

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

**HYATT CORPORATION d/b/a
HYATT REGENCY SCOTTSDALE
Respondent**

and

Case 28-CA-112474

**CHRIS WELCH, an Individual
Charging Party**

William Mabry III, Esq., for the General Counsel
Thomas M. Stanek, Esq., for the Respondent

DECISION

STATEMENT OF THE CASE

Dickie Montemayor, Administrative Law Judge. This case was tried before me on March 4-6, 2014, in Phoenix, Arizona. Chris Welch (Charging Party) filed a charge on September 3, 2013, alleging violations by Hyatt Corporation d/b/a Hyatt Regency Scottsdale (the Respondent) of Section 8(a)(1) of the National Labor Relations Act, as amended (the Act). Respondent filed an answer denying that it violated the Act. The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross examine witnesses, and to file briefs. I carefully observed the demeanor of witnesses as they testified and I rely on those observations here. I have studied the whole record, and based upon the detailed findings and analysis below, I conclude that the Respondent violated the Act as alleged.

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, Respondent admits and I find that:

1. (a) At all material times, Respondent has been a Delaware corporation with an office and place of business in Scottsdale, Arizona (Respondent's facility) and has been engaged in the business of operating hotels and providing food and lodging.

(b) In conducting its operations during the 12-month period ending September 3, 2013, Respondent purchased and received at Respondent’s facility goods valued in excess of \$50,000 directly from points outside the State of Arizona.

(c) In conducting its operations during the 12-month period ending September 3, 2013, Respondent derived gross revenues in excess of \$500,000.

(d) At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

Jon Rosenthal -	Alto Ristorante Manager
Jeff Chetty -	Assistant Food & Beverage Director
Donna Lowell -	Human Resources Director

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Chris Welch was employed as a fine dining server in Respondent’s Alto Ristorante. He began his employment on January 19, 2006, and worked until his discharge on March 7, 2013. (Tr. 92:1). His job was that of a “liaison” between the kitchen and hotel. His duties included taking orders, serving food, bringing drinks and serving as an “ambassador for Hyatt hotels.” (Tr. 92:6-12). His immediate supervisor was Jon Rosenthal the manager of the Alto Ristorante. (Tr. 37:2). Jeff Chetty was the assistant food and beverage manager, Carlos Morales was the food and beverage director, and Donna Lowell was Respondent’s human resources director.

B. Chris Welch Complains About Terms and Conditions of Employment

Respondent had in place a regular practice of conducting pre-shift meetings. At these pre-shift meetings, various topics were discussed regarding the operation of the facility during that particular shift including rotation of tables, assigned sections, special events and other matters. Normally, the meetings were attended by between four to eight employees depending upon who was scheduled to work that evening. At the time, Respondent had in place a sick leave policy which provided that regular full-time employees were eligible to receive paid sick days after 90 days of service, directly related to their respective length of service. (GC Exh. 3:21) Part-time employees were not eligible for paid sick time, and if a part-time employee missed work due to illness, that employee was subject to counseling, the first step in Respondent’s disciplinary process. (GC Exh. 3:36; Tr. 43:8).

During one of the pre-shift meetings sometime in January or February 2013, one of the part-time staff members, John Meeske had been out sick and Rosenthal was “refreshing” sick leave policy with staff. (Tr. 42:21). Charging Party raised his concerns regarding the sick leave policy. (Tr. 42:17--25). Specifically, Charging Party made known his belief that the policy was unfair not only because part-time employees did not receive paid sick leave but also that it was unfair to “document” and or “coach” part-time employees for being sick. (Tr. 43:3). Charging Party expressed his disagreement with part-time employees being written up for being sick. (Tr.44:6--10). His concern was that if employees were written up for being sick, the policy would essentially force them to work while sick. (Tr. 102--103). This he believed was a violation of the food safety manual for food service workers. (GC Exh. 5).

This wasn't the first time Charging Party raised workplace issues during the pre-shift meetings and general discussions. On other occasions, he expressed his concerns regarding Respondent's policy of applying a gratuity to the total amount of the bill including the sales tax portion. (Tr. 95). He also expressed concerns regarding the propriety of reselling to new customers unused portions of alcohol that was previously purchased by other customers. (Tr. 97:2--15). On another occasion, he expressed concerns regarding what he perceived to be unfair rotation of shifts and the distribution of large parties. (Tr. 73:4--6).

On March 6, 2013, Charging Party attended a pre-shift meeting with Rosenthal and other employees. At this meeting, Rosenthal complained about being feverish, having the chills and having strong headaches. (Tr. 344:16--345:3). He joked that maybe he caught something from another employee who had been ill in the prior weeks. Charging Party responded, “well that's why you don't make people work while they're sick. The thing stays in the building and everybody gets sick.” (Tr. 109:12--21). There was a pause and Rosenthal tilted his head down and stared intensely at Charging Party. (Tr. 109:23-25). The meeting ended without further incident.

C. The Events of the Evening of March 6, 2013

After the meeting, Charging Party began his regular shift and was scheduled to work from 4 p.m. until the restaurant closed. (Tr: 49:1--7). Charging Party was assigned to work table 65 which was occupied by two male guests and two female guests. (Tr. 170:1--8). Charging Party served the table a bottle of wine. Thereafter the female guests departed for the evening. (Tr. 110). Charging Party recounted the events of the evening as follows:

And as soon as their wives left, he asked me to -- he said, "You know what, go get four of the most expensive shots of tequila that you have." And I told him, "Well, they're going to be about \$250 apiece." And they said, "Well, all right. Well, get something nice. You know, maybe something around \$50." I said, "Okay." So I went to the bar. At that time our bartender, Stephen Marshall was no longer there. And the protocol, I type it into the computer and it prints up a ticket. I then take that ticket to the main bar, the Center Stage Bar. I took it directly to the manager, the bar manager at the time. His name is Jonas. Handed him the ticket.

This is, you know, very expensive liquor. It's under lock and key. And we had to walk in back -- part of the hotel we call the bowling alley where there's a -- kind of a liquor

storeroom. And it was there where we got the bottle, poured the shots, poured four shots, and then took it to the -- to the gentleman that ordered it.

5 They then took two for themselves and gave two to these two women that were at a table right next to them right after their wives left, and they basically started hitting on them. And being jovial, joking around, and they were asking why -- you know, why is tequila -- you know, what's -- what's \$50 of tequila -- why is -- why does it taste -- you know, what goes into it? So I tell them it's like an aged Scotch where they're aged in barrels, there's a very limited amount of that particular tequila, it's a type of thing that you sip. It's not like
10 doing shots, you -- you sip on it and taste it and -- and told them that -- what goes into it.

And they said, "Well, it seems like you enjoy this type of thing. Can we buy you a shot?" And I said, "Well, you know, I don't know. Let me go ask." It was at that point I go into Jon Rosenthal's office and he was saying, "What's going on, you know, out there?" And
15 he could see that they were a lively bunch and, you know, there's quite a -- there's a bit of drama ensuing. And I basically said, "You know, they offered to buy me a shot." And he said, "Well, especially it's" -- "it's not even wine." You know, he was uncomfortable with that and he told me not to do it. So I go out --

20 Q Let me stop you there. When you came into his office, did you tell him that you had taken a shot?

A No. Me -- no. I said that they had offered to give me a shot.

25 Q What happened next?

A He told me that especially because it wasn't wine that he was uncomfortable with that and not to do it. So I said, "Okay." So I went out, I told the guests, you know, "Thanks but no thanks. You know, you're going to get me in trouble if I do that." And so I didn't.
30

They then -- they were there for a few -- a bit longer. They were talking with the girls whom they had bought the shots for. And I still had a couple of other tables closing out. There's closing duties that you go about in the restaurant; polishing silverware, putting the different, you know, linens and setting things up, away. So I went about those duties.
35 Everybody in the restaurant sort of trickled out and the last -- the two gentlemen that ordered the original four shots were the last people in the restaurant. And they walked from their table up in the direction of their room and met me at the Cantina Due bar.

At that time there was no bartender. Everything had been locked up. There was
40 nothing -- no alcohol available. They said, "Hey, we'd like to close out. We" -- "Can we have another round for the road and we'll sign the check for you?" I said, "Sure." So I rang in two more shots for these gentlemen, took the ticket back to Jonas, the bar manager, who poured two bottles -- or two -- two shots. I brought the glasses from the Cantina Due, our bar. The glasses are out just on the shelves. The liquor's the only thing
45 that gets -- liquor and wine's the only thing that gets locked up.

So I took the glasses, got the shots, came back, gave it to the gentlemen. They were still

just talking, having a good time, talking about lots of things and saying, "Hey, you know, are you sure you don't want a shot? You know, the manager's not around." I said, "No. You know, it's going to get me in trouble. And, you know, I'm 31 I don't" -- "I don't need to get a DUI on my way home from here. You know, thanks but no thanks." They go,
 5 "Well, come on, what if I gave you \$100?" I was like, "Well, that's -- "that's tempting," but, you know, I declined.

They were saying, "Oh, well, you know, it's rude not to. Why not? You know, he's offering you this." You know, just kind of joking around being kind of an obnoxious drunk, so to speak. So I grabbed a little glass and there's a gun on just about every bar that has soda, ginger ale, Coke, diet Coke, flat water, things like that. And I just spritzed just a tiny little thing in the glass and said, "hey, cheers. Thank you very much for coming in. My name's Chris. If you ever come back, I would, you know, like to take care of you again. Congratulations on your good fortune. Thank you very much." They
 10 took the check. They did give me a very nice tip. And that was pretty much the extent of dealing with those guests.

Q What did you spritz in your -- in your glass?

20 A Ginger ale. It's labeled G on the gun. There is no alcohol on the gun available. It's all soft drinks.

Q Was your glass the same as the guests' glasses?

25 A Yes. (Tr. 110-114:1-14).

Charging Party's toast with the guests was witnessed by Rosenthal. Charging Party was thereafter called into Rosenthal's office where he was confronted about drinking with the guests. He explained to Rosenthal that he did not drink alcohol and offered to take a drug/alcohol test to
 30 prove that he had not. (Tr. 115:9-17).

D. Chris Welch is Discharged

The following day when Charging Party arrived at work, Rosenthal escorted him to the
 35 human resources director's office. When he arrived, he was handed a peer review counseling form and then was questioned about the events of the prior evening. (Resp. Exh. 7). The form had been completed prior to the meeting and the box on the form entitled "separation of Employment" was checked. The description of the incident included a typed portion that stated that at approximately 11:30 Charging Party was observed "taking a shot of tequila with guests."
 40 (R. Ex. 7). Donna Lowell asked him if he had taken a shot of tequila with guests. He testified as follows regarding what happened next:

I said that I did not, "that that would be, you know, a mistake. I don't need to get a DUI. I'm 31. Jon was uncomfortable with it." And at that point I said, you know, "This is" --
 45 "what I really think this is about -- because I've noticed changes. I've been here for seven years. Things are different. You know, I'm being treated differently. It's a red flag. And what I really believe all of this is about is me complaining about the sick [leave] policy,

reselling the alcohol and the added sales tax on all of the gratuity."

Q And -- and did anybody respond to you saying that?

5 A It -- basically -- sort of. Jon basically got very irate. He turned red and just sort of -- for lack of a better word, he -- I was basically -- you know, filibuster. He just kept screaming and yelling. Would not answer any of the -- answer to any of the claims that I had made.

10 And it was at that point Donna quickly gets up. And I remember her hands shaking. She grabs my food handler's card, comes down and gives it to me and says, "Well, you know, Jon's the manager. It's his testimony. I think clearly at this point it's" -- "we just need to part ways."
(TR. 119:23-25, 120-1-25).

15 After Welch denied having violated the policy and expressed his belief as to the real reason for what he realized was going to be his termination, Lowell requested that he sign the peer review counseling form (the termination form). He refused and was "showed the door."
(Tr. 120: 24).

20 The above facts as recounted by Charging Party are undisputed in many respects. There is no dispute regarding the fact that Charging Party was serving individuals who offered to buy him a shot of tequila. There is no dispute that he approached his manager to speak to him about it. There is no dispute that after speaking with his manager, he went out to the guests and
25 continued to serve them. There is no dispute that Charging Party was unable to pour his own liquor because it was kept under lock and key and that a bartender had to pour any drinks. There is also no dispute regarding whether Charging Party drank a liquid from a glass that resembled the same snifter glasses that the guests were drinking out of. There is no dispute that the next day Charging Party was called into the office and after meeting with Lowell and Rosenthal was
30 terminated.

35 What is in dispute is whether Charging Party was in fact drinking alcohol (or as he testified was drinking ginger ale), and whether he admitted to Rosenthal and Lowell that he drank a shot or shots. After carefully considering the evidence of record, and as will be discussed in more detail below, I credit the testimony of Charging Party and do not credit the testimony of Rosenthal or Lowell regarding these basic disputed questions of fact.¹ Charging Party was subjected to adept and skillful cross examination yet at all times remained composed and confident and his testimony was convincing. He very easily could have advanced his
40 interests by denying drinking anything altogether. Instead, he candidly admitted that he drank out of the snifter glass.

¹ Similar findings were made in the unemployment compensation hearing. Although admissible but not controlling, the decision specifically found that "the supervisor testified that he observed the claimant drinking a substance, but no evidence was offered as to how he knew what that substance was." (GC Exh. 6 p. 3). See *Cardiovascular Consultants of Nevada*, 323 NLRB 67 (1997).

I find that Charging Party was confronted with a difficult situation with difficult guests which required an on the spot creative solution. His solution was to toast the guests with ginger ale which balanced the interest of serving as a good “ambassador,” complying with the wishes of his manager that he not drink alcohol, while at the same time keeping in mind his own interest of maximizing his gratuity. It should be noted that it was a requirement of his position description to proactively seek opportunities to delight guests and co-workers, and creatively identify solutions when problems occur. (Resp. Exh. 12). In keeping with the letter and spirit of his position description, I find this is exactly what he did.

E. Analysis

In order to determine whether an adverse employment action was effected for prohibited reasons, the Board applies the analysis articulated in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied, 455 U.S. 989 (1982), approved in *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393 (1983).

To establish an unlawful discharge under *Wright Line*, the General Counsel must first prove, by a preponderance of the evidence, that the employee's protected activities were a substantial or motivating factor in the employer's decision to take action against them. *Manno Electric, Inc.*, 321 NLRB 278, 280 (1996). The General Counsel makes a showing of discriminatory motivation by proving the employee's protected activity, employer knowledge of that activity, and animus against the employee's protected conduct. *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999). Proof of an employer's motive can be based upon direct evidence or can be inferred from circumstantial evidence, based on the record as a whole. *Ronin Shipbuilding*, 330 NLRB 464 (2000); *Robert Orr/Sysco Food Services*, 343 NLRB 1183 (2004).

If the General Counsel is successful, the burden of persuasion then shifts to the employer to show that it would have taken the same action even in the absence of the employee's protected activities. *Wright Line*, 251 NLRB at 1089; *Septix Waste, Inc.*, 346 NLRB 494, 496 (2006); *Williamette Industries*, 341 NLRB 560, 563 (2004).

Once the General Counsel has met its initial burden under *Wright Line*, an employer does not satisfy its burden merely by stating a legitimate reason for the action taken, but instead must persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of the protected conduct. *T&J Trucking Co.*, 316 NLRB 771 (1995); *Manno Electric, Inc.*, 321 NLRB at 280 fn. 12 (1996).

In applying *Wright Line* the Board has cautioned that “a judge's personal belief that the employer's legitimate reason was sufficient to warrant the action taken [cannot be] a substitute for evidence that the employer would have relied on this reason alone.” *Ingramo Enterprise*, 351 NLRB 1337, 1338, fn. 10 (2007), rev. denied 310 Fed. Appx. 452 (2d Cir. 2009).

The Board has also reminded that “[a]n employer has the right to determine when discipline is warranted and in what form The Board's role is only to evaluate whether the reasons the employer proffered for the discipline were the actual reasons or mere pretexts.” *Cast-Matic Corp.*, 350 NLRB 1349, 1358-1359 (2007).

Applying the law to the facts of the case, I find that the General Counsel has established a *prima facie* case. It is undisputed in this record that Charging Party engaged in protected and concerted activity when he complained about work policies including the sick leave policy that applied to part-time workers at the facility. See *Chromalloy Gas Turbine Co.*, 331 NLRB 858, 863 (2000) enfd. 262 F.3d 184, 190 (2nd Cir. 2001). See also, *Worldmark by Windham*, 356 NLRB No.104 (2011). Thus, I find that the first element of the *prima facie* case has been met.

The second element of the *prima facie* case is also met as it is undisputed that the employer was aware of Charging Party’s complaints. This is necessarily true because the complaints were made during the open pre-shift meetings when not only the manager but other employees were present.

The third element of the *prima facie* case is also met as the discharge took place within a time frame in which improper motives can be inferred. Charging Party’s discharge was set in motion the very day he complained about sick leave policies and effectuated the day after. I find the timing of the discharge sufficient to support an inference of animus. See *Sawyer of Napa*, 300 NLRB 131 (1990); *Olathe Health Care Center*, 314 NLRB 54 (1994); *Daniel Construction Co.*; 264 NLRB 569 (1982), enfd. 731 F.2d 191 (2nd Cir. 1984). This inference is further supported by the direct expression of anger by Rosenthal at the time of Charging Party’s discharge. Rosenthal erupted in anger when Charging Party confronted him with what he believed were the true reasons for his discharge, his having engaged in protected activity. I find Rosenthal’s anger tied directly to Charging Party’s clear opposition to being terminated for engaging in protected activity is a clear expression of animus. As will be discussed in more detail below, other evidence of animus is found in the fabrication of evidence to support the termination.

Having concluded that the General Counsel satisfied his initial burden under *Wright Line*, the burden shifts to the Respondent to prove, as an affirmative defense, that it would have discharged Charging Party even in the absence of his protected activities. This burden may not be satisfied by proffered reasons that are found to be pretextual, i.e., false reasons or reasons not in fact relied upon for the discharge. Rather, as the Board has consistently held, a finding of pretext defeats an employer's attempt to meet its rebuttal burden. *Stevens Creek Chrysler Jeep Dodge*, 357 NLRB No. 57, slip op. at 5 (2011), enfd. sub nom. *Mathew Enterprise, Inc. v. NLRB*, 498 Fed. Appx. 45 (D.C. Cir. 2012). Further, an employer does not carry its *Wright Line* burden merely by asserting a legitimate reason for an adverse action, where the evidence shows it was not the real reason and that protected activity was the actual motivation. *T&J Trucking Co.*, 316 NLRB 771, 771-773 (1995), enfd. mem. sub nom. *NLRB v. T&J Container Systems*, 86 F.3d 1146 (1st Cir. 1996); *Stevens Creek*, supra, 357 NLRB No. 57, slip op. at 5; *Metropolitan Transportation Services*, 351 NLRB 657, 659-660 (2007). Applying these principles, I find that the Respondent failed to satisfy its burden under *Wright Line*.

Respondent contends that Charging Party was terminated because he was insubordinate and drank alcohol with guests and his termination had nothing to do with his protected activities. Respondent’s defense is multi-layered. First, that Charging Party admitted to Rosenthal that he drank tequila, second, that Rosenthal witnessed Charging Party drink what was “presumed” to be tequila, third, that Rosenthal, upon observing Charging Party drink, called him into the office and he again admitted to drinking tequila, fourth, that after he spoke with Charging Party, Rosenthal

spoke with the guests who also confirmed that Charging Party was drinking tequila with them, fifth, that after Rosenthal spoke to the guests, he smelled Charging Party's glass and smelled tequila.

5 The defense although multilayered has one significant thread that runs throughout it and that is that the defense is dependent upon whether or not Rosenthal's testimony can be credited as truthful. As noted above, I observed the demeanor of the witnesses first hand and my credibility determinations are based in part on those observations. More importantly, I have studied the evidence of record which reveals discrepancies in the testimony of Rosenthal that lead directly to the conclusion that his testimony is suspect and unworthy of credence and that Respondent has failed to meet its burden.

Regarding the events of March 6, 2013, Rosenthal testified as follows:

15 A. He -- at around 11:00 p.m., the first -- the night of the 6th, the first discussion about shots with the guests, Chris had approached me in the office. I asked Chris what was -- how it was going on the floor.

He said, "Why, what did you see?"

20

I said, "Well, I saw your guests from 65 and 64, two tables, comingling."

He said, "Well, I may have taken a shot with the guests." At that point, I counseled Mr. Welch on not doing that. And you know, reminded him, he was well aware of the policies.

25

Q. So hold on. So you're telling me he told you at that time, he drank with the guests.

A. Drank alcohol, tequila, yes.

Q. Tequila.

30

A. Yes, sir.

Q. And was in uniform.

A. In uniform.

Q. On the clock.

A. But again --

35

Q. And all you did wa --

A. -- without witness --

Q. Hold on.

A. -- that act --

Q. My question is -- and you only counseled him?

40

A. Yes, sir.

Q. You didn't write him up.

A. No, sir. I counseled Chris. I asked him not to make me write him up for these infractions, not to do it again. He was well aware of the policies. And that we do things professionally. We do it off the floor. We do it in sanctioned tastings with vendors or for training for the staff. That we don't do it at the table.

45

I mean again, it's not about the guest that he's enjoying. It's the perception of what's

going on. The other guests that might be around. Or even another manager might walk by and just see a server out on the floor drinking with guests. It just -- it doesn't send the right message. It's not what we do at Hyatt or in Alto. (Tr. 58:17--25, 59:1--25, 60:1--5).

5

He elaborated on the details of what happened next in the testimony that follows:

Q. And on the night in question, March 6th, were you able to see Mr. Welch and the two guests?

10

A. I could.

Q. You saw them at the bar through that window?

A. I could -- I did.

Q. And what did you witness that night when you were walking past Cantina Due Bar, but looking through the window at Mr. Welch and his two guests?

15

A. I witnessed the three men raise their glass in drink, and witnessed Mr. Welch take a shot.

Q. What did you think when you saw that?

A. Damn was, I think, my initial reaction.

Q. And why is that?

20

A. Because it was upsetting. It was definitely not the way you want to end an evening and definitely not something you want to see one of your associates do.

Q. Reflecting back on your other testimony, what time did you say you had the discussion with Mr. Welch in your office where you instructed him not to do the drink or have a shot of tequila or any alcohol with guests?

25

A. 11 p.m., or just after.

Q. And approximately what time did you witness him when you were walking through the area -- depicted by Respondent's 19, what time did you see that?

A. About 11:30.

Q. So what did you do after seeing that?

30

A. Well, got stop[ped] dead in my tracks just because I was so miffed. I went -- continued to the back of the house after I watched that. Seconds after, Chris came back around, and I said, Chris, can I see you in the office for a moment? I walked down there, closed the door, and I said, now we have a problem. He said, okay.

35

I said I just saw you take that shot with the guests. He said, yes. And he apologized, said I'm sorry. Again, they're really cool. You know, they offered me \$100, and I was just showing them a good time.

40

Chris, that's not what we do, and I said, unfortunately, now you've put me in a position where I need to do my job and bubble this up to Donna Lowell, Carlos. I said, I'm not going to risk my job for you to drink with the guests. I said, unfortunately, you've left me no choice.

45

And he said, he understood. He apologized again. He said, you know, I know how these things play out. You know, it's been a pleasure working with you. And I said, Chris, I don't know how these things play out. I said, but I'm going to discuss it with them.

And, again, you know, he apologized. And we had a couple minutes dialogue, if that, about the conversation, and then from there, I kind of said, well, the reason is I have a complaint about another guest. And so, he kind of said in his -- oh, well, you know, everything was great.

5

I said, well, no, everything is not great, they complained about it and this is the group contact. This is a big deal. You know, this is -- they could let their meeting planner know, this could impact the way that they, you know, they book their business in the future.

10

I said, this is a big deal that you felt that you didn't provide a great service. And so, he, said, no, they left me extra money, everything's great. I said, no, you know, Chris, unfortunately, this is the situation.

15

So, you know, I told him about it, kind of finished that conversation up, and I just said, listen, just finish up for the evening. You know, finish up with those guests, and I kind of left it at that.

Q. Okay. At any point during that conversation, did he ever claim that he did not drink tequila?

20

A. He did not.

Q. Did he actually admit to you that he did drink tequila?

A. He admitted that he drank tequila.

Q. And he said he would drink it if for \$100

25

A. Yes.

Q. Did he ever say it was actually Ginger Ale?

A. He had never mentioned Ginger Ale.

Q. Did he ever say it was some liquid other than tequila?

A. He did not. (Tr. 378: 20--25, 379:1--25, 380:1--25, 381:1--17).

30

Rosenthal further testified that he spoke with the two guests and questioned them regarding whether Charging Party had taken a shot with them and he testified that, "they kind of jump up and say shot, more like shots." (Tr. 385:7--10). During this conversation with the

guests, he asserted that he picked up the glass that he saw Charging Party drinking from and smelled it. He testified that upon doing so he smelled tequila. (Tr. 387:22-25, 388:8--11).²

1. Rosenthal's Fabrication

5

The cornerstone of Respondent's defense is that Rosenthal, as part of his investigation smelled tequila in Charging Party's glass. Reviewing the notes that Rosenthal prepared, there is no mention whatsoever of smelling the glass of Charging Party. (Resp. Ex. 22). There is similarly no mention of smelling the glass in the peer review counseling form. There is no mention of him smelling the glass in Judge Montell's Decision in the State unemployment compensation case. (Resp. Exh. 7). Indeed the decision clearly states, "the supervisor testified that he observed the claimant drinking a substance, but no evidence was offered as to how he knew what that substance was." (GC Exh. 6 p. 3). Nor is there any mention of the smelling of the glass in Donna Lowell's notes dated March 7, 2013, the day of the alleged termination. (Resp. Exh. 27). The unemployment hearing preparation notes of Lowell also fail to mention any smelling of the glass. (Resp. Ex. 28).

10

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I find it highly unlikely that such an important detail would have been overlooked given the numerous opportunities to raise the issue in notes and communications (both formal and

² During the timeframe in question, Respondent had in place a substance abuse policy. That policy provided in pertinent part:

The use or possession of alcohol during the working day or reporting to work under the influence is also a violation of [Respondent's] substance abuse policy and may result in disciplinary action up to and including separation of employment.

If [Respondent] suspects an employee has violated the substance abuse policy, they may request that the employee submit to drug and/or alcohol testing. (GC Exh. 3:30)

Respondent's Drug-Free Workplace Policy, which includes its Substance Abuse Policy, states in pertinent part:[Respondent] also reserves the right to take all appropriate and lawful actions where there is reasonable suspicion to believe than an employee has violated this policy, including reasonable suspicion that the employee is under the influence of illegal drugs and/or alcohol. When an employee's appearance, behavior, speech or body odor (e.g. smell of alcohol) is indicative of the use of legal drugs which impairs safety or job performance or the use of any illegal drugs or alcohol, the employee will be suspended pending an investigation. The employee also may be subject to a physical examination, including blood, urine or Breathalyzer testing, at a designated medical facility. (GC Exh. 4).

Respondent's policies however contain an exception that sanctions the consumption of alcohol in some circumstances. The policy found under the heading of "Consumption of Alcohol Related to Business and/or Social Function," provides that "[e]mployees whose job responsibilities involve periodic entertainment of guests or others may be involved in situations in which alcohol is ordered and/or served, and it is not the intent of this policy to create an absolute ban against the consumption of alcohol in such circumstances. However, it is the obligation of such employees who may consume alcohol to do so responsibly and in moderation." (GC Exh. 4).

In addition to the above policies, Arizona state law forbids employees of a retail establishments from consuming liquor while serving customers. See A.R.S. Section 4-244(13).

informal) before trial. I find that more likely than not this testimony was fabricated in an attempt by Rosenthal to bolster Respondent’s case. This fabrication casts doubt on the veracity of all of Rosenthal’s testimony and Respondent’s asserted reasons for its actions and supports a finding that Respondent’s actions lacked good faith and were pretext.

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Moreover, I credit Charging Party’s testimony as truthful. Therefore, assuming for the sake of argument that Rosenthal indeed smelled Charging Party’s glass, he would have smelled ginger ale which has a distinctly different smell than tequila (as demonstrated by Respondent during the trial). If, after smelling ginger ale, he then nevertheless proceeded to terminate Charging Party there is no conclusion that can be drawn from this evidence but that the discharge was not based upon any good-faith belief but rather was pretext. See *Victor’s Café 52 Inc.*, 321 NLRB 504 (1996), a strikingly similar case, wherein a person alleged to be drinking alcohol was instead found to be drinking Roses’ Lime Juice and Club Soda and the allegation of alcohol use was found by the Board to be a pretext to discharge the employee. The reasoning and rationale of *Victor’s Café* is equally applicable to the facts of this case.

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2. Rosenthal’s Alleged Conversation With The Guests

Rosenthal, although conveniently, didn’t speak to the bartender who actually poured drinks and presumably had direct knowledge of the facts, testified that he spoke with two guests who specifically told him that Charging Party drank alcohol with them.³ In the first instance, given my findings discussed previously that Rosenthal fabricated his testimony, I question whether he also fabricated his testimony regarding what, if anything, the guests allegedly told him.

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The notes of Rosenthal were analyzed to determine if they comported with his testimony at trial regarding the incident. (Resp. 22). Regarding the alleged conversation with the guests, Rosenthal wrote that, “the two gentlemen then told me as well that Chris had been drinking **all**

³ It should be noted that testimony regarding what the guests told Rosenthal was admitted over the hearsay objection of counsel for the General Counsel. The testimony was admitted pursuant to FRE 801(c)(2) as it was not offered to prove the truth of the matter asserted. The practical effect of this is that any weight given the evidence is entirely dependent on whether or not Rosenthal’s version is found to be credible. As noted above, his testimony involved fabrication, was not reliable or trustworthy and accordingly his testimony regarding what (if anything) was allegedly said to him is accorded little weight. Moreover, assuming that one of Rosenthal’s versions of what was said is correct, the guests were inebriated. While the guests alleged statements were not offered to prove the truth of the matter asserted, Rosenthal allegedly relied upon the guest’s statements as truthful. This reliance is clothed of its own probative force. Rosenthal failed to credit his own employee who was employed by Respondent for 7 years, and in the past received distinguished performance evaluations. (Resp. Exh. 12). Instead, Rosenthal would purportedly rely on the statements of guests who were so inebriated they were offering to buy strangers shots of tequila and “hitting on women” after their wives retired for the evening, with at least one of the guests presenting as “an obnoxious drunk.” (Tr. 111:13, Tr. 113:25). It is also entirely within the realm of inherent probabilities that if anything was said to Rosenthal by the inebriated guests it simply may not have been intended by them to be taken as truthful or literal and may have simply been the type of banter that is commonly attributed to persons who have been drinking. Taking statements of inebriated guests whose statements may or may not have been truthful (or even meant to be truthful) over that of Charging Party’s given his adamant denial and request for an alcohol test suggests that Rosenthal had another agenda and in fact was “gunning” for Charging Party’s job. (Tr. 190-191).

night with them and I said yes I know of the 1 shot Chris had taken prior with them, and they replied, ‘**more than that**’” emphatically (emphasis added, quotations in original). (Resp. 22). At the trial, his testimony was different. He never mentioned anything regarding the guests telling him that the Charging Party had been “drinking all night with them” and his testimony regarding what was allegedly said differed from his written quoted language in his notes. He testified that he was told by the men that when referring to the amount of liquor consumed by Charging Party they said “shot- more like shots.” (Tr. 385).⁴ Rosenthal’s first version of an employee drinking “all night” and his own quoted language of “more than that” is significantly different than what he later testified he heard. Given that what is directly in issue is what Rosenthal allegedly heard, I find the previously discussed fabrication along with the discrepancies set forth above renders his testimony both unreliable and untrustworthy.⁵

3. The Alleged Admissions

Rosenthal’s contention that Charging Party admitted to him that he drank alcohol is also difficult to credit given the fact that what Rosenthal alleged was told to him changed at least three times in the record. When first questioned at trial, Rosenthal testified that Charging Party told him, “well I **may have** taken a shot with the guests (emphasis added).” (Tr. 58:24). When questioned later, he testified that Charging Party, came in the office and said, “**I may or may not** have just done a shot of tequila with these guys (emphasis added).”⁶ (Tr. 455: 15--20). Rosenthal’s notes indicate that Charging Party, “told me **he had taken a shot** with a guest at their request (emphasis added).” (Tr. 22). The discrepancy between the three versions is plainly apparent. The third is a blatant admission while the second version is not an admission at all. The shifting nature of his testimony regarding the alleged admission casts significant doubt upon the reliability of his testimony.

I also find other assertions by Rosenthal and Lowell that Charging Party admitted that he was drinking with guests suspect and not worthy of credence. Lowell testified that Charging Party, “said that he had taken a shot with a guest, because it was ‘\$100.00 dollars in his pocket.’ He said he took a shot of tequila.” (Tr. 502: 1--8). There is a direct conflict between Charging Party and Lowell regarding this alleged admission. Charging Party denies that he admitted drinking alcohol and further avers that in fact he refused to sign the separation document. The separation document which appears in the record is in fact unsigned. (Resp. Exh. 7). I find it inherently improbable that Charging Party complained about being discharged for engaging in protected and concerted activities, thereafter admitted drinking alcohol, and then refused to sign the separation papers. I find Charging Party’s version is more believable.

⁴ It is also important to note that the identity of the guests was known to Respondent but neither were called to testify at trial. Respondent instead chose to rely exclusively on the testimony of Rosenthal regarding this issue.

⁵ There are other inconsistencies in Rosenthal’s testimony regarding other issues about which he testified however to discuss them all would serve no useful purpose.

4. The Totality of the Evidence

Respondent’s defense when analyzed separately and in a compartmentalized fashion fails to meet its required burden under Wright Line. This conclusion is even more evident when
 5 viewed in its totality, and further supports a finding of pretext.

It is undisputed in the record that Charging Party could not pour his own drinks and in fact the drinks had to be poured by a bartender because the high priced tequila was kept under lock and key. (Tr. 111:5). Rosenthal testified he never saw Charging Party pour any drink and
 10 conveniently never attempted to speak to the bartender to determine whether or not he poured Charging Party any liquor for his own consumption. (Tr. 55:20-22). This suggests that he really didn’t want to know the answer, or stated differently he didn’t want the bartender to muddy up his plans to get rid of Charging Party.⁷ See *Kidde, Inc.*, 284 NLRB 78 (1987), wherein the Board citing perfunctory nature of the investigation conducted by Respondent found the discharge of an
 15 employee who was alleged to have been terminated for drinking alcohol was pretext finding that “it was as if Respondent’s agents feared that expanded investigation would not produce confirmation but perhaps even contradiction....” *Id.* at 87.

Other cumulative evidence of pretext lie in the fact that when confronted with the
 20 allegation that he was drinking alcohol, Charging Party immediately denied drinking and volunteered to be tested for alcohol. (Tr. 115:9--17). Respondent’s policy in effect at the time specifically provides that employees may be subject to “physical examination, including urine or Brethalyzer testing at a designated facility. (GC Exh. 4). Despite the policy, and Charging Party’s expressed desire to be tested, no testing was arranged. Similarly, when asked whether he
 25 even attempted to smell Charging Party’s breath to determine if there was any odor of alcohol Rosenthal testified, that he made no attempt to do so. (Tr. 63:13).

Similarly, the charge receipt records also support Charging Party’s version of events. He testified the guests bought four shots and gave two to the women the guests were “hitting on.”
 30 (111:11). He later testified that the guests ordered two more shots. (Tr.111). The charge receipts show that exactly six shots were ordered. (Resp. Exh. 5). This not only supports Charging Party’s version of events but also directly contradicts any assertion that Charging Party was “drinking all night” with the guests. This was information that was directly within Respondent’s control but Respondent failed and/or refused to consider it.

35 Other evidence of pretext can be found in the treatment of other employees in comparison to the treatment afforded Charging Party. It is undisputed in the record that no restaurant employee (other than Charging Party) was identified as ever having been disciplined and/or

⁷ Nor was the bartender or other person who may have poured the drinks called as a witness. Applying the adverse inference rule, I find that had the person been called his testimony would have reflected unfavorably upon Respondent. See, *In re DPI New England*, 354 NLRB 849, 858 (2009). “[W]hen a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge.” *International Automated Machinist., Inc.*, 285 NLRB 1122, 1123 (1987) (citing 2 Wigmore, Evidence § 286 (2d ed.1940); McCormick, Evidence § 272 (3d ed.1984).

1. Cease and desist from engaging in the following conduct:

(a) Terminating any employee for engaging in protected concerted activities, including but not limited to expressions of concern by employees regarding leave and attendance policies.

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

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

10 (a) Within 14 days from the date of this Order, offer Chris Welch full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Chris Welch whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against him, in the manner set forth in the remedy section of the decision.

15 (c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful termination of Chris Welch and within 3 days thereafter notify him in writing that this has been done and that the materials removed will not be used as a basis for any future personnel action against him and/or referred to in response to any inquiry whatsoever including but not limited to any inquiry from any employer, employment agency, unemployment insurance
20 office, or reference seeker or otherwise used against him in any way.

(d) Provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to
25 analyze the amount of back pay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Scottsdale, Arizona, copies of the attached notice marked “Appendix.”⁹ Copies of the notice, on forms provided by the Regional Director after being signed by the Respondent's authorized
30 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 addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily
35 communicates with its employees by such means. 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

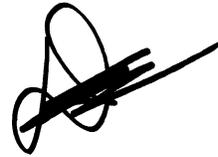
⁹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

all current employees and former employees employed by the Respondent at any time since February 24, 2011.

5 (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. July 31, 2014

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Dickie Montemayor
Administrative Law Judge

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 do anything that interferes with these rights.

WE WILL NOT discharge any employee for discussing wages, hours, and terms and conditions of employment, such as our sick leave policy, with other employees.

WE WILL NOT discharge you for engaging in concerted activities or because you bring group complaints to our attention.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

YOU HAVE THE RIGHT to discuss your wages, hours, and terms and conditions of employment including sick leave policies with other employees.

YOU HAVE THE RIGHT to bring group concerns regarding terms and conditions of employment to our attention.

WE WILL offer Chris Welch full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or to any other rights or privileges previously enjoyed.

WE WILL make Chris Welch whole for any loss of earnings and other benefits suffered as a result of our unlawful discharge.

WE WILL remove from our files any reference to the unlawful discharge of Chris Welch and notify him in writing that this has been done and that the materials removed will not be used as a basis for any future personnel action against him or referred to in response to any inquiry whatsoever including but not limited to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker or otherwise used against him in any way.

**HYATT CORPORATION d/b/a
HYATT REGENCY SCOTTSDALE**

(Employer)

Dated: _____

By: _____
(Representative) (Title)

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

2600 North Central Avenue, Suite 1800, Phoenix, AZ 85004-3099
(602) 640-2160, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/28-CA-112474 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, (602) 640-2146.