JD(SF)–37–14
Irvine, CA

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

HOSTMARK HOSPITALITY GROUP
d/b/a EMBASSY SUITES IRVINE HOTEL

and

Cases 21-CA-090936
21-CA-092316
21-CA-100277
21-CA-107604
21-CA-109345
21-CA-110900

UNITE HERE, LOCAL 11

Jean C. Libby and *Irma Hernandez*,
for the General Counsel.

Travis M. Gemoets, Esq. and *Taraneh Fard, Esq.*
(Jeffer Mangels Butler & Mitchell),
for the Respondent.

Kirill Penteshin, Esq., for the Union.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. This case was tried in Los Angeles, California, beginning on February 24, 2014, and ending on April 9. 2014. On October 9, 2012, UNITE HERE Local 11 (the Union) filed the charge in Case 21-CA-090936 against Hostmark Hospitality Group d/b/a Embassy Suites Irvine Hotel (Respondent or the Employer). On October 29, 2012, the Union filed the charge in Case 21-CA-092316 against Respondent. On December 18, 2012, the Union filed an amended charge in Case 21-CA-092316. On March 12, 2013, the Union filed the charge in Case 21-CA-100277. The Union filed the charge in Case 21-CA-107604 on June 10. 2013. On August 30, 2013, the Union filed an amended charge in Case 21-CA-107604. On September 30, 2013, the Regional Director for Region 21 of the National Labor Relations Board (the Board) issued a consolidated complaint against Respondent. The complaint alleges that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Respondent filed a timely answer in which it denied that it had violated the Act. The Regional Director issued a second order consolidating cases and amended consolidated complaint on December 4, 2013. The Respondent filed a timely answer in which it

denied that it had violated the Act. On January 23, 2014, the Regional Director approved an informal settlement agreement in Cases 21-CA-088663 and 21-CA-089530.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses,[1] and having considered the briefs submitted by the parties, I make the following

Findings of Fact and Conclusions

I. Jurisdiction

At all times since September 1, 2012, Respondent, an Illinois corporation, has been engaged in the management of a hotel in Irvine, California. Respondent, in conducting its business operations described above, during 12 months prior to the issuance of the complaint, derived gross revenues in excess of $500,000. Respondent purchased and received goods at its facilities in California valued in excess of $50,000 directly from sources outside the State of California. . Accordingly, the parties stipulated and I find, Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

II. Facts

Respondent took over management of the Embassy Suites Irvine hotel on September 1, 2012. Employees of the hotel were engaged in an organizing campaign since about August 2010. After Respondent took over operation of the hotel the employees continued in their attempt to unionize the hotel.

Employees Rachele Smith, David Williamson, Anna Maria Trevino, Angelia Rico, and Albertina Solorio, actively participated in the union campaign. They wore union buttons,[2] spoke to their coworkers at the hotel, visited employees at their homes, and participated in delegations to management. There is no dispute that Respondent had knowledge of these employees' union activities.

One of the activities in which employees participated to support the Union was picketing at the hotel's pedestrian crosswalk. Rachele Smith, front desk clerk, testified that she picketed at least once a month with about 10 other picketers. The picketing took place between 6 a.m and

[1] The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.,* 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence, or because it was in and of itself incredible and unworthy of belief.

[2] The complaint originally alleged that Respondent unlawfully disciplined employees for wearing union buttons. That portion of the complaint was resolved by an informal settlement agreement.

8 a.m. Smith testified that one day in late October 2012, Maria Monroe, then Respondent's human resources manager, began photographing the picketing with her IPAD. Smith recorded Monroe photographing the picketing. Smith's video was shown at the hearing.

Smith testified that on November 1, 2012, in a discussion concerning communications with hotel guests, [FIRST NAME//] Cahill told Smith that she was very intelligent and that if she wanted to move up in management at the hotel, Cahill could see that happening. Smith took this as an attempt to have her abandon her union support. Cahill testified that in discussing Smith's change form part time to full time, she mentioned that if Smith liked what she did, the sky was the limit. Cahill denied that the Union or union activity was mentioned in this conversation.

Smith testified that she passed out Union flyers while off duty. Smith testified that she stationed herself several feet to the side of the hotel's front entrance. David Williamson, janitor, testified that he passed out leaflets several feet to the side of the hotel's front entrance. According to Williamson, on the morning of November 28, Cahill approached him while he was handing out leaflets and told him that he was on private property and could not leaflet on private property. Cahill said Williamson had to move to the pedestrian crosswalk. Williamson refused to move. Cahill told Williamson that if he did not leave, she would call the police.

After speaking with Williamson, Cahill spoke to Smith who was leafleting at the other side of the entrance. Cahill asked what Smith was doing and told Smith that it was not in her best interest.

Cahill testified that she did not prohibit Smith and Williamson from leafleting. She further denied threatening to call the police. Cahill testified that she just asked Williamson and Smith not to block the front door. The police did arrive that day but no one was arrested.

Smith testified that she went with union organizer Maricella Frutos to visit the house of employee Carla Fontes. Smith and Frutos spoke with Fontes for about 30 minutes. Fontes told Smith that she was scared and wanted to think about the union matter. On June 7, 2013, Smith approached Fontes in the hotel's parking lot. Smith requested that Fontes sign a union petition but Fontes stated she needed more time. According to Smith they agreed to talk again in a few days.

Fontes testified that she told Smith that she did not want to sign the petition. She testified that she asked Smith to leave her alone. Fontes testified that she told her supervisor, Arturo Romero, that the union supporters were harassing her. Romero suggested that Fontes speak with Amber Ayala, human resources manager.

On June 10, 2013, employees Argelia Rico and Ana Maria Trevino approached Fontes in the parking lot as Fontes was reporting for work. Trevino and Rico said they wanted to have a discussion. Fontes questioned how they recognized her as she was driving a borrowed car. They said they saw her face as she drove in. Trevino and Rico stated they wanted Fontes to support the Union. Fontes answered that she had worries. They asked her to think about it.

Fontes testified that Rico knocked on her windshield and that she had to tell them to move so she could park her car.

On June 11, Trevino, Smith, and employee Virginia Perez waited for Fontes to report to work. As the employees approached, Fontes began running to the hotel's side entrance. Fontes said she was late and ran into the hotel.

The following day, Fontes met with Ayala and told her about the incident. A few days later, Fontes gave Ayala a written statement alleging harassment. Fontes alleged that on June 10, Smith, Trevino, and another employee tapped on her car window. She told them to move but they didn't. Fontes wrote that on June 11, they were waiting for her again and that she felt nervous and harassed. According to Fontes, she told the employees to leave her alone. Fontes testified that since she made the complaint to Ayala, the employees have left her alone.

In June, Smith spoke with Michelle Beristane, front-desk clerk in the hotel garage. Smith ended her workday at 3 p.m. and waited for Beristane whose shift ended at 7 p.m. Smith met Beristane in the garage. Beristane asked why Smith was still at the hotel. Smith told Beristane that she should feel special because she had waited to talk to her about the Union. Smith asked how Beristane would vote in a union election. Beristane answered that she wanted what was best for everyone. Beristane said that she had to go and drove off.

On June 13, 2013, Trevino and a union organizer went to Beristane's home to attempt to obtain union support. Beristane did not open the door and hid in her garage. Her father and brother spoke with Trevino and she left. Beristane then called Cahill and stated she was upset that they knew where she lived. Beristane wrote Cahill an email stating that she was worried and scared. She stated that the fact they knew her address scared her tremendously and that she wanted the harassment to stop.

On June 17, 2013, Ayala called Smith into her office. Ayala suspended Smith for a week so that an investigation could be conducted. The suspension stated that Ayala and Cahill had received harassment complaints against Smith.

On that same date, Ayala called Trevino into her office. Ayala said that she had received complaints on June 10 and 3, 2013, accusing Trevino of harassment. Trevino was given a suspension notice.

Ayala testified that by June 14, 2013, she had received many complaints from employees about harassment by Smith and Trevino. In addition to the written complaints by Fontes and Beristane, Ayala testified that she received verbal complaints from several employees. Ayala suspended Trevino and Smith on June 17. She told each of them to make an appointment for an interview as part of the investigation.

On June 19, Ayala interviewed Smith about the complaints from Beristane and Fontes. Smith admitted waiting for 4 hours for Beristane and stating that Beristane should feel special. Smith stated that Beristane never told her not to talk about the Union.

Ayala showed Smith the video showing Fontes running into the hotel. Smith said she was waiting with Perez and Trevino to talk with Fontes. Smith said Trevino had an appointment with Fontes. Ayala asked Smith why Fontes was in such a hurry. Smith answered that she did not know.

Ayala interviewed Trevino on June 19. Ayala asked Trevino about the complaint from Fontes. Ayala showed Trevino the video of Fontes running into the hotel. Trevino denied knocking on the car window, Trevino said that she had told Fontes to think about it and that they would talk the next day. Thus, Trevino expected to speak with Fntes on the day in question.

On June 24, employee Jorge Luna presented Ayala with a petition signed by 22 employees asking that Trevino not be returned to work. Ayala submitted the petition and her interview notes for the employees to Respondent's corporate office. Smith and Trevino were reinstated on Monday, July 1. Trevino and Smith were reinstated on July 1 but did not receive pay for the period of their suspensions. They were both given "final warnings" stating, inter alia, "on multiple occasions, after your coworkers specifically informed you that your conduct was unwelcome, you continued to engage in inappropriate and unwelcome conduct."

Williamson testified that in late June he along with Rico spoke to Ayala to protest the suspensions of Trevino and Smith. Ayala attempted to interrupt him but Williamson told her that he only had a 10-minute break to talk with her. Ayala testified that Williamson rudely interrupted her when she attempted to answer a question.

On July 8, Williamson and employees Smith, Trevino, and Rico attempted a delegation to Cahill. They found Cahill in the lunchroom with Ayala and Maria Monroe, former human resources manager. Trevino tried to hand Cahill copies of recent charges filed by the Union. Cahill refused the papers saying that she was on her lunchbreak. Williamson said that her 30-minute lunchbreak was over. Cahill became angry and told Williamson to go to her office.

When Williamson arrived at Cahill's office, Cahill was there with Ayala and Monroe. Cahill asked why Williamson had disrespected her. Williamson denied doing so. Cahill testified that she told Williamson that his conduct was unacceptable and would be documented. Cahill claimed that Williamson had been disrespectful and was continuing to be disrespectful. Williamson asked whether she wanted him to apologize. Ayala corroborated Cahill's version of this meeting.

The following day, July 9, Williamson was given a written warning for the incident in the lunchroom. The warning stated that Williamson had been insubordinate and disrespectful. It further stated that Williamson had been disrespectful to Ayala. Although Williamson had received no prior warnings, this warning was classified as a final warning.

Respondent's work rules prohibit employees from "working overtime without authorization." Respondent's handbook states, "it is your responsibility to let your supervisor know one-half hour before you are in danger of running into overtime." In mid-May 2013, Respondent began using a new payroll system. In June, a notice was posted next to the timeclock stating that all overtime had to be preapproved by a manager. That month, Luis Perez, housekeeping manager, began announcing the overtime policy at morning meetings.

Perez testified that he wrote down overtime approved if an employee called to get approval for overtime and the request was approved. Thereafter, Perez typed overtime approved into the payroll system.

Respondent's records show that in June 2013, housekeeping employees Maria Alvarez, Rosalba Dominguez, Maria Lozano, Virginia Perez, Rosa Ponce, Braulia Rodriguez, Maria Sanchez, and Virginia Soriano de Perez, all worked overtime without any notation that the overtime was preapproved. None of these employees were disciplined.

On June 27, Perez informed employee Albertina Solorio that overtime needed to be approved in advance by a supervisor. Solorio told Perez that she had tried calling the office but that nobody answered. Perez told Solorio that she should call Supervisor Eli Sanchez to request overtime. Solorio answered that Sanchez was rude and aggressive.

On June 27, Solorio punched out 9 minutes after her scheduled shift, thereby earning 15 minutes overtime. Perez gave Solorio a verbal warning stating that she worked overtime on June 27 without management's prior approval. On July 18, Solorio clocked out 10 minutes late, thereby earning 15 minutes of overtime. Perez gave Solorio a written warning for working overtime without a manager/supervisor's approval. However, Solorio's assignment sheet for July 16 has a note from Perez indicating that overtime was approved.

On June 29, 2013, employee Argelia Rico went to Perez to see her payroll records. Perez stated that Rico had been working overtime and to be careful. On June 29, Rico clocked out 19 minutes after her scheduled shift. On July1, Perez gave Rico a verbal warning for working overtime without manager/supervisor's approval. Rico told Perez that Teresa Santana had approved the overtime. Perez stated that Santana could not approve overtime.

On July 26, Rico was issued a warning for not taking her scheduled breaks Thereafter on August 10, 2013, Rico was issued a final warning regarding overtime on August 4 and 7, Respondent's payroll records show that overtime was approved on August 4. The records also show that overtime was approved on August 2 and not August 4.

On July 10, Perez gave employee Anna Maria Trevino a verbal warning for working overtime on July 7. Trevino testified that she believed Supervisor Sanchez had approved the overtime.

On July 26, Respondent issued Solorio a final warning for not taking her scheduled breaks. After receiving this warning, Solorio took her scheduled breaks. On August 7, Solorio was given a suspension for violating Respondent's meal and break policy. However, Solorio had taken her breaks. Solorio had written on her assignment sheets that she did not finish her rooms because she had taken her breaks. Respondent suspended Solorio anyway, because "she didn't call anybody."

Solorio was suspended for 5 days on August 8, 2013. On August 13, Ayala gave Solorio her final paycheck and terminated her employment. Solorio was terminated for insubordination, failure to observe work schedules, and working overtime without authorization.

The General Counsel alleges that the following language in Respondent's employee handbook violates Section 8(a)(1) of the Act:

Assigned Work Area

Only associates on duty belong in the hotel. All associates are expected to remain in the proper "working areas" during scheduled working hours. Any associate found in an area of the property that is not considered to be a part of his assigned work area will be questioned and subject to disciplinary action. The "working area" is the area in which the department manager has asked the associate to perform work-related duties, and where the associate could be expected to be found by his department manager should he be needed for any reason. Only those associates whose work requires them to enter public areas of the property are permitted to do so. When in public areas, associates are expected to conduct themselves in such a manner as to project a professional image to guests as well as other associates.

Work Rules and Performance Standards

Nothing in this Section alters the hotel's status as an at-will employer. Every situation involving associates with fellow workers, guests and with management or other conduct cannot be covered in a brief document such as this. Therefore, each associate must accept the basic responsibility to maintain a standard of conduct consistent with the image of the hotel ad a high degree of professional behavior.

The hotel recognizes that associates have the right to engage in certain activities for their mutual benefit. The rules stated herein are not intended to prohibit associates in the exercise of rights guaranteed by federal or state law and should not be interpreted from engaging in lawful and/or protected activities. It is understood that at all times employment is at the will of the company; and the associates may be dismissed at any time with or without cause.

It is not possible to provide a complete list of every work rule or performance standard, as a result, the following are presented only as examples. You are responsible for understanding and following these standards and work rules. Associates who do not comply may be subject to disciplinary action up to and including possible termination of employment.

Solicitation or distribution of literature on company property in violation of hotel policy.

Name Badge

You are required to wear your name badge each day you work. It should be worn on your left hand side of your uniform. Name badges will be ordered with your first name only, with the exception of managers and supervisors. Name badges must be kept clean and well maintained- do not add any ornamentation (i.e. stickers, pins additional markings, etc.) Nothing other than your name badge is permitted to be worn as part of your uniform.

Confidentiality

Each associate is responsible for safeguarding confidential information obtained during employment. In the course of your work, you may have access to confidential information regarding the hotel itself, fellow associates, or guests. It is your responsibility to in no way reveal or divulge any such information unless it is necessary for you to do so in the performance of your duties. Access to confidential information should be on a "need to know" basis and must be authorized by your supervisor. Any breach of this policy will not be tolerated and may result in disciplinary action up to and including termination of employment. Also the hotel may choose to take legal action against you for any violation of this policy.

Media Contacts

Associates may be approached for interviews or comments by news media. Only the Public Relations Department or those designated by the General Manager may comment on the hotels policies or events that may have an impact on the hotel or Host mark Hospitality Group.

Use of Facilities

All associates should enter and leave the hotel no more than 15 minutes before the scheduled shift begins/end or after a reasonable changing time. Returning to the property after scheduled hours for any reason, other than picking up a paycheck requires approval from a supervisor. All associates are required to enter and exit the hotel through the designated Associate Entrance only.

Respondent's Defense

Respondent argues that all of the discipline at issue was legitimate, justified upon the facts and circumstances, and nondiscriminatory. Respondent further argues that its policies were applied in a nondiscriminatory manner and that none of its policies interfered with conduct protected by the Act.

III. Conclusions

A. Respondent's Off-Duty Access Rule

In *Tri-County Medical Center,* 222 NLRB 1089 (1976), the Board held that a rule denying off-duty employees access to an employer's premises is lawful if it: (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity.

Here, not only do the assigned work area and use of facilities rules ban employees' access to the hotel during "scheduled working hours" but they ban access except during that time to the entire hotel. In *Flamingo Hilton-Laughlin,* 330 NLRB 287, 289-290 (1999), the Board held that a hotel's no-access rule prohibiting employees from "patronizing the property" during the 8

hours immediately before a shift is unlawful under *Tri-County Medical Center,* supra. Here, Respondent offered no business justification for these restrictions. The rules ban access to the entire hotel, not just the working areas. Accordingly, I find that these rules violate Section 8(a)(1) of the Act.

B. Work Rules and Performance Standards

Respondent's rules prohibit employees from "solicitation or distribution of literature on company property." The Board held in *Kinder-Care Learning Centers,* 299 NLRB 1171 (1990), that employees have a Section 7 right to communicate regarding their terms and conditions of employment to other employees, an employer's customers, the media, and the public. An employer cannot ban employee solicitation on company property during nonworking time, absent special circumstances. Total bans on employee solicitation and distribution are overbroad and, therefore unlawful. See, e.g., *Guard Publishing Co.,* 351 NLRB 1110 (2007); *Pepsi-Cola Bottling Co.,*211 NLRB 870 (1974); *Hughes Properties v. NLRB,*755 F.2d 1320 (9th Cir. 1985).

C. Name Badges' Rule

Respondent's handbook states, "Nothing other than your name badge is permitted to be worn as part of your uniform." It is well established that employees have a statutory right to wear union insignia. *Republic Aviation Corp. v. NLRB,* 324 U.S. 793 (1945). See, e.g., *Metro-West Ambulance Service,* 360 NLRB No. 124 (2014). The record shows that Respondent enforced this policy. However, enforcement of the rule was the subject of an informal settlement agreement.

D. Respondent's Confidentiality Rule

The employee handbook prohibits dissemination, without a supervisor's permission, of confidential information. Such information is defined as "information regarding the hotel itself, fellow associates or guests.'' The Board has consistently held that rules which employees may reasonably read to bar disclosure of their own, or their coworkers' wages, hours, and condition of employment violates Section 8(a)(1) of the Act. *Flamingo Hilton-Laughlin*, 330 NLRB at 288 fn. 3, 291. Similarly, in *IRIS U.S.A., Inc.,* 336 NLRB 1013 fn. 1 (2001), the Board found a rule that instructs employees to keep information about employees strictly confidential to be unlawful.

E. Respondent's Media Contacts Rule

Respondent's handbook prohibits employees from speaking to the news media about "hotel policies." Section 7 permits employees communications with third parties, including appeals to the press, the public at large, and even an employer's clients. See, e.g., *Flamingo Hilton-Laughlin*, 330 NLRB 287; *Meriscordia Hospital Medical Center v. NLRB,* 623 F.2d 806, 813 (2d Cir. !980).

F. Impression of Surveillance

The complaint alleges that Monroe engaged in surveillance and created the impression of surveillance when she used her IPAD to photograph employee picketing at the hotel. . Photographing employees engaged in concerted activity constitutes unlawful surveillance because it has the tendency to intimidate employees. *F. W. Woolworth Co.,* 310 NLRB 1197 (1993). I find that by pointing her IPAD at the employees picketing the hotel, Monroe created the impression of surveillance of the picketing activities.

G Alleged Promise of a Promotion

Rachael Smith testified that after discussing labor issues with Cahill, Cahill complemented Smith's intelligence and told her that she had a future with management at the hotel. Cahill testified that she did not discuss the Union with Smith but did say that if Smith liked her work, the sky was the limit. I credit Smith's testimony and find that Cahill impliedly promised a promotion in order to discourage union activities.

H. Interference with Leafleting

Smith and Williamson credibly testified that Cahill told them that they could not leaflet in front of the hotel. Off-duty employees are permitted to solicit and distribute leaflets as long as they are not engaging in these activities in a work area. *Tri-County Medical Center,* 222 NLRB 1089 (1976). The front area of the hotel is not a work area. See, e.g., *Sheraton Anchorage,* 359 NLRB No. 95 (2013).

I. The Suspensions of Smith and Trevino

In cases involving dual motivation, the Board employs the test set forth in *Wright Line,* 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399-403 (1983). Initially, the General Counsel must establish by a preponderance of the credible evidence that antiunion sentiment was a "motivating factor" for the discipline or discharge. This means that the General Counsel must prove that the employee was engaged in protected activity, that the employer knew the employee was engaged in protected activity, and that the protected activity was a motivating reason for the employer's action. *Wright Line,* supra, 251 NLRB at 1090. Unlawful motivation may be found based upon direct evidence of employer animus toward the protected activity. *Robert Orr/Sysco Food Services,* 343 NLRB 1183, 1184 (2004). Alternatively, proof of discriminatory motivation may be based on circumstantial evidence, as described in *Robert Orr/Sysco Food Services,* supra.

If the General Counsel has satisfied the initial burden, the burden of persuasion shifts to Respondent to show by a preponderance of the credible evidence that it would have taken the same action even in the absence of the employee's protected activity. If Respondent advances reasons which are found to be false, an inference that the true motive is an unlawful one may be warranted. *Shattuck Denn Mining Corp. v. NLRB,* 362 F.2d 466, 470 (9th Cir. 1966); *Limestone*

Apparel Corp., 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). However, Respondent's defense does not fail simply because not all the evidence supports its defense or because some evidence tends to refute it. *Merrilat Industries,* 307 NLRB 1301, 1303 (1992). Ultimately, the General Counsel retains the burden of proving discrimination. *Wright Line,* supra*,* 251 NLRB at 1088, fn. 11.

The record establishes that Smith and Trevino were engaged in union activities in attempting to solicit employee support for the Union. Respondent disciplined the two employees for engaging in those activities. The question is whether Smith and Trevino engaged in action which became unprotected. In *Candandaigua Plastics,* 285 NLRB 278, 280 (1987), the Board found that an employer did not violate the Act by disciplining an employee pursuant to its no harassment policy because the employee's solicitation involved repeated cursing, threats, and disregard of the employer's prior warnings to stop the harassment. I find the instant case distinguishable, as there were no cursing, no threats, and no prior warnings.

In the instant case, the alleged harassment did not take place during working hours. Thus, there was no interference with work production. The solicitation of employees Fontes and Beristane took place outside work areas and outside worktime. While Trevino went to Beristane's home, she did not speak to her. Trevino was not told not to go Beristane's home. There is no evidence that Trevino or Smith issued any threats. There is no evidence that Respondent, Beristane, or Fontes demanded that the solicitation stop.

Accordingly, I find that Respondent has not shown that the activities of Smith and Trevino lost the protection of the Act. Respondent's no harassment policy has to yield to the protection of the Act. Thus, I find Respondent violated Section 8(a)(3) of the Act in suspending these employees for engaging in protected union activities.

J. The Warning Issued to Williamson

Williamson was engaged in union activities when he approached Cahill in the lunchroom. Again the question is whether Williamson's conduct lost the protection of the Act. In *Atlantic Steel Corp.,* 245 NLRB 814. 816 (1979), the Board considered the place of the discussion, the subject matter of the discussion, the nature of the employee's outburst, and whether the outburst was provoked by an employer's unfair labor practice.

In the instant case, Williamson did not threaten Cahill or use any profanity. The alleged misconduct took place in the lunchroom, a nonwork area. Williamson's comment was brief and unaccompanied by insubordination. I find that Williamson did not lose the protection of the Act. Accordingly, I find that Respondent violated Section 8(a)(3) by disciplining Williamson for this conduct.

K. The Warnings to Solorio, Rico, and Trevino

In cases involving dual motivation, the Board employs the test set forth in *Wright Line,* 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399-403 (1983). Initially, the General Counsel must establish by a preponderance of the credible evidence that antiunion sentiment was a "motivating factor" for the discipline or discharge. This means that

General Counsel must prove that the employee was engaged in protected activity, that the employer knew the employee was engaged in protected activity, and that the protected activity was a motivating reason for the employer's action. *Wright Line,* supra*,* 251 NLRB at 1090. Unlawful motivation may be found based upon direct evidence of employer animus toward the protected activity. *Robert Orr/Sysco Food Services,* 343 NLRB 1183, 1184 (2004). Alternatively, proof of discriminatory motivation may be based on circumstantial evidence, as described in *Robert Orr/Sysco Food Services,* supra:

> To support an inference of unlawful motivation, the Board looks to such factors as inconsistencies between the proffered reasons for the discipline and other actions of the employer, disparate treatment of certain employees compared to other employees with similar work records or offenses, deviations from past practice, and proximity in time of the discipline to the union activity. *Embassy Vacation Resorts,* 340 NLRB 846, 848 (2003).

If the General Counsel has satisfied the initial burden, the burden of persuasion shifts to Respondent to show by a preponderance of the credible evidence that it would have taken the same action even in the absence of the employee's protected activity. If Respondent advances reasons which are found to be false, an inference that the true motive is an unlawful one may be warranted. *Shattuck Denn Mining Corp. v. NLRB,* 362 F.2d 466, 470 (9th Cir. 1966); *Limestone Apparel Corp.,* 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). However, Respondent's defense does not fail simply because not all the evidence supports its defense or because some evidence tends to refute it. *Merrilat Industries,* 307 NLRB 1301, 1303 (1992). Ultimately, the General Counsel retains the burden of proving discrimination. *Wright Line,* supra*,* 251 NLRB at 1088 fn. 11.

The record establishes that Solorio, Rico, and Trevino were known to be leading union supporters. Respondent has shown animus towards union activity. However, Respondent has a policy requiring employees to obtain prior approval before working overtime. That policy was stated in the employee handbook given to all employees. The policies were reiterated in an employee orientation meeting in September 2013. The policy was posted near the timeclock in the housekeeping department.

Solorio was informed on June 26, 2013, that she needed to have prior approval to work overtime. Despite this notice, Solorio worked overtime without approval on that same date. Solorio was then given a verbal warning. Supervisor Perez discussed the warning with Solorio. On July 16, Solorio worked overtime without prior approval. She was given a written warning for doing so on July 18. The warning was read to Solorio by Perez and explained to her that prior approval of overtime was required. Accordingly, I find that Respondent has shown that the warnings given to Solorio would have been issued to her even in the absence of her union activities.

Employee Angelia Rico received Respondent's work rules and employee handbook. She attended employee meetings where the overtime rule was discussed. On June 24 and 26, Rico worked overtime without prior approval. On June 29, Perez discussed Rico's unauthorized overtime and reminded her of the overtime policy. On that same date, Rico worked overtime without prior approval. Thus, Rico was issued a verbal warning on June 29. On July 1, Perez read the warning to Rico and reminded her of the overtime policy. Again on August 4, Rico

worked overtime without prior approval. On August 10, Rico was given a warning for this violation.

Accordingly, I find that Respondent has established that Rico would have been issued these warnings even in the absence of her union activities.

Employee Maria Trevino knew Respondent had a policy requiring employees to obtain prior approval before working overtime. That policy was stated in the employee handbook given to all employees. The policies were reiterated in an employee orientation meeting in September 2013. The policy was posted near the timeclock in the housekeeping department.

On July 3, Trevino worked overtime without prior approval. On July 4, Perez reminded Trevino of the overtime policy. However, on July 7, Trevino worked overtime without prior approval. Trevino was given a verbal warning for this infraction. On July 10, Perez met with Trevino and read the warning and reminded her of the overtime policy. Accordingly, I find that Respondent has established that Trevino would have been issued these warnings even in the absence of her union activities.

L. The Suspension of Solorio and Her Discharge

To support an inference of unlawful motivation, the Board looks to such factors as inconsistencies between the proffered reasons for the discipline and other actions of the employer, disparate treatment of certain employees compared to other employees with similar work records or offenses, deviations from past practice, and proximity in time of the discipline to the union activity. *Embassy Vacation Resorts,* 340 NLRB 846, 848 (2003).

If the General Counsel has satisfied the initial burden, the burden of persuasion shifts to Respondent to show by a preponderance of the credible evidence that it would have taken the same action even in the absence of the employee's protected activity. If Respondent advances reasons which are found to be false, an inference that the true motive is an unlawful one may be warranted. *Shattuck Denn Mining Corp. v. NLRB,* 362 F.2d 466, 470 (9th Cir. 1966); *Limestone Apparel Corp.,* 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). However, Respondent's defense does not fail simply because not all the evidence supports its defense or because some evidence tends to refute it. *Merrilat Industries,* 307 NLRB 1301, 1303 (1992). Ultimately, the General Counsel retains the burden of proving discrimination. *Wright Line,* supra*,* 251 NLRB at 1088 fn. 11.

I found above that Respondent has shown that the warnings given to Solorio would have issued to her even in the absence of her union activities. After receiving warnings for violating the overtime policy, Solorio again worked overtime without prior approval on July 27 and 28. On August 7, Solorio met with Perez and Ayala and was given a suspension for violating the overtime policy. On August 13, Solorio's suspension was turned into a termination.

I find that Respondent has established that Solorio was aware of and knew Respondent's overtime policy but continued nonetheless to violate that policy. Accordingly, I find that Solorio would have been discharged even in the absence of her union activities.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 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. Respondent violated Section 8(a)(1) of the Act by maintaining off-duty access rules, no-solicitation and distribution rules, name badge rules, confidentiality rules, and media contact rules, which interfere with employee Section 7 rights.

4. Respondent violated Section 8(a)(1) of the Act by creating the impression of surveillance of union activities.

5. Respondent violated Section 8(a)(1) by impliedly promising an employee a promotion in order to discourage union activities.

6. Respondent violated Section 8(a)(1) of the Act by interfering with lawful leafleting activity.

7. Respondent violated Section 8(a)(3) and (1) of the Act by issuing a warning to employee David Williamson.

8. Respondent violated Section 8(a)(3) and (1) by suspending employees Rachele Smith and Ana Maria Trevino.

9. Respondent did not otherwise violate the Act, as alleged in the complaint.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having discriminatorily suspended employees Rachele Smith and Ana Maria Trevino, Respondent must make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of demotion to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Respondent must also be required to remove any and all references to its unlawful discipline of Williamson, Smith, and Trevino, from its files and notify them in writing that this has been done and that the unlawful discipline will not be the basis for any adverse action against them in the future. *Sterling Sugars, Inc.*, 261 NLRB 472 (1982).

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended.[3]

ORDER

Respondent, Hostmark Hospitality Group d/b/a Embassy Suites Irvine Hotel, Irvine, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Suspending employees because they engaged in union or other protected activities.

(b) Issuing warnings to employees because they engaged in union or other protected concerted activities and/or to discourage those activities.

(c) Maintaining rules that interfere with employees rights to engage in activity protected by the Act.

(d) Creating the impression of surveillance of employee union activity.

(e) Impliedly promising employees a promotion to discourage employees from supporting the Union.

(f) Interfering with lawful leafleting activities.

(g) 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) Make Ana Maria Trevino and Rachele Smith whole for any loss of pay and other benefits from their suspensions with interest including reimbursement of amounts equal to the difference in taxes owed upon receipt of a lump-sum payment and taxes that would have been owed had there been no discrimination.

(b) Remove from the files any reference to the suspensions issued to Trevino and Smith, and notify them in writing that this has been done and that the suspensions will not be used against them in any way.

(c) Remove from the files any reference to the final warning issued to David Williamson and notify him in writing that this has been done and that the warning will not be used against him in any way.

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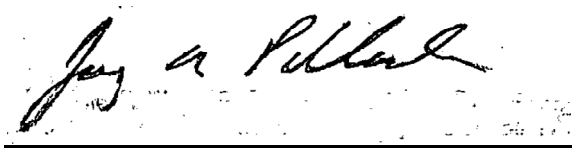
[3] All motions inconsistent with this recommended order are denied. In the event no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Rescind the following rules contained in the employee handbook at Respondent's facility and notify employees that the rules have been rescinded to the same extent that the unlawful rules were publicized: Assigned Work Area; No Solicitation/No Distribution; Name Badge; Confidentiality, and Media Contacts.

(e) Within 14 days after service by the Region, post at its facility in Irvine, California, copies of the attached notice marked "Appendix."[4] Copies of the notice, in English and Spanish, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt 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 Respondent 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 Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 2013.

(f) 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., August 7, 2014



Jay R. Pollack
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

After a hearing at which all sides had a chance to give evidence, the National Labor Relations Board has found that we violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended, 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 suspend employees because they engaged in union or other protected activities.

WE WILL NOT issue warnings to employees because they engaged in union or other protected concerted activities and/or to discourage those activities.

WE WILL NOT maintain rules that interfere with employee's rights to engage in activity protected by the Act.

WE WILL NOT create the impression of surveillance of employee union activity.

WE WILL NOT impliedly promise employees a promotion to discourage employees from supporting the Union.

WE WILL NOT interfere with lawful leafleting activities.

WE WILL NOT 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.

WE WILL make Ana Maria Trevino and Rachele Smith whole for any loss of pay and other benefits from their suspensions with interest including reimbursement of amounts equal to the difference in taxes owed upon receipt of a lump-sum payment and taxes that would have been owed had there been no discrimination.

WE WILL remove from the files any reference to the suspensions issued to Trevino and Smith, and notify them in writing that this has been done and that the suspensions will not be used against them in any way.

WE WILL remove from the files any reference to the final warning issued to David Williamson and notify him in writing that this has been done and that the warning will not be used against thim in any way.

WE WILL rescind the following rules contained in the employee handbook at Respondent's facility and notify employees that the rules have been rescinded to the same extent that the unlawful rules were publicized: Assigned Work Area; No Solicitation/No Distribution; Name Badge; Confidentiality, and Media Contacts.

HOSTMARK HOSPITALITY GROUP d/b/a
EMBASSY SUITES IRVINE HOTEL

(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.

888 South Figueroa Street, 9th Floor, Los Angeles, CA 90017-5449
(213) 894-5200, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/21-CA-090936 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

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, (213) 894-5184.