

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

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

and

Case No. 28-CA-22680

GERALD FOLEY, an individual

**RESPONDENT'S OPPOSITION TO ACTING GENERAL COUNSEL'S
LIMITED EXCEPTIONS**

COMES NOW Respondent Wyndham Resort Development Corporation d/b/a WorldMark by Wyndham ("Wyndham"), and files this Opposition to Acting General Counsel's Limited Exceptions.

I. PROCEDURAL HISTORY

On September 11, 2009, Gerald Foley ("Mr. Foley") filed a Charge with the National Labor Relations Board alleging, *inter alia*, that he had been disciplined for concertedly protesting the implementation of a dress code policy. On October 30, 2009, the Regional Director of Region 28 issued a Complaint and Notice of Hearing alleging, *inter alia*, that Mr. Foley had been disciplined for concertedly protesting the implementation of a uniform policy in violation of Section 8(a)(1) of the National Labor Relations Act. On November 9, 2009, Wyndham filed an Answer that, *inter alia*, denied said allegation. A hearing was held before Administrative Law Judge ("ALJ") Burton Litvack on January 12, 2010. On August 18, 2010, the ALJ issued a Decision finding that, *inter alia*, Wyndham had not disciplined Mr. Foley for concertedly protesting the implementation of a uniform policy because other employees acted independently by raising their own complaints about the new policy. On September 15, 2010, Acting

General Counsel (“AGC”) filed Exceptions. Wyndham’s timely Opposition follows.

II. RELEVANT FACTS

Wyndham takes no exception to the AGC’s Statement of Material Facts contained in his Brief in Support of Limited Exceptions to the extent that such facts do not contradict Wyndham’s Relevant Facts.

The morning of September 4, 2009 Mr. Foley had an encounter with Rodney Hill (“Mr. Hill”), his immediate supervisor and Site Vice President, In-House, prior to the daily sales meeting. Wyndham introduced a revision to its dress code requiring that employees tuck in their shirts. (Wyndham maintains a Personal Appearance policy (Resp. Ex. No. 3), and reserves the right to amend such policies from time to time (Resp. Ex. No. 4)).¹ Mr. Foley learned of the policy revision that morning. Upon learning of this, Mr. Foley became upset. Tr. 109: 15-22. He demanded that Mr. Hill provide him with a written copy of this policy and stated that this requirement is not in his “contract.” Tr. at 269: 20-22; 310: 9-12. Mr. Foley’s colleague Charles Feathers (“Mr. Feathers”) also complained about “not needing this crap.” Tr. 109:11-25. Soon, as other employees began to arrive for work, they watched the confrontation. Tr. at 320: 9-15. After initially deciding to send Messrs. Foley and Feathers home, Mr. Hill instead sent them to his office. After a discussion of the matter, Messrs. Foley and Hill agreed to adhere to the rule requiring that shirts be tucked in. Tr. 272: 1-13. Upon leaving Mr. Hill’s office, Mr. Foley thanked Mr. Feathers for supporting him. Mr. Feathers recoiled, telling Mr. Foley that what they had done was stupid and that they deserved to be disciplined. Tr. 313: 8-14. Clearly, Mr. Feathers’ statement shows that he and Mr. Foley were not operating in concert when they independently complained about the new dress code.

¹ References to the ALJ’s decision will hereinafter be designated as (“ALJ ____”). References to the hearing transcript will hereinafter be designated as (“Tr. ____”). References to the AGC’s Brief in support of its Exceptions will hereinafter be designated as (“Excp. Br. ____”). References to Respondent’s Exhibits will hereinafter be designated as (“Resp. Ex. ____”). References to the AGC’s Exhibits will hereinafter be designated as (“G.C. Ex. ____”).

III. ARGUMENT

The Acting General Counsel's sole exception concerns whether Mr. Foley and Mr. Feathers engaged in concerted protected activity when Mr. Foley confronted his supervisor, Mr. Hill, regarding the implementation of a dress code policy. The ALJ correctly concluded, based on both Messrs. Foley and Feather's testimony, that the two salesmen did not work in concert when complaining about the newly implemented policy. Wyndham contends that the National Labor Relations Board ("NLRB" or "Board") must reject Acting General Counsel's Exception and affirm the ALJ's decision on this point.

A. **Mr. Foley's Unplanned and Spontaneous Confrontation of Mr. Hill Does Not Constitute Concerted Activity.**

The Board holds that:

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.

Meyers Industries, Inc., 268 NLRB 493, 497 (1984) ("*Meyers I*"). Shortly thereafter, the Board held that:

We reiterate, our 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. . . . It is not questioned that a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees.

Meyers Industries, Inc., 281 NLRB 882, 887 (1986) ("*Meyers II*"). It is well-settled Board law that the activity of a single employee is not concerted activity unless it is engaged in with the object of initiating group action. *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964).

The AGC contends that Mr. Foley's impromptu questioning of Mr. Hill regarding the implementation of a dress policy constitutes concerted activity. In support, the AGC notes that an audience gathered to watch Mr. Foley confront Mr. Hill. Tr. 311. There is nothing to indicate, however, that the audience participated in Mr. Foley's protest, or that they did anything but watch. The fact that a crowd began to gather during the confrontation is not evidence of concerted activity; in fact, the crowd simply began to arrive at work to participate in a required morning meeting. A more complete excerpt from Mr. Feather's testimony regarding the audience and its action follows:

[Mr. Foley's confrontation of Mr. Hill] was before the sales meeting ever started. We show up, the sales meeting is at 8:00, and this was at a quarter of 8:00 in the morning, on the work room floor though, and it was in front of—I mean, when it first started, I think there was just he and I, maybe Bobby was there, one other sales person, as it kept going and more people started arriving at work and showing up, all of a sudden there was an audience of seven or eight people[.]

Tr. 310:24-25; 311:1-6. This passage is noteworthy for two reasons. First, it shows that Mr. Foley confronted Mr. Hill prior to the start of a daily sales meeting. Had Mr. Foley sought to engage in concerted activity, he would have done so when a number of his colleagues were present, or once the daily sales meeting had started. Next, nothing in that passage demonstrates that any member of the audience participated or acted in concert with Mr. Foley. There is no question that people were arriving and watching, but there is no indication that people joined in. Third, there is nothing to indicate that Mr. Foley sought to initiate group action. *Mushroom Transportation*, 330 F.2d at 685.

The AGC's cross-examination of Mr. Feathers failed to elicit that the confrontation was concerted activity:

Q Now, when you were talking about the discussion relating to the new dress code of tucking in shirts, you said you were there, Mr. Foley was there, Rod Hill was obviously, there, and you thought Bobby may have been there. Who is Bobby?

A Bobby Westbrook is a —he is another sales person.

Q Isn't it true that James Robertson was there?

A That could have been. I know there was at least three of us there when they initially started the conversation, and by the time we finished, there were like seven people there that were—and I became very aware that other people were witnessing and watching us, and as they got more out of control, I was thinking, “This isn't good.” I mean, I would never have allowed that –

Q Okay, thank you. You have answered my question.

Tr. 320:3-16. While there may have been anywhere from three or four persons present at the beginning of the confrontation, and seven or eight people there at the end, there is nothing to indicate that such people acted in concert. Simply watching Mr. Foley confront Mr. Hill isn't “concerted activity” any more than standing in a garage makes one a car.

The AGC also points to Mr. Foley's statement, “Hey, way to man up in there and stick up for me,” as evidence of concerted activity with Mr. Feathers. Excp. Br. 7. Mr. Feathers, however, does not consider his actions “sticking up” for Mr. Foley or concerted activity, but rather “the stupidest thing I have ever done.” Tr. 313:11-12. Clearly Mr. Feathers did not think he was working in concert with Mr. Foley and he wasn't inspired to act by Mr. Foley.

Mr. Foley's personal testimony shows best that he was acting solely on his own behalf and not with anyone else in mind. To begin, Mr. Foley admits to acting completely alone. Tr. 147: 16-25. Further, Mr. Foley testified on direct as follows:

Q Did you say anything to Mr. Hill after he said that shirt tails must be tucked in?

A Yes.

Q What did you say?

A I said, “Is that true? Is that a new rule, because I was told that there is a rumor going around to this effect and I was just curious. Is this real?”

Q What did Mr. Hill say?

A He said, "Yes."

Q Did you say anything after that?

A Yes.

Q What?

A "Is it a corporate policy? Is it just us? Is it—I need to see the memo. Was there a memo posted about this?"

Q What did Mr. Hill say about that?

A He abruptly asked me, "Why does everything have to be in writing with you?"

I am like, "I am just asking, because companies, like us, anytime they have changes, we always see a memo, and I am just curious if it was a rumor or not."

Q Did any other individual pipe in during this discussion?

A Yeah. As we were talking, Chuck Feathers was a little boisterous, yeah, I felt. You know, he was kind of loud about it and he made a statement along the lines. "I didn't sign up for this crap. My wife and I"—I think his wife's name is Leah or something—"we were talking. I don't need the money, you know. This is not what I signed up for," and it is known that he is pretty close with Mr. Hill—

Well, at that time, as he started being boisterous, Mr. Hill looks at Mr. Feathers, and said, "You," and pointed with his index finger, "and you," and pointed at me, "Go home. You guys can go home for today."

I looked at him and I go, "What are you talking about, going home? I am just asking a question."

Tr. 109:11-25; 110:1-20. "I am just asking a question," encapsulates Mr. Foley's conduct. He just asked a question. He did not lead a protest. He did not incite others to complain. He did not speak on behalf of others. He sought only to satisfy his own curiosity. He asked a question about a new dress code policy that he did not like. As for Mr. Feathers, he complained about the dress code because he had money and "didn't

need the crap.” Tr.109:11-25. There is nothing to indicate that Mr. Foley “was engaged in [a conversation] with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees.” *Meyers II*, 281 NLRB at 887. There is no evidence that he succeeded in doing so. As such, the AGC’s Exception must be denied.

B. The ALJ Did Not Read *Meyers I* or *Meyers II* to Require a Prior Agreement Is Needed to Establish Concerted Activity.

Neither *Meyers I* nor *Meyers II* requires that employees need agree in advance to certain activity for it to be concerted, and the ALJ did not read them as requiring as such. The ALJ made a factual conclusion that, “What seems to have occurred is that, overhearing [Mr.] Foley’s conversation with [Mr.] Hill and upset by the new dress rule, [Mr.] Feathers decided to act independently and in his own self interest by raising his own complaints about the new policy.” ALJ at 18. There is nothing in that conclusion that applies or interprets the standard established in *Meyers I* or *Meyers II*. It is simply a factual conclusion that Messrs. Foley and Feathers were not engaged in concerted activity.

The simple fact that Mr. Feathers decided to speak when Mr. Foley had engaged Mr. Hill does not mean they were acting in concert. Nothing in Mr. Foley’s testimony on this subject, quoted extensively above, indicates that he was speaking on behalf of anyone but himself. The testimony of Messrs. Foley and Feathers shows their complaints were of a personal nature. Mr. Foley wanted to discuss the rumor of a change in the dress code policy, and to see a memo to that effect. Tr. 110:1-20. Mr. Feathers had been “talking to his wife” and “didn’t need this crap.” Tr. 109:11-25. How such testimony indicates concerted activity cannot be, and has not been, explained by the AGC.

Even assuming, *arguendo*, that the ALJ did require such a standard, there is nothing to indicate that the conversation was “engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of employees.” *Meyers II*, 281 NLRB at 887. The comments and questions of both men were of an individual nature.

The AGC’s reliance on *Brawly Beef, LLC*, 339 NLRB 476 (2003) is misplaced, as it is easily distinguishable from the instant matter. First, the employees in *Brawly Beef* had already started their shift and were working together when they become upset about having to lift heavy meat carcasses (339 NLRB at 477); here, Mr. Foley acted individually before the work day had even started. Second, the employees in *Brawly Beef* together approached management three separate times and complained about their work (339 NLRB at 477); here, Mr. Foley, on his own, approached management once and stated that he was “curious” about the policy and wanted to see a memo. Mr. Feathers did not join in with Mr. Foley and clearly considered only his own issues: he did not “sign up for this crap” and “didn’t need the money.” Tr. 109:11-25. There is nothing in those two statements indicating that Mr. Feathers engaged in that conversation with other employees’ authority, but simply on behalf of himself. As opposed to the employees in *Brawly Beef* who concertedly complained about the weight of meat carcasses, Mr. Foley individually sought to satisfy his own curiosity. As such, this case has no bearing on the matter at hand and ought not be relied upon.

C. No Evidence Indicates that Mr. Hill Knew that Mr. Foley’s Activity was Concerted.

In *Meyers I*, the Board held that:

Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee’s activity, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g. discharge) was motivated by the employee’s protected concerted activity.

Meyers I, 268 NLRB at 497. Here, there is nothing to indicate that Mr. Hill knew that Mr. Foley's protest over having to tuck his shirt in was concerted activity.

The AGC cherry picks certain testimony in effort to demonstrate that Mr. Hill had knowledge. The first such statement is, "He continued to argue with me in front of the team." Excp. Br. 9. Arguing in front of other people does not show that a person represents such persons, or is speaking on their behalf—it's just arguing. That statement, standing on its own or in the context of the complete quotation, lends no credence to the argument that Mr. Foley was acting on behalf of anyone but himself. The next statement selected is, "He incited another Rep to join in[.]" *Id.* Inciting another to speak does not mean that persons are working in concert. In fact, the testimony shows that Messrs. Foley and Feathers' statements addressed only their personal issues. Nothing indicates that Mr. Foley sought to vindicate the rights of a group.

Mr. Foley's lack of influence and inability to inspire the audience watching his questioning of Mr. Hill is underscored by Mr. Hill's testimony that Mr. Feathers' didn't support Mr. Foley, and in fact said, "I didn't join a side." (Tr. 42:6.) Bizarrely, the AGC states that such testimony shows that Mr. Foley "tried and succeeded in getting [Mr.] Feathers to join the discussion[.]" Excp. Br. 9. The AGC also italicizes other sentences spoken by Mr. Hill, but fails to recognize the most important of all: Mr. Hill testified that Mr. Feathers said, "I didn't join a side." Tr. 42:6. Mr. Feathers testified that his complaining was "the stupidest thing I have ever done." Tr. 313:11-12. Stating that someone did not join a side, and that their conduct was the stupidest thing they had ever done, does not show concerted activity. It does not show that Mr. Feathers supported Mr. Foley's complaining—in fact it shows the exact opposite. As such, the AGC's Limited Exception must fail.

IV. CONCLUSION

For all the reasons set forth above, the Board should enforce the ALJ's findings

and conclusions that Gerald Foley did not engage in concerted activity when he confronted Mr. Hill regarding the new dress code policy, and that therefore he was not disciplined as a result thereof.

Dated at Las Vegas, Nevada, this 29 day of September, 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D.R. Keene, II", written over a horizontal line.

David R. Keene, II, ESQ.
LITTLER MENDELSON

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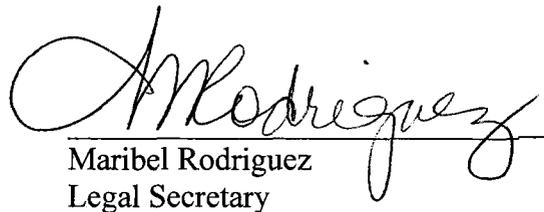
CERTIFICATE OF SERVICE

I hereby certify that a copy of RESPONDENT'S OPPOSITION TO ACTING GENERAL COUNSEL'S LIMITED EXCEPTIONS in WYNDHAM RESORT DEVELOPMENT CORPORATION d/b/a WORLDMARK BY WYNDHAM, case no. 28-CA-22680, was served by E-Gov, E-Filing, E-Mail, U.S. Mail, on this 29 day of September, 2010, on the following:

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