

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

VEGAS VALLEY FOOD & BEVERAGE,
LLC. d/b/a DÉJÀ VU EROTIC ULTRA
LOUNGE FUSION

and

CASE 28-CA-23032

CAMILLE SYDNOR, an Individual

Lyn R. Buckley, Esq., for the General Counsel.¹
Edith A. Thomas, Esq., for the Respondent.²

DECISION

Statement of the Case

WILLIAM N. CATES, Administrative Law Judge. This is a wrongful discharge case I heard in Las Vegas, Nevada, on November 16, 2010. The case originates from a charge, filed by Camille Sydnor, an Individual (Sydnor) on May 10, 2010, against Vegas Valley Food & Beverage, LLC d/b/a/ Déjà vu Erotic Ultra Lounge Fusion (the Club). The prosecution of this case was formalized on June 30, 2010, when the Regional Director for Region 28 of the National Labor Relations Board (the Board), acting in the name of the Board's Acting General Counsel, issued a complaint and notice of hearing (complaint) against the Club.

The complaint alleges the Club, on or about May 9, 2010, discharged its employee, Sydnor, for concertedly complaining to the Club about the requirement that cocktail waitresses, bartenders, and bar backs pay a fee to the Club as a condition of employment. It is alleged the Club's actions violate Section 8(a)(1) of the National Labor Relations Act, as amended (the Act).

¹ I shall refer to counsel for the Acting General Counsel as counsel for the Government and to the General Counsel as the Government.

² I shall refer to counsel for the Respondent as counsel for the Club and I shall refer to the Respondent as the Club.

The Club, in a timely filed answer to the complaint, denied having violated the Act in any manner alleged in the complaint.

5 The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. I carefully observed the demeanor of the witnesses as they testified and I rely on those observations in making credibility determinations herein. I have studied the whole record, the post-trial briefs, and the authorities cited therein. Based on the detailed findings and analysis below, I conclude and find the Club violated the Act substantially as alleged in the complaint.

10 **Findings of Fact**

I. Jurisdiction and Supervisory/Agency Status

15 The Club is a limited liability company, with an office and place of business in Las Vegas, Nevada, where it is, and has been, engaged in the business of operating a nightclub. Based on projections of its operations since on or about November 16, 2009, at which time the Club commenced operations, the Club, in conducting its business operations will annually derive gross revenues in excess of \$500,000. Based on the same projections the Club will annually purchase and receive at the Club’s facility goods valued in excess of \$50,000 directly from points outside the State of Nevada. The evidence establishes, the parties admit, and I find, the Club is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

25 It is admitted and I find that General Manager Skip Thomas Waugh (General Manager Waugh or Waugh), Assistant General Manager Jerry Anthony Barone (Assistant General Manager Barone or Barone), Beverage Manager Gregory Easton (Beverage Manager Easton or Easton), and Shift Manager Paul Slade (Shift Manager Slade or Slade) are supervisors and agents of the Club within the meaning of Section 2(11) and (13) of the Act.

30 **II. Alleged Unfair Labor Practices**

A. Facts

35 **1. Background**

40 The Club employs approximately 50 employees in various classifications such as cocktail waitresses, bartenders, bar backs, hosts, security personnel, valets, disc jockeys, go-go dancers, topless dancers, and strippers. General Manager Waugh describes the business as an afterhours (6 p.m. until 10a.m.) gentlemen’s and dance club.

45 It is undisputed Charging Party Sydnor worked for the Club for a limited period in the Spring of 2010. She received training in February and worked some in March, however, her employment records reflect she was hired on April 6, 2010. Sydnor worked as a cocktail waitress primarily on the 6 p.m. to 2 a.m. shift. She sometimes worked the 1 a.m. to 9 a.m. (graveyard) shift. Cocktail waitress positions, such as Sydnor’s, are tipped positions. In addition to cocktail waitress positions many other job classifications such as bartenders and bar

backs are also tipped positions. Waitresses serve drinks to guests at designated stations and at the close of their shift make arrangements with on-coming waitresses regarding tip sharing from customers served first by the earlier shift waitresses then continued by the later on-coming shift waitresses. Sydnor was normally supervised by Assistant General Manager Jerry Barone except when she worked the graveyard shift during which she was supervised by Shift Manager Paul Slade.

2. Early May tip pool
(a) Government’s evidence

It is undisputed the Club instituted a tip pool arrangement around the first week of May 2010. It is undisputed the tip pool arrangement only lasted for approximately a week or so and was not well received. It is disputed whether the tip pool arrangement was voluntary and who would benefit from it.

Former bartender Rachel Kaohi testified she worked with waitresses at the Club in May 2010. Kaohi said the first week in May Shift Manager Slade told her about the \$25 tip fee collection. Slade told Kaohi it was “a mandatory \$25 fee . . . going toward management.” Kaohi did not ask Slade about the fee because she did not know if it was a standard practice in the industry because this was the first time she had actually worked in this type of environment. Kaohi said she, thereafter, asked Beverage Manager Easton if this was a normal practice at other places in the industry. Easton told Kaohi all he knew was it was mandatory. Kaohi also asked other employees whom she said told her other night clubs did it, that it was a regular practice.

Kaohi testified she attended the regular Wednesday employee meeting in early May 2010 at which General Manager Waugh spoke. Kaohi said another bartender asked if the employees had to pay the \$25 tip fee. According to Kaohi, General Manager Waugh responded; “that if anybody asked about __ or if he heard any more complaining about the fee, he would raise it. That was the last of it.” Kaohi made two \$25 tip fee payments and was, thereafter, told by Shift Manager Slade the fee was no longer being collected. According to Kaohi, Sydnor did not attend this particular Wednesday employee meeting.

Sydnor testified business was really slow the early hours of her shift on Thursday, May 6, 2010. Sydnor, a waitress named Jessica, and a waitress trainee were in the service well near the bar on that occasion restocking supplies. Jessica asked Sydnor, “Did you hear about the \$25 that we had to pay.” Sydnor had not and asked if Jessica was serious. Jessica opined management would probably be speaking with Sydnor about it and told Sydnor that she (Jessica) had told management she did not agree with the arrangement saying it was, “just bull.” Sydnor did not agree cocktail waitresses should pay a house fee since waitresses were employees on the Club’s payroll. Sydnor told Jessica, “A mandatory tip to management, \$25? . . . they’re treating us like strippers because they’re independent contractors, we’re employees.”

Sydnor testified that later that same day, Assistant General Manager Barone handed her a sheet of paper with bold lettering at the top “Tip to Management, House Fee” which was dated May 2 — 8. The sheet’s left column provided for a listing of employees’ names who had

contributed a tip fee while the right column reflected the amount each employee paid. The amount to be paid was specified at \$25. According to Sydnor waitresses Monica, Stephanie, Winnie, and Rachel, along with porter Sergio and bartender Jessica, had already signed as having paid the \$25 tip fee. Sydnor told Assistant General Manager Barone; “Okay, we have to pay \$25” and asked if he knew “what this is for?” Barone said, “its something that management is doing right now.” Sydnor complained that plenty nights when she worked the early shift she might not even make \$25. Barone told Sydnor he did not know what else to tell her other than the Club was doing it and the payment had to be in by Saturday, May 8, 2010. Sydnor did not make a payment at that time and was never told the tip fee was voluntary.

The following day, May 7, Sydnor spoke by telephone, and later in person, with a waitress named Wendy. Wendy asked if Sydnor had paid the \$25 tip fee and told her she thought it obscene and did not agree with having to pay it. Sydnor told Wendy she also did not want to pay it and stated Assistant General Manager Barone had said it was something management was doing. Sydnor told Wendy, “its like we have to pay to be at work and that’s something an independent contractor does, which we’re not.” Later that same evening, Sydnor spoke with employee Monica, telling her they had to pay a \$25 tip fee and asked how she felt about it. Monica said, “it didn’t really bother her too much” it was just something management was doing. Sydnor told Monica that if she worked Monica’s shift it might not be a big deal to her either and added she did not agree with it but would pay it. Sydnor also spoke about the tip with bar back Sidney. Sidney had heard about it and said he needed his job and commented it had to be paid by Saturday. Sydnor told Sidney she did not agree with the tip fee and Sidney did not either.

Sydnor testified that on Saturday morning, May 8, 2010, as she was getting off work, she paid Shift Manager Slade the \$25 tip fee. Employees Andrew and Desiree were present at the time. Sydnor said Shift Manager Slade asked her, “Do you have the commie cut?” Sydnor asked Slade if he was a communist and told him she was paying the \$25 tip fee and asked why. Slade told her, “It’s just something that the management is doing.” Sydnor explained an “envelope” where the waitresses normally paid .03 percent of their daily tip money for the bartenders and bar back was in the room as usual, plus, an extra “envelope” for the new \$25 tip fee. Sydnor left work after that.

Sydnor worked 3 a.m. until 9 a.m., Saturday, May 8, 2010. At around 7 a.m. Sydnor told Assistant General Manager Barone she had paid the \$25 tip fee and asked if she could get a “receipt or something” to show she had made the payment. According to Sydnor, Barone responded “A receipt? Are you f_ing kidding me? You know what? I’m sick of playing these games with you” and walked off. Sydnor thereafter told host/bouncer Robert she had a feeling she was going to be terminated based on Barone’s reaction to her questions about the \$25 tip fee.

(b) The Club’s evidence

Assistant General Manager Barone testified he brought up the idea of the tip fee as a way to generate money for the valet because the Club did not pay for the valet’s services. Barone discussed his idea with Shift Manager Slade and Beverage Manager Easton. Thereafter, General Manager Waugh established a \$25 tip fee arrangement in May 2010. The

tip fee would be collected by the managers and placed in an “envelope” and eventually the proceeds would be paid to the valet and disc jockeys, (DJ or deejay) at the Club. Waugh said the \$25 per week tip fee was voluntary among the cocktail waitresses, bartenders, floor hosts, and other tipped employees. According to Waugh the idea behind the tip fee arrangement was to supplement the valet and disc jockey’s earnings.

The tip pool arrangement only lasted for approximately 1 week. Waugh explained that, “not a lot of people participated . . . , So that’s why we scrapped it. . . . It wasn’t a lot of money . . . [n]ot a lot of people participated.” Waugh said there was no pressure on employees to participate in the tip fee arrangement nor was there any attempt to make employees feel guilty if they did not participate. According to Waugh, he explained the tip fee arrangement to employees as they came into the office for “a bank” or other reasons. Waugh said the employees were told about the \$25 fee and asked, “Would you like to do it? If so, great; if not, then that’s okay.” Assistant General Manager Barone told cocktail waitresses Rosa and Monica, as well as host Andy, about the \$25 tip fee and asked them to tell other employees. Beverage Manager Easton said he explained the tip fee arrangement, as well as who would benefit from the proceeds, to every employee who worked inside the Club, specifically including, cocktail waitresses, bartenders, and floor hosts. Easton, however, testified he never had a conversation about, nor, did he ever explain the tip fee to Charging Party Sydnor.

General Manager Waugh was certain Sydnor did not participate in the tip fee arrangement and that Sydnor never complained to him about the arrangement, nor did he ever hear she had complained to anyone else. Waugh said he never heard complaints from other employees. Waugh specifically said he never heard employees complain they did not want to contribute to the tip arrangement because they thought management might get part or all the tip monies.

Assistant General Manager Barone testified that although he spoke with three employees about the tip fee arrangement he did not hear any complaints about it. Barone said he never spoke with Sydnor about the tip fee and that she never indicated to him she was unhappy with the arrangement nor did she ever ask him for a receipt for having paid the tip fee. Barone denied telling Sydnor he was sick of her f_ing complaints.

Shift Manager Slade testified he had no problems with Sydnor, but added they did not work the same shifts and he had little interaction with her. Slade said he never spoke with Sydnor about the tip fee arrangement and she never complained to him about it.

Beverage Manager Easton worked with Sydnor and was involved with her termination but denied having any conversation with her regarding the tip arrangement around the time of her discharge and denied Sydnor made any mention about believing she was being terminated because she complained about the tip arrangement. Easton said Sydnor never complained to him about the tip arrangement nor did other employees. Easton did not even know of any employee who was angry about the tip arrangement.

3. Sydnor’s discharge

(a) Government’s evidence

Sydnor reported for work on Sunday, May 9, 2010. Beverage Manager Easton told Sydnor he needed to see her in his office. Sydnor wanted to know what it was all about and Easton told her it didn't look good and handed her a termination letter which she read. Sydnor again asked what it was all about. Easton told her it was what he had been instructed to do and added she did not meet the 90-day probation period. The termination letter reflects Sydnor did not meet standards. She complained regarding the, "didn't meet 90 days probation" by stating, for example, that just a couple of hours earlier that same evening, a group had come into the Club specifically asking for her and the group was told she was not working that evening or wasn't even employed there anymore. Sydnor explained there was some confusion about whether the group had asked for her and the customers then asked to speak with Shift Manager Slade about Sydnor. Sydnor further explained that customers coming back and asking for her by name showed she did her part for hospitality and representing the Club. Sydnor told Easton there had always been a problem with the bottle service at the Club because the bottle sales customers would go to the "pride and joys of the Club . . . Monica, Stephanie, Rose and that's it," but she explained she made bottle sales on her own by persuading her customers to buy bottles. Sydnor reminded Easton she reported for work when called, had never been late, had never been disciplined, written up, or suspended and all of this did not make sense. Easton responded, "Camille, I don't know what happened, sweetheart, but I got to go. My radio's going off. You got to fill this out, you got to sign it Look, there's a lot of things I don't agree with, that's why I'm in the process of getting out of here. Look, if you need me to help you get another job or whatever, you have my cell phone number?"

Sydnor, thereafter, wrote below that portion of the termination notice that reflects the reason for her termination. "I did nothing wrong. I only was a hostess to my guests that came in to see me. This system is set up in favoritism. It would be nice, if you please, more mindful and give verbal warnings!"

Sydnor testified she spoke with Shift Manager Slade about having off from work the Friday night of the Mosley/Mayweather boxing title fight in early May 2010. Sydnor said Slade told her "okay, no problem" but to remind him closer to the date he did the schedule for that day. Sydnor reminded Shift Manager Slade a couple of days before he was supposed to do the schedule. The schedule was, as usual, posted on a Sunday. Sydnor did not work Sunday or Monday of that week but, saw the schedule when she returned to work and noticed she was scheduled to work on the Friday night of the Mosley/Mayweather fight. Sydnor spoke with Slade who said he thought she wanted Saturday, then stated, or was it Friday off. Slade had given Friday night off to waitress Rena. Sydnor told Slade she would try to get Rena to swap nights with her but, reminded Slade she had family coming into town and needed Friday off. Shift Manager Slade said he would try to figure something out. Sydnor was left on the schedule at that time.

Sydnor, who was to report for work at 1 a.m. fight night, telephoned the Club at 6 p.m. fight night and her call was directed to Beverage Manager Easton. Sydnor told Easton she would not be able to come in for work. Easton asked if she was serious. Sydnor told Easton she had asked earlier for Friday off and had family coming into town staying with her and she needed to pick them up at the airport and she had tickets for the Mosley/Mayweather boxing title fight that night. According to Sydnor, Easton said, "Okay Camille, you know what? Go

ahead, enjoy your evening.” Sydnor called Easton back later that evening asking, “You’re not upset with me, are you?” Easton told her, “No, you know, Camille, it’s all good, go ahead and enjoy your night, okay.” Sydnor said she had never before or after the fight night called in and cancelled a shift.

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Sydnor further said she never stayed around the work floor when she was not working because, “it wasn’t popular with coming in when you didn’t work there.” Sydnor denied ever cursing Assistant General Manager Barone on the floor at work.

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(b) The Club’s evidence

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Club General Manager Waugh testified he approved Sydnor’s termination, before its effective date of May 9, 2010. Waugh based his approval on the recommendations of Beverage Manager Easton and Assistant General Manager Barone. According to Waugh, Easton on one occasion, told him Sydnor was not reliable, not friendly with other employees, had an attitude, and basically was not a good employee. Easton reported Sydnor called in within a half an hour before her shift started when she was not going to report for work rather than following the four hour call-in rule. Waugh testified Sydnor called-in late “on a few occasions” but could only recall an early May occasion which was the day of the Mosely/Mayweather boxing title fight held in Las Vegas.

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General Manager Waugh testified Assistant General Manager Barone also spoke with him, alone in Waugh’s office, about Sydnor’s conduct and recommended she be terminated. According to Waugh, Barone explained there was an incident where he was trying to change out Sydnor from her shift and bring in her replacement for the next shift, or when he was trying to cut (send home early) Sydnor from a shift, when Sydnor “snapped at him . . . and said something like, ‘Somebody get me out of here before I f_ing snap,’ or something like that.” Waugh said Barone allowed Sydnor to remain on the job throughout the night after the incident. Waugh placed the incident a week or 2 before Sydnor was terminated. Waugh could not explain why Barone did not terminate Sydnor on the spot for cursing at him. According to Waugh, Barone also told him Sydnor was hard to train, because she did not take directions well and “just basically was unpleasant, unfriendly.” Waugh acknowledged Sydnor was never given any written warnings, and could not explain why, but added it was not unusual for an employee to be terminated without prior warnings. Waugh said other waitresses had been terminated for not being friendly or having an attitude but he could not recall any incidents.

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Assistant General Manager Barone said he hired Sydnor and spoke with General Manager Waugh about terminating her approximately 2 weeks before she was actually terminated. Barone told Waugh, Sydnor was insubordinate, had a bad attitude, a poor work ethic, and she would call off her shift 20 to 30 minutes before starting time. Barone explained Sydnor would not ask if she could have the night off, but rather, would call and say she was taking the night off leaving him stuck without staff. Barone said on one occasion he did not see Sydnor on the floor serving customers for a while and found her talking with a bartender and texting on her cell phone. Barone said he told Sydnor to get on the floor and that she snapped at him saying, “Let me get on the floor before I snap on this mother f_er.” Barone stated any other boss would have fired her on the spot but added he did not. Barone said Sydnor apologized later that night. Barone placed the incident as a week or 2 before Sydnor was

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5 terminated. Additionally, Barone said Sydnor was always “mumbling under her breath” and just did whatever she wanted. Barone said he could have terminated her long before he did. Barone testified that when he spoke to General Manager Waugh about firing Sydnor, Waugh wanted to talk with other managers to see if they had problems with Sydnor. Barone recalled
10 Sydnor did not report for work on a busy weekend which he said may have been the weekend of the Mosely/Mayweather boxing title fight. Barone said he also spoke with Shift Manager Slade about Sydnor. Slade testified he never had much interaction with Sydnor but had no problems with her. Barone summarized the reasons he wanted Sydnor terminated as insubordination, poor work ethics, calling off, bad attitude, not having very good people skills and not pleasant.

15 Beverage Manager Easton testified he worked with Sydnor and recommended to General Manager Waugh she be terminated. Easton based his recommendation on three things. First, he said Sydnor called off work on the Mosely/Mayweather fight weekend in Vegas. Second, Sydnor did not do the job required of her, and, third, she always had problems with fellow female coworkers.

20 According to Easton, Sydnor telephoned the Club and her call was directed to him on the Mosely/Mayweather boxing title fight weekend and told him she was sick. Easton said, “so, it’s amazing you’re sick and it’s fight weekend. Mayweather’s fight and you’re sick. All of a sudden, now you’re sick.” Easton said Sydnor then told him, “well, look, my man got me tickets.” Easton told Sydnor, “you know what? Just go to the fight,” but, he denied telling her it was okay and to have a good time. Easton said he was angry because it was a busy weekend and he needed everyone at work. Easton said he wrote a note of what Sydnor did and passed it
25 to Shift Manager Slade, who gave it to Assistant Manager Barone, who gave it to General Manager Waugh.

30 Easton testified he called Sydnor to his office on May 9, 2010, and told her she was being terminated. Specifically, Easton said, “I told her, I said, ‘Look, the situation that’s going down’ – she goes, ‘Well, why am I terminated?’ I said, ‘You know why.’ She goes, ‘This is BS, this is BS.’ I’m like, ‘Look, this is what it is.’ I said, ‘You need to sign it.’ She goes, ‘I don’t feel like signing it.’ So she walked out of the office. She came back, she took the write up, she went to the Martini bar and she signed it, brought it back to me and left.”

35 **III. Legal Principles, Credibility Determinations, Analysis, and Conclusions**

A. Legal Principles

40 It is helpful to review certain guidance of the Board and courts regarding concerted activity to include under what circumstances it will or will not be protected under the Act. Section 7 of the Act guarantees employees the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. Section 8(a)(1) of the Act makes it an unfair labor practice “for an employer to interfere with, restrain, or coerce
45 employees in the exercise of the rights guaranteed in Section 7.” For an employee’s activity to be “concerted” the employee must be engaged with or on the authority of other employees and not solely on behalf of the employee him/herself. *Meyers Industries (Meyers I)*, 268 NLRB 493

(1984), and *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986). The statute requires the activities under consideration be “concerted” before they can be “protected.” *Bethany Medical Center*, 328 NLRB 1094, 1101 (1999). As the Board observed in *Meyers I* “Indeed, Section 7 does not use the term ‘protected concerted activities’ but only concerted activity.” It goes, without saying, the Act does not protect all concerted activity. In *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), enfd. sub. nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), the Board made it clear that under the proper circumstance a single employee could engage in concerted activity within the meaning of Section 7 of the Act. The question of whether an employee has engaged in concerted activity is a factual one based on the totality of the record evidence. See e.g. *Ewing v. NLRB*, 861 F.2d 353 (2d Cir.1988). The Board has found an individual employee’s activities to be concerted when they grew out of prior group activity. *Every Women’s Place*, 282 NLRB 413 (1986). An employee’s activity will be concerted when he or she acts formally or informally on behalf of the group. *Oakes Machine Corp.*, 288 NLRB 456 (1988). Concerted activity has been found where an individual solicits other employees to engage in concerted or group action even where such solicitations are rejected. *El Gran Combo de Puerto Rico*, 284 NLRB 1115 (1987), enfd. 853 F.2d. 966 (1st Cir. 1988). It is clear the Act protects discussions between two or more employees concerning terms and conditions of employment. Nothing is more basic “terms and conditions” of employment than wages. *Parexel International, LLC.*, 356 NLRB No. 82, slip op at 3 (January 28, 2011). Tips constitute a large portion of waitresses’ wages. Discussions by employees about tip generated wages, are protected. *Trayco of S.C.*, 297 NLRB 630, 634 (1990). In a group meeting context, a concerted objective may be inferred from the circumstances. *Whittaker Corp.*, 289 NLRB 933, 934 (1988), citing *Jeannette Corp. v. NLRB*, 532 F.2d 916, 919 (3d Cir. 1976). The Board has long held, however, that for conversations between employees to be found protected concerted activity, they must look toward group activity and that mere griping is not protected. See: *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3rd Cir. 1964). Once the activity is found to be protected concerted activity 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.

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced its causation test in cases alleging violations of Section 8(a)(3) of the Act or violations of Section 8(a)(1) turning on employer motivation. To establish such a violation, the government must prove, by a preponderance of the evidence, that an individual’s protected activity was a motivating factor in the employer’s action. Once the government makes this showing, the burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even in the absence of the protected conduct. To sustain its burden, the government must show that the employee was engaged in protected activity, that the employer was aware of that activity, that the activity was a substantial or motivating reason for the employer’s action.

B. Credibility Resolutions

5 In deciding whether the employees at the Club participated in concerted activity in early
May 2010, it is helpful to review the testimony and make some necessary credibility
resolutions. In making my credibility resolutions I was impacted by impressions I formed
while watching the witnesses as they testified. The impressions I gathered were based on a
combination of the witnesses' mannerisms, how they spoke and their overall bearing on the
witness stand. I applied my observations as one, among several factors, in deciding whether
10 witnesses' testimony impressed me as candid, fair, and believable. I note crediting certain
testimony will automatically discredit conflicting testimony of other witnesses without having
to so state. Although I have not commented on every bit of testimony, nor resolved every
possible credibility conflict, I have considered all the testimony and made all necessary
credibility resolutions.

15 Former bartender Rachel Kaohi impressed me as a truthful witness. She exhibited no
bias against the Club and it appears she had no interest in the outcome in this case. Although
her testimony was very limited, I am fully persuaded she attempted to relate what she knew in a
truthful manner. I note Kaohi had not worked in this industry before and it appears she wanted
to know what was standard practice regarding tip fees in the industry. I was also impressed by
20 Charging Party Sydnor's testimony. Simply stated her overall testimony had a ring of truth
about it. While Sydnor occasionally answered more than she was asked, I viewed such as an
effort, on her part, to fully tell what had taken place rather than anything else.

C. Analysis and Conclusions

25 It is undisputed a tip fee arrangement was established by the Club in early May 2010. It
is undisputed it was implemented and announced to the tipped employees at that time. It is
clear the tip fee arrangement was not well received and was scrapped within a few days of
implementation.

30 While not essential to a resolution of the issues herein, it is somewhat helpful to decide
if the tip fee arrangement was mandatory. I find it was. Kaohi credibly testified Shift Manager
Slade told her the first week in May 2010, that it was a mandatory \$25 fee going toward
management. Beverage Manager Easton verified Slade's announcement, that it was
35 mandatory, after Kaohi inquired if the tip fee arrangement was normal practice, by telling her
all he knew was it was mandatory.

40 Sydnor testified regarding the mandatory nature of the tip fee arrangement. Specifically
Sydnor was shown a letter by Assistant General Manager Barone on May 6 that read at the top,
"Tip to Management, House Fee" for the period May 2 through 8. The letter reflected at least 6
employees had already paid the \$25 tip fee. Barone told Sydnor, "its something that
management is doing right now"; and told her the payment had to be in by Saturday, May 8. I

am persuaded the employees were led to believe the tip fee was mandatory. I am also persuaded the Club led its employees to believe the proceeds would go to management.

5 It is established there were numerous discussions among the tipped employees about the \$25 tip fee arrangement. The new tip fee arrangement directly impacted or cost the tipped employees a portion of their take home wages and they discussed the arrangement. Some employees were against it while others were not bothered by it. Charging Party Sydnor was one of those clearly opposed to the new tip fee. She even told Assistant General Manager Barone there were plenty of nights when she worked the early shift (less favorable for tips) that she might not even make \$25 in tips the entire shift.
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Charging Party Sydnor engaged in concerted activity when she discussed the new tip fee arrangement with various coworkers. Sydnor first learned of the tip fee when fellow waitress Jessica told her about it on May 6, 2010, when she asked if Sydnor had heard about the \$25 fee that “we had to pay.” Jessica and Sydnor, in the presence of a waitress trainee, disagreed with the fee and concluded Club management was attempting to treat them as independent contractors not employees.
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The following day, May 7, 2010, Sydnor and waitress Wendy discussed the tip fee arrangement with Wendy saying it was obscene and she did not agree with it. Sydnor told Wendy she did not want to pay it either but was mindful Assistant General Manager Barone had said it was something management was doing. Later that same evening Sydnor discussed the tip fee arrangement with waitress Monica asking how she felt about it. When Monica told Sydnor the tip fee arrangement did not bother her too much Sydnor responded she might feel the same way if she worked Monica’s late shift but, she was opposed to the new tip fee. The late shift was more favorable for tips. Sydnor spoke with bar back Sidney. Both were opposed to the new tip fee but Sidney was concerned about and needed his job and noted the fee had to be paid by Saturday, May 8, 2010.
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The credible evidence reflects management knew of the employees’ discussions and discontent with the new tip fee arrangement. Waitress Jessica told Sydnor that she (Jessica) had informed management on May 6 she did not agree with the arrangement and thought it was just bull. On May 6, Sydnor complained to Assistant Manager Barone about the new tip fee asking what it was for and complained she might not even make \$25 on the early shift she was assigned. General Manager Waugh acknowledged the new tip fee arrangement was not well received and noted, “we scrapped it.”
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The Club looked with displeasure at its employee’s comments about, and objections to, the new tip fee arrangement. Former bartender Kaohi credibly testified that at the regular Wednesday employee meeting in early May, General Manager Waugh responded to inquiries about the fee by telling the employees if anyone asked, or if he heard any more complaining about the tip fee arrangement, he would raise the amount. Sydnor asked Shift Manager Slade why the tip fee, when she was getting off work on Saturday morning, May 8. Slade told her it was just something management was doing. Sydnor paid the \$25 fee. When Sydnor told
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Assistant Manager Barone at around 7 a.m. she had paid the \$25 tip fee and asked for a receipt to show she had paid it, Barone wanted to know if she was “f__ing kidding” him. Barone then told Sydnor he was “sick of playing these games” with her and walked off.

5 Sydnor and other employees discussing the tip fee arrangement were not only engaging in concerted activity but in activity protected by the Act. Speaking about the new tip fee arrangement whether in favor or against it, and whether or not it was mandatory, constituted concerted activity protected by the Act. Simply stated the employees were discussing their wages.

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 It is undisputed when Sydnor reported for work on Sunday, May 9, 2010, she was immediately called into Beverage Manager Easton’s office and told she was terminated. The termination notice, which she was requested to sign, reflected only “90 days probation did not meet standards.” It is unrefuted that when Sydnor asked why she was being terminated Easton did not provide any specific reasons(s), but he did offer to assist her in finding employment elsewhere.

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 I am persuaded the Government established, by a preponderance of the evidence, Sydnor’s protected concerted activity was a motivating factor in the Club’s decision to discharge her on May 9, 2010. First, it is clear Sydnor engaged in concerted activity with her coworkers upon learning of the early May 2010 instituted tip fee arrangement. Sydnor discussed, both by telephone and in person, the arrangement with various coworkers seeking their views and voicing her objections to the tip fee arrangement. Second, the concerted activity related to wages, that is, to the net take home pay the employees would have. Such concerted activity is protected by the Act. Third, Sydnor questioned club management about and expressed concerns related to the tip fee arrangement. Fourth, other employees also expressed their concerns to club management. Fifth, The Club expressed its displeasure with, and animus toward, its employee’s concerted protected activities when General Manager Waugh announced, in a meeting with the employees, that if they asked about or if he heard any more from them about the tip fee arrangement, he would raise the amount of the tip fee they would have to pay. Sixth, the Club’s displeasure with and animus toward its employees’ responses was personalized to Sydnor when she asked Assistant General Manager Barone for a receipt reflecting her payment of the tip fee. Barone wanted to know if Sydnor was, “f__ing kidding” him and told her he was “sick of playing games” with her. Sydnor was terminated at the very beginning of her next work shift. While Sydnor’s request for a receipt was an individualized request, it was a request made in the context of her and other employees discussions about and expressed objections to the tip fee arrangement.

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 Having found the Government established that Sydnor engaged in protected activity of which the Club was aware and her protected activity was a substantial and motivating reason for the Club’s action against her, the burden of persuasion shifts to the Club to establish its affirmative defense that it would have taken the same action (terminating Sydnor), even in the absence of her protected conduct. I find the Club failed to establish it would have discharged Sydnor absent her concerted protected activities. First, the Club’s defense is undermined by the fact it never counseled, warned, or disciplined Sydnor for any offenses or short comings

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attributed to her by the Club as justification for her discharge. Second, the timing of the Club’s discharge of Sydnor is very suspect. In that regard, I note the Club announced its new tip fee arrangement in early May 2010. At its next regular Wednesday meeting with its employees, the Club’s general manager expressed animus toward the employees’ concerted protected activity regarding the tip fee arrangement. Thursday, May 6, 2010, Sydnor learned of the new tip fee arrangement and spoke with various employees about it. That same day she was given a paper by Assistant General Manager Barone captioned, “Tip to Management, House Fee” covering the period May 2 — 8. Sydnor at that time questioned Barone about the tip fee arrangement and complained about the amount of tips received during a work shift; and she was told by Barone its something management was doing and it had to be paid by Saturday, May 8, 2010. On May 7, Sydnor continued to speak with her coworkers about the tip fee. On May 8, she made the tip fee payment to Shift Manager Slade and later that same day, May 8, she requested from Assistant Manager Barone a receipt for her payment. Barone told her he was sick of playing games with her. Then at the beginning of her next work shift, she was terminated without specific explanation or specific reason(s) provided for her discharge. The timing of and the lack of explanation for her discharge convinces me the real reason for her termination was an unlawful one.

Looking further at the reasons, or stated reasons, for Sydnor’s discharge I find such does not withstand close review. General Manager Waugh approved Sydnor’s termination based on reasons provided to him from other managers. The asserted reasons fail to establish the Club would have discharged Sydnor absent her concerted protected conduct. Assistant Manager Barone’s assertion Sydnor cursed at him a week or 2 before she was discharged was not credible, and did not, in fact, take place. I specifically credit Sydnor’s testimony she did not curse Barone. I note the evidence establishes Barone was given to cursing in the work place. I would come to the same conclusion it would not constitute an affirmative defense even if I credited, which I do not, Barone’s testimony. If Sydnor had cursed Barone, it would have occurred as much as 2 weeks before she was terminated and she was not warned or counseled about it. The Club’s stated justifications that Sydnor was insubordinate, had a bad attitude, a poor work ethic, and did not get along well with coworkers, especially female coworkers, also does not withstand careful review. These concerns the Club contends it had with Sydnor admittedly had been ongoing since the start of her employment. Even assuming Sydnor’s conduct, attitude, and work ethic had been less than the Club desired, the Club tolerated her conduct and took no action to counsel or correct her prior to her termination.

The Club’s contention that one of the reasons for Sydnor’s discharge was she called off from work on the day of the Mosley/Mayweather boxing title fight does not withstand scrutiny. Sydnor credibly testified she spoke with Shift Manager Slade 2 weeks before the scheduled fight to see if she could have fight night off from work. Slade asked her to remind him closer to the date and, allowed her to write down the date in the office, and said, “Okay, no problem.” Sydnor reminded Shift Manager Slade a couple of days before he prepared the schedule she needed fight night off. Sydnor discovered when she reported for work a day or so later that she was scheduled to work fight night. Sydnor again spoke with Slade who told her he thought she wanted Saturday off and then observed, “or was it Friday?” Sydnor reminded Slade she needed fight night off from work and pointed out he had given that night off to waitress Rena. Slade asked Sydnor to see if she could find someone to switch with her. Sydnor indicated she would

try to get Rena to swap with her. Sydnor mentioned again she needed fight night off and Slade responded, “alright, well, I’ll try to work something out. I’ll try to figure something out.” Sydnor was left on the schedule at that point.

5 Sydnor telephoned the Club at around 6 p.m., the day of the Mosley/Mayweather fight, some 7 hours before she was scheduled to report for work. Her call was directed to Beverage Manager Easton. Sydnor told Easton she was not going to be able to come in for her shift that night. Easton wanted to know if she was serious about not being able to come in. Sydnor told Easton she would not be able and asked him to remember that she had, “even complained to him about the schedule.” Sydnor told Easton she had family coming to town to stay with her whom she needed to pick up at the airport and they had tickets to the fight. Sydnor credibility testified Easton responded, “Okay, Camille, you know what? Go ahead, enjoy your evening.” Sydnor later telephoned Easton again to ask if Easton was upset with her. He told her, “No, you know, Camille, its all good, go ahead and enjoy your night, okay.” I find Sydnor had express permission to be away from work on fight night and the Club may not now use that as a defense for her discharge. Even if I credited Beverage Manager Easton’s account, which I do not, of his interaction with Sydnor on the fight night, I would still conclude Easton gave Sydnor permission to be away from work that night. Easton testified he told Sydnor, “You know what? Just go to the fight.”

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In conclusion, I find the Club violated Section 8(a)(1) of the Act when it discharged Sydnor on May 9, 2010, because she engaged in concerted activity protected by the Act.

CONCLUSIONS OF LAW

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By on or about May 9, 2010, discharging Camille Sydnor because she engaged in concerted protected activity, the Club engaged in an unfair labor practice affecting commerce, within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

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REMEDY

Having found the Club has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, to remedy the unlawful conduct toward Sydnor, the Club must, within 14 days of the Board’s Order, offer her reinstatement to her former job, or if her former job no longer exists, to a substantially equivalent job without prejudice to her seniority or other rights and privileges previously enjoyed, and make her whole for any lost wages and benefits as a result of her May 9, 2010 discharge, with interest. Backpay will be computed as outlined in *F. W. Woolworth Co.* 90 NLRB 289 (1950) (backpay computed on quarterly basis). Determining the applicable rate of interest will be as outlined in *New Horizons for the Retarded*, 283 NLRB 1173 (1987) (adopting Internal Revenue Service rate for underpayment of Federal taxes). Interest on all amounts due to the employee shall be compounded on a daily basis as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). I also recommend the Club, within 14 days of the Board’s Order, be ordered to remove from its files any reference to its May 9, 2010, discharge of Sydnor and, within 3 days thereafter, notify Sydnor in writing it has done so

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and her discharge will not be used against her in any manner. I also recommend the Club be ordered, within 14 days after service by the Region, to post an appropriate “Notice to Employees” in order that employees may be apprised of their rights under the Act, and the Club’s obligation to remedy its unfair labor practices.

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On these findings and conclusions of law and on the entire record, I issue the following recommended³

ORDER

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The Club, Vegas Valley Food & Beverage, LLC d/b/a Déjà vu Erotic Ultra Lounge Fusion, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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(a) Discharging or otherwise discriminating against employees for engaging in concerted activity protected by the Act.

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

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

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

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(b) Make Camille Sydnor whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of this decision.

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

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

³ 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 all the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) Within 14 days after service by the Region, post at its Las Vegas, Nevada facility, copies of the notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Club's authorized representative, shall be posted by the Club 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 email, posting on an intranet or an internet site, or other electronic means, if the Club customarily communicates with its employees by such means. Reasonable steps shall be taken by the Club to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Club has gone out of business or closed the facility involved in these proceedings, the Club shall duplicate and mail, at its own expenses, a copy of the notice to all current employees and former employees employed by the Club at any time since May 9, 2010.

Dated at Washington, D.C., February 15, 2011

William N. Cates
Administrative Law Judge

⁴ If this Order is enforced by a Judgment of the 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 or otherwise discriminate against any of you for engaging in concerted activity protected by the Act.

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

WE WILL, within 14 days from the date of this Order, offer Camille Sydnor full reinstatement to her former job, or, if that job no longer exists, to a substantially equivalent position without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Camille Sydnor whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

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

**VEGA VALLEY FOOD & BEVERAGE, LLC d/b/a
DÉJÀ VU EROTIC ULTRA LOUNGE FUSION**
(Employer)

Dated: _____ **By** _____
(Representative) (Title)

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

2600 North Central Avenue, Suite 1800, Phoenix, AZ 85004-3099
(602) 640-2160, Hours: 10:15 a.m. to 6:45 p.m.

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) 640-2146