

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

In the Matter of:

BELLAGIO, LLC,

and

GABOR B. GARNER,

An Individual,

and

NAJIA ZAIDI,

An Individual.

Case No. 28-CA-106634
28-CA-107374

**BELLAGIO, LLC'S ANSWERING BRIEF TO THE COUNSEL FOR THE GENERAL
COUNSEL'S CROSS-EXCEPTIONS**

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I. SUMMARY OF ARGUMENT

The General Counsel's Cross-Exceptions should be denied. The allegations pertaining to the charge filed by Najia Zaidi are meritless. The General Counsel alleges that when the Company acted on an anonymous complaint that Zaidi had diverted confidential customer information to her private Yahoo! email account and thereby breached its PCI policy, it violated Section 8(a)(1) in two ways:

- In paragraph 5(c), the General Counsel claims that Erden Kendigelen, who at the time was Bellagio's Executive Director of Hotel Operations, "created an impression among its employees that their concerted activities were under surveillance" by "investigating [Zaidi's] emails through information technology[.]"
- In paragraphs 5(d) and (e), the General Counsel contends that the investigation itself was instigated in retaliation for Zaidi's December 2012 complaints about the Bell Department's inability to access the newly built Valet Department break room.

The ALJ properly dismissed the allegation that Kendigelen "created the impression of surveillance." Decision at 12:19-25. In urging reversal, the General Counsel's theory appears to be that the Company created the impression of unlawful surveillance because it informed Zaidi that it had received an anonymous complaint regarding PCI. Unlawful surveillance requires proof that an employee believes her concerted protected activity is being monitored, however, and Zaidi's email did not pertain to concerted protected activity; it established that Zaidi had asked a customer to send credit card information to her private email account.

In fact, the General Counsel introduced *no* evidence that Zaidi used her work email to engage in protected concerted activity, nor did it submit any evidence that Kendigelen personally accessed Zaidi's emails or did anything else that would have created the impression of *unlawful* surveillance. Bellagio owned the email system. There is no contention that Zaidi was subject to disparate enforcement, and Zaidi also conceded that she knew all of her work emails were

subject to monitoring at any time for any purpose. She had no reasonable expectation of privacy. On these facts, the General Counsel cannot establish an impression of surveillance claim.

The General Counsel's second contention, that Kendigelen manufactured the anonymous PCI complaint in order to retaliate against Zaidi for complaining about the Valet Department break room is completely meritless. It too was properly dismissed. Decision at 11:36-39. It is a motive-based allegation analyzed under *Wright Line*, yet the General Counsel offered *no* prima facie evidence that Kendigelen masterminded the supposed conspiracy. Zaidi's speculation that Kendigelen or someone else may have hacked her email account is not evidence.

Moreover, the ALJ properly sustained Bellagio's *Wright Line* defense. Bellagio's legitimate right to investigate a violation of the PCI policy cannot be questioned. Zaidi made her complaint regarding the Valet break room almost two months before the investigation began. This is a significant break-in-time, and given Kendigelen's undisputed testimony that he received the PCI complaint anonymously on January 31, 2013, as well as the undisputed testimony from Berry and Young that proved the PCI complaint against Zaidi was investigated in the same way that other allegations of alleged misappropriation of information or money have been investigated, the General Counsel's Cross-Exception should be denied.

II. STATEMENT OF FACTS

Zaidi's case arises out of the Company's investigation into her suspected misuse of customer credit card information. Information about that policy – and the seriousness of any potential violation of that policy – is critical. In order to minimize the serious nature of Zaidi's potential misconduct – and thereby diminish the legitimacy of Bellagio's investigation into Zaidi's actions – the General Counsel omitted that information from his Cross-Exceptions. He also omitted a number of other facts that were important to the ALJ's decision. Accordingly, this

statement of facts includes a brief discussion of the PCI policy, and then proceeds to describe the remaining facts that are relevant to the case.

A. Bellagio Maintains A Robust Payment Card Industry (“PCI”) Policy¹ To Secure Customer and Guests’ Private Information.

As a Front Services Dispatcher, Zaidi was classified as a Bell Department employee. 295:9. Because employees in the Bell Department, including Front Services Dispatchers, transmit customer credit card information when they take and place reservations for helicopter and other forms of tours, Bellagio also maintains and trains its employees regarding PCI compliance. 471:19-473:5; RX 11. As Zaidi herself explained, the policies and obligations set forth in the Company’s training document applied to her work. 367:14-370:16. All employees who process credit card information are made aware of PCI requirements. 563:5-564:10. Violations of the policy are very serious. 370:1-16. If credit information is not kept private and secure, both the customer and the Company are exposed to the risk of fraud. 564:12-19.

As such, any potential PCI infraction is investigated. The record established that the Company had received only one other potential PCI violation in the Front Services Department. RX 19; 441:23-445:13. That infraction was investigated by Berry. *Id.* As he explained, he was made aware of the potential violation when Zaidi and one of her coworkers, Lynna Wilkie, alleged that a coworker named Nancy Rojas may have taken customer credit card information off property. *Id.* This complaint was made on January 18, 2013, less than two weeks before the anonymous complaint lodged against Zaidi. *Id.* Zaidi was concerned that this action was improper and also complained that Rojas’ improper use of the information had resulted in the loss of a commission. *Id.* Berry’s investigation including meeting with Rojas, Zaidi and Lynna

¹ The applicability of this policy is not in dispute. Everyone agrees that Zaidi was covered by the policy, that her mistaken email was a breach of the policy, and that had she not corrected her mistake, she would have committed a very serious violation of the policy. Accordingly, this discussion is intentionally brief, but necessary because it validates Kendigelen’s concern about the anonymous letter and the Company’s need to investigate.

Wilkie, as well as contacting the customer. *Id.* As in Zaidi's case, he determined that Rojas had not violated the PCI policy. *Id.* She had secured the information in a locked drawer. *Id.*

B. Zaidi Is A Long Term Bellagio Employee Who Has Received Training Regarding Her Obligations Under The PCI policy.

As a Front Services Dispatcher, Zaidi frequently asks guests for credit card information because she serves as a liaison between tour companies and the guests. 562:24-563:22. As such, she is expected to comply with the Company's PCI policy, RX 11, and by her own admission, she is aware of these obligations. 361:8-24. In fact, she acknowledged that there could be serious consequences if the PCI policy were violated. 368:12-23.

In fact, Zaidi conceded on cross-examination that due in part to the nature of her position, she understood and agreed that Bellagio could monitor her work email at any time and for any reason:

Q: [Y]ou also understand that Bellagio can monitor all of your work email?

A: Yes.

Q: At any time?

A: Yes.

Q: Whenever it wants?

A: Yes.

Q: Okay. And you've agreed to that?

A: Yes.

Q: ... So you could understand, right, that it would be a serious situation if you were diverting private -- or credit card information to a private email account?

A: Yes.

362:5-17.

C. Bellagio Constructed A New Valet Department Break Room in December 2012 And Zaidi Complained About It.

On or about December 3, 2012, Bellagio began construction on a Valet Department break room. 575:5-18; 278-279. As Brian Wiedmeyer, a Front Services Supervisor, explained, the

poor quality of the Valet break room – it was like a baseball dugout, made of wire fencing and enclosed with tarps, and located in a hallway – had been an issue for several years, and construction started without notice. 280:8-282:23. Zaidi learned of the room at the time construction began, but the record is not clear if she was upset about the matter because it would lead to the relocation of scooters, or if her primary concern was access, but in any event, she claims to have taken it upon herself to circulate a petition and ask management for permission to use the room. 302:1-18; GCX5.

On December 3, 2012, she approached Wiedmeyer, who was one of her supervisors, and informed him that she was concerned about the placement of the scooters and that she wished to have access to the room. In an attempt to assuage those concerns and give Zaidi the background information necessary to put Valet break room into context – and thereby understand why it was exclusively for the Valet department – Wiedmeyer gave Zaidi a tour of the former Valet facilities.² 280:8-282:23. Zaidi testified that she was not satisfied with Wiedmeyer’s explanation, and that Wiedmeyer referred her to Erden Kendigelen, the Executive Director of Hotel Operations. 309:11-310:6.

Zaidi claims that she thereafter contacted Kendigelen’s office and requested a meeting. 310:5-6. Within an hour of the request, Kendigelen agreed to meet with her that day, although he was not aware of the purpose for the meeting. 575:19-576:6. Zaidi and Kendigelen met in Kendigelen’s office, and Zaidi expressed her interest in accessing the Valet break room. 576:8-18. Kendigelen responded by explaining that this was the first time he had heard that Zaidi and

² Zaidi claimed to have shown Wiedmeyer a copy of her petition. She admitted on cross-examination that the claim was missing from her Board affidavit. 375:13. It should not be credited.

other Bell Dispatchers needed a separate break area.³ 576:17-577:12. He went on to explain that the Valet break room was a long time in the making and that he could not agree to make it available to the Bell Department. *Id.* He concluded by saying that he would reach out to the Bell Department's management and see what he could do. *Id.* Zaidi did not discuss the issue with Kendigelen again.

D. On January 31, 2013, Kendigelen Met With Zaidi Because He Received An Anonymous Complaint That Zaidi Had Violated The PCI Policy By Instructing A Customer To Send Credit Card Information To Her Personal Yahoo! Email Address.

On January 31, 2013, Kendigelen received an anonymous, type-written letter alleging that Zaidi used her personal email address to make reservations for customers and attaching a copy of an email from June 2012. 565:25-566:4; GCX 6 and 9. The letter had been slipped beneath his door. *Id.* The email appeared to have been printed using Zaidi's Microsoft Outlook account.⁴ 567:8-18. In the email, Zaidi solicited a guest's credit card information ("Just as a reminder, please make sure to include the following: [...] credit card to hold the tour") and requested that the credit card number be sent to her personal email address (Najia7604yahoo.com), rather than her secured email address provided by Bellagio. GCX 6 and 9. This action was in violation of the Company's Personal Credit Information Policy, which prohibits employees from transmitting customer data in any format other than a secured

³ Zaidi's description of this meeting was embellished. For example, she claimed that Kendigelen's eyes were "bulging out." 313:7. Given that Kendigelen agreed to seek out a different solution and was successful in obtaining new designated break areas for the Bell Department, it is unlikely that his eyes were bulging in anger. Zaidi's description of events should not be credited.

⁴ Kendigelen emphatically denied printing the email himself, accessing Zaidi's email inbox or otherwise obtaining the email on his own. 567:18-25. In fact, he stated he did not know whether it was even possible for him to request access Zaidi's account. *Id.* The ALJ credited this testimony properly. There is no reason in the record to question his veracity, particularly when, as Zaidi admitted, she was merely speculating that Kendigelen may have obtained the email through other means. 388:16-390:7. The facts speak for themselves. Kendigelen did not perpetrate an elaborate conspiracy against Zaidi. He followed up on a serious anonymous complaint and then promptly removed himself from any further involvement in the investigation because he wanted Zaidi to be comfortable with the process. 572:1-6.

transmission; and, while the email itself was more than six months old, given the potential severity of the infraction, Kendigelen immediately began inquiring into the matter. 568:5-569:6. He forwarded the letter to Berry and after confirming that Berry was not aware of the issue, asked Berry to arrange for a meeting with Zaidi as soon as possible. *Id.*

The meeting began with Kendigelen asking Zaidi if she understood her PCI obligations and whether she had ever violated the policy. 319:2-322:25; 569:23-570:5. After Zaidi answered yes to both questions, Kendigelen confronted Zaidi with the anonymous letter. 570:13-22. According to Zaidi, he said “an anonymous coworker of yours submitted this for us” and slid the documents across his desk for her to review. 320:21-22. In response, Zaidi admitted that the email was authentic, but stated that it was a mistake that happened only once, and offered to allow Kendigelen to review her cell phone and personal email. 322:8-13. According to Kendigelen, Zaidi did not claim that she had corrected the mistake with the subsequent email during that meeting. 571:7-15. There was no discussion of Union or other protected concerted activity during the meeting, and at no time did Kendigelen suggest that he had reviewed or accessed Zaidi’s emails in any way.

Based on potential severity of the issue and Zaidi’s response, Kendigelen concluded that the matter required further inquiry. 570:25-571:14. At the conclusion of the meeting, Kendigelen informed Zaidi that he would be turning the matter over to Employee Relations. After leaving Kendigelen’s office, Berry and Zaidi spoke. Berry encouraged Zaidi to look through her old email and find the correction sent to the customer. 253:9-16.

E. Kendigelen Asked Bellagio's Employee Relations Department To Conduct An Investigation, and That Investigation Exonerated Zaidi Of Any Wrongdoing.

After the January 31st meeting concluded, Kendigelen contacted Employee Relations. 572:9-15. He sent them a copy of the anonymous complaint letter and Zaidi's email, advised them of his conversation with Zaidi, and suggested that investigations should look into the matter. 572:21-573:3. Kendigelen had no further involvement in the matter. 572:24-574:14.

Susan Moore, Employee Relations Manager, contacted Bethany Young in the Security Department. As Young explained, her department handles investigations into issues that present a potential systemic risk and which require in depth investigation, including a review of employee email. 480:3-22. After receiving the anonymous complaint – Young also recalls speaking to Kendigelen – Young began the process of obtaining access to Zaidi's email account. 483:6-484:12. In accordance with corporate policy, she sought approval from her Vice President and Bellagio's General Counsel. *Id.* Her request was granted because the anonymous complaint referenced Zaidi's email, and Young began a comprehensive review of Zaidi's *work* email account. 485:5-486:20. She looked for other emails that Zaidi may have sent to her Yahoo! account or other third parties, emails referencing PCI, and emails which may exonerate Zaidi. *Id.* She found the email which prompted the investigation, GCX 6, as well as Zaidi's subsequent email correcting the mistake. RX 23; 487:1-488:4. Young concluded that the email appeared to be an isolated mistake. 488:11-489:18. To complete the investigation, Young contacted Bernard Davis and Scott Reekie, also members of her department, so that they could schedule an interview. *Id.* As she explained, this interview is part of her department's protocol.

Davis and Reekie scheduled a meeting with Zaidi for February 3, 2013. 489:1-25. The meeting took place in the investigations conference room. 526:16-18. It was attended by Davis,

Reekie, Zaidi, Wiedmeyer, and another bellmen named Scott Lykens who served as Zaidi's representative. 526:15-527:2; RX 27. At the beginning of the meeting, Zaidi consulted with Lykens and complained about a variety of matter which were not related to PCI compliance. 528:5-13; *see also* RX 13 (Zaidi's statement). After a brief discussion of whether Zaidi understood her obligations under PCI, Davis and Reekie gave Zaidi the opportunity to complete a statement regarding the situation.⁵ 528:14-25. Just over two weeks later, on February 21, 2013, Berry met with Zaidi to inform her that the investigation had been closed and that there would be no further action.⁶ GCX 40. When Zaidi raised her concern that Kendigelen may have accessed her email account, Berry confirmed that he did not do so.

III. ZAIDI WAS NOT A CREDIBLE WITNESS.

The ALJ did not appear to consider Zaidi's credibility in detail, but it is clear from the record that her testimony should be discounted, and that to the extent the General Counsel has relied on her testimony and speculation, his Cross-Exceptions lack merit. First, her testimony frequently occurred in the context of lengthy, multi-page narratives that were not necessarily responsive to the original question from the General Counsel. *See, e.g.*, 304:16-305:25; 309:22-310:11; 311:17-3135; 313:13-314:4; 319:2-322:25; 327:20-328:24; 335:2-336:2; 336:25-337:15. It appeared as if she had memorized portions of her affidavit. The Board has repeatedly held that these large swaths of memorized testimony are not credible and are entitled to little weight. *See, e.g., St. George Warehouse, Inc.*, 349 NLRB 870, 889 (2007). In addition, Zaidi's testimony was, in places, inconsistent with her Board affidavit. For example, although she claimed to have

⁵ In his Cross-Exceptions, the General Counsel suggests that the Company allowed Zaidi to languish and suffer during the interview, spending unnecessary time on her statement. This is complete nonsense. Zaidi chose to spend her time completing the statement, and her conduct in that interview was consistent with her testimony in the hearing: long narratives filled with rampant speculation and devoid of facts.

⁶ The evidence showed that Zaidi was in contact with the Employee Relations department during this period of time. 394:1-396:22.

shown Wiedmeyer the employee petition – a strong indication of concerted activity – she does not discuss it in her Board affidavit. 375:13; 390:8-391:14.

IV. THE ALJ CORRECTLY HELD THAT THE GENERAL COUNSEL FAILED TO PROVE HIS ALLEGATIONS REGARDING ZAIDI. THE GENERAL COUNSEL’S CROSS-EXCEPTIONS SHOULD BE REJECTED.

A. The General Counsel Did Not Prove His Allegation In Paragraph 5(c) That Kendigelen Created The Impression Of Surveillance.

It is the General Counsel's burden to prove that employees would reasonably assume that, based on Kendigelen's activity, their protected activities had been placed under surveillance or were being closely monitored by the Respondent. *See Register Guard*, 344 NLRB No. 150, slip op. at 3 (2005). The test for determining whether an employer has created an impression of surveillance is “whether the employees would reasonably assume from their employer’s statements or conduct that their *protected activities* had been placed under surveillance.” *Greater Omaha Packing Co.*, 360 NLRB No. 62, slip op. at 3 (2014).

The General Counsel did not meet this burden. First, there is no evidence that Zaidi was engaging in protected concerted activity with her work email or that Kendigelen said anything about her protected activities that he could have learned only through surveillance. The evidence showed only that Kendigelen received a hard copy of an email regarding PCI compliance from an anonymous employee and that is exactly what he told Zaidi in the January 31st meeting. The PCI email did not concern protected activity, nor is there any evidence that Zaidi used her work email to engage in such activity. Plainly, the General Counsel cannot prove an allegation of unlawful surveillance when it failed to show that there is underlying union or protected activity being observed.

Second, Kendigelen's statements are not sufficient to create an impression of surveillance under the Board's established objective standard. Perhaps most critically, Zaidi conceded that

Kendigelen *never said anything* that would have suggested he was monitoring her email account or targeted her for retaliation. 388:16-390:7. She “just felt that way.” *Id.* Moreover, the evidence is clear that Kendigelen acted properly. He did not reference an unnamed source. He truthfully said it was an anonymous employee, and in identifying his source, dispelled the risk that he could create the impression of surveillance. *See The Children’s Mercy Hosp.*, 311 NLRB 204, 212 (1993). Third, Zaidi conceded that she had no expectation of privacy in her work email. As she explained, she knew that it could be monitored at any time and for any reason. Kendigelen cannot have conveyed a threat of unlawful surveillance when Zaidi already knew that her activities on her *work* computer could be examined. In short, no reasonable person would infer that Kendigelen was spying on Zaidi’s protected or union activity based on this evidence. *Intermet Stevensville*, 350 NLRB 1349, 1354 (2007) (brief comment that supervisor had “heard of him” did not establish surveillance) (citing *SKD Jonesville Division L.P.*, 340 NLRB 101, 102 (2003)).

B. The General Counsel Did Not Prove His Allegations In Paragraphs 5(d) and (e) That Bellagio Initiated Its Investigation Into Zaidi’s PCI Compliance Because She Complained About The Valet Department Break Room in December 2012.

The General Counsel’s allegation that Kendigelen initiated the January 31st investigation because of Zaidi’s December 2012 complaints is analyzed under *Wright Line*. Once again, the General Counsel failed to establish a *prima facie* case. The fact that Zaidi complained in December 2012 and that Kendigelen then initiated the PCI investigation almost two months later is not sufficient. *See Snap-On Tools, Inc.*, 342 NLRB 5, 9 (2004) (two month period between protected activity and allegedly retaliatory warning militates against a finding of unlawful motivation). Indeed, given the amount of time separating the meeting and the intervening

anonymous complaint, the timing of the PCI investigation does not support an inference that it was unlawfully motivated. *Pacesetter Corp.*, 307 NLRB 514, 521-522 (1992).

There is no underlying proof of animus. Other than Zaidi's speculation that she believed that Kendigelen was upset with her Valet break room complaint, there is nothing to suggest that Kendigelen's displeasure was the motivating factor for the investigation. As Zaidi conceded, they met once. The fact that this meeting occurred before the PCI investigation does not show animus. *See Neptco, Inc.*, 346 NLRB 18, 20 (2005). There is also no evidence of pretext. The "crucial factor is not whether the business reasons cited by [Bellagio] were good or bad, but whether they were honestly invoked and were, in fact, the cause" of Kendigelen's investigation. *Healthcare Emples. Union, Local 399 v. NLRB*, 463 F.3d 909, 921-922 (9th Cir. 2006) (quoting *NLRB v. Savoy Laundry*, 327 F.2d 370, 371 (2d Cir. 1964)).

Here, the evidence proves that Zaidi was treated fairly. PCI compliance is extraordinarily important. Kendigelen would have been breaching his obligations to the Company if he accepted her contention that the email was a mistake and took no further action. There is no doubt that Kendigelen would have continued with his investigation in the absence of Zaidi's alleged protected activity. Moreover, Zaidi was not singled out for investigation. As established at the hearing, Bellagio conducts an exhaustive allegation whenever it receives a "tip" that one of its employees is engaging in misconduct, which, if proven, would pose a systematic threat to financial security.⁷ 504:13-505:1. Indeed, as Young explained, her department has investigated several allegations of alleged misappropriation in just the past few years on the basis of a

⁷ During the hearing, the General Counsel attempted to downplay the severity of Zaidi's misconduct, by asserting that it was a "one-time" occurrence, 506:1-10, no sensitive information left the property and that her actions posed not actual threat to Bellagio. 465-66. The General Counsel's position brings the oft-used aphorism, "hindsight is 20-20" to mind because it leaves out a crucial fact. Bellagio could not have exonerated Zaidi if it had not performed an investigation. The potential diversion of personal credit information is a very serious issue. Bellagio was not required to stop its investigation simply because Zaidi claimed that she had made a mistake and found an email. Everything Bellagio did in Zaidi's case was in accordance with its standard investigation protocol. 507:13-508:11.

seemingly innocuous tip, and the investigation resulted in the discovery of significant misconduct and fraud. 490:11-501:17; RX 25. One employee was found to have embezzled almost \$500,000. *Id.* The tip that led to her discovery was a customer complaint about small billing errors and the investigation involved an email review. An individual was discovered to have been running a coupon scam whereby he was misappropriating 25% of ticket revenue. *Id.* An anonymous tip similar to the one received by Kendigelen regarding Zaidi prompted Bellagio to conduct an exhaustive investigation of its poker room for alleged theft of tips. ER 26; 503:3.

The General Counsel seemed to suggest that Bellagio should have tried harder to discover how the anonymous letter made its way to Kendigelen's office. It is well-established that merely questioning Bellagio's actions does not constitute prima facie evidence of animus. Moreover, there was no realistic way to investigate further. As Kendigelen explained, there was no way to check who dropped the email because the area up to his office is left open and there is no camera coverage; and, as Young explained, it is highly unlikely that Zaidi's email was hacked. In fact, because the anonymous email happened to be printed from Zaidi's outlook account, the most plausible explanation was that Zaidi printed it, kept a printed copy as a record – which was common for employees in Zaidi's job description because they used the copies to keep tour records – and that someone discovered that printed email, just as Zaidi had discovered information relating to Nancy Rojas and the Pink Jeep commission.⁸ 515:18-520:15.

The General Counsel appears to be advancing the claim that Kendigelen spearheaded a complex, multi-faceted conspiracy. That claim makes no sense. Kendigelen acted promptly and had no involvement in the investigation once it was turned over to Employee Relations. The Company did not impose any discipline. Given that the anonymous complaint was given to

⁸ The fact that Bellagio investigated a similar violation of PCI policy involving Nancy Rojas in essentially the same way is comparative evidence that Zaidi was not targeted because she engaged in protected activity. 440:25-445:21; RX 19.

Kendigelen less than two weeks after Zaidi attempted to turn in Rojas, as well as Zaidi's contentious relationship with her coworkers, it is, as Young hypothesized, much more likely that one of Zaidi's coworkers obtained a printed copy of the email and used it to lodge the anonymous complaint. In short, the only basis for Zaidi's claim that her email had been improperly accessed, by Kendigelen or anyone else, is Zaidi's own speculation. That is not evidence at all.

C. The General Counsel's Cross-Exceptions Are Meritless

1. The General Counsel's arguments concerning the investigation are wrong and severely misstate the facts in the record.

The General Counsel advances a handful of arguments in excepting to the ALJ's dismissal of his allegation that the investigation into Zaidi's violation of the PCI policy was retaliatory. First, the General Counsel asserts that the "ALJ considered [Bellagio's] affirmative defenses under an incorrect legal framework." Cross-Exceptions at 5. The General Counsel does not cite the section of the ALJ's decision that contains the supposedly improper analysis, nor does he explain with any clarity how the ALJ's determination was incorrect. Moreover, the General Counsel is clearly wrong. The ALJ applied the *Wright Line* framework to the General Counsel's motive based allegation in paragraphs 5(d) and (e) of the Complaint. Decision at 11:5-39.

The ALJ should not have concluded that the General Counsel established a prima facie case. A finding that Kendigelen reacted "angrily" to a minor complaint two months before the investigation began is insufficient to establish a prima facie case of animus. *See FES (A Division of Thermo Power) and Plumbers and Pipefitters Local 520 of the United Association*, 331 NLRB 9, 21-22 (2000) (to establish a prima facie case, the circumstantial evidence must be "substantial and the inferences drawn therefrom reasonable."). Nonetheless, the ALJ's remaining application

of the *Wright Line* standard was correct. Decision at 11:10-39. Bellagio introduced uncontroverted evidence showing the importance of the PCI policy, the seriousness of any alleged breach, comparative evidence showing that Bellagio performs in depth investigations whenever a breach involving credit cards or fraud is alleged, and that the investigation was fair. *See* Decision at 11:14-33. Given that the General Counsel’s case was flimsy at best, the ALJ conclusion that Bellagio sustained its burden under *Wright Line* was correct.

Second, the General Counsel contends that the ALJ misstated the relevant time frame and erred in finding that the investigation into Zaidi’s PCI policy violation commenced two months after she spoke to Kendigelen about the Valet break room.⁹ *See* Cross-Exceptions at 2-3 and 5. In an attempt to establish temporal proximity, the General Counsel claims that “around January 20, Zaidi went to [Berry’s] office to discuss” the Valet break room. *Id.* **This is utterly false.** Indeed, this portion of the General Counsel’s Cross-Exceptions is misleading to the point that it should be stricken. Not even Zaidi herself made such a claim, and the transcript citations in the Cross-Exceptions do not come close to supporting the General Counsel’s claim.

Specifically, the General Counsel cites 229:21-22, but that section of testimony does not establish a meeting on January 20, 2013. To the contrary, it merely confirms that Berry met with Zaidi on a single occasion. It provides:

Q Okay. *Have you ever* met with her about the Valet break room?
A I did meet with her on the -- about a Valet break room, yes.

229:21-22 (emphasis added).

In fact, when the entire page is read, it is clear that the General Counsel, is *at best*, taking the testimony and date out of context:

⁹ The General Counsel made the same erroneous argument in his Post-Hearing Brief at page 6. The ALJ properly found that Zaidi’s complaints to Kendigelen – the alleged mastermind of the conspiracy – on December 3, 2012.

Q BY MR. HIGLEY: Do you recall January 20th, that date?

A Not specifically, no.

Q Okay. Do you know who Najia Zaidi is?

A Yes, I do.

Q And who is she?

A She is a bell dispatcher.

Q All right. And are you, not her immediate, but are you in a supervisory capacity over her?

A Yes, I am.

Q Okay. Have you *ever* met with her about the Valet break room?

A I did meet with her on the -- about a Valet break room, yes.

229:9-19 (emphasis added).

Somehow assuming that the testimony above establishes that a conversation took place on January 20, 2013, the General Counsel goes on to cite 230:23-25; 235:13-23; 232:11-18, 237:7-19; 238:17-22; and, 239:14-16. None of that testimony establishes that Zaidi pursued her complaint about accessing the Valet break room after her meeting with Kendigelen on December 3, 2012. Simply put, there is no evidence that Zaidi met with anyone about the Valet break room on January 20, 2013, nor is there any evidence that Berry spoke to Kendigelen about the Valet break room at any time after a brief conversation in early December 2012. In fact, the clear weight of the record contradicts it. *See* 237:7-19 (conversation happened once, in December); 310:14 (Zaidi testifies that her meeting with Kendigelen occurred on December 3, 2012 317:20-24 (Zaidi testifying that she spoke to Berry – who is not alleged to have engaged in animus – a few weeks after her meeting with Kendigelen on December 3, 2012).

The General Counsel's remaining arguments consist of baseless speculation. He attacks the ALJ's finding that the lack of discipline shows no invidious intent, arguing that the investigation took too long. He claims that the aid offered by the Company is insignificant because it was not offered by Kendigelen. And, he claims that the investigation persisted for "nearly a month". None of this is true. If Kendigelen was motivated by animus, he would not have conducted discipline or given anyone the opportunity to conduct an investigation. He could

have separated Zaidi on the basis of the email alone, and ensured her discharge by quashing any attempt to exonerate her. the fact that he did not do so strongly supports the ALJ's conclusion that his motivation was proper.

Similarly, the investigation did not persist for a month. Zaidi was interviewed on February 3, 2013, and Berry met with her on February 21, 2013. That delay, which includes a number of weekends, was not improper and does not show that Kendigelen had an improper motivation. Nor is there evidence that Kendigelen – the *only* individual who allegedly harbored animus – had *any* involvement in the investigation after the first interview. Indeed, the evidence is uncontroverted that he had no further involvement whatsoever.

Zaidi was not left in limbo and unfairly interviewed. To the contrary, giving Zaidi the opportunity to provide her version of events is a hallmark of a full and fair investigation. Moreover, as the ALJ found, she was aware that she was exonerated shortly after the Company discovered the email. Finally, the General Counsel's efforts to discount the Company's efforts to exonerate Zaidi are misplaced. As noted above, and as noted by the ALJ, if Kendigelen wished to retaliate against Zaidi, he would not have turned the investigation over to Employee Relations and Young. He would not have allowed Young to attempt to identify any person who may have had a motive to send Kendigelen the letter about Zaidi. He would not have allowed her to return to her email and search for the correction email that she sent to the customer. The conduct of both Kendigelen and the Company is unimpeachable.

In sum, there is literally *no* evidence in the record that Zaidi was targeted for an investigation due to her December 2012 complaint regarding the Valet break room. The ALJ's decision was correct. The cross exception should be denied.

2. The General Counsel’s arguments regarding the ALJ’s dismissal of the allegation that Bellagio created the impression of surveillance are just as meritless.

The General Counsel’s argument for reversing the ALJ’s dismissal of the allegation that Bellagio created the impression of surveillance is meritless. The sole argument advanced in the Cross Exception is the General Counsel’s contention that the absence of evidence that Zaidi saw the transmission letter is a “crucial mistake of fact.” Cross-Exceptions at 8. This is wrong for three reasons.

First, as noted above, Zaidi conceded on cross examination that she had no reasonable basis for believing that Kendigelen had accessed her email. Second, she also conceded that she knew her work email was subject to monitoring at all times, meaning that she had no reasonable expectation for believing that her actions on her work email were private. Third, Kendigelen did not reference any *protected* activity. The offending PCI email was not protected. Zaidi never claimed to use her email to engage in protected activity. Indeed, there was no discussion of any protected activity during the initial PCI meeting. The cases in which the Board has found that an employer created the impression of surveillance by failing to tell employees about how it learned of certain information all involve an employer’s discussion of information pertaining to *protected activity*.

As the Board explained in *Omaha Packing*, the impression of surveillance is created when an employer tells employees that it is aware of their *protected activities* but fails to tell them the source of that information, leaving employees to “speculate as to how the employer obtained the information.” 360 NLRB No. 62, slip op. at 3. The critical and necessary element of protected activity is missing in this case.

Further, in dismissing the allegation, the ALJ applied the correct legal standard. He held:

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.

Decision at 12:19-25.

In dismissing the allegation, the ALJ considered what Zaidi had been told, what Kendigelen did, and the nature of the investigation. He cited *Flamingo Las Vegas*, which concerns an allegation that an employer created the impression of surveillance, not surveillance, and concluded that what Zaidi herself conceded was nothing more than her own speculation, was unreasonable. The General Counsel's assertion that the ALJ erred in his legal analysis of this issue, Cross-Exceptions at 8, is frivolous.

V. CONCLUSION

For the reasons set forth above, the ALJ correctly concluded that the General Counsel failed to prove that Bellagio committed any of the unfair labor practices alleged in Paragraphs 5(c)-5(e) of the Complaint. To the contrary, the hearing established that Bellagio's actions were

fully consistent with both the letter and the spirit of its obligations under the Act. The Cross-Exceptions should be dismissed in their entirety.

May 23, 2014

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CERTIFICATE OF SERVICE

In addition to filing this Answering Brief in the above captioned matter via the NLRB's electronic filing system, we hereby certify that copies have been served this 18th day of May 23rd, 2014 by First Class Mail, upon:

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