UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

ELEMI RESTAURANT, LLC

and Case 28–CA–289582

ALFONSO TREVISO, an Individual

Nestor Zarate-Mancilla, Esq., for the General Counsel.
Mr. Alfonso Treviso, for the Charging Party.
Mr. Emiliano Marentes, for the Respondent.

DECISION

STATEMENT OF THE CASE

BRIAN D. GEE, Administrative Law Judge. This case was tried before me in El Paso, Texas, on September 9 and 10, 2026.[1] Based on a charge filed by individual charging party Alfonso Treviso on January 26, 2022, the General Counsel issued a complaint and notice of hearing on August 7, 2026 (the complaint). The complaint alleges that Elemi Restaurant, LLC (Respondent or Elemi) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by discharging Treviso on or about December 28, 2021, in retaliation for his protected concerted activities and/or his union activities. Respondent filed a timely answer on August 18, 2026, and an amended answer on August 27, 2026 (the answer), denying the commission of any unfair labor practices (ULPs).

At trial, all parties were afforded the right to call, examine, and cross-examine witnesses, to present any relevant documentary evidence, to argue their respective legal positions orally, and to file posthearing briefs. Based on a careful review of the entire record, including the posthearing briefs[2] and my observation of the credibility of the witnesses, I make the following findings, conclusions of law, and recommendations.[3]

---

[1] Pursuant to an unopposed motion by the Counsel for the General Counsel (the General Counsel), former employee Leslie Gonzalez testified by Zoom from the Region 21 Resident Office in San Diego, California.
[2] Respondent did not submit a brief to the Administrative Law Judge (ALJ).
[3] While the transcript is mostly accurate, there appears to be some lines missing on p. 366, where Respondent concluded its cross-examination of witness Gonzalez. For example, the transcript failed to record Respondent representative Emiliano Marentes saying that he had no further questions for the witness.

FINDINGS OF FACT

I. JURISDICTION

Respondent is a limited liability company with a place of business in El Paso, Texas, where it operates a public restaurant selling food and beverages. During the 12-month period preceding the issuance of the complaint, Respondent derived gross revenues in excess of $500,000. It also purchased and received at its restaurant goods valued in excess of $5000 directly from points outside the State of Texas. Respondent admits, and I find, that during the times material to the complaint it was an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Based on the foregoing, this dispute affects commerce, and the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

II. FACTS

Elemi is a critically acclaimed restaurant located in El Paso, Texas.[4] At the time of these events in July through December 2021, it was located at its former building downtown, a smaller facility consisting of approximately 10 tables, a bar, and a kitchen. Its staff consisted of fewer than 20 people. Emiliano Marentes (Emiliano) was the owner and chef of the restaurant; he made all decisions governing the restaurant, including the dishes served, customer service, personnel, and business operations. His wife, Krystal Marentes (Krystal), was co-owner and general manager; she oversaw guest relations, employee scheduling, and payroll.[5] They founded Respondent in 2019, following years working in the restaurant business. America Breceda (Breceda) was the manager and Analiza Guzman (Guzman) was the shift lead. Respondent admitted that all four were supervisors and/or agents under Section 2(11) and 2(13) of the Act, respectively. (R. answer, Tr. 21–25, 77, 102–103, 212–213, 295, 303–306.)

The servers included Charging Party Alfonso "Fonzie" Treviso (Treviso) and Leslie Gonzalez (Gonzalez). (Tr. 25–26, 77, 210, 295, 306.)

Staff can be divided into front of the house and back of the house employees. Back of the house staff consisted of the chef, cooks, and dishwashers; they worked in the kitchen, away from customers. Front of the house staff included hostesses, bartenders, barbacks, servers, and bussers; they worked in the dining area. Most employees received the State of Texas minimum wage of $7.25 per hour. However, tipped employees, such as servers and bartenders, received a lower wage of $2.25 per hour plus tips earned during their shift. Income from tips could range from $100-$200 per shift, or even more on occasion.[6] Cash tips were paid to employees immediately after shifts, while credit card tips and hours worked were paid through biweekly payroll checks. (Tr. 35–37, 113–114, 160–164, 211, 297–304, 314, 351, 381.)

---

[4] See This El Paso Spot Might Be the Buzziest Taqueria of the Year—Texas Monthly, last viewed on November 10, 2026.

[5] To avoid confusion, I will refer to Emiliano Marentes as "Emiliano," and to Krystal Marentes as "Krystal."

[6] While the Texas minimum wage for tipped employees was $2.13 per hour, Respondent paid a slightly higher hourly wage. See Minimum Wages for Tipped Employees | U.S. Department of Labor, last viewed on November 10, 2026.

The "expo window"[7] was a partition separating the front and back of the house; this was where the cooks placed the prepared dishes and the servers or expediters picked them up to take to guests. A manager, such as Krystal or Breceda, would often be stationed there to make sure the dishes were ready for presentation. A wall separated the expo window from the dining room. To get from the expo window to the dining area, servers would have to pivot, go around a corner, and then walk down a short hallway. Patrons could not see or hear what occurred at the expo window. (Tr. 29–30, 222, 228–229, 307, 336–338.)

Respondent used a Square point of sale (POS) system to track the placement of orders, customer bills, tips paid, employee hours, and the overall operation of the restaurant. There were two main POS registers and a screen in the kitchen for the cooks to see orders placed. (Tr. 27–30, 103–105, 170–171, 351.)

Respondent maintained an employee handbook, which all staff had to acknowledge and sign. The policy titled "Anti Slander and Gossip Policy" contained two important prohibitions: "Avoid backstabbing, work gossip, and spreading rumors" and "ELEMI does not tolerate any form of criticizing, bullying, condemning or *complaining* in such a way that it lowers employee morale. We will take immediate disciplinary action with employees who engage in any of these *toxic practices*." (Emphasis added.) The policy titled "Tip Pool Sharing" provided, in pertinent part, that "[d]iscussing or gossiping about tips in public areas of the bar or suggesting to guests that a tip should be left is unprofessional, of bad taste, and not allowed. You will be subject to disciplinary action, including termination." The policy titled "Misconduct Leading to Termination" provided that causes for "immediate termination" include "[a]ny violation of the company's Anti-Gossip and Slander Policies."[8] (GC Exh. 3, pp. 9, 24, 32, 36; Tr. 38–42, 45–47.)

Respondent used an electronic scheduling platform called "Homebase."[9] Through it, Respondent published the work schedule, could communicate with employees, and sometimes posted policies. During onboarding, employees downloaded the Homebase application on their cellphones. (Tr. 47–48, 106–107.)

On October 19, 2021,[10] Emiliano announced to the staff on Homebase that the restaurant would be closed on Thanksgiving, Christmas Eve, Christmas Day, and New Year's Day. He added that Elemi might also close from December 21 through 23, meaning that there would be no work for December 21–25. Emiliano said he would be "getting everyone's consensus on w[h]ether or not to close for that particular week." As explained by server Leslie Gonzalez, restaurant staff often like working during the holidays because patrons tend to tip well. Moreover, the following month of January tends to be a slow time. (GC Exh. 3, Tr. 309–310.)

Also in October, Respondent held an all-staff meeting at the restaurant during which Emiliano discussed the holiday closures and gave employees a chance to voice any objections.

---

[7] "Expo" is short for "expedite."

[8] As evident in these facts, Respondent considered employee discussions about wages, hours, and other terms and conditions to be "gossip," "rumors," and "toxic" behavior.

[9] See Employee Scheduling, Time Clocks, Payroll, & More | Homebase, last viewed on November 10, 2026.

[10] All subsequent dates are for the year 2021, unless specified otherwise.

Present for management were Emiliano, Krystal, and Breceda. After discussing the days that the restaurant would be closed (Thanksgiving, Christmas Eve, Christmas Day, and New Year's Day) and might be closed (December 21–23), Emiliano said that he would try to get vacation pay for the staff to cover those days but would have to get back to them about that. Emiliano also said that he heard rumors that some employees had been discussing their wages and tips—and told them that such conduct was both unacceptable and against company policy. After the meeting ended and people were filing out, employee Elizabeth "Lizzie" Cisneros uttered that, if she wanted to discuss her wages and tips, she was going to continue to do so. (Tr. 54–56, 213–219, 253–257.)

Later in October, Emiliano mentioned to Leslie Gonzalez that, if some source of "money was to arrive," he might be able to pay employees during the holiday closure. At the time, Emiliano was standing inside the kitchen, while Gonzalez and Krystal were on the front side of the expo window. (Tr. 306–307.) Emiliano again mentioned that possibility to Gonzalez on October 30 at the staff Halloween party. He said that he was going to give employees the week of Christmas off and that he was going to pay everyone. (Tr. 308–310.)

On November 13, the Square POS system shutdown in the middle of the lunch shift, preventing diners from using their credit cards to pay for their bills or add any tip. Krystal was scheduled to be off, but Emiliano telephoned her and asked her to contact Square to find out what was going on. While Manager Breceda was in the bar area trying to troubleshoot the system, Treviso and Gonzalez approached her, saying that the customers wanted to pay. Unable to fix the system, Breceda told Treviso to ask customers if they would be willing to pay cash. While many did, Treviso became upset thinking that he would be denied tip income.[11] He assumed that he would get no tips and be paid just the Texas minimum wage of $2.13 for tipped workers. He approached Breceda at the expo window and exclaimed that he "did not work for minimum wage." Breceda reported Treviso's complaints over the phone to Krystal. While driving in, Krystal texted her husband to say, "Get Fonzie's ass in line please!!!" Breceda walked to the back of the restaurant and tried to troubleshoot the POS system there. Treviso brought some credit cards and asked her to process those payments. He got upset again, repeating that he was not going to work for minimum wage. Treviso added that if he wasn't going to get paid, he would just clock out. Because of the malfunction, Respondent stopped taking new customers. Leslie Gonzalez shared Treviso's frustration. "I could see why Alfonso was trying to, you know, advocate for himself, and for us, really, about whether we should close or not," she testified. "I have seen how Alfonso works, and I myself, hold myself to high regard in what I do. ¶ So, I knew that we were good employees and I felt it was unfair that we were going to go home with no money," she added later in her testimony. (GC Exhs. 5 and 6; Tr. 57–69, 113–117, 170–177, 220–227, 270–271, 310–316.)

After the system was fixed, Emiliano asked to speak with Treviso and Breceda to address Treviso's complaints to Breceda and Gonzalez about not wanting to work for the minimum

[11] Treviso did not know that, under Texas law, if a tipped employee does not make at least $5.12 per hour in tips, their employer must make the employee's earnings equal to $7.25 per hour for the work week. See Texas Minimum Wage Guide for 2026 | Employer Pass, last checked on November 10, 2026.

wage. Emiliano testified: "So after I learned everything that America told me about and after he told me that he didn't want to work for minimum wage, that's when I wanted to talk to him—address that particular issue." The three stepped into the external hallway shared with other businesses; Emiliano sometimes held discussions there since there was no manager's office inside the restaurant. (Tr. 59–64, 105, 144.)

Once in the hallway, Emiliano told Treviso that the POS system's malfunction was something out of their control and that his complaints about the minimum wage were unprofessional and unnecessary. Emiliano asked Treviso why he made that remark—he said that, pursuant to the waiver in the handbook, employees were prohibited from discussing their wages with other employees. When Treviso responded that he had the right to talk about pay, Emiliano countered that the way he had spoken to Breceda was disrespectful, as was Treviso's attitude. Emiliano said that Treviso could talk about whatever he wanted, but that he had to do it outside of the restaurant. Treviso shot back that he had the right to talk about his wages and that he was being oppressed. The discussion had become heated by this point. Emiliano said that Treviso was not a lawyer and that his personal lawyer had written the policy in the handbook. He then pointed out that Treviso had the option of resigning. "[Mr. Marentes] also said that if I did not like the way that things were run at Elemi. That I should reconsider my employment there," Treviso testified.[12] (Tr. 225.) After further exchanges, Treviso said that he found it hard to believe that simply discussing his wages with his supervisor, Breceda, would result in him being fired. "Mr. Marentes then said, 'I am not firing you, but I think that if you don't like it here, or if you don't like the rules that we have set in place, that you should still reconsider your position here.'" (Tr. 226.) To calm down the situation, Breceda said that Treviso should have more faith in management, that they would not "screw [him] over." Treviso said that he needed tip income to support his family and therefore had to raise that issue. Towards the end of the discussion, Emiliano said that Treviso had performance issues and was not a true team player. (GC Exh. 5; Tr. 64–69, 98–99, 118–119, 170–177, 220–227, 270271, 310–316.)

In general, Manager Breceda agreed that employees should not talk about their compensation around other employees—"It was just like manners," she explained. This was because getting assigned to serve a generous tipper could be random and because some employees earned tips while others did not. On FRE 611(c) examination, she agreed that talking about compensation "could create a toxic environment between employees." (Tr. 165–166.)

That night, Treviso, under the username "puppyypapi," posted a message on Instagram saying that, even if a company has a policy against it, employees have a right under Federal law to discuss their wages. The post stated, in part, that companies which prohibit wage discussions "would likely be surprised to learn that such policies generally violate federal labor law. Indeed, the National Labor Relations Act contains a provision, Section 7 (29 U.S.C. § 157) that gives all employees the right to 'engage in concerted activities.'" Shift Lead Analiza Guzman saw the

[12] When asked on FRE 611(c), Emiliano admitted that he gave Treviso the option of resigning. "[I]f he didn't agree with what—how a server gets paid and if there's no tips, I mean, it's his choice not to be there." (Tr. 66.)

post and texted a screenshot to Krystal, who showed it to Emiliano. (GC Exh. 4; Tr. 69–72, 119–121, 269–270.)

On November 17, Guzman sent Emiliano, Krystal, and Breceda an end-of-shift message reporting that Treviso complained about the delay in getting his tips from November 13. She wrote that Treviso "did feel a little bit more petty about certain things after you all left, made it a point to ask me if you all had added the tips from Saturday." Krystal replied that she would talk to Guzman and Breceda about that. (GC Exh. 9.)

On December 14, Treviso and Gonzalez approached Breceda to get some clarity about what would be happening during the holidays. They asked whether Respondent had decided which holidays it would be closed on and whether the employees would receive vacation pay or any other form of compensation. Breceda said she did not know but would speak to the owners and get back to them. (Tr. 177–178, 233–234, 272.)

Employee concerns percolated up to Krystal during the second week of December. Guzman said that Gonzalez and Abril Figueroa told her that morale was down and that a group of employees planned to speak with Emiliano and Krystal about their concerns. Breceda also told Krystal that Gonzalez had concerns about the holiday closure. (Tr. 124–127, 178–179.)

After Krystal shared this news with him, Emiliano sent a message to the front of house staff on December 17. Through Homebase, he communicated the following:

- Expressed his disapproval of employee plans to speak to management about keeping the restaurant open during the holidays or about filing for unemployment benefits: "Unfortunately, it has been brought to my attention that some team members are upset and were commenting about planning to approach us as a group to stay open next week or else. Also, I have heard about the many rumors that certain individuals have made such as trying to file for unemployment, etc."
- Suggested that employees should have spoken to management about their concerns, not to each other, and equated wage discussions amongst employees as "toxic rumors": "I really wish that if any of you had any legitimate concerns or questions, that you should have spoken with Kristal or myself instead of partaking in gossip, spreading toxic rumors."
- Stated that employee discussions about payroll, scheduling, or other terms and conditions of employment would not be tolerated: "[I]f you have any concerns regarding payroll, scheduling, or anything else about ELEMI please reach out to Kristal or myself. Rumors are toxic and I will not tolerate any gossip or comments to demoralize the team."
- Invited employees to quit if they did not agree with management's decisions: [I]f you do not agree with how we run our establishment, please feel free to part ways with us if you wish to do so."
- Said that hearing about employee plans to speak to management felt like being "blindsided": "I personally feel blindsided and saddened by the actions of a few, when all I wanted to do was take care of you all."

(GC Exh. 8; Tr. 86–92.) Emiliano did not view any of these issues as "legitimate concerns." Rather, he viewed them as "just spreading rumors and, yeah, gossiping and creating something." (Tr. 88–90.)

Leslie Gonzalez interpreted this Homebase message as prohibiting her and others from discussing wages and whether they would get paid during the holiday week. "[He's] accusing the staff of gossip, and this is untrue," she testified. "The staff had serious and honest, genuine concerns about payroll, particularly about whether we were going to get paid or not, the week they wanted to give us off. ¶ The whole entire restaurant, all of the staff had been talking amongst themselves. 'Hey do you know if we are going to get paid? Is it going to be closed? Is it not going to be closed? Can we talk about this or not,' because like I mentioned earlier, Krystal had told us that we shouldn't be talking about wages." As to Emiliano's invitation for employees to "part ways" with Respondent if they disagreed with the way things were run, Gonzalez viewed that as being directed towards her and Treviso: "the fact that in the message, he says, if we don't like the way things are run, we should leave, which I immediately understood, as, you know, reading between the lines, that it was directed probably at me or Alfonso, in retaliation for what had happened on the days when the systems had gone down, and we had—to advocate for ourselves and our wages." (Tr. 320–321.)

With these thoughts in mind, Gonzalez went to Elemi on her day off, December 17, to speak with Emiliano and Krystal about the Homebase message. In the external hallway, Gonzalez sought to explain to them that the "toxic rumors" and "gossiping" which Emiliano mentioned were actually the legitimate questions and concerns shared by the employees about whether they would be paid during any holiday closure. "I was trying to tell him, 'Look, it's okay if we close the restaurant. It's okay if you want to take a vacation, but you did tell me two times that you would pay us. So, the people are wondering, are you going to pay us the minimum wage? Are you going to pay us what we would make with tips? Are—how—how is this going to work? Are we going to make an announcement to the people? What's going to happen?'" (Tr. 327.) Emiliano responded by saying that she should be careful about spreading such rumors and gossip, and that it would be better for employees to speak directly with management if they had any questions or concerns. He also looked Gonzalez in the eyes, denied ever saying he would pay employees during the closure, and accused her of unionizing. This upset and disappointed Gonzalez because Emiliano's father "is an activist that works protecting farm worker rights." She submitted her 2-week resignation notice.[13] (Tr. 92–94, 97, 324–330.)

The following day, December 18, Treviso reported for his lunch shift dressed in black clothes and a black beret. Analiza Guzman told Manager Breceda that Treviso was dressed as a "Black Panther." Unfamiliar with the American activist organization founded in the 1960s known as the Black Panther Party (BPP), Breceda approached Treviso to ask him about his

[13] Gonzalez testified that she chose to work for Respondent because of its cultural focus. "[T]he ethos [of] Elemi was all about the culture of the mais, which goes hand in hand with the protection of workers' rights, farm workers' rights to be exact, and the resilience of the people that do this hard labor," she said. "So, how can you say the tortilla and the – and everything that you use to make your branding, your logo, your restaurant. And then, you, yourself and your actions, not protect your own workers." (Tr. 329–330.)

appearance. Treviso explained that he was dressed as a BPP and lifted his pant leg to reveal black socks with the words "No Oppression" or "Stop Oppression" on them. Treviso said there was a problem at Elemi and that he was standing in solidarity with his coworkers. When Breceda asked him why he continued working there if he disagreed with Respondent's policies, Treviso said that he had rights and that was why unions existed. At the end of her shift, Breceda told Emiliano and Krystal about Treviso's conduct. Her manager-on-duty text to ownership stated, in pertinent part:

> SATURDAY DECEMBER 18, 2021
>
> "While you guys were out of town, Fonzie came in dressed up as a 'black panther' to make a 'statement.' All dressed in black with socks that said something along the lines of 'stop oppression[.]' I didn't realize what his outfit meant until Analiza pointed it out. I straight up asked him if he was dressed as a black panther and he said yes. I understand that we are allowed to dress[] 'almost' as whatever we'd like, but he's really pushing the limit here. In his words, 'in lieu of recent events at Elemi, I stand in solidarity with my fellow coworkers…'"

(GC Exh. 5; Tr. 94-95, 179-183, 239-242.)

On or about December 18, Emiliano consulted with Krystal and Breceda, and then decided to discharge Treviso. In an end-of-shift message[14] Emiliano wrote:

> On Friday December 17, 2021 Analiza Guzman (bartender lead) expressed her concern that a few employees were disrupting others while on the clock due to being upset that we were closing the following week and were gossiping about teaming up to confront ownership to either stay open [or] they would go to unemployment. I then sent a general message to all FOH employees regarding the rumors. One employee Leslie Gonzalez came into work to discuss the message, I was not aware of who was involved. Leslie Gonzalez never mentioned any names, but she did admit that she was the one gossiping with a few team members since they were upset. I explained to her that she is not a manager and if there are any legitimate issues to please reach out to me so we can address them rather than spread any false information with other staff and disrupting other employees. After that meeting, she continued to spread rumors amongst some employees, I was not aware for who but then Alfonso Trevizo created a scene the following day when we (ownership) were not at our establishment. We then decided to part ways with Alfonso Trevizo.
>
> -Emiliano Marentes

(GC Exh. 5; Tr. 133–134, 242.)

[14] This note could not have been written on December 17 because the Black Panther incident did not occur until December 18.

It was not until after the holiday break that Respondent implemented the discharge decision. On the morning of December 28, Krystal telephoned Treviso to tell him that he was terminated immediately. Treviso asked why and Krystal answered that it was for "gossiping." When he asked for a written termination notice and explanation of what was meant by "gossiping," Krystal said that Respondent was not required to do that and hung up on him.[15] (Tr. 135–136, 242–243.)

III. CREDIBILITY

A credibility determination may rest on various factors, including "the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole." *Hills & Dales General Hospital*, 360 NLRB 611, 617 (2014), citing *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001). It is well established that the trier of fact may believe some, but not all, of a witness's testimony. *NLRB v. Universal Camera Corp.*, 179 F.2d 749 (2d Cir. 1950). I found that to be the case here, as all five witnesses' memories were impacted by the five-year gap between these events in Fall 2021 and the ULP hearing in Summer 2026. Multiple witnesses said the passage of time made it difficult to remember certain specifics.[16] In those instances, I viewed any inaccurate testimony as a product of the time lag, not as an effort to evade the truth. Additionally, it was fortuitous that all witnesses gave affidavits during the ULP investigation, thereby recording the details closer in time to the events. The General Counsel effectively used those affidavits to refresh recollections or to impeach certain testimony.

I did not wholly credit or discredit any witness. Rather, based on my observations of demeanor, comparison of testimony against that of other witnesses or documentary evidence, or consideration of the inherent probabilities at play, I credited and discredited portions of each witness' testimony. As explained below, I found all the witnesses credible to some extent.

Alfonso Treviso was a mostly credible witness. He demonstrated a good recall of facts and was very articulate, describing events and situations with nuance and detail. He admitted facts which could be viewed as harmful to his interests. For example, in connection with the incident where the POS went down, he readily admitted that Respondent's management lacked control over that situation and any loss of tips. (Tr. 260–261.) However, I found his testimony about the December 18 "Black Panther" incident to be lacking in credibility. When Respondent asked Treviso on cross-examination if his all-black apparel was intended to send a message that

[15] Respondent also terminated Gonzalez that day. Emiliano told her that they "were going to part ways" effective immediately, despite her 2-week notice. When Gonzalez asked why, Emiliano responded: "Because I want to, because you are gossiping." (Tr. 332–335.)

[16] For example, when asked about Treviso saying he "stood in solidarity" with his coworkers during the Black Panther incident, Breceda answered: "And I apologize. It's all coming back because it was so long ago, but yes." (Tr. 158.) When asked about text messages he exchanged with Krystal, Treviso testified: "I just—I don't remember these conversations. They happened five years ago…" (Tr. 266.) When asked on cross-examination about which employees had questions about getting paid in December, Leslie Gonzalez said, "Because it has been so many years since it happened, I can't list specifically the dates and times of how these questions were asked…" (Tr. 362.)

he was standing in solidarity with his coworkers, he flatly denied that. Based on Breceda's testimony and end-of-shift text to the owners, I find that denial to be false. (Tr. 278.)

While Leslie Gonzalez' testimony was largely credible, there were times when her recollection was inaccurate or where she exaggerated or misrepresented facts. For the POS incident, she insisted that Krystal was present the whole time. But it was clear from both other witnesses and the documentary evidence that Krystal was still driving to the restaurant when most of the events occurred. On cross-examination, Gonzalez insisted that she was "a hundred percent sure" that Krystal was there. (Tr. 348–350.) As a second, more significant example, Gonzalez falsely claimed that Emiliano "pushed me outside" on December 28, the day she was terminated. On cross-examination, Gonzalez conceded that Emiliano had not pushed her, but simply stepped outside of the restaurant's front door, thereby causing her to step backwards. (Tr. 331–333, 358–359.)

Former Manager America Breceda struck me as unbiased and forthright. Her testimony was generally consistent with the documentary evidence. Due to the passage of time, however, there were times when Breceda could not recall certain details. There were also times when the General Counsel impeached Breceda with her affidavit. Nonetheless, based on her demeanor and the totality of her account, I found her testimony generally reliable.

While the testimony of Krystal Marentes was usually reliable, there were times when I found her not entirely forthcoming. For example, when the General Counsel sought to impeach her and asked if the Board agent gave her a chance to review her affidavit, Krystal initially testified no. Only after further examination by the ALJ did Krystal concede that, although she felt rushed, she did have the opportunity to review the affidavit and make changes. (Tr. 130–131.) Additionally, regarding Leslie Gonzalez speaking to Krystal and Emiliano on November 17, General Counsel had to show Krystal her affidavit before she corrected her testimony that Gonzalez said she was there to speak on behalf of the employees, not just herself. (Tr. 130–132.)

Emiliano Marentes was a largely credible witness. He listened carefully to questions and answered them directly, giving answers which were consistent with the documentary evidence. It was clear from his testimony, however, that the employee conduct he viewed as "gossiping," "spreading toxic rumors," and "harming morale" was, in actuality, the exercise of rights protected by Section 7 of the Act: employees discussing wages, working hours, and appealing to management as a group. In short, I found that he readily admitted animus towards the employees' exercise of statutory rights.

IV. DECISION AND ANALYSIS

A. Respondent Discharged Charging Party Treviso in Violation of Section 8(a)(1)

Paragraph 4 of the complaint alleges that Treviso engaged in various forms of protected concerted activity between November 13 and December 18—such as raising concerns with coworkers and Respondent about wages and tips, restrictions on discussions about wages and

tips, and the temporary holiday closure—and that Respondent discharged him on December 28 in retaliation for that activity.

Under Section 8(a)(1), it is unlawful for an employer to discriminate against an employee in retaliation for their protected concerted activity. When deciding whether an unfair labor practice has been committed, the Board asks whether the employee's conduct was both concerted and protected. *Miller Plastic Products*, 372 NLRB No. 134, slip op. at 3 (2023), *Morgan Corp*., 371 NLRB No. 142, slip op. at 2–3 (2022). The "concerted" inquiry focuses on the manner of the employee's conduct: whether it was engaged in with other employees or on behalf of other employees, and not solely by and on behalf of the employee. *Meyers Industries (Meyers I)*, 268 NLRB 493, 497 (1984), remanded sub nom *Prill v. NLRB*, 755 F. 2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), on remand *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), affd. sub nom *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Additionally, concerted activity includes situations "where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Meyers II*, 281 NLRB at 887. The "protected" inquiry focuses on the goal of the employee's activity: "chiefly, whether the employee or employees involved seek to improve their terms and conditions of employment or otherwise improve their lot as employees." *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 153 (2014) (citing *Eastex, Inc. v. NLRB*, 437 US 556, 565 (1978)). Activity will be considered for mutual aid or protection simply if it "inures to the benefit of all." Id. at 155 (citing *Meyers II* at 887).

When assessing the lawfulness of an adverse action that turns on employer motivation, the Board applies the analytical framework set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved by *NLRB v. Transportation Management Corp*., 462 U.S. 393, 395 (1983). To prove a violation under *Wright Line*, the General Counsel must demonstrate, by a preponderance of the evidence, that the employee's union or other protected activity was a substantial or motivating factor in the employer's adverse action against the employee. *SBM Site Services, LLC*, 367 NLRB No. 147, slip op. at 2 (2019). The General Counsel satisfies the initial burden by showing that: (1) the employee engaged in union or other protected activity, (2) the employer had knowledge of the activity, (3) the employer had animus against union or other protected activity, and (4) an adverse employment action occurred. Animus can be established through direct evidence or inferred from circumstantial evidence on the record. *Intertape Polymer Corp*, 372 NLRB No. 133, slip op. at 6–7 (2023). Circumstantial evidence of discriminatory motive may include, among other factors, the timing of the action in relation to the union or protected conduct; contemporaneous unfair labor practices; shifting, false, or exaggerated reasons offered for the action; failure to conduct a meaningful investigation; departures from past practices; and/or disparate treatment of the employee. Id.

If the General Counsel makes their initial showing, the burden of proof shifts to the employer to demonstrate it would have acted the same had the statutorily protected activity not occurred. *Wright Line*, 251 NLRB at 1089. The employer cannot carry this defense merely by

showing that it had a legitimate reason for the action, but must persuade, by a preponderance of the evidence, that the adverse action would have taken place absent the protected concerted or union activity. *Northeast Center for Rehabilitation*, 372 NLRB No. 35, slip op. at 1–2 fn. 5 (2022), and cases cited therein. If the employer fails to do so, a violation will be found because a causal relationship exists between the employee's protected activity and the employer's adverse action. *Intertape Polymer*, supra. The employer's burden also cannot be satisfied by proffered reasons that are pretextual, i.e., false reasons or reasons not in fact relied upon. Indeed, where the reason advanced by an employer for the adverse action either did not exist or was not actually relied on, the inference of unlawful motivation remains intact, and is in fact reinforced by the pretextual reason proffered by the employer. Id.

The General Counsel established a strong prima facie case. By his October 19 Homebase message and his statements at the October staff meeting, Emiliano sparked a controversy and uncertainty over whether employees were allowed to talk to each other about compensation (wages and tips), whether the restaurant would be closed during Christmas week (hours), and whether the employees would receive either pay or unemployment benefits during that time.[17] In November and December, Treviso complained to management multiple times about these topics of group concern. On November 13, he complained to Breceda about potentially being shorted tips due to the POS malfunction. He then pushed back against Emiliano by saying that he had the right to talk about his wages, thereby echoing concerns of other employees (Leslie Gonzalez and Lizzie Cisneros). In his Instagram post that evening, he stood up for the right of employees to discuss wages. On December 14, Treviso and Gonzalez approached Breceda to ask whether the restaurant would be closed during Christmas week and whether they would receive vacation pay or other compensation. On December 18, after Emiliano's second Homebase message prohibiting employees from discussing pay, Treviso reported to work dressed all in black with socks bearing the message "stop oppression." He also told Breceda that there was a problem at the restaurant and that he stood in solidarity with his coworkers. All of these actions constituted protected concerted activity because Treviso—with coworkers or by himself—was bringing truly group concerns to the attention of management. *Meyers Industries II,* supra.[18] They also occurred after employees raised these issues amongst themselves. *Snowflake, Inc*., 375 NLRB No. 39, slip op. at 1 (2026). All of these actions were known to or believed[19] by admitted Supervisors and/or Agents Emiliano, Krystal, Breceda, or Guzman and were thus imputable to Respondent.

The General Counsel presented overwhelming evidence that Respondent's animus towards Treviso's protected concerted activity was a motivating factor behind his discharge. There is considerable direct evidence. On December 28, when Treviso asked why he was being

[17] Compensation and hours of work are terms and conditions of employment. See *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995), and cases cited therein, where the Board stated that the discussion of wages is protected concerted activity because wages are a "'vital term and condition of employment,' 'probably the most critical element in employment,' and 'the grist on which concerted activity feeds'" and *Technocap LLC*, 372 NLRB No. 136 (2023) (terms and conditions of employment include work hours).

[18] Additionally, the Board has found discussions about employee compensation to be "inherently concerted" activity. *Automatic Screw Products Co*., 306 NLRB 1072, 1072 (1992).

[19] *Alternative Energy Applications*, 361 NLRB 1203, 1205 (2014) (the General Counsel's prima facie case of discrimination can also rest on the employer's belief the alleged discriminatee engaged in protected activity).

discharged, Krystal said it was for "gossiping." I view this as a veiled reference to Treviso discussing wages and hours with coworkers since Emiliano, Krystal, and Breceda routinely used words like "gossip," "rumors," and "toxic behavior" to refer to such protected activity. See *Climatrol, Inc*., 329 NLRB 946, 946 fn. 4 (1999) (citing several decisions where the Board deemed references to employees' "bad attitude," "negative attitude," and "work attitude" to be covert references to Sec. 7 activity). On November 13, when Treviso complained about possibly being shorted tips due to the POS malfunction, Krystal texted Emiliano to tell him to "get Fonzie's ass in line please!!I" There was also generalized evidence that Respondent disapproved of employees discussing wages. That was evidenced by Emiliano's remarks at the October staff meeting when he said talking about wages and tips was unacceptable and against company policy; on November 13, when Emiliano told Treviso that discussing wages was prohibited and that if he disagreed with that, Treviso could look for employment elsewhere; on November 17, when shift lead Guzman called Treviso's complaints about unpaid tips "petty"; and Emiliano's Homebase message on December 17, when he called such discussions, "partaking in gossip, spreading false rumors." *Kava Holdings, LLC d/b/a Hotel Bel-Air*, 370 NLRB No. 73, slip op. at 11–12 (2021) (generalized animus sufficient to establish a prima facie case). Finally, the close timing between protected activity and the discharge supports an inference of animus. Treviso reported to work dressed in black, showed Breceda his "stop oppression" socks, and declared that he "stood in solidarity" with his coworkers on December 18. That same day, Emiliano decided to discharge him. *Hiran Management, Inc. d/b/a Hungry Like the Wolf*, 373 NLRB No. 130, slip op. at 22 (2024) (employer statements that employees would be discharged "within days" of the walkout and strike notification was evidence of animus).

The adverse employment action was Treviso's discharge on December 28.

The burden thus shifted to Respondent to prove that it would have, not just could have, discharged Treviso absent his protected concerted activity. While Respondent did not file any posthearing brief, it did raise various defenses in its answer and opening statement. (R Answer; Tr. 369–376.) Respondent argued that it "was never made aware of any complaints or concerted activities by Treviso or any other employee." This was contradicted by the record, as the evidence squarely established that Respondent knew about Treviso's complaints about wages and hours. Respondent also asserted that "it could no longer continue the employment relationship because of Treviso's conduct, including verbally abusive behavior and conduct that created a disruptive environment." Contrary to this defense, I found that Treviso's advocacy on November 13 (the POS malfunction and Instagram post), November 17 (complaint to Guzman about tips still not having been paid), December 14 (Treviso and Gonzalez asked if the restaurant would be closed during Christmas week and whether employees would be paid), and December 18 (the Black Panther incident) was protected activity well within the protections of Section 7 of the Act. Finally, Respondent contended that it discharged Treviso based on his "performance and conduct," not due to animus towards the exercise of statutory rights. No evidence supported this claim. While Treviso may have failed to consistently perform side duties, such as polishing silverware or cleaning the bathroom, nothing suggested that Respondent discharged him for that reason. To the contrary, Respondent had a history of tolerating his lackadaisical performance in that area.

Based on the foregoing, I find that Respondent discharged Treviso in violation of Section 8(a)(1), as alleged in paragraph 4 of the complaint.

B. Respondent Did Not Discharge Treviso in Violation of Section 8(a)(3)

Paragraph 5 of the complaint alleges that Respondent discharged Treviso in retaliation for his exercise of union activity.

There was insufficient evidence of a prima facie case. In terms of union activity known to Respondent, the General Counsel asserted two theories. First, during the "Black Panther" discussion on December 18, manager Breceda asked Treviso why he continued working at the restaurant if he disagreed with their policies. He replied that he had rights and "that's why unions existed." Second, General Counsel pointed to Emiliano accusing Gonzalez of organizing a union and extrapolated that Respondent must have "suspected" Treviso of doing the same. Neither theory is persuasive. As a starting point, Treviso admitted that he engaged in no union activity. Against this backdrop, I cannot find Treviso's general reference to unions in a single sentence to Breceda to constitute union activity. Nor can I find that Respondent suspected Treviso of organizing based on Emiliano's accusation that a completely different person, Gonzalez, was organizing. Therefore, Respondent did not know or believe that Treviso engaged in union activity. In terms of animus, the General Counsel pointed to suspicious timing. In this case, where the timing of the discharge was so obviously linked to Treviso's protected activity, I decline to also infer it was motivated by Treviso's nonexistent union activity.

Based on the foregoing, I find that the allegation in paragraph 5 of the complaint was unsupported by the evidence and therefore dismiss it.

CONCLUSIONS OF LAW

1. Respondent Elemi Restaurant, LLC is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. On or about December 28, 2021, Respondent violated Section 8(a)(1) of the Act by discharging Charging Party Alfonso Treviso in retaliation for his protected concerted activities.
3. This unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.
4. The allegations in paragraphs 5 and 7 are unsupported by the evidence and should thus be dismissed.

REMEDY

Having found that Respondent 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. Specifically, having found that the Respondent violated Section 8(a)(1) by discharging employee Alfonso Treviso for engaging in protected concerted activity, Respondent shall offer him full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed. Respondent shall make Treviso whole, with interest, for any loss of earnings and other benefits suffered as a result of his unlawful discharge. That backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the

rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

In accordance with *Thryv, Inc*., 372 NLRB No. 22 (2022), enf. denied on other grounds 102 F.4th 727 (5th Cir. 2024), Respondent shall compensate Treviso for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful discharge, including reasonable search-for-work and interim employment expenses, if any, regardless of whether such expenses exceed interim earnings. Compensation for these harms shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

Respondent shall be ordered to compensate Treviso for the adverse tax consequences, if any, of receiving a lump-sum award for backpay and loss of benefits and to file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the award for backpay and loss of benefits to the appropriate calendar year(s). *AdvoServ of New Jersey, Inc*., 363 NLRB 1324 (2016). In addition, Respondent is ordered to file with the Regional Director for Region 28 a copy of the corresponding W-2 form(s) reflecting the backpay awards. *Cascades Containerboard Packaging —Niagara*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021).

Respondent shall be required to remove from its files any reference to the unlawful discharge of Treviso and to notify him in writing that this has been done and that the discharge will not be used against him in any way.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[20]

ORDER

Respondent Elemi Restaurant, LLC, El Paso, Texas, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Discharging employees in retaliation for having engaged in protected concerted activities.

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

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

(a) Within 14 days from the date of the Board's Order, offer Alfonso Treviso full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

[20] 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.

(b) Make Treviso whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section set forth above.

(c) Compensate Treviso for the adverse tax consequences, if any, of receiving a lump-sum award for lost backpay and benefits, and file with the Regional Director for Region 28, within 21 days of the date such amounts are fixed, either by agreement or Board order, a report allocating the award to the appropriate calendar years.

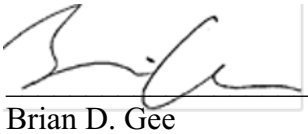
(d) File with the Regional Director for Region 28, within 21 days of the date the amount of the award for backpay and benefits is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of Treviso's corresponding W-2 forms reflecting the award.

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

(f) 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 the Board's Order.

(g) Within 14 days after service by the Region, post at its El Paso, Texas, facility copies of the attached notice marked "Appendix."[21] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that notices are not altered, defaced, or covered by any other material.

Dated, Washington, D.C., November 19, 2026.



Brian D. Gee
Administrative Law Judge

[21] 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."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT discharge you in retaliation for having engaged in protected concerted activities.

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

WE WILL, within 14 days from the date of any Board order, offer Alfonso Treviso full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges he previously enjoyed.

WE WILL make Treviso whole for any and all loss of earnings and other benefits incurred as a result of our unlawful decision to discharge him and WE WILL make him whole for any other direct or foreseeable pecuniary harms suffered as a result of the unlawful discharge, including reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Treviso for the adverse tax consequences, if any, of receiving a lump-sum award for backpay and benefits, and WE WILL file with the Regional Director for Region 28, within 21 days of the date that the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

WE WILL file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of Treviso's W–2 form(s) reflecting the backpay award.

WE WILL, within 14 days from the date of any Board order, remove from our files any reference to our unlawful decision to discharge Treviso and, within 3 days thereafter, notify him in writing that this has been done and that the unlawful discharge will not be used against him in any way.

ELEMI RESTAURANT, LLC

(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.nlrb.gov.

2600 North Central Avenue, Suite 1400
Phoenix, AZ 85004-3099
(602) 640-2160, Hours: 8:15 a.m. to 4:45 p.m. MT

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/case/ 28-CA-289582 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940

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 (602) 416-4755.