Keller, Rivera, and Collazo tried to calm them down. She contends that in the hallway, she stood in front of the three managers as Keller tried to convince employees to let the matter be discussed at a meeting. Employees, however, refused to let Keller speak and were all "screaming." In particular, she identified two individuals -- "Cuba" aka DeJesus and Mercado Peralta -- as the more vocal ones. Her testimony in this regard, however, was somewhat confusing and ambiguous. Thus, while claiming that DeJesus and Mercado Peralta were doing most of the "yelling," on cross-examination, Navarro, as previously noted, demonstrated that she had no idea who Mercado Peralta was. For example, asked by the General Counsel if Garcia and "Puerto Plata" aka Mercado Peralta were also in the hallway while this was going on, Navarro seemed uncertain, replying, "Maybe they were there, but I don't know," adding there were many people present and that all she could hear was DeJesus and Mercado Peralta. Pressed for a more definitive answer on whether or not she saw Garcia and "Puerto Plata" in the hallway, Navarro finally answered she had not. (Tr. 1054). It is patently clear that Navarro's testimony of having seen Mercado Peralta yelling in the hallway,

<sup>13</sup> I found Hernandez' and Cruz' testimony to be reliable and trustworthy. As stated, both testified while still in the Respondent's employ. While no presumption of credibility attaches to an employee who testifies while still in his or her employer's employ, the Board nevertheless often observed that such testimony is "apt to be particularly reliable." *Advocate South Suburban Hospital*, 346 NLRB 209, fn. 1 (2006); *Frazier Industrial Co.*, 328 NLRB 717, 724 (1999). *Fitel/Lucent Technologies, Inc.* 326 NLRB 46, 53 (1998); *International Carolina Glass Corp.*, 319 NLRB 171 (1995). From my observation of their demeanor on the witness stand, and their, at times, mutually corroborative testimony, I find that Hernandez and Cruz testified honestly and truthfully. As to Villar, while there are some inconsistencies in his testimony, for the most part he came across as credible.

like her claim of seeing him in the cafeteria when the work stoppage first began, is unreliable and not worthy of belief. Finally, Navarro claims that while in the hallway, she observed Guzman came within one foot of Rivera and tell him that “he was one of the worst enemies of the employees.” (Tr. 1042).

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Collazo testified that he showed up in the hallway after receiving a call from Rivera about employees gathering in the locker room area. When he arrived, he found some 20-25 employees gathered around Keller and Rivera and being “rowdy.” He also recalled seeing Romaniello and Avila in the hallway at that time, as well as Mercado Peralta, Olivo, and DeJesus. Collazo testified that as Keller tried to speak to the employees, Mercado Peralta, Olivo, and DeJesus spoke louder than Keller, preventing the latter from being heard, and becoming aggressive by yelling and getting closer to Keller. He contends that Mercado Peralta was standing some 1-2 feet from Keller during their exchanges, while Olivo and DeJesus stood about 3 feet away from Keller. Garcia, he further contends, was standing “almost next to” Avila, and some two feet behind Keller. Collazo recalled Keller telling employees they would be getting a 10 percent bonus, but could not say when they would receive it. Like Keller and Rivera, Collazo did not describe what Mercado Peralta, Olivo, DeJesus, or any other employee may have said to Keller and/or Rivera during the hallway episode, although he did not claim, as did Keller and Rivera, that he was unable to understand what these employees were saying. (Tr. 668-669; 672).

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Both Romaniello and Avila arrived in the hallway soon after Keller began addressing the employees. Romaniello testified she learned of the work stoppage from Avila, who purportedly heard it from another unidentified employee. Romaniello recalled seeing Keller and Rivera standing in the middle of some 50-80 employees and hearing Keller speaking to the employees in Spanish. As she does not speak Spanish, Romaniello did not understand what Keller was saying to employees. However, she testified that from the outside perimeter of the crowd where she was then standing, she could hear Keller clearly, describing his voice as “very loud,” and proffered that had Keller been speaking in English, she would have had no difficulty hearing and understanding Keller’s words. Romaniello’s testimony regarding her ability to hear Keller clearly over the noise in the hallway corroborates Roman’s similar claim. At one point, an employee Romaniello identified only as “Johnny” escorted her through the crowd to where Keller and Rivera were standing. According to Romaniello, Avila did not follow her through the crowd, and she did not know where Avila went after both arrived on the scene. Avila, however, claims that “Johnny” escorted both her and Romaniello through the crowd to where Keller and Rivera were (1105; 954). Romaniello testified that as she stood next to Keller and Rivera, the crowd encircled them and that, when Keller tried to address the crowd, employees began yelling with their arms in the air, pointed in Keller’s face, and kept getting closer to them. After about three minutes, Romaniello, unable to control the crowd and fearful that something might happen, left the hallway, returned to her office, and placed a call to Human Resources Vice President Daubenspeck, to advise him of what was transpiring, and to seek advice on what to do. Romaniello claims she never spoke to employees during this hallway incident. (Tr. 954; 1105-1108)

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Avila testified that on arriving at where Keller and Rivera were standing, she took a position right next to Keller on his left side as he tried to speak to employees. She contends, however, that Keller had difficulty speaking to employees because, as she voluntarily repeated throughout her testimony, the employees were “out of control.” Keller, it should be noted, denied seeing Avila at all during the entire the hallway episode. Keller’s denial notwithstanding, I find that Avila, as testified to by her and as corroborated by various other witnesses, was indeed present in the hallway, although where she actually stood vis-à-vis Keller is somewhat in question. I find it difficult to accept, however, that Keller would not have seen or noticed Avila

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standing next to him if that indeed was the case. Romaniello apparently left the area soon thereafter, but Avila remained in the event she was needed to interpret. Like Keller and Rivera, Avila, who speaks and understands Spanish, claimed not to have understood what the employees were saying to Keller in the hallway, stating, at one point, that she could not  
5 remember whether employees were speaking in Spanish or English because everyone was yelling and “out of control.” (Tr. 978-979). Avila further claimed not to have seen either Mercado Peralta or DeJesus in the hallway that day, a claim I find hard to believe in light of her admission that she was standing right next to Keller, who, in turn, claimed to have been standing only 12 inches from Mercado Peralta, DeJesus, and Olivo.<sup>14</sup>

10 Although she did not know Garcia at the time, Avila recalled that Garcia was one of the employees who stepped forward to prevent Olivo’s removal from the hallway. She claimed that as this was occurring, she made eye contact with Garcia, who was standing some 3 feet from her, and heard Garcia say that if Olivo were removed, everyone else was going to leave. She  
15 did not respond to Garcia, but testified that as employees moved forward to prevent Bednar from removing Olivo, Garcia grabbed her wrist tightly for a split second, and then pushed it down, which, she contends, made her even more fearful than she already was by the situation occurring in the hallway. Garcia, who testified she the others were standing on one side of the hallway some 5-6 feet from the managers, denied either grabbing or touching Avila in the  
20 hallway, and none of the General Counsel or Respondent witnesses who purportedly were present in the hallway and observed Avila there testified to having seen Garcia grab, push, or touch Avila. Avila contends that after this alleged incident with Garcia, she left the hallway and headed to Romaniello’s office where she told the latter that “someone,” whom she did not know, had grabbed her hand and pushed it down. She testified she had no further talks or discussion with Romaniello that Friday about this “touching” incident. Avila, however, claimed that at some  
25 subsequent point in time, presumably the following Monday since, by her own admission, she had no further discussions with Romaniello on Friday, Romaniello came to her with a photo of Garcia and asked her to identify if this was the person who had “touched” her. Avila told her it was. (Tr. 971) Unexplained by Avila is how Romaniello could have known on Monday, December 18, which employee picture to show Avila to have her identify who had touched her  
30 on Friday. Romaniello could not have gleaned that information from anything Avila purportedly said to her on Friday, for Avila testified only to have told Romaniello that some unknown person had grabbed her hand in the hallway, and had no further conversations with her that day.

35 Romaniello was vague on when, and from whom, she first learned of this alleged touching incident, claiming she simply could not recall when she was told or who told her of it. Romaniello testified that at her request, and for purposes of having her identify a photograph of the person who allegedly touched her, Avila came to her office between 9-10:00 a.m., Monday, December 18, and, once there, asked Avila to describe the “touching” incident to her.  
40 Romaniello believes Avila may have, during this meeting, mentioned the name Garcia to her, but she could not be sure of the name. However, when asked if this Monday meeting with Avila was the first time she heard of any incident involving Garcia, Romaniello replied, “I think so. I don’t recall having a discussion of that on Friday. I just don’t remember it.” Further, when asked if she knew anything about Garcia’s involvement in this “touching” incident before that Monday,  
45 December 18, Romaniello answered, “I don’t believe so.” As to the photo identification of Garcia, Romaniello claims that because Avila was not one hundred percent sure of the name of the person who “shoved” her, she and Avila went to security and had them pull up Garcia’s

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50 <sup>14</sup> Asked again if she saw either Mercado Peralta or DeJesus in the hallway that morning, Avila vacillated from her previous answer by stating that she did not remember seeing them. (Tr. 980-981).

Company photo ID on the computer, at which point Avila confirmed that Garcia was the one who had pushed her. (Tr. 1144; 1167-1169). Unexplained by Romaniello is the inconsistency between her claim that she asked Avila to come to her office to discuss this alleged Friday “touching” incident involving Garcia and to photo ID her, and her admission that she did not believe she knew of this alleged incident before Monday. Clearly, if, as Romaniello admitted, she was unaware of the touching incident before Monday and first learned of it when she met with Avila on Monday morning, her further claim that she summoned Avila to her office on Monday morning to discuss this very subject, and to have her identify Garcia as the individual who purportedly touched her, makes very little sense.

Avila, it should be noted, made no mention in her testimony of meeting with Romaniello in her office on Monday, or of going to the security office with the latter to identify Garcia from a computer photo. Rather, Avila’s testimony, which was somewhat vague in this regard, suggests that it was Romaniello who came to her with a photo of Garcia and asked her to identify the latter. This, and other above-described discrepancies and contradictions in their testimony regarding this incident, renders their testimony unreliable and not worthy of belief. Also rejected as not credible is Rivera’s assertion that Romaniello told him about the alleged “touching” incident during an afternoon meeting on Friday, December 15, for Romaniello, as shown by her testimony, did not learn of the incident until Monday, December 18, three days after Rivera claims Romaniello told him of it. (Tr. 836).

On balance, I am not convinced that Garcia grabbed or touched Avila during the hallway episode, as claimed by the latter. As stated, the only evidence that such an incident occurred came from Avila herself, and lacked corroboration from the various General Counsel and Respondent witnesses who testified to being present in the hallway and who, presumably, would have been in a position to observe the incident had it occurred. Nor, as noted, was her claim that she immediately reported the incident to Romaniello that same Friday corroborated by Romaniello.<sup>15</sup> Further, from a demeanor standpoint, Avila came across as scripted, and not

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<sup>15</sup> The Respondent’s assertion on brief, that Avila “made contemporaneous reports of the Garcia confrontation to Abreu, Bednar, and Romaniello is not supported by the evidence. (RB:32). Romaniello, as noted, recalled first hearing of this alleged incident between Garcia and Avila on Monday, December 18, and, consequently, not contemporaneous with its alleged occurrence on Friday. As to Abreu, the question put to her by Respondent’s counsel on this matter, which she answered in the negative, was whether Abreu recalled having “any further conversation” with Romaniello regarding Garcia “on that Friday or Monday.” (Tr. 1074-1075). Abreu never testified to hearing anyone tell her about an alleged “touching” incident that occurred in the hallway between Garcia and Avila. While she did testify to speaking to Avila in the cafeteria regarding Garcia, there was no testimony from Abreu as to what that conversation entailed. Consequently, the Respondent’s assertion that Avila told Abreu of this alleged incident in the hallway is based on nothing more than rank speculation and conjecture. Nor is there anything in Bednar’s testimony to indicate that Avila told him of this alleged touching incident by Garcia soon after it purportedly occurred on Friday. The only evidence relating to what Bednar knew of this incident is an email Bednar sent to Dennis Lee on Tuesday, December 19, four days after the alleged incident, in which Bednar informs Lee of a conversation he had with Avila the day before, December 18, wherein Avila told Bednar how “someone grabbed her from the crowd and yelled at her about things.” (RX-10). Avila recalled mentioning something about this incident to “the security guy” but did not recall when she may have done so. At best, Bednar’s e-mail to Lee shows only that Bednar learned of an incident involving Avila and another unidentified person on Monday, December 18, three days after the alleged incident is said to have occurred, and not, as the Respondent asserts on brief, contemporaneously with its alleged

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particularly reliable or worthy of belief. Avila's repeated use of the phrase "out of control" to describe the employees' behavior during the work stoppage struck me as a well-rehearsed phrase especially selected for use in the trial. Avila also was somewhat evasive and less than forthright when questioned about her longstanding personal relationship with Rivera.<sup>16</sup>

5 Accordingly, her testimony in this regard is rejected as not credible. Rather, I credit Garcia and find that this particular "handgrabbing," "touching," or "pushing" incident never occurred.<sup>17</sup>

10 Alleged discriminatees Mercado Peralta, Olivo, Garcia, and Guzman, as well as employees Cruz and Villar, gave accounts of what they observed and heard during the hallway episode. Mercado Peralta recalled that on entering the hallway, he saw Olivo speaking to Keller, and heard Olivo tell the latter that he could not understand why, after employees had worked so hard that year, the Company had not considered giving bonuses to employees. Olivo, he contends, pointed out to Keller that work had apparently gone well, and that employees were working and keeping up with production. He believes Rivera replied by stating that they would have a response for employees but that they had to return to work. Mercado Peralta claims he then asked for, and received, permission from Rivera to speak. He recalled telling Keller and Rivera that employees wake up early at 5 a.m., and those employees who do not have transportation have to pay \$25 to get to the plant. He further pointed out to them that employees had willingly worked very hard that year, and asked how was it possible that they had not considered throughout the year whether or not to give out employee bonuses. Mercado Peralta then proffered that it would be good if they could all come to an agreement and return to work. Rivera translated for Keller what Mercado Peralta had said. According to Mercado Peralta, Keller's response was that nothing could be done and that they should return to work. Mercado Peralta claims that after he spoke, Olivo again spoke up, saying that the Company had mistreated them and treated them poorly, and expressed his belief that it was only fair that employees receive bonuses that year. Mercado Peralta claims that he and the other employees stood on opposite sides of the hallway from the managers, some 3-4 feet away from each other, and that he at no time used rude, insulting language, or profanity when speaking to the managers.

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occurrence. In sum, the Respondent's assertion is based on nothing more than speculation, conjecture, and, I am inclined to believe, a deliberate mischaracterization of the record evidence.

35 <sup>16</sup> Avila is Rivera's fiancée. Rivera has known her for at least ten years, and testified that they have had a close, personal relationship for four years and, at the time of the hearing, were living together. Avila was somewhat evasive regarding her long-standing relationship with Rivera. She testified to having left the Respondent's employ of her own volition in 2004. A letter received into evidence as GCX-6 shows that she, in fact, voluntarily left the Respondent's employ in October 2003, but also indicates that her departure may have had something to do with a romantic relationship she was having with a supervisor at the time. Rivera's claim that his close personal relationship with Avila dated back four years strongly suggests that he was the one with whom she was having a romantic relationship when she left the Respondent's employ in late 2003. (Tr. 835). Avila denied being in a relationship with Rivera when she left the Respondent's employ in 2003, contradicting Rivera's more reliable assertion to the contrary. Avila, I find, was being less than candid in owning up to her long-term relationship with Rivera.

45 <sup>17</sup> While there were also some inconsistencies in Garcia's testimony, such as her claim that it was Avila, not Keller, who directed Bednar to remove Olivo from the hallway, her overall testimony vis-à-vis Avila's was more reliable and trustworthy. It is worth noting in this regard that it is not uncommon, and fully within his or her judicial discretion, for a trier of fact to believe some, but not all, of a witness' testimony. *American River Transportation Co.*, 347 NLRB No. 93, slip op. at fn. 12 (2006).

Mercado Peralta admits it was somewhat noisy in the hallway, but attributed the noise to the fact that all employees were talking at once. He denied, however, that employees or managers engaged in yelling or shouting in the hallway. He recalled hearing Olivo speaking loudly but only because the noise of other employees in the hallway speaking at the same time prevented him from being heard. He contends that because he was unable to hear Olivo from where he was standing in the back of the crowd, he moved to the front. Mercado Peralta claims that he at one point asked Rivera if he could speak and Rivera gave him permission to do so. Rivera denied that Maximo Peralta or Olivo ever asked for permission to speak. I credit Mercado Peralta's claim that he asked Rivera for and received permission to speak. Rivera, as noted, testified he could not understand what the employees were saying in the hallway purportedly because Mercado Peralta, Olivo, and others were yelling loudly, a claim which I have rejected as simply not credible. Thus, if, indeed, Rivera was unable to understand what Mercado Peralta and others were saying to him in the hallway, how would he have known if Mercado Peralta had made such a request of him? This inconsistency was not explained by Rivera, leading me to doubt his denial that Mercado Peralta asked him for permission to speak.

Overall, Mercado Peralta described the situation in the hallway as "orderly." He denied getting any closer to Keller than the 3-4 feet separating them, hearing any negative or threatening remark being made, seeing Olivo or any other employee bang on lockers, and denied that he or Olivo pointed their fingers at Keller as they conversed. He admits, however, being part of the group of employees who stepped in front of Olivo to prevent his removal by Bednar. (Tr. 154-160; 562). He recalled several employees asking Keller what crime Olivo had committed that required his removal, and telling Keller that Olivo was only addressing work-related matters at the plant. Mercado Peralta testified that he was not one of the employees who expressed these views. Cruz, however, testified that Mercado Peralta was one of the employees who spoke out on the workers' behalf in the hallway that morning.

Olivo gave the following recollection of the hallway events. Employees, he contends, stood some 8-9 feet from the managers at all times, except for the one instance when he was about to be removed by Bednar. He testified that Mercado Peralta, Garcia, and other employees spoke up and addressed the management group at various times. He recalled Mercado Peralta asking Keller and the other managers why a memo regarding the bonus had not been issued to employees as had been done in the past. Keller replied that they would have an answer for them regarding the bonuses as soon as possible. Olivo recalled saying aloud that he could not understand why the Company was "going to reduce" the bonus "from 20 hours when the Company was doing well and we were good workers."<sup>18</sup> Garcia, according to Olivo, asked Keller why the Company had not spoken to employees beforehand about what they were doing, and Keller simply answered that they would have an answer, presumably

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<sup>18</sup> It is unclear what Olivo meant by his remark about the bonus being reduced from 20 hours, as he was not asked to explain it. There was testimony by Keller, Rivera, and Collazo, all of whom were not particularly credible witnesses, suggesting that employees were told in the hallway that they would be receiving a 10-hour bonus. It is not, however, clear that this is what Olivo might have been referring to. Notably, other than Keller, Rivera, and Collazo, no other witness present in the hallway that morning testified to hearing Keller promise employees a 10-hour bonus, although Garcia did testify to hearing Keller say that employees could possibly receive a 10-hour bonus but would not have an answer for them until the following Monday. I credit Garcia's account and am convinced that Keller never assured employees they would receive a 10-hour bonus, but instead told them a 10-hour bonus might be possible but he could not give them an answer at that time but would have to wait until Monday.

about the amount of the bonuses, as soon as possible.

5 Olivo also recalled raising a concern about why he only had two people working with him when there had been five individuals in the past, explaining that he viewed such a reduction as abusive. Olivo contends that right before he was ordered removed by Keller, he was  
 10 commenting to Keller about these abuses and about the failure to distribute bonuses. When Keller gave the order, Olivo recalled hearing Keller order Bednar to take him out of the hallway.<sup>19</sup> Olivo recalled that as Bednar approached to escort him out, Mercado Peralta, Garcia, DeJesus, and other employees, whose names he could not recall, gathered in front of  
 15 him to prevent his removal. Olivo denied seeing any employee banging on lockers, shaking their fists over their heads, chanting, or shouting. Olivo admitted speaking in a loud voice, but claimed he did so only because the noise level was high given the large number of employees gathered there. He denied that he, Mercado Peralta, Garcia, or DeJesus shouted, yelled, cursed, or used profanity towards Keller or any other management official. Nor, he contends, did managers shout when they addressed the group of employees, and spoke only in a loud voice in order to be heard, again because the noise level was fairly high. (Tr. 306-310).

20 Garcia recalled Keller telling employees on several occasions to return to work, that he would have an answer for them by Monday on why they had not received Christmas bonuses. Employees, however, remained unsatisfied and insisted that Keller given them an answer then and there, claiming that Keller and the Company had had all year to come up with an explanation. She claims that Rivera at one point told employees to return to work or he would call security on everyone, and heard Olivo remark that employees should be given an answer  
 25 that day because “we can’t be working here nine or ten hours like animals without having communication.” Soon thereafter, an attempt was made to remove Olivo, and she and others surrounded Olivo to prevent his removal because, in the employees’ view, Olivo had done nothing wrong to warrant his removal. Garcia did recall saying to Avila that they cannot take Olivo but, as found above, she never touched or pushed Avila during this incident, as alleged by Avila.<sup>20</sup> The police arrived on the scene a few minutes later. (Tr. 51-58).

30 Guzman arrived in the hallway around 10:30 a.m. as he was about to take his break and, consequently, offered little testimony on what occurred there. He recalled finding some 30-40 employees gathered along both sides of the hallway, and Keller and Rivera also present. He recalled little else, however. Thus, he did not recall hearing what Mercado Peralta or Olivo said  
 35 that morning, nor did he hear any manager say there would be a bonus or that a meeting would be held to discuss the bonus issue. He apparently remained in the hallway for a short while before going outside the facility for a smoke break.

40 Cruz testified that when he entered the hallway, he heard Keller asking employees to return to work, and telling them that the solution to the problem was to return to work and give him some time to talk with his supervisors, that he was unable to make a decision at that point regarding the bonuses. Employees, however, insisted on speaking with someone who could

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45 <sup>19</sup> Olivo initially testified that he did not understand what Keller said when ordering Olivo removed. However, when presented with his affidavit on cross-examination, Olivo admitted hearing “the supervisors” instruct security to take him “out of the hallway.”

50 <sup>20</sup> Garcia’s assertion that it was Avila who instructed the security guard to remove Olivo is inconsistent with Olivo’s and other witnesses’ assertion that it was Keller who asked to have Olivo removed. I find Garcia was mistaken in her testimony, and that it was Keller who ordered Olivo escorted out of the facility. Garcia, however, did admit that she did not know if Keller may have instructed security to remove Olivo. (Tr. 118).

5 make that decision. He recalled Mercado Peralta saying to Keller that “it was a shame that a  
company with this projectory would have problems with something as small as a bonus with so  
many years that this company has been here.” Olivo expressed his view to Keller regarding the  
number of work hours given to employees, reflecting his apparent disappointment that work  
hours were being reduced for persons like him who were heads of families. Cruz also recalled  
hearing Garcia question why the Company could not have placed a notice on a wall stating  
there would be no bonuses. Someone did respond to this query, although Cruz could not  
10 identify the individual, by stating that a notice on the bonuses was being prepared or was on its  
way. He also recalls DeJesus being present and speaking, but could not remember what  
DeJesus said. Cruz described the exchanges as just basic conversation, without any show of  
disrespect. At no time did he hear any abusive or offensive language, or curse words, used by  
any of the four above-mentioned employees. Employees, he contends, seemed to identify and  
agree with what Mercado Peralta was saying to Keller for they applauded as he spoke. Cruz  
15 denied seeing any employee touch, push, or demonstrate any aggression towards any  
supervisor, nor did he see employees waving fists in the air. He recalls that, at one point, a  
MOPAC security guard sought to remove Olivo from the area, but was prevented from doing so  
by employees who formed a circle around Olivo. The police, he contends, arrived a short while  
later. (Tr. 529-534)

20 Villar testified that on entering the hallway, some 25-30 employees were already there,  
along with Keller, Rivera, and supervisors Collazo and Giraldo Vargas. He recalled Mercado  
Peralta being the principal speaker for the employees, but remembered hearing Garcia, Olivo,  
Guzman, and DeJesus also speak out. Mercado Peralta, he contends, asked Keller to explain  
why employees were not receiving bonuses that year. Keller purportedly replied that since it  
25 was Friday and his own supervisor was not at the facility, employees should wait until the  
following Monday for an answer. Mercado Peralta, however, insisted that they wanted an  
answer that same day. The other employees, Villar recalled, responded to what Mercado  
Peralta was saying by telling management to pay them the bonus, and cheered Mercado  
Peralta on by saying “that’s the way to go.”

30 Villar contends that when Mercado Peralta finished speaking, Rivera tried to speak but  
Guzman told Rivera he could not speak for the employees because he had not defended them  
in the past. Rivera did not respond, according to Villar. He further testified, however, that, in  
directing his remark at Rivera, Guzman did not scream at Rivera, and that neither Guzman nor  
35 any of the other employees who spoke up that morning used profanity, curse words, or other  
offensive language towards Rivera or anyone else. He also denied seeing any of these  
individuals bang on the hallway lockers. Although Villar, as noted, claimed to have heard  
Garcia, Olivo, and DeJesus speak out that morning, he could not recall what they may have  
said, stating only that they kept referring to the bonus issue. He did, however, recall that  
40 Garcia, soon after the police arrived, asked Avila if she had called the police, and then told Avila  
she had no right to do so. He also recalled seeing Garcia and Avila standing relatively close to  
each other but testified that, except for the above-described verbal exchange, nothing happened  
between the two. In short, Villar’s testimony, contrary to that provided by management  
witnesses, is that the events that occurred in the hallway on December 15, were neither rowdy  
45 nor out of control. Rather, his recollection is that the only time employees became loud and  
began yelling was when the police arrived and ordered them to shut up. Villar contends that  
employees did not appreciate being told to shut up by the police, and commented aloud that  
they had no reason to do so because they (the employees) were being treated like “animals.”  
(Tr. 435; 439-440, 466)

50 Hernandez testified to being present in the hallway as employees tried to speak with  
Keller and vice versa. He recalled it being noisy in the hallway because everyone was talking at

the same time, but contends that Keller was allowed to speak. At times, when Keller was speaking, he wouldn't finish what he had to say because employees began speaking again. According to Hernandez, while all employees apparently tried speaking at the same time, there was no yelling or shouting by employees in the hallway. He contends that employees only spoke as loud as Keller was speaking.

Bednar, as pointed out earlier, is the security guard asked by Keller to remove Olivo from the hallway. Bednar claims he learned from employees that something was happening in the hallway as he was making his rounds. On arriving at the hallway, he saw Keller and Rivera trying to talk to some 30-40 employees who were gathered there. While he could not make out what was being said, he concluded from Rivera's translation of what Keller was saying that the matter pertained to holiday pay. He recalled hearing Keller and Rivera telling employees that there had been a miscommunication and that it would be rectified. Employees, on the other hand, were yelling, raising papers in the air, and banging on lockers, although he admitted that not all employees behaved in the same manner.<sup>21</sup> Rather, he testified that there was a small group of employees who were "probably" provoking the crowd to become more hostile or aggressive towards management. Asked how this provocation was done, Bednar explained that these few employees, two of whom he subsequently learned were Olivo and Mercado Peralta, "would cut off" Keller as he spoke, which he described as being "disrespectful." He contends that when these individuals interrupted Keller, Olivo would begin to chant which, in turn, caused the "whole crowd" of employees to begin "banging on lockers and just acting out of the ordinary...acting a little out of control." This, he further contends, was the extent of these employees' provocative conduct. They did not, however, block anyone's way in the hallway. He described Mercado Peralta as the most vocal employee in the group. On observing what was going on, Bednar used his two-way radio to request further assistance from other security and supervisory personnel that might be available. (Tr. 883).

Bednar recalled seeing Romaniello, Avila, and Abreu arrive in the hallway a short while later, and claims they began urging employees to return to work and telling them the work stoppage was not the way to handle the situation. Neither Romaniello, Avila, nor Abreu corroborated Bednar's claim in this regard. Thus, Romaniello admitted that she did not speak at all in the hallway that morning. As to Avila, she made no mention in her testimony of taking part in trying to persuade employees to return to work or telling them this was not the way to handle the problem. Abreu, for her part, never claimed to have been in the hallway at all during this particular episode, much less being part of any effort in the hallway to encourage employees to return to work. In fact, her testimony, as discussed below, reflects only that she was present during the second cafeteria episode. Bednar's claim, therefore, of having heard or seen Romaniello, Avila, or Abreu urging employees in the hallway to return to work is simply not credible and is, I am convinced, a pure fabrication on Bednar's part designed to aid the Respondent's case.

Regarding the Olivo incident, Bednar testified that Keller instructed him to "take care" of Olivo after Keller "got tired of being interrupted" by him. As he moved forward to do so, Mercado Peralta, he contends, also stepped forward in an apparent effort to block him, followed by several other employees. Unlike Keller, who claimed this group of employees encircled and surrounded Olivo and Bednar presumably isolating him from the other managers, Bednar testified that employees simply moved forward and that he, as well as Keller and Rivera, were in

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<sup>21</sup> When asked, on cross-examination, about the screaming by employees in the hallway, Bednar changed his account somewhat by claiming that employees were only "raising their voices and just holding paper" in their hands. (Tr. 908).

the middle of this “small, condensed circle.” Bednar claims that four employees, led by Mercado Peralta, challenged and dared him with hand motions to come and try to remove Olivo, and taunted and threatened him while telling him to calm down and that he did not belong there. Neither Keller nor Rivera, however, nor, for that matter, any other witness who was present and testified at the hearing, claimed to having seen Mercado Peralta or any other employee taunt, threaten, challenge, or dare Bednar to remove Olivo, or to have heard employees tell Bednar to calm down or that he did not belong there. According to Bednar, Keller and Rivera were only one step behind him when this exchange with employees took place. Presumably, therefore, Keller and Rivera could easily have seen and heard these exchanges taking place. Their failure to corroborate Bednar’s account leads me to conclude that Bednar was again exaggerating and embellishing his account to fit the Respondent’s defense. Bednar’s propensity for exaggeration and embellishment became most apparent when he tried, rather feebly and unconvincingly, to equate the behavior of employees during the work stoppage with his experiences during the armed conflict in Bosnia. (Tr. 905). Accordingly, Bednar’s above description of what transpired between him and the employees in the hallway that morning is rejected as not credible.<sup>22</sup>

Bednar claimed that in response to the employees’ actions, he put his hand up, told employees to calm down, and backed away from the employees. His testimony in this regard suggests that he backed off on his own without any instructions from Keller, implicitly contradicting the latter’s claim that it was he who directed Bednar to back away. Nor was Rivera’s claim at the hearing, that he pulled Bednar back from this employee group by grabbing him by rear of his pants, corroborated by Bednar. Further, Bednar’s assertion that the crowd of employees all banged on lockers is at odds with Keller’s and Rivera’s testimony of having only seen DeJesus banging on a locker. After backing away from the employees, Bednar testified he left the area and instructed security guard John Geist to call 911 and report a “possible riot of 50 or more employees” at the facility. As Geist did not testify, it is unclear what message he may have conveyed to the 911 operator. Overall, I found Bednar’s testimony not very convincing, peppered as it was with inconsistencies and obvious embellishments and/or exaggerations. Accordingly, his testimony as to what transpired in the hallway on the morning of December 15, is rejected as not credible. Further, the inconsistencies between Keller’s and Bednar’s testimony regarding the Olivo incident also casts doubt on Keller’s version of events and renders it equally unreliable.

Two police officers, Glenn Kranich and Al Jazul, of the Franconia, PA Police Department, which has jurisdiction over the MOPAC facility, were the first responders to the 911 call. Kranich testified he received the call around 10:14 a.m. from an unidentified MOPAC security guard who reported that a large fight was taking place at the plant among some 50-70 employees. On their way to the MOPAC facility, Kranich radioed for assistance from other police jurisdictions. On arriving at the plant, Kranich was met by a MOPAC security guard who

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<sup>22</sup> A report, identified by Bednar as prepared by him on December 15, memorializing the events of that day, was received into evidence as RX-9. Nowhere in RX-9 is mention made by its purported author, Bednar, of Mercado Peralta or any other employee “taunting” or “threatening” him during this episode. Further, while the report states that Rivera was the one who informed Bednar of the situation occurring in the hallway, at the hearing, Bednar testified that it was employees, and inferentially not Rivera, a supervisor, who reported to him what was going on, but could not recall who the employees were. Bednar’s report, it should be noted, also avers that Keller asked him to remove Olivo only after the latter said something to Keller in Spanish. This, however, appears to be at odds with Keller’s assertion that it was his “frustration” over Olivo’s alleged refusal to let him communicate his message to employees for some 10-15 minutes that led him to ask for Olivo’s removal.

reported to him that “a security officer was being assaulted in the hallway by numerous employees.” As he made his way to the hallway area, Kranich kept asking persons along the way “where the large fight was.” He received no response and simply followed the sound of shouting and screaming” he was hearing. He eventually located the source of the commotion in the hallway, and found some 100-150 people yelling, screaming, and jumping around. He did observe some employees with their hands in the air, but denied they did so with clenched fists, stating instead that they did so with their palms opened. He began walking through the crowd in the hallway, looking for the security officer who was presumably being assaulted, and attempting to find out what was going on from employees he encountered. Kranich eventually learned that the matter involved a dispute between the employees and MOPAC over the bonus. As he and Jazul walked through the hallway and employees noticed their presence, things began to quiet down. According to Kranich, employees were respectful towards him as he made his way down the hallway towards where Keller and Rivera were. At one point, certain individuals standing near the managers began shouting in Spanish, prompting Jazul to yell “shut up,” at which point everyone began yelling and shouting.

Kranich testified that while he felt he was making some headway with employees, his partner’s actions in yelling to employees to “shut up” only served to anger the employees and gave them a reason to start yelling and screaming again. It was at this point that Kranich claims he felt that the crowd might get violent. Soon thereafter, however, other police officers arrived on the scene, allaying Kranich’s fears. To further calm things down, Kranich and his partner began motioning the employees to go into the cafeteria, which they eventually did. (Tr. 359-364; 382; 384-385).

25 (c) The second cafeteria episode

Once inside the cafeteria, the employees, numbering between 100 and 150, dispersed into smaller groups. Kranich testified that employees continued to yell and scream as they entered the cafeteria. Inside the cafeteria, Kranich recalled seeing the “floor manager” standing on a table or a chair alongside a female interpreter telling employees that “they needed to return to work or they were going to be excused for the day, and that the problems they needed to talk about would have to wait and would be discussed with management.” He did not recall seeing any of the employees in the group he was next to standing on tables. (Tr. 367-368)

Keller testified that after discussing with two police officers how to proceed and asking them to keep a low profile as he tried to resolve the situation, he followed the employees into the cafeteria. On entering the cafeteria, he observed two separate grouping of employees. The larger group, he contends, was being addressed by Mercado Peralta who stood on a bench while doing so. Keller also claimed to have seen Berios standing on a table as Abreu addressed the group Mercado Peralta had been speaking to. However, he subsequently modified his testimony to reflect that, in fact, it was Mercado Peralta, not Berios, he saw standing on the table, and that Berios was actually standing on the floor. Keller recalled mentioning to Collazo that Mercado Peralta should not be on the table, but was not sure if he instructed Collazo to tell Mercado Peralta to get down, or if he did so himself.

Collazo also claimed to have seen Mercado Peralta get up on a table and speak out and agitate other employees by telling them that “We have to be united, we’re not animals, we deserve the bonus.” According to Collazo, Mercado Peralta had made the same remarks to employees and management during the hallway episode, although he contends that Mercado Peralta had been more aggressive and spoke in a higher voice in the hallway when making his remarks. Collazo contends that he was the first to order Mercado Peralta off the table, and that Keller, Rivera, and Acosta subsequently made the same request of Mercado Peralta, but that

the latter refused to do so. Mercado Peralta denied ever getting on a cafeteria table.  
(Tr. 676-677; 686)

5 There are sound reasons for doubting Collazo's claim that Rivera, Acosta, and Keller  
instructed Mercado Peralta to get off a cafeteria table. Thus, both Rivera and Acosta had no  
recollection of seeing Mercado Peralta standing on a cafeteria table, rendering implausible  
Collazo's assertion that Rivera and/or Acosta issued such a directive to Mercado Peralta. As to  
Keller, the latter, as noted, was uncertain whether he or Collazo ordered Mercado Peralta off the  
table, undermining Collazo's claim that Keller also instructed Mercado Peralta to step down.  
10 Nor do I find credible Collazo's claim that he was the first to instruct Mercado Peralta off the  
table, and that, after doing so, he was instructed by Keller to return to his work area. According  
to Collazo, after being instructed by his superior, Keller, to return to the production area, he,  
Collazo, intentionally ignored those instructions and hung around a bit longer during which time  
he purportedly observed Rivera and Acosta order Mercado Peralta off the table. Not only is his  
15 testimony not corroborated by either Rivera or Acosta, but I doubt seriously that Collazo would  
have ignored Keller's directive to return to the production floor immediately. From a demeanor  
standpoint, Keller did not strike me as someone who would have readily tolerated such a refusal  
by a subordinate. In sum, I am convinced that this aspect of Collazo's testimony was a pure  
fabrication designed to help bolster the Respondent's case. I find instead that Mercado Peralta  
20 was never on a cafeteria table during the second cafeteria episode.

Keller recalled getting up on a bench and addressing the employees in English while  
Berios interpreted, asking them to return to work or, if they refused to do so, to head to the  
double doors on the far side of the cafeteria where police were stationed and they would be  
25 escorted off the premises. He contends that as he did so, Mercado Peralta shouted to  
employees, "Don't leave, don't listen to him, don't go back to work, we're staying here." Keller  
claims that after repeating his message to employees a third time to either return to work or  
head towards the exit, employees began to respond and started heading towards the production  
floor. Keller did not witness either Mercado Peralta or DeJesus being escorted out of the  
cafeteria by the police. He testified that he learned of their removal sometime after things in the  
cafeteria had calmed down and employees had returned to work, although he did not say who  
30 informed him of it or whether he was told of the circumstances which prompted their removal.  
There is, in this regard no evidence, including testimony by the two police officers involved in  
the removals, Kranich and Ciarello, to indicate that Keller was told why Mercado Peralta and  
DeJesus were escorted out of the cafeteria, although, as noted below, there is strong evidence  
35 to suggest that Mercado Peralta was removed on instructions from Keller. (See, e.g., RX-20).

Rivera entered the cafeteria with Keller, and claims employees were still yelling and  
screaming as they headed for the cafeteria and, once inside, dispersed into smaller groups. He  
40 and Keller went over to the larger group, which included Mercado Peralta, and reiterated the  
earlier message conveyed to employees in the hallway to either "return back to their jobs or  
leave the plant." He contends Mercado Peralta continued to yell and scream at Keller as they  
did so, a claim not made by Keller in his recitation of events. Acosta showed up a few minutes  
later at which time Rivera went over to where Olivo and another employee group were gathered  
45 and began repeating the same message to them about returning to work or leaving the plant.  
Olivo and this group, he contends, then began heading back to work, and were joined by  
DeJesus. Rivera contends that as he, Olivo, DeJesus, and this employee group headed  
towards the hallway to return to work, Olivo apologized to him for the entire situation, explaining  
that employees had an obligation to speak up.  
50

Rather than returning to the production area, DeJesus, according to Rivera, slipped back  
into the cafeteria. DeJesus was eventually removed from the cafeteria by the police, but Rivera,

like Keller, did not witness DeJesus' removal, or the events or conduct by DeJesus that led to it. Romaniello, on the other hand, claimed to have seen an employee, presumably DeJesus, being surrounded by five officers, and DeJesus resisting and fighting off attempts by the police to grab and hold him by his arms. At one point, DeJesus, she contends, "went down on the ground,"  
5 after which he was stood up, handcuffed, and escorted out of the facility. Romaniello, it should be noted, did not claim to have seen DeJesus push or shove a police officer. Nor is there anything in Romaniello's testimony to suggest she reported this incident involving DeJesus to Keller while they were in cafeteria, or at some point thereafter. Romaniello did recall speaking with Keller shortly after the incident, but testified only that this conversation involved Keller  
10 instructing her on where to position herself as the work stoppage waned and employees began returning to work. Romaniello claims that soon after this conversation with Keller, she heard screaming and saw employees returning to the cafeteria, where they continued yelling, screaming, speaking loudly, and forming groups. She gave no indication in her testimony of knowing what may have prompted employees to return to the cafeteria.

15 Rivera contends that shortly after escorting Mercado Peralta out, he came back to the cafeteria and was standing by the doors leading to the hallway when Guzman came up behind him and brushed up against his shoulder as he went by. Rivera contends that as Guzman did so, the latter put his finger some six inches in front of his (Rivera's) face, and yelled aloud to the  
20 group, "this is our true enemy." Despite claiming that these were the exact words directed at him by Guzman, Rivera nevertheless admitted that he asked Guzman what he had just said, suggesting implicitly that he may not have clearly heard or understood Guzman's remark. Guzman, he contends, did not respond and continued on through the crowd towards the slaughter department. According to Rivera, Guzman made his remark only once and did not  
25 repeat it. (Tr. 828-830)

Regarding this Rivera-Guzman exchange, Boyrie claims she witnessed Guzman "get close enough to touch [Rivera's] nose, point a finger in Rivera's face, and accuse him of being  
30 "one of the first enemies that we had here." Navarro also testified that during the hallway portion of the work stoppage, she was "speaking in front of" Rivera when [Guzman] passed by, turned around, and told Rivera he was "one of the worst enemies of the employees." (Tr. 991; 1042)

35 Following this exchange, Rivera claims he then turned back to the cafeteria and observed Mercado Peralta being "disruptive." He recalled seeing a police officer trying to grab Mercado Peralta on the shoulder to escort him out because he was refusing to either go through the hallway back to work or to leave the premises through the double doors on the other side of the cafeteria. Rivera contends he then walked up to Mercado Peralta, put his arm around him, and urged him to follow the officer's instructions as he did not want to see anybody get hurt. He  
40 and the police officer then escorted Mercado Peralta to the door leading out of the facility.

Romaniello also claims to have witnessed the Mercado Peralta incident in the cafeteria. She testified that once in the cafeteria, employees who chose to return to work were asked to return via a hallway that led to the slaughter area, and not through some double doors leading  
45 to the Fabrication department. Romaniello contends that Mercado Peralta refused to follow these directions and sought to enter the work area through the wrong doors. She testified to seeing Rivera walk up to Mercado Peralta and place his arm around him in an effort to speak with him. While presumably only five feet away, Romaniello could not hear what Rivera was saying to Mercado Peralta. She claimed that Mercado Peralta resisted Rivera and would not let  
50 Rivera speak to him, and that, at one point, he broke away from Rivera and tried to "bust through the crowd to get to [the] double doors" he and other employees had been instructed not to go through. Romaniello contends that Mercado Peralta was then pursued by a police officer

and another supervisor and returned to the cafeteria. Presumably, it was at this point that Mercado Peralta was escorted off the premises. She made no mention of seeing Rivera take part in escorting Mercado Peralta out of the facility. (Tr. 1120; 1196-1197). By the same token, Rivera made no mention of seeing Mercado Peralta “bust” through a crowd of employees to get through the double doors.

Bednar, who also claimed to have witnessed and taken part in the incident involving Mercado Peralta, gave a much different account than that provided by Romaniello. Thus, he testified that when employees in the cafeteria began heading towards the hallway to return to work, he noticed that Mercado Peralta was among the employees returning to work and he immediately notified his “boss” and the police officer that Mercado Peralta should be restrained and taken outside. He did so, he contends, because Mercado Peralta was “one of the instigators” who had stopped him from doing his job, and had challenged and “taunted” him in front of other employees in the hallway. He explained that he viewed Mercado Peralta as an “instigator” because he was “one of the individuals that was responsible for getting [the work stoppage] escalated to the point it was escalated to.” However, when asked on cross-examination if he had Mercado Peralta removed from the facility because he viewed the latter as an “instigator,” Bednar changed his story, stating that Mercado Peralta was not removed for being an “instigator” but rather “because he personally threatened me and I felt threatened by his actions.” (Tr. 895; 910) In RX-9, Bednar’s December 18, report on the work stoppage, Bednar wrote that he prevented Mercado Peralta from returning to work and had him escorted out of the building by two police officers because Mercado Peralta had been “the main cause of the situation with getting the employees fired up.” Bednar made no mention in his testimony or in his report of Mercado Peralta trying to return to work through some other cafeteria exit, or “busting” through a crowd of employees. Nor does his report state that he had Mercado Peralta removed because the latter threatened him and because he, Bednar, had felt threatened by Mercado Peralta’s actions.

Mercado Peralta’s account is that, once inside the cafeteria, he saw Keller on a cafeteria table telling employees on several occasions to return to work, that nothing could be done at that point, and he responding to Keller that employees would return to work once they obtained a satisfactory response on the bonus question. Keller replied that those who are unable to return to work should go home. Mercado Peralta also recalled seeing Abreu get on a table and scream out loud to employees to return to work or leave the plant.

Mercado Peralta testified that as he turned and headed towards the hallway to return to work, two Company security guards grabbed him by the arms in the hallway and told him they had been ordered to remove him from the facility. They then escorted him back to cafeteria where two police officers took him by the arm to escort him out of the facility. He recalled one of the officers telling him not to be afraid, that he hadn’t done anything wrong, but that management did not want him in the plant. At that point, Rivera approached and Mercado Peralta asked him why he was being removed. Rivera answered that he should go peacefully as he did not want the police to drag him out or use violence against him, and promised to call Mercado Peralta. Mercado Peralta did not recall Rivera putting his arm around him, and denied pushing Rivera away from him. He did recall that Rivera helped him and that, together with the police, escorted him out of the facility. Olivo recalled hearing Rivera assuring Mercado Peralta that he would call him. (Tr. 166-167; 172-173; 231; 342).

Romaniello’s description of Mercado Peralta’s conduct in the cafeteria differs from Officer Kranich’s account, which is more in line with Mercado Peralta’s version of events. Thus, contrary to Rivera’s description of Mercado Peralta’s conduct in the cafeteria as “disruptive,” Kranich testified that he observed Mercado Peralta in the cafeteria simply standing around not

doing anything, and that at no time did Mercado Peralta display any aggressive behavior toward the police.

5 Regarding Mercado Peralta's removal from the premises, Kranich testified that someone, identifying himself as Head of Security Denis Lee, approached him in the cafeteria and asked for his help in the matter. Kranich told Lee that there was not much he could do other than provide security as he did not see that any laws were being violated. Lee nevertheless asked Kranich to arrest Mercado Peralta because the latter had been an "instigator" in the incident, had "started the entire uprising of employees originally, and was one of the advocates of getting everybody together." Kranich replied that he had not seen any violations of law taking place, and that Mercado Peralta had not shown any aggression towards the police, and that this entire matter was an employer/employee dispute. Lee nevertheless insisted that he wanted Mercado Peralta removed from the premises. Kranich then went over to Mercado Peralta and told him about Lee's request to have him removed. Kranich, I am convinced, was one of the two police officers who Mercado Peralta described as having escorted him out of the facility. Mercado Peralta, Kranich claims, simply said he was fine with that, and walked out of the facility with Kranich where they chatted for a few minutes. Kranich told Mercado Peralta that he understood from what Lee had said to him that Mercado Peralta was being terminated.

20 Kranich testified that at no time did Mercado Peralta push or become physically aggressive with him or any other police officer, nor did he become belligerent or defiant when asked to leave. His testimony in this regard thus contradicts Rivera's claim that Mercado Peralta had been "disruptive" in the cafeteria, as well as Romaniello's claim of seeing Mercado Peralta "resisting" Rivera and "busting" through a crowd of employees trying to enter the hallway through an exit he and other employees were told not to go through.

30 Romaniello's account of the incident involving Mercado Peralta and his removal from the cafeteria was not credible. Thus, neither Rivera, Bednar, nor Kranich provided any support for her version of events. None, for example, testified to seeing Mercado Peralta trying to get away from Rivera when the latter placed his arm around Mercado Peralta, or to have seen the latter attempting to "bust" through the wrong doors in an effort to return to work. Nor did they describe seeing a police officer and a supervisor chase after Mercado Peralta and return him to the cafeteria. Mercado Peralta's own testimony regarding this incident is, for the most part, consistent with the events as described by Rivera and Kranich. As to Romaniello's claim that Mercado Peralta refused to listen to Rivera or to let him speak during this incident, Rivera made no such assertion in his testimony. Nor do I believe Rivera's claim that Mercado Peralta was "disruptive" during this cafeteria episode, for Kranich's more credible testimony reflects that when removed from the facility, Mercado Peralta was simply standing around not doing anything in particular.

45 While there are some discrepancies on the question of who ordered Mercado Peralta removed from the facility,<sup>23</sup> the record makes patently clear that Mercado Peralta was removed

<sup>23</sup> Bednar, as noted, claimed he unilaterally made the decision to have Mercado Peralta removed from the facility. (Tr. 896). However, a report, purportedly prepared by Lee and attached to the termination report prepared by Romaniello on Mercado Peralta, suggests that the decision not to allow Mercado Peralta to return to work and to be removed from the facility was made by Keller because he viewed Mercado Peralta as "one of the original agitators." (RX-20). Kranich's credible account on how Lee approached him in the cafeteria and asked that he arrest Mercado Peralta because he was one of the "agitators" responsible for getting all the

Continued

not, as claimed by Romaniello, for trying to enter the production area through the wrong doors, or for any other particular conduct he may have engaged in during this second cafeteria episode, but rather because he was considered to be one of the “original agitators” of the work stoppage. Kranich’s undisputed and credible testimony as to what Lee said to him supports this finding, as does the attachment to RX-21, as well as RX-9, an incident report prepared by Bednar regarding the work stoppage wherein Lee avers that Mercado Peralta was removed because he “was the main cause of the situation with getting the employees all fired up.”

Guzman denied seeing any employee, including Mercado Peralta, standing on a cafeteria table, but did see Keller up on either a chair or table instructing employees on several occasions to either return to work or go home. He also heard Abreu being pretty agitated and upset as she tried to convince employees to return to work. As to the incident described by Rivera involving him, Guzman gave a different account of what transpired. Thus, he denied addressing himself to Rivera during this incident. Rather, he testified that he was, at the time, addressing himself to Olivo who was nearby, and that he simply told Olivo that he did not understand why the police had to be called, and that management was treating its employees as enemies. He recalled that Rivera, who was standing some 6 feet away, asked him what he had just said, and Guzman repeated to Rivera what he had just told Olivo about employees being treated like enemies. Guzman denied pointing his finger in Rivera’s face or touching or brushing up against Rivera’s shoulder. Guzman recalled remarking out loud to employees at one point that they could possibly lose their rights if they left the facility. Olivo denied seeing Guzman point his finger in Rivera’s face or raise his hand above his shoulder. He did recall hearing Guzman question why Rivera “would take care of us if he’s like an enemy to us,” and heard Guzman make his remark about employees losing their rights if they left the facility.

I credit Guzman and find that he never pointed a finger in Rivera’s face, or yelled aloud to employees, “this is our true enemy,” as claimed by Rivera. Both Guzman and Olivo, as noted, denied that any finger pointing took place. As to the remark allegedly made by Guzman, a composite of the versions provided by Guzman and Olivo convinces me that Guzman essentially told Rivera what he had just said to Olivo about how the Respondent was treating its employees like enemies, and that he at no time pointed his finger or yell in Rivera’s face that Rivera was the “true enemy.” Indeed, Rivera’s own testimony, that he asked Guzman to repeat what he had just said, a fact confirmed by Guzman, strongly suggests that Rivera may not have clearly heard or understood Guzman’s comment. As Guzman, according to Rivera’s own testimony, did not repeat himself but rather kept moving towards the production floor, Rivera, I am convinced, never actually learned the true nature of Guzman’s remark. Had Rivera heard or understood what Guzman had said, there would have been no reason for Rivera to ask Guzman to repeat himself. Moreover, there would have been no need for Guzman to repeat himself if, as claimed by Rivera, Guzman was only inches away from him when he made his remark, hence close enough for Rivera to have heard what Guzman had said. A plausible explanation for Rivera’s request for Guzman to repeat his comment, one that is fully consistent with

employees together, supports a finding that it was Lee, with instructions from Keller, and not Bednar, who made the decision to have Mercado Peralta removed from the facility. In this regard, I reject Villar’s description of how Mercado Peralta came to be removed from the cafeteria. Villar testified that it was Abreu who directed a police officer to remove Mercado Peralta because the latter was attempting to return to work through some other exit. I am convinced Villar was mistaken regarding the incident involving Mercado Peralta’s removal, as the weight of the credible evidence makes clear that it was Lee, with instructions from Keller, who gave the order. I do, however, credit Villar’s testimony that Mercado Peralta never pushed or touched a police officer in the cafeteria.

Guzman's version of events, is that Rivera, as testified to by Guzman, was several feet away from Guzman, and not inches away as claimed by Rivera, when Guzman made his remark. Given the noise level in the cafeteria at the time, it is understandable that Rivera may not have clearly heard or understood Guzman's remark, prompting him to ask Guzman to repeat himself.

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In sum, as with other aspects of his testimony, Rivera's claim that Guzman pointed a finger in his face and accused him of being "our true enemy" was not credible, notwithstanding what appears to be corroborating testimony from Boyrie and Navarro. Boyrie, like Rivera, was prone to exaggeration if not outright fabrication regarding the events of the work stoppage. She claimed, for example to have seen all of the alleged discriminatees standing on cafeteria tables, a claim credibly denied by the alleged discriminatees themselves, and disputed by Berios, Kranich, and Rivera. Boyrie's propensity to fabricate was also made apparent when she claimed to have heard Mercado Peralta, Guzman, and Olivo cursing and using profanity in the hallway, a claim credibly denied by the individuals in question, disputed by Berios, and not substantiated by any of the management officials who were present in the hallway at the time. I am convinced that Boyrie, who readily admits being related to supervisor Collazo, willingly and deliberately lied to curry favor with the Respondent, and that her willingness to fabricate extended to her version of the incident between Rivera and Guzman.

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Navarro, as previously pointed out, also tended to exaggerate, if not outright fabricate, what she observed during the work stoppage, as when, for example, she claimed to have seen alleged discriminatees DeJesus and Mercado Peralta in the cafeteria when the work stoppage began. As noted, and as the Respondent readily admits on brief, neither DeJesus nor Mercado Peralta were in the cafeteria when the work stoppage began. Indeed, Navarro, as noted, claimed to have seen both "Puerto Plata" and Mercado Peralta in the cafeteria, not knowing that the former is simply Mercado Peralta's nickname and that Puerto Plata and Mercado Peralta are the same individual. Her willingness to adhere to this story despite the subtle opportunity afforded her by the General Counsel on cross-examination to clarify her answer leads me to suspect that Navarro simply fabricated this account in an effort to show her support for the Respondent in this matter. Further casting doubt on the reliability of her testimony is her admission that a few days before the hearing began, Rivera was present with her as she was being prepared for trial by the Respondent's counsel. No explanation was proffered as to why Rivera's presence was needed or required during this interview, raising a concern in my mind that Navarro's testimony may have been compromised prior to the hearing. In sum, I place no credence on Navarro's claim as to what she heard or saw happen between Olivo and Rivera on December 15.

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After escorting Mercado Peralta off the premises, Kranich returned to the cafeteria and observed employees returning to work. He also saw another police officer, Detective John Ciarllo of the Hatfield, PA police department, speaking with an employee, identified to him by Ciarllo as DeJesus. Kranich recalled seeing DeJesus at one point shouting something in Spanish, and observed that, in response to the latter's shouting, employees who were beginning to exit the cafeteria to return to work stopped and began re-entering the cafeteria. Ciarllo instructed DeJesus to stop shouting and to allow employees to return to work. DeJesus, however, continued to shout and began walking away from Ciarllo, at which point Kranich and other officers assisted Ciarllo in taking DeJesus into custody. He did not see DeJesus become aggressive towards Ciarllo. However, he contends that DeJesus did offer some resistance to being handcuffed and that he threatened to "tazer" DeJesus if he continued resisting. After being handcuffed, DeJesus calmed down and was escorted out of the facility by Kranich and Ciarllo. Once outside, Kranich told DeJesus he was being charged with "disorderly conduct." Kranich claims that DeJesus understood what he was being told, explaining that the latter spoke English, although not a hundred percent. His claim in this

regard, however, conflicts with Abreu's assertion that she was asked by a police officer to interpret for an employee who had just been arrested. Abreu claims she did go outside to a van, presumably a police vehicle, and interpreted for the employee. As DeJesus was the only employee arrested during the work stoppage, it is reasonable to assume that it was the latter for whom Abreu interpreted.

Ciarllo testified as follows regarding the DeJesus incident. On entering the cafeteria, Ciarllo essentially just stood around observing what was going on. He recalled seeing a "guy in a leather jacket and jeans" who seemed to be in charge trying to calm the employees and urging them to return to work. According to Ciarllo, at one point, when employees in the cafeteria appeared to have calmed down, DeJesus entered from the hallway and began screaming at employees as if trying to stir them up again. DeJesus, he recalled, spoke to employees in Spanish, which Ciarllo readily admitted he could neither speak nor understand. Soon thereafter, an individual wearing a white coat, whom he had seen earlier in the hallway, came up to Ciarllo, pointed DeJesus out to him, and remarked that DeJesus was the main problem, and the one causing all the problems. Ciarllo then went up to DeJesus and told him to calm down, that he was making everybody upset, and that he should either go outside and cool off, or go back to your work area. Ciarllo could not say for sure if DeJesus understood him, and simply "assumed" that he had because when Ciarllo motioned with his hands for DeJesus to go outside or calm down, the latter turned as if heading back to his work area, suggesting that he might have understood Ciarllo's instructions. Ciarllo conceded, however, that while DeJesus appeared to be returning to work, he simply did not know if that was what DeJesus had in mind. DeJesus, according to Ciarllo, was calm at that point.

Soon thereafter, however, Ciarllo claims he observed DeJesus heading in a different direction away from the work area, at which point he approached DeJesus and told him he needed to go outside. DeJesus apparently did not respond to Ciarllo's directive and continued towards the cafeteria. Unlike Kranich, Ciarllo does not contend that DeJesus continued shouting or screaming after being told not to do so, or while walking away. Olivo testified that he saw DeJesus heading back towards the cafeteria, and heard him comment that he was going back in to get some water. Olivo purportedly cautioned DeJesus not to go back in because the police were there, and DeJesus remarked, "No, it's ok, I'm just going to get water." (Tr. 322). Olivo's testimony in this regard is undisputed and accepted as true.

Admitting that he did not know what DeJesus was up to, Ciarllo nevertheless grabbed DeJesus by the arm as he re-entered the cafeteria, explaining that he did so because he also had "an obligation to protect the people" in the cafeteria. (Tr. 406-407; 416). When DeJesus offered some resistance, Ciarllo, with assistance from Kranich, forced DeJesus onto a table and handcuffed him. On realizing he was about to be handcuffed, DeJesus apparently calmed down. Ciarllo described DeJesus as being "a little bit" violent, but explained that DeJesus "wasn't attempting to injure me. He was just angry, he was irate." He stated that he decided to handcuff DeJesus because he did not want to get into a "cat and mouse" game with DeJesus. Asked if DeJesus was trying to get away before being handcuffed, Ciarllo testified that given DeJesus' large physique, the latter could have easily pushed him off and gotten away, suggesting implicitly that he may not have viewed DeJesus' minor resistance as an attempt by the latter to get away.<sup>24</sup>

<sup>24</sup> Kranich's and Ciarllo's description of the DeJesus incident in the cafeteria contrasts sharply with the description contained in a report which Romaniello claims was purportedly prepared by Lee, copies of which were received into evidence as attachments to certain Company exhibits, including RX-21, a Termination Payroll Change form prepared in connection

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DeJesus was thereafter taken to the local police station, and issued a “Non-Traffic Citation” charging him with “Engaging in fighting or threatening or in violent or tumultuous behavior,” and “attempting to run and push police away during an incident in MOPAC.” The citation was issued by Kranich. Ciarllo, however, testified that he was asked, presumably by Kranich, if he wanted DeJesus to be charged with an “assault on a police” for pushing away from Ciarllo, which would have called for fingerprinting and other booking procedures, but he declined to do so finding it to be unnecessary. He nevertheless testified that the conduct described in the citation accurately described what had happened in the cafeteria that day. (See, RX-1).<sup>25</sup> Ciarllo was unsure of the outcome of the DeJesus legal proceedings, and simply assumed that DeJesus must have pled guilty to the charge because he, as the alleged victim, was never subpoenaed to appear at any hearing relating to the matter.<sup>26</sup>

with DeJesus’ termination. The Lee report appended to RX-21 thus describes DeJesus as “another male associate who had been an agitator,” and states that DeJesus had “tried to run through the east/west hall police screen.” It goes on to state that “The associate literally bounced off of the line of police officers; at which he gathered himself and charged back at the line violently striking into one of the police officers, but was again rebuffed, this time with the police officer in pursuit.” The Lee report further claims that “the subject associate ran parallel to the police line heading south. He was subdued by the police officers, taken into custody, and charged with a summary offense akin to disorderly conduct.” It goes on to report that “It was necessary for the police to place a Tazer/stun gun against the subject’s neck in order that the subject cease resisting.” A comparison of Kranich’s and Ciarllo’s testimony regarding DeJesus’ conduct in the cafeteria with that set forth in the Lee report makes clear that the latter greatly exaggerated and embellished what actually occurred. Thus, neither Kranich nor Ciarllo testified to seeing DeJesus trying to break through a “police screen,” “bouncing off” a line of police officers and violently striking one of them, being chased or pursued by police officers, or placing a Tazer on DeJesus’ neck to subdue him. Rather, both gave a more benign description of their encounter with DeJesus, describing the latter as simply offering some minor resistance but eventually allowing himself to be handcuffed and led out of the facility. Lee, as noted, was not called to testify or to offer some explanation for his entries in the report, or to refute other statements attributed to him.

<sup>25</sup> Kranich and Ciarllo explained that DeJesus was not charged with a more serious offense requiring booking or fingerprinting because DeJesus’ conduct in the cafeteria did not rise to the level of an assault or anything of that nature. However, their testimonial description of the events which prompted Ciarllo to arrest and remove DeJesus suggests that the latter’s conduct was more benign than that described in the offenses portion of the citation. In fact, from Ciarllo’s testimony, it would appear that it was DeJesus’ failure to leave the cafeteria right away and to continue in another direction, and not any specific disruptive behavior on his part, which caused Ciarllo to begin taking steps to prevent DeJesus from remaining in the cafeteria and to escort him outside. Thus, at the time he was detained, DeJesus, again according to Ciarllo’s testimony, was not engaged in any “fighting” or “threatening” anyone, engaging in any “violent” or “tumultuous” behavior, or “running” away. Nor did DeJesus “push” Ciarllo, for the latter described DeJesus as only as offering some resistance, and never claimed to have been pushed. In fact, when asked by Kranich if DeJesus should be charged with the more serious offense of assault for “pushing” him, Ciarllo, as noted, declined to do so, finding it to be unnecessary. I am inclined to believe that DeJesus was not charged with “pushing” and, therefore, assaulting Ciarllo because it never occurred.

<sup>26</sup> I give no weight to Ciarllo’s assertion that DeJesus must have pled guilty to the charge, since, by his own admission, he simply assumed this to be case. His assumption, however, is based on nothing more than speculation and conjecture. The fact that he was never

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On returning to the cafeteria after helping to escort DeJesus out, Kranich observed that, except for some 20-30 employees who were meandering around in the cafeteria, the employees had returned to work. Soon thereafter, Kranich was again approached by Lee and told that  
 5 “most of the employees are going back to work, but that he wanted those who “are choosing not to go back to work” to be arrested. Kranich replied by asking Lee why he wanted to arrest employees who refused to go back to work since they were not doing anything wrong. He told Lee that if he was going to fire them, he should let the employees know as their refusal to leave would then constitute trespassing, but that, until then, he was not going to do anything to the  
 10 employees. (375-376). Lee did not testify. Accordingly, I credit Kranich’s description of what Lee said to him in the cafeteria that morning.

#### 4. Post “work stoppage” events

15 The record reflects that sometime in the afternoon of December 15, decisions were made to terminate the five named discriminatees, although the circumstances surrounding who made those decisions and why is somewhat murky and confusing. Berios testified that, about an hour after production had resumed on the kill floor department, Rivera remarked to him that “whoever started this is going to get fired.” Rivera denied making any such statement to Berios.  
 20 (Tr. 595; 857-858). However, Rivera, as noted, was not a very credible witness. He was prone to exaggeration and not very consistent in his testimony. Berios, on the other hand, came across as more reliable and trustworthy. I am convinced that Rivera, upset that his department employees had chosen to engage in a work stoppage that day, did express his anger at what had occurred by commenting to Berios that those responsible for initiating the work stoppage would be fired. Rivera, as previously found, had earlier expressed his dissatisfaction about the  
 25 work stoppage to Berios when he remarked to the latter during the first cafeteria episode that those who refused to return to work would be fired. The decisions on who to terminate and why as noted, were apparently made later that afternoon.

30 The Respondent, according to Romaniello, maintains a 3-step progressive disciplinary policy generally used to mete out discipline to employees for infractions committed. The first

subpoenaed to appear at any hearing related to the DeJesus matter does not ipso facto lead to the conclusion that DeJesus chose to admit to the charge, pay the requisite fine, and avoid a  
 35 trial. There are, to be sure, certain entries on the face of the citation showing the amount of the fine, and court costs and fees that would have to be paid by DeJesus to resolve the matter. What is not clear, however, is when and by whom these amounts were entered on the citation. Kranich, who wrote up the citation, was never questioned about it. Thus, it is not clear if the entries were made by Kranich to show how much DeJesus had to pay in fines and related costs to resolve the matter, or whether they reflect the amounts actually paid by DeJesus at a later  
 40 date. Notably, a document attached to the actual citation prepared by Kranich (RX-1) contains entries which cast doubt on whether DeJesus actually pled guilty and paid the fines, as assumed by Ciarllo. Unlike the actual citation itself which lists several offenses, the attachment lists only “Disorderly conduct” as the basis for the citation. In the “disposition” section of the attachment, the word “undefined” has been entered, and as to fines and court costs paid by DeJesus in connection with this charge, the attachment contains only “0.00”  
 45 entries. Thus, it is simply not clear what the outcome was of the citation issued to DeJesus. In these circumstances, I am reluctant to accept Ciarllo’s unsupported assumption that DeJesus pled guilty to the offenses charged with in the citation, as the matter could very well have been  
 50 disposed of in some other fashion, including an eventual withdrawal of the charge, refusal to prosecute, or an outright dismissal.

step of the policy requires that an alleged infraction be brought to the attention of, and discussed with, the employee and memorialized in writing in the employee's file; the second step calls for issuance of a "black" or written warning; the last step is a "red" or final warning. (Tr. 1185). She explained that in most cases when discipline is to be imposed, the Respondent's practice is to gather information regarding the incident in question "by talking to the parties involved; talking to witnesses; witnessing it ourselves; taking a written statement, or whatever method of information that we can use." Romaniello further explained that, before making a final decision involving discipline, she "wants to know the facts that occurred; wants to know who saw it." (Tr. 1230).

Romaniello, however, testified that, in this case, the five discriminatees were never interviewed or spoken to, nor was the progressive disciplinary policy followed, before the discharge decisions were made because of what she described as the "severity" of the alleged discriminatees' misconduct during the work stoppage. She explained that not every act of misconduct requires use of the progressive disciplinary policy, and that factors, such as the "seriousness" of the issue, the "magnitude of the event," and the "potential for violence," are considered in determining whether an immediate discharge, without going through the progressive disciplinary system, is warranted. She testified that, in her view, the potential for violence created by the discriminatees' alleged misconduct was so great that their immediate discharge without first interviewing them or hearing their side of the story was justified.

Keller testified that at around 2 p.m., he spoke with Daubenspeck by phone regarding the conduct of some of the individuals involved in the morning work stoppage, more specifically, that of Medina (the gold hat employee), DeJesus, and Mercado Peralta. Keller admitted that he considered these three individuals to be the "instigators of the whole situation" that occurred at the facility that morning. (Tr. 775). He recalled explaining to Daubenspeck that DeJesus had been yelling, screaming, and banging on lockers as he (Keller) tried to communicate with employees, and that he had been informed by Romaniello that DeJesus pushed a police officer and was thereafter removed from the facility by the police. Based on that conversation, he and Daubenspeck agreed to terminate DeJesus for "banging on the lockers in a threatening way, and because he had been arrested by the police for his conduct." (Tr. 758). As to Mercado Peralta, Keller purportedly told Daubenspeck he had been confrontational by getting in Keller's face and preventing him from speaking to employees, and had also been removed from the premises by police. He and Daubenspeck purportedly agreed that Mercado Peralta should also be terminated but that Rivera and Romaniello should first confirm the identity of Mercado Peralta as the person in question. They also agreed to terminate Medina for his conduct.

Keller claims that following his and Daubenspeck's purported decision to terminate certain employees for alleged misconduct, he met with Romaniello, Rivera, and Fisher around 3 p.m. in the latter's office, informed them of his discussion with Daubenspeck, and asked them to confirm the identity of the individuals to be terminated. He specifically recalled telling Romaniello and others at this meeting that he had reviewed and discussed DeJesus with Daubenspeck, and had decided to terminate him. According to Keller, this meeting was essentially to explain what he and Daubenspeck had discussed and of their decision to terminate certain of the alleged discriminatees. Asked if Garcia was discussed at all during this latter meeting, Keller claimed Garcia was discussed, and that it was Romaniello who reported to him at this meeting that Garcia had pushed Avila in the hallway. According to Keller, a decision was made at this meeting to terminate Garcia for pushing Avila pending confirmation of her identity. Yet, when asked by Respondent's counsel if there were any issues during this meeting regarding the identification of Garcia, Keller unequivocally replied, "No." (Tr. 753; 756-757; 764-766).

Keller's testimony as to what was said or known about Garcia at this meeting is contradicted by Romaniello, who testified that she did not learn of this alleged incident until three days later, on Monday, December 18. Further, Avila's own testimony undermines Keller's claim in this regard for she testified that she never identified to Romaniello the person who purportedly touched her in the hallway as she did not know the person. Keller's claim, therefore, that Romaniello told him during the Friday meeting that Garcia had pushed Avila and that there was no issue regarding the identification of Garcia is patently false. Indeed, the Respondent appears to concede as much for in its post-trial brief, it admits that during that Friday afternoon meeting, "it was unclear at that time who had pushed Avila, and therefore that remained to be determined." (RB: 19). I am convinced that Keller was not being truthful, and simply lied, when he testified to being told by Romaniello during their December 15, meeting that Garcia had pushed Avila.

Contrary to Keller, Romaniello testified her meeting with Keller, at which Fisher and Rivera were present, occurred around 2 p.m., although she could not recall who called the meeting. Romaniello described the purpose of the meeting was to "discuss the event, what occurred, and to discuss the issues and events that occurred that made it out of control." As to what was discussed at this meeting, Romaniello recalled hearing Keller ask about the identity of the "gold-hat" employee; heard discussion of an incident "about a particular individual, presumably DeJesus, banging on the lockers when police arrived;<sup>27</sup> heard about the incident when Keller asked "for an employee, presumably Olivo, to be removed by security;" and heard of an incident involving an employee, presumably Guzman, pointing a finger in Rivera's face and yelling to the crowd, "There's our problem right here" or "here's our problem right here." She contends that an agreement was reached among those present that the individuals involved in these incidents should be terminated, and that she then asked Rivera and/or Keller to get back to her with the names and employee numbers of those individuals so their identities could be confirmed. (Tr. 1125-1126).<sup>28</sup>

<sup>27</sup> It is worth noting that in her description of what was discussed at this meeting regarding the conduct of certain employees, Romaniello never mentioned DeJesus' arrest as having been brought up or discussed. According to Romaniello, it was at this meeting that the decision to discharge DeJesus and others was made. On cross-examination, Romaniello testified that she made the "final call" to terminate DeJesus presumably at this meeting, a claim that is in direct conflict with Keller's assertion that he made the decision to terminate DeJesus just an hour earlier during his conversation with Daubenspeck. (Tr. 1194).

<sup>28</sup> Romaniello's claim that the finger-pointing incident involving Guzman and Rivera was discussed at this meeting was not corroborated by Rivera. Thus, asked if Guzman was discussed at this meeting, Rivera stated, "I don't believe we discussed Guzman." (Tr. 842). Nor is there anything in his testimony to suggest that he raised this incident on his own at this meeting. Rather, according to Rivera, it was at a second subsequent meeting attended only by him, Romaniello, and Abreu that Romaniello questioned him about the Guzman incident, and asked for his opinion on what should be done with Guzman, to which he replied that Rivera should be terminated. (Tr. 843). Abreu, it should be noted, testified only to being present during Guzman's discharge interview to interpret for Guzman, and made no mention of having attended the earlier meeting referenced by Rivera in which Romaniello purportedly asked for his opinion on what should be done with Guzman. In fact, Abreu testified that she did not participate in any other discussions regarding discipline to be taken or termination decisions. (Tr. 1074). It is highly unlikely that the discharge meeting mentioned by Abreu, and the one referenced by Rivera, are one and the same, as I seriously doubt Romaniello would have asked Rivera what should be done with Guzman during the latter's discharge interview. This inconsistency between Romaniello's claim, that the decision to terminate Guzman was made

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Romaniello claims that, a short while later, she met with Fisher in the latter's office for the purpose of calling Daubenspeck to notify him of the various incidents of misconduct engaged in by the named discriminatees, and of her decision to terminate the employees in question. Romaniello remembered "distinctly" that this meeting was between the two of them only, but then added that she couldn't remember if anyone else was in attendance. Her testimony as to who made the final decision to discharge these individuals was somewhat vague and confusing. For example, at one point in her testimony, Romaniello explained that she had only made recommendations to Daubenspeck that these individuals be discharged, which the latter was free to accept or reject. Yet, asked directly by me if Daubenspeck had the final say regarding the discharges, Romaniello answered yes. However, when discussing the individual terminations, she repeatedly pointed out that she "made the final call." (1127-1128; 1130; 1194-1197; 1201; 1203).

Fisher recalled having two meetings, the first that same afternoon in his office around 3:30 p.m. with Keller, Romaniello, and Rivera during which he was informed of what had transpired that morning, and of the actions of certain employees.<sup>29</sup> Because he did not witness any of the events, Fisher simply left it to Keller and Romaniello at that first meeting to decide what action should be taken, and then accepted their recommendation that four individuals identified as having engaged in misconduct be terminated. He claims that at this meeting, Rivera made reference to a woman, which he described by her job duties, who had purportedly pushed or shoved someone, and a decision was made to continue trying to identify this woman, Garcia, as it turned out.

Rivera, however, had no recollection of discussing Garcia at all during this meeting with Fisher. (Tr. 842). In fact, Rivera testified that he and Avila had not discussed the alleged touching or pushing incident involving Garcia before this meeting, and that he only learned of it from Romaniello at his subsequent meeting with the latter, which followed the Fisher meeting. Fisher's claim, therefore, that he heard of the Garcia incident from Rivera during this first meeting is simply not credible given Rivera's above testimony as to when and how he first learned of the Garcia pushing incident. The second meeting, Fisher contends, was with Romaniello in his office, although he was not sure if it was held that same Friday or the following day, Saturday, and recalls speaking by phone with Daubenspeck during this meeting. During this phone conversation, he or Romaniello, his testimony does not make clear whom, updated

during the meeting attended by Keller, Fisher, Rivera and herself, and Rivera's claim that Guzman's termination was not discussed at this meeting but occurred at a later meeting involving himself, Romaniello, and Abreu, was not explained, which only serves to cast further doubt on the overall reliability of both Romaniello's and Rivera's testimony.

<sup>29</sup> Fisher was vacationing in Atlantic City, NJ that morning when he received a call from Human Resources employee Christine McCann at around 9:45 a.m. informing him of "a riot at the facility." He tried calling security from Atlantic City and reached an individual who essentially repeated the same thing to him. As McCann was not called to testify, Fisher's claim of McCann having referred to what was going at the plant at that time as "a riot," cannot be corroborated. However, the testimony of various witnesses makes clear that the protest over the failure to pay the bonuses began around 9:45 a.m., at about the time Fisher claims to have received the McCann call, and involved only a few employees in the cafeteria refusing to return to work over the bonus issue, and was, at that point in time, a peaceful protest and not "a riot," as purportedly described to Fisher by McCann. I am convinced that either Fisher exaggerated what he was told by McCann, or McCann mischaracterized or deliberately misrepresented what was taking place in the cafeteria at that point in time.

Daubenspeck on the decision to terminate four individuals, and their decision to continue trying to identify the woman, e.g., Garcia, as one of the other employees allegedly involved in misconduct. (Tr. 1247-1250).

5 Rivera recalled attending two meetings that Friday, the first with Keller, Romaniello, and Fisher at around 2:30 p.m. in Fisher's office. The meeting was held to discuss what had occurred that morning, including the conduct of several employees. At that meeting, a decision was made to terminate Medina, the gold hat employee, for putting his finger in Keller's face and making a threatening comment; DeJesus for misconduct including banging on lockers in the hallway and pushing a police officer in the cafeteria; and Mercado Peralta for screaming and shouting in Rivera's and Keller's faces and refusing to allow them to communicate with employees. As noted, he had no recollection of Guzman or Garcia being discussed at this meeting.

15 The second meeting, as previously discussed, purportedly included Romaniello and Abreu and related to Guzman's alleged finger-pointing incident. It was at this meeting that Rivera contends Romaniello asked for his opinion on what to do with Guzman, to which Rivera replied that Guzman should be terminated. Rivera did not recall either DeJesus, Mercado Peralta, or Medina being discussed at this meeting with Romaniello, but believes they may have been. He contends that it was during this meeting that Romaniello told him about Avila being grabbed on the wrist by Garcia at the time Bednar was asked to remove Olivo. Rivera testified he was unaware of what had occurred between Garcia and Avila until told of the incident by Romaniello at that Friday afternoon meeting. Rivera could not recall if a decision regarding disciplining Garcia for her conduct towards Avila was made at this meeting with Romaniello. 20 (842-843; 846) This latter testimony as to when he first learned of this alleged Garcia-Avila incident does not, however, square with, and indeed contradicts, Romaniello's claim that she first learned of the incident three days later, on Monday, December 18.

30 Finally, Berios testified that on Monday, December 18, he was at a regularly scheduled supervisors meeting attended by Rivera, Collazo, and several other supervisors. He recalled the Friday work stoppage being discussed, and hearing Rivera remark that "these people," referring to the named discriminatees, have to be fired, and that Rivera and Collazo laughed aloud at his comment and seemed to find the matter amusing. (Tr. 597). He contends that Rivera cited the reasons why certain of the individuals should be fired. Rivera, for example, 35 purportedly stated that Guzman had yelled at him and blamed him for everything, that DeJesus was terminated for pushing a police officer, and that Garcia had pushed his girlfriend. Berios did not hear Rivera give reasons for why Mercado Peralta or Olivo should be terminated. (599).

40 Rivera recalled attending the Monday, December 18, supervisors' meeting mentioned by Berios. Although he did not specifically deny stating at this meeting, in front of Berios and Collazo, that those who took part in the work stoppage have to be fired, he expressly denied there being any discussion at this meeting of the events of December 15, or of any of the disciplinary actions to be taken. Collazo was never questioned about this meeting, or whether he heard Rivera make the comments attributed to him by Berios. I credit Berios, and find that 45 Rivera, indeed, remarked aloud that the alleged discriminatees had to be fired. Rivera's remark in this regard was in line with his earlier remark to Berios about firing those employees in the cafeteria who were refusing to return to work. The Respondent made no effort to obtain corroboration of Rivera's denial from Collazo, who was also at this meeting. Given the scope of the December 15, work stoppage, and the rather extraordinary events of that day, I find it highly 50 that the work stoppage and the resultant employee terminations would not have been a subject of conversation or a topic for discussion at the Monday morning supervisor's meeting, as professed by Rivera. Rivera's denial in this regard is rejected as simply not credible.

## 5. The discharge notifications

## (a) Garcia

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Garcia worked the remainder of the day on Friday, and all day Monday. Towards the end of her workday, Collazo told Garcia her supervisor wanted to speak with her. Collazo escorted her to Romaniello's office, where she met with the latter and Rivera. According to Garcia, Romaniello spoke very little at this meeting, and Rivera did most of the talking. She recalled Rivera asking if she knew what had happened on Friday. Garcia replied that she knew, and Rivera then asked if she knew "that they had caused a lot of damage in the plant." When Garcia asked what damage had been done, and asserted that no one had done anything wrong that day, Rivera answered that a lot of damage had been done, and that people like her (Garcia) were a threat to the Company. Garcia responded that she did not believe she was a threat to the Company, had not done anything wrong, and that she had simply spoken in a straightforward manner. At that point, Garcia was told she was fired. When Garcia asked what she had done to be fired, Rivera told her it was because she had "pushed a person on Friday." Garcia recalled hearing Romaniello mention something about "pushing people." Garcia then asked for the name of the individual she allegedly pushed, but Rivera refused to provide her with that information. (Tr. 75-76)

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Romaniello testified that she and Rivera met with Garcia in her (Romaniello's) office, that the entire meeting lasted no more than five minutes, and that she simply told Garcia, through Rivera as interpreter, that she was being terminated for putting her hands on a Human Resources employee under circumstances that had the potential for creating a safety risk to others. She informed Garcia that this type of conduct would not be tolerated in the Company. Although Garcia denied the accusation, Romaniello nevertheless told her that the affected individual reported the incident to her as well as to security, and that she believed the employee in question. Romaniello never bothered to question any of the employees or other managers who were in the hallway when the incident allegedly occurred who might have corroborated Avila's account or Garcia's denial of the incident. Romaniello testified that this was the only reason for Garcia's termination. Garcia was then escorted by security out of the plant. (Tr. 1148; 1198).

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Rivera provided no testimony as to what he may or may not have said or done during Garcia's discharge interview. Thus, he offered no corroboration for Romaniello's account of what the latter claims was told to Garcia at this interview. Garcia's testimony of what Rivera said to her during that interview is, therefore, uncontested. Although Romaniello, as noted, testified to what she purportedly told Garcia through her interpreter, Rivera, Garcia, who neither speaks nor understands English, would not have understood what Romaniello may have said to her and could only testify as to what she heard Rivera say to her during that meeting. In these circumstances, I credit Garcia's unchallenged account of what she was told by Rivera, and find that Rivera told Garcia that the employee protest had caused damage to the plant, that Garcia was a threat to the Company, and that she was being fired for pushing an unidentified person during the Friday incident. Garcia, along with the other alleged discriminatees, was not given anything in writing explaining the reason for her termination. However, individual "Termination Payroll Change" forms, setting forth the reason(s) for the terminations, were prepared, some by Romaniello, others by persons unknown, on December 30, for all of the alleged discriminatees. The "Termination Payroll Change" form prepared on Garcia, received into evidence as RX-19,

lists “insighting [sic] a riot” as the reason for her discharge, with the “05” notation next to it.<sup>30</sup>

(b) Guzman

5 While the decision to terminate the named discriminatees was made on Friday, Guzman was the only one whose termination was carried out that same day.<sup>31</sup> Olivo and Garcia were verbally informed of their terminations on Monday, December 18. The record is unclear as to how and when Mercado Peralta and DeJesus were informed of their terminations. Regarding his termination, Guzman testified that following the morning work stoppage, he returned to work and worked the entire shift, until 6:20 p.m., at which time Collazo approached and escorted him to Romaniello’s office, where he found Romaniello, Rivera, and Abreu waiting. Collazo did not remain for the meeting. Once inside, Guzman recalls Romaniello spoke to him through Abreu, who served as interpreter. According to Guzman, Romaniello told him he was being terminated because of the comments he had made to Rivera earlier that morning. Guzman was not told what the comments were, but assumed it was the comment he had made to Rivera about management treating employees like they were enemies for which he was being fired. Romaniello, according to Guzman, gave no other reason for the termination. Guzman then apologized if he had offended anyone and, soon thereafter, was escorted by security to his locker to retrieve his personal belongings, after which he left the facility. (231-232; 237).

20 As to Guzman, Romaniello testified she and Rivera met with Guzman in her office around 4 p.m., and that she was the primary speaker while Rivera interpreted for her. Romaniello claimed she told Guzman that he had pointed his finger in Rivera’s face while shouting to the crowd of employees, “This is the reason for our problem,” that his conduct incited others to act aggressively, and that the Company could not allow such behavior in the plant. (Tr. 1136). She contends Guzman simply shook her hand and thanked her, after which he was escorted out of her office and taken to security where he was allowed to retrieve his personal belongings from his locker. The Payroll Change form prepared by Romaniello on Guzman, received into evidence as RX-17, lists “inciting a riot” and the “05” as the reason for his termination.<sup>32</sup> (Tr. 850-851; 1073; 1160).

35 <sup>30</sup> Romaniello admits that the “05” and “see attached” notations were written by her, but that the “insighting a riot” entry is not her handwriting, and therefore was not inserted by her. She explained that “05” entry is the Company code for “other improper conduct.” No explanation was given as to who made the “insighting a riot” entry on the termination report, or when it was made. Attached to RX-19 is a report purportedly prepared by Lee setting forth the latter’s description of the events of March 15.

40 <sup>31</sup> Medina, the gold-hat employee, was also discharged on Friday. His discharge is not alleged to be unlawful and, consequently, requires no further discussion here.

45 <sup>32</sup> Attached to Guzman’s termination report is a memo prepared by Romaniello containing a paragraph description of Guzman’s alleged misconduct. The attached memo states that Guzman “actively engaged in inciting other employees to not return to work,” and that, after employees had been persuaded to return to work, Guzman “began yelling to the crowd and pointing to ...Rivera, stating that, ‘this is our problem right here.’” The memo further states, inter alia, that this conduct by Guzman “incited the crowd again and elevated the situation to a point where the police department had to be called.” The memo is incorrect in at least two respects. First, its claim that Guzman’s alleged misconduct towards Rivera resulted in the local police being called is inaccurate since the police were already in the facility, having been summoned earlier by Bednar following the Olivo incident in the hallway. Second, it quotes Guzman as having said to Rivera, “This is our problem right here.” Neither Guzman nor Rivera, however, claimed to have made any such remark. Rivera, as noted, testified that Guzman’s actual words

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Romaniello did not identify Abreu as being present at this meeting. Abreu, however, testified that she, in fact, was present and served as interpreter, contradicting Romaniello's claim that Rivera interpreted during the Guzman discharge interview. Abreu further recalled that Guzman was simply told he was being terminated for "disorderly conduct," but did not recall if Guzman was given any specifics as to the nature of the disorderly conduct in question. (Tr. 1073). Rivera, who did attend Guzman's discharge interview, corroborated Abreu's assertion that the latter, not he, served as interpreter. Rivera nevertheless agreed with Romaniello that Guzman was told of the alleged finger-pointing incident and that his conduct was viewed as a threat and could not be tolerated. He recalled Guzman apologizing for his conduct.

(c) Olivo

Olivo, as noted, was terminated on Monday, December 18. He testified that after returning to work following the morning protest, he worked until around 4 p.m., at which time he was approached by Collazo who accompanied him to an office where Romaniello, Rivera, and another individual whom he did not know, were waiting. Once in the office, Romaniello, speaking through Rivera who served as interpreter, explained that they wanted to discuss what had happened in the hallway that morning. Romaniello went on to say that he would not be allowed to continue working at the Company because he had behaved in an aggressive manner, and they believed if another incident were to occur, he would again act aggressively. Olivo then asked Romaniello why he was being fired since all he had done that morning was express his view as to the problems the Company was having. Romaniello, he contends, simply answered, "Well, you're fired," and instructed him to turn in his Company ID badge. Rivera, at that point, wished him luck, and he was then escorted out of the office by security. (327-328).

Romaniello testified that after Rivera confirmed for her, sometime between Friday and Monday, Olivo's identity, she and Rivera met with Olivo in her office for about 5 minutes on Monday to notify him of his termination. She recalls telling Olivo that his conduct on Friday of yelling and screaming so loud as to prevent Keller from being heard was unacceptable, that it incited other employees to engage in similar conduct, and that it had created a safety issue for other employees in the plant. Romaniello informed Olivo he was being terminated for engaging in such conduct. Olivo, she recalls, apologized and asked her for another chance. Romaniello declined his request, explaining that his behavior could not be tolerated at the facility and she did not want to take that risk. Although somewhat more descriptive on direct examination in explaining why she decided to terminate Olivo, when asked on cross-examination "what were all of the reasons" for Olivo's termination, Romaniello simply stated, "safety risk" as the sole reason for the discharge, which she then defined to mean that Olivo had "incited other people in a very volatile situation." Asked if there were any other reasons for his termination, Romaniello unequivocally replied, "No." (Tr. 1145-1146; 1202).

Rivera testified that he served as Romaniello's interpreter during Olivo's discharge meeting, and that Romaniello basically informed Olivo he was being terminated for contributing to the creation of an unsafe environment during the Friday work stoppage. Towards the end of

were, "This is our true enemy" (Tr. 829), while Guzman testified that he simply told Rivera that the Respondent was treating its employees as enemies. Further, a review of Guzman's description of what transpired during the discharge interview does not reveal any admission by Guzman of the phrase attributed to him by Romaniello in her letter. I find the inaccuracies in the document render it purely self-serving and unreliable and give it no weight.

the meeting, Olivo, he contends, apologized, shook Rivera's hand, and told him it had been a pleasure working with him. (Tr. 852). The termination report prepared by Romaniello on Olivo also lists "Inciting a riot" and the "05" notation as the reason for his discharge. Like the others, Olivo was given no written explanation for his discharge.

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(d) Mercado Peralta

10 The decision to discharge Mercado Peralta and DeJesus, according to the Respondent, was made on December 15, although the record, as noted, is not clear as to when they may have been informed of those decisions. Both, as noted, were removed from the premises by the police towards the latter part of the work stoppage on the morning of December 15. Romaniello testified that in the week following the work stoppage, both she and Abreu tried unsuccessfully to contact Mercado Peralta to notify him of his discharge. (Tr. 1157). She claims that at some point during the week, she instructed Human Resources Consultant Mike Lupton to notify Mercado Peralta that he had been terminated and, in response to Lupton's inquiry presumably regarding the reason for the termination, told Lupton that "it was a safety violation as a result of Friday, December 15."<sup>33</sup> (1163).

20 Asked by the General Counsel on cross-examination what her reasons were for terminating Mercado Peralta, Romaniello answered, "He was a safety risk, resisting direction, resisting the police," and resisting Rivera's attempt to talk to him. Specifically, Romaniello explained that the "resisting direction" charge referred to his conduct during the second cafeteria episode when Mercado Peralta disobeyed instructions given to employees returning to work to proceed in a certain direction to the hallway, and not through some double doors that led to the Fabrication department. Mercado Peralta, she contends, insisted on proceeding through the double doors. On the charge of resisting Rivera's attempt to talk to him, Romaniello explained that this referred to the incident in the cafeteria when Rivera walked up to Mercado Peralta, put his arm around him, and tried to speak with him. Romaniello, who claimed to have been only five feet away from Mercado Peralta and Rivera when this incident occurred, testified to seeing the former move away from Rivera and "bust through the crowd to get to [the] double doors" he had been instructed not to go through. She contends that the police and another supervisor pursued Mercado Peralta and brought him back. (Tr. 1196-1197). Presumably, it was at this point that Mercado Peralta was escorted off the premises.

35 Mercado Peralta testified that during the week after the December 15, walkout, he called and spoke with Avila at Human Resources to find out what was happening regarding his employment, explaining to Avila that he had not done anything and wanted to continue working at MOPAC. Avila purportedly told him that Abreu was handling the matter and would be calling him. He never received a call from Abreu, but did receive a call one evening at home from an individual who declined to identify himself, presumably Lupton. This individual, Mercado Peralta contends, accused him of being the cause of the problem at the plant. When Mercado Peralta replied that he had not caused any problems at the facility, the individual informed him he was no longer working for MOPAC. Mercado Peralta replied that that was fine with him, and has heard nothing further from the Company since then.

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Lupton was not called to confirm or deny Romaniello's claim that she instructed him to inform Mercado Peralta of his discharge, nor to confirm or deny whether he was the individual

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<sup>33</sup> Lupton did not testify, but Romaniello suggested in her testimony that Lupton may have spoken with Mercado Peralta during the week which led her to instruct Lupton to notify Mercado Peralta of his termination. (Tr. 1157).

that phoned Mercado Peralta regarding his discharge. I am satisfied from a composite of Romaniello's and Mercado Peralta's testimony that the individual who called the latter to notify him of his termination was indeed Lupton. As Lupton was not called to testify, Mercado Peralta's claim of what Lupton said to him during their phone conversation, e.g., that Mercado Peralta had been the cause of the problem at the plant, is uncontested and accepted as true. The Termination Payroll Change form prepared by Romaniello on Mercado Peralta simply cites "05" as the reason for the discharge, with a notation to see an attached the document appended thereto, e.g., the alleged Lee report identical to the one attached to Garcia's Payroll Change form. (see RX-20).<sup>34</sup> Asked if the attached Lee report factored into Mercado Peralta's discharge, Romaniello answered, "Number 5, other improper conduct, is the reason." (Tr. 1160).

(e) DeJesus

DeJesus did not testify.<sup>35</sup> As noted, it is not clear who made the decision to terminate DeJesus as both Keller and Romaniello provided conflicting testimony on who made the decision. Keller, for example, testified he made the decision during his phone consultation with Daubenspeck, and subsequently informed Romaniello of that decision. Romaniello, on the other hand, testified that she made the decision to terminate DeJesus and subsequently notified Daubenspeck of her decision, who supported it. (Tr. 761; 1194). As to when DeJesus' was actually terminated, Keller and Romaniello both contend the decision was made on December 15. However, the Termination Payroll Change form prepared on DeJesus shows "12-19-06" as the "Actual Termination Date." (RX-21).<sup>36</sup> Further, there is no record evidence to show that DeJesus was ever notified of his termination.<sup>37</sup> DeJesus, as noted, was removed from the

<sup>34</sup> As noted, Mercado Peralta's termination report, unlike that prepared by Romaniello on the other named discriminatees, does not contain an "inciting a riot" entry, and simply gives the "05" disorderly conduct entry as the basis for the discharge. The attachment to Mercado Peralta's termination report consists of an undated and unsigned incident report identified by Romaniello as having been prepared by Lee. Lee did not testify.

<sup>35</sup> The Respondent, on brief (RB:25, fn. 6), contends that an adverse inference should be drawn from DeJesus' absence as a witness. I disagree. A discriminatee's failure to appear and testify does not necessarily warrant the drawing of an adverse inference, or preclude findings in his or her behalf if the evidence so warrants it. *Davey Roofing, Inc.*, 341 NLRB 222, 242 at fn. 1 (2004). *Salisbury Hotel, Inc.*, 283 NLRB 685, 693 (1987). As pointed out by the Board in the above cases, the testimony of a discriminatee is not a sine qua non for relief under the Act.

<sup>36</sup> A copy of the Lee report was also appended to RX-21. Romaniello's attempt to explain why RX-21 shows a "12-19-06" termination date for DeJesus when he purportedly was discharged on 12-15, was confusing and made little sense. Thus, she described this obvious discrepancy as a "practice" issue, explaining that the day after the last day worked is considered the employee's actual termination date. However, since DeJesus' last day of work was Friday, December 15, when he was removed from the plant and denied re-entry, then, according to Romaniello's explanation, the Termination Payroll Report should have listed "12-18-06" and not "12-19-06" as DeJesus' actual termination date. Romaniello admits she did not prepare DeJesus' Termination Report, and that the only entry she made therein was the "#05 – Inappropriate Conduct" entry found under the "Reason for Termination" section of the Report. Nor could she identify who may have prepared the Report or listed "12-19-06" as DeJesus' actual termination date.

<sup>37</sup> In its posttrial brief (p. 21), the Respondent states that DeJesus "was told he was terminated for creating an unsafe environment," e.g., "yelling, screaming, and banging on lockers, and for his aggressive behavior in inciting a riot." It cites to Rivera's testimony at Transcript p. 873 to support its claim that DeJesus was told the reasons for his termination. A

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facility by the police during the second cafeteria episode, and did not return to work after that. Following his removal, the Respondent blocked his ID card so that DeJesus would not have access to the facility.

5 Keller claims that in his discussion with Daubenspeck, he told the latter that DeJesus, in addition to yelling, screaming, and banging on lockers “in a threatening way,” had, as purportedly reported to him by Romaniello, also “approached and pushed the police” in the cafeteria, and, based on this information, they decided to terminate DeJesus. (Tr. 758).  
 10 Although Romaniello claimed to have seen DeJesus resisting and being led away, she made no mention in her testimony of seeing DeJesus push a police officer, or of telling Keller that she had. Fabrication superintendent Acosta also testified to seeing DeJesus being detained by the police and, while he recalled seeing DeJesus trying to walk away from the police, and offering some resistance to being detained, he never claimed to have seen DeJesus push a police officer. Indeed, for that matter, none of the police officers involved in the incident with DeJesus  
 15 testified to being pushed by DeJesus. Nor is there any evidence, such as testimony from either Kranich or Ciarllo, to suggest that they may have notified Keller of DeJesus’ removal and arrest. Keller himself made no such claim, nor did he, as noted, explain who told him about DeJesus’ arrest or of the events that led to the latter’s removal. Keller’s claim of being told by Romaniello that DeJesus pushed a police officer during the cafeteria incident lacks  
 20 corroboration and strikes me as a pure fabrication and simply not credible.

Rivera testified that DeJesus was terminated for “his aggressive behavior” during the Friday protest, and for “inciting a riot,” but, unlike Keller, did not cite the pushing of a police officer as a ground for the termination. He explained that DeJesus displayed his aggressive  
 25 behavior” by “running up towards the group, running back” with his fists in the air and screaming and shouting, and by banging on lockers on various occasions and getting in his and Keller’s face. He contends that DeJesus incited employees to riot by trying to get them to scream and yell, rather than discuss the issues. Rivera contends that DeJesus did, in fact, cause a riot at the facility because the employees that day conducted themselves as “an out-of-control mob.”  
 30 Asked if DeJesus’ alleged conduct of standing on a cafeteria table played a role in his termination, Rivera could recall only that this conduct was discussed during the Friday afternoon, but could not recall if it was a factor in DeJesus’ discharge. (Tr. 873-874).

Romaniello, as noted, claimed she made the “final call to fire” DeJesus because “it was  
 35 an out-of-control situation, a safety risk, and he was taken out by police,” and that there were no other reasons for the discharge. Her claim of having made the “final call” to terminate DeJesus, as noted, conflicts with Keller’s assertion that he and Daubenspeck made that decision during their phone conversation, which Keller described as having occurred before his subsequent meeting with Romaniello. Romaniello did not mention DeJesus’ alleged pushing of a police  
 40 officer in the cafeteria as a factor in the decision, thereby contradicting Keller’s assertion that she had notified him of this incident. As to who may have actually notified DeJesus of his discharge, Romaniello identified someone name “Jorge” as the one who may have communicated that decision to DeJesus. (Tr.1163; 1194). “Jorge” was not called to testify.

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review of Rivera’ testimony, however, makes clear that the latter was simply explaining why DeJesus was terminated, not describing what DeJesus may have been told about his termination. Nothing in Rivera’ testimony suggests that DeJesus was ever notified of the reasons for his termination.

## The allegations

The General Counsel contends that the 90-minute work stoppage was from its inception to its conclusion protected conduct, and that the named discriminatees were unlawfully discharged for their participation in that stoppage. The Respondent counters that while the work stoppage may have been protected when it first began, it lost its protection “when the crowd prevented [Bednar] from removing...Olivo” and the police had to be called.<sup>38</sup> (RB:25) As to the termination of the five named discriminatees, the Respondent contends they were terminated not for their participation in the work stoppage but rather for “inciting a riot.”

### B. Analysis

#### 1. The protected nature of the work stoppage

The parties, as noted, agree that the work stoppage was, at its onset, protected under Section 7 of the Act. The Board and the courts have long held that when a group of unrepresented employees spontaneously cease work over a wage-related issue or to protest unsatisfactory work conditions, said conduct presumptively enjoys the protection of the Act. *NL.R.B. v. Washington Aluminum Co.*, 370 U.S. 9 (1962); *California Gas Transports*, 347 NLRB No. 118, slip op. at 6 (2006). There are, however, circumstances in which an otherwise protected work stoppage could lose its statutory protection. Thus, in *Quietflex Mfg. Co.*, 344 NLRB 1055 (2005), cited by both the General Counsel and the Respondent in support of their respective positions, the Board set forth certain criteria to be used in determining when in-plant collective employee action, like the work stoppage here, loses its protection.<sup>39</sup> Applying the *Quietflex* criteria, I am in agreement with the General Counsel that the work stoppage was protected throughout its approximately 90-minute duration.

The work stoppage began at around 9:45 a.m. on December 15, when Garcia and other kill floor department employees, on not receiving their anticipated Christmas bonuses along with their regular paychecks, spontaneously and collectively decided not return to work to protest the Respondent’s failure to distribute the bonuses. Contrary to the Respondent’s assertion on brief (RB:50), and as found above, Garcia and the other employees were never told by Rivera they would be getting a 10-hour bonus, nor did she or any other employee demand that they be given a 20-hour bonus as a quid-pro-quo for returning to work. Rather, employees during the first cafeteria episode simply refused to return to work until someone from upper management came and explained why the bonuses had not been handed out. Clearly, the Respondent’s

<sup>38</sup> The Respondent’s position at the hearing, that the work stoppage began as protected conduct which lost its protection at some point during its 90-minute duration, stands in sharp contrast to the position it took in a February 20, 2007, pretrial position statement it submitted to the Region, and in a July 23, 2007 pretrial brief it filed with the Board opposing a request for 10(j) injunctive relief in this matter, wherein it argued, inter alia, that “[n]othing about this situation made it a protected in-plant strike.” (see GCX-23, p. 5; GCX-24, p. 7).

<sup>39</sup> The following ten criteria were cited by the Board in *Quietflex* as relevant to making this determination: (1) the reason for the work stoppage; (2) was the work stoppage peaceful; (3) did it interfere with production or deprive the employer access to its property; (4) did employees have adequate time to present their grievances to management; (5) were employees warned they must leave the premises or face discharge; (6) the duration of the work stoppage; (7) were employees represented or did they have a grievance procedure; (8) did employees remain on the premises beyond their shift; (9) did employees attempt to seize employer’s property; (10) the reason for which the employees were ultimately discharged.

failure to distribute Christmas bonuses, which the employees reasonably expected to receive given the Respondent's past practice, was a proper subject for concerted action by the employees. *Skrl Die Casting*, 222 NLRB 85, 89 (1976). This *Quietflex* factor weights in favor of finding the work stoppage to be protected.

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As to whether the work stoppage was peaceful, witnesses on both sides offered contrary views on the conduct of the protest. The alleged discriminatees, for example, described the situation in the hallway and cafeteria as orderly, and their discussions with management as not loud but rather peaceful conversations. The Respondent's witnesses, on the other hand, used terms such as "chaotic," "volatile," "out of control," "near riot," and "near violent" to describe the employees' conduct and behavior in the hallway and during the second cafeteria episode. The truth, I find, lies somewhere in between. Thus, I do not believe that the situation either in the hallway or during the second cafeteria episode was chaotic, near riotous, or "out of control" as the Respondent would have me believe. Nor do I fully believe the alleged discriminatees' characterization of the employees' behavior during these episodes as completely orderly and not loud. Rather, I find the tenor of the work stoppage was more aptly described by Respondent witness, Roman and by General Counsel witness, Hernandez.

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Roman described the employees in the hallway as being "excited" and "loud" as they tried to communicate their concerns over the Christmas bonus with Keller, who, in turn, was trying to calm them down by telling them a meeting would be held after work to discuss the matter. According to Roman, "everybody was excited," and talking loud and at the same time. Nevertheless, as earlier pointed out, she also credibly testified that she could hear what Keller was saying to employees because "he's the one that has the big, really strong, voice." (Tr. 1023). Hernandez similarly credibly testified that the hallway was noisy but, like Roman, attributed it to the fact that everyone was talking at the same time. He testified that while Keller was at times interrupted by employees trying to speak, Keller nevertheless was allowed to speak and, like Roman, claimed that Keller could be heard over the noise in the hallway. Both Keller and the employees, he contends, were equally as loud in the hallway. He credibly disputed Respondent's claim that employees in the hallway engaged in yelling or shouting either in the hallway or during the second cafeteria episode. (Tr. 513). Indeed, Bednar, who, as noted, was not a particularly reliable witness, conceded on cross-examination that employees were only raising their voices and waving papers in the air, and not screaming, as he initially testified to on direct examination. On the question of whether he heard employees banging on lockers, Hernandez, I find, credibly testified that while "a pair" of employees engaged in some light tapping on lockers in the hallway, there was no loud banging on the lockers, as claimed by various Company witnesses.

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Undoubtedly, employees who took part in the work stoppage could reasonably be expected to be angry and upset on not receiving their anticipated Christmas bonuses, or a clear explanation from Keller on why that decision was made. It is hardly surprising, therefore, given the reason for the work stoppage and the large number of employees who participated in it, that the noise level in the hallway and during the second cafeteria episode would have been high. The Board has long recognized that disputes over wages, hours, and working conditions, which is what the work stoppage here over the Christmas bonuses was all about, are among the disputes most likely to engender ill feelings and strong responses. *Consumers Power Company*, 282 NLRB 130 (1986). Thus, while the work stoppage was noisy and loud, with an occasional shouting, as occurred when employees in the hallway were ordered by the police officer to shut up, it was, I find, a relatively peaceful one, devoid of any violence or threats, usage of profanity or foul language, damage to property, or injury to persons.

There was, of course, the incident in the hallway when the alleged discriminatees and

other employees encircled Olivo to prevent his removal by Bednar, which the Respondent insists was the defining moment that transformed the work stoppage from a protected to an unprotected one. I am not, however, convinced that this particular incident was as sinister or threatening as the Respondent would have me believe. Rather than being an act of aggression, as Keller, Rivera, and Bednar strongly suggest, the actions by these individuals was more reflective of employees demonstrating their support for, and solidarity with, Olivo who had been speaking out on their behalf and who, the employees believed, had not engaged in any misconduct warranting his removal. Other than Bednar's discredited account that Mercado Peralta and others taunted and challenged him with hand gestures to come forward and remove Olivo, there is no credible evidence that this incident involved anything more than a handful of employees lending their support to Olivo by encircling him to prevent his removal. There was no violence, physical contact made, threatening or aggressive behavior directed at management or other employees, nor profanity or abusive language used by Mercado Peralta, Garcia, DeJesus, or any of the other employees who took part in this incident.

The assertions by Keller, Rivera, and Bednar, that the employees' conduct in encircling Olivo caused them to be fearful of being attacked or physically harmed, or that a riot might break out, was, in my view another exaggeration, designed, I am convinced, to bolster and justify the Respondent's subsequent actions. Support for this finding is evident from officer Kranich's description of the 911 call he received from an unidentified MOPAC security guard, who reported that a large fight was taking place among some 50-60 employees at the facility, and the report he received on arriving at the facility that a security guard was being assaulted in the hallway. Both reports were patently false, as no evidence was produced, nor, for that matter, any claim been made by the Respondent, that any fighting among employees occurred in the hallway that day, or that any assault was attempted or committed on a security guard, employee, or management representative at the facility that day. The only incident remotely suggestive of an assault having taken place in the hallway that day involved the Garcia-Avila "touching" or "hand-grabbing" allegation, which, as previously discussed and found, did not occur. Neither of the individuals who made these reports to Kranich were called to testify, leaving intact and unchallenged Kranich's description of what he was told was occurring at the facility warranting an official police response. Kranich, as noted, was generally a fairly reliable and credible witness, and his undisputed account of the reports he received is credited. I am convinced that the false reports made to the police by these unidentified MOPAC security guards regarding what was taking place in the facility at the time were clearly intended to depict the situation as being worse than it actually was.

The work stoppage, as noted, was confined to the cafeteria and the locker room hallway away from the production areas of the facility. The only slowdown in production resulting from the work stoppage occurred in the kill floor or slaughter department where the protesting employees worked. By itself, however, this fact does not render the work stoppage unprotected. As the Board noted in *Quietflex*, supra at 1057, fn. 6, it is not considered an interference of production where the employees do no more than withhold their own services. While the work stoppage may obviously have created some inconvenience, there is no evidence that it disrupted or interfered with other production areas of the facility.<sup>40</sup> For example, the

<sup>40</sup> Fabrication department superintendent Acosta's testimony strongly suggests that the production in his department was still ongoing while the work stoppage was in progress. Thus, he testified that after being present during the second cafeteria episode, he decided to leave the cafeteria and head back to his department because he had to hand out paychecks. He explained that he instructed his supervisors to keep the fabrication employees in their production area and not let them go on break because he did not want them "joining the rest of

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hallway where employees gathered was generally used to gain access to locker rooms, bathrooms, uniform and linen storage bins, and as an occasional passageway for forklifts. There is, however, no evidence that employees seeking access to the locker rooms, bathrooms, or the laundry bin, or that forklifts had attempted to use, but were prevented from doing so during the hallway episode of the work stoppage, which lasted, more or less, about a half-hour. Undoubtedly, the large number of employees gathered in the hallway during that 30-minute period might have dissuaded employees not involved in the work stoppage from seeking to access these areas. Nonetheless, the record is devoid of any evidence suggesting that this in fact occurred.

In any event, employees gathered in the hallway not because they sought to extend the work stoppage beyond the cafeteria area where the work stoppage began, but rather because they were urged by management to come out of the locker rooms and into the hallway so that Keller could address their concerns. As noted, following Rivera's initial discussion with Garcia and other employees in the cafeteria at the onset of the work stoppage, employees appeared ready to take Rivera up on his offer to either return to work or leave the plant. Employees, as noted, chose Rivera's latter option, left the cafeteria, and entered the locker rooms to prepare to leave the premises. However, as they were doing so, Berios asked them not leave but to step out into the hallway so Keller could speak with them. Thus, it was at the Respondent's request that the gathering in the hallway took place. Keller could just as easily have asked the employees to return to the cafeteria, a much larger and open location, to discuss the matter of the bonuses with them. He chose, instead, to address the employees in the hallway, running the risk that this might serve to hinder use of the hallway by others not involved in the work stoppage, or otherwise interfere with other aspects of production. As noted, there is simply no evidence that any such interference or disruption in production took place, but to the extent it could have done so, it would have been a problem of the Respondent's own making, as it was Keller who chose the hallway as the venue from which to address employees.

Nor was any evidence presented to show that employees not involved in the work stoppage were unable to use the cafeteria for its intended purpose, e.g., taking breaks, having snacks, etc. Indeed, Officer Kranich testified that when he entered the cafeteria following the hallway episode, he noticed people were already there, "talking, having their snack, or break-time, whatever." (Tr. 386). Olivo similarly testified, without contradiction, that there were other employees taking their break in the cafeteria when the protesting employees entered the cafeteria from the hallway. Asked if the work stoppage in the cafeteria interfered with those workers who were on break, Olivo replied, "I don't think so because the ones that were able to go back to work could, and the ones who wanted to stay could." His testimony in this regard was not challenged and is accepted as true. In short, other than the cessation of work in the kill floor or slaughter department by the protesting employees, there is no evidence that the work stoppage interfered with, disrupted, or adversely affected the Respondent's overall operations, or that the Respondent was denied access to any part of its facility or property. This particular *Quietflex* factor, I find, weighs in the employees' favor and supports finding the work stoppage to be protected.

As to whether employees were given an opportunity to present their grievance to management, e.g., *Quietflex* factor 4, the record makes clear that when Rivera appeared in the

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the kill floor people" who involved in the work stoppage. Acosta's fear, therefore, was not that his department employees would be prevented by the work stoppage from accessing or using the cafeteria, but rather that the fabrication employees might decide to join in with the kill floor employees and support the work stoppage. (Tr. 709).

cafeteria to inquire why employees had not yet returned from their breaks, Garcia and other employees presented their grievance to him, explaining that they were upset at not receiving their Christmas bonuses, and stating that they would not return to work until they received an explanation from upper management on why the bonuses were not distributed. Rivera, however, never offered Garcia or the employees any such explanation, telling them instead that they should either return to work or leave the premises, and that he would try to arrange a meeting after work to discuss the issue. Indeed, at no time during work stoppage did Keller or anyone else from management provide employees with an explanation on why they had not received their customary 20-hour bonus. The evidence suggests only that at some point in time either in the hallway or during the second cafeteria episode, Keller told employees he might be able to get them a 10-hour bonus but that they would have to wait until the following Monday for a more definitive answer. Thus, while this *Quietflex* factor appears to have been met, I find it only minimally weighs in the Respondent's favor, as the Respondent never actually explained to employees why it had not paid out the entire 20-hour bonus.

I am convinced that had Keller provided employees with such an explanation, which I am further convinced he had an opportunity to do in the hallway, employees might very well have been persuaded to end their protest and return to work. Employees, as noted, were not refusing to return to work until they received their 20-hour bonus, as the Respondent speculates on brief, but rather were demanding an explanation as to why the Respondent chose not to hand out bonuses that year. In *Quietflex*, the Board found this particular criteria to have been satisfied because the employer in that case made a reasonable effort to respond to the issues raised by the protesting employees, and immediately agreed to remedy one of the employees' concerns and expressed a willingness to address their other concerns. Here, the most that can be said is that Keller offered to meet with employees after work hours to discuss the matter, and hinted at a possible 10-hour bonus. Accordingly, the Respondent's rather limited and vague response to the employees' insistence on knowing why they did not receive their bonuses, as found above, only marginally favors the Respondent, as the employees did get to make their grievance known to management.

*Quietflex* factor 6, relating to the duration of the work stoppage, favors finding the employee protest to have been protected throughout its duration. The work stoppage, as noted, lasted approximately 90 minutes, after which most employees, with the exception of DeJesus who was arrested and Mercado Peralta who was escorted out of the facility, heeded Keller's directive to either return to work or leave the facility and peacefully ended the work stoppage and returned to work. Work stoppages of similar, or even slighter longer, duration than the one that occurred here have been found by the Board to be protected. *Quietflex*, supra at fn. 9, citing to *Golay & Co.*, 156 NLRB 1252 (1966); also, *Molon Motor & Coil*, 302 NLRB 138 (1991); *City Dodge Center*, 289 NLRB 194 (1988). Again, with the exception of DeJesus and Mercado Peralta, no kill floor department employee who took part in the work stoppage remained on the premises beyond their regular shift,<sup>41</sup> satisfying *Quietflex* factor 8, and weighing in favor of finding the work stoppage protected.

On the question of whether there was a grievance procedure available for employees to present their concerns to management (*Quietflex* factor 7), the employees here are not represented by any union and, thus, not subject to any collective bargaining agreement grievance procedure. The Respondent, however, maintains an employee handbook which contains a "Grievance Procedure" through which employees can "discuss with [their] immediate

<sup>41</sup> The Respondent appears to concede this point as it simply asserts on brief that the employees remained in the premises only beyond the end of their first break. (RB:51).

supervisor any complaint or grievance arising from your employment with the Company.” (RX-22). If not resolved at that level, the employee may take the grievance to the next highest level of supervision, and may also contact the Respondent’s personnel department “at any time for advice or guidance about the process.”

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Romaniello testified that employees are given a copy of the employee handbook when they are first hired, sit through a slide show which explains the contents of the handbook, and then engage in discussions with the “new employee administrator” during which she answers any questions they may have. (Tr. 1172). Romaniello claims that the handbook’s grievance procedure is used frequently, almost every day, by employees and supervisors alike to resolve issues that arise. The Respondent’s attempt to introduce documentary evidence, to show the extent to which the grievance procedure had been used in the past, was rejected after the General Counsel objected to the introduction of such documents on grounds that said documents had been subpoenaed by, and admittedly not turned over to, the Government.<sup>42</sup>

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Thus, there is no evidence to substantiate Romaniello’s claim regarding the extent to which the grievance procedure in the Employee Handbook is actually utilized by employees.<sup>43</sup> In any event, to the extent the Employee Handbook grievance procedure can be construed as a viable method for individual employees to make their grievances known to the Respondent, there is nothing in the wording of grievance procedure to suggest that it was intended to be used by employees to resolve group complaints of the type that arose on December 15. See, *HMY Roomstores, Inc.*, 344 NLRB 963, at fn. 2 (2005). This particular factor, therefore, does not militate against finding the work stoppage to have been protected.

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As to *Quietflex* factor 9, there is no evidence that the employees involved in the work stoppage seized, or as claimed by the Respondent on brief, attempted to seize, control of its facility. Rather, the evidence here shows only that employees remained in specified areas of the facility, e.g., the hallway and the cafeteria, as directed by Keller and the police, for a limited duration (90 minutes) over a work-related matter, e.g., their Christmas bonuses. At no time did the employees interfere with or prevent the Respondent from continuing to run its facility as it saw fit. The Respondent produced no evidence to the contrary, or to show that employees of other departments not involved in the work stoppage were prevented from coming and going as they pleased. I find this factor supports finding the work stoppage to be protected.

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Finally, regarding the last *Quietflex*, e.g., the reasons why the name discriminatees were

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<sup>42</sup> See, *Bannon Mills*, 146 NLRB 611 (1964).

<sup>43</sup> Mercado Peralta apparently was aware of the existence of some grievance procedure but testified that he never used it because the individual to whom one would take such a grievance or complaint was Avila, whom he believed was married to Rivera. He explained that it made no sense to him bring a complaint he might have against Rivera if he had to discuss it first with the latter’s spouse, Avila. While the evidence does show that Rivera and Avila are living together, it is not clear that they are husband and wife. Nevertheless, Mercado Peralta’s point was that he was reluctant to use the grievance procedure established in the handbook because of the close relationship between Avila and Rivera. (Tr. 182; 185). According to Olivo, the only grievance handling procedure he was familiar with consisted of a “mailbox” type of bin where employees could fill out a form setting forth their complaint and place it in the box. He explained this procedure was instituted in 2004 by the Respondent, following a union’s organizational attempt, because of the number of complaints it was receiving from employees. Olivo testified he never used the “mailbox” because he had heard from others who presumably used it that their grievances were never resolved. Olivo’s failure to mention the employee handbook’s grievance procedure suggests he may have been unfamiliar with its existence. (Tr. 329-330).

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terminated, the Respondent's contention is that these individuals were fired for alleged misconduct during the course of the work stoppage, not for refusing to comply with Keller's directive to return to work or leave the facility. As fully discussed and found below, these five named discriminatees did not engage in the misconduct for which the Respondent contends they were discharged, and were fired solely for their protected conduct of participating and taking an active role in the work stoppage. This factor, therefore, does not weigh in the Respondent's favor.

To summarize, the in-plant work stoppage engaged in here by the Respondent's "kill floor" employees on December 15, was at all times a relatively peaceful one devoid of violence, threats, injury, destruction or damage to property, was focused exclusively and specifically on a job-related complaint, e.g., the Respondent's failure to distribute Christmas bonuses, caused no disruption of work performed by employees who chose to continue working, and was ongoing for reasonable period of time, e.g., 90 minutes. Accordingly, I find the in-plant work stoppage was at all times a protected, concerted activity.

## 2. The Section 8(a)(1) discharges

### (a) Garcia

The Respondent, on brief, contends that Garcia was lawfully discharged for "pushing" or "touching" Avila during the hallway portion of the work stoppage. There is no disputing that Garcia, along with the other named discriminatees, were discharged for conduct that occurred during what, as found above, was a protected in-plant work stoppage. The analysis required for determining if Garcia's termination, and that of the other alleged discriminatees, was unlawful was spelled out by the Supreme Court in *NLRB v. Burnup & Sims*, 379 U.S. 21 (1968).

In *Burnup & Sims*, the Court held that Section 8(a)(1) will be violated if it is shown that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct. Under the *Burnup & Sims* analysis, the General Counsel bears the burden of showing the striking employees were discharged for conduct that occurred during the strike or work stoppage. Once this threshold is satisfied, the burden shifts to the employer to show that it had an honest belief that the employees engaged in misconduct during the work stoppage that was serious in nature. The severity of the misconduct required to justify the discharge has been defined by the Board to be that which "under circumstances existing...reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." *Universal Truss, Inc.* 348 NLRB No. 41, slip op at 2 (2006), citing *Clear Pine Mouldings*, 268 NLRB 1044, 1046. If the Respondent is able to do so, the burden then shifts back to the General Counsel to show, by a preponderance of evidence, that the employee did not, in fact, engage in that misconduct, or that the conduct was not serious enough for the employee to forfeit the protection of the Act. *Id.* at 3; See, also *Marshall Engineered Products Company, LLC*, 351 NLRB No. 47 (2007); *Pratt Towers*, 338 NLRB 61 (2002).

Applying the above principles to Garcia's termination, I find Garcia's discharge to have been unlawful. As previously noted, the sole reason cited by the Respondent on brief, and by Romaniello at the hearing, for terminating Garcia is that she either "pushed" or "touched" Avila in the hallway as Olivo was about to be removed from the facility. Although the Respondent argues that the work stoppage was rendered unprotected once Garcia and other employees encircled Olivo to prevent his removal, I have, as previously discussed and found, rejected that argument and concluded, based on the credible evidence of record, that this particular incident

did not cause the work stoppage to lose its protection, and that the work stoppage was protected throughout its 90-minute duration. The record makes clear, and the Respondent does not deny, that Garcia took an active role in the work stoppage, speaking out at first during the first cafeteria episode to Rivera by insisting that employees would not return to work until management provided them with an explanation for not paying out the Christmas bonuses, and again during the hallway episode by addressing her concerns to Keller and taking part in the Olivo incident.

The first three *Burnup & Sims* criteria have clearly been met regarding Garcia's termination, for Garcia, with the Respondent's full knowledge, took part in the protected work stoppage, and was, according to the Respondent, terminated for conduct she allegedly engaged in during that work stoppage. As to the last criteria, that too has been satisfied, for, as fully discussed and found above, there is no credible evidence to show that Garcia ever "pushed" or "touched" Avila in the hallway that morning. Having concluded that Garcia did not engage in the misconduct for which she purportedly was terminated, her discharge was, under *Burnup & Sims*, unlawful. A contrary finding would not be warranted even if I were to believe, and I do not, that, in discharging Garcia, Romaniello did so based on a good faith but mistaken belief that Garcia had indeed pushed Avila in the hallway, for the Supreme Court made clear in *Burnup & Sims* that an employer's good faith is simply not relevant if the misconduct never occurred. See, also, *Shamrock Foods Company v. NLRB*, 346 F.3d 1130, 1134 (D.C. Cir. 2003).

There are, in any event, good reasons for doubting any claim by the Respondent that it discharged Garcia under a mistaken but good faith belief that she had engaged in the misconduct in question. First, the termination decision, as noted, was made on the afternoon of December 15, a few hours after the alleged incident occurred. At no time before that decision was made was Garcia questioned about this incident, or given an opportunity to explain or defend herself against, the accusation. Nor, as noted, did Romaniello interview any other employee, or manager for that matter, who was present in the hallway and who might have been able provide some corroboration on whether the incident did, or did not, occur. Rather, Romaniello simply accepted, without inquiry or even a rudimentary investigation, Avila's representation that Garcia had either "pushed" or "touched" her in the hallway. The Board has found the failure to conduct a meaningful investigation or to give the employee [who is the subject of the investigation] an opportunity to explain to be clear indicia of discriminatory intent. *U.S. Recycling And Disposal, LLC*, 351 NLRB No. 67 (2007); *Bantek West, Inc.*, 344 NLRB 886, 895 (2005); *West Maui Resort Partners*, 340 NLRB 846, 848-849 (2003).

The Board has also held that an employer's shifting explanations for action taken may support an inference of pretext and an inference that the true reason was an unlawful one. *Inter-Disciplinary Advantage, Inc.*, 349 NLRB No. 49 (2007); *Mt. Clemens General Hospital*, 344 NLRB 450, 458 (2005). The Respondent here, as noted, claimed in its post-hearing brief, as did Romaniello in her testimony, that Garcia was discharged solely for "pushing" or "touching" Avila in the hallway. This, however, was not the position taken by the Respondent prior to the hearing. Thus, in its pretrial position statement to the Board, the Respondent, in addition to citing the pushing incident, claimed that Garcia was also terminated for being "loud and disruptive while Keller and Rivera tried to talk to the workers," and further averred therein that Garcia and the other alleged discriminatees were "disciplined for their misconduct in connection with the work stoppage" which included "their steadfast refusal to return to work when they were told to leave the plant or return to work, ...and their many actions to incite a riot and other specific misconduct as described above." (GCX-23, pp. 3 & 5).

In its answer to the complaint, the Respondent yet again cited "loudly trying to disrupt so Keller and Rivera could not talk to co-workers," engaging in "disruptive behavior (yelling,

screaming, banging on lockers, standing on tables), “creating a climate of violence,” “blocking the movement of co-workers,” “keeping workers from working,” “taking over Moyer Packing’s property,” and “refusing to leave or return to work,” as its reasons for discharging Garcia. Further, on cross-examination, Rivera, apparently adhering to a “more is better” philosophy, added yet another reason for Garcia’s discharge that was never raised or mentioned by Romaniello in her testimony, or asserted by the Respondent in its brief. Thus, he asserted that Garcia’s alleged conduct towards him at the onset of the work stoppage during the first cafeteria episode, of “speaking loud” and “yelling” at him, was also a factor in Garcia’s termination decision. Pressed further on this by the General Counsel, Rivera also suggested that Garcia’s “disruptive” conduct in the hallway may also have been a factor in her termination. (Tr. 875-876).

The above shifting and changing reasons proffered by the Respondent at various points in this proceeding for discharging Garcia, along with the Respondent’s failure to conduct any inquiry into what, if anything, may have transpired in the hallway between Garcia and Avila, and its failure to allow Garcia an opportunity to respond to Avila’s accusation before deciding to terminate Garcia, reasonably leads me to conclude that the “pushing” or “touching” explanation for the termination is nothing more than a pretext. I find, instead, that Garcia was discriminatorily discharged solely for her involvement in the work stoppage, in violation of Section 8(a)(1) of the Act.

(b) Guzman

The record evidence, including testimony by Respondent’s own witnesses, makes clear that Guzman took part in the work stoppage in the hallway and in the cafeteria, and that the Respondent was fully aware of his involvement. Indeed, the reason proffered by the Respondent in its brief, and by Romaniello at the hearing, for terminating Guzman, to wit, threatening Rivera by pointing his finger directly in the latter’s face and yelling to the crowd in the cafeteria, “This is the reason for our problem,” leaves no doubt that the Respondent knew of Guzman’s participation in the work stoppage. What is in doubt, however, is whether the Respondent had a good faith belief, when it discharged Guzman, that the latter had in fact threatened Rivera. I find that it did not.

First, the credited evidence makes clear that the conduct for which the Respondent contends it discharged Guzman did not occur as described in its brief, or as testified to by Romaniello. Guzman, as found above, never got close to Rivera during their brief encounter, but rather stood some six feet away when he purportedly make the remark attributed to him by Romaniello, and, moreover, did not, as further found, point his finger in Rivera’s face. As to the remark attributed to Guzman by the Respondent, e.g., that Rivera was “the reason for our problem,” this too did not occur, for Rivera’s own testimony makes clear that what he thought he heard Guzman say was, “this is our true enemy.” As found above, Guzman never made any such remark to Rivera, but rather repeated to Rivera what he had just said to Olivo and presumably others around him, to wit, that the Respondent was treating employees like enemies.

Romaniello, on whose testimony the Respondent relies, as noted, claimed she discharged Guzman, inter alia, for telling Rivera during this brief encounter that he, Rivera, was “the reason for our problem.”<sup>44</sup> Notably, Romaniello never explain how she came to attribute

<sup>44</sup> In her memo attached to Guzman’s termination report, Romaniello placed the remark attributed to Guzman in quotes, reflecting her understanding that the phrase, “the reason for our

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5 this particular remark to Guzman. Clearly, it could not have come from Rivera for the latter, as  
 stated, testified, albeit mistakenly, that Guzman's actual words were, "this is our true enemy."  
 Nor could she have gotten it from Boyrie, whose testimony, although discredited, is in line with  
 what Rivera contends was said to him by Guzman, and because Romaniello never bothered to  
 10 speak with or interview Boyrie as to what she may have heard or seen before deciding to  
 discharge Guzman. It is patently clear, therefore, that Guzman could not have been discharged  
 for accusing Rivera of being the "reason for our problem" at the facility, as asserted by  
 Romaniello in her testimony, and as argued by the Respondent on brief, for there is no credible  
 15 evidence that Guzman ever made any such remark. As to the "this is our enemy" remark  
 erroneously attributed to Guzman by Rivera, this comment too was, as found above, never  
 made by Guzman.

15 Nor, as further found, is there any credible evidence to indicate that Guzman, either in  
 words or deeds, threatened or acted in an aggressive or belligerent manner towards Rivera  
 when he, at Rivera's request, repeated what he had just told Olivo about how the Respondent  
 was treating its employees like enemies. Finally, I accept Guzman's assertion, corroborated  
 somewhat by Abreu, that Romaniello simply told Guzman, through Abreu, that he was being  
 20 discharged for the comment he made to Rivera earlier that day, without explaining what the  
 comment was. In this regard, I further find that Guzman did not, as claimed by Romaniello,  
 admit to making the remark attributed to him by Romaniello, for, as noted, he was never told  
 what that remark was. Although Guzman admits offering an apology, his testimony makes clear  
 that he was apologizing only if his remark about the Respondent treating its employees like  
 enemies had offended anyone. He was not, I am convinced, apologizing for having accused  
 25 Rivera of being "the reason for our problem" for, as found above, he never uttered the  
 statement, and, moreover, was never told by Romaniello during the discharge meeting what he  
 was alleged to have said to Rivera.

30 As with Garcia's discharge, even if Romaniello honestly believed that Guzman had  
 accused Rivera of being the reason for the employees' problems, her good faith belief would  
 nevertheless not have justified Guzman's termination since, as found above, Guzman never  
 made the above alleged threat.<sup>45</sup> Accordingly, consistent with the holding in *Burnup & Sims*,  
 Guzman's discharge for conduct which did not occur during his participation in a lawful and  
 protected work stoppage was unlawful.

35 There are, in any event, sound reasons for believing that Guzman's discharge was  
 motivated not by a good faith belief that he threatened Rivera during the work stoppage, but for  
 some other unstated reason. As noted, Romaniello, by her own admission, never interviewed  
 or questioned Guzman, or, for that matter, any other individual who may have witnessed the  
 incident, including Boyrie, before making her decision to terminate Guzman. The only person  
 40 she purportedly spoke to about this incident was Rivera. However, Rivera did not corroborate

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problem," were Guzman's actual words and not just her general understanding of what Guzman  
 purportedly may have said.

45 <sup>45</sup> Nor would a different result be warranted even if I were to believe, which I do not, that  
 Guzman may have referred to Rivera as the employees' enemy, as claimed by the latter, or as  
 the "real reason for the employees' problems, as claimed by Romaniello. The Board has held  
 that an employee does necessarily not lose the Act's protection if, while engaged in protected  
 concerted activity, he engages in conduct that might be deemed abrupt or disrespectful,  
 50 regardless of the inaccuracy of an employee's comments or their lack of merit or even his usage  
 of foul language or epithets directed toward a member of management. *Hacienda Hotel, Inc.*  
 348 NLRB No. 49, slip op at 17 (2006).

Romaniello's claim as to what Guzman allegedly said to him, leading me to question whether Romaniello ever spoke to Rivera at all about the incident. Romaniello's failure to conduct a meaningful investigation of this incident, or to allow Guzman an opportunity explain or give his side of what may have occurred between him and Rivera that morning, undermines any suggestion that the discharge was done in good faith, and, instead, supports an inference that the reason given is nothing more than a pretext designed to hide another reason the Respondent prefers to conceal.

The pretextual nature of the discharge is further buttressed by the fact that, as with Garcia, the Respondent proffered other explanations from those listed by Romaniello, the alleged decision-maker, as grounds for the termination. According to Romaniello, her decision to discharge Guzman was based solely on the above-described incident involving Rivera, "and nothing else." (Tr. 1204). Yet, in its answer to the complaint, and in its July 23, pretrial position statement, the Respondent averred that Guzman was also discharged for, inter alia, "banging on lockers, standing on tables," "blocking the movement of co-workers," "taking over Respondent's property," "refusing to leave or return to work," "preventing management representatives from talking to co-workers," "blocking locker room corridor ingress/egress," "chanting to coerce workers not to return to work," "insubordinately repeating the Rivera threat after being told by Rivera to stop,"<sup>46</sup> and "threateningly forcing his way through a crowd of workers." As stated, an employer's proffer of shifting or changing explanations for disciplining or terminating an employee supports an inference that the true reason for the action taken is one which the employer seeks to conceal. *Id.* Accordingly, for all of the above-stated reasons, I find that Guzman was unlawfully terminated for his involvement in, not for any alleged misconduct during, the protected work stoppage, in violation of Section 8(a)(1) of the Act.

(c) Mercado Peralta

Mercado Peralta's discharge was, I find, also unlawful under *Burnup & Sims*, supra. Mercado Peralta, according to the Respondent, was discharged for alleged misconduct in the cafeteria during the course of the work stoppage. Specifically, as testified to by Romaniello, Mercado Peralta was terminated for refusing to listen to Rivera in the cafeteria, and for pushing away from Rivera, resisting the police, and "busting" through a crowd of employees to get through some double doors employees were instructed not to go through. The above assertion by Romaniello, along with other evidence of record, thus satisfies the first two *Burnup & Sims* criteria: Mercado Peralta's participation in the work stoppage and Respondent's knowledge of his activities. On the question of whether Respondent's discharge of Mercado Peralta was based on an honest belief that he engaged in the alleged misconduct, the Respondent, I find, has not sustained its burden.

Thus, Romaniello's explanation for discharging Mercado Peralta simply does not withstand scrutiny. As found above, the conduct on which she purportedly relied to terminate Mercado Peralta did not occur as described by her. That Mercado Peralta spoke with Rivera in the cafeteria and was eventually removed from the facility is not disputed. However, testimony

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<sup>46</sup> This particular claim, that Guzman kept repeating the remark he purportedly made to Rivera after being ordered by Rivera to stop, is contradicted by Rivera's own testimony for, according to Rivera's account, he specifically asked Guzman to repeat what he had just said and Guzman, in fact, did not do so and simply walked away. Rivera, as noted, admitted that Guzman made the remark only once and did not repeat it. Thus, his own testimony undercuts and renders specious Respondent's asserted claim in its answer that Guzman continued to repeat his remark after being ordered by Rivera to stop.

provided by two of Respondent's own witnesses, as well as by the more credible, unbiased, nonpartisan witness, Kranich, makes clear that Mercado Peralta did not engage in the conduct described by Romaniello. Bednar, as noted, observed Mercado Peralta trying to return to work but prevented him from doing so because he recognized him as one of the principal agitators of the work stoppage. He made no mention in his testimony of Mercado Peralta trying to "bust" through the crowd of employees to get to work. Rivera, somewhat contradicting Bednar's account, claims he came over and put his arm around Mercado Peralta to speak with him because the latter appeared to be ignoring Keller's directive for employees to either leave the facility or return to work. Bednar, as pointed out, claimed, contrary to Rivera, that Mercado Peralta was in fact heading towards the production floor when stopped by him. However, like Bednar, Rivera made no mention in his testimony of Mercado Peralta refusing to hear him out or getting away from Rivera and "busting" through the crowd of employees in an effort to return to work, as claimed by Romaniello. Finally, Kranich credibly testified that he escorted Mercado Peralta out of the cafeteria after being directed by Lee to do so because the latter considered Mercado Peralta one of "instigators to the incident," who "had started the entire uprising of employees originally, [and] was one of the advocates of getting everybody together." Kranich, like Bednar and Rivera, made no mention of seeing Mercado Peralta "resisting" Rivera or the police, or attempting to "bust" through a crowd of employees in order to get to work. Mercado Peralta, he pointed out, was never handcuffed or arrested.

Thus, although Romaniello claims she was standing only five feet away from Rivera and witnessed Mercado Peralta's behavior towards Rivera and his subsequent conduct of "busting" through a crowd of employees, neither Rivera, Bednar, nor Kranich, all of whom testified to having been involved in one form or another with this particular incident involving Mercado Peralta, provided any corroboration for Romaniello's version of events. This lack of corroboration, together with her overall lack of credibility on other matters, and her poor testimonial demeanor, convinces me that, as previously found, the conduct for which Romaniello asserts she discharged Mercado Peralta never occurred. Rather, Romaniello's account strikes me as nothing more than a fabrication and a pretext.

As with the Garcia and Guzman terminations, there are good reasons for finding the explanation proffered for Mercado Peralta's termination to be nothing more than a pretext. The Respondent, as it did with Garcia and Guzman, has not provided a consistent explanation for terminating Mercado Peralta. Thus, while Romaniello explained that Mercado Peralta's discharge was based solely on the above-described specific behavior towards Rivera in the cafeteria, e.g., refusing to listen to Rivera in the cafeteria, pushing away from Rivera, resisting the police, and "busting" through a crowd of employees to get through some double doors, the Respondent, in its February 20, prehearing position statement and answer to the complaint, cited additional grounds for his termination not mentioned by Romaniello. In its position statement, for example, the Respondent claimed that it had discharged Mercado Peralta (as well as the other named discriminatees) because he "acted to incite a riot, engaged in conduct threatening physical harm to certain management representatives, acted to undercut the authority of the management representatives, kept management representatives from talking to co-workers, and engaged in actions that provoked workers just as management representatives were making progress to get the situation under control." (GCX-23, p. 6).<sup>47</sup>

In its answer to the complaint, the Respondent cites other factors as having played a

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<sup>47</sup> The Respondent also cited these same reasons for Mercado Peralta's discharge in a statement submitted to the Board on July 23, opposing the General Counsel's request for injunctive relief. (See, GCX-24, p. 8).

role in Mercado Peralta's discharge. (GCX-1[h]). For example, it generally averred that Mercado Peralta, as well as the other named discriminatees, were discharged for their disruptive behavior during the work stoppage, including yelling, screaming, banging on lockers, standing on tables, exhibiting threatening and insubordinate behavior toward particular management personnel; creating a climate of violence; blocking the movement of co-workers thereby keeping them from working; taking over Company property; refusing to leave or return to work; preventing management representatives from talking to co-workers; and acting to incite a riot. As to Mercado Peralta's specific misconduct, it averred that he engaged in "angry and disruptive yelling and screaming;" "getting in Keller's and Rivera's face;" "attempting to prevent Keller and Rivera from communicating with the workers;" "blocking locker room corridor ingress/egress;" "repeatedly trying to keep Keller and Rivera from regaining control of the situation;" "chanting to coerce workers not to return to work;" "standing on cafeteria tables;" "threatening HR representative Abreu;" "violating police-imposed security lines and directives;" "conduct leading to his arrest by the police;" and "threatening Keller by saying, 'You do not know me. You don't know what I can do.'"

As noted, Romaniello, the purported decision maker, cited only Mercado Peralta's alleged refusal to listen to Rivera, and his alleged conduct of moving away from Rivera and trying to "bust" through a crowd of employees into the hallway leading to the production area, as the reason for the termination. Her failure to cite the additional reasons earlier proffered by the Respondent to the Board is, I find, an implicit acknowledgement that these additional reasons cited by the Respondent in its prehearing position statement and in its answer to the complaint played no role in Mercado Peralta's termination.<sup>48</sup> These varying, shifting, and at times false, explanations proffered by the Respondent prior to and at the hearing convinces me that they are nothing more than pretexts and that the real reason for the Mercado Peralta's discharge is one which the Respondent prefers to conceal. *Inter-Disciplinary Advantage, Inc.*, supra.

The true reason for Mercado Peralta's discharge was nevertheless made quite apparent when Lee told officer Kranich that Mercado Peralta should be removed from the facility because the latter had one been of the instigators who "had started the entire uprising of employees originally, [and] was one of the advocates of getting everybody together." Lee's statement to Kranich, which was not challenged by Lee as he did not testify,<sup>49</sup> and which I have credited, makes patently clear it was Mercado Peralta's role in, and involvement with, the protected work stoppage, not any alleged misconduct on his part, that led to his eviction from the facility and to

<sup>48</sup> There is little or no credible evidence to support many of the discharge reasons cited by the Respondent in its February 20, position statement or in its answer. For example, Mercado Peralta was never arrested, nor did he ever threaten Abreu, for Abreu readily admitted that while Mercado Peralta may have been disrespectful, he never threatened her. (Tr. 1068). Further, the claim that Mercado Peralta stood on a cafeteria table and yelled at management was, as found above, not credibly established. As noted, Kranich's description of Mercado Peralta as simply standing around not doing anything undermines the claim that he had been disruptive in the cafeteria. Nor was any credible evidence produced to show that Mercado Peralta followed DeJesus into a restricted area, got into a police officer's face, or pushed a police officer. Finally, the assertion in Respondent's answer, that Mercado Peralta threatened Keller by saying, "You do not know me. You don't know what I can do," is patently false. Keller himself, as well as Rivera, both attributed this remark solely to Medina, the gold-helmeted employee, and never accused Mercado Peralta of making this remark. (Tr. 738; 814-815).

<sup>49</sup> The Respondent's failure to call Lee to refute or dispute Kranich's rather revealing and damaging testimony to its case warrants an adverse inference that Lee's testimony, had he been called to testify, would not have been favorable to the Respondent.

his subsequent discharge. Having found that the sole reason for Mercado Peralta's discharge was his participation in, and involvement with, the protected work stoppage, I find the discharge to have been unlawful, and a violation of Section 8(a)(1) of the Act, as alleged. *Industrial Hard Chrome, Ltd.*, 352 NLRB No. 47, slip op. 24 (2008); *Benesight, Inc.*, 337 NLRB 282, 283 (2001).

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## (d) Olivo

Regarding Olivo's discharge, the record makes clear that Olivo also took an active role in the work stoppage by voicing his concerns to Keller about the bonus in the hallway, that Keller and other managers were fully aware of his involvement therein, and that he was discharged allegedly for engaging in misconduct during the course of the work stoppage. Specifically, the misconduct in question consisted of being "disruptive" in the hallway by "screaming and yelling over Keller so loudly that no one could hear him, inciting others to scream and yell, and by continuing to react that way in a very volatile situation." (RB: 23; Tr. 1145). While claiming that the work stoppage became unprotected when employees encircled Olivo to prevent his removal by Bednar, a claim I have rejected based on the credible evidence of record, the Respondent has not denied knowing of Olivo's participation and involvement in the work stoppage, or that his termination resulted from conduct that occurred during the hallway portion of the work stoppage. The General Counsel's initial burden under *Burnup & Sims* has, consequently, been met here with respect to Olivo's discharge.

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The Respondent points to the testimony of Keller, Rivera, Collazo, and Roman to support its claim that Olivo's discharge was based on a good faith belief that Olivo had engaged in the above-described misconduct. However, of these four, only Roman, in my view, provided a more reliable and candid assessment of what transpired in the hallway on the morning of December 15. Roman, as noted, described all employees in the hallway as being "excited" and "loud" as they expressed their concerns to Keller and Rivera, and specifically identified Olivo, along with Mercado Peralta and DeJesus, as the ones who primarily engaged in exchanges with Keller regarding the bonuses. According to Roman, all employees were talking as loud as, if not slightly louder than, Keller. However, she never testified to seeing Olivo "scream" or "yell" over Keller, or trying to incite others to scream or yell at Keller. Her testimony reflects only that she observed Mercado Peralta, DeJesus, and Olivo talking to Keller, and made no mention of seeing any of any of these three engaged in the type of "disruptive" behavior described by Keller, Rivera, and Collazo. In fact, Roman identified only DeJesus, not Olivo, as the one who was "talking loud" to Keller, but again never described seeing him scream, yell, or shout at Keller. (Tr. 1020). It is worth noting that in the report allegedly prepared by Lee regarding the December 15, events, Lee stated that Olivo was asked to be removed from the hallway after "addressing a comment" to Keller. Lee's report makes no mention of Olivo having screamed, shouted, or yelled at Keller. The mere act of addressing a comment to Keller, as described in the Lee report, can hardly be equated, or viewed as synonymous, with yelling, screaming, or shouting, or inciting others to riot.

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Roman's observations regarding the events and the conduct of the alleged discriminatees, including Olivo, in the hallway are more in line with the descriptive and credible accounts provided by Cruz, Villar, and Hernandez. Thus all three described the situation in the hallway as noisy and loud, but testified that at no time did any of the employees, including Olivo, display any disrespect towards Keller or the other managers, or become abusive or use profanity towards them. More importantly, none claimed to have seen Olivo, or indeed any of the alleged discriminatees, scream, shout, or yell at Keller or Rivera. As noted, all three were still employed by the Respondent when they gave testimony that clearly was contrary to their employer's interest and, by implication, their own self-interest, thus enhancing the reliability and

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trustworthiness of their testimony.

By contrast, Keller, Rivera, and Collazo were, as previously discussed and found, not very reliable or credible. All three, for example, either embellished, exaggerated, or fabricated their testimony at one point or another to suit the Respondent's theory of the case. Keller's and Rivera's assertion, for example, of being unable to hear or understand what the alleged discriminatees were saying to them in the hallway, despite claiming to have stood only inches away from them, was, as noted, neither plausible nor credible, particularly given the contrary testimony of other witnesses, including Roman, who stood further away and had no difficulty hearing either what the employees or Keller was saying. Keller also was not candid in recounting what Rivera told him had been said or occurred between Rivera and employees in the cafeteria, or who first alerted him about the work stoppage. Collazo, for his part, lied about seeing all of the alleged discriminatees standing on cafeteria tables. Further, Collazo's conduct, as more fully discussed and found below, in unlawfully interfering with Hernandez' right to appear and testify at the hearing, and then threatening him with reprisal if he did so, revealed his pro-Respondent bias in the matter and rendered his entire testimony suspect and unreliable.

On whole, I am convinced, and so find, that while Olivo may have spoken loudly in the hallway in his discussions with Keller and Rivera, he never screamed, yelled, or shouted at either of them, or attempted to prevent them from addressing other employees in the hallway. Rather, I find it more likely than not that while Olivo may have raised his voice in order to be heard over the voices of the almost 100 employees who were gathered there, Olivo was never disrespectful to Keller or any other manager who was present. Thus, I find that the General Counsel has demonstrated that Olivo never engaged in the type of "disruptive" behavior for which the Respondent contends he was discharged, and that in voicing his concerns and that of other employees to Keller in a somewhat loud and possibly excited manner, Olivo did not exceed the protective boundaries of Section 7. In this regard, no evidence was produced to show that Olivo used threatening or abusive language or gestures towards Keller, Rivera, or any other manager or employee while expressing his views regarding the bonuses. Nor has the Respondent made any such claim, for it asserts only that Olivo engaged in disruptive conduct by "screaming and yelling over Keller so loudly that no one could hear him, and inciting others to scream and yell and continue to react that way in a very volatile situation," an assertion that, as found above, was not substantiated or proven through credible evidence. In these circumstances, Olivo's conduct in the hallway was not so egregious as to have caused him to lose the Act's protection. His discharge for his involvement in the protected work stoppage was, therefore, unlawful and a violation of Section 8(a)(1) of the Act.

(e) DeJesus

The reasons cited by Respondent for DeJesus' discharge are essentially the same as those proffered for Olivo's discharge, except that DeJesus' alleged banging on lockers in the hallway, and his arrest in the cafeteria, are cited as also having been factors in his termination. Thus, the Respondent contends on brief, as did Romaniello in her testimony, that DeJesus was discharged for "creating an unsafe environment," specifically, by "yelling, screaming and banging on lockers, and for his aggressive behavior in inciting a riot," and for being arrested during the work stoppage. (RB:21; Tr. 1203).

As it did with Olivo's discharge, the Respondent relies on the testimony of Keller, Rivera, and Collazo, in addition to testimony provided by Lawless, Roman, and Navarro, to support its claim that DeJesus' discharge was based on a good faith belief that the latter had engaged in the above-described misconduct during the work stoppage. For the reasons previously discussed with respect to Olivo's discharge, I place no credence in Keller's, Rivera's, or

Collazo's account of what transpired in the hallway, as their description of the employees' overall conduct and behavior in the hallway, including that of DeJesus and the other named discriminatees, was, I am convinced, grossly exaggerated and embellished.

5 Of the remaining three witnesses relied on by the Respondent -- Lawless, Roman, and Navarro -- only Roman offered a more reliable, honest, and credible appraisal of what occurred in the hallway. Roman, as previously pointed out in connection with Olivo's termination, did hear DeJesus and the other discriminatees speaking loudly in the hallway, DeJesus more so than the others, but never claimed to have heard or seen the latter scream or yell at Keller or any other manager, provoke other employees to engage in such conduct, or prevent Keller from speaking to employees. Keller, she credibly explained, was able to speak out to employees and to be heard over the noise of the crowd, and over the loud talking by DeJesus and the other discriminatees.

15 Lawless, like Roman, did identify DeJesus as being "probably the loudest" of the named discriminatees, and testified that the latter was "shouting down" Keller, was "the center of attention in the hallway," and the one "we were watching the closest." (Tr. 930). However, in an incident report prepared by Lawless three days later, on December 18, at Bednar's request, setting forth his recollection of what occurred in the hallway, Lawless never identified, much less mentioned, DeJesus as having engaged in any of the conduct he described in his testimony. (RX-11). In fact, in his report, Lawless identified and singled out only Mercado Peralta, not DeJesus or any of the other named discriminatees, as the one who "was acting as an instigator, shouting down Mr. Keller and Mr. Rivera." He also claimed in his report to have seen the crowd of employees in the hallway, "lead by [Mercado Peralta], surge forward and begin to shove and grab for [Keller] and Bednar." At the hearing, however, Lawless testified that while the crowd may have been physically pushing towards the center where Keller and Rivera stood, there was no "shoving," and, more importantly, never mentioned anything about Mercado Peralta, DeJesus, or any other employees in the crowd attempting grab Keller or Rivera. The inconsistencies in his testimony at the hearing vis-à-vis statements contained in his December 18, incident report render his testimony regarding DeJesus' conduct in the hallway unreliable and not credible.

Navarro claims that, while in the hallway, she, DeJesus, Mercado Peralta, Keller and Rivera were all standing "together," and that she heard employees screaming as Keller tried to calm them down. She contends that DeJesus and Mercado Peralta did not let Keller speak. Although claiming to have been standing right next to Keller, Rivera, DeJesus, and Mercado Peralta while this was going on, Navarro nevertheless testified that she was unable to hear what DeJesus or Keller were saying in the hallway. Her testimony, that she was unable to hear what DeJesus or Keller was saying despite being only inches from them, is, like the similar claims made by Keller and Rivera, simply not credible, and inconsistent with Roman's more credible account of being able to hear and understand what the alleged discriminatees were saying to Keller, and vice versa. Navarro, as previously discussed and found, had a propensity to exaggerate or embellish her testimony, as when she claimed to have seen DeJesus and Mercado Peralta during the first cafeteria episode, when the credible evidence of record, and the Respondent's own admission, make clear neither of these alleged discriminatees was present when the work stoppage first began. Accordingly, I place no credence in Navarro's claim that DeJesus screamed, yelled, or shouted at Keller to prevent him from speaking with employees in the hallway. Moreover, Navarro, it should be noted, never testified to seeing DeJesus act in an aggressive or threatening manner towards Keller, Rivera, or employees in general, or of trying to provoke employees into rioting.

As to Respondent's assertion that DeJesus was banging on lockers in the hallway, that

too lacks credible evidentiary support. Although Keller and Rivera both claimed to have seen DeJesus banging on lockers, their propensity to exaggerate and embellish the events of that day, their rather lackluster demeanor on the witness stand, and the lack of corroboration by some of their own witnesses, renders their claim of having seen DeJesus banging on lockers highly suspect. Lawless, for example, testified to hearing employees “sort of behind” him banging on lockers, but never named or identified DeJesus as being one of them. Nor did Roman, Navarro, or Collazo mention in their testimony seeing or hearing DeJesus, or for that matter any other employee, bang on lockers in the hallway. Moreover, other witnesses who were present in the hallway that morning testified in similar fashion. Thus, Bednar, Avila, and Boyrie, all of whom testified for the Respondent, claimed to have heard banging on lockers in the hallway. However, like Lawless, none of these individuals testified to seeing or hearing DeJesus engage in such conduct that morning. Similarly, General Counsel witness Villar denied seeing DeJesus bang on lockers in the hallway, and Hernandez, also a General Counsel witness, testified he did not specifically see DeJesus bang on any lockers, but added that he just didn’t know. While I do not doubt that some banging of lockers occurred during the hallway episode, the Respondent, I find, has produced no credible evidence to support its claim that DeJesus took part in that activity.

Like the above-described reasons cited by the Respondent for DeJesus’ discharge, the remaining reason, his arrest, likewise does not withstand scrutiny and appears to be nothing more than a pretext. It is not disputed, and the record makes perfectly clear, that DeJesus was removed from cafeteria by the police in handcuffs, arrested, and issued a non-traffic citation. What is not clear, however, is precisely why he was arrested, or what the Respondent knew to be the reason for his arrest.

As to why he was arrested, Ciarllo’s testimony, as previously discussed, suggests that he chose to arrest DeJesus for failing to follow his instructions to leave the cafeteria either by exiting the facility or returning to work. Ciarllo, as noted, did not detain or arrest DeJesus when he first observed him urging employees to remain in the cafeteria, but simply instructed him to cease doing so and to leave the facility or return to work. It was when Ciarllo noticed DeJesus returning to the cafeteria, after seeing him heading towards the hallway and the production area, that he took steps to detain DeJesus. As noted, Ciarllo never asked DeJesus, before deciding to detain him, why he was returning to the cafeteria; rather, on seeing him re-enter the cafeteria he immediately ordered DeJesus to stop and told him he needed to go outside. It is unlikely DeJesus would have understood what Ciarllo was saying to him for Ciarllo, as noted, does not speak or understand Spanish, DeJesus’ primary language, and there is likewise no evidence to suggest that DeJesus understood or spoke English. The fact that Abreu was asked to interpret for DeJesus while he was being interviewed by the police supports such an inference. According to Ciarllo, it was when DeJesus continued walking that he grabbed DeJesus by the arm, apparently prompting DeJesus to react by trying to pull away and offering some minor resistance to being detained.

Ciarllo admitted not knowing what DeJesus was up to just before he detained him, and nothing in his testimony suggests that he bothered to ask DeJesus, either directly or via an interpreter, why he was returning to the cafeteria. (Tr. 416). Nothing in Ciarllo’s description of what occurred as DeJesus was returning to the cafeteria suggests that DeJesus was at the time being loud, or acting in rowdy or in a disruptive manner, so as to give Ciarllo concern that DeJesus’ intent in returning was to resume his earlier attempts to convince employees to remain in the cafeteria and continue the work stoppage. As noted, according to Olivo’s credited account of what DeJesus said to him, the only reason the latter re-entered the cafeteria was simply to get a drink of water. Although Ciarllo claims that DeJesus was yelling to, and trying to communicate with, employees as he was being escorted out, he conceded that DeJesus did

so in Spanish. As he spoke no Spanish, Ciarllo could not have known what DeJesus was saying, and nothing in his testimony suggests that he questioned other employees to find out what DeJesus was trying to communicate to employees. Again, DeJesus, for all Ciarllo knew, might simply have been protesting his detention out loud, not attempting to stir up the employees.

While Ciarllo's undisputed account of what prompted him to arrest DeJesus is accepted as true, I am nevertheless troubled by what seems to have been an uninformed snap decision on his part to arrest DeJesus without first questioning the latter to see if he may have had a legitimate reason for returning to the cafeteria in the first place. In this regard, there is nothing in Ciarllo's version of events to suggest that DeJesus may have said something to provoke, anger, or that was disrespectful towards, Ciarllo, which may have prompted the latter to initiate the arrest. Indeed, given the language barrier, it is doubtful Ciarllo would have understood anything DeJesus may have said to him. While he was ultimately charged with disorderly conduct, this particular offense could not have been related to his initial conduct in the cafeteria of trying to convince employees to stay with the work stoppage since, by Ciarllo's own account, DeJesus stopped doing so after being instructed by Ciarllo to either leave the facility or return to work. The arrest, again by Ciarllo's own account, was prompted solely by DeJesus' decision to re-enter the cafeteria. However, A simple query to DeJesus, via an interpreter such as Abreu, who would soon thereafter be called upon by the police to help communicate with DeJesus, would have revealed that DeJesus was simply trying to get a drink of water, and possibly obviated any need by Ciarllo to arrest him. DeJesus was never given an opportunity to explain, leading me to question whether there may have been some other reason for his arrest.

However, regardless of whether or not DeJesus' arrest was justified, several factors lead me to conclude that the arrest was conveniently and opportunistically seized upon by the Respondent to further justify its decision to terminate DeJesus, whom it viewed as one of the principal agitators of the work stoppage, for his involvement and participation in the work stoppage. (Tr. 774-775). First, as previously noted, it is unclear who made the decision to terminate DeJesus, for Keller and Romaniello both claimed to have separately done so, the former asserting he did so in conjunction with Daubenspeck during their 2 p.m. phone conversation on December 15, the latter stating she made the "final call" either during or after her meeting with Keller, Rivera, and Fisher which she then telephonically confirmed during a subsequent phone conversation with Daubenspeck. This obvious discrepancy and inconsistency in Keller's and Romaniello's testimony regarding DeJesus' discharge could readily have been resolved by Daubenspeck, since both claimed to have separately discussed their respective decisions with him and gotten his approval. Despite Daubenspeck's obvious importance to the resolution of this glaring conflict in testimony, Daubenspeck was not called to testify even though, from both Keller's and Romaniello's account, Daubenspeck apparently played a role in the decision-making process. Daubenspeck's failure to appear and testify leads me to question whether he had any involvement at all in DeJesus' termination, a fully reasonable inference given the inconsistent and contrary explanations proffered by Keller and Romaniello on how the decision to terminate DeJesus was made. The Respondent's failure, in any event, to call Daubenspeck to clarify or explain the inconsistencies regarding DeJesus' termination decision, and his involvement, if any, in that decision, warrants an adverse inference that, had he been called, Daubenspeck's testimony would not have been favorable to the Respondent.

Second, regardless of who made the decision to terminate DeJesus, both Keller and Romaniello readily admit they never questioned or interviewed DeJesus about his arrest before summarily discharging him, in part, for that arrest, as called for under the Respondent's

5 progressive disciplinary policy. The explanations proffered by Keller and Romaniello for not  
doing so are neither convincing nor credible. Thus, Keller claimed he had no need to do so  
because DeJesus' conduct in the cafeteria which led to the arrest was "witnessed by several  
individuals," none of whom incidentally was identified by Keller at the trial. There is no question,  
10 given the number of people in the cafeteria at the time, that the events that led Ciarllo to arrest  
DeJesus must have been witnessed by numerous individuals who were present, including the  
two most obvious witnesses, police officers Ciarllo and Kranich. Keller, however, never  
claimed in his testimony to have spoken with any of these unidentified "several individuals," or  
15 for that matter with either Ciarllo or Kranich about the arrest, nor is there anything in Ciarllo's  
or Kranich's testimony to suggest they discussed the incident with Keller or any other  
management official, or that Keller or anyone else questioned them about it. The bare fact,  
therefore, that the DeJesus incident and arrest may have been witnessed by "several  
individuals" is of no help to the Respondent in trying to show that, in discharging DeJesus in part  
20 for the arrest, Keller had a good faith belief that DeJesus had engaged in misconduct justifying  
his arrest. Rather, as discussed above, it is quite clear from the record that Keller apparently  
relied only on the fact that an arrest had occurred and never bothered to question DeJesus, the  
arresting police officers, or anyone else to determine if the arrest was justified, or to ascertain  
whether the conduct in question was serious enough to warrant DeJesus' termination, as was,  
25 according to Romaniello, its established past practice. Accordingly, assuming the truth of  
Keller's assertion that it was he who made the decision to terminate DeJesus, his failure to  
question DeJesus about the circumstances of the arrest, as called for under Respondent's  
progressive disciplinary policy and its established past practice, or anyone else for that matter  
who may have witnessed the events, including officers Ciarllo and Kranich, undermine any  
30 claim by the Respondent that the decision to terminate DeJesus was based on a good faith and  
honest belief by Keller that DeJesus had engaged in misconduct warranting his arrest. Rather,  
the hasty manner in which the termination occurred, without any investigation by Keller in  
contravention of established Company policy, supports a finding that the arrest was, as stated,  
opportunistically seized upon by Keller as way of pretextually covering up a predetermined  
decision to fire DeJesus, along with the other named discriminatees, for having "instigated" the  
work stoppage.

Romaniello, who also takes credit for discharging DeJesus, offered a different, and  
equally unsupportable, explanation for not interviewing DeJesus about the arrest before  
purportedly making her decision. Her explanation, one incidentally not mentioned by Keller, is  
35 that because of the seriousness, severity, and potential for violence of DeJesus' overall  
conduct, including presumably that which precipitated his arrest in the cafeteria, his immediate  
discharge, without the standard interview called for under Respondent's progressive disciplinary  
policy or its established past practice, was fully justified. The flaw in Romaniello's argument,  
however, is that, prior to his arrest, DeJesus, as found above, had not engaged in any of the  
40 alleged misconduct she claims occurred in the hallway. Thus, DeJesus did not yell, scream, or  
shout at Keller, or otherwise prevent him from addressing other employees in the hallway, nor  
did he engage in any other type of behavior that could be classified as disruptive, threatening,  
abusive, or offensive. As also found above, no credible evidence was produced to show that  
DeJesus banged on lockers, one of the reasons cited for his discharge. As to the arrest,  
45 Romaniello claims only to have seen someone, presumably DeJesus although she never  
actually said it was him, offering some resistance to the police and being led away. In her  
testimony, Romaniello never claimed to know what precipitated the incident she observed.  
Except for this one incident, Romaniello never testified to having seen DeJesus in the cafeteria  
engaging in any type of misconduct, or behaving in an unruly and disruptive behavior.

50 As with Keller, there is nothing in Romaniello's testimony, or elsewhere in the record for  
that matter, to indicate that Romaniello interviewed, questioned, or discussed with, Ciarllo,

Kranich, or any other person in the cafeteria that day, the events which led to DeJesus being detained and arrested. Romaniello, therefore, could not have known how severe, serious, or potentially violent, if at all, DeJesus' pre-arrest conduct in the cafeteria had been when she purportedly decided to fire him, in part, for that arrest. Romaniello's failure to conduct even the most rudimentary of inquiries into what occurred in the cafeteria with DeJesus undermines any claim by the Respondent that DeJesus' discharge was based on a good faith and honest belief by Romaniello that DeJesus had, in part, engaged in serious, egregious, and potentially violent behavior in the cafeteria. As with Keller, I find Romaniello's stated reason for not adhering to the Company's progressive disciplinary policy or following its established past practice before terminating DeJesus to be both specious and pretextual, designed to mask the real reason for the termination, e.g., DeJesus' active participation and involvement in the work stoppage or, as Keller put it, for being one of its principal "agitators." Accordingly, I find that DeJesus was unlawfully discharged for engaging in protected concerted activity, in violation of Section 8(a)(1) of the Act.<sup>50</sup>

### 3. Other Section 8(a)(1) conduct

The complaint, as amended at the hearing, further alleges that the Respondent, through supervisor Collazo, unlawfully interfered with Hernandez' Section 7 rights by advising him that he did not have to comply with a Board subpoena. Hernandez, as noted, was subpoenaed to testify and did so reluctantly. He testified that a few days before the hearing began, he informed his then supervisor, Collazo, that he would not be reporting to work on Friday, August 10, as he had been subpoenaed to testify that day. He contends that he tried to hand Collazo the subpoena so he could look at it but the latter declined to take it. Instead, Collazo, he claims, told him that his attendance was not mandatory, but Hernandez replied that it was. Collazo then told him he would see about it as he did not have that many people available. Collazo claims that a few days later, on Thursday, August 9, the day he actually testified, he again spoke with Collazo that morning to inform him that his appearance at the hearing had been moved up and he was scheduled to testify that same day. He testified that he had only been alerted the night before by the General Counsel of the change in his appearance date. Collazo, he contends, repeated that Hernandez' attendance at the hearing was not mandatory, and told him that he was not approving his absence and would receive two points for his absence. Hernandez explained that when an employee accumulates four points, he or she receives a warning for absences. (Tr. 509-512).

Collazo recalled speaking with Hernandez at the end of the day, on Wednesday, August 8, about needing time off in his office at the end of the day, and that Paul Geurts, a slaughter analyst with the Respondent, was present at the time. He contends that Hernandez came to his office to ask for Friday off, and that he told Hernandez he would have to check as he believed he already had someone scheduled to be off that day. Hernandez, he claims, explained that he had gotten a letter telling him he had to go. Collazo denied that the word "subpoena" was mentioned during that conversation, and that he simply was going to check on it and get back to him. Hernandez, he contends, came to him again on Thursday morning, August 9, while he was at a supervisors' meeting, and informed him he (Hernandez) had received a call and had to leave right away. Hernandez, he claims, did not have any papers with him during this brief meeting. He told Hernandez that if he left, he would not get paid for the day because he had

<sup>50</sup> That Respondent intended to discharge DeJesus, and the other named discriminatees, for "instigating" the work stoppage was made clear just one hour after the work stoppage ended, when Rivera, as credibly testified to by Berios, remarked to the latter that "whoever started this is going to get fired."

not requested the day off in advance. Collazo explained that the practice has been for employees to request time off in advance, even when attending to court-related matters, to ensure that there are no more than two people out on the same day. He did not recall anything else being said by Hernandez at the time (Tr. 659-660).

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Geurts testified he had a chance to speak with Hernandez when the latter came to ask Collazo on Wednesday to ask for the day off. He recalls Hernandez and Collazo conversing in Spanish only, and admits he speaks only English and neither speaks nor understands Spanish. He claims that Collazo, at one point, told him that Hernandez had to go to court the next day, and that he then asked Hernandez, in English, why he had to go to court. Geurts purportedly then asked Hernandez why he had to go to court, and the latter replied he had to testify. Geurts informed Hernandez that this would be an unexcused absence and he would not be paid for it. He purportedly then asked Hernandez if “they” were going to pay him for it, and whether he had received a subpoena. Hernandez purportedly answered, “No,” that it was just a letter “from the lawyer.” Geurts reiterated that “if it’s not a subpoena, you shouldn’t have to go if you don’t want to; and if you’re going to go, they should pay you your wages.” (Tr. 647-648). Hernandez, he contends, did not ask him any questions, and simply stated, in Spanish, he was going to go anyway. Geurts admits he did not understand what Hernandez said to him, and gathered this is what Hernandez said based on what Collazo was saying to him. Hernandez admits he speaks and understands very little English.

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I place no credence in Geurts’ testimony. Thus, neither Collazo or Hernandez corroborate any aspect of his testimony regarding his alleged discussion with Hernandez. Collazo, for example, made no mention of Geurts taking part in his discussion with Hernandez about needing time off to testify, and Hernandez never mentioned discussing the subpoena or his need for time off with Geurts. I find Geurts simply fabricated his alleged exchange with Hernandez that Wednesday to assist the Respondent in contesting this particular allegation.

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As between Collazo and Hernandez, I credit the latter and find that Hernandez indeed made clear to Collazo that he had been subpoenaed to testify, and, in fact, attempted to present Collazo with the subpoena which Collazo refused to accept. As discussed earlier regarding other aspects of his testimony, Collazo was not a particularly credible witness who was prone to fabrication or exaggeration. Hernandez, on the other hand, came across as honest, sincere, and trustworthy. His testimony, as previously discussed, is rendered particularly reliable given that he was testifying against the Respondent while still in its employ, and thus against his own self interest. Accordingly, I find that when Hernandez informed Collazo he had been subpoenaed to testify, Collazo told him he did not have to comply with the subpoena, e.g., it was not mandatory for him to testify, and that, if he chose not to work and to go to the hearing instead, he would be disciplined by being issued two points, half the amount needed to receive a formal warning.

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The Board has held when an employer tells an employee that he or she does not have to comply with a Board subpoena, and is free to decide whether or not to go to a Board hearing in response to the commands of a Board subpoena, it engages in conduct which constitutes unlawful interference with Section 7 rights and, as such, violates Section 8(a)(1) of the Act. *Amoco Fabrics Co.*, 260 NLRB 336 (1982); also, *Winn-Dixie Stores, Inc.* 128 NLRB 574, 586 (1960); *Fitel/Lucent Technologies, Inc.* supra at 54. Accordingly, I find that Collazo’s remarks to Hernandez about not having to comply with the subpoena, and threatening to issue him two points towards a warning if he did so, were coercive and violated Section 8(a)(1) of the Act, as alleged.

## Conclusions of Law

1. The Respondent, Moyer Packing Co. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

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2. The work stoppage engaged in by Respondent's employees on December 15, 2006, was at all times protected activity under Section 7 of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by:

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(a) Discharging employees Geovanny Guzman, Maria Garcia, Maximo Franklin Mercado Peralta, Jency Olivo-Muñoz, and Armando Ortiz DeJesus for engaging in concerted protected activity, specifically, their involvement in the protected in-plant work stoppage.

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(b) Telling an employee he did not have to comply with a Board-issued subpoena and threatening to discipline him if he did so.

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

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## Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

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The Respondent having discriminatorily discharged employees Geovanny Guzman, Maria Garcia, Maximo Franklin Mercado Peralta, Jency Olivo-Muñoz, and Armando Ortiz DeJesus, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer 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 for the Retarded*, 283 NLRB 1173 (1987). It must also remove from its files any reference to the unlawful discharges of these employees and notify them in writing within 3 days that it has done so, and that their discharges will not be used against them in any way. Finally, the Respondent shall be ordered to post a notice to employees in both English and in Spanish, as many of its employees apparently do not understand or speak English.

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On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>51</sup>

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<sup>51</sup> 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.

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## ORDER

The Respondent, Moyer Packing Company, Souderton, PA, its officers, agents, successors, and assigns, shall

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## 1. Cease and desist from

(a) Discharging or otherwise discriminating against employees for participating in a protected work stoppage or engaging in any other protected activity.

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(b) Interfering, restraining, or coercing employees in the exercise of their Section 7 rights by telling them they do not have to comply with a Board-issued subpoena and threatening to discipline them if they do so.

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

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

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(a) Within 14 days from the date of this Order, offer Geovanny Guzman, Maria Garcia, Maximo Franklin Mercado Peralta, Jency Olivo-Muñoz, and Armando Ortiz DeJesus 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.

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(b) Make Geovanny Guzman, Maria Garcia, Maximo Franklin Mercado Peralta, Jency Olivo-Muñoz, and Armando Ortiz DeJesus 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 the decision.

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

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(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

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(e) Within 14 days after service by the Region, post at its facility in Souderton, PA, copies of the attached notice marked "Appendix"<sup>52</sup> in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are

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<sup>52</sup> 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."

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5 customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 15, 2006.

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

Dated, Washington, D.C., May 22, 2008.

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George Alemán  
Administrative Law Judge

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**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 or otherwise discriminate against any of you for participating in a protected work stoppage, or any other protected concerted activity.

**WE WILL NOT** interfere with, restrain, or coerce you in the exercise of your Section 7 rights to testify in a Board proceeding by stating that you do not have to comply with a National Labor Relations Board subpoena, and threatening to discipline you if you do comply.

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

**WE WILL**, within 14 days from the date of this Order, offer Geovanny Guzman, Maria Garcia, Maximo Franklin Mercado Peralta, Jency Olivo-Muñoz, and Armando Ortiz DeJesus full reinstatement to their former jobs or, if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they previously enjoyed.

**WE WILL** make Geovanny Guzman, Maria Garcia, Maximo Franklin Mercado Peralta, Jency Olivo-Muñoz, and Armando Ortiz DeJesus whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

**WE WILL**, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Geovanny Guzman, Maria Garcia, Maximo Franklin Mercado Peralta, Jency Olivo-Muñoz, and Armando Ortiz DeJesus, and **WE WILL**, within 3 days thereafter, notify each of them, in writing, that this has been done, and that the discharges will not be used against them in any way.

**MOYER PACKING COMPANY**

\_\_\_\_\_  
(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).

615 Chestnut Street, One Independence Mall, 7th Floor  
Philadelphia, Pennsylvania 19106-4404  
Hours: 8:30 a.m. to 5 p.m.  
215-597-7601.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 215-597-7643.