

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**WYNDHAM RESORT DEVELOPMENT
CORPORATION d/b/a WORLDMARK
BY WYNDHAM**

and

Case 28-CA-22680

GERALD FOLEY, an Individual

**ACTING GENERAL COUNSEL'S BRIEF IN
SUPPORT OF LIMITED EXCEPTIONS**

I. INTRODUCTION

Counsel for the Acting General Counsel (CAGC) files this Brief in Support of Limited Exceptions to the Decision of Administrative Law (ALJ) Judge Burton Litvack (ALJD) [JD(SF)-34-10]. The ALJ correctly found that Respondent issued Charging Party Gerald Foley (Foley) a written warning for having engaged in protected concerted activity on May 2, 2009¹, when Foley and other salesmen inquired and complained about Respondent's payment of commissions and that Respondent suspended and discharged Foley in September for engaging in protected concerted activity. However, the ALJ failed to find that Foley engaged in protected concerted activity on September 2, when Foley was joined by fellow salesman Charles Feathers (Feathers) in complaining about Respondent's new dress code with Respondent's vice-president Rodney Hill (Hill). Thus, the ALJ concluded that the warning given to Foley by Respondent on September 4, for his complaints about the new dress code was not unlawful. In arriving at this conclusion, the ALJ found that although Foley and Feathers complained about the new dress code at the same time to Hill while all three were standing together, Foley and Feathers acted independently of each other and were not engaged

¹ All dates are 2009, unless otherwise noted.

in concerted activity. This conclusion is incorrect; and CAGC excepts to that conclusion and the underlying findings.

II. RELEVANT FACTS

Respondent is engaged in the business of selling time shares, including time share credits. From June 2007, until he was discharged on September 11, Foley was employed by the Respondent as an in-house sales representative. Before employment with Respondent, Foley worked for other timeshare companies in Las Vegas such as Cancun Resort and Polo Towers. When he began working for Respondent, the commission paid was \$100 for every \$1,000 of credits, or points, that he sold. Respondent did not maintain a program to sell foreclosed or withdrawn property until February, when it rolled out the Owner Transfer Program (OTP). (TR. 52)

The OTP was initiated so that Respondent could sell properties and/or credits that purchasers could no longer pay. The commission rate for such sales varied from month to month, leading to the inevitable questioning by sales people. (TR. 27-28) Sales people discussed among themselves about the OTP, as well as about the failure of Respondent to make payments to its employees on time. (TR. 61-62; 193-94; 232-36) In some cases, sales people lost significant commission because of mistakes made by others. For instance, James Robertson (Robertson) testified that sales people received a higher commission if they convinced the purchaser to make a larger down payment. Robertson described one incident where a clerical error resulted in a slight miscalculation of the percentage of total cost the down payment represented, and this resulted in Robertson receiving approximately \$700 less in commission than he was entitled. (TR. 196)

At various times when Hill passed sales people talking about their pay problems, Hill told them that it was not appropriate for them to discuss topics together. (TR. 64, 199) The apparent last straw for Hill occurred at a sales meeting held early on the morning of May 2. Hill distributed copies of the May OTP compensation plan and opened the floor to questions. Several sales people, including Foley, Jennifer Griffin, and Phillip Bridges, took advantage of the opportunity to ask questions of Hill and responded with questions about the payment of commissions by Respondent and why Respondent could not handle the paperwork the way its sister company, Fairfield, did. After listening to a discussion that was more heated than he expected, Hill lost his temper and told the employees that sales meetings were not the proper venue for such discussion, and that if anyone had any questions or comments he or she should speak to Hill in private. (TR. 84-89; 201-07; 236-42)

Foley went on vacation shortly after this meeting. During the vacation, he spoke with Hill who told him that Respondent's regional vice-president of sales Derek Milholland (Milholland) wanted to speak with Foley when Foley returned from vacation. When he returned from vacation, Foley handed Hill a request for transfer to Respondent's sister company Fairfield. Instead of getting approval for his transfer request, Foley received a Notice of Correction Action dated May 14. (GCX 2) In that written warning, Hill criticized Foley for "voic[ing] his frustrations to the rest of the group" and "continu[ing] to discuss the issue with others" after the meeting ended. Hill also wrote:

REQUIRED IMPROVEMENT AND TIMELINE IF APPLICABLE:
Gerald must immediately stop and avoid expressions of open negativity in sales meetings and on the sales floor with other Sales Representatives and stop making inaccurate statements. Such negativity has an adverse impact on productivity. Should Gerald have a concern he is welcome to express it with management in private and it will be addressed.

(GCX 2; emphasis added)

The next incident involving Foley occurred on September 2. Foley was returning to work after some time off and heard other sales people talking about a new dress code. Before the daily sales meeting was to start, Hill told Foley that sales people must tuck in their shirts. Foley asked Hill if the new policy was in writing and if it came from headquarters. Hill responded by asking Foley, “Why does everything have to be in writing with you?” (TR. 108-10) After Foley asked about the new policy, fellow sales person Feathers joined in and complained about the new rule. Feathers often wore Tommy Bahama shirts and Robertson even called him “the Tommy Bahama king.” (TR. 208) The testimony at the hearing sometimes resembled an article in GQ as all the witnesses opined that Tommy Bahama shirts are not meant to be tucked in. (TR. 105-06 (Foley), 208 (Robertson), 297 (Hill), 312 (Feathers)) Hill again grew angry and directed Leila Darling (Darling), the sales manager, to conduct the sales meeting while he met with Foley and Feathers in his office. When he was alone with the two sales people, Hill criticized them for creating a disturbance; and, apparently to show that the rules will not change, told them how he told his daughter, who had left home after chafing under Hill’s rules, that she could return but she would still have to obey the rules. He dismissed both employees and it appeared that any problem had been resolved. Feathers, at least, did not receive any discipline. (TR. 41, 111-12)

When Foley and Feathers went onto the sales floor and greeted their customers, Foley discovered that he had the couple Feathers was supposed to see and vice versa. The two switched customers. Foley and the male customer had a misunderstanding. Hill came by and took the customer outside and refused to permit Foley to follow. Foley went back inside and conducted another tour. (TR. 122-23)

Later that day, Hill directed Foley to join him in Milholland's office. Milholland asked Foley what the problem was, and he told Foley that he had heard Foley was "sideways" over the shirt-tail rule, and that Foley irritated a customer. Milholland told Foley that he was being suspended for a day. Foley reacted with surprise that he was being suspended for asking a question about the new dress policy, especially when Feathers was more abrupt. He looked at Hill and said that he thought the situation had been resolved. Milholland said that Foley was suspended until Respondent did an investigation. Foley invited Milholland to do the investigation at that time, but Milholland declined. (TR. 123-26)

Two days later, after the expiration of the one-day suspension that Milholland had declared, Foley returned to work. Hill asked him what Foley was doing there, since Hill had sent Foley a text message telling him not to return until further notice. On September 10, Hill called Foley and told him to come to work the next day. Foley went in to work on September 11, and met with Hill and Milholland. Hill began the meeting by telling Foley that he was an "awesome" salesperson. Milholland said it was not important and asked Hill what human resources had said. Hill then said that Respondent had decided to terminate Foley's employment. Foley asked why and Hill responded, "Multiple write-ups." When Foley said that he had only received one write-up, the one in May, Hill took out two more. (TR. 128, 133-35; GCX 3 and 4) The warning that Foley received for the dress code incident reads:

Gerald was visibly and vocally upset over a new policy in which Sales Reps were required to have their shirts tucked in. *He continued to argue with me in front of the team.* I asked him several times to discuss it later. He continued to press me getting more and more aggravated as he went on. *He incited another Rep [sic] to join in at which point I asked them both to take the day off because I would not start our day with negativity.* At that point I brought both reps into my office for a little chat.

(GCX 3; emphasis added) Foley filed the charge in this case that same day.

III. ARGUMENT

The sole issue here is whether Foley and Feathers acted “independently,” as the ALJ ruled, when Feathers found Foley discussing the new dress code with Hill and joined in the discussion; or whether by acting together on an issue of mutual concern, their action was “concerted.” The ALJ correctly found that the subject of the discussion concerned “terms and conditions of employment.” (ALJD at 18, citing *Public Service Co. of New Mexico*, 337 NLRB 193, 199 (2001); *St. Luke’s Hospital*, 314 NLRB 434, 440 (1994)) The ALJ’s conclusion that Foley did not engage in concerted activity when he and Feathers discussed the subject with Hill is undermined by the undisputed evidence.

A. **Foley’s Activity Meets the Definition of Concerted Activity in *Meyers I & II*.**

The definition of concerted activity is grounded in the two *Meyers* cases: *Meyers Industries*, 268 NLRB 493 (1984) (“*Meyers I*”) and 281 NLRB 882 (1986) (“*Meyers II*”). In *Meyers I*, the Board defined “concerted activities” as follows: “In general, to find an employee’s activity to be ‘concerted,’ we shall require that *it be engaged in with* or on the authority *of other employees*, and not solely by and on behalf of the employee himself.” 268 NLRB at 497 (emphasis added). In *Meyers II*, the Board stated that its definition of concerted activity in *Meyers I* “encompasses those circumstances 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.” 281 NLRB at 887.

The plain language of *Meyers I* supports finding that Foley was engaged in protected concerted activity after Feathers joined the discussion with Hill. Further, at that point, Foley’s activity was “engaged in with ... other employees” 268 NLRB at 497. On this point

alone the Board should reverse the ALJ's conclusion and hold that the warning given to Foley for discussing the dress code was unlawful.

Moreover, the ALJ ignored testimony of both Hill and Feathers reflecting that Foley looked to induce group action, which the Board in *Meyers II* also included within the definition of concerted activity. Feathers testified that while he and Foley were discussing the dress code with Hill, an "audience" of about seven or eight other salespeople gathered around. (TR. 311) Feathers also testified that after he and Foley met with Hill following the discussion, Foley told him, "Hey, way to man up in there and stick up for me." (TR. 313) Hill testified similarly and said that Feathers told him after the discussion Foley had told Feathers, "Hey, thanks for sticking up with me on that one.' Something to the effect of, 'We got to stick together on this stuff.'" (TR. 271) When asked why Hill initially told Foley and him to go home, Feathers testified it was "because I was party to what had transpired here. I was -- had -- you know, *I was an instigator also*. I was -- I had vocalized my opposition to tuck in." (TR. 311; emphasis added) The testimony of both Feathers and Hill is further proof that Foley's activity on September 2, was concerted.

Unlike the situation in *Meyers*, where "there [was] no record evidence whatsoever that [the charging party] at any relevant time or in any manner joined forces with any other employee, or by his activities intended to enlist the support of other employees in a common endeavor" (281 NLRB at 886), Foley joined forces with Feathers in discussing the dress code with Hill. Even if the Board concludes that Foley did not intend to enlist the support of other employees (which, by discussing the dress code in front of other employees, Foley intended), it is clear that Foley and Feathers both engaged in concerted activity with Hill.

B. The ALJ Misinterpreted *Meyers* to Require a Prior Agreement.

Although the ALJ was correct in finding that Foley began the discussion of the new dress code with Hill by himself, Feathers joined Foley that discussion. The ALJ swept aside this obviously concerted activity by stating:

As to whether Foley's individual protest was somehow transformed into concerted activity at the point that Charles Feathers spoke and interjected himself into the confrontation with Hill, I note that there exists not a scintilla of record evidence that Foley and Feathers consulted with each other or in any manner planned to engage in a joint protest of Respondent's new dress rule that morning. What seems to have occurred is that, overhearing Foley's conversation with Hill and upset by the new dress rule, Feathers decided to act independently and in his own self interest by raising his own complaints about the new policy.

(ALJD at 18) The quoted language above illustrates the ALJ's mistake. First, the ALJ based his conclusion upon the belief that employees act concertedly only if they discussed the subject beforehand and planned to act together. The law as set forth in both *Meyers* cases, however, requires no such preparation. Second, the ALJ found that Feathers "acted independently" even though: 1) Feathers made no complaint about the dress code until he overheard Foley raising the same objections Feathers had; and 2) rather than speak with Hill on his own, Feathers joined the discussion between Foley and Hill. Thus, both on the law and on the facts, the ALJ erred.

The ALJ distinguished *Brawly Beef, LLC*, 339 NLRB 476 (2003), because one of the two employees in that case acted as a translator and spokesman for the other. To the contrary, the decision in *Brawly Beef* supports the finding of a violation here. As in *Brawly Beef*, where one employee initiated discussion of a working condition and the other "soon joined in the complaint" (339 NLRB at 478), Foley and Feathers joined each other in protesting the new

dress code. Their activity was concerted and the Board should hold that the warning notice given to Foley as a result of that protected concerted activity was unlawful.

C. The Respondent Knew Foley's Activity Was Concerted.

Although Foley testified that he did not request Feathers to join in the discussion (“He chimed in on his own”; TR. 147), the language of the warning itself reflects that Hill, and therefore Respondent, viewed Foley’s activity as concerted. In the warning notice, Hill stated:

Gerald was visibly and vocally upset over a new policy in which Sales Reps were required to have their shirts tucked in. *He continued to argue with me in front of the team.* I asked him several times to discuss it later. He continued to press me getting more and more aggravated as he went on. *He incited another Rep [sic] to join in* at which point I asked them both to take the day off because I would not start our day with negativity. At that point I brought both reps into my office for a little chat.

(GCX 3; emphasis added) The warning notice reflects that Hill believed that Foley incited Feathers to join the discussion. Moreover, when the ALJ questioned Hill with regard to what he meant by “incited,” Hill answered:

He was very vocal with one of the other reps and *continued to egg on -- another rep did complain about the change in policy, and so Mr. Foley continued to encourage him* to the point where he said, “Thank you for joining my side,” to which the other guy said, “I didn’t join a side. I made a mistake.”

(TR. 42) According to Hill, Foley not only tried and succeeded in getting Feathers to join the discussion, Foley continued to encourage Feathers to contribute to the discussion. Hill’s view of Foley’s actions, as contained in both the warning notice and his testimony, undermines the ALJ’s finding that “there exists no evidence that Foley sought any form of group action in support of his individual protest.” (ALJD at 15) At the very least, the notice and Hill’s testimony reflect that Respondent was aware of the concerted nature of Foley’s activity and relied upon it in disciplining him. See *Amelio’s*, 301 NLRB 182, 182 (1991) (an employer

must have knowledge of the concerted nature of an employee's activity in order for the employer to violate Section 8(a)(1) of the Act).

IV. CONCLUSION

For all the reasons set forth above, the Board should reverse the ALJ's findings and conclusions and hold that Foley engaged in concerted activity when he and Feathers discussed the new dress code with Hill; that the warning notice given to Foley for discussing the new dress code with Hill and having Feathers join in that discussion was unlawful; and that Foley was suspended and discharged for having engaged in this protected concerted activity, as well as Foley's activity on May 2.

Dated at Las Vegas, Nevada, this 15th day of September 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF LIMITED EXCEPTIONS in WYNDHAM RESORT DEVELOPMENT CORPORATION d/b/a WORLDMARK BY WYNDHAM Case 28-CA-22680, was served by E-Gov, E-Filing, E-Mail and Overnight Delivery via Federal Express, on this 15th day of September 2010, on the following:

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