

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20, SUBREGION 37

AQUA-ASTON HOSPITALITY, LLC, D/B/A
ASTON WAIKIKI BEACH HOTEL AND HOTEL
RENEW

And

Case 20-CA-154749
20-CA-157769
20-CA-160516
20-CA-160517

UNITE HERE! LOCAL 5

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF
TO THE ADMINISTRATIVE LAW JUDGE

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I. STATEMENT OF THE CASE

On October 28, 2015¹, the Regional Director issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (Complaint) against Aqua-Aston Hospitality, LLC, d/b/a Aston Waikiki Beach Hotel and Hotel Renew (Respondent) in Case Nos. 20-CA-154749, 20-CA-155678², 20-CA-157769, 20-CA-160516, and 20-CA-160517, alleging that Respondent violated Section 8(a)(1) of the National Labor Relations Act, as amended (the Act), by: directing employees to stop participating in Unite Here! Local 5 (Union) organized rallies; directing employees to stop visiting the homes of coworkers to engage in Union and/or other protected concerted activities; impliedly threatening employees with the loss of their jobs for engaging in Union and/or protected concerted activities by telling them that they were lucky to have jobs; telling employees to apologize to Respondent for engaging in Union and/or protected concerted activities; and impliedly threatening off-duty employees with discipline for engaging in Union and/or protected concerted activities in non-work areas. The Complaint also alleges that Respondent violated Sections 8(a)(1) and (3) of the Act when it issued a written warning to its employees, Edgar DeGuzman a/k/a Edgar Guzman (Guzman) and Santos Ragunjan a/k/a Sonny Ragunjan (Ragunjan) to discourage employees from engaging in protected concerted activities.

Respondent filed an Answer to the Complaint denying the material allegations.

A hearing was held on February 2, 3, 4, and 5, 2016, before Administrative Law Judge Mara-Louise Anzalone.

¹ All dates refer to 2015 unless otherwise noted.

² On January 20, 2016, Region 20 issued an Order Severing Case No. 20-CA-155678, Approving Withdrawal of the Charge in Case No. 20-CA-155678, and Withdrawing Certain Complaint Paragraphs. Case No. 20-CA-155678 alleged that Respondent's termination of Edmund Legaspi violated the Act.

II. STATEMENT OF FACTS

A. Jurisdiction

Respondent, by its Answer, admits that it is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act. (GC Ex. 1(y)).³ With respect to jurisdiction, Respondent admits during the twelve-month period ending September 30, in conducting its business operations, it derived gross revenues in excess of \$500,000, and purchased and received at its facilities in Honolulu, Hawaii, goods valued in excess of \$5,000 directly from points outside the State of Hawaii. *Id.*

Respondent admits the Union is a labor organization within the meaning of Section 2(5) of the Act. *Id.*

B. Respondent's Operations

Respondent is a limited liability company with an office and place of business in Honolulu, Hawaii, and is engaged in the business of operating hotels, which provide food and lodging. (GC Ex. 1(w)). Respondent operates the Aston Waikiki Beach Hotel and Hotel Renew. (Tr. 624:24-625:4). Respondent manages both Hotels as one entity. (Tr. 625:7).

Respondent admits at all material times the following employees and their respective positions as supervisors and/or agents under Section 2(11) and 2(13) of the Act: Executive Vice President of Operations Gary Ettinger (Ettinger); Senior Vice President for Human Resources Velina Haines (Haines)⁴; Senior Vice President and Associate General Counsel Liane Kelly; General Manager of Aston Waikiki Beach Hotel and Hotel Renew Mark DeMello (DeMello);

³ References to the transcript shall be "Tr. [page number]:[line number]". References to the trial transcript Errata Sheet shall be "Tr. [page number]:[line number] errata". References to Counsel for the General Counsel's exhibits shall be "GC Ex. [number]". References to Respondent's exhibits shall be "Resp. Ex. [number]".

⁴ Haines retired from employment with Respondent in October 2015. (Tr. 679:14).

Rooms Division Manager of Aston Waikiki Beach Hotel and Hotel Renew Jenine Webster (Webster); Executive Housekeeper of Aston Waikiki Beach Hotel and Hotel Renew Marissa Cacacho (Cacacho); Front Office Manager of Aston Waikiki Beach Hotel and Hotel Renew Adam Miyasato (Miyasato); Front Services Supervisor at the Aston Waikiki Beach Hotel Lennon Kaipo Kaleikini; and Chief Engineer of Aston Waikiki Beach Hotel and Hotel Renew Bert Takahashi. (GC Ex. 1(y), 1(w)).

C. Unlawful Statements At May 19 Mandatory Meeting

About February 2015 Unite Here! Local 5 began a campaign among employees at the Aston Waikiki Beach Hotel and Hotel Renew to achieve a fair process for employees to decide Union representation. (GC Ex. 7; Tr. 628:1).

The Aston Waikiki Beach Hotel and Hotel Renew (Hotel) are hotels located adjacent to each other in Waikiki. (Tr. 681:11-22). In February 2015 Hotel employees began holding Union sponsored rallies outside the Aston Waikiki Beach Hotel and Hotel Renew. (Tr. 509:16-18; 628:1,9-11; 739:5-8). In response to the Union's presence, Respondent, among other things, held employee meetings with members of Hotel management. (Tr. 629:12-22). Hotel management initially held small meetings with no more than 15 employees, with up to five meetings a day. (Tr. 630:13-15, 21-22). In May 2015, Respondent reduced the number of meetings to two meetings a day. (Tr. 631:16-17). At the same time Respondent increased the number of employees at each meeting. (Tr. 631:16-17). Respondent's Executive Vice President of Operations Gary Ettinger conducted many of the employee meetings regarding the Union. (Tr. 630:1-3).

Although several witnesses were unsure of the date, it appears that the Hotel held two employee meetings at the Lokahi Room of the Aston Waikiki Beach Hotel on May 19. (Tr. 636:22; 686:8,21-22; 742:7,11; 789:5,8). Attendance at the May 19 meeting was mandatory. (Tr. 302:2). About 30-35 employees attended each meeting. (Tr. 637:18; 686:13; 742:14; 790:4). Employees from both Hotel Renew and Aston Waikiki Beach Hotel attended the meetings. (Tr. 216:14-18; 264:15-16; 507:1-4; 688:15-16). The chairs in the Lokahi Room on May 19 were arranged in a circle facing inward. (Tr. 216:6-8; 263:13; 303:2; 507:11; 686:25; 743:11; 790:11). Ettinger conducted the May 19 mandatory employee meeting. (Tr. 636:221-222; 638:8-9). Ettinger was holding a water bottle during the May 19 meeting. (Tr. 217:9,18; 263:2; 299:14; 505:20-22). Ettinger did not hold a water bottle at any other employee meeting. (Tr. 299:15-19). Several employee witnesses testified that Ettinger was holding the water bottle with one hand and banging it against his other hand and throwing the water bottle back and forth between his hands during the May 19 meeting. (Tr. 217:23; 218:3-7; 263:17-18; 301:7).

What Ettinger discussed at the May 19 employee meetings is in dispute. Hotel General Manager DeMello described Ettinger as “very intense” at the May 19 employee meeting. (Tr. 464:5-7; GC Ex. 14). Nearly every witness testified that Ettinger discussed the practice of employees banging pots and pans at early morning Union rallies held just outside the Hotel. (Tr. 223:19-20; 237:22; 267:12, 15; 268:1; 306:17; 640:10; 641:6-7; 645:13; 691:6-8; 794:23). Several employee witnesses testified that Ettinger told the employees at this meeting to stop banging pots and pans. (Tr. 223:25; 237:23-25; 239:20-23; 266:15 errata; 306:17-19). Ettinger told the employees that “enough is enough” and that he was tired. (Tr. 264:20 errata; 306:19). Hotel Rooms Division Manager Jenine Webster noted that Ettinger stated at the May 19

employee meeting that the Union should call for a vote and “not do things via pots, pans...”. (Resp. Ex. 18, 19; Tr. 794:21-24).

Several employee witnesses testified that Ettinger told employees at the May 19 meeting that they were lucky to have work or lucky to have jobs. (Tr. 224:3, 238:1-3; 265:13-14; 308:6). Respondent’s Human Resources Vice President Haines wrote that Ettinger stated at the May 19 meeting that the Union is disrupting the Hotel’s business, which could affect work opportunity for employees. (Resp. Ex. 16). General Manager DeMello noted that Ettinger stated at the May 19 meeting that the Union wants to disrupt the Hotel’s business. (Resp. Ex. 17). Webster also noted that Ettinger stated at the May 19 meeting that the Union wanted to disrupt the Hotel’s business which would take away work opportunities for employees. (Resp. Ex. 18, 19). Despite denying he made any such statement, Ettinger’s notes made in preparation for to the May 19 meeting state that the Union had only created “*pilikia*”, the Hawaiian word for trouble. (GC Ex. 16; Tr. 658:18).

At the May 19 meeting Ettinger also told the gathered employees that the Hotel had received complaints about employees being visited at their homes by their co-workers and Union representatives. (Tr. 318:10; 640:8; 644:8-10; 689:7-9; 747:5; 749:5; 794:2-3). Employee witnesses testified that Ettinger told the employees to stop bothering their coworkers at their homes. (Tr. 270:23-24; 306:24-25). Ettinger told the employees that they had the right to call the police if their visitors did not leave. (Tr. 307:3-4; 645:2; 796:5-7).

Ettinger asked the employees at the May 19 meeting if they were happy cashing their checks while they were doing this to the Hotel. (Tr. 273:5 errata). Ettinger told the employees that if they wanted to, the employees could stop by his office and apologize. (Tr. 274:7-8, 11;

309:24; 310:19). Ettinger did not explain for what reason he wanted the employees to apologize. (Tr. 274:24).

Ettinger also spoke at this meeting about employees who were going on the radio discussing the Hotel. (Tr. 693:11-12; 747:6; 794:8; 649:18). Ettinger discussed the Union's difficulties with other employers, including Kaiser Permanente and the Hilton Hawaiian Village. (Tr. 308:23; 689:23; 782:19; 793:21). Ettinger told the gathered employees that employees represented by Unite Here! Local 5 at Kaiser had not received any wage increases and had instead lost wages. (Resp. Ex. 16, GC Ex. 16). Ettinger told the gathered employees that the Union had hundreds of grievances with Hilton still pending. (Resp. Ex. 16). Ettinger stated that without the Union the Hotel and employees can work together. (Resp. Ex. 16). Ettinger shared with the employees that his father had a pension with Unite Here! Local 5, and when his father died, the money in the pension did not pass to his mother. (Tr. 513:21; 643:12; Resp. Ex. 16). Ettinger told the employees to ask the employees at United Airlines and Aloha Airlines about their pensions, because employees at both companies had lost their pensions. (Resp. Ex. 16, Tr. 650:3-5; 689:21).

D. Threatening Trespass

The ground floor at the Aston Waikiki Beach Hotel includes a lower lobby and porte-cochère, or covered driveway. (Tr. 56:14; GC Ex. 4, 5, 6). The porte-cochère driveway enters the Hotel from the side of the Hotel fronting Paoakalani Avenue. (Tr. 56:20-22; 145:10; GC Ex. 4). The driveway exits the Hotel, back onto Paoakalani Avenue, approximately 120 meters from the driveway entrance. (Tr. 56:22). The Hotel driveway creates a porte-cochère on the ground floor of the Hotel. (GC Ex. 4, 6). The lower lobby and porte-cochère are separated by the driveway curb. (Tr. 150:6). The lower lobby of the Hotel is open to the public. (Tr. 768:25-

769:1; 117:1213; 116:9-15). The Hotel's lower lobby contains a small convenience store and multiple shops and restaurants that are open to the public. (Tr. 769:11-12; 768:13-24; 115:2; 117:2-4). There are several lounge seats for guests' use in the lower lobby of the Hotel. (Tr. 116:1-3). The restaurants and businesses in the lower lobby do not offer food service to Hotel guests seated in the lounge seats in the lower lobby. (117:24-118:15). The Hotel does not offer regular guest check-in in the lower lobby. (Tr. 60:3-4). The Hotel does offer remote check in at the lower lobby for large parties with more than 75 guest rooms. (Tr. 756:8-14). The Hotel gets anywhere from zero to five such large groups a month, mainly in the spring and fall. (Tr. 756:17-19; 765:20-21). The lower lobby does not have a concierge desk. (Tr. 60:15). The bell and valet departments operate a single combined desk in the lower lobby. (Tr. 68:15). The Hotel also assigns one housekeeper lobby attendant to the lower lobby. (Tr. 772:2-5). The lobby attendant may also be assigned to cover both the upper and lower lobby, depending on the occupancy level of the Hotel. (Tr. 772:11-15).

On August 10, interim Hotel Front Services Manager Makana Kaanoi (Kaanoi) informed Hotel Rooms Division Manager Webster that Hotel employee Jonathan Ching (Ching) would be passing out fliers in the lower lobby the next day. (Tr. 671:22; 821:18-21). Kaanoi testified that earlier that day Ching told Kaanoi that on the next day he would be passing out flyers in the Hotel's lower lobby with another individual. (Tr. 671:10). Kaanoi and Ching had discussed the Union on previous occasions. (Tr. 675:12-14). Kaanoi had also witnessed Ching participate in a Union rally during which Ching, along with several other employees, attempted to have Kaanoi deliver a basket of food to Hotel management as part of the Union rally. (Tr. 676:8-13). Kaanoi understood that Ching would be passing out Union flyers on August 11. (Tr. 677:1).

On August 10, DeMello, Webster, and Kaanoi met with Hotel security supervisor Andrew Smith (Smith). (Tr. 44:18; 49:17,20-21). Webster informed Smith that Ching would be at the Hotel the next morning passing out literature. (Tr. 50:1-2). Webster instructed Smith to issue a verbal warning to Ching not to pass out flyers in the lower lobby. (Tr. 50:7-8; 62:24-25). DeMello instructed Smith to “trespass” Ching if he did not comply with the verbal warning.⁵ (Tr. 50:13-14; 62:12-16). Smith testified that when he trespasses a non-employee of the Hotel, the person is first given a verbal warning to leave the property and their picture is taken and a flyer would be generated with their picture stating that the person had been verbally trespassed from the property.⁶ (Tr. 64:18-24). The person would be advised not to return to the property. (Tr. 64:22). If the person who had previously been verbally warned returns to the property, that person is officially trespassed. (Tr. 65:1-3). When a person is trespassed that person is escorted off property by the police and that person would not be allowed to return to the Hotel property for a period of one year. (Tr. 65:8-11). If a trespassed person returns to the property within a year, the police are called and that person would be arrested. (Tr. 65:11-14).

On August 11, at approximately 7:08 am, Ching and Hotel Night Auditor Lakai Wolfgramm (Wolfgramm) entered the Hotel porte-cochère/lower lobby area to hand out flyers. (Tr. 157:8-10; GC Ex. 15:Camera 10). Both Ching and Wolfgramm were off duty at the time. (Tr. 137:7; 193:18-20). Ching and Wolfgramm intended to hand out flyers that declared, among other things, that the employees at the Hotel want a fair process to decided union representation. (GC Ex. 7; Tr. 158:18-22). Ching and Wolfgramm stood in the two to three foot space between

⁵ DeMello testified that it was his understanding that issuing a trespass to an employee would trigger an investigation into that employee. (Tr. 761:10-13). DeMello testified that he did not know of any occasion where the Hotel issued a trespass to an employee. (Tr. 761:19).

⁶ Smith testified that he had never trespassed an employee of the Hotel. (Tr. 50:15-17; 65:21). Smith also testified that he had never before been instructed, by Hotel management, to “trespass” an employee of the Hotel. (Tr. 47:5-7).

the porte-cochère curb and two pillars in the lower lobby. (Tr. 157:18-19; 195:1-2; GC Ex. 9). Ching stood in front of one pillar in the lower lobby, facing the porte-cochère driveway, in the space between pillar and the curb of the driveway. (Tr. 68:1-3; 157:18-19; GC Ex. 5, 9). Wolfgramm stood at the pillar to Ching's left, also facing the porte-cochère driveway, in the space between the pillar and the curb of the driveway. (Tr. 68:23-69:5; 195:1-12; GC Ex. 5, 9, 15:Camera 11). Less than one minute after Ching and Wolfgramm took their positions in the porte-cochère/lower lobby, Smith approached Ching, accompanied by Hotel Security Guard Paul Pagan (Pagan) and Hotel Front Office Manager Adam Miyasato (Miyasato). (Tr. 51:2,17; 52:10-11; 71:11; GC Ex. 15:Camera 10). Smith testified that he observed Ching and Wolfgramm in the lower lobby of the Hotel holding pamphlets that Smith described as having "Local 5 material on it." (Tr. 106:4).

The precise content of the conversation between Smith and Ching and Wolfgramm is in dispute, although not in a material way which would impact the unlawful nature of Respondent's actions. Smith testified that he gave Ching a verbal warning that he was not allowed to pass out pamphlets on Hotel property. (Tr. 52:13-15; 20-23). Smith testified that Ching asked Smith what would happen if he did not stop. (Tr. 71:19). Ching testified that Smith told Ching that they were not allowed to be there and that if they did not move, Smith would have to trespass Ching and Wolfgramm. (Tr. 160:12). Ching testified that he told Smith that he had the right to be there and what Ching was doing was legal. (Tr. 160:8-9). Smith testified that he reminded Ching of the Hotel policy stating that Ching could not pass out flyers on Hotel property. (Tr. 71:23-25). Ching testified that Smith told Ching that he and Wolfgramm could not be there and asked Ching to leave. (Tr. 160:14-15). Ching asked Miyasato if he could have some other representative tell Ching what to do other than Smith who was an outside contractor. (Tr. 72:25-

73:2). Respondent's admitted agent Miyasato gestured toward Smith and told Ching that "he'll do." (Tr. 73:4). At that time Wolfgramm made her way over to where Smith and Ching were standing. (Tr. 74:1-3). Smith told Ching that Smith represented management and that he spoke on their behalf. (Tr. 74:9-10). Smith told Ching and Wolfgramm that if they continued to leaflet they would be trespassed. (Tr. 76:12-14; 197:19-21). Ching testified that Smith stated that Smith was going to call the Honolulu Police Department and have Ching and Wolfgramm trespassed if they did not leave. (Tr. 161:13-14). Union representative Morgan Evans (Evans) approached Smith, Pagan, Miyasato, Ching and Wolfgramm. (Tr. 75:4; GC Ex. 15:Camera 10 and 11). Evans told Smith, Pagan, and Miyasato that Ching and Wolfgramm had a right to pass out flyers on Hotel property. (Tr. 75:10-11). Evans continued that Smith was violating Ching and Wolfgramm's rights. (Tr. 75:11). Smith told Evans that she was trespassing and asked her to leave the property. (Tr. 75:17-18).

Smith told Ching and Wolfgramm that it was up to them what they wanted to do. (Tr. 76:5-6). Smith, Pagan, and Miyasato walked away leaving Evans, Ching, and Wolfgramm in the porte-cochère/lower lobby area. (Tr. 76:6-7). A few seconds later Ching, Wolfgramm, and Evans left the porte-cochère/lower lobby and exited the Hotel property. (Tr. 164:9-13; GC Ex. 15:Camera 10, 11). Neither Ching nor Wolfgramm prevented any Hotel employees from executing their work duties while standing in the porte-cochère/lower lobby on August 11. (Tr. 78:22; 166:25-167:1; 201:14-16). Neither Ching nor Wolfgramm blocked guests or employees from walking in the area. (Tr. 78:19; 167:2-3; 201:8-13).

E. Discipline For Engaging In Protected Concerted Activities

On June 30, Hotel Maintenance Engineer Edgar Guzman and Utility Housekeeper Santos "Sonny" Rangunjan were both disciplined for engaging in protected concerted activity. (GC Ex.

10, GC Ex. 11). Guzman received a written warning on June 30 for asking fellow employee, Houseman Dany Pajinag (Pajinag), on June 5, if Pajinag would have his picture taken for the Union. (Tr. 433:9-13, GC Ex. 10). Guzman was also given a written warning for asking Pajinag on June 9 to sign a Union authorization card and for asking Pajinag if he would have his picture taken for the Union. (Tr. 433:9-13, GC Ex. 10).⁷ Ragunjan received a written warning on June 30 for asking the same employee, Dany Pajinag, on May 21, if Pajinag would sign a Union authorization card and have his picture taken for the Union. (GC Ex. 11). Pajinag also received, as part of his June 30 Corrective Action, a written warning for allegedly saying to Pajinag on June 13 to “Be careful and watch your back all the time.” (GC Ex. 11).⁸

Pajinag testified that on May 21 Ragunjan approached Pajinag on the 11th floor of the Hotel. (Tr. 595:3). According to Pajinag, Ragunjan was vacuuming the hallway carpet outside room 1102. (Tr. 595:3,17). Ragunjan asked Pajinag if he would sign a Union authorization card and have his picture taken for the Union. (Tr. 595:20-22; 596:2-3). Pajinag testified that he did not say anything in response to Ragunjan’s request. (Tr. 596:4-5). According to Hotel Executive Housekeeper Marissa Cacacho (Cacacho), Pajinag prepared a written statement and gave the statement to Cacacho on May 22. (Resp. Ex. 13; Tr. 546:14). Pajinag states in his May 22nd written statement that on May 21 Ragunjan asked Pajinag to have his picture taken and sign a Union authorization card. (Resp. Ex. 13). On May 22 Pajinag did not notify Cacacho of any other incidents that occurred between himself and Ragunjan other than what allegedly happened on May 21. (Tr. 592:17). That same day, on May 22, Cacacho notified Hotel General Manager DeMello and Hotel Room’s Division Manager Webster of Pajinag’s interaction with Ragunjan.

⁷ The June 10 date referenced in Guzman’s Corrective Action appears to be an error, and should refer to June 9.

⁸ DeMello testified that the reference to June 11, on Ragunjan’s Corrective Action is incorrect and that the correct date should read June 13.

(Tr. 428:23-25; 557:15). DeMello discussed with Respondent's then Vice President of Human Resources Haines about Ragunjan asking Pajinag to have his picture taken for the Union and to sign a Union authorization card. (Tr. 473:23-25). Respondent did not start an investigation into Pajinag's complaints immediately after his May 22 complaint. (Tr. 473:22-23).

On June 9, Pajinag notified Cacacho that Maintenance Engineer Edgar Guzman had spoken to Pajinag on June 5 and on June 9. (Tr. 560:1). On June 9 Pajinag gave Cacacho a handwritten statement describing his alleged interactions with Guzman. (Tr. 597:14). According to Pajinag's June 9th written statement, on June 5, Guzman had asked Pajinag to have his picture taken for the Union. (GC Ex. 13). Pajinag also claims in his June 9th written statement that earlier on June 9, Guzman spoke to Pajinag in the laundry room of the Hotel and asked Pajinag to have his picture taken for the Union and asked Pajinag to join the Union. (GC Ex. 13). Pajinag claimed that Guzman "always bothers" him and that he was "not comfortable" discussing the Union with Guzman. (GC Ex. 13). Pajinag also claimed that he told Cacacho on June 9 that Guzman had approached Pajinag on prior occasions. (Tr. 599:25-600:1). Pajinag could only recall four or five times that Guzman had talked to him about the Union. (Tr. 600:14-16). Pajinag did not describe how long each interaction with Guzman or Ragunjan lasted, nor did he identify the time period within which the four or five alleged interactions occurred. Guzman testified that he had three interactions with Pajinag where they discussed the Union. Guzman testified that each interaction lasted at most one minute in length. (Tr. 340:3,12; 345:4; 353:4; 356:5). Cacacho conveyed Pajinag's June 9 written statement to DeMello and Webster on June 9. (Tr. 568:8). DeMello could not recall Cacacho describing any threatening behavior or conduct by Guzman toward Pajinag. (Tr. 444:24). After learning that Guzman had discussed

the Union and unionization with Pajinag on June 5 and June 9, DeMello and Webster started an investigation into Pajinag's complaints. (Tr. 430:20; 432:9-13; 433:9-13).

DeMello and Webster met with Guzman on June 10. (Tr. 482:6). What was discussed at that meeting is in dispute. DeMello and Webster testified that DeMello asked Guzman if he had someone to take a picture for any non-work related purpose during work hours and work time. (Tr. 482:11-13; 811:22-23). DeMello and Webster testified that Guzman responded no. (Tr. 482:13; 811:24). DeMello testified that Guzman asked who made the complaint and asked if it was a man or a woman. (Tr. 482:24-25).

According to DeMello, Guzman said he would not "do that" and that he "read the poster on the bulletin board."⁹ (Tr. 483:1-2). Guzman testified that at the meeting DeMello stated that someone had told DeMello that Guzman was bothering an employee. (Tr. 357:13). According to Guzman he asked DeMello who told DeMello about that. (Tr. 357:18). Guzman testified that DeMello said he could not tell Guzman who the witness was, that DeMello wanted to protect the witness. (Tr. 357:22-23). DeMello did not identify Pajinag as the employee making the complaint against Guzman. (Tr. 358:1). DeMello and Webster did not ask anything else of Guzman at the June 10 meeting. (Tr. 826:16,20).

DeMello and Webster met with Pajinag on June 15. (Tr. 433:17-19). Pajinag discussed with DeMello and Webster his June 5 and June 9 interaction with Guzman. (Tr. 433:22). Pajinag explained to DeMello and Webster that during both the June 5 and June 9 interactions Guzman asked Pajinag to have his picture taken for the Union. (Tr. 434:10). DeMello testified that Pajinag did not claim that any behavior or conduct by Guzman at their June 9 interaction

⁹ DeMello testified Guzman did not explain what that statement meant. (Tr. 483:5). DeMello testified that there was a document in the employee notice board at the Hotel that discussed solicitation. (Tr. 483:8-10).

was threatening, and that DeMello himself did not believe that Guzman's conduct, as described by Pajinag, was threatening. (Tr. 438: 19-20,23). At the June 15 meeting, Pajinag did not describe any threatening conduct or behavior by Guzman at their June 5 interaction. (Tr. 439:13). At the June 15 meeting, Pajinag did not identify for DeMello or Webster any other dates or times he interacted with Guzman, other than June 5 and June 9. (Tr. 440:7).

At the June 15 meeting Pajinag also described to DeMello and Webster his two interactions with Ragunjan as referenced in Ragunjan's June 30 Corrective Action. (Tr. 441:25; GC Ex. 11). Pajinag stated that on May 21 he was approached by Ragunjan and Ragunjan asked Pajinag to sign a Union card. (Tr. 442:7-8). Pajinag did not identify any threatening conduct or behavior exhibited by Ragunjan during the May 21 interaction. (Tr. 443:4-6). Ragunjan's June 30 Correction Action states that on June 13 Ragunjan told Pajinag to "be careful and watch your back all the time." (GC Ex. 11). No testimony was given describing what Pajinag told DeMello or Webster at the June 15 meeting regarding his June 13 interaction with Ragunjan. Pajinag did not identify any other dates or times of previous interactions with Ragunjan. (Tr. 442:25). At the June 15 meeting Pajinag did not identify any threatening conduct or behavior by Ragunjan during any interactions other than the interactions described in Ragunjan's June 30 corrective action. During Pajinag's testimony, he said nothing about the length of any of his alleged conversations with Ragunjan. DeMello did not meet with Pajinag after June 15. (Tr. 443:10).

On June 19, DeMello and Webster had a second meeting with Guzman. (Tr. 443:19). At the meeting DeMello asked Guzman to make a written statement. (Tr. 359:10). DeMello asked Guzman if there were any changes to Guzman's statement he gave on June 10. (Tr. 359:13-15). Guzman provided a written statement at the June 19 meeting. (Tr. 360:7; Resp. Ex. 11).

Guzman wrote in his statement that there was “no change” to the statement he provided on June 10.

DeMello and Webster also met with Ragunjan on June 19. (Tr. 443:14). DeMello asked Ragunjan if he had ever asked anyone to take a picture for a non-work related purpose during work time. (Tr. 484:17-18; 812:8-9). Ragunjan said no. (Tr. 484:20). DeMello asked Ragunjan if he had ever threatened anyone on the loading dock. (Tr. 485:1-2). Ragunjan replied no. (Tr. 485:2).

Other than Pajinag’s complaints, DeMello did not receive any complaints about Guzman or Ragunjan’s conduct. (Tr. 447:15; 448:23). During the investigation, DeMello did not conduct interviews with any other employees other than Ragunjan, Guzman, and Pajinag. (Tr. 447:8-15). DeMello and Webster concluded their investigation into Pajinag’s complaints by June 30. (447:16-23). DeMello did not receive any additional complaints from Pajinag against Guzman or Ragunjan other than those identified in Ragunjan and Guzman’s June 30 Corrective Actions. (Tr. 448:10-14; 448:24-449:3). Once the investigation was completed, DeMello and Webster forwarded the information gathered during the investigation to Human Resources Vice President Velina Haines. Haines made the decision to issue written warnings to Guzman and Ragunjan. (Tr. 708:5). Haines testified that she issued written warning to Ragunjan and Guzman to prevent similar activities from happening again. (Tr. 715:4-5). Haines testified that Guzman and Ragunjan’s conduct was not the kind of conduct Respondent wanted employees to have towards each other. (Tr. 715:5-6). On June 30, Respondent issued the written warning Corrective Action to Guzman regarding his June 5 and June 9 interactions with Pajinag and to Ragunjan regarding his May 21 and June 13 interactions with Pajinag. DeMello signed both Corrective Actions for Respondent. (GC Ex. 10, 11).

III. ARGUMENT

A. Respondent's Motion Requesting the Administrative Law Judge Take Judicial Notice of Certain Documents and Facts Should Be Denied

Respondent filed a Motion during the hearing that the Administrative Law Judge take judicial notice of certain documents relating to the climate of Anchorage Alaska and Honolulu, Hawaii. Respondent's motion was admitted as Resp. Ex. 20. Counsel for the General Counsel (General Counsel) opposes the Motion to take judicial notice. General Counsel questions the relevancy of the climate data for Anchorage, Alaska and Honolulu, Hawaii. Further, General Counsel objects to Exhibit 6 of Resp. Ex. 20. Respondent has not produced any foundation for Exhibit 6 as to what the exhibit purports to represent and the date of the image reflected in Exhibit 6. Because of the lack of relevance and lack of foundation of Respondent's Exhibit 20, General Counsel respectfully urges the Administrative Law Judge to deny Respondent's Motion.

B. General Counsel's witnesses should be credited where in conflict with that of Respondent's Witnesses

In determining whether Respondent committed the unfair labor practices alleged in the Consolidated Complaint, the Administrative Law Judge is required to make credibility determinations. The merits of the allegations depend in large measure on witness credibility regarding the conduct witnesses observed and experienced at or around the workplace. A credibility determination may rely on a variety of factors, including the context of each witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, and inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction*, 339 NLRB 303, 305 (2003); *Daikichi Suchi*, 335 NLRB 622,

623 (2001) (*citing Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996), *enfd.* 56 Fed. Appx. 516 (D.C. Cir. 2003)).

Nearly all of the witnesses called to testify by the General Counsel were employed by Respondent at the time that they testified at hearing. The Board has consistently held that an employee's continued employment by a respondent may be properly weighed and considered in resolving credibility issues. *In Gold Standard Enterprises, Inc.*, 234 NLRB 618, 619 (1978), the Board held that:

...every reason exists for finding the testimony of these employees particularly credible since both were still in Respondent's employ at the time of the hearing.... The Board has long recognized that the testimony of a witness in such circumstances is apt to be particularly reliable, inasmuch as the witness is testifying adversely to his or her pecuniary interest, a risk not lightly undertaken. (footnote omitted)

Similarly, in *Shop-Rite Supermarket*, 231 NLRB 500, 505 fn. 22 (1977), an administrative law judge, with Board approval, observed that the testimony of current employees that is adverse to their employer is "... given at considerable risk of economic reprisal, including loss of employment ... and for this reason not likely to be false." In *S.E. Nicols, Inc.*, 284 NLRB 556, 556 fn. 2 (1987), the Board expressly affirmed the administrative law judge's credibility resolutions finding that the testimony of employees of the respondent was more reliable than that of the respondent's supervisors because the employees were testifying against their own interest. In the instant case, each of the employees called by the General Counsel testified against Respondent and offered testimony that contradicted that of Respondent's management. *See also Flexsteel Industries*, 316 NLRB 745 (1995). Each of General Counsel's witnesses testified

candidly and forthrightly and did not attempt to evade questions during cross-examination.

For the reasons stated above, General Counsel's witnesses should be credited where in conflict with that of Respondent's Witnesses.

An important factor in assessing a witness's credibility is whether the witness testified in the presence of another witness who might thereafter tailor their own testimony so as to avoid contradictory statements. In the instant case, each of the General Counsel's witnesses testified outside the presence of one another.¹⁰ Respondent's witnesses Velina Haines and Jenine Webster were present for nearly all witness testimony. Their testimony should be not be credited where it conflicts with that of General Counsel's Witnesses. Furthermore, the testimony of Respondent witnesses Marissa Cacacho, Alona Afable (Afable), and Dany Pajinag should not be credited. Cacacho's testimony appeared to be over exaggerated and rehearsed. Afable's testimony appeared rehearsed and overly dramatic. Pajinag's was testimony was confusingly guided by Respondent. Pajinag could not recall significant details, including the majority of interactions with Guzman, which Respondent relied upon in its defense of the discipline issued.

C. Statements Made By Ettinger's During A Mandatory Meeting Were Coercive and Violated Section 8(a)(1) of the Act

It has long been established that a violation of Section 8(a)(1) of the Act does not "turn on the employer's motive or whether the coercion succeeded or failed [but instead on] whether

¹⁰ Union organizer Morgan Evan (Evans) was presented as a witness and was also present for all witness testimony during the hearing. Evans testimony was limited to authenticating the video evidence produced by Respondent. Evans did not testify to any substantive issues discussed during the hearing.

the employer engaged in conduct which, it may be reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *American Freightways Co.*, 124 NLRB 146, 147 (1959). See also *Double D Construction*, 339 NLRB 303 (2003); *Yoshi's Japanese Restaurant, Inc.*, 330 NLRB 1339 (2000); *Westwood Health Care Ctr.*, 330 NLRB 935 (2000); *Williamhouse of California, Inc.*, 317 NLRB 699, 713 (1995); *Sage Dining Service*, 312 NLRB 845-46 (1993); *NLRB v. Burnup & Sims*, 379 U.S. 21, 31(1964). The test of whether a statement or conduct would reasonably tend to coerce is an objective one, requiring an assessment of all the surrounding circumstances in which the statement is made as the conduct occurs. *Flying Food Group, Inc.*, 345 NLRB 101, 106 (2005); *Electrical Workers Local 6 (San Francisco Electrical Contractors)*, 318 NLRB 109 (1995); *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). The Board has noted in this regard that the context of statements can supply meaning to the otherwise ambiguous or misleading expressions, if they are to be considered in isolation. *Joseph Chevrolet, Inc.*, 343 NLRB 7, 9 (2004); *Debbie Reynolds Hotel*, 332 NLRB 466 (2000).

The evidence adduced at trial clearly demonstrates that Respondent intended to dissuade employees from organizing and to cease their protected, concerted activities. Throughout the May 19 meeting, Ettinger disparaged the Union and pointed to the futility of the Union's representation. According to Respondent's own witnesses, Ettinger pointed to the futility of the Union's representation of employees at Kaiser Permanente (Kaiser) and the Hilton Hawaiian Village (Hilton). (Resp. Ex. 16, 17, 18, 20, GC Ex. 16). Ettinger told employees that Union represented employees at Kaiser had not received any wage increases and had lost wages. (Resp. Ex. 16, GC Ex. 16). Ettinger also told employees that the Union had hundreds of grievances that it filed with Hilton that were never resolved. (Resp. Ex. 16). Ettinger urged that without the

Union the Hotel and employees can work together. (Resp. Ex. 16). Ettinger told the employees to ask the employees at United Airlines and Aloha Airlines about their pensions because employees at both companies had lost their pensions. (Resp. Ex. 16, 19; GC Ex. 16). Ettinger described how his father was a long time Unite Here! Local 5 member and had a Union pension. (Tr. 220:7-9, 513:21-2, 747:20-22; Resp. Ex. 16, GC Ex. 16). Ettinger described how when his father died, none of the money in his Union pension went to his mother. (Tr. 513:23-24, 514:15-16, 643:14-17; 747:22-24; 793:14-15; Resp. Ex. 16, GC Ex. 16). Ettinger stated that he and his brother had to financially support his mother because she did not get any money from his father's pension. (Tr. 220:9-10). Ettinger told the gathered employees that the Union had brought antagonism, divisiveness, in-fighting, and disruption to the Hotel and its employees. (Resp. Ex. 17, 18, 19; GC Ex. 16). Ettinger told the employees at the May 19 meeting that the Union has been spreading lies about the Hotel and lying to Hotel employees. (Tr. 265:10-11; Resp. Ex. 17, 18, 20).

Several witnesses testified to the tone of the May 19 meeting conducted by Hotel Vice-President Gary Ettinger. In an email to Ettinger the afternoon after the May 19 meetings, Hotel General Manager Mark DeMello described Ettinger as being "very intense" at the May 19 meetings. (Tr. 464:7; GC Ex. 14). In the same email DeMello conveyed to Ettinger that the "pro-company" people were very happy with Ettinger at the May 19 meeting. (GC Ex. 14). Ettinger was described as "very upset", sweating, and loud. (Tr. 226:4-6). Several witness described Ettinger banging or hitting a water bottle with his hands during the May 19 meeting. (Tr. 217:23; 218:6; 263:17-18; 301:7). It is within this context and tone that Ettinger made various statements at the May 19 meeting in violation of the Act.

1. Ettinger Unlawfully Discouraged Employee Participation in Union Rallies

Beginning in February 2015, the Union held weekly rallies on the sidewalk just outside both the Aston Waikiki Beach Hotel and Hotel Renew. (Tr. 270:10; 509:16-20, 739:8). The Union's morning rallies started at around 6:00 or 6:30 am. (Tr. 268:1, 509:4). At these morning rallies, the Hotel employees banged pots and pans. (Tr. 526:9-11, 640:9-11; 641:15; 740:17). At the May 19 meeting Ettinger told the assembled employees to stop banging pots and pans. (Tr. 223:25; 237:23-25; 239:20-23; 266:15 errata; 306:17-19). Ettinger's statement to stop banging pots and pans in the context of the tenor of the mandatory meeting, and other statements made at the meeting, can be reasonably inferred to coerce employees to stop participating in Union rallies; rallies where employees banged pots and pans to get management's attention. (Tr. 267:3). Furthermore, Hotel Rooms Division Manager Webster noted that Ettinger stated at the May 19 employee meeting that the Union should call for a vote and "not do things via pots, pans...". (Resp. Ex. 18, 19; Tr. 794:21-24). Ettinger's statements that the Union should not be doing things "via pots and pans" can also reasonably be inferred to coerce employees to stop participating in Union rallies. Ettinger's statement to employees to stop banging pots and pans would reasonably tend to restrain and coerce employees in the exercise of their Section 7 right to participate in Union rallies in violation of Section 8(a)(1) of the Act.

2. Employees Lucky To Have Jobs

Aston Waikiki Beach Hotel employee Faustino Fabro testified that Ettinger told employees at the May 19 meeting that they were "lucky to have work." (Tr. 265:15-16). Hotel Renew employees Cecile Daniels (Daniels) and Lotuseini "Lani" Kava (Kava) testified that Ettinger stated at the May 19 meeting that the employees were "lucky to have jobs." (Tr. 308:6).

Daniels testified that Ettinger explained that Ettinger was comparing other hotels to the Aston Waikiki Beach Hotel and Hotel Renew. (Tr. 308:10). Kava testified that Ettinger explained that most hotels are cutting back on employment, but Hotel Renew and the Aston Waikiki Beach Hotel are providing jobs to help employees. (Tr. 224:8-10). Ettinger stated that the other hotels aren't fighting the Union. (Tr. 308:10-11). Referring to the rallies, Ettinger said that guests are coming to the Hotel to spend their money, and then they have to hear noise during the rallies. (Tr. 208:16-18). Ettinger's statement that the employees were lucky to have jobs and his explanation, that other hotels were not fighting the Union, would reasonably tend to restrain and coerce employees in the exercise of their Section 7 right to join or assist the Union's efforts at the Hotel.

Ettinger statement implies that the employees' jobs could be in peril because the Hotel was engaged with the Union. This implication is supported by other statements Ettinger made at the May 19 meeting. Hotel Manager Webster wrote that Ettinger stated at the May 19 meeting that the Union wants to disrupt the Hotel's business, which ultimately would take work opportunity away from employees. (Resp. Ex. 19, 20). In Hotel General Manager DeMello's notes of the meeting he wrote that Ettinger told employees at the May 19 meeting that the Union wanted to disrupt business at the Hotel and that the Union continues to disrupt employee work life. (Resp. Ex. 17). Respondent's then Senior Vice-President of Human Resources Haines wrote in her notes of the meeting that Ettinger stated at the May 19 meeting that the Union is disrupting Hotel business, which could affect work opportunity for employees. (Resp. Ex. 16). When taken in context, it is clear that Ettinger's statement that the employees were lucky to have jobs was designed to convey a veiled threat to the employees, and as such, would reasonably

tend to restrain and coerce employees in the exercise of their Section 7 in violation of Section 8(a)(1) of the Act.¹¹

3. Stop Visiting Coworkers Homes

Hotel employee Faustino Fabro testified that he had visited his coworkers' homes with Union representatives to discuss the Union. (Tr. 271:5; 272:20 errata errata). Fabro had visited coworkers' homes prior to the May 19, employee meeting. (Tr. 272:5). At the May 19 meeting, Ettinger told the employees that the Hotel had received complaints about employees being visited at their homes by Union representatives and other employees. (Tr. 640:6-9; 644:8-10; 794:1-3). Ettinger stated at the May 19 meeting that employees at home were with their families, that it was their time, and employees just want to left alone when there are in their homes. (Tr. 794:4-56). Ettinger stated that employees felt threatened by people going to their homes. (Resp. Ex. 16). Ettinger also stated that people are not being able to enjoy the privacy of their own homes. (Resp. Ex. 17, 18, 19). Fabro and Daniels both testified that Ettinger told the assembled employees to stop bothering their coworkers at their homes. (Tr. 270:23-24; 306:24-25). Ettinger's direct admonition at the May 19 meeting to stop bothering coworkers at their homes would reasonably tend to restrain and coerce employees in the exercise of their Section 7 rights to meet and speak with coworkers about the Union outside of work.

Ettinger further told employees that they have rights when they are visited at their homes. Ettinger told the gathered employees that they had the right to not answer the door and the right

¹¹ The present case is distinguishable from *Children's Services Int'l*, 347 NLRB 67 (2006). The employer in *Children's Services* remarked to employees that they were lucky to have jobs. The Board found that the employer's statement referenced the employees' skill levels and the job market. The Board found that the employer's statement did not state, or imply, that the employees' jobs would come to an end. 347 NLRB at 68. In the present case, Ettinger clearly implied that the Union's efforts at the Hotel have placed the employees' jobs in peril. In context of Ettinger's other statements at the May 19 meeting, Ettinger's statement that the employees' were lucky to have jobs would reasonably tend to coerce an employee's Section 7 right to join or support the Union.

to not let somebody into their homes if they did not want them in their homes. (Tr. 644:16-19). Ettinger told employees that they have the right to let people in their homes as they see fit and that if they wanted someone to leave, and they were not leaving, they had the right to call the police. (Tr. 644:23-645:2). Ettinger's statement that employees have the right to call the police, when discussed in the context of coworker visits, would reasonably tend to restrain and coerce employees in the exercise of their Section 7 rights.¹² *Station Casinos*, 358 NLRB No. 153, slip op. at 3 (2012).

In *Station Casinos*, a supervisor for the employer advised employees to call the police if union supporters refused to leave their homes after being asked to do so. *Id.* at 31. The Administrative Law Judge reasoned that an employer violates the Act when it responds to protected union activity by threatening to call the police, *Id.* at 32, citing *Walgreen Co.*, 352 NLRB 1188, 1193 (2008). The Administrative Law Judge found that the broad advice to call the police, without regard for the specific circumstances or lawful conduct while visiting an employee's home, unlawfully chilled employees in the exercise of their Section 7 rights. *Id.* at 32. The Board adopted the Administrative Law Judges conclusion that the employer violated Section 8(a)(1) of the Act when it advised employees to contact the police if the union would not leave their homes upon request. *Id.* at 3. The Board reasoned that within the context of other coercive and unlawful statements, the directive to call the police was not lawful Section 8(c) speech, but coercive and unprotected. *Id.*

Ettinger's direct admonition at the May 19 meeting to stop bothering coworkers at their homes, given the context of Ettinger's statement that employees have the right to call the police,

¹² Ettinger's statement to employees at the May 19 meetings that they have the right to call the police when visited by coworkers at their homes gives context to Ettinger's instruction to employees to stop bothering their coworkers at their homes.

would reasonably tend to restrain and coerce employees in the exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act.

4. Office Apology

Fabro testified that Ettinger asked the assembled employees at the May 19 meeting if they were happy cashing their checks while they were “doing this to the company.” (Tr. 273:5 errata). Fabro and Daniels testified that Ettinger offered employees the opportunity to come to his office and apologize. (Tr. 274:7-8,11; 309:23-24; 310:19). Ettinger did not explain what the employees should apologize for or why the employees would need to apologize to Ettinger. (274:22-24).

Ettinger’s offer for employees to come to his office and apologize must be evaluated in the context of the meeting in which he made the statement. As noted above, at the May 19 meeting, Ettinger disparaged the Union for bringing antagonism, divisiveness, in fighting, and disruption to the Hotel and its employees. (Resp. Ex. 17, 18, 19; GC Ex. 16). Ettinger told the employees that the Union is spreading lies about the Hotel and lying to Hotel employees. (Tr. 265:10-11; Resp. Ex. 17, 18, 20). Ettinger charged that the Union wants to disrupt the Hotel’s business, taking away work opportunity for employees. (Resp. Ex. 16, 17, 18, 19, 20). In attendance at the May 19 meeting were employees who engaged in the Union activities that Ettinger argued were hurting the Hotel’s business. (284:21; 304:4-7; 645:9-13). Taken in this context, Ettinger’s invitation to apologize would reasonably tend to restrain and coerce employees in the exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act.

D. Threatening Off-duty Employees For Engaging In Lawful Hand Billing In Non-Work Areas Violated Section 8(a)(1) of the Act

The Court and Board have long held that, absent special circumstances, employees have the right to distribute union literature on their employer's premises during non-work time in non-

work areas. *Republic Aviation Co. v. NLRB*, 324 U.S. 793, 803-804 (1945); *Central Hardware Co., v. NLRB*, 407 U.S. 539, 543 (1972); *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615,621 (1962); *NLRB v. Babcock & Wilcox*, 351 U.S. 105, 110-111 (1956). On August 11, Hotel security supervisor Andrew Smith, acting on orders of Hotel General Manager DeMello and Room Division Manager Webster, approached off-duty employees Ching and Wolfgramm at the Hotel's lower lobby/porte-cochère area. Ching and Wolfgramm were in the lower lobby/porte-cochère to distribute flyers that informed guests, among other things, that the employees at the Hotel want a fair process to decide union representation. Smith testified that on August 11 he observed Ching and Wolfgramm in the lower lobby of the Hotel holding pamphlets that Smith described as having "Local 5 material on it." (Tr. 106:4). Acting pursuant to his orders from DeMello and Webster, Smith verbally warned Ching and Wolfgramm to stop hand billing on Hotel property and told them that if they did not cease hand billing on Hotel property¹³ they would be trespassed from the Hotel and that Smith would call the police. (supra at 10). Respondent does not dispute that Smith engaged in this conduct. Contrary to Respondent's assertions, Ching and Wolfgramm were not in a work area when they attempted to distribute leaflets, Smith clearly is Respondent's agent, and his actions on August 11 constitute a violation of the Act.

1. Respondent's lower lobby/porte-cochère is a non-work area.

DeMello testified that "virtually every guest that arriv[es] or depart[s] the hotel goes through the lower lobby." (Tr. 754:20—22). The lower lobby of the Hotel is, effectively, the Hotel's front entrance.¹⁴ However, the Board has found that activities such as security,

¹³ Smith did not offer or ask Ching and Wolfgramm to move to another area of Hotel property. (Tr. 125:11).

¹⁴ DeMello testified that the Hotel does not offer self-parking. All guests arriving by car and wishing to have their cars parked at the Hotel must use the valet service. (Tr. 754:11-14).

maintenance, and valet parking, which typically occur at the entrances to the Respondent's facility, are "incidental" to a hotel's primary function, and are, thus, insufficient to transform a hotel's front entrance area into a "work area" where the Employer could lawfully ban employee distributions. *Sheraton Anchorage I*, 359 NLRB No. 95 slip. op. at 53 (2013), enfd and incorporated by *Sheraton Anchorage II*, 362 NLRB No. 123 slip op. at 1 (2015).¹⁵

In *Santa Fe Hotel & Casino* the Board found that the respondent hotel-casino violated Section 8(a)(1) of the Act by restricting its off-duty employees from distributing literature at the main entrance of its facility. 331 NLRB at 723. The Board reasoned that work functions at casino entrances, such as security, maintenance, and gardening, are merely incidental to the casino's main function to allow patrons to gamble. Such space therefore cannot be designated as a working area for the purpose of restricting employee distribution/solicitation activity. *Id.*

Respondent produced no credible evidence that the Hotel's lower lobby is a work area. Smith testified that maintenance employees "sometimes" work in the lower lobby "fixing [the] wiring for [the] internet connection", assessing Wi-Fi accessibility, or repairing water damage in the ceiling.¹⁶ (Tr. 101:19-22). Smith testified that maintenance employees are not regularly assigned to the lower lobby area and are only in the area when assigned to fix something. (Tr. 120:9-14). Smith also testified that housekeeping employees will "come by" the lower lobby area and that contractors walk through the lower lobby. (Tr. 101:22-23). Smith also testified that security patrols the lower lobby area. (Tr. 101:23). Smith also testified that security will occasionally instruct and assist Hotel guests in the lower lobby on the operation of the elevator

¹⁵ Citing *Santa Fe Hotel, Inc.*, 331 NLRB 723 (2000) (finding that respondent hotel-casino violated Section 8(a)(1) by enforcing its no-distribution/no solicitation rule to prohibit its off-duty employees from distributing literature at the main entrances to its facility).

¹⁶ Smith testified that one employee, identified in Resp. Ex. 4 takes 10 minutes to empty each trash can in the lower lobby, only because that employee is "very thorough and he likes to clean." (Tr. 120:21).

keys. (Tr. 102:23-24). Smith also testified that Bell department employees will store guest luggage in a storage area in the lower lobby and that Bell employees are not likely to place guests luggage on the porte-cochère/lower lobby curb. (Tr. 119:4-9).

DeMello testified that the Bell employees handle guest luggage in the lower lobby, valet guest vehicles, and act as an informal concierge service in the lower lobby/porte-cochère area.¹⁷ (Tr. 757:18-19; 758:18-20). DeMello testified that the Hotel employs a front doorman in the lower lobby to greet guests as they arrive at the Hotel and to direct guests to the upper lobby.¹⁸ (Tr. 758:8-11). The Front doorman also directs the flow of traffic in the porte-cochère driveway. (Tr. 758:11-12).

The Hotel does not offer regular guest check-in in the lower lobby. (Tr. 60:3-4). The Hotel does offer remote check in at the lower lobby for large parties with more than 75 guest rooms. (Tr. 756:8-14). DeMello testified that the Hotel gets anywhere from zero to five such large groups a month, mainly in the spring and fall. (Tr. 756:17-19; 765:20-21). DeMello could not recall any large group check-ins in the lower lobby in August 2015. (Tr. 766:3-6). The Hotel also assigns one housekeeper lobby attendant to the lower lobby. (Tr. 772:2-5). The lobby attendant may also be assigned to cover both the upper and lower lobby, depending on the occupancy of the Hotel. (Tr. 772:11-15). As in the *Sheraton Anchorage* cases, the work performed in the lower lobby/porte-cochère area is incidental to a hotel's primary function, and is, thus, insufficient to transform a hotel's lobby/porte-cochère area into a "work area" where Respondent could lawfully ban employee distributions.

¹⁷ DeMello testified that Bell employees are frequently asked by Hotel guests for transportation directions and entertainment and dining recommendations. (Tr. 758:20-25).

¹⁸ DeMello testified that the upper lobby of the Hotel contains, among other things, the Hotel's front desk, tour desk, a swimming pool and deck, a large restaurant. (Tr. 754:4-6). Ettinger testified that the upper lobby pool deck host the Hotel's "breakfast-on-the-beach events for Hotel guests. (Tr. 648:25-649:3).

The lower lobby of the Hotel is open to the public further repudiating Respondent's claim that the lower lobby is a work area. (Tr. 768:25-769:1; 117:1213; 116:9-15). The Hotel's lower lobby contains a small convenience store and multiple shops and restaurants that are open to the public. (Tr. 769:11-12; 768:13-24; 115:2; 117:2-4). The lower lobby has several lounge seats for guests of the Hotel. (Tr. 116:1-3). The restaurants and businesses in the lower lobby do not offer food service to Hotel guests seated in the lounge seats in the lower lobby. (Tr. 117:24-118:15).

Respondent's attempts to convert the Lower Lobby into a tropical resort attraction fail. DeMello admitted, when presented with Respondent's Exhibit 6, a picture from the lower lobby looking toward the direction of ocean, that a guest in the lower lobby would not have a view of Waikiki Beach. (Tr. 770:4). DeMello testified that guests sitting in the lower lobby of the Hotel would have a view of the driveway and the Hotel across the street. (Tr. 770:21-4; 771:6). DeMello admitted there is no open-air view of the Waikiki sky from the lower lobby. (Tr. 771:12). A guest sitting in the lower lobby would only see a drab ceiling when gazing up from the lower lobby. (Tr. 771:14). The activities of the lower lobby, and the attached driveway/porte-cochère, are not integral to the Hotel's primary function and do not make it a work area.

Respondent's prohibition of employee hand billing in the lower lobby/porte-cochère is unlawful under Section 8(a)(1) of the Act. Any contention by Respondent that the lower lobby/porte-cochère constitutes a working area because of the work performed there by security officers, maintenance, bell, or valet drivers, should be rejected. The Board has held that such a contention would "effectively [destroy] the rights of employees to distribute literature." *Santa Fe Hotel & Casino*, 331 NLRB at 730, quoting *United States Steel Corp.*, 223 NLRB 1246, 1248 (1976).

2. On August 11, Smith acted as Respondent's agent.

The Board applies common law principles of agency when it examines whether a person or entity is an agent of the employer while making a particular statement or taking a particular action. Under these common law principles, the Board may find agency based on either actual or apparent authority to act for the employer. As to the latter, “apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question.” *Southern Bag Corp.*, 315 NLRB 725 (1994). *See also Alliance Rubber Co.*, 286 NLRB 645, 646 (1987). The test is whether, under all the circumstances, employees “would reasonably believe that the [alleged agent] was reflecting company policy and speaking and acting for management.” *Waterbed World*, 286 NLRB 425, 426-427 (1987), *citing Einhorn Enterprises*, 279 NLRB 576 (1986). Thus, it is well settled that an employer may have a third party's statement attributed to it if the third party is “held out as a conduit for transmitting information [from management] to the other employees.” *Debber Electric*, 313 NLRB 1094, 1095, fn. 6 (1994).

Security supervisor Smith is not an employee of Respondent. On August 11, Smith was employed by Guardsmark¹⁹, a company contracted to provide security services for Respondent at the Aston Waikiki Beach Hotel and Hotel Renew. (Tr. 44:12-14; 47:22). Smith is the highest-ranking employee of the security contractor working at the Aston Waikiki Beach Hotel and Hotel Renew. (Tr. 46:15). Smith reports directly to Respondent's General Manager DeMello. (Tr. 46:19-22).

¹⁹ Guardsmark has since been purchased by Universal Protection Services. (Tr. 44:8-14).

On August 10, interim Aston Waikiki Beach Hotel Front Services Manager Kaanoi informed Webster that Hotel employee Ching was going to be passing out fliers in the lower lobby the next day. (Tr. 671:22; 821:18-21). Kaanoi knew of Ching's prior Union activity and understood that Ching would be handing out Union flyers on Hotel property on August 11.²⁰ (supra at 7). On August 10, DeMello, Webster, and Kaanoi met with Smith and instructed Smith to issue a verbal warning to Ching to not pass out flyers in the lower lobby and to trespass Ching if he did not comply. (Tr. 44:18; 49:17,20-21; 50:13-14; 62:12-16).

At approximately 7:09 am, August 11, Smith approached Ching in the lower lobby, accompanied by Hotel Security Guard Pagan and Hotel Front Office Manager Miyasato. (Tr. 51:2,17; 52:10-11; 71:11; GC Ex. 15:Camera 10). During their discussion Miyasato confirmed through gesture that Smith was acting on behalf of management. (Tr. 73:4). Smith specifically informed Ching that Smith represented management and that he spoke on their behalf.²¹ (Tr. 74:9-10).

It is clear from the evidence that an employee would reasonably believe that Smith was reflecting company policy and speaking and acting for management. Smith held himself out as a conduit for transmitting information from management to Ching and Wolfgramm. Hotel Manager Miyasato's presence at the August 11 interaction and failure to contradict Smith's representation of agency is further evidence of Smith's agency. In light of all of these circumstances, Smith was clearly an agent of Respondent.

²⁰ Kaanoi's knowledge of Ching's Union support and knowledge that Ching was going to be passing out Union flyers is imputed to Respondent's management. *State Plaza*, 347 NLRB 755, 756 (2006), *Dobbs International Services*, 335 NLRB 972, 973 (2001).

²¹ Smith's testimony that he was instructed by DeMello and Webster to issue a verbal warning to Ching and to "trespass" him confirms that Respondent designated him as its agent.

3. Smith's threat to trespass Ching and Wolfgramm would reasonably tend to interfere with the free exercise of employees' rights under the Act.

As noted above, employees have the right to distribute union literature on their employer's premises during non-work time in non-work areas. Smith threatened to trespass Ching and Wolfgramm if they refused to stop hand billing and leave Hotel property. Smith testified that he had never trespassed an employee at the Hotel. (Tr. 50:17).

Ching testified that he understood that when individuals are trespassed that person cannot return to the property for a year. (Tr. 163:11-12). Ching also understood that if a trespassed individual returned to the property within a year that individual would be arrested. (Tr. 163:13-17). Ching had previously worked as a security guard at the Hotel, and in his former capacity as a security guard at the Hotel, he trespassed individuals at the Hotel but did not trespass any employees. (Tr. 177:1,10,14). There was no evidence presented of any past instances of an active employee being trespassed from the Hotel. The only evidence presented of a trespass at the Hotel was that a trespassed individual would be barred from the Hotel property for one year. Based on the evidence presented, a reasonable employee would expect that if she or he were trespassed by Hotel security she/he would not be allowed to return to the Hotel property for the period of one year. An employee would reasonably expect that such a ban would adversely affect her/his employment at the Hotel. Ching testified that immediately after being threatened with trespass by Smith, Ching and Wolfgramm left the Hotel property. (Tr. 164:9-13; GC Ex. 15). Ching and Wolfgramm's rapid retreat from the lower lobby/porte-cochère area is evidence that Respondent's threat of trespass interfered with their rights under the Act to engage in hand billing and other Section 7 activity in violation of Section 8(a)(1) of the Act.

4. Respondent failed to demonstrate any special circumstances to justify restricting employees from hand billing on August 11.

There is no record evidence that preventing employees from leafleting was necessary for the operation of Respondent's hotel business or the maintenance of security or discipline. The passage of hotel guests into or out of the Hotel was not adversely affected. Employees did not block entrances or driveways. Nor did they litter on the premises while leafleting. Respondent presented no credible evidence that Ching or Wolfgramm prevented any employees from performing their job duties. Ching and Wolfgramm were positioned in such a way that they could not have prevented guests from entering the property. Ching and Wolfgramm were positioned in front of two pillars near the curb of the porte-cochère. (Tr. 157:18-19; 195:1-2; GC Ex. 9).

Respondent violated Section 8(a)(1) of the Act when its agent, security supervisor Smith, instructed Ching and Wolfgramm to cease hand billing in the lower lobby and threatened to trespass the employees if they refused to leave Hotel property.

E. Respondent Unlawfully Disciplined Employees Edgar Guzman and Santos Rangunjan For Engaging In Protected Concerted Activity

Section 7 of the Act provides that employees possess "the right to self-organization and to engage in other concerted activities for the purpose of mutual aid or protection," including the right of employees to organize or assist in the functioning of a union. This right is enforceable by means of Section 8(a)(1) and 8(a)(3) of the Act, which prohibits employer interference, restraint or coercion of employees who are exercising their Section 7 rights. *Chartwells, Compass Group*, 342 NLRB 1155 (2004).

Under the principles set forth in *Burnup & Sims*, 379 U.S. 21 (1964), when the evidence establishes that an employee was disciplined based on alleged misconduct occurring in the

course of protected activity, the burden shifts to the respondent to show that "it had an honest or good-faith belief that the employee engaged in the misconduct." *Alta Bates Summit Medical Center*, 357 NLRB No. 31, slip op. at 1-2 (2011) enf. denied on other grounds 687 F.3d 424 (DC Cir. 2012); see also *Roadway Express*, 355 NLRB 197, 1015 (2010), enf. 427 Fed. Appx. 838 (11 th Cir. 2011). If the respondent does so, the burden then shifts back to the General Counsel to prove that the employee did not actually engage in the alleged misconduct. *Alta Bates*, supra, slip op. at 2; *Roadway Express*, supra at 1015.

1. Guzman and Ragunjan engaged in protected concerted activity within the meaning of Section 7 of the Act.

It is undisputed that Guzman and Ragunjan separately interacted with their coworker Dany Pajinag to engage in Section 7 activity. Hotel General Manager DeMello testified that he knew that based on Pajinag's written statement of June 9 that Guzman had discussed the Union, including asking Pajinag to have his picture taken for the Union and asking Pajinag to join the Union on both June 5 and June 9. (Tr. 433:13; GC Ex. 13). DeMello also received Pajinag's May 22nd written statement and heard directly from Pajinag that Ragunjan had asked Pajinag to have his picture taken for the Union and to sign a Union authorization card on May 21. (Tr. 442:7-8; 475:13; Resp. Ex. 13). There can be no doubt that Respondent knew of the Section 7 activities Guzman and Ragunjan engaged in with their coworker Pajinag. On June 30, after learning of Guzman and Ragunjan's Section 7 activities, Respondent issued written warning to both employees, citing to Guzman and Ragunjan's Section 7 activities in each Corrective Action disciplinary form. (GC Ex. 10, 11). Neither Guzman nor Ragunjan were disciplined for violating Respondent's "No Solicitation/No Distribution" policy as found in Respondent's Employee Handbook. (Resp. Ex. 9, page 55).

Applying *Burnup & Sims*, the evidence clearly shows that Guzman and Ragunjan engaged in protected, concerted activity at the time of their purported misconduct, that Respondent knew of the protected, concerted activity, and that the basis of discipline was their alleged misconduct in the course of their protected concerted activity. Specifically, while acknowledging that Guzman and Ragunjan were engaged in Union activities, Respondent alleges that Guzman and Ragunjan were disciplined because they interfered with Pajinag's work on various dates and because of an alleged threat made by Ragunjan. As demonstrated below, the record evidence fails to establish that Respondent had an honest or good faith belief that Guzman and Ragunjan engaged in misconduct..

2. Respondent lacked an honest or good faith belief that Guzman engaged in misconduct.

Respondent cannot meet its burden to show it had an honest or good-faith belief that Guzman engaged in misconduct, while engaging in Section 7 activity. Guzman was disciplined for violating Respondent's Rules of Conduct Rule #3 interfering with others in the performance of their job. (GC Ex. 10; Resp. Ex. 9; Tr. 709:24). Guzman's June 30 Corrective Action cites only to two incidents as the basis for the written warning. (GC Ex. 10). The incidents were alleged to have occurred on June 5 and June 9. The Corrective Action states that Guzman's conduct on June 5, asking a coworker to have his picture taken of the Union, disrupted the coworker's performance of their work. The Corrective Action states that on June 9, Guzman's conduct made a coworker uncomfortable and disrupted the coworker's performance of his work. DeMello acknowledged that the only coworker referred to in Guzman's June 30 Corrective Action is Dany Pajinag. (Tr. 425:24). As noted above, Guzman's Corrective Action on its face reflects that Guzman was engaged in Union activity. Respondent must show that it had an

honest or good-faith belief that Guzman engaged in misconduct on June 5 and June 9 causing Guzman to lose protection of the Act. Respondent cannot meet this burden.

Guzman was disciplined solely for interfering with Pajinag's work performance on June 5 and June 9.²² Respondent presented no credible evidence that it had an honest or good-faith belief that Guzman interfered with Pajinag's work performance. First, there is no documentary showing that Pajinag's work performance suffered those days. General Counsel subpoenaed "documents reflecting all discipline issued to Danny Pajinag from June 1 to July 31." (GC Ex. 2). The subpoena request covers the dates in question in Guzman's June 30 corrective action. Respondent stated in response to General Counsel's request for Pajinag's disciplinary records that "no documents exist". (GC Ex. 2). DeMello testified that he was not aware of any discipline issued to Pajinag, by the Hotel, during the month of June 2015. (Tr. 449:11). DeMello was also not aware of any reports that Pajinag was not completing his job duties. (Tr. 449:15). In June 2015, Pajinag was not spoken to, warned, or otherwise disciplined for failing to fulfill his job duties. (Tr. 449:19). Second, Guzman testified that each of these interactions lasted no more than one minute.²³ Third, DeMello admitted that Pajinag did not describe any threatening conduct or behavior by Guzman.²⁴ (Tr. 438:19-20; 439:13). In sum, Respondent presented no credible evidence that it had an honest or good-faith belief that Guzman engaged in misconduct against Pajinag on June 5 or June 9.

During the hearing Respondent attempted to raise a new defense to justify Guzman's discipline. Respondent argued that Pajinag described being bothered by Guzman on occasions

²² Neither Guzman nor Ragunjan were disciplined for violating Respondent's "No Solicitation/No Distribution" policy as found in Respondent's Employee Handbook. (Resp. Ex. 9, page 55).

²³ Respondent presented no evidence as to the length of the June 5 or June 9 encounters between Pajinag and Guzman.

²⁴ DeMello testified that Executive Housekeeper Cacacho did not describe any threatening behavior by Guzman towards Pajinag during their interactions. (Tr. 444:24).

other than those listed on Guzman's June 30 Corrective Action. In this new claim, Respondent presented no credible evidence that it had an honest or good-faith belief that Guzman engaged in misconduct against Pajinag. Despite claiming that Guzman had bothered Pajinag on previous occasions prior to June 5, DeMello admitted that Pajinag did not describe any dates or times for the other interactions. (Tr. 440:7). Respondent provided no details as to what occurred at the other alleged interactions between Guzman and Pajinag. DeMello testified that Pajinag did not describe any threatening conduct or behavior for any interaction with Guzman. (Tr. 441:16). Pajinag could only recall that there were four or five interactions with Guzman. (Tr. 600:12-16). Pajinag did not testify to the length of those interactions or to the period within which those interactions occurred.²⁵ Guzman's uncontroverted testimony stated that each interaction with Pajinag lasted, at most, one minute. (Tr. 340:3,12; 345:4; 353:4; 356:5). Pajinag's inability to provide details of the four or five alleged additional interaction with Guzman renders ineffective Respondent's attempt to justify its unlawful discipline.

For the reasons stated above, Respondent did not have an honest or good-faith belief that Guzman engaged in misconduct against Pajinag on June 5 or June 9 or on any other occasion as alleged by Respondent. Respondent failed to meet its burden set forth in *Burnup & Sims*. In fact, the evidence shows that Guzman did not engage in the misconduct alleged.

²⁵ The facts in the instant case are distinguishable from *BJ's Wholesale Club*, 318 NLRB 684 (1995). In *BJ's Wholesale Club* the Board affirmed the administrative law judge's finding that the employer did not impinge on the protected activities of an employee engaged in protected activities where the employer disciplined the employee for meeting with another employee three times in one day in an effort to get that employee to sign a union authorization card. In the present case, Guzman interacted with Pajinag no more than four or five times during an undetermined period. Pajinag could only recall two interactions that happened four days apart. Meeting, at most, once every four days clearly distinguishes the harassment claim the employer alleged in *BJ's Wholesale Club*.

3. Even if Respondent had an honest or good faith belief that Guzman interfered with Pajinag's work performance, Guzman's conduct was not so egregious as to forfeit the protection of the Act.

Even if Respondent could show it had a good faith belief that Guzman interfered with Pajinag's work performance, Guzman did not engage in actions that would remove Guzman's conduct from the protection of the Act. The Board held in *Conagra Foods, Inc.*, 361 NLRB No. 113, slip op. at 2-3 (2014), that a "momentary interruption in work, or even a risk of interruption" does not "subject employees to discipline for conveying such union-related information." The Act allows employees to make union-related statements which do not 'occupy enough time to be treated as a work interruption in most work settings." *Id.* quoting *Wal-Mart Stores*, 340 NLRB 637 (2003). Further the Board held that protected conduct "must be egregious or offensive to lose its protection under the Act." *Consolidated Diesel Co.*, 332 NLRB 1019, 1020 (2000) enfd. 263 F.3d 345 (4th Cir. 2001). This means that the manner in which Guzman exercised his Section 7 right must be extreme to be rendered unprotected. Neither Guzman nor Pajinag testified to any extreme conduct by Guzman during their interactions. Pajinag could only testify to interacting with Guzman four or five times. (Tr. 600:12-16). Pajinag did not give a timeframe for when these interactions occurred or the duration of each occurrence. Guzman testified that each time he spoke with Pajinag the conversations were brief, lasting only as long as one minute. (Tr. 340:3,12; 345:4; 353:4; 356:5). Four or five Section 7 conversations lasting one minute each are not extreme, egregious or offensive and do not lose protection of the Act.

Guzman's June 30 Corrective Action states that Guzman's June 9 interaction with Pajinag made Pajinag uncomfortable and disrupted his work performance. (GC Ex. 10). As discussed above, there is no credible evidence that Pajinag suffered any work performance issues during the period in question. Further, the Board held in *Chartwells, Compass Group, USA*, that

an employer may not lawfully discipline an employee for making pro-union (or antiunion) statements that merely cause another employee to feel uncomfortable. 342 NLRB at 1157 (2004), citing *Consolidated Diesel Co.*, 332 NLRB at 1020 (2000). An employee's Section 7 activity is protected even if a fellow employee is uncomfortable with the solicitation. *Fresh and Easy Neighborhood Market, Inc.*, 361 NLRB No. 12 slip op. at 5 (2014) citing *Frazier Industrial Co.*, 328 NLRB 717, 719 (1999), enfd. 213 F.3d 750 (D.C. Cir. 2000). Guzman did not lose protection of the Act simply because Pajinag was uncomfortable with Guzman's Section 7 activity. Respondent violated Section 8(a)(1) of the Act when it disciplined Guzman because he engaged in the protected, concerted activity of discussing the Union with Pajinag.

4. Respondent lacked an honest or good faith belief that Ragunjan engaged in misconduct.

Respondent cannot meet its burden to show it had an honest or good-faith belief that Ragunjan engaged in misconduct while engaging in Section 7 activity on May 21, causing Ragunjan to lose protection of the Act. Ragunjan was disciplined, in part, for violating Hotel Rules of Conduct Rule #3 – interfering with Pajinag in the performance of his job.²⁶ (GC Ex. 11; Resp. Ex. 9). Ragunjan's June 30 written warning Corrective Action states the May 21 incident with Pajinag as the basis for a violation of Rules of Conduct #3. The Corrective Action itself states that the reason Ragunjan was being disciplined, in part, was for his Union activities - - asking Pajinag to have his picture taken for the Union and asking Pajinag to sign a Union authorization card. The Corrective Action alleges that Ragunjan's actions bothered Pajinag and disrupted the performance of his work. Respondent would have to show that it had an honest or good faith belief that Ragunjan engaged in misconduct on May 21, that caused him to lose the

²⁶ DeMello identified the team member in the June 30 Corrective Action as Dany Pajinag. (Tr. 428:12).

protection of the Act. Respondent cannot meet its burden for the same reason as in the Guzman discipline.

Respondent presented no credible evidence that it had an honest or good faith belief that Ragunjan engaged in misconduct on May 21. As noted above, Respondent produced no credible evidence that Pajinag's work performance was affected during the period in question.

Respondent presented no evidence of the length of the May 21 encounter between Pajinag and Ragunjan. DeMello admitted that Pajinag did not describe any threatening conduct or behavior by Ragunjan during the May 21 interaction. (Tr. 443:6). DeMello admitted that Executive Housekeeper Cacacho did not contend that Pajinag had described any threatening behavior by Ragunjan towards Pajinag during their May 21 interaction. (Tr. 445:21). In sum, Respondent presented no credible evidence that it had an honest or good-faith belief that Ragunjan engaged in misconduct against Pajinag on May 21.

During the hearing Respondent also attempted to raise a new defense to justify Ragunjan's discipline. Respondent argued that Pajinag described being bothered by Ragunjan on occasions other than May 21. (Tr. 720:4-6). Despite claiming that Ragunjan had bothered Pajinag on occasions prior to May 21, Haines admitted that Pajinag did not describe any dates or times other than the interactions listed in Ragunjan's Corrective Action. (Tr. 720:7-10). Respondent provided no details as to what occurred at the other alleged interactions between Ragunjan and Pajinag.

For the reasons stated above, Respondent did not have an honest or good-faith belief that Ragunjan engaged in misconduct against Pajinag on May 21, or on any other previous occasion as alleged by Respondent. Respondent fails to meet its burden set forth in *Burnup & Sims*.

5. Even if Respondent had an honest or good faith belief that Ragunjan interfered with Pajinag's work performance, Ragunjan's conduct was not so egregious as to forfeit the protection of the Act.

Even if Respondent could show it had a good faith belief that Ragunjan interfered with Pajinag's work performance, Ragunjan did not engage in actions on May 21 or any other previous occasion that would remove Ragunjan conduct from the protection of the Act. As noted above, this means that the manner in which Ragunjan exercised his Section 7 right must be extreme to be beyond the Act's protection. (supra at 38-39). Pajinag did not testify to any extreme conduct by Ragunjan during their May 21 interaction. DeMello testified that Pajinag did not describe any threatening conduct or behavior by Ragunjan at the May 21 interaction. (Tr. 443:6). Ragunjan's June 30 Corrective Action states that the May 21, interaction made Pajinag feel bothered and disrupted his work performance. (GC Ex. 10). As discussed above, there is no credible evidence that Pajinag suffered any work performance issues during the period in question. Further, as discussed above, Ragunjan does not lose protection of the Act simply because Pajinag is uncomfortable with Ragunjan's Section 7 activity. (supra at 39). Respondent violated Section 8(a)(1) of the Act when it disciplined Ragunjan for engaging in protected, concerted activity on May 21.

F. Respondent's Discipline Of Ragunjan For An Alleged Threat Was A Pretext

Along with the unlawful discipline for his May 21 Union activity, the June 30 Corrective Action issued to Ragunjan included a written warning for an alleged threat which reportedly occurred on June 30. During the hearing, General Counsel stated that he would be applying the *Burnup & Sims* analysis to the 8(a)(3) allegations in the Complaint. During the presentation of

its case in chief, Respondent appeared to apply a *Wright Line*²⁷ analysis to the 8(a)(3) allegations. Clearly, the discipline issued to Guzman and Ragunjan for engaging in Union activity is properly analyzed under *Burnup & Sims*. We now address Respondent's *Wright Line* theory as it pertains to the alleged threat contained in Ragunjan's June 30 Corrective Action.

To establish that an employer's adverse action has violated the Act, *Wright Line* requires the General Counsel to initially prove by a preponderance of the evidence that the employee's protected activities were a motivating factor in the employer's decision to take the adverse employment action. 251 NLRB 1083, 1089 (1980), *enf'd*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). Once that is established, the burden of persuasion shifts to the employer to prove that it would have taken the same adverse action even in the absence of the protected activities. *Id.* An employer must not only establish a legitimate reason for its action, but must persuade by a preponderance of the evidence that it would have taken the same actions even in the absence of the employee's protected activity. *Peter Vitalie Co., Inc.*, 310 NLRB 865, 871 (1993). The General Counsel must establish that the discriminatee engaged in protected activity, that the employer had knowledge of this activity, and that the employer carried out the adverse employment action because of the protected activity. *Wright Line*, 251 NLRB at 1089.

The causal link between the protected activity and the adverse employment action may be sustained with evidence that is short of direct evidence of motivation. *Roadway Express*, 327 NLRB 25, 26 (1998). For example, a discriminatory motive or animus may be established by: (1) the timing of the employer's adverse action in relationship to the employee's protected activity, see *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1283 (D.C. Cir. 1999); *Hall v. NLRB*, 941 F.2d 684, 688 (8th Cir. 1991); *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984)

²⁷ 251 NLRB 1083 (1980).

(“timing alone may suggest anti-union animus as a motivating factor in an employer’s action”); (2) the presence of other unfair labor practices, see *Mid-Mountain Foods, Inc.*, 332 NLRB 251, 251 n.2, 260 (2000), enf’d mem., 169 LRRM 2448 (4th Cir. 2001); *Richardson Bros. South*, 312 NLRB 534, 534 (1993); (3) statements and actions showing the employer’s general and specific animus, see *NLRB v. Vemco, Inc.*, 989 F.2d 1468, 1473-74 (6th Cir. 1993) (statements even if lawful, serve as background evidence of animus); *Affiliated Foods, Inc.*, 328 NLRB 1107, 1107 (1999); (5) evidence demonstrating that an employer’s proffered explanation for the adverse action is a pretext, see, e.g., *Wright Line*, 251 NLRB at 1089; *Roadway Express*, 327 NLRB at 26. Finally, the Board will infer an unlawful motive or animus where the employer’s action is “baseless, unreasonable, or so contrived as to raise a presumption of unlawful motive.” *J.S. Troup Elec.*, 344 NLRB 1009 (2005) (citing *Montgomery Ward*, 316 NLRB 1248, 1253 (1995)); *ADS Elec. Co.*, 339 NLRB 1020, 1023 (2003); *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

It is undisputed that Respondent knew of Ragunjan’s protected activity. Ragunjan’s June 30 Corrective Action, created and written by DeMello and Haines, disciplined Ragunjan for asking Pajinag “to sign a union authorization card.” (Tr. 427:9-14; GC Ex. 11). Respondent’s union animus is amply demonstrated, not only by the discipline it issued to Ragunjan for engaging in Union activity, but also by the statements discouraging union activity made by Ettinger at the May 19 mandatory meeting, and finally by the threats made to trespass off duty employees engaged in lawful leafleting activities. Respondent attempts to legitimize and justify Ragunjan’s written warning for protected activity by bolstering it with discipline for the June 13 alleged threat, and that attempt must be rejected.

Respondent's discipline of Ragunjan for the alleged threat is clearly pretextual for the following reasons. First, Pajinag's actions after the alleged threat belie his claim that Ragunjan's June 13 statement was a threat. Respondent alleges that Ragunjan threatened Pajinag on June 13. Pajinag testified that he thought that somebody would do something to him when he left his house or went outside. (Tr. 603:10-12). Pajinag wondered if somebody would beat him up. (Tr. 603:14).

Despite his alleged concern that he may be beaten or otherwise physically harmed, Pajinag did not report being threatened on June 13. (Tr. 620:6). One of Pajinag's two supervisors, Connie or Elvi, was working the day the alleged statement was made. (Tr. 620:4-6). Both Connie and Elvi speak Ilocano. (Tr. 620:1,3). Despite having a supervisor who spoke Ilocano working on June 13, Pajinag did not report Ragunjan's statement to his supervisor that day. Pajinag also knew that Hotel Security worked that day, but he failed to report the incident to security. (Tr. 619:17).

Pajinag reported to work the very next day, Sunday, June 14. (Tr. 603:10-17; 620:16-17). Again one of Pajinag's supervisors, Elvi or Connie, worked at the Hotel that Sunday. (Tr. 621:7). Pajinag did not report the alleged threat to his supervisor or security on Sunday. (Tr. 621:11-12). Pajinag did not report the incident to any Hotel official until, two days after the alleged incident occurred. (Tr. 604:1-9). Pajinag testified that on Monday June 15, he reported Ragunjan's alleged statement to Executive Housekeeper Cacacho and testified that he reported the statement to Cacacho in Ilocano.²⁸ (Tr. 604:6-9,11). This is certainly not the action of someone who genuinely feared for his physical safety.

²⁸ Cacacho testified incredibly that despite waiting two days to notify anyone at the Hotel, Pajinag was "shaking" and "very upset" on June 15 when he reported Ragunjan's alleged threat to Cacacho. (Tr. 568:25-569:1). .

Second, Respondent's unhurried reaction to Ragunjan's alleged threat also supports the conclusion that his discipline was pretextual and belies Respondent's claims that the alleged threat was of any significance. Former Senior Vice-President of Human Resources Haines testified that Respondent takes threats of bodily harm very seriously and that the Respondent would expose itself to liability if it does not do so. (Tr. 729:1,5). Haines testified that Respondent addresses threats of violence in its Employee Handbook, and pointed to page 50 of Employee Handbook which states, "The Company will promptly and thoroughly investigate all reports of threats of (or actual) violence and of suspicious individuals or activities." (Resp. Ex. 9, Tr. 729:23). The policy also states, "In order to maintain workplace safety and the integrity of its investigation, the Company may suspend employees, either with or without pay, pending investigation." (Resp. Ex. 9).

Despite the policy referenced in Respondent's Employee Handbook, there is no credible evidence that Respondent took Ragunjan's alleged threat seriously. If it had, it would stand to reason that Respondent would have invoked its policy and would have immediately suspended Ragunjan to "maintain workplace safety and the integrity of the investigation". Moreover, Respondent did nothing to adjust or change Pajinag's or Ragunjan's schedule to minimize or prevent their interaction. (Tr. 466:21,24). Respondent's only response was to notify Pajinag's department head to monitor Pajinag and "keep...a close eye on the whole situation." (Tr. 467:6-8).

Cacacho testified that she typed Resp. Ex. 14, Ragunjan's alleged June 15 statement, at Pajinag's request. (Tr. 568:16-23). Pajinag did not sign the June 15 typed statement and his typed name is misspelled. DeMello testified that Respondent made no effort to investigate who created the June 15 document and did not ask Pajinag why his name was misspelled on a document DeMello believed Pajinag created. (Tr. 496:6-13). Pajinag did not testify regarding Resp. Ex. 14. The lack of integrity of the evidence that documents this alleged threat casts doubt on the veracity of the allegation.

Finally, in keeping with its lackadaisical approach, Respondent did not interview Ragunjan until June 19, six days after the alleged threat was made, and did not issue discipline to Ragunjan for the alleged threat until two and a half week after the alleged incident. Respondent coupled this untimely discipline with one for Ragunjan's Union activities, an incident which occurred almost six full weeks earlier. (Tr. 443:14). These are not the actions of an employer that truly believes that a credible threat had been made by one employee to another, or which is concerned about liability, but is more consistent with one that is looking for opportunities to discipline a Union supporter.

In light of these factors, it is difficult to escape the conclusion that the discipline issued to Ragunjan for the alleged threat to Pajinag was a pretext to bolster Respondent's decision to discipline Ragunjan for his Union activity. Because of the strong evidence of pretext, Respondent has failed to demonstrate that it would have disciplined Ragunjan for the alleged threat, even in the absence of Ragunjan's Union activity. Since the Corrective Action is clearly pretextual as to the June 13 event, and the discipline for Ragunjan's Union activity on May 21 was undeniably unlawful, Respondent should be ordered to rescind Ragunjan's Corrective Action in its entirety.

IV. CONCLUSION

It is submitted that on the basis of the entire record as summarized herein, a preponderance of credible evidence supports the allegations of the Consolidated Complaint and therefore, it is respectfully urged that the Administrative Law Judge find that Respondent violated Sections 8(a)(1) and (3) of the Act as alleged in the Complaint and that Respondent be ordered to cease and desist from engaging in such conduct. General Counsel respectfully

requests that the Administrative Law Judge order the posting of a notice and that Respondent rescind the June 30 discipline issued to Guzman and Rangunjan. General Counsel further respectfully requests that the Administrative Law Judge issue an Order including the remedies requested herein and any other remedy deemed appropriate.

DATED AT Honolulu, Hawaii, this 18th day of March, 2016.

/s/ Scott E. Hovey, Jr.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that Counsel for the General Counsel's Brief to the Administrative Law Judge has this day been electronically filed with the National Labor Relations Board's Division of Judges, and a copy served upon the following persons by e-mail pursuant to Section 102.114(i) of the National Labor Relations Board's Rules and Regulations:

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