JD(ATL)–14–14
Las Vegas, NV

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

BELLAGIO, LLC

and **Cases 28–CA–106634**
28–CA–107374

GABOR GARNER, an Individual

and

NAJIA ZAIDI, an Individual

Nathan Higley, Larry A. Smith **and**
Stephen Wamser**,** ***Esqs.,*** for the General Counsel.
Paul Trimmer (Jackson Lewis, LLP) **and**
Nathan Lloyd (MGM Resorts International), Esqs.,
for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT A. RINGLER, Administrative Law Judge. Between January 6 and 8, 2014, these cases were heard in Las Vegas, Nevada. The complaint alleged that the Bellagio, LLC (the Bellagio or Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by, inter alia: engaging in, and creating the impression of, surveillance; retaliating against Najia Zaidi because of her protected concerted activities; denying Gabor Garner's request for union representation during a disciplinary interview, and then suspending him because he made this request; and orally promulgating a rule prohibiting disciplinary discussions.

On the entire record, including my observation of the demeanor of the witnesses, and after thoroughly considering the parties' briefs, I make the following:

Findings Of Fact

I. JURISDICTION

At all material times, the Bellagio has been a limited liability company, with an office and place of business in Las Vegas, Nevada, where it operates a luxury hotel and casino.

Annually, its gross revenues exceed $500,000, and it purchases goods valued at more than $50,000 directly from points located outside of the State of Nevada. Based upon the foregoing, it admits, and I find, that it is an employer engaged in commerce under Section 2(2), (6), and (7) of the Act. It further admits, and I find, that the Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226, and Bartenders Union, Local 156, affiliated with UNITE HERE (the Union) is a labor organization under Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Bellagio, an elite Five Diamond hotel and casino, is located on the Las Vegas strip.[1] The Union represents its food servers, waiters, bartenders, bellmen, dispatchers, valets and other employees (the unit). (JT. Exh. 1). The parties enjoy a stable, long-term, collective-bargaining relationship, which has been memorialized in multiple consecutive contracts.

A. Garner Incident

Garner, a unit bellman, is generally the first and last employee to interact with his assigned guests. He is, as a result, expected to foster strong first and last impressions, which are commensurate with the Bellagio's Five Diamond rating.

1. May 12, 2013[2]

A guest checked in at the bell desk; he was greeted by Garner, who handed him a luggage claim check. The guest alleged that, after tendering the claim check, Garner rudely hovered over him, in an effort to coax a gratuity. The guest, who was offended by his lack of subtlety, responded by withholding a tip, which allegedly caused Garner to yell, "appreciate it," in close proximity. The guest then filed a formal complaint with management. (GC Exh. 2).

2. May 13 Disciplinary Interview

Front Services Supervisor Brian Wiedmeyer,[3] summoned Garner to an investigatory meeting concerning the complaint. Max Sanchez, another Front Services Supervisor, served as a witness. This meeting occurred roughly 15 minutes before the end of Garner's 7 a.m. to 3 p.m. shift. See (GC Exh. 4). When the meeting began, Garner asked whether he might be disciplined; when Wiedmeyer responded affirmatively, he invoked his "*Weingarten* rights."

a. Bellagio's Position

Wiedmeyer testified that, because he did not possess a Union steward list and Garner failed to identify a specific representative, he asked Employee Relations for help. He stated that they, unfortunately, were also unable to locate a steward.[4] He averred that Garner replied that, if

---

1 Less than ½ percent of lodgings are awarded Five Diamond status by the American Automobile Association.

2 All dates herein are in 2013, unless otherwise stated.

3 He supervises the valets, dispatchers and bellmen (i.e., roughly 235 workers).

4 Susan Moore, Employee Relations Manager, testified that she does not possess a current Union shop steward list, although she generally knows who serves in this role. She added, however, that her colleagues do not share her awareness. She related that she was unavailable to speak to Wiedmeyer on May 13.

he could not find a steward, he would return to work. He contended, however, that he was reluctant to permit him to return to work because he had become agitated during their meeting, and seemed unable to continue serving guests.[5] He related that, consequently, he placed him on a suspension pending investigation (SPI). His written statement about the incident reported that:

> I informed [Employee Relations] . . . that I would have to SPI . . . [Garner] because he stated that he was going back to work without filling out a statement. I . . . inform[ed] . . . [him] that I could not locate his representation and he would have to. He again refused . . . to fill out a statement . . . . I placed him on SPI so he could not return to work until the investigation had been completed.

(GC Exh. 3). Although this statement also described Garner as "argumentative," it conspicuously failed to cite his agitation as necessitating the SPI. See also (GC Exh. 4) (Sanchez statement). His account, instead, linked Garner's refusal to "fill out a statement" to the SPI. He confirmed that he did not ask Garner any other questions, once he invoked his *Weingarten* rights. He said that the meeting ended at 2:50 p.m., i.e., 10 minutes before Garner's shift ended.

Sanchez recalled Wiedmeyer telling Garner that:

> [T]he meeting was over because he wanted representation and [none] . . . could be found [and] . . . we would have to SPI him.

(Tr. 97).

Front Services Director Charles Berry indicated that Garner is somewhat emotional and periodically loses his composure. He agreed, however, that he could not recall an example of another employee being issued an SPI, under similar circumstances. (Tr. 457–58).

b. Garner's Contentions

Garner recounted Wiedmeyer showing him the complaint. He recalled telling him to ask Employee Relations for a steward list, and suggesting that such a list might also be posted in Berry's office. He said that Wiedmeyer placed a statement in front of him and told him to fill it out, which he declined to do without a steward. He added that Wiedmeyer told him that he would simply SPI him and figure it out later. He said that Sanchez and Wiedmeyer eventually left the room to call Employee Relations and then issued the SPI upon returning. He denied becoming upset, or being emotionally unable to return to serving guests.

c. SPI

The SPI provided:

> You are being placed on Suspension Pending Investigation effective **05/13/13**. This is not a disciplinary action; it is a process that Bellagio utilizes to remove you from the workplace **in order to investigate a serious situation or policy**

[5] Specifically, he testified that, "he was beyond what I have seen him on an agitation scale." (Tr. 50–51).

> **infraction** in which you may have been involved. **It is also utilized if you have reached the final step in the progressive disciplinary process** . . . .
>
> [Y]ou are not permitted on property except to attend your meeting with Employee Relations . . . . [W]e ask that you treat this as a confidential matter . . . .
>
> Upon the completion of the investigation . . . , one of the following . . . will occur:
>
> 1. You will be returned to work without disciplinary action . . . ; or
> 2. You will be returned to work with disciplinary action if warranted . . . ; or
> 3. You will be separated from the company . . . .

(GC Exh. 25) (emphasis added).

Moore described an SPI as a "holding pattern," which requires a closed investigation before an employee can be returned to work. (Tr. 631). She stated that SPIs are generally not included in personnel files. She denied retaining records of prior SPIs.[6]

d. Credibility Resolution

Because Wiedmeyer testified that Garner's irate state prompted the SPI, and Garner insisted that he was composed and able to work, I must make a credibility finding. I credit Garner. First, if he were truly that irate, he would have received independent discipline, which did not occur.[7] Second, Wiedmeyer's and Sanchez' written statements, which were prepared almost contemporaneously, conspicuously fail to mention that his agitation caused the SPI. Moreover, Wiedmeyer's written statement and Sanchez' testimony expressly provided that his *Weingarten* request and their connected inability to continue the meeting caused the SPI. See (GC Exh. 3; Tr. 97). Finally, Garner possessed a credible demeanor.

3. Events Immediately Following the Investigatory Meeting

Wiedmeyer indicated that, after issuing the SPI, he told Garner to depart. He said that, shortly thereafter, he observed him lingering in the break area recounting his tale to 6 coworkers. He said that, when he asked him to leave, Garner queried whether he was now prohibited from talking to his coworkers. He added that, as Garner left, he similarly asked whether he was also precluded from departing with his coworkers. See also (GC Exhs. 3–4).

Garner recounted the following exchange in the bellmen break area:

> We got out of the office . . . . I clocked out . . . . [A]s I was walking through dispatch, ... Russ Meyer [asks]. . ., "What's wrong, Bryan?" [I] . . . said, "I just got SPI[e]d . . . . [b]ecause I asked for my steward." At that point, while I was

---

6 Although Moore said that the Bellagio issues about 5 percent of its SPIs to employees who are "agitated in a meeting with a supervisor" (tr. 646), she failed to supply corroborating documentation. Given this omission, as well as her inability to cite a single employee as an example, her testimony on this matter has been afforded little, if any, weight.

7 As stated, he solely received a verbal warning for the guest complaint.

> talking, . . . Wiedmeyer comes around the corner . . . [and] in a loud voice . . . says, "You can't . . . discuss . . . that matter in here" . . . .
>
> I said, "You can't tell me who to talk to," . . . . As I walked out of the door to dispatch and . . . down the hall to leave the hotel, my friend Jason Weinman, . . . a bellman . . . , was waiting for me . . . .
>
> [W]hen I looked at Jason, ... I turned around and . . . Wiedmeyer was standing there . . . glaring . . . . And I said, "Are you going to tell me who I can walk out [with] . . . ?" And he . . . said, "Just move along, gentlemen."

(Tr. 121–23) (grammar as in original).

Russ Meyer, a bellman, recounted Wiedmeyer abruptly appearing in the break area, banning Garner from talking about the SPI, and ordering him to depart. He stated that he saw Wiedmeyer following Garner and Weinman out of the Bellagio. Weinman essentially corroborated Meyer's and Garner's accounts.

I credit Garner's account. He was a highly credible witness, whose testimony was corroborated by Meyer and Weinman, who were also credible. Wiedmeyer also conceded the vast majority of Garner's testimony, including his directive to stop discussing the SPI.

4. May 14 Meeting

Garner met with Berry, Moore and Union Shop Steward Monica Smith.[8] He completed a statement concerning the complaint and received a verbal warning for the tip incident. See (GC Exh. 22; R. Exhs. 14, 15, 17). He was reimbursed for all wages lost during the SPI.

B. Zaidi Allegations

The Bellagio adheres to payment card industry compliance standards (PCI). (R. Exh.11). PCI holds merchants liable for credit card data breaches,[9] and requires the maintenance of a secure computer network.

Zaidi, a unit dispatcher, handles tour reservations, wheelchair rentals and other matters. She often receives guest credit card information that must be handled in accordance with PCI.

1. July 31, 2012 Emails

Zaidi sent this email to a client, who was representing a large tour group:

> My boss . . . has assigned . . . this reservation [to me] . . . . I understand . . . [your clients] are interested in the Wind Dancer package . . . . I will look forward to receiving the information . . . to my email address Najia7604@yahoo.com . . . .

---

8 Smith's attendance was arranged by Moore.

9 Such data includes account numbers, service codes, names, addresses, phone numbers, and signatures.

> [P]lease make sure to include the following:
> - full name of one of the passengers
> - date of tour
> - number of passengers . . .
> - **credit card to hold the tour. . . .**

(GC Exh. 6) (emphasis added). This email violated PCI, inasmuch as it asked a client to send credit card data to an unprotected, personal, email address. (R Exh. 11). Zaidi admitted that the email violated PCI, and conceded that she failed to contemporaneously advise her superiors about her breach.

Within minutes, Zaidi, sent out this remedial email:

> I accidentally gave you the wrong email address (najia7604@yahoo.com). The correct address is nzaidi@bellagioresort.com.

(GC Exh. 7). Her PCI breach then lay dormant for several months; in the interim, she became enmeshed in a protest over a newly constructed valet break area.

2. December 2012 Break Room Protest

On December 3, 2012, Zaidi observed that an exclusive valet break area had been constructed.[10] The exclusion of dispatchers and bellmen from this new break area was seen as an affront by Zaidi, which prompted her to distribute a petition seeking their inclusion.[11] (GC Exh. 5). Later that day, she told Wiedmeyer about her disappointment; he referred her to Erden Kendigelen, then Executive Director of Hotel Operations.[12] She recounted also meeting with Kendigelen that day, and relaying the group's concerns.[13] She recollected his frustration, as he chided her that, "we're always trying to do something nice and someone always gets in the way." She said that his mind remained unchanged, and that, when she told him about her petition, he hostilely replied that, "he did not care if she had 100 signatures."

3. January 31—Anonymous Letter and Meeting

Kendigelen testified that, upon arriving that morning, he observed that the following anonymous letter had been slipped under his office door:

> Najia Zaidi from the bell desk is not being PCI compliant. Having personal information sent to her personal email is against company policy . . . .

(GC Exh. 9). The letter attached the July 31, 2012 email that contained her PCI violation, but, oddly, omitted the corrective email that was sent minutes later. To date, it remains a full-blown mystery concerning who placed these documents at Kendigelen's doorstep.

---

10 Valets received keys for the private area, which had couches, flat screen televisions and other amenities.

11 She eventually collected 24 signatures on the petition.

12 He oversaw day-to-day hotel operations; he is currently a hotel manager for the Ritz Carlton Hotels.

13 Berry stated that, on January 20, Zaidi also complained to him, and that he relayed her ongoing grievance to Kendigelen.

Kendigelen testified that he summoned Zaidi to his office, and presented the letter and incriminating email. He recollected her admitting a PCI violation, but insisting that she sent a prompt remedial email, which he lacked at that point. He added that she then oddly stated that she was uncomfortable speaking with him, which prompted him to close the meeting and forward the matter to Employee Relations. He related that he took no further role in the investigation.

In response to the suggestion that he surreptitiously drafted the unidentified letter, broke into Zaidi's email account to find the incriminating email and created a hoax about the anonymous package, Kendigelen very credibly denied such wrongdoing or retaliation.[14] He added that, while his office is locked when he is not there, the suite area that houses his office is accessible to the cleaning crew and employees who use the suite's shared printer. He, as a result, contended that anyone could have slipped the anonymous letter under his office door.

Zaidi testified that Kendigelen told her that her actions were unacceptable, and referred her case to Employee Relations. She stated that she firmly believed that he orchestrated the entire investigation, in order to retaliate against her for complaining about the valet break area. She could not, however, explain why he waited 2 months to exact his revenge, or how he might have accessed her email account, which is username and password protected.[15]

4. Berry's Assistance

Berry testified that he told Wiedmeyer to help Zaidi access the "vault," which is where the system's old emails are stored; he did this in order to help her find the exculpatory email that would aid her defense.[16] Wiedmeyer helped her and she eventually found the email.[17]

5. Security Investigation and Follow-Up

a. Investigation

Bethany Young, Investigations Manager, stated that she investigates fraud and misconduct. She added that she investigated the PCI compliance matter, in order to assess whether Zaidi's violation was only an aberration or ongoing misconduct. She was granted approval by her supervisor and General Counsel to review Zaidi's email account. She said that:

> [She] look[ed] . . . for anything that did not pertain to business . . . . [She] looked at anything . . . forwarded to her external email, as well as anything . . . of a nature that [demonstrated] . . . a disagreement between her and another employee . . . .

---

14 His credibility was greatly buttressed by the General Counsel's conspicuous, and unexplained, failure to call a witness, who was familiar with the Bellagio's information technology system (e.g., its Chief Information Officer or designee), who could show that: Kendigelen accessed her email account; or that her account was accessed, when she was not there. Kendigelen was also a very believable witness, who was consistent on direct and cross-examination, and thoughtful in his responses.

15 She stated that she changes her password every 3 months, and assumed that her supervisor could freely access her email account.

16 He credibly denied informing Zaidi that Kendigelen had accessed her email system or engineered her investigation.

17 The General Counsel similarly failed to show that Kendigelen held the ability to access Zaidi's email via the "vault" without her consent, or that someone else might have accessed her "vault" account.

(Tr. 485). She confirmed that she found Zaidi's exculpatory email, and concluded that her infraction was isolated and discipline was unwarranted.

b. February 3 Meeting

Zaidi testified that she met with security employees Scott Reekie and Bernard Davis, and *Weingarten* representative Scott Lykens. She stated that she completed a statement, and was told weeks later that the investigation had closed and she would not be disciplined.

III. ANALYSIS

A. Garner and Zaidi Retaliations

1. Legal Precedent

Section 7 affords employees these rights:

> [T]he right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

29 U.S.C. § 157. Under Section 8(a)(l), it is unlawful for an employer to interfere with these rights. This case involves the Bellagio's alleged interference with: Garner's Section 7 right to seek Union assistance during a disciplinary interview without retaliation; and Zaidi's Section 7 right to lodge a collective protest without retaliation.

a. Disciplinary Interviews

If an employee reasonably believes that he has been summoned to a disciplinary interview, he may request a union representative. *NLRB v. Weingarten*, 420 U.S. 251, 260, 263 (1975). Once such a request is made, the employer retains three options: granting the request; discontinuing the interview; or offering the employee the choice between continuing without representation, or ending the interview and relinquishing any associated benefit. *Consolidated Freightways Corp*., 264 NLRB 541, 542 (1982). However, "the selection of an employee's representative belongs to the employee and the union, in the absence of extenuating circumstances, and as long as the selected representative is available." *Barnard College*, 340 NLRB 934, 935–36 (2003) (citations omitted).

b. Protected Concerted Activity

The Board construes the term "concerted activities" to include "those circumstances where individual employees seek to initiate or induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Meyers Industries (Meyers I),* 268 NLRB 493 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. den. 474 U.S. 971 (1985), and *Meyers Industries (Meyers II)*, 281 NLRB

882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. den. 487 U.S. 1205 (1988). A conversation constitutes concerted activity when "engaged in with the object of initiating or inducing or preparing for group action or [when] it [has] some relation to group action in the interest of the employees." *Meyers II*, supra, 281 NLRB at 887 (quoting *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964)).

c. Analytical Framework

If an employee is disciplined after exercising their Section 7 right to request a *Weingarten* representative, or after engaging in concerted activity, the Board will consider whether such discipline constituted unlawful retaliation under the framework established in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).[18] The *Wright Line* standard is as follows:

> [T]he General Counsel must prove by a preponderance of the evidence that [the employee's exercise of their Section 7 right] . . . was a substantial or motivating factor in the adverse employment action. The elements commonly required to support such a showing are . . . protected concerted activity by the employee, employer knowledge of that activity, and . . . [connected] animus on the part of the employer.
>
> If the General Counsel makes the required initial showing, the burden then shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of the employee's union activity. To establish this affirmative defense, "[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity."

Consolidated Bus Transit, 350 NLRB 1064, 1065–66 (2007) (citations omitted). If the employer's proffered defenses are found to be a pretext, i.e., the reasons given for its actions are either false or not relied upon, it fails by definition to show that it would have taken the same action for those reasons, and there is no need to perform the second part of the *Wright Line* analysis. However, further analysis is required if the defense is one of "dual motivation," that is, the employer defends that, even if an invalid reason might have played some part in its motivation, it would have taken the same action against the employee for permissible reasons. *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 223 (D.C. Cir. 2005).

2. Garner's SPI[19]

The General Counsel demonstrated that the Bellagio violated Section 8(a)(1), when it issued Garner an SPI following his request for a *Weingarten* representative. The General Counsel adduced a strong prima facie case, while the Bellagio failed to prove that it would have issued the SPI in the absence of his *Weingarten* request.

---

18 See *Barnard College*, supra, 340 NLRB at 935–36 (*Weingarten* rights); *Mesker Door*, 357 NLRB No. 59, slip op. at 2 and fn. 5 (2011) (protected concerted activity).

19 These allegations are listed under pars. 5(f)–(k), 6, and 7 of the complaint.

a. Prima Facie Case

The General Counsel has made a prima facie showing that Garner's SPI was triggered by the exercise of his *Weingarten* rights. First, he engaged in protected activity, when he requested a representative at his disciplinary interview.[20] Second, there was close, almost lockstep, timing between the SPI and Garner's exercise of his *Weingarten* rights. Lastly, Wiedmeyer conceded causation in his written statement. (GC Exh. 3) (stating that he, "informed [Employee Relations] . . . that [he] . . . would have to SPI . . . [Garner] because he stated that he was going back to work without filling out a statement.").[21]

b. Affirmative Defense

The Bellagio failed to show that it would have issued Garner an SPI,[22] absent the exercise of his *Weingarten* rights. It contended that the SPI was not connected to the exercise of his *Weingarten* rights, but instead, resulted from his agitation during the disciplinary meeting and associated need to be removed from the workplace. This stance is unpersuasive for several reasons. First, Garner credibly testified that he maintained his composure. Second, the SPI was issued at the end of his shift, which meant that he could have cooled off during non-work time without an SPI. This redundancy suggests invidious intent. Third, the Bellagio failed to specifically identify others, who have been issued SPIs under similar circumstances. Fourth, if Garner genuinely lost control at this meeting, he would have received independent discipline, which was not done. Fifth, the SPI form clearly states that it is only reserved for a "serious situation or policy infraction" or employees at the last disciplinary step, which widely exceeded the bounds of Garner's situation. Lastly, it is plausible that Wiedmeyer became frustrated when Garner derailed his meeting by requesting a steward, and issued the SPI out of such frustration. In sum, the Bellagio's contention that his behavior prompted the SPI is unconvincing.

c. Conclusion

The General Counsel has established that Wiedmeyer issued Garner an SPI because he exercised his *Weingarten* rights. The SPI, as a result, violated Section 8(a)(1).[23] See *Safeway Stores*, 303 NLRB 989, 990 (1991) (where "[t]he nexus between the statutory right and the disc[ipline] . . . is clear," the discipline violates Section 8(a)(1)).

3. Zaidi's PCI Investigation[24]

The General Counsel has alleged that the Bellagio violated Section 8(a)(1), when it investigated Zaidi's PCI compliance. Specifically, it asserts that the investigatory meetings were designed to retaliate against her valet break area complaints. I find that, although the General

---

20 Wiedmeyer agreed that the interview was disciplinary in nature, with Garner ultimately receiving a verbal warning for the tip incident.

21 Sanchez also testified that their inability to find a steward and continue the meeting triggered the SPI. (Tr. 97).

22 As a threshold matter, the Bellagio's claim that the SPI was non-disciplinary is flawed, given that the SPI clearly contemplates further disciplinary action or potential separation. (GC Exh. 25.)

23 Although the complaint avers that the SPI also violated Sec. 8(a)(3), it is unnecessary to address this allegation, given that this allegation would not materially affect the remedy. See *Provider Services Holding, LLC*, 356 NLRB No. 181, slip op. at 1 fn. 3 (2011).

24 These allegations are listed under pars. 5(a)–(b), (d)–(e), and 6 of the complaint.

Counsel established a prima facie case, the Bellagio persuasively adduced that it would have taken the same action against Zaidi, absent her protected activity.

a. Prima Facie Case

The General Counsel made a prima facie showing that Zaidi's PCI investigation was triggered by her concerted complaints. Her complaints were protected concerted activity; she led a group complaint about the new break area. She amassed 24 signatures on a petition, and voiced the group's complaints to Wiedmeyer, Berry and Kendigelen. Kendigelen demonstrated animus, when he responded angrily.

b. Affirmative Defense

The Bellagio demonstrated that it would have investigated Zaidi's PCI compliance, irrespective of her group complaints. First, the Bellagio has a substantial interest in protecting guest credit card information, which was furthered by a PCI investigation that flowed from an anonymous tip. Second, the General Counsel wholly failed to show that Kendigelen even had access to Zaidi's email, which deeply undercuts its retaliation theory. Specifically, Kendigelen credibly denied such access, and no one contradicted this point.[25] Third, the PCI investigation was innocuous, inasmuch as Zaidi was exonerated, without discipline.[26] Given that it is undisputed that her first email violated PCI policy and that she failed to promptly notify management about this breach, the Bellagio acted benevolently by not issuing even a verbal warning for her failure to promptly notify supervision about her breach.[27] Such latitude does not support retaliation. Fourth, even assuming arguendo that Kendigelen was as Machiavellian as suggested, it then becomes inexplicable that he: would have also failed to delete Zaidi's exculpatory email;[28] would have voluntarily relinquished all control over the investigation, solely on the basis of Zaidi's request; or would waited almost 2 months to retaliate against her. Fourth, given that Zaidi's complaints were relatively minor, it is improbable that Kendigelen, a high-level manager, would been even minimally motivated to retaliate against her. This is particularly true, given that, if caught, he could have suffered serious discipline for creating a hoax and breaking into an email account without authorization.[29] Lastly, the Bellagio voluntarily helped her find exculpatory evidence in the "vault," which is deeply inconsistent with retaliation.

c. Conclusion

The General Counsel failed to show that Zaidi's PCI investigation was retaliatory. The Bellagio persuasively demonstrated that it would have commenced the PCI investigation, irrespective of her protected concerted activity, and that the investigation was conducted in an evenhanded manner.

---

25 It is equally probable that a disgruntled coworker could have set up Zaidi, as opposed to Kendigelen.

26 Moreover, Investigations Manager Young testified that such investigations are routine.

27 It is likely that, if the Bellagio truly sought to retaliate against her, it would not have overlooked this obvious disciplinary venue.

28 Simply put, why would Kendigelen have undergone this time-consuming charade only to leave Zaidi with an ironclad defense?

29 Young testified that approval to access a coworker's email account is arduous, and requires the General Counsel's consent.

B. Directive to Not Discuss the SPI[30]

The Bellagio violated Section 8(a)(1), when Wiedmeyer told Garner to not discuss the SPI with coworkers. Generally, employers cannot ban their employees from speaking to coworkers about discipline. *Hyundai America Shipping Agency*, 357 NLRB No. 80 (2011).

C. Surveillance[31]

The Bellagio's surveillance violated Section 8(a)(1). An employer unlawfully "surveils employees engaged in Section 7 activity by observing them in a way that is 'out of the ordinary' and thereby coercive." *Aladdin Gaming LLC*, 345 NLRB 585, 586 (2005). Indicia of coerciveness, include the "duration of the observation, the employer's distance from employees while observing them, and whether the employer engaged in other coercive behavior during its observation." Id. Wiedmeyer aggressively observed Garner's SPI discourse under the auspices of an invalid SPI, banned such discussion, ousted him from the workplace and hovered as he left.

D. Impression of Surveillance[32]

The Bellagio did not create an unlawful impression of surveillance when it searched Zaidi's emails. Statements or actions by employer agents causing employees to reasonably assume that their protected activities are under surveillance violate the Act. *Flamingo Las Vegas Operating Co.*, 359 NLRB No. 98 (2013). The Bellagio had legitimate cause to search Zaidi's emails in furtherance of its interest in protecting client credit card data. Its investigation ultimately exonerated Zaidi and was non-retaliatory. These actions, which were handled discreetly, would not reasonably cause someone to presume surveillance.

CONCLUSIONS OF LAW

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

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

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

a. Refusing to allow Garner to be represented by a Union representative during an investigatory interview, where he had reasonable cause to believe that discipline could result;

b. Issuing Garner an SPI after being summoned to an investigatory interview, where he had reasonable cause to believe that discipline might result, and where the SPI was issued because he refused to participate in the disciplinary interview without Union representation;

---

30 These allegations are listed under pars. 5(l) and 6 of the complaint.

31 These allegations are listed under pars. 5(m) and 6 of the complaint.

32 These allegations are listed under pars. 5(c) and 6 of the complaint.

c. Engaging in surveillance of employees' Union or protected concerted activities; and

d. Promulgating, maintaining, and enforcing an oral rule prohibiting employees from discussing disciplinary matters under investigation by Employee Relations.

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

5. The Bellagio has not violated the Act except as set forth above.

REMEDY

Having found that the Bellagio has engaged in certain unfair labor practices, it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Bellagio shall expunge from its records any reference to Garner's SPI, give him written notice of such expunction, and inform him that its unlawful conduct will not be used against him as a basis for future discipline.[33] Finally, the Bellagio shall distribute appropriate remedial notices electronically via email, intranet, internet, or other appropriate electronic means to unit employees at the facility, if it customarily communicates with those workers in this manner, in addition to the traditional physical posting of paper notices. See *J Picini Flooring*, 356 NLRB No. 9 (2010).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[34]

ORDER

The Respondent, Bellagio, LLC, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

a. Denying employees' requests to be represented by Union representatives of their choosing at investigatory interviews, when such employees have reasonable cause to believe that discipline might occur;

b. Issuing employees an SPI or other discipline after being summoned to investigatory interviews, where they possess reasonable cause to believe that discipline might occur, and where the SPI or other discipline was issued because of their refusal to participate in the disciplinary interview without Union representation;

---

33 A full make-whole remedy is not warranted herein, given that he has already been reimbursed for lost wages.

34 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.

c. Engaging in surveillance of employees' Union or other protected concerted activities;

d. Promulgating, maintaining and enforcing an oral rule prohibiting employees from discussing disciplinary matters under investigation by Employee Relations; and

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

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

a. Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful SPI, and within 3 days thereafter notify Garner in writing that this has been done and that such discipline will not be used against him in any way;

b. Within 14 days after service by the Region, physically post at its Las Vegas, Nevada facility, and electronically send and post via email, intranet, internet, or other electronic means, if it customarily communicates with the unit electronically, to its unit employees who were employed at its Las Vegas, Nevada facility at any time since May 13, 2013, copies of the attached Notice marked "Appendix."[35] Copies of the Notice, on forms provided by the Regional Director for Region 28, after being signed by the Bellagio's authorized representative, shall be physically posted by the Bellagio and maintained for 60 consecutive days in conspicuous places including all places where Notices to employees are customarily posted. Reasonable steps shall be taken by the Bellagio 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 Bellagio has gone out of business or closed the facility involved in these proceedings, the Bellagio shall duplicate and mail, at its own expense, a copy of the Notice to all current employees and former employees employed by it at the facility at any time since May 13, 2013; and

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

Dated Washington, D.C. March 20, 2014

Robert A. Ringler
Administrative Law Judge

[35] 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 deny your request to be represented by a Union representative of your choice, while completing witness statement forms or participating in investigatory interviews, which you have reasonable cause to believe will result in discipline.

WE WILL NOT issue you a suspension pending investigation or otherwise discipline you for refusing to complete a witness statement form or participate in a disciplinary interview, which you have reasonable cause to believe will result in discipline, where the suspension pending investigation or other discipline was because of your refusal to complete the witness statement form or participate in the interview without Union representation.

WE WILL NOT engage in surveillance of your Union or other protected concerted activities.

WE WILL NOT promulgate, maintain, and enforce an oral rule prohibiting you from discussing with other persons any disciplinary matters under investigation by our Employee Relations department.

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, remove from our files any reference to the unlawful suspension pending investigation that we issued to Gabor Garner.

WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the suspension pending investigation will not be used against him in any way.

BELLAGIO 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 1800, Phoenix, AZ 85004-3099
(602) 640-2160, Hours: 8:15 a.m. to 4:45 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.