ORAL ARGUMENT NOT YET SCHEDULED

Nos. 15-1327, 15-1390

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BELLAGIO, LLC,

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

FINAL BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BELLAGIO, LLC	*	
	*	
Petitioner/Cross-Respondent	*	Nos. 15-1327
	*	15-1390
	*	
v.	*	
	*	Board Case Nos.
NATIONAL LABOR RELATIONS BOARD	*	28-CA-106634
	*	28-CA-107374
	*	
Respondent/Cross-Petitioner	*	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel for the National Labor Relations Board ("the Board") certifies the following:

A. Parties and Amici

Bellagio, LLC was the Respondent before the Board and is Petitioner/Cross-Respondent before the Court. The Board is the Respondent/Cross-Petitioner before the Court; its General Counsel was a party before the Board. There were no intervenors or amici before the Board, and there are none in this Court.

B. Rulings Under Review

The ruling under review is a Decision and Order of the Board in *Bellagio, LLC*, 362 NLRB No. 175 (Aug. 20, 2015).

C. Related Cases

This case has not previously been before this, or any other, court. Board counsel is not aware of any related cases.

/s/ Linda Dreeben
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Dated at Washington, DC
this 19th day of May, 2016

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GLOSSARY

A	Joint Deferred Appendix
The Act	The National Labor Relations Act
Bellagio	Bellagio, LLC
The Board	The National Labor Relations Board
Br.	Opening Brief of Bellagio
The Order	*Bellagio, LLC*, 362 NLRB No. 175 (Aug. 20, 2015)
SPI	Suspension Pending Investigation
The Union	The Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226, and Bartenders Union, Local 156

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ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of Bellagio, LLC ("Bellagio") for review, and the cross-application of the National Labor Relations Board ("the

Board") for enforcement, of a Board Decision and Order issued against Bellagio on August 20, 2015, and reported at 362 NLRB No. 175.[1]

The Board had jurisdiction over the proceeding below pursuant to Section 10(a) of the National Labor Relations Act ("the Act"). 29 U.S.C. § 160(a). The Board's Decision and Order is final under Section 10(e) of the Act. 29 U.S.C. § 160(e). The Court has jurisdiction over this proceeding pursuant to Section 10(f) of the Act, 29 U.S.C. § 160(f), which provides that petitions for review of Board orders may be filed in this Court, and Section 10(e) of the Act, 29 U.S.C. § 160(e), which allows the Board to cross-apply for enforcement. The petition and application are timely, as the Act provides no time limit for such filings.

STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the Board's finding that Bellagio committed four violations of Section 8(a)(1) of the Act when supervisor Brian Wiedmeyer: (a) continued to question employee Gabor "Bryan" Garner in an investigatory interview after he requested union representation; (b) suspended Garner for refusing to participate in the investigatory interview without union representation; (c) prohibited Garner from

[1] "A" refers to the Joint Deferred Appendix. "Br." refers to Bellagio's opening brief. Where applicable, references preceding a semicolon are to the Board's findings; those following the semicolon are to the supporting evidence.

discussing his suspension with coworkers; and (d) unlawfully surveilled Garner's protected activity after the investigatory interview.

2. Whether the Board's remedy is within its broad discretion conferred under Section 10(c) of the Act.

APPLICABLE STATUTORY PROVISIONS

Section 7 of the Act, 29 U.S.C. § 157:

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

Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1):

> It shall be an unfair labor practice for an employer –
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.

Section 10(c) of the Act, 29 U.S.C. § 160(c):

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board . . . shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter . . . .

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

This case came before the Board on a consolidated complaint issued by the Board's Acting General Counsel based on two separate unfair labor practice charges filed by Bellagio employees.[2] (A 283-91.) Regarding Garner, the complaint alleged that Bellagio violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by denying Garner's request for a union representative during an interview that Garner reasonably believed could lead to discipline, by orally promulgating a rule prohibiting employees' discussion of the terms and conditions of their employment, and by engaging in surveillance of employees engaged in protected activity. (A 287-88.) The complaint further alleged that Bellagio violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. § 158(a)(3) and (1), by suspending Garner for refusing to attend an investigatory interview without union representation. (A 287-88.)

After a hearing, Administrative Law Judge Robert A. Ringler issued a decision on March 20, 2014, finding that Bellagio had violated the Act as alleged

[2] An additional case (28-CA-107374 (Najia Zaidi)) was consolidated for administrative purposes with this case. The Board dismissed the allegations related to Zaidi, and that dismissal is not before the Court.

against Garner.[3] (A 7-14.) Before the Board, Bellagio excepted to the judge's findings.

On August 20, 2015, the Board issued a Decision and Order, affirming the judge's rulings, findings, and conclusions, with slight modification, and adopting his recommended Order, also with slight modification. (A 2.)

II. THE BOARD'S FINDINGS OF FACT

A. Background

Bellagio operates a high-end casino and hotel in Las Vegas, Nevada. (A 2, 7 & n.1; A 105-06.) The Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226, and Bartenders Union, Local 156, affiliated with UNITE HERE ("the Union"), represents Bellagio's food servers, waiters, bartenders, bellmen, dispatchers, valets, and other employees. (A 2 n.4, 7; A 190-280.)

Employee Garner has worked for Bellagio since its opening approximately 16 years ago. (A 87.) He is currently a bellman in Bellagio's Front Services Department and a member of the bargaining unit. (A 2, 7; A 87-88.) Although Bellagio bellmen are represented by the Union, the Front Services Department does not have its own union steward. (A 92.)

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[3] Having found that Garner's suspension violated Section 8(a)(1), the judge did not address the Section 8(a)(3) allegation, stating that it "would not materially affect the remedy." (A 11 n.23.)

As a bellman, Garner's duties include assisting guests with their luggage and checking guests in and out of the hotel. (A 2, 7; A 87-88.) Because bellmen are typically the first and last Bellagio employees to interact with guests, their demeanor is important to the hotel's image, and their job performance must meet high standards. (A 7; A 105-06.)

B. A Bellagio Guest Complains that Garner Solicited a Tip

On May 12, 2013, a hotel guest filed a formal complaint with Bellagio. (A 2; A 292.) According to the complaint, when the guest dropped off his luggage at the bell desk, the bellman (Garner) paused and hovered as if expecting a gratuity. (A 2, 7; A 292.) The guest complaint further alleged that Garner reacted unprofessionally when the guest declined to tip him. (A 2, 7; A 292.)

C. Garner's Supervisor Summons Him to an Investigatory Interview Regarding the Guest Complaint and Continues To Press Him To Give a Statement After He Requests a Union Representative

On May 13, towards the end of Garner's shift, Front Services Supervisor Brian Wiedmeyer summoned Garner for a meeting to discuss the guest complaint. (A 2, 7; A 90, 294-96, 297.) Max Sanchez, another of Garner's supervisors, attended the meeting as a witness. (A 2, 7; A 49, 79, 90, 297.)

At the start of the interview, Garner asked Wiedmeyer whether he might be disciplined. (A 2, 3, 7; A 50, 51, 60, 80-81, 91-92, 165-66.) Wiedmeyer

responded that discipline was a possibility, and Garner immediately requested a union steward. (A 2, 3, 7; A 51-52, 60, 80-82, 91-92, 165-66.)

Wiedmeyer did not know how to locate a steward, so Garner suggested that he contact Employee Relations (Bellagio's Human Resources department) for a list of union stewards. (A 2, 8; A 92.) Wiedmeyer then repeatedly requested that Garner fill out and sign a written statement about the guest incident. (A 2 & n.7, 3 n.10, 8; A 92-94, 297, 308.) Garner declined to do so without a union representative present and expressed his intention to return to work. (A 2; A 94, 294-96, 297, 308.)

Wiedmeyer and Sanchez left the room to call Employee Relations. (A 2-3.) On that call, Wiedmeyer "informed [Employee Relations] that [he] would have to [suspend] Bryan [Garner] because he stated he was going back to work without filling out a statement." (A 8; A 86, 296.)

D. Wiedmeyer Suspends Garner Pending Investigation Because Garner Will Not Provide a Statement Without a Union Steward Present

When Wiedmeyer and Sanchez returned from calling Employee Relations, Wiedmeyer "inform[ed] Bryan [he] could not locate his representation and [Garner] would have to" locate a steward. (A 2 n.7, 8; A 296.) Without his representative present, Garner again refused to fill out a statement about the guest incident. (A 2 n.7, 8; A 296.) Wiedmeyer then issued Garner a suspension

pending investigation ("SPI"), preventing him from returning to work until Bellagio completed the investigation. (A 2 n.7, 3, 8; A 296, 297, 306.) Wiedmeyer and Garner both signed the suspension form, and Wiedmeyer instructed Garner to leave the building immediately. (A 3; A 94-95, 306.)

Garner's suspension form stated, in part:

> You are being placed on Suspension Pending Investigation effective **05/13/13**. This is not a disciplinary action; it is a process that **Bellagio** utilizes to remove you from the work place in order to investigate a serious situation or policy infraction in which you may have been involved. It is also utilized if you have reached the final step in the progressive disciplinary process . . . .
>
> Upon the completion of the investigation process, one of the following things will occur:
>
> 1. You will be returned to work without disciplinary action . . . ; or
> 2. You will be returned to work with disciplinary action if warranted . . . ; or
> 3. You will be separated from the company . . . .

(A 306 (emphasis in original).)

According to Susan Moore, Employee Relations Manager, SPIs generally are not included in employee personnel files. (A 8; A 179.) They are used to maintain a "holding pattern" until Bellagio can conduct and close its investigation. (A 8; A 171.)

After signing the suspension form, Garner wrote on the back of the form:

> Was asked to fill out a statement. I asked if this was for discipline [Wiedmeyer] said could be. I asked for representation he said no. [He] asked if I was refusing to fill out a statement I said no I would like

> representation he said if I don't fill it out I would be SPI. I asked for my Weingarten rights.[4]

(A 2 n.7; A 95, 308.)

E. Wiedmeyer Follows Garner to the Dispatch Area and Tells Garner Not To Discuss His Suspension with the Other Bellmen

After Wiedmeyer and Garner signed the suspension form, Garner clocked out and went to the dispatch area to collect his personal belongings. (A 9; A 96.) The bellmen store their belongings, wait for and receive their work assignments, and start and end their work days in the dispatch area. (A 96-97, 119-21, 132-33.)

Approximately six other bellmen were in the dispatch area when Garner entered, and bellman Russ Meyer asked Garner what was wrong. (A 9; A 97, 121-22, 126.) Garner responded, "I just got SPI[e]d . . . [b]ecause I asked for my steward." (A 9; A 97.) Upon hearing Garner's statement, Wiedmeyer abruptly appeared in the dispatch area and told Garner he could not "discuss[] that matter in here." (A 9; A 97, 122, 126, 297.)

Garner responded, "[y]ou can't tell me who to talk to." (A 9; A 97, 122, 127.) Garner then walked out of the dispatch area and down the hall to leave the hotel with fellow bellman Jason Weinman. (A 9; A 97, 122-23, 128.) As they were leaving, Garner turned to look at Weinman and saw Wiedmeyer standing

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[4] The Board inadvertently stated that Garner wrote this statement on May 14, rather than on May 13. (A 2 n.7; *see* A 306, 308.)

nearby "glaring" at him. (A 9; A 97.) Garner asked if Wiedmeyer was also going to tell him who he could walk out with, and Wiedmeyer again told him to leave. (A 9; A 97, 122-23, 128.)

F. Garner Attends a Due-Process Meeting and Receives a Verbal Warning for the Guest Incident

On May 14, Garner attended a due-process meeting with Employee Relations Manager Moore and Front Services Director Charles Berry. (A 3; A 99-100, 138-39, 154-55, 176.) Upon Garner's request, Moore arranged for a union steward to join the meeting. (A 3; A 101, 176-77.) At the end of the interview, Garner completed a written statement regarding the May 12 guest incident and returned to work. (A 3; A 103-04, 302-04.) He received a verbal warning for the guest complaint, but ultimately suffered no loss in pay from the one-day suspension. (A 3; A 99, 141-42, 174.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On August 20, 2015, the Board (Chairman Pearce and Members McFerran and Johnson) affirmed, with modification, the administrative law judge's finding that Bellagio had violated Section 8(a)(1) of the Act. (A 2-7.) Specifically, a majority of the Board (Chairman Pearce and Member McFerran; Member Johnson, dissenting) found that Bellagio violated Section 8(a)(1) by denying Garner's request for union representation during the investigatory interview and by suspending him because he refused to participate in the interview without union

representation. (A 2.) The Board unanimously found that Bellagio unlawfully instructed Garner not to talk about his suspension with other employees, but rejected the judge's finding that the unlawful instruction constituted an oral rule. (A 2 & n.3.) Finally, the Board unanimously found that Bellagio unlawfully engaged in surveillance of its employees' protected concerted activity. (A 2.)

The Board's Order directs Bellagio to cease and desist from the unfair labor practices found and from "[i]n any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act." (A 13.) Affirmatively, the Order requires Bellagio to remove from its records any reference to Garner's unlawful suspension and give him written notice that it has done so and that the suspension will not be used against him as a basis for future discipline. (A 13.) Bellagio also must post a remedial notice. (A 4, 6-7, 13.)

SUMMARY OF ARGUMENT

This case involves a series of unlawful actions that Bellagio took against employee Garner in response to his exercise of statutorily protected rights and in violation of Section 8(a)(1) of the Act. To start, supervisor Wiedmeyer violated Garner's *Weingarten* right to a union representative in a meeting that Garner reasonably believed could lead to discipline. Substantial and undisputed evidence supports the Board's finding that Garner requested a union representative in an

investigatory interview about a guest complaint. But despite the parties' inability to locate one, Wiedmeyer repeatedly pressed Garner to fill out a statement summarizing his version of the incident.

Substantial evidence supports the Board's further finding that Bellagio then unlawfully suspended Garner pending investigation for engaging in that protected activity. Contrary to Bellagio's assertion, the Board's finding that Garner's suspension was an adverse action is amply supported. Because the suspension removed Garner from the workplace and carried with it the potential for serious discipline or discharge, it had a chilling effect on employees' protected activity.

The Board's finding that Garner's *Weingarten* request was a motivating factor in Bellagio's decision to suspend him is supported by substantial evidence. Moreover, as the Board reasonably found, Bellagio failed to prove that it would have suspended Garner absent that protected activity. Bellagio's weak justifications for the suspension – that Garner was agitated during the interview and/or that he was suspended to give Bellagio time to locate his union representative – are undermined either by credited evidence or by the testimony and documentation of Bellagio's own witnesses.

Substantial evidence also supports the Board's findings that Bellagio then unlawfully prohibited Garner from speaking with his coworkers about his suspension and unlawfully surveilled Garner and his coworkers as he engaged in

this protected discussion. After the interview, Wiedmeyer followed Garner to the dispatch area where Garner was gathering his personal belongings, demanded Garner stop discussing his suspension with his coworkers, glared at Garner with his hands on his hips, and followed Garner and his coworker as they left the premises. Bellagio's arguments that this conduct was not unlawful are contrary to the credited testimony and based on a misunderstanding of the law. Moreover, Bellagio's due process argument is without merit. The Board's finding that Wiedmeyer engaged in coercive conduct, rather than orally promulgating an unlawful rule, did not violate due process because the Board's finding was closely connected to the subject matter of the complaint and was fully litigated.

Finally, the Board's Order is well within its broad remedial discretion. The Order, and its accompanying notice, either speak to Bellagio's conduct in this matter or are sufficiently related to the violations found.

STANDARD OF REVIEW

The Board's legal determinations are upheld if they are rational and consistent with the Act. *Jacoby v. NLRB*, 325 F.3d 301, 308 (D.C. Cir. 2003) (citation omitted). The Board's findings of fact are "conclusive" when supported by substantial evidence on the record considered as a whole. 29 U.S.C. § 160(e), (f); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (citation omitted) (stating that evidence is substantial when "a reasonable mind might accept

[it] as adequate to support a conclusion"). A reviewing court may not displace the Board's choice between two fairly conflicting views, even if the court "would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera*, 340 U.S. at 488; *accord Laro Maint. Corp. v. NLRB*, 56 F.3d 224, 229 (D.C. Cir. 1995).

An employer's motivation for an adverse employment action is a factual determination, *Laro*, 56 F.3d at 229, of which the Court is "even more deferential . . . because most evidence of motive is circumstantial," *Inova Health Sys. v. NLRB*, 795 F.3d 68, 80 (D.C. Cir. 2015) (citation omitted). Credibility determinations made by the judge and adopted by the Board are to be upheld unless those determinations are "hopelessly incredible, self-contradictory, or patently unsupportable." *Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 28 (D.C. Cir. 1998) (citation and internal quotation marks omitted).

Finally, the Board's selection of remedy is reviewed for abuse of discretion. *Teamsters Local Union No. 639 v. NLRB*, 924 F.2d 1078, 1085 (D.C. Cir. 1991); *see also United Food & Commercial Workers Int'l Union, AFL-CIO v. NLRB*, 852 F.2d 1344, 1347 (D.C. Cir. 1988) (citation omitted) (stating that "the imposition of remedies is a matter of special administrative competence, subject to very limited judicial review"). Thus, its remedy "should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said

to effectuate the policies of the Act." *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943).

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY COMMITTED FOUR VIOLATIONS OF SECTION 8(a)(1) OF THE ACT

Section 7 of the Act guarantees employees the right "to engage in . . . concerted activities for the purpose of . . . mutual aid or protection . . . ." 29 U.S.C. § 157. Section 8(a)(1) of the Act protects those rights by making it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7. 29 U.S.C § 158(a)(1). On May 13, Bellagio, through its Front Services Supervisor Wiedmeyer, repeatedly violated Section 8(a)(1) of the Act by impeding its employees' Section 7 activities.

A. Bellagio Violated Section 8(a)(1) of the Act When Wiedmeyer Continued To Press Garner for a Statement After He Requested a Union Steward in an Investigatory Interview

In *NLRB v. J. Weingarten, Inc.*, the Supreme Court held that an employee has a Section 7 right to request union representation as a condition of participation in an investigatory interview "where the employee reasonably believes the investigation will result in disciplinary action." 420 U.S. 251, 257 (1975). Once an employee has exercised that right, the employer has three options: (1) to grant

the request, (2) to offer the employee the choice of a meeting without a representative or of no meeting at all, or (3) to discontinue the interview. *Consol. Freightways Corp.*, 264 NLRB 541, 542 (1982) (citation omitted). "Under no circumstances may the employer continue the interview without granting the employee union representation unless the employee voluntarily agrees to remain unrepresented." *Washoe Med. Ctr., Inc.*, 348 NLRB 361, 367 (2006) (citations omitted).

The Board, with court approval, has consistently found that an interview is investigatory for *Weingarten* purposes when an employee is summoned in front of management to explain his or her version of a disputed event. *Bentley Univ.*, 361 NLRB No. 125, 2014 WL 6989116, at *2 (Dec. 10, 2014) (citing cases); *see also Texaco, Inc.*, 251 NLRB 633, 636 (1980) (stating that "were the employer to inform the employee of a disciplinary action and then seek facts or evidence in support of that action, or to attempt to have the employee admit his alleged wrong doing *or to sign a statement to that effect* . . . , the employee's right to union representation would attach") (emphasis added), *enforced*, 659 F.2d 124 (9th Cir. 1981); *Detroit Edison Co.*, 217 NLRB 622, 624 (1975) (finding Section 8(a)(1) violation where employee was denied request for union representation in meeting held by security agents solely to solicit statement from employee, even though agents had no disciplinary authority). Moreover, for an interview to be

investigatory, the employer's requests need not require a verbal response. *See Ralphs Grocery Co.*, 361 NLRB No. 9, 2014 WL 3778350, at *1 (July 31, 2014) (finding that "drug and alcohol test, ordered as part of the [employer]'s investigation into [employee]'s conduct, triggered [employee]'s right to a *Weingarten* representative").

Substantial record evidence supports the Board's finding (A 3) that Garner's May 13 interview qualified as "investigatory" within the meaning of *Weingarten*. It is undisputed that Garner reasonably believed the May 13 meeting with Wiedmeyer and Sanchez could lead to discipline. (A 3, 7; A 50, 51, 60, 80-81, 91-92, 165-66.) Indeed, when Garner asked Wiedmeyer if discipline was a possibility, Wiedmeyer responded affirmatively. (A 2, 3, 7; A 51-52, 60, 80-82, 91-92, 165-66.) And it is uncontested that Garner immediately exercised his *Weingarten* rights by requesting the presence of a union steward before undergoing further questioning. (A 2, 3, 7; A 51-52, 60, 81, 92.)

But, as the Board found (A 3) and as the record amply demonstrates, Bellagio then failed to follow one of the three "lawful avenues available to it" under *Weingarten*. First, Bellagio did not grant Garner's request for a steward because, despite the parties' attempts, they were unable to locate one. (A 3.) Second, the record is devoid of any evidence that Wiedmeyer explicitly offered

Garner "the choice of a meeting without a representative or of no meeting at all." (A 3); *see Consol. Freightways*, 264 NLRB at 542.

Nor did Wiedmeyer simply discontinue the interview, the third lawful avenue available to Bellagio. (A 3.) Although Wiedmeyer may have stopped his verbal questioning about the specifics of the guest complaint (A 2 n.7, 3 n.10; A 116), Wiedmeyer continued to press Garner to fill out and sign a statement, even after Garner repeated his request for a union steward, and despite the parties' inability to contact one. (A 2 & n.7, 3 n.10, 8; A 92-94, 294-96, 297, 308.) Thus, the evidence fully supports the Board's finding (A 3) that Bellagio violated Section 8(a)(1) by continuing the investigatory interview in the face of Garner's *Weingarten* request. *See Texaco, Inc.*, 251 NLRB at 636 (finding that employer violated Section 8(a)(1) when it sought and secured admission of misconduct from employee in absence of active assistance of union representative).

Contrary to Bellagio's assertion (Br. 33-34), the Board's finding (A 2 n.7, 3 & n.10) is amply supported by both testimonial and documentary evidence. Garner credibly testified that, after he requested union representation, Wiedmeyer began pressing him for a statement, and did so numerous times. (A 92-94.) Indeed, Wiedmeyer admitted as much in his written account of the May 13 meeting, stating that "I returned [from calling Employee Relations] to inform [Garner] I could not locate his representation and he would have to. He

again refused *and refused to fill out a statement regarding the issue*." (A 296 (emphasis added).) Wiedmeyer's account is corroborated by the contemporaneous written accounts of both Sanchez – "Wiedmeyer explained to [Garner] that it was up to him to find a shop steward and that we could continue with the request of a statement from him" (A 297), and Garner – "I said no I would like representation, [and] he said if I don't fill [a statement] out I would be SPI" (A 308).

Bellagio does not appear to contest that Wiedmeyer's pressing Garner for a statement constitutes further questioning for *Weingarten* purposes. Instead, it incorrectly asserts (Br. 33-34) that the Board failed to consider Garner's testimony that Wiedmeyer ceased his verbal questioning, claiming that this testimony somehow contradicts or trumps the Board's well-supported finding that Wiedmeyer continued to press Garner to complete the statement. But the Board plainly considered that testimony in finding the *Weingarten* violation. Indeed, the Board specifically acknowledged that "Garner testified that Wiedmeyer ceased questioning him about the incident once Garner requested a steward." (A 2 n.7.) And it later explained that fact was irrelevant because "[c]learly, the Respondent's request that Garner complete a statement relating to an incident that could lead to discipline was part of its investigatory interview of Garner." (A 3 n.10.)

Bellagio also takes great pains (Br. 32-33, 45) to emphasize that *Weingarten* does not require that it (the employer) locate a steward upon request, especially

when (it alleges), "Garner had the ability to end Wiedmeyer's search for a steward the entire time." But those arguments are mere distractions, as the Board's *Weingarten* finding (A 3) was solely focused on the principle that Wiedmeyer violated the Act when he continued to press Garner for a statement without his requested representative present.[5] That finding is amply supported by the evidence, and the Board's Order should be enforced.

B. Bellagio Violated Section 8(a)(1) of the Act When It Suspended Garner Pending Investigation for Invoking His *Weingarten* Rights

An employer violates Section 8(a)(1) of the Act when it takes an adverse employment action against an employee for engaging in protected activity. *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 125 (D.C. Cir. 2001) ("It is well settled that an employer violates the [Act] by taking an adverse employment action . . . in order to discourage union activity."). In *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393 (1983), the Supreme Court approved the Board's test for determining motivation in unlawful discrimination cases first articulated in *Wright Line, A Div.*

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[5] Even though Garner's right to a specific representative is not at issue in this case, it bears noting that Bellagio's citations to *Roadway Express*, 246 NLRB 1127 (1979) and *Pac. Gas & Elec. Co.*, 253 NLRB 1143 (1981), are confusing. Under current Board precedent, "in a *Weingarten* setting, an employee has the right to specify the representative he or she wants, and the employer is obligated to supply that representative absent some extenuating circumstances." *See Anheuser-Busch, Inc.*, 337 NLRB 3, 7-12 (2001) (summarizing evolution of Board precedent on this issue), *enforced*, 338 F.3d 267, 276-78 (4th Cir. 2003).

of Wright Line, Inc., 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981). Under that test, if substantial evidence supports the Board's finding that an employee's protected activity was a "motivating factor" in the employer's decision to take adverse action against the employee, the adverse action is unlawful unless the employer demonstrates, as an affirmative defense, that it would have taken the same action even in the absence of protected activity. *Transp. Mgmt. Corp.*, 462 U.S. at 401-03; *see Wright Line*, 251 NLRB at 1089. The Board has traditionally treated discipline, or an otherwise adverse employment action, for exercising *Weingarten* rights as a violation of Section 8(a)(1), subject to the *Wright Line* analysis. *See Provider Servs. Holdings, LLC*, 356 NLRB No. 181, 2011 WL 2561369, at *4 n.3 (June 16, 2011); *see also Wal-Mart Stores, Inc.*, 351 NLRB 130, 133-34 (2007) (finding that employer violated Section 8(a)(1) by discharging employee based, in part, on his refusal to participate in investigatory interview without representation);[6] *Safeway Stores*, 303 NLRB 989, 989-90 (1991) (similar); *T.N.T. Red Star Exp.*, 299 NLRB 894, 895 (1990) (finding that employer violated Section 8(a)(1) by suspending and issuing warning to employee because he exercised his *Weingarten* rights).

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[6] *Wal-Mart* involved a non-union workforce and was decided retroactively applying the Board's (now overruled) position that non-union employees are entitled to *Weingarten* rights under the Act. *See Wal-Mart Stores, Inc.*, 351 NLRB 130, 136 (2007) (following *Epilepsy Found. of Ne. Ohio*, 331 NLRB 676 (2000)).

A showing of unlawful motivation typically requires three elements: "[1] union or protected concerted activity by the employee, [2] employer knowledge of that activity, and [3] union animus on the part of the employer." *Consol. Bus Transit, Inc.*, 350 NLRB 1064, 1065 (2007) (citing *Willamette Industries*, 341 NLRB 560, 562 (2004)), *enforced*, 577 F.3d 467 (2d Cir. 2009); *accord Bally's Park Place*, 646 F.3d 929, 935 (D.C. Cir. 2011) (citation omitted) (stating that, under *Wright Line* test, substantial evidence must show that "protected conduct was a motivating factor" in the adverse decision). Proof of an employer's discriminatory motive can be through direct evidence or inferred from circumstantial evidence taken from the record as a whole. *Mesker Door, Inc.*, 357 NLRB No. 59, 2011 WL 3739685, at *2 (Aug. 24, 2011) (citation omitted). Circumstantial evidence of discriminatory motive includes the proximity in time of the adverse action to the protected activity. *See Robert Orr/Sysco Food Servs.*, 343 NLRB 1183, 1184 (2004) (citing *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003)); *accord Bally's Park Place*, 646 F.3d at 936 (noting timing of employer's action as one consideration in showing unlawful motive).

As explained below (pp. 30-36), the record fully supports the Board's findings that Garner's *Weingarten* request was a motivating factor in Bellagio's decision to suspend him and that Bellagio failed to prove that it would have suspended Garner absent his protected activity. Indeed, Bellagio hardly quibbles

with those findings. Instead, it argues that the Board erred in finding that the suspension was adverse. Ample record evidence also supports that threshold finding, which is addressed first, below.

1. The suspension pending investigation was an "adverse employment action"

Within the *Wright Line* analysis, an employment action need not be formally labeled "discipline" or be within the confines of an employer's formal disciplinary structure to be considered adverse. Rather, an employment action is "adverse" when an "individual's prospects for employment or continued employment have been diminished or [] some legally cognizable term or condition of employment has changed for the worse." *Northeast Iowa Tel. Co.*, 346 NLRB 465, 475-76 (2006) (defining "adverse" and listing examples of adverse employment actions).

The Board, with court approval, has found various employer actions to be adverse, even though not disciplinary. *See, e.g.*, *Tasty Baking Co.*, 254 F.3d at 129-30 (transfer of employee to night shift); *Southwire Co. v. NLRB*, 820 F.2d 453, 464 (D.C. Cir. 1987) (confinement of employees to their machines and forbidding them to talk to other employees); *Brandeis Mach. & Supply Co. v. NLRB*, 412 F.3d 822, 836 (7th Cir. 2005) (implementation of staggered and shortened lunch times); *New Orleans Cold Storage & Warehouse Co. v. NLRB*, 201 F.3d 592, 600, 600 n.8 (5th Cir. 2000) (transfer of employee to less-desirable position working in freezer); *Extendicare Homes, Inc.*, 348 NLRB 1062, 1062 n.4, 1079 (2006) (verbal

reprimand that was not part of progressive discipline system); *Am. Red Cross Missouri-Illinois Blood Servs. Region*, 347 NLRB 347, 350 (2006) (90-minute meeting with employee in which several managers read aloud and questioned her about company handbook). Moreover, the prospect of discipline for engaging in Section 7 activities – and its attendant coercive chilling effect, whether or not discipline is imposed – can be sufficiently adverse for purposes of a Section 8(a)(1) violation. *See Murtis Taylor Human Servs. Sys*., 360 NLRB No. 66, 2014 WL 1232905, at *1 n.3, 23-24 (Mar. 25, 2014) (noting "profound chilling effect" of investigation leading to potential discipline); *Am. Red Cross Missouri-Illinois Blood Servs. Region*, 347 NLRB at 349-50 (stating that 90-minute meeting with employee, which did not ultimately lead to discipline, "had a reasonable tendency to restrain her from engaging in further protected activities"); *Consol. Diesel Co.*, 332 NLRB 1019, 1020 (2000) (finding that "Respondent's requiring employees who engage in protected concerted activity to submit to a process with the potential for interrogation about protected activity, discipline, discharge, and permanent documentation . . . has a reasonable tendency to restrain the exercise of Section 7 rights"), *enforced*, 263 F.3d 345 (4th Cir. 2001).

Substantial evidence supports the Board's finding (A 3-4, 11 n.22) that Garner's suspension was an "adverse employment action." As the Board explained (A 4), in direct response to Garner's protected activity, Bellagio

removed him from the workplace, going so far as to "personally follow[] him out of the building to ensure his departure." Through this conduct, Garner's "prospects for employment or continued employment [were] diminished." *Northeast Iowa Tel. Co.*, 346 NLRB at 475-76. Indeed, Bellagio's Employee Relations Manager Moore conceded that a suspension pending investigation is "uncomfortable for employees." (A 182.) Such discomfort inheres in the suspended employee's separation from work and his uncertainty about his future with the company.

Moreover, as the Board emphasized (A 4 n.13), even if the removal does "not ultimately result in written disciplinary action or loss of pay, [it] serve[s] to reinforce to employees the employer's ability to quell protected activity at its source." That is, Garner's removal itself – along with its attendant discomfort and uncertainty – is enough to make Bellagio employees think twice about requesting a union representative in an investigatory interview, thus chilling their protected activity.

Further, the SPI form that Bellagio required Garner to sign as part of the suspension specified the severity of the potential discipline he was facing, which prior to that point had not been made clear. (A 4; A 306.) It stated that Bellagio issues an SPI in order "to investigate a *serious* situation or policy infraction" (A 306 (emphasis added)), and then listed, as potential resolutions to Bellagio's

investigation, returning Garner to work with discipline or separating Garner from the company. (A 3; A 306.) The form also explicitly noted the possibility of his receiving no compensation during the suspension, if discipline was warranted. (A 306.) Wiedmeyer's issuing Garner a formal SPI – separating him from work indefinitely with the possibility of no pay, and suddenly raising the prospect of termination – correspondingly diminished Garner's prospect for continued employment at Bellagio. Given its potential chilling effect on Garner's Section 7 activity, the suspension was adverse.

Bellagio, in arguing that the suspension was not adverse (Br. 34-41), provides after-the-fact rationalizations. It finds significant (Br. 35) that ultimately Garner's suspension lasted less than 24 hours, Garner was reimbursed for his time off work, and the suspension was not included in his personnel file. But none of those points "negate the fact of the suspension (removal from the workplace) or its chilling effect on the exercise of the *Weingarten* right, given the potential for discipline or discharge." (A 4.) Rather, the chilling effect was clear. Bellagio demanded that Garner sign an official-looking form documenting the suspension; indefinitely suspended him, with the possibility of no compensation for his time off work; and, regarding his future employment, told him only that he would "receive a phone call from [] HR to let [him] know what process to go through next." (A 95.)

In an attempt to bolster its argument, Bellagio cites (Br. 35-36) several Board cases analyzing whether employee coachings or counselings constitute adverse employment actions. These cases are either distinguishable or support the Board's finding here. For example, in *Promedica Health Systems, Inc.*, the Board found the coachings at issue to be disciplinary actions for purposes of a Section 8(a)(3) violation because the coachings are "duly considered when future discipline is contemplated" by the employer. 343 NLRB 1351, 1351-52 (2004), *enforced in relevant part*, 206 F. App'x 405, 408 (6th Cir. 2006). Having found the coachings to be disciplinary, the Board did not address whether the coachings were otherwise adverse to the employees.

Similarly, contrary to Bellagio's insinuation (Br. 36), *Lancaster Fairfield Community Hospital*, 311 NLRB 401, 403-04 (1993) supports the Board's finding that the suspension here was adverse. In that case, the Board found that the employer's issuing a "conference report," summarizing an employee's "'disruptive' pattern of behavior 'of continuing to question Management operational decisions,'" was not sufficiently adverse to find a Section 8(a)(3) violation. *Lancaster Fairfield Comty. Hosp.*, 311 NLRB at 403-04. The Board based its finding on the fact that the report "merely warns an employee of potential performance or behavior problems," was not a part of the employer's formal disciplinary process, and did not affect the employee's terms or conditions of

employment. *Id.* In contrast, here Bellagio suspended Garner indefinitely, required that he immediately leave the premises, and introduced the uncertainty of future discipline or discharge. Those differences warrant a different result from *Lancaster*'s finding that the conference report was not disciplinary for purposes of a Section 8(a)(3) violation.

While factually distinguishable with respect to the adverse action finding, the *Lancaster* Board's separate finding that, in issuing the conference report, the employer violated Section 8(a)(1) of the Act, provides a useful analogy. *See Lancaster Fairfield Comty. Hosp.*, 311 NLRB at 403. In that case, the Board alluded to the potential chilling effect of the conference report, noting that it "was meant to inhibit [the employee's] protected right to criticize management at proper times and places and in an appropriate manner in support of a union organizational drive." *Id.* There, as here, the employment action's chilling effect on the employee's Section 7 activities was significant enough to violate Section 8(a)(1), even if it was not officially considered "discipline." *See id.*; *cf. NLRB v. Air Contact Transp. Inc.*, 403 F.3d 206, 213 (4th Cir. 2005) ("Under our legal standard interpreting § 8(a)(1), a so-called 'counseling' measure, while not affecting the

terms or conditions of an employee's job, could nevertheless coerce an employee from exercising his § 7 rights.").[7]

Other cases relied on by Bellagio (Br. 36-37) are easily distinguishable, as they examine a different issue under the Act – whether an individual has the authority to impose discipline and is therefore a supervisor under Section 2(11) of the Act. *See* 29 U.S.C. § 152(11) (listing twelve indicia conferring supervisory status, including authority to impose "discipline"). Those cases provide little guidance, as they do not address suspensions pending investigation or other analogous adverse actions in the *Wright Line* context. Moreover, the supervisory context does not lend itself well to analogy. In that context, the Board must assess an individual's purported supervisory authority consistent with the principle that exemptions to the Act are to be construed narrowly to avoid unnecessarily stripping workers of their rights. *See, e.g.*, *Jochims v. NLRB*, 480 F.3d 1161, 1168 (D.C. Cir. 2007) (noting serious consequences of an erroneous determination of supervisory status); *Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298, 305 (6th

[7] Bellagio also cites *Alan Ritchey, Inc.*, 359 NLRB No. 40, 2012 WL 6800789 (Dec. 14, 2012), misstating (Br. 36) its holding as finding that suspensions pending investigation do not constitute a change in the terms and conditions of employment that require bargaining because they do not have a material impact on employment. Not only was this case invalidated by the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), but the Board made no such finding, *see Alan Ritchey*, 2012 WL 6800789, at *11 n. 19.

Cir. 2012) (citation omitted) ("[I]t is important for the Board not to construe supervisory status too broadly, for a worker who is deemed to be a supervisor loses his organizational rights.").[8]

The Board's finding (A 3-4, 11 n.22) that Garner's suspension was adverse is fully supported, and Bellagio's efforts to argue otherwise are unpersuasive. As shown below, it was therefore unlawful for Bellagio to suspend Garner for requesting his *Weingarten* representative.

2. Garner's invoking his *Weingarten* rights was a motivating factor in Bellagio's decision to suspend him

Substantial evidence supports the Board's finding (A 3, 11) that Garner's suspension was unlawfully motivated by his protected activity – that is, his "refusal to complete a statement in a disciplinary interview without his representative." The first two elements of the *Wright Line* showing – protected activity and employer knowledge – are easily met, and Bellagio does not argue to the contrary. *See Consol. Bus Transit, Inc.*, 350 NLRB at 1065. Indeed, the record evidence

[8] Even further off the mark is Bellagio's reliance (Br. 37-38) on cases examining adverse employment actions under federal anti-discrimination laws. Those cases interpret different statutes in different contexts, and the Board is not bound by such precedent when interpreting the Act. *See, e.g.*, *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963) ("The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review.").

shows that Garner invoked his *Weingarten* rights in an investigatory interview (A 2, 3, 7, 11 & n.20; A 51-52, 60, 81, 92), and Bellagio was aware of his protected activity (A 2, 3, 7, 11; A 51-52, 60, 81, 92).

Regarding the third element, both direct and circumstantial evidence amply supports the Board's finding (A 11) that Bellagio exhibited anti-union animus in issuing Garner's suspension. *See Consol. Bus Transit, Inc.*, 350 NLRB at 1065. As for direct evidence, Wiedmeyer's, Sanchez's, and Garner's written accounts of the May 13 meeting uniformly show that that Wiedmeyer suspended Garner for exercising his *Weingarten* rights.[9] Those statements are further corroborated by Sanchez's and Garner's testimony that Wiedmeyer suspended Garner because he would not fill out the statement without a steward present. (A 11 n.21; A 86, 94.)

Circumstantial evidence bolsters the Board's finding. As the Board explained, the "close, almost lockstep, timing between the SPI and Garner's exercise of his *Weingarten* rights" (A 11) is further evidence of Bellagio's anti-union animus. *See Inova Health*, 795 F.3d at 82 (citing cases) ("The Board and

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[9] In Wiedmeyer's written account of the May 13 meeting, he wrote, "I informed [Employee Relations] that I would have to SPI Bryan [Garner] because he stated he was going back to work without filling out a statement." (A 11; A 296.) Sanchez corroborates this account, writing, "[Wiedmeyer] also told [Garner] that he would have to SPI him if he wasn't willing to find a shop steward and fill out the statement." (A 297.) Garner's written account is consistent with Wiedmeyer's and Sanchez's, stating, "[Wiedmeyer] said if I don't fill it out I would be SPI." (A 308.)

this court have long recognized that the close proximity of protected conduct, expressions of animus, and disciplinary action can support an inference of improper motivation."). Thus, substantial evidence supports the Board's finding that Garner's request for a *Weingarten* representative was a motivating factor in Bellagio's decision to suspend him.

3. Bellagio failed to show that it would have suspended Garner absent his protected activity

The record evidence also supports the Board's finding (A 3, 11) that Bellagio failed to establish its *Wright Line* affirmative defense that it would have suspended Garner absent his protected activity. *See T.N.T. Red Star Exp.*, 299 NLRB at 895 n.6; *see also Cadbury Beverages*, 160 F.3d at 31 (stating that employer must "prove, as an affirmative defense, that despite any anti-union animus, [it] *would* have fired [the employee] *because* of his insubordination, not that it *could* have done so") (emphasis in original). Where, as here, there is "a strong showing of discriminatory motivation, the employer's rebuttal burden is substantial." *Bally's Park Place*, 646 F.3d at 936 (citations omitted).

Before the Board, and again before the Court (Br. 29, 32, 35, 40, A 65-67), Bellagio claims that it suspended Garner because he was agitated during the May 13 investigatory interview. That claim is easily rejected, as it directly conflicts with Garner's credited testimony that he remained calm during the interview. (A 2 n.7, 4 n.13, 8, 11; A 107-08.)

The Board's crediting Garner's testimony is well supported. First, the judged based his determination on Garner's demeanor. (A 8.) Demeanor-based credibility determinations are entitled to particular deference. *See, e.g.*, *NLRB v. Louton, Inc.*, 822 F.2d 412, 414 (3d Cir. 1987) (citation omitted) ("Where credibility determinations are based at least partially on the [judge's] assessment of demeanor, they are entitled to great deference, as long as relevant factors are considered and the resolutions are explained."). Second, as the Board specifically explained, Garner's credited testimony was corroborated by Wiedmeyer's and Sanchez's near-contemporaneous written accounts of the May 13 meeting, neither of which linked Garner's purported agitation to his suspension. (A 2 n.7, 8; A 294-96, 297.) Finally, the judge noted that if Garner were truly agitated, he would have received independent discipline for that conduct. (A 8.) Given the record support for the judge's credibility finding, Bellagio's claim (Br. 12 n.3) that Garner's testimony is "contrary to the weight of the record" is meritless.

Likewise, Bellagio's citation to testimony that Garner was "distraught" and speaking loudly (Br. 12 n.3) after his suspension does nothing to show that his credited testimony that he remained calm during the meeting was "hopelessly incredible, self-contradictory, or patently unsupportable." *Cadbury Beverages*, 160 F.3d at 28. To the contrary, even if that testimony were considered conflicting, it is well settled that the "mere fact that conflicting evidence exists is

insufficient to render a credibility determination 'patently insupportable,' since such a conflict is present in every instance in which a credibility determination is required." *Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 426 (D.C. Cir. 1996).[10]

In sum, Bellagio's proffered justification for suspending Garner because of his purported agitation in the May 13 meeting is based solely on discredited evidence. It should be rejected. *See id.* at 425 (rejecting employer's proffered reasons for adverse employment action based on testimony explicitly discredited and/or inconsistent with testimony specifically credited by judge).

Bellagio also suggests (Br. 28-29, 35, 39-41) that Wiedmeyer suspended Garner to allow Garner time to obtain union representation so Bellagio could complete its investigation into the guest complaint. That claim, however, was specifically rebutted by Bellagio's Employee Relations Manager, who testified that the need to locate a shop steward "wouldn't be a reason we would [] place somebody on SPI." (A 186.)

Nevertheless, Bellagio further argues (Br. 28-29, 39-41) that suspension for this reason is expressly authorized under *Weingarten* and its progeny. But Bellagio misinterprets this precedent. *Weingarten* allows an employer to suspend an

[10] Bellagio's reliance (Br. 39-40) on Susan Moore's testimony that Bellagio consistently uses SPIs to allow employees to "cool off" is likewise misplaced. The judge discredited this testimony too, giving it "little, if any, weight." (A 8 n.6.)

interview upon an employee's request for representation, 420 U.S. at 258-59; it does not allow an employer to suspend an *employee* for requesting representation, *see T.N.T. Red Star Exp.*, 299 NLRB at 895. The Board's decision in *Roadway Express*, 246 NLRB 1127 (1979), does not hold otherwise. In that case, the Board elaborated on when *Weingarten* rights kick in, finding that the employer there lawfully suspended its employee for insubordination for refusing to leave the employer's dock area to attend an interview. *See id.* at 1128 (stating that "an employee's *Weingarten* rights, with all its attendant safeguards, matures at the commencement of the interview, be it on the production floor or in a supervisor's office"). In so finding, the Board specifically stated that, although the employee was not "privileged to ignore Respondent's order to leave the dock area," the employee "was entitled to refuse to participate in an investigatory interview in the absence of the requested representative." *Id.* at 1129. Consistent with *Roadway Express*, the Board found that Garner did the latter.

That finding in no way prevents Bellagio from conducting investigations into its employees' misconduct, as Bellagio claims. (Br. 40-41.) Under *Weingarten*, Bellagio has three lawful options when an employee requests a representative in an investigatory interview, as discussed in detail above. Certainly within this framework, it can both lawfully end an interview to allow an employee an opportunity to secure his representation and continue its investigation. But in so

doing, Bellagio cannot, as it did here, suspend an employee for an unlawful reason. (A 4 n.13); *cf. Transp. Mgmt. Corp.*, 462 U.S. at 394 (noting that "employers retain the right to discharge workers for any number of other reasons unrelated to the employee's union activities"). Because Bellagio failed to prove that it would have suspended Garner absent his *Weingarten* request, the Board reasonably found (A 3-4, 11) that Bellagio violated Section 8(a)(1) of the Act.

C. Bellagio Violated Section 8(a)(1) of the Act When Wiedmeyer Prohibited Garner from Discussing His Suspension

Bellagio's series of unfair labor practices did not stop with its *Weingarten* violation or with its unlawful suspension. After the interview, Bellagio then unlawfully demanded Garner stop discussing his suspension with other Bellagio employees.

An employer violates Section 8(a)(1) when it prohibits employees from speaking with coworkers about discipline, disciplinary investigations, or other terms and conditions of their employment. *See Inova Health*, 795 F.3d at 85 (discussing "settled Board precedent holding that employees have a protected right to discuss discipline or disciplinary investigations with fellow employees"); *Lucky Cab Co.*, 360 NLRB No. 43, 2014 WL 670231, at *10 (Feb. 20, 2014) (citing cases), *enforced*, 621 F. App'x 9 (D.C. Cir. 2015). "An employer may prohibit such discussion only when a 'substantial and legitimate business justification'

outweighs the 'infringement on employees' rights.'"[11] *Inova Health*, 795 F.3d at 85 (quoting *Caesar's Palace*, 336 NLRB 271, 272 (2001)); *accord Intermet Stevensville*, 350 NLRB 1349, 1355 (2007) (rejecting employer's proffered justification that employee's discussion of discipline would interrupt production). An employer's statement – such as one prohibiting discussion of discipline or investigations – violates the Act if, considering the totality of the circumstances, "the statement has a reasonable tendency to coerce or to interfere with those rights." *See Tasty Baking Co.*, 254 F.3d at 124-25 (finding employer statements to be unlawful threats in violation of Section 8(a)(1) of the Act).

Substantial evidence supports the Board's finding (A 2 & n.3) that Wiedmeyer violated the Act when he demanded that Garner stop discussing his suspension with his coworkers. The credited testimony shows that after Garner left the May 13 investigatory interview, he entered the dispatch area[12] to collect his personal belongings and, in response to a question from fellow bellman Russ Meyer, told his coworkers that "I just got SPI[e]d . . . [b]ecause I asked for my steward." (A 9; A 96-97.) Just as Garner said that, "Brian Wiedmeyer [came]

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[11] Bellagio has put forth no justification for prohibiting Garner's protected discussion – either before the Court or in the underlying Board litigation.

[12] Bellagio bellmen are allowed to sit, watch television, and read the newspaper while they are waiting for their work assignments in the dispatch area. (A 96, 120-21, 132.) They were doing just that ("mulling around") when Garner went there to retrieve his personal belongings after the May 13 meeting. (A 98.)

around the corner with his hands on his hips, glaring at [Garner], in a loud voice looked at [him] and [said], 'You can't be discussing that matter in here.'" (A 9; A 97, 112, 114, 122, 126.) Given the clear directive not to discuss his suspension, the Board's finding (A 2 & n.3, 9) that Wiedmeyer's conduct violated Section 8(a)(1) of the Act is amply supported and should be upheld. *See Inova Health*, 795 F.3d at 85 (finding Section 8(a)(1) violation where employer directed employee "not to discuss her suspension with anyone else").

In arguing otherwise, Bellagio misrepresents the Board's finding, stating that the Board found a Section 8(a)(1) violation because "Wiedmeyer instructed Garner to stop talking to his coworker and leave the premises because he had been placed on SPI . . . ." (Br. 41.) But the Board made no such finding. Rather, it specifically found (A 2 & n.3) that Wiedmeyer unlawfully prohibited Garner from discussing his suspension with his coworkers. That finding is supported by Garner's credited testimony, as well as by the credited testimony of both Meyer and Weinman, who corroborated Garner's version of the events. (A 9; A 97, 112, 114, 122, 126-27.) Bellagio provides no basis for overturning those credibility determinations. *See Cadbury Beverages*, 160 F.3d at 28.

Bellagio's reliance (Br. 41) on *Roadway Express*, 246 NLRB at 1130, is again misplaced. *Roadway Express* (discussed p. 35) does not address the situation where (as here) in the process of unlawfully suspending its employee, an employer

also unlawfully forbids him from discussing the suspension. *Compare Lucky Cab Co.*, 2014 WL 670231, at *10 (finding Section 8(a)(1) violation where employer "gave [employee] her final paycheck, escorted her out of the office, and told her 'not to speak to anyone as she left the property'") (alteration omitted).

In an attempt to circumvent well-settled precedent, Bellagio claims (Br. 41-42) that the Board could not, consistent with due process, find that Wiedmeyer's instruction was unlawfully coercive under Section 8(a)(1) when the Complaint alleged (A 288 ¶ 5(l)), and the administrative law judge found, that his statement violated Section 8(a)(1) as an unlawful oral rule. This argument is meritless. It is well established, as the Board explained in *Pergament United Sales, Inc.*, that the Board may find and remedy an unalleged unfair labor practice that: (1) is "closely connected to the subject matter of the complaint," and (2) "has been fully litigated." 296 NLRB 333, 334 (1989), *enforced*, 920 F.2d 130, 134 (2d Cir. 1990); *accord Casino Ready Mix, Inc. v. NLRB*, 321 F.3d 1190, 1200 (D.C. Cir. 2003) (quoting *Pergament*). The Board's decision here easily satisfies both requirements.

First, the Section 8(a)(1) violation found in this case is closely connected to the Section 8(a)(1) violation alleged. Both ultimately turn on the same issue – whether Wiedmeyer unlawfully restricted Garner in discussing the terms and conditions of his employment, and on the same set of facts – what happened in the

dispatch area on May 13. Cases like this one, where both violations plainly "focus on the same set of facts," epitomize the close connection that *Pergament* requires. 296 NLRB at 334.

Second, the parties fully litigated the unfair labor practice found. Over the course of the hearing, the parties introduced evidence (A 73, 96-97, 112, 114, 122, 126) describing what took place in the dispatch area – evidence that Bellagio actively participated in adducing and had every opportunity to challenge or to supplement. *See Casino Ready Mix*, 321 F.3d at 1200 (finding unalleged coercive statement fully litigated where respondent did not object to testimony describing statement and had opportunity to cross-examine witness).

Furthermore, Bellagio fails to show any prejudice to its case from the Board's change of theory, distinguishing this case from *Sierra Bullets, LLC*, 340 NLRB 242 (2003) and *Lamar Advertising of Hartford*, 343 NLRB 261 (2004). In *Sierra Bullets*, the General Counsel precluded the use of a particular theory by expressly limiting the allegations at the hearing in a manner that led the respondent in that case to present no evidence relevant to the theory in question. *See* 340 NLRB at 242-43. Similarly, in *Lamar Advertising of Hartford*, the Board held that due process precluded consideration of a violation under a theory alleged for the first time in the General Counsel's exceptions, because that theory required

different evidence than the alleged theory and thus was not fully litigated. *See* 343 NLRB at 265-66.

In contrast, Bellagio had every opportunity to explain and defend Wiedmeyer's conduct in prohibiting Garner's protected discussion. Its inability to demonstrate otherwise shows that the Board's slight change in theory did not deprive Bellagio of due process.

D. Bellagio Engaged in Surveillance of Its Employees in Violation of Section 8(a)(1) of the Act

Wiedmeyer's conduct in the dispatch area went beyond unlawfully prohibiting Garner from discussing his suspension. Substantial evidence supports the Board's finding (A 2, 12) that Bellagio also violated Section 8(a)(1) of the Act when Wiedmeyer surveilled Garner's protected activity.

The test for determining whether an employer engages in unlawful surveillance "is an objective one, and involves the determination of whether the employer's conduct, under the circumstances, was such as would tend to interfere with, restrain or coerce employees in the exercise of the rights guaranteed under Section 7 of the Act." *Parsippany Hotel Mgmt. Co.*, 319 NLRB 114, 126 (1995) (citation omitted), *enforced*, 99 F.3d 413 (D.C. Cir. 1996). Although employer observation of Section 7 activity on or near company property does not necessarily violate the Act, the employer "may not do something 'out of the ordinary'" in the course of its observation. *Sprain Brook Manor Nursing Home, LLC*, 351 NLRB

1190, 1191 (2007) (citation omitted). Indicia of coerciveness or out-of-the-ordinary behavior include the employer's distance from his employees while observing them and whether the employer engaged in other coercive behavior during his observation. *Rivers Casino*, 356 NLRB No. 142, 2011 WL 1572359, at *2 (Apr. 26, 2011) (citation omitted) (finding unlawful surveillance to be objectionable conduct warranting setting aside election).

The record evidence fully supports the Board's finding (A 2, 12) that Bellagio engaged in unlawful surveillance. Although Garner openly engaged in protected activity – discussion of his suspension – on Bellagio's premises, the unusual and intrusive conduct by Wiedmeyer, a supervisor (accompanied by Sanchez, another supervisor), went well beyond Wiedmeyer's merely observing Garner's protected discussion. Instead, as the Board reasonably found, Wiedmeyer engaged in additional coercive conduct – "aggressively observ[ing] Garner's SPI discourse under the auspices of an invalid SPI, bann[ing] such discussion, oust[ing] him from the workplace and hover[ing] as he left." (A 12; *see also* A 9; A 97-98, 112.) Moreover, Wiedmeyer did so in a relatively small area and in front of approximately six other Bellagio bellmen. (A 98, 126); *see Partylite Worldwide, Inc.*, 344 NLRB 1342, 1342-43 (2005) (emphasizing high-ranking managers' proximity to employees' protected activity in finding unlawful surveillance); *Liberty House Nursing Homes*, 245 NLRB 1194, 1200 (1979) (finding unlawful

surveillance where management deliberately mingled with employees during break and lunch periods and followed employees who sought privacy).

In arguing (Br. 42-44) that Wiedmeyer's conduct did not violate the Act, Bellagio manipulates the facts by suggesting that Wiedmeyer merely observed Garner's activity after happening upon Garner in the dispatch area. That characterization of the facts is contradicted by credited testimony showing that Wiedmeyer approached Garner when he heard him in the dispatch area and, upon observing him speaking to coworkers about his suspension, unlawfully prohibited him from discussing it. (A 9.) And, once again, Bellagio makes no argument that this testimony is "hopelessly incredible, self-contradictory, or patently unsupportable." *Cadbury Beverages*, 160 F.3d at 28. Given that Wiedmeyer's out-of-the-ordinary behavior was witnessed by several other bellmen and culminated a series of other unfair labor practices, his conduct certainly could have a chilling effect on Bellagio employees' Section 7 activities. *See Rivers Casino*, 2011 WL 1572359, at *2 (finding unlawful surveillance where "a high-level manager[] remained in close proximity to [employee] in a nonwork area immediately after having directed [employee] to stop distributing union T-shirts").

II. THE BOARD'S ORDER IS WELL WITHIN ITS BROAD REMEDIAL DISCRETION

In Section 10(c) of the Act, Congress conferred upon the Board the power to remedy unfair labor practices.[13] That power includes the authority to order any entity found to have violated the Act "to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of" the Act. 29 U.S.C. § 160(c). The Board's remedial power under Section 10(c) is "a broad discretionary one, subject to limited judicial review." *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964) (citation omitted). Accordingly, the Supreme Court has held that courts must enforce the Board's chosen remedy "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Elec. & Power*, 319 U.S. at 540; *accord United Food & Commercial Workers Union v. NLRB*, 447 F.3d 821, 827 (D.C. Cir. 2006).

Here, the language in the Board's cease-and-desist Order and in its remedial notice (A 4, 6-7, 13) is well within its broad discretion. *See May Dep't Stores Co. v. NLRB*, 326 U.S. 376, 390 (1945) ("The test of the proper scope of a cease and desist order is whether the Board might have reasonably concluded from the

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[13] In arguing (Br. 5, 44-45) that the Board exceeded its remedial authority, Bellagio cites Section 10(e), 29 U.S.C. § 160(e), of the Act. Presumably, it intended to cite Section 10(c), 29 U.S.C. § 160(c), which confers authority on the Board to issue remedial orders.

evidence that such an order was necessary to prevent the employer before it from engaging in any unfair labor practice affecting commerce.") The Order either speaks to Bellagio's conduct in this matter or is sufficiently related to the Section 8(a)(1) violations found by the Board. And to the extent that it restrains "like or related unlawful acts," that too is well within the Board's discretion. *See NLRB v. Express Pub. Co.*, 312 U.S. 426, 436 (1941) ("Having found the acts which constitute the unfair labor practice the Board is free to restrain the practice *and other like or related* unlawful acts.") (emphasis added).

Bellagio's argument (Br. 44-45) that the Board's language is not sufficiently tailored to the facts of this case is without merit. For example, the Board's inclusion of the phrase "representative of your choice" is "related" to the Section 8(a)(1) *Weingarten* violation found, as it merely states, in plain terms, employees' rights under current applicable Board law. *See Anheuser-Busch, Inc.*, 337 NLRB 3, 7-12 (2001) (summarizing Board precedent regarding employees' right to choose specific *Weingarten* representative absent extenuating circumstances), *enforced*, 338 F.3d 267, 276-78 (4th Cir. 2003).

Nor is there merit to Bellagio's argument (Br. 44-45) that the remedial language is overly broad and contrary to Board precedent because it does not cite exceptions to an employee's ability to choose his *Weingarten* representative or to Bellagio's ability in certain circumstances to request confidentiality. Notices to

employees must be clear. Requiring cease-and-desist orders and the corresponding notices to contain a list of all exceptions to the general rule of law would dilute their effectiveness and confuse employees. *See Ishikawa Gasket Am., Inc.*, 337 NLRB 175, 177 (2001) (stating that "notices to employees should be drafted in plain, straightforward, laypersons' language that clearly informs employees of their rights and the violations found"), *enforced on other grounds*, 354 F.3d 534 (6th Cir. 2004). The Board's language here is clear and accurate, and its Order should be enforced.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying Bellagio's petition for review and enforcing the Board's Order in full.

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May 2016

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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	*	
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	*	15-1390
	*	
v.	*	
	*	Board Case Nos.
NATIONAL LABOR RELATIONS BOARD	*	28-CA-106634
	*	28-CA-107374
	*	
Respondent/Cross-Petitioner	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 10,574 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010, and the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.6 and is virus-free according to that program.

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Dated at Washington, DC
this 19th day of May, 2016

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	*	
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CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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Dated at Washington, DC
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