JD(SF)–31–16
Las Vegas, NV

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

TRUMP RUFFIN COMMERCIAL, LLC,
d/b/a TRUMP INTERNATIONAL HOTEL
LAS VEGAS

and **Cases 28–CA–149979**
28–CA–150529
28–CA–155072
28–CA–156304
28–CA–156719
28–CA–157883

LOCAL JOINT EXECUTIVE BOARD OF
LAS VEGAS, affiliated with UNITE HERE
INTERNATIONAL UNION
Charging Party

Judith Davila and Elise Oviedo, Esqs.
for the General Counsel.
William Dritsas and Ronald Kramer, Esqs. (Seyfarth Shaw, LLP)
for the Respondent.
Richard McCracken, Esq. (McCracken, Stemerman & Holsberry)
for the Charging Party.[1]

DECISION

STATEMENT OF THE CASE

LISA D. THOMPSON, Administrative Law Judge. Local Joint Executive Board of Las Vegas, which is affiliated with UNITE HERE! International Union (Charging Party or the Union), filed three unfair labor practice (ULP) charges against Trump Ruffin Commercial, LLC d/b/a Trump International Hotel Las Vegas (Respondent).[2] On August 31, 2015, the Regional Director for Region 28 (Regional Director) issued a consolidated complaint and notice of hearing. While the consolidated complaint was pending, the Union filed three more ULP charges against Respondent.[3] The Regional Director consolidated all six of the charges and issued a second consolidated complaint and notice of hearing on September 30, 2015.

The second consolidated complaint alleges that Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) when it: (1) promulgated/maintained unlawful

[1] Although Mr. McCracken entered his appearance in the case, he did not appear or participate during the hearing.
[2] Cases 28–CA–149979, 28–CA–150529, and 28–CA–155072.
[3] Cases 28–CA–156304, 28–CA–156719, and 28–CA–157883.

no-solicitation and no-distribution rules, (2) promulgated/maintained an unlawful confidentiality policy, (3) interrogated employees about their union membership/activities/sympathies, (4)surveiled and created an impression of surveillance among employees concerning their union activities, (5) threatened employees with various, unspecified reprisals because of their union membership/activities/sympathies, (6) promulgated/enforced a directive prohibiting employees from distributing union literature on Respondent's property, (7) promulgated/enforced a directive prohibiting employees from speaking with guests, and (8) terminated employee Martha Guzman because she assisted/joined the Union. Respondent filed its answer, and later an amended answer, denying all material allegations and setting forth its affirmative defenses to the complaint.[4]

This case was tried before me in Las Vegas, Nevada from November 17 through November 20, 2015. The trial resumed from December 1 through December 4, 2015 and ultimately concluded on December 10, 2015.[5] During the hearing, the parties settled the allegations concerning Respondent's no-solicitation and no distribution policy (complaint paragraphs 5(a)(1–2)) as well as its confidentiality policy (complaint paragraphs 5(a)(3) and 5(b)). Accordingly, those allegations will not be addressed in this decision.

All parties were afforded a full opportunity to appear, introduce evidence, examine and cross-examine witnesses, argue orally on the record, and file post-hearing briefs. After carefully considering the entire record, including the demeanor of the witnesses and the parties' post-hearing briefs, I make the following[6]

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

At all material times, Trump International Hotel Las Vegas has been a corporation with an office and place of business in Las Vegas, Nevada. Respondent has been engaged in the operation of a hotel providing food and lodging. During the 12-month period ending April 13, 2015, Respondent derived gross revenues in excess of $500,000 and purchased and received at its Las Vegas hotel goods valued in excess of $50,000 directly from points outside the State of Nevada. Accordingly, at all material times, Respondent admits and I find that it has been an employer within the meaning of Sections 2(2), (6), and (7) of the Act.

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[4] Abbreviations used in this decision are as follows: "Tr." for the Transcript, "Jt. Exh." for the Joint Exhibits, "GC Exh." for the General Counsel's exhibits, "R. Exh." for Respondent's Exhibits, "GC Br." for the General Counsel's brief, and "R. Br." for Respondent's brief.

[5] The parties agreed to the taking of testimony of three rebuttal witnesses by video on December 10, 2015. In so doing, the undersigned presided over the hearing from Region 21's offices in Los Angeles, California and lead counsel for the General Counsel Judith Davila appeared from Region 28's offices in Phoenix, Arizona. Co-counsel for the General Counsel Elise Oviedo, Respondent's counsel William Dritsas and the rebuttal witnesses appeared from Region 28's offices in Las Vegas.

[6] Specific citations to the transcript and exhibits are included where appropriate to aid review, and are not necessarily exclusive or exhaustive.

It is also undisputed, and I find that, at all material times, Local Joint Executive Board of Las Vegas, affiliated with UNITE HERE! International Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background Facts

Respondent's Operation

Respondent operates a hotel in Las Vegas, Nevada. Respondent has nearly 1300 rooms and employs about 700 employees. Of the 700 employees, Respondent has approximately 300 housemen and guest room attendants (GRAs)/housekeepers who are responsible for cleaning throughout the hotel.[7]

At all material times, Brian Baudreau (Baudreau) served as Respondent's General Manager. Respondent's Director of Hotel Operations was Matthew Vandegrift, who reported to Baudreau.[8] This case involves Respondent's Housekeeping, Food and Beverage, Security and Human Resources departments.

Alejandra Magaña (Magaña) served as the Director of Housekeeping. She reported to Vandegrift. Kevin Kwon, Respondent's Assistant Housekeeping Director, reported to Magaña. Respondent also employed a housekeeping department manager and a housekeeping department coordinator.

Respondent also employed five Floor Managers: Anthony Wandick (Wandick), Imelda Cretin (Cretin), Cherie Gallagher, Neda Elkurdi, Thomas Stende, and Krystyna Stills. Respondent's Floor Managers were responsible for overseeing the day-to-day operations of the Housekeeping Department, supervising and directing the GRAs, conducting room quality inspections, responding to guest complaints about room cleanliness or other issues, ensuring productivity and staffing, issuing disciplinary actions, and hiring and conducting training. They all reported to Magaña.

Christina Keeran (Keeran) served as a Status Clerk Lead. Keeran reported to Magaña.[9] Because Keeran's job duties are relevant in deciding Respondent's motion for summary judgment, I will briefly detail those below.

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[7] The official title of Respondent's housekeepers is guest room attendant (GRA). However, the term "housekeeper(s)" and "guest room attendant(s)" are used interchangeably throughout the hearing and in this decision.

[8] As noted by Respondent in its brief, Mr. Vandegrift was incorrectly referred to as "Mattieu Vanderbilt," "Martin Vanderbilt," and/or "Matthew Vanderbilt" in the complaint, transcript and the General Counsel's brief. See GC Exh. 1(r) ¶¶ 4, 5(n); Tr. 157; see also R. Br. at 7, fn. 3.

[9] Respondent moved for summary judgment regarding the complaint allegations against Keeran on the grounds that Keeran is not a supervisor or agent of Respondent. Respondent's motion and the parties' arguments therein will be addressed in detail later in this decision.

As the Status Clerk Lead, Keeran oversaw approximately four to ten status (also called dispatch) clerks. In so doing, she ensured that housekeepers' task sheets were completed correctly and guest requests for items and/or services were completed in a timely manner.

Keeran also was responsible for drafting and assisting with the schedule for housekeeping employees. To do that, Keeran entered a 12-day occupancy forecast into a computer program, and the program generated the number of housekeeping employees who needed to be scheduled for work each day. Keeran then entered approved vacations given to her by Magaña, and the program automatically populated the schedule with full-time employees.

Keeran subsequently filled in any gaps in the schedule with full-time floaters and on-call employees in order of seniority. The schedule was then reviewed by Magaña to ensure the 12-day forecast and vacations were entered accurately and to make any necessary changes on how many and which housekeeping employees were scheduled to work.

Keeran assisted with housekeeping payroll and editing payroll documents, and other miscellaneous duties. She kept track of employees' attendance points in their attendance calendars to facilitate enforcement of Respondent's disciplinary policy for attendance infractions. Keeran assisted with payroll, by entering employees' clock-in times when Respondent's biometric clock-in system could not read their fingerprints. Keeran also signed off on employee's vacation requests, if authorized by Respondent to do so.

Keeran communicated and reviewed daily housekeeping staffing needs with Magaña and other housekeeping managers to ensure staffing needs were appropriate.[10] When authorized by Respondent to do so, Keeran communicated with GRAs about how many attendance points they accrued and spoke to them about clock-in and clock-out procedures.

Lastly, when authorized by management, Keeran called employees to offer them time off without penalty when Respondent had too many housekeeping employees scheduled or to offer them a shift when Respondent did not have enough GRAs scheduled.[11]

Respondent also employed approximately 10–20 security officers at the hotel. Olivia Green (Green) and Daniel Slovak (Slovak) were two of Respondent's security officers. As security officers, Green and Slovak were responsible for ensuring the overall safety and security of the hotel. Both reported to Security Manager Eric Delgado. Clyde Turner (Turner) served as Director of Security.

[10] GC Exh. 13.
[11] Id.

Union's organizing campaign

In order to better understand the current dispute in this case, it is important to describe the events in the months leading up to the incidents giving rise to this complaint.

In mid-2015, the Union began organizing Respondent's housekeeping and food and beverage employees. GRAs Ofelia Diaz (Diaz), Carmen Llarull (Llarull), Rodolfo Aleman (Aleman), Gisella Happe (Happe), and Celia Vargas (Vargas) served as Union Committee leaders at Respondent's hotel. At the outset of the organizing campaign, they wore red Union "Committee leader" and/or yellow Union buttons to work and sought to encourage other housekeeping employees to wear Union buttons and unionize.[12]

On June 5, 2015, the Union filed a representation petition with Region 28 of the National Labor Relations Board (NLRB or the Board) seeking to organize and represent certain of Respondent's employees.[13] An election was scheduled on June 25, 2015, however it was postponed due to the filing of the ULP charge in Case 28–CA–149979. Nevertheless, the Union continued organizing, and on November 6, 2015, the Union requested to proceed with the election.

Throughout the campaign, housekeeping employees who supported unionizing routinely gathered in the Employee Dining Room (EDR) to chant, distribute Union literature, and discuss the Union. Housekeepers also displayed their growing support for the Union either by wearing red Union Committee leader and/or yellow Union buttons.

Quite naturally, Respondent opposed unionization. During the morning talks with housekeeping employees, called "Trump Talks," management often conveyed their opposition to the Union. Floor Manager Wandick testified that he and other managers were told to reinforce to GRAs that the hotel "didn't need a third party to mediate between management and employees." According to Wandick, he was also told to present the message that, "Corporate doesn't want the Union here . . . to reinforce what [Donald] Trump is doing for employees and that we don't need a union. So we obviously follow what Corporate wants."[14] Wandick explained that, while he was given instructions not to interfere with Union activities or take action against employees that were pro-union, Magaña told managers to rate employees on a point system, from 1 to 5, as to which employees were pro- or anti-union and to report their activities to Housekeeping, Human

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[12] In her post-hearing brief, counsel for the General Counsel inserted facts from a prior ULP charge against Respondent pertaining to the above-named Committee members. GC Br. at 6–7. That prior charge was settled through an informal Board settlement. However, I find that the inclusion of facts from the prior charge clutters the record, attempts to re-litigate issues that have been settled between the parties, and arguably, violates the confidentiality provisions of the prior settlement agreement. Accordingly, I will not consider those facts in this decision.

[13] The unit consisted of 415 Hotel employees, to include, "all regular full-time and regular part-time housekeeping, food and beverage and front services employees" and excluding "all front-desk employees, valet parkers, drivers, engineering and maintenance employees, office clerical employees, confidential employees, and all supervisors and guards as defined in the Act.

[14] Tr. 414.

Resources (HR) Manager Gustavo Acosta (Acosta) and/or HR Director Jeff Peterson (Peterson).[15]

Security Officer Slovak was also told by his superiors to report any union activities. According to Slovak, he was instructed that if he saw employees handbilling, he should report their activity to his immediate supervisor.

Magaña also instructed floor managers and other supervisory staff to report all union activity verbally versus in writing.[16] Moreover, if GRAs complained about union activity, managers were told to tell employees that if they wanted it to stop, they should vote "no" in the election.[17]

Floor managers also were told to have the Union give employees guarantees—that is, if an employee approached a manager and asked about a promise or benefit the Union was offering, managers were instructed to give employees a flyer and tell them to ask the Union for the promise in writing.[18] It is against this backdrop that the incidents in this complaint occurred.

B. Specific Incidents of Alleged Unlawful Conduct

For ease of discussion, I will set forth the facts concerning the alleged unlawful conduct as follows: (1) the ULP allegations against Housekeeping Director Magaña; (2) the ULP allegations against Floor Manager Wandick; (3) the ULP allegations against Floor Manager Cretin; (4) the ULP allegations against Status Clerk Lead Keeran; (5) the ULP allegations against Security Officer Green; (6) the ULP allegations against Security Officer Slovak, (7) the incident involving Food and Beverage Manager James Doucette (Doucette); and (8) Ms. Guzman's termination.[19]

1. Magaña's "traitor" comment

The substance of what occurred regarding this incident turns on an evaluation of credibility.[20] Having carefully reviewed the record, I find the following facts:

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[15] Tr. 485.

[16] Tr. 486.

[17] Tr., 471, 474.

[18] Tr. 1653.

[19] During the last rebuttal witness on the last day of the hearing, the General Counsel moved to amend the complaint to include an allegation that Respondent violated Section 8(a)(1) of the Act when it unlawfully granted benefits to employees by suspending its attendance-related discipline during the Union campaign in order to discourage employees from supporting the Union. The amendment was based upon HR Manager Acosta's testimony. Acosta was called by the General Counsel early in the hearing, testified as a Rule 611(c) witness and offered testimony concerning suspending Respondent's attendance discipline during his initial testimony. As such, Respondent objected to the amendment as untimely. In agreement with Respondent, I denied the amendment as untimely on the record. Despite this ruling, in her brief, counsel for the General Counsel reasserts her request to include the above allegation in the complaint. I again decline to amend the complaint for the reasons stated on the record, and I will not address the proposed amended allegations in this decision.

[20] I have based my credibility findings on multiple factors, including, but not limited to, the consideration of a witness' opportunity to be familiar with the subjects covered by the testimony given; established or admitted facts; the impact of bias on

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During the week of June 14, 2015, GRA Antonia Garcia (Garcia) was scheduled to work from June 16–19, from 8:30 a.m. until 5 p.m. and on Saturday, June 20, from 9 a.m. until 5:30 p.m. While there was considerable dispute as to the date the events surrounding the "traitor" remark occurred (Garcia thought the conversation occurred on June 15 or 16, GRA Maria Jaramillo (Jaramillo) believed the incident occurred on June 15, while Magaña believed she spoke with Garcia on June 19), I find that Garcia and Jamarillo were simply confused as to the date and that, contrary to Magaña's testimony, the incident in question actually occurred on June 16.

In any event, it is undisputed that all GRAs participate in a check out process prior to clocking out for the day. To check out, GRAs are required to return their room keys and iPads—formerly called written task sheets—to the Floor Managers at the Floor Managers' table.[21] When returning their room keys and iPads, the GRAs typically form a line in the Housekeeping office while awaiting a Floor Manager to check them out. After the GRAs return their keys, the Floor Manager checks to ensure the GRAs have completed their assigned tasks for the day.

On June 16, 2015, at the end of her shift, Garcia went into the Housekeeping office to turn in her room keys and iPad to Floor Manager Cretin. Cretin's work station was typically located the furthest away from Magaña's office. Jaramillo also was in the office checking out at the end of her shift. Although there was considerable dispute as to where Jaramillo was standing in relation to Magaña's office during the check-out process, how many other GRAs were in the office checking out, and whether Jaramillo clocked out before or after Garcia,[22] I find these inconsistencies insignificant. Rather, the evidence reveals that, at some point, Jaramillo stood near the first station at the Floor Managers' table, located closest to Magaña's office. Meanwhile, while Cretin was checking out Garcia, Magaña noticed Garcia and asked her to come into her office. Garcia complied.

Once in Magaña's office, Magaña asked Garcia "What is that?" to which Garcia responded, "What, my union button?" Magaña responded, "Yes." At that point, Magaña stated words to the effect, "I thought you were on my side [meaning for the company and against the union]." Garcia responded "Why?" to which Magaña replied, "At this time, I see you as a traitor." Surprised, Garcia replied, "for what reason?" to which Magaña responded, "I thought you were on my side, but now I see that you are one of the ones who attends the Union meetings." Garcia then responded words to the effect, "no no, ma'am, I'm not on the committee, I don't attend the meetings, and I don't need to attend Union meetings to show support to my Union members…" Garcia then apologized to Magaña for having disappointed her. In response,

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the witness' testimony; the quality of the witness' recollection; testimonial consistency; the presence or absence of corroboration; the strength of rebuttal evidence, if any; the weight of the evidence; the witness' demeanor while testifying; inherent probabilities; and reasonable inferences that may be drawn from the record as a whole. *Daikichi Sushi*, 335 NLRB 622, 633 (2001), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003); *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1465 (9th Cir.), cert. denied 522 U.S. 948 (1997) .Credibility findings need not be all-or-nothing propositions, and it is common for a fact finder to credit some, but not all, of a witness' testimony. *Daikichi Sushi,* supra at 622.

[21] For the exact layout and location of the floor managers' table, see R. Exh. 18(e).

[22] Tr. 568, 574–575, 579–581, 751–752, 762–763.

Magaña stated, "Are you aware that the person who started this movement is leaving in a few days?" to which Garcia replied something to the effect, "well, if she's leaving, she's leaving." Magaña then responded words to the effect, "well, I don't think it's fair for her to leave the 'hot potato' [meaning starting the Union campaign] in everybody else's hands," to which Garcia replied, "Well, that's only one person, there are other people on the committee and the fight continues." At that point, the conversation ended and Garcia left Magaña's office.

As Garcia left Magaña's office, she saw Jaramillo, who was standing at the Floor Managers' table closest to Magaña's door. Both women left the office. As they left the office, Garcia asked Jaramillo if she heard what Magaña told Garcia. Jaramillo responded affirmatively and told Garcia that she heard Magaña call Garcia a traitor. Jaramillo asked Garcia whether she would continue wearing her Union button, and Garcia responded affirmatively. It is undisputed that no action was taken against Garcia, and she continued wearing her Union button without incident.

For her part, Magaña denied calling Garcia a "traitor" and the conversation in general. However, I found Magaña less than fully credible for several reasons. First, although Magaña denied that she in any way discussed Garcia's Union button/support, other than her self-serving denials, she offered no credible evidence to refute Garcia's and Jamarillo's testimony. Magaña also explained that, on June 19 (not June 16), she called Garcia into her office, not to discuss her Union button; but rather to find out if Garcia attended a voluntary campaign meeting/class with labor consultants Cruz & Associates that Magaña scheduled for her to attend that day. However, Magaña's explanation as to why she called Garcia into her office does not rebut the fact that she could have easily seen Garcia's Union button as Garcia approached Magaña's office then interrogated Garcia about her Union support. Moreover, Garcia's and Jaramillo's version of events is more believable given Wandick's testimony that Magaña instructed Floor Managers to keep track of which GRAs were in favor of or against the Union. I found Wandick's testimony particularly credible on this point.

Furthermore, while Respondent's counsel made a point of eliciting testimony about the distance between Floor Manager Cretin's station and Magaña's office, the noise level in the office during the GRA's check-out process, that Magaña often closed her door when speaking with GRAs, and that several managers and staff never heard Magaña call Garcia a "traitor," (implying that Jaramillo also could not have heard what Magaña discussed with Garcia), there was no definitive evidence proffered that Magaña's door was closed during her discussion with Garcia.

Additionally, even though Jaramillo testified that Cretin checked her out that day, which implies that Jaramillo stood furthest away from Magaña's office, there was no testimony as to whether the "traitor" remark was made during or after Jaramillo's check out process. In fact, Jaramillo may have been waiting in a line of GRAs to check out that stretched toward Magaña's office. Or, she may have completed her check out process and, as she testified, waited for Garcia to conclude her conversation with Magaña. In any event, the point is that Jaramillo could have easily stood outside Magaña's office and heard Magaña's "traitor" remark. None of Respondent's witnesses disputed where Jaramillo stood in relation to Magaña's office.

In any event, while I noticed that Garcia was visibly irritated by Respondent counsel's questioning on cross-examination and often appeared with her arms folded, looking down and breathing heavily, overall, I found Garcia's testimony, given mainly through a Spanish interpreter, was open, non-evasive and detailed concerning the "traitor" remark. Garcia's testimony was further corroborated by Jaramillo, who appeared composed and steady and testified openly, directly and specifically as to her recollection of Magaña's "traitor" comment. As such, Jaramillo struck me as committed to speaking the truth.

In contrast, Magaña's demeanor was moderately hostile, particularly on direct examination (as a Rule 611(c) witness). She appeared visibly stiff and gave guarded testimony that presented as less than forthright.

Lastly, and most importantly, I credit Garcia's and Jaramillo's testimony over Magaña's due to their status as current employees. Under these circumstances, their testimony has a special guarantee of reliability.[23] As such, I find that, on or around June 16, 2015, Magaña called Garcia a "traitor" when she saw Garcia wearing her yellow Union button.

2. Wandick's allegations

a. Wandick confiscates union literature from Llarull

The testimony regarding this incident varied widely, both in substance and credibility. However, after reviewing the record, I find the following facts:

It is undisputed that, as the training manager for newly hired GRAs, Wandick was responsible for pairing more seasoned GRAs with newly hired housekeepers. According to Wandick, if he saw a new employee in the EDR before the start of their shift and they needed to be trained, his standard practice was to approach the employee *before* the Trump Talk so he could introduce them to their trainer.[24]

Moreover, it is undisputed that, as a Floor Manager, Wandick frequently gave "Trump Talks" to the GRAs in the EDR. To prepare for these talks, Wandick and other managers arrived a bit early *before* the Trump Talk, walked around, greeted employees and got them "juiced up for the day."[25] It is also undisputed that the 8 a.m. Trump Talk was the busiest, with approximately 90–95 GRAs and housemen in attendance.

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[23] See *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978) (testimony of current employees, particularly while management representatives are present, that accuses respondent of wrongdoing has inherent reliability because these witnesses are testifying adverse to their pecuniary interests).

[24] Tr. 1647–1648. "Trump Talks" are given three to four times per day during the morning shift, at 7:00 a.m., 8:00 a.m., and 8:30 a.m. Tr. 397, 427–429, 1104–1105. There is an evening "Trump Talk" for swing shift employees. During these talks, managers discuss with the GRAs the Hotel's occupancy, VIP arrivals, and other important issues that need to be addressed that day. GRAs also receive their room keys and iPads (containing their tasks/room assignments for the day) before or after the Trump Talks. Trump talks last approximately five to 20 minutes depending on the circumstances of the day.

[25] Tr. 431–433.

Additionally, Wandick frequently attended other manager's Trump Talks in the mornings. When he attended other manager's Trump Talks, he routinely wandered or stood around employee's tables in the EDR to ensure that employees paid attention in the meeting and were not having side conversations during the Talk.

GRA Carmen Llarull (Llarull) is a Union committee leader and supporter. Admittedly, Llarull has the reputation of campaigning zealously on behalf of the Union, and she vehemently supports unionizing Respondent's housekeepers and housemen.[26]

Sometime in March/April 2015, Llarull was distributing Union flyers to employees in the EDR at 8 a.m., before clocking into work. Employees were allowed to participate in union activities in the EDR and in and around Respondent's facility before their shifts began, during lunch, and after their shifts ended.

While Llarull testified that, as she handed a Union flyer to an employee, Wandick snatched the flyer, tore it up, crossed his arms across his chest, and stood looking at Llarull before leaving with the employee, I credit Wandick's testimony where he denied that he ever engaged in the alleged conduct. Also, based upon Wandick's testimony, I find that, to the extent Wandick left with an employee while Llarull was handbilling, he did so either to introduce the new employee to his trainer, to ensure that the employees were not engaging in side conversations during the Trump Talk, or for some other legitimate reason.

I found Llarull's testimony less than fully credible for several reasons. First, although Llarull's testimony was corroborated by GRA Celia Vargus (Vargus), the fact that Llarull, given her zeal for the Union, never complained about the incident to anyone in management or the Union at the time it occurred or mentioned the incident in her Board affidavit (also known as a *Jencks* statement) as part of this case struck me as odd and made her testimony less than fully credible.

Second, both Llarull and Vargus testified that they often saw Wandick talking with employees as they distributed Union flyers but could not discern the conversation. As such, neither of them could refute Wandick's testimony that he pulled employees away so they could meet their trainers or for some other legitimate purpose.

Third, there were significant discrepancies in Llarull's and Vargus' version of events. Although Llarull testified that Wandick snatched the flyer, tore it up and threw it away, she also testified that Wandick "balled up" the flyer. In addition, Vargus never mentioned Llarull's version of events in her testimony. Moreover, the record reflects that, at the time Llarull was distributing Union flyers, Vargas also was distributing Union flyers in the EDR and there was no evidence presented that Vargas was prevented from distributing Union flyers. As such, it seems highly implausible that Wandick would have confiscated Llarull's flyer without also confiscating Vargus' flyers.

[26] Tr. 686–691.

Next, Llarull's demeanor was extremely hostile on cross examination. In fact, Llarull was often reluctant to answer Respondent's counsel's questions and appeared as if she was withholding testimony if the answer did not support her narrative—i.e., support the Union. As such, I was left with the impression that Llarull was prejudiced against Respondent because it did not support unionization, which made her testimony less than fully credible.

Lastly, because Wandick, as a (former) management official, gave favorable *and* unfavorable testimony regarding Respondent, his testimony lacked bias or prejudice.[27] As such, I found Wandick's testimony particularly reliable regarding this incident.

b. Wandick Surveilled Aleman while conversing with GRAs and increased his presence/surveiled GRAs in the EDR during the Union campaign

GRA Rodolfo Aleman (Aleman) worked for Respondent from October 2011 to June 2015. He was a Union Committee leader. He testified that, on or about June 23, 2015, between 7:35 a.m. and 7:40 a.m., he observed Wandick standing near or behind him for approximately five minutes while he spoke with another employee about the Union. According to Aleman, Wandick increased his surveillance of him immediately after he began prominently displaying his Union Committee leader and Union buttons. Aleman also explained that, on this occasion, Wandick stood so close to him and another female employee while they were conversing that the female employee told Aleman they should wait and continue their conversation once Wandick left their table.

GRA Llarull corroborated Aleman's testimony. According to Llarull, Wandick increased his presence in the EDR, particularly when she was handbilling, routinely approached, interrupted and took the attention away from her when she spoke to employees about the Union. On one occasion, Llarull told Wandick that they were not "on the clock" and that he was violating her rights.[28]

Although Wandick denied that he increasingly surveiled Aleman or Llarull, I credit Aleman's testimony concerning this incident for several reasons. First, Aleman's recollection of the incident was direct and specific. He was not evasive in his testimony and his demeanor remained consistent throughout questioning. Although Llarull corroborated Aleman's testimony, because I found Llarull less than fully credible generally, I did not rely on her testimony regarding this incident.

Nevertheless, I found Aleman's testimony about Wandick's surveillance corroborates Wandick's own testimony that he was instructed to assess and rate which of the GRAs were in favor of or were against unionization. Thus, it is reasonable to infer that Wandick stood over and listened to Aleman, a known Union Committee member and supporter, to ascertain whether

[27] *Flexsteel Industries,* 316 NLRB 745, 749 (judge found that a former employee witness had no reason to lie or nothing to gain by fabricating his testimony, and as such, found the witness credible).

[28] Tr. 655, 658, 682.

Aleman was encouraging the other female employees to support the Union. Accordingly, I find that Wandick surveiled Aleman while he conversed with a GRA during the Union campaign.

c. Wandick and Vandegrift stood by EDR, greeted employees, and told them to vote "no" on unionization

The General Counsel failed to proffer any testimonial or documentary evidence to support the allegation that, on or about June 24, 2015, Wandick and Hotel Operations Director Vandegrift created an impression among employees that their union activities were under surveillance when they stood by the EDR, greeted employees and told them to vote "no" on unionization. Accordingly, the General Counsel has failed to state a claim, and as such, complaint paragraph 5(n) should be dismissed.

d. The Guest Room incident

After a careful review of the record, I find the following facts:

On or about June 13, 2015, GRA Vargas, a Union supporter and Committee leader, was assigned to clean rooms on the Hotel's 52nd floor. GRA Dora Rivera (Rivera), also a Union supporter and Committee leader, was assigned to clean rooms on the Hotel's 51st floor. On that afternoon, Vargas' assigned rooms were unavailable to clean so she called a Floor Manager, the identity is unclear, to check on any additional assignments. The Floor Manager told Vargus that a guest in Room 5107, a one-bedroom corner suite, requested that Housekeeping make up a sofa bed.[29] Rivera, who was working on the 51st floor, decided to assist Vargas, because Rivera's assigned rooms were occupied and she had no other work assignments.

Vargas went to the room and informed the guest that she was there to make the guest's sofa bed. Meanwhile, Rivera went to the linen closet on the floor to get clean sheets for the sofa bed. When Rivera returned to the room, the guest informed Vargas that she did not want the sofa bed made; rather, she wanted the foam mattress insert she requested at check-in. At that point, Vargas called someone in the status office from the hallway telephone to inquire as to the delivery of the insert.

After concluding her telephone call, Vargas informed the guest that the insert would be delivered in 10 minutes. At that point, Vargus and Rivera left to clean two other rooms.

Vargas and Rivera returned to Room 5107 approximately 30 to 45 minutes later. However, the foam mattress insert had not been delivered. Vargas explained to the guest that the Hotel was busy that day so there were many requests for foam inserts, and as a result, it was taking longer than usual to have one delivered. Apparently, the guest was upset at the delay so Vargus asked the guest if she could use the guest's telephone to find out when the mattress would be delivered.

[29] R. Exh. 13.

Vargus called Magaña, explained the situation, and Magaña told Vargus that Wandick was coming up to the room.

When Wandick entered the room, he saw Vargus and Rivera talking. Wandick did not see the guest in the room. Although Vargus and Rivera testified that Wandick had the foam mattress in tow, the documentary evidence belies their testimony. Rather, the record shows no mattress inserts were available when Wandick arrived in the guest's room.[30]

In any event, although there was considerable dispute as to what Wandick said when he arrived in the room, I find that Wandick asked Vargus and Rivera "what's going on?" Vargus replied words to the effect that the guest requested a foam mattress insert that had not yet been delivered so she (and Rivera) had gone to clean another room while she waited for the mattress. Because the documentary evidence proves that Wandick did not have the foam mattress when he arrived in the room, I find that Wandick told Vargus and Rivera that he would put a rush on the mattress delivery.[31] Wandick then radioed the VIP houseman and told him to put a rush on the foam mattress. After receiving confirmation that the houseman was attempting to search for the mattress, Wandick left the room.

In making the above findings, I found Vargus' and Rivera's version of events less than fully credible. Specifically, Vargus and Rivera testified that, after they told Wandick what they were doing in the room, Wandick left the mattress in the room and asked Vargus to meet him in the hallway. However, because I find, and the documentary evidence proved, that Wandick did not have the mattress with him when he arrived in the room, I find Vargus' and Rivera's testimony unreliable.

Moreover, although Vargus testified that, once they walked to the hallway, Wandick told her she could not speak to guests, given the inconsistency in her testimony that Wandick arrived in the room with the foam mattress, I do not believe Wandick ever made such a statement. In fact, based upon Wandick's testimony, I find that, after Wandick called to rush the foam insert to the guest's room, he left the room.

Lastly, it is undisputed that, at around 6 p.m., another call was placed for a foam mattress for Room 5107, and one was found, which lends further credibility to Wandick's version of events.[32] Accordingly, I find that, when Wandick arrived in the guest's room and saw Vargus and Rivera, he asked them "what was going on," and when they told him the guest was waiting on a foam mattress insert to be delivered, Wandick contacted the VIP houseman, put a rush on the insert, and left the room.

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[30] R. Exh. 15.

[31] R. Exh. 15, Tr. 465–466.

[32] R. Exh. 15, Tr. 478–79.

e. Wandick asked GRA Vazquez how she would vote in the Union election

Based upon the testimony of GRAs Janet Vasquez (Vazquez) and Iresyane Gonzalez (Gonzalez), I find the following facts:

Some time in May 2015, before the scheduled Union election, Vazquez went with Gonzalez to Magaña's office to ask Magaña about rumors Vazquez had heard about the Union. Vazquez was undecided about the Union but had heard that if she voted for the Union, she would receive additional benefits. Vazquez wanted to find out whether the rumors were true. Magaña and Wandick were present in Magaña's office when Vazquez and Gonzalez arrived.

When Vazquez and Gonzalez arrived in Magaña's office, Vazquez asked whether the Union's promises of benefits to the GRAs were true. Magaña replied that she could not answer Vazquez's question. Instead, Magaña showed Vazquez and Gonzalez the guarantee form and told them that if the Union promised them any benefits, to make sure to have the Union sign the guarantee form. Wandick then offered Vazquez one of the guarantee forms. Although Gonzalez testified that Vazquez responded, "I'm convinced I'm not going to vote for the Union," Vazquez never mentioned making this statement.[33]

In any event, Vazquez and Gonzalez testified that, at the end of their conversation with Magaña, Wandick asked Vazquez how she was going to vote. While Vazquez and Gonzalez's testimony differ as to where Wandick's remark occurred, nevertheless, I find that Vazquez became angry and told Wandick she did not have to answer his question. Neither Vazquez nor Gonzalez took the guarantee forms and both left the Housekeeping office.

Although Wandick denied he asked Vazquez how she would vote, I credit Vazquez's testimony for several reasons. First, I found Vazquez especially credible, in that she listened carefully to the questions asked and maintained the same demeanor regardless of who examined her. Second, Vazquez's testimony was corroborated by Gonzalez. While Gonzalez appeared nervous and testified with the assistance of a Spanish interpreter, I found her equally credible as her testimony was open, direct and non-evasive. Her recollections of what occurred were specific and unambiguous. Although Gonzalez appeared somewhat hostile during examination by the General Counsel (because she did not support the Union), her demeanor struck me that she was telling the truth.

While there were some inconsistencies regarding where Wandick's comment occurred as well as testimony from Gonzalez that Wandick spoke with Vazquez in the housekeeping office outside of her earshot, I nevertheless credit her testimony that she heard Wandick ask Vazquez how she would vote in the Union election. Similarly, although I found it odd that Gonzalez recalled Vazquez saying, "I'm convinced I'm not going to vote for the Union" when Vazquez never mentioned making that statement, I conclude that that testimonial inconsistency does not

[33] Tr. 1434.

detract from Vazquez's overall testimony that Wandick asked her how she would vote in the election.

More importantly, Vazquez's (and Gonzalez's) testimony supports Wandick's earlier testimony that he was instructed to find out whom amongst the GRAs supported the Union. Finally, because of their status as current employees, Vazquez's and Gonzalez's testimony warrants enhanced reliability under the circumstances.[34] Accordingly, I find that Wandick asked Vazquez how she would vote in the Union election.

3. Cretin allegations

a. Cretin told Llarull that Aleman would not get promoted if voted for Union

The testimony surrounding this incident is conflicting, both in substance and credibility. However, based upon the testimony of former Floor Manager Imelda Cretin (Cretin), I find as follows:

At all material times, Cretin was one of Respondent's Floor Managers in the Housekeeping Department. As stated above, GRA Llarull is a zealous Union Committee leader and active Union supporter who vehemently supports unionizing Respondent's housekeepers and housemen.[35]

In or around June 2015, GRAs Llarull and Aleman were discussing various job vacancies within Housekeeping and why Aleman had not been promoted into a white house position for which he applied. At some point, Cretin walked by. Upon seeing Cretin, Llarull asked Cretin why Aleman was not offered the white house position. Although Llarull testified that Cretin told her that Aleman was not promoted because of his Union support (i.e., wearing a Union button), I credit Cretin's testimony where she denied Llarull's version of events.

Rather, I find that Cretin told Llarull that Aleman was not promoted because of his prior discipline. Specifically, Cretin told Llarull, "I should not tell you this but Aleman has discipline in his file and he cannot be promoted or transferred with discipline on his record. Aleman knows why he didn't get that position." When asked why Cretin told Llarull about Aleman's discipline, Cretin stated, "There were a lot of rumors about why GRAs don't get positions so I wanted to set the record straight." According to Cretin, many GRAs believed they were not promoted due to favoritism and/or their support for the Union, so Cretin wanted to ensure that Llarull knew the reasons why Aleman was not promoted.

In making these factual findings, I found Llarull less than fully credible. As stated above, Llarull's tone and demeanor was very aggressive on cross examination and her answers reflected

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[34] *Gold Standard Enterprises*, supra (the testimony of current employees, particularly while management representatives are present, that essentially accuses respondent of wrongdoing has inherent reliability because these witnesses are testifying adversely to their pecuniary interests).

[35] Tr. 686–691.

extreme hostility toward Respondent.[36] As such, her testimony lacked objectivity which made her less than fully credible. In contrast, Cretin was straightforward and even tempered throughout her testimony which made her more credible.

b. Cretin told GRA Ofelia Diaz that wearing her union button prejudiced her in obtaining opportunities to train newly hired GRAs

Relying upon the credible testimony of former Floor Manager Cretin, I find as follows.

It is undisputed that, for a period of time, Cretin served as the training manager for newly hired GRAs. As part of training, new hires were paired with more experienced GRAs and shadowed them on their daily assignments. Once Cretin stopped serving as training manager, and after her successor left, Wandick assumed this role in early 2015.

It is also undisputed that, in the past, as the training manager, Cretin gave GRA Ofelia Diaz (Diaz) opportunities to train new GRAs. At that time, Diaz was not a Union Committee leader or active Union supporter. However, from approximately January 22 through April 18, 2015, Diaz was unable to train because she was on leave due to a personal injury.

By July 2015, Diaz was a Union Committee leader and active Union supporter. On July 7, 2015, after one of the morning Trump Talks, Diaz asked Cretin why she had not been given opportunities to train new GRAs. Although Diaz testified that, in response, Cretin pointed to Diaz's Union Committee leader button and told her that wearing her button was "ruining things" for Diaz, I credit Cretin's testimony where she denied Diaz's version of events.

Rather, I find Cretin told Diaz that Cretin was no longer the training manager, Wandick was the new training manager, and he changed the training procedures whereby all trainers were required to take a training class before being assigned to train new GRAs. Cretin then told Diaz that she could not train new GRAs until Diaz took the training class. Diaz replied that she believed she was no longer able to train because she wore her Union Committee leader button and/or supported the Union. At that point, Cretin reassured Diaz that her union support was never a consideration then told Diaz that she would talk to Wandick to find out if he could return Diaz to the training program.

At some point thereafter, Cretin asked Wandick why Diaz was not training new GRAs, to which Wandick replied that Diaz had missed the training class. Cretin asked Wandick to find out the date of the next class and he agreed to do so.

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[36] In fact, Llarull's aggressive zeal for the Union was evidenced by an incident in October 2015, when Housemen Ryan Aguayo (Aguayo) and Jose Perez Cortez (Cortez), both Union supporters, complained to Human Resources (HR) that Llarull was angry and aggressive toward Cortez and called Cortez "stupid" when Cortez asked Llarull how much he would get paid if he became a Union committee leader. Tr. 686–688, 698–699, 776–777, 794–796, 970–971, 975; R. Exh. 19. This incident coupled with Llarull's tone and demeanor on the stand and her palpable hostility toward Respondent left me with the impression that she was prejudiced against Respondent because it did not support unionization, which made her testimony less than fully credible.

In crediting Cretin's version of events, I found Cretin was direct, specific, and unambiguous in her testimony. She maintained a good recall of events. Cretin was not evasive in answering questions asked on direct and cross examination. While I found Diaz generally credible, Cretin's demeanor and tone appeared confident and her testimony was straightforward and unbiased. Although Diaz's testimony is presumed especially reliable given she is a current employee of Respondent, I note that Cretin, being a former management official of Respondent, was under no obligation to testify favorably toward Respondent.[37] Overall, Cretin's testimony struck me as truthful which made her version of events particularly credible.

4. Keeran allegations

a. Keeran interrogated GRA Vargus about her union sympathies

As stated above, GRA Vargus is a Union Committee leader and Union supporter. It is undisputed that, at all material times, Christina Keeran (Keeran) was employed as a Status Clerk—Lead.

In or around March 2015, Vargus, Llarull, Jaramillo and several other GRAs were standing in the EDR waiting for the morning Trump Talk. At some point, Keeran entered the EDR, saw Vargus and asked her to sit down. Vargus did not comply. According to Vargus, Keeran asked, "I want to know why you want the Union." Vargus did not answer Keeran. Instead, Vargus told Keeran she was on the clock and could not talk to her about the Union. Thereafter, Keeran replied that she would look for Vargus on her break to continue their conversation.

Some time later that afternoon, Vargus and Keeran met in the hallway. Keeran told Vargus that she had been looking for her to which Vargus replied that she and Keeran had different break times. Neither Keeran nor Vargus said anything else to one another. Keeran denied that the entire incident ever occurred.

After carefully reviewing the record, I credit Vargus' version of events for several reasons. First, Vargus had a specific recollection of the conversation and events surrounding this incident. She appeared even tempered, and her demeanor was composed and steady. In contrast, Keeran's testimony was generalized, non-specific and amounted to general, perfunctory denials that the incident occurred. On balance, due to Vargus' status as a current employee, testifying against her pecuniary interest, I found her testimony inherently more credible than that of Keeran.[38] As such, I find that the conversation between Vargus and Keeran, as Vargus testified, occurred.

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[37] See *Flexsteel Industries,* supra at 749 (regarding reliability of former employee witness' testimony).

[38] *Gold Standard Enterprises,* supra (regarding the inherent reliability of the testimony of current employees). .

b. Keeran told Housemen Cortez and Aguayo that their hours would be reduced if they supported the Union

Relying primarily on the testimony of Houseman Jose Perez Cortez (Cortez), I find the following facts.

Housemen Cortez and Ryan Aguayo (Aguayo) work on-call for Respondent. Both of them wore Union buttons. Some time in June 2015, Cortez and Aguayo clocked in for the day and walked to the Housekeeping office to view their work schedules. At some point, they ran into Keeran, who looked at their Union buttons, and said, "If the Union comes in, you'll [meaning all on-call personnel] only receive 20 hours [of work] or less." Cortez replied "well, in that case, I don't really want [the Union] here. I'm sorry I didn't know." Keeran did not respond to Cortez's remark.

Although Cortez testified that, after this conversation, he wore his Union button underneath his jacket for fear of being retaliated against, Cortez admitted that, despite wearing his Union button, he was promoted from an on-call houseman, at the time of his conversation with Keeran, to a full time houseman, after the conversation. Again, Keeran denied the statements attributed to her.

While I found Aguayo generally credible, I found Cortez's testimony particularly credible for several reasons. First, Cortez's testimony was corroborated by Aguayo. Second, both Cortez and Aguayo were direct and specific in their recall of the conversation with Keeran and were even-tempered and non-evasive in their answers. In contrast, other than her general denials that the conversation occurred, Keeran offered no explanation to rebut Cortez's and Aguayo's specific recall of the conversation that day.

Lastly, and most importantly, I credit Cortez's (and Aguayo's) testimony over that of Keeran, due to their status as current employees. Under these circumstances, their testimony has a special guarantee of reliability.[39] As such, I find that when Keeran saw Cortez and Aguayo wearing their Union buttons, she told them that if they supported the Union, their hours would be cut down to 20 hours or less per week.

5. Officer Green confronts group of GRAs about Union handbilling outside Trump Hotel

At all material times, Olivia Green (Green) served as a Security Officer for Respondent. She was responsible for protecting/securing the inside and outside of the hotel and ensuring the safety of guests, employees and other individuals at the Hotel.

On or about February 28, 2015, GRA Vargus arrived at work at 7:30 a.m. Her shift began at 9 a.m. that day. Vargus secured her belongings and walked to the front of the hotel to

[39] Id.

participate in a handbilling event organized by the Union. GRA Rivera also arrived around 7:30 a.m. that morning and she, together with GRAs Llarull, Blanco, Aleman, Jose Martinez (Martinez) and others met in the front of the hotel to participate in the event. It is undisputed that the GRAs intended to distribute Union flyers to the guests of the Hotel.

Sometime around 7:30 a.m., while Officer Green was patrolling the property, she saw four or five GRAs, who were in uniform, and other individuals standing on the sidewalk in front of the Hotel. It is undisputed that the front sidewalk is public property. None of the GRAs had flyers in their possession.

Officer Green approached the GRAs and asked them what they were doing. Although Green testified that someone replied "we have business here," I credit Vargus' testimony that she told Green that the GRAs were participating in a Union activity. At that point, Green told the GRAs that they were not allowed to handbill because it was private property. No one responded. At that point, Green left the group, radioed the Security Control Desk, advised them about what she observed and requested back up. Officers Cornelius Johnson (Johnson) and Jesus Bonales (Bonales) were dispatched to the front of the Hotel.

At some point, Union Organizers Jose Pineda (Pineda), Ramiro Navas and Mercedes Castillo arrived with the Union flyers. Vargus told Pineda that Green told the group that they could not handbill on the sidewalk. At that point, Green returned to the group accompanied by Officers Johnson and Bonales. When the officers approached the group, they again asked the GRAs what they were doing to which Vargus responded "we are doing our union activity and we have all the right to do that." While Green denied she said anything to the group after Officers Johnson and Bonales arrived, I credit Vargus' testimony that Green again told the group that they could not gather in front of the building and distribute flyers to hotel guests. Officers Johnson and Bonales were not called as witnesses and did not testify at the hearing.

In any event, Officer Johnson also told the group they could not gather on the sidewalk because they were on private property. In response to Vargus' comment about the group's right to handbill, Johnson told Vargus words to the effect, "You, get in your car and go home." Vargus refused and told Johnson, "No, I'm in my right." At that point, Pineda interjected and told the officers that the GRAs had the right to handbill on the public sidewalk and asked for the officers' names. While there was some considerable testimony as to whether Green told the group that she was the commander in chief of the officers, I find that none of the officers gave their names to the group.

At some point, Security Director Clyde Turner (Turner) was notified of the encounter and he radioed the officers to back away from the GRAs. They complied. However, the GRAs left the sidewalk and walked inside the Hotel to clock in for work.

In making the above factual findings, I found Vargus' testimony more credible than Green for several reasons. First, although I found Vargus and Rivera unreliable concerning the guest room incident, on this occasion Vargus' testimony was corroborated, almost exactly, by GRA Rivera, who I also found credible. Second, both Vargus and Rivera were specific, direct and straightforward in their testimony and had great recall of the events surrounding this

incident. Vargus' (as well as Rivera's) tone and demeanor were even-tempered and their specific recall of events left me believing they were telling the truth.

In contrast, I did not find Officer Green particularly credible for a number of reasons. First, I note that Green's testimony was extremely vague on who said what during the encounter, as opposed to Vargus, who was specific in her testimony. Second, Green's testimony was direct and specific on the events that appeared favorable to Respondent but was evasive in her answers when questioned by the General Counsel (as a Rule 611(c) witness) about what the officers said to the group. Her inconsistent recall of events gave me the impression that she was being less than forthright in her testimony and was skewing her testimony to support Respondent, her employer.

I also noticed that Green often smiled, shifted in her chair and hesitated with her answers, particularly when the question would have required her to say something unfavorable toward Respondent. Her overall nonverbal communication left me with the impression that she was reluctant to answer the General Counsel's questions. In those instances, particularly when the General Counsel asked her a direct question about who said what during the incident, Green often responded "I don't recall." Since Officers Johnson and Bonales were not called to testify, Green's testimony was not independently corroborated.

Third, while Green generally denied the remarks attributed to her, because of her overall demeanor during her testimony, I did not find her particularly credible. Lastly, because Vargus and Rivera are current employees, their testimony had heightened credibility.[40] Accordingly, I credit Vargus' version of the events (set forth above) regarding the handbilling incident.

6. Officer Slovak questions Blanco about distributing Union literature while eating lunch in the EDR

At all material times, Danny Slovak (Slovak) was a full-time Security Officer. Like Officer Green, Slovak was charged with patrolling/protecting the interior and exterior sections of the Hotel and to ensure employee and guest safety and overall satisfaction.

It is undisputed that Security Officers took staggered lunches in the EDR between 11 a.m. and 1 p.m. In so doing, they must punch out for lunch and are not on the clock.

Some time after the February 28, 2015 handbilling incident, security personnel, including Slovak, received a passdown report from Security Director Turner on what to do if they saw employees handbilling in/on/around the property.[41] In the passdown, officers were told that GRAs were not allowed to handbill in the EDR and could not distribute anything beyond the doors of the Hotel. Officers were instructed not to remove the flyers from employees; but rather, to report any employees handbilling if, in the officer's view, the handbilling created an

[40] Id.

[41] A passdown is a verbal/written instruction from either Security management or Security Director Turner explaining to security personnel how to handle security issues or deal with certain situations occurring in/around the Hotel.

annoyance to guests. If the handbilling did not create an annoyance, officers were told to allow the GRAs to handbill. Officers also were instructed that if they were on lunch and they saw employees handbilling, they could use their discretion on whether to report it.

It is undisputed that sometime in June 2015, Slovak was eating lunch in the EDR at a table closest to the entrance and food line. Another employee was seated at the table across from Slovak. While eating his lunch, Slovak saw GRA Blanco, who was also on her lunch break, handing out Union flyers to employees in the EDR. Although Blanco testified that Slovak told her that she could not handbill in the EDR, I find that Blanco misunderstood Slovak's remark as she admittedly understood little English and asked another coworker sitting next to Slovak to translate his comment from English to Spanish. That employee was not called to corroborate Blanco's testimony.

Instead, I credit Slovak's testimony that he asked the employee sitting next to him "I didn't know they had that [meaning handbilling in the EDR] approved?" In response, the gentleman chuckled but did not say anything in response.

Thereafter, apparently someone else at the table told Slovak something to the effect that, "it's legal what's she [Blanco] is doing so long as it's done before work, during lunch or after her tour." While Blanco testified she asked for Slovak's name and he refused to give it, I again credit Slovak's testimony that he gave Blanco his full name. At that point, Slovak finished his lunch and left the EDR. It is undisputed that Blanco continued handing out flyers in the EDR that day without incident.

In crediting Slovak's version of events, I found he was direct, specific, and unambiguous in his testimony on direct and cross examination. Slovak was not evasive with his answers. His demeanor and tone appeared confident and his testimony was unbiased. Moreover, but for one disputed fact—Blanco asking for Slovak's name—their testimony corroborated each other.

Although Blanco, like many other of her coworker's testimony, is presumed especially reliable given she is a current employee of Respondent, I note that Slovak is also a current employee of Respondent.[42] Overall, Slovak's testimony struck me as truthful which made his version of events particularly believable.

7. Manager Doucette confronts Blanco in employee parking lot while she was distributing Union literature

There is considerable disputed testimony surrounding this incident. However, after my review of the record, relying upon the credible testimony of former Food and Beverage Manager James Doucette (Doucette), I find as follows:

[42] *Gold Standard Enterprises*, supra (concerning the reliability of current employees' testimony).

At all material times, Doucette served as Respondent's Food and Beverage Manager. He is approximately 6'6" tall and weighs 260 pounds.[43]

Some time in March 2015, prior to one of Doucette's afternoon shifts, he was in the employee parking lot near the rear entrance of the Hotel on his way into work. The employee parking lot is not a restricted area, but it is reserved for employee parking. As Doucette was walking into the Hotel, he saw one of his Department's busser employees talking with a woman that he did not know or recognize but who was later identified as GRA and Committee leader Blanco. Although Blanco wore her identification badge on a lanyard around her neck, Doucette could not see the badge when he initially saw Blanco talking with the busser. It is undisputed that Blanco was off-duty that day so she was not wearing her work uniform.

Blanco testified that, as she was in the midst of soliciting the busser, Doucette walked over and yelled, "Don't do that" and directed her to go to security with him. According to Blanco, she responded, "Are you security? I'm an employee, and I have a right to be here" then showed Doucette her work badge. Blanco, who described herself as a "little person," testified that Doucette moved close to her, shoved Blanco with his left arm and told her to go to security. At that point, according to Blanco, the busser looked frightened by Doucette so she reassured him that her solicitation was legal.

However, I credit Doucette when he testified that, upon noticing that his busser looked annoyed with Blanco's solicitations, he walked over and asked Blanco in English, "Do you work here?" Blanco, who admittedly spoke/understood little English, replied, "No, don't work here." At that point, Doucette asked Blanco to come inside the Hotel to security so he could determine her identity and whether she could continue to solicit in the employee parking lot. As Doucette and Blanco walked to the Security Department inside the Hotel, he stood close to Blanco as he opened the door to allow her to proceed through the door. Doucette turned as Blanco walked through the door at which point he saw his busser quickly leaving out of the parking lot. The busser was not called to testify.

Doucette and Blanco proceeded to Turner's office, with Blanco walking behind Doucette. Doucette told Turner that he saw Blanco outside talking to a busser and wanted to check if there were any issues with it. Turner responded that there were no issues, apologized to Blanco for being brought into security and told her she could return to the parking lot. Blanco then asked for Doucette's name. At that point, Turner replied, "You don't need to know that but you can go back to doing what you were doing," but Doucette voluntarily gave Blanco his full name. At that point, Blanco left Turner's office and returned to the parking lot to continue soliciting employees.

I credit Doucette's testimony over that of Blanco for several reasons. First, Blanco admittedly spoke/understood little English, so much so that if someone was speaking to her in English, Blanco often required someone to translate what was said from English to Spanish.

[43] Tr. 1502–1503.

Since the busser was not called to give his version of what occurred during Doucette's and Blanco's conversation and given Blanco's difficulty understanding English, I find it believable that, when Doucette asked Blanco if she worked for Respondent, she misunderstood and responded "No."

Second, in observing Doucette on the stand, I found that he listened carefully to questions, testified openly, was not evasive, and maintained the same demeanor regardless of who was examining him. Although the General Counsel made much to do about Doucette's lack of recall about specific events, I attributed his specific lack of recollection on *some* aspects of the events reasonable given the isolated nature of the incident that took place for five to 10 minutes and occurred eight months prior to the hearing. Rather, I found Doucette recalled the main points of the incident clearly and his testimony was unambiguous and forthcoming. Overall, Doucette's tone and demeanor was composed and steady, and he struck me as committed to speaking the truth.

Lastly, while I note that Blanco is a current employee whose testimony should warrant enhanced reliability, Doucette, being a former manager of Respondent, was under no obligation to testify favorably toward Respondent.[44] For these reasons, I found Doucette's testimony unbiased and forthright; and as such, found his version of the events to be slightly more credible than Blanco.

8. Guzman's termination

Martha Guzman (Guzman) was a GRA for Respondent. She was initially hired on June 6, 2013 as an on-call GRA but was promoted to full time on May 23, 2014. At all material times, Magaña served as Guzman's supervisor. Guzman's employment was terminated on July 22, 2015.

While many of the facts surrounding Guzman's termination are undisputed, the reasons behind her discharge are hotly contested. Because I found Guzman's testimony wholly and completely incredible (for reasons discussed later in this decision), I find the following facts occurred.

a. Respondent's Attendance Policy

It is undisputed that Respondent has a no-fault punctuality and attendance policy located in its Associate Handbook.[45] Under Respondent's attendance policy, associates are charged points for various attendance-related violations—from reporting to work late, failing to clock in

[44] *Flexsteel Industries,* supra (concerning the reliability of a former employee's testimony).

[45] GC Exh. 11 at 34–37; see also Tr. 173–174, 189–190, 896, 1132–1133; 1260, 1609–1610.

or out, calling off or being absent from work.[46] In addition, attendance points are increased if associates are absent during "peak periods," when the Hotel is at 100% occupancy.[47]

Under Respondent's point system, an associate who has accumulated four points is subject to a verbal coaching. At 5.5 points, the associate receives his/her first written warning. At seven points, the associate receives a second written warning. At eight points, an associate is subject to a suspension. When an associate reaches ten points, discipline is escalated to a suspension pending an investigation ("SPI") for termination.

Once an associate reaches the SPI stage, they must turn in their badge and are placed on leave pending the outcome of the investigation. At that point, the associate's attendance records and/or other pertinent information are referred to either the Director or Assistant Director of Human Resources Director to determine whether management should terminate the employee.

Associates can reduce accrued attendance points by one point for each 30-day period that they are not absent. Associates also do not accumulate points if their absence is due to a work-related injury, FMLA leave, and/or military service. Moreover, if an employee is out for consecutive days, points will only accrue for the first date of absence. In addition, points may be excused for other justifiable reasons, at management's discretion, based upon, for example, the circumstances surrounding the associate's absence or tardiness, whether the absence was caused by an emergency or whether the situation was outside of the associate's control. Associates may be required to provide a doctor's note to excuse an absence, but if management suspects that an employee is excessively absent or abusing the policy, a doctor's note alone may not excuse an absence or prevent an employee from accumulating attendance points.

b. Call-Off Procedures and Attendance Tracking

GRAs who call off work typically contact the Hotel's outside switchboard, called the PBX, or they call the Housekeeping Department directly. Either a status clerk or whoever received the GRA's call will send an email to both Magaña/Housekeeping management and the status clerks to report the call-off.

GRAs attendance points are kept on an attendance calendar, which is an Excel spreadsheet maintained on Respondent's computer system. Attendance points are logged onto the employee's computerized attendance calendar by either Keeran or Administrative Assistant Vania Mariscal (Mariscal). Keeran and Mariscal notify the associate when they accrue attendance points, but associates are ultimately responsible for tracking their own attendance points.

When an employee reached a certain number of attendance points warranting discipline, Keeran or Mariscal noted the disciplinary level on the attendance calendar and notified either

[46] GC Exh. 11 at 35.

[47] Id. at 36–37; see also Tr. 194–196, 232–234, 1353–1354.

Magaña or Assistant Housekeeping Director Kwon. At that point, Magaña or Kwon determined whether the discipline should issue and were responsible for issuing the appropriate discipline or triggering an SPI. Prior to Magaña becoming the Housekeeping Director, attendance related discipline was inconsistently noted on the attendance calendars. Magaña sought to bring more consistency in the marking/issuing of attendance related discipline.

c. Guzman's Attendance Record

It is undisputed that, prior to her termination, Guzman had a history of attendance problems. Guzman often told Magaña about the various family problems she was having which caused her to be absent from work.[48]

It is undisputed that, because of her family problems, Magaña often adjusted Guzman's attendance points in an effort to try to work with Guzman. However, Magaña repeatedly told Guzman that she would not be able to continue helping Guzman and that Guzman needed to work on her attendance. Despite this advice, Guzman's attendance problems continued.

It is undisputed that Guzman accumulated two points during her first six months as a GRA.[49] On January 19, 2014, Guzman received another point for calling in, which led to her first verbal coaching. On February 15, 2014, Guzman called off again during a peak period, which earned her two points, brought her total to five points, and triggered her first written reprimand.[50]

Guzman called off again on February 23, 2014, less than four hours prior to her shift, which should have counted as two points.[51] However, after Magaña deducted one point, Guzman was left with a total of six points, warranting a second written warning.[52] Then, in March 2014, Guzman accrued two half-points for being tardy and failing to clock in.[53]

On April 3, 2014, Guzman accrued four points for calling off work less than four hours before her shift and during a peak period, which brought her total to 11 points.[54] At this point, Guzman should have received an SPI for her exceeding 10 points.[55] However, Guzman provided

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[48] As examples of her many family issues, Guzman told Magaña she was absent from work because: her uncle was missing, the same uncle was dying, Guzman was beaten up by her husband, she was having issues with her daughters, Guzman was evicted from her apartment, another one of Guzman's uncles was having health problems, and/or Guzman was having health issues. Although Guzman denied telling Magaña that someone beat her up, she nevertheless admitted all of the other family issues that caused her to be absent from work.

[49] R. Exh. 26.

[50] R. Exhs. 4, 27.

[51] GC Exh. 11, R. Exh. 4.

[52] R. Exh. 4.

[53] Id. at 4.

[54] R. Exh. 1 at 4.

[55] GC Exh. 11 at 35.

a hospital doctor's note, and because Magaña was new to Housekeeping and wanted to work with Guzman, Magaña accepted Guzman's doctor's note and deducted the four points.[56]

Guzman reported tardy on May 2, May 14, and again on May 30, 2014, which raised her to nine points.[57] However, Magaña again deducted one point, which brought Guzman to eight points and triggered a suspension. While Guzman wrote on her disciplinary form that she had not received a second written warning and testified that she did not recall speaking to Magaña about removing attendance points, Guzman's testimony is belied by the documentary evidence.[58]

Guzman had no attendance issues for 30 days after her suspension. As such, by June 30, 2014, Guzman dropped to seven attendance points.[59]

Guzman called off on July 12, 2014, which brought her back up to eight points. Although a suspension was noted on her attendance calendar, after speaking with Magaña, Guzman was not suspended at that time. Although Guzman testified that Magaña never found her attendance unacceptable, her testimony is totally belied by the documentary evidence.[60]

In October 2014, Guzman again hit 10 points after she incurred a total of four half-points between August and early October, 2014 for being tardy and taking inappropriate breaks. Guzman should have received another SPI at this point, but after Guzman explained her situation, Magaña again gave her a break.

Guzman continued to have serious attendance issues into the fall. She called off on November 2, 2014, which brought her to 11.5 points. Keeran entered a note on Guzman's attendance calendar that "[s]he [Guzman] said it was FMLA, but she does not have FMLA. I mentioned this to Alejandra [Magaña] on November 2."[61] At that point, Magaña explained to Guzman that she was not eligible for FMLA. However, Guzman told Kwon that the November 2 call-off was due to the death of her uncle. In any event, no points were deducted, but Guzman was not placed on an SPI despite having 11.5 attendance points.

On December 2, 2014, Guzman had one point deducted for going 30 days without any absences. However, she was 28 minutes tardy for her 8:30 a.m. shift on December 3, which brought her to 11 points. On December 12, instead of issuing an SPI, Magaña issued a suspension after deducting three points in order to accommodate Guzman's personal issues. This brought Guzman's total to eight points.

In her suspension notice, Guzman was advised that it was her responsibility to track her attendance points. In addition, Guzman was warned that if she did not improve her attendance,

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[56] Tr. at 1167.

[57] R. Exh. 1 at 4–5; see also R. Exh. 3.

[58] R. Exh. 3 at 2; R. Exh. 4.

[59] R. Exh. 1 at 5.

[60] R. Exhs. 1, 3, 4.

[61] R. Exh. 1 at 5.

she could be terminated.[62] While Guzman wrote a comment on her suspension notice that she did not believe she was late on December 12, again the documentary evidence showed otherwise.[63]

By the time of Guzman's 2014 performance review, completed in early 2015, it is undisputed that Guzman was rated below expectations for attendance because she ". . . struggled with attendance, whether it has been calling in on many occasions or being late."[64] It is undisputed that Guzman had no less than fifteen occurrences of tardiness or calling off work by the end of 2014.

Unfortunately, Guzman's attendance failed to improve in 2015. Guzman had one point deducted in January 2015 for going 30 days without any absences. However, Guzman called off on February 5, 2015 during a peak period, less than four hours before her shift. At that point, she accrued four points, but after speaking with Magaña, the four points were deducted.[65] However, Magaña told Guzman that she could not keep deducting points since it appeared to Magaña that Guzman was abusing the system versus making efforts to improve her attendance.[66]

On February 24, 2015, Guzman again called off during a peak period with less than four hours' notice.[67] At this point, Guzman would have accrued 12 points, which would have triggered an SPI.[68] However, before Magaña could address Guzman's discipline, Guzman called off on March 11, which added to her point total.[69] When Magaña finally spoke with Guzman, she brought a doctor's note for her absences and prior tardy. Magaña deducted seven points which brought Guzman down to seven total attendance points. At that point, believing Guzman was abusing her leniency, Magaña told Guzman that she could not help her anymore.[70]

Guzman testified that, although she had heard about the Union earlier in 2015, she began wearing a Union button sometime beginning in April 2015. Both Magaña and Wandick admitted that they saw Guzman wearing her Union button from April 2015 until her termination.

On April 1, 2015, Guzman was late for her shift, which moved her to eight points, and triggered a suspension.[71] By this time, Magaña testified that she was at her wit's end with Guzman and her pleas to have her attendance points deducted.

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[62] R. Exh. 1.
[63] Id. at 6; Tr. 1177–1178.
[64] R. Exh. 29; Tr. 1191–1193, 1270–1271.
[65] R. Exhs. 2, 6.
[66] Tr. 1178, 1214.
[67] GC Exh. 14.
[68] R. Exh. 2.
[69] R. Exh. 2; GC Exh. 14; see also Tr. 1163, 1179.
[70] Tr. 1180.
[71] R. Exh. 2.

As a result, on April 2, 2015, Magaña asked Kwon to issue the suspension to send a message to Guzman that Magaña would no longer continue to deduct points whenever Guzman brought in an excuse.[72] Kwon drafted the suspension on April 6, 2015 when he next returned to work. Kwon served Guzman with the suspension on April 7.[73]

On April 10, 2015, Guzman complained to Magaña that her suspension "wasn't fair," however Magaña told Guzman that the suspension would stand.[74] At that point, Magaña noticed that Kwon did not sign the second page of the suspension so she signed her name instead.

It is undisputed that Guzman was absence-free for a month, which dropped her to seven points.[75] Around May, Guzman asked Mariscal how many attendance points she accumulated, to which Mariscal told her she had seven points.[76]

On May 16, 2015, Guzman again called off during a peak period which added two points. Guzman had accumulated nine points, which resulted in her being suspended again for exceeding eight points.[77] Guzman did not provide an excuse or ask Magaña to deduct the points for this absence. Guzman had no attendance issues for 30 days after the suspension issued, which dropped down to eight points effective June 16, 2015.[78]

a. Guzman's Termination

On July 2, 2015, Guzman arrived at work but had not clocked in. As she arrived, Guzman felt dizzy, as if her chest was constricted. Guzman told Anita (last name unknown) that she did not feel well, and Guzman was taken into the security department. Someone from security checked Guzman's blood pressure and it was determined to be high. An ambulance was called, but when ambulance personnel arrived and asked Guzman what happened, due to her symptoms, she was unable to tell them. Thereafter, Guzman was taken to the hospital for further evaluation.

At some point after being evaluated at the hospital, Guzman spoke to Wandick where she told him that she had been transported to the hospital. She also told Wandick that the doctor was placing her off work for five days from July 2. Wandick told Guzman to bring her doctor's note when she returned to work. According to Guzman, she was given a doctor's note then released from the hospital around 6:00 p.m. While Guzman thought she was excused from work for five days—from July 2 to July 7, her doctor's note only excused her for three days—or from July 2 to July 5.[79] Guzman admitted she never reviewed the note after leaving the hospital.

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[72] Tr. 1180–1181, 1271, 1602–1603.
[73] R. Exhs. 2, 47.
[74] R. Exh. 2; Tr. 1181.
[75] R. Exh. 6 at 4.
[76] Tr. 1354, 1357–1358, 1608–1609.
[77] R. Exh. 5.
[78] R. Exh. 6.
[79] R. Exh. 10.

Nevertheless, at 4:57 p.m. on July 2, Wandick emailed Housekeeping Department management, Mariscal, Keeran, and the status clerks, that "Martha will be out until the 5th. Please do not do task sheet [meaning put her on the schedule]."[80] Guzman was scheduled to be off work on July 5 and 6, so her next scheduled work day was July 7.[81]

On July 7, 2015, at 4:15 a.m., Guzman called Housekeeping Supervisor Walter Rubi (Rubi) to call off for her shift starting at 8:30 a.m., during a peak period. While Guzman denied that she called off on July 7, again, her testimony is clearly belied by the documentary evidence.[82] In any event, Rubi notified Housekeeping's management team of Guzman's absence via email. Thus, at this point, without having received the doctor's note, Guzman's July 7 absence was marked as a two-point violation, which brought her to 10 points and triggered another SPI.[83]

Guzman returned to work on July 8.[84] Although Guzman testified that she gave Magaña her doctor's note and Magaña told her she was "ok" to return to work, it is undisputed that Magaña was on vacation on July 8 and did not return to work until July 9.[85] Thus, I find Guzman never gave Magaña her doctor's note on July 8 and her testimony on this point is completely unreliable.

In any event, Guzman did not work on July 9, but worked again on July 10.[86] When Magaña returned to the office on July 9, learned of Guzman's absence and saw the doctor's note, Magaña decided to issue Guzman an SPI. According to Magaña, Guzman had reached ten points, the doctor's note only covered Guzman's absence from July 2–5, and there was nothing that justified Guzman's absence on July 7.

Magaña informed Assistant HR Director Gustavo Acosta (Acosta) of the proposed discipline. Since Kwon was on vacation, Magaña asked Wandick to issue the SPI, which he did on July 15.[87]

On July 15, 2015, Guzman's next work day, Wandick met with Guzman and gave her the disciplinary notice. Per procedure, Wandick asked Guzman to return her badge and keys and sign the disciplinary notice. She did not agree with the SPI.

At some point that day, Guzman met with Acosta in HR who told her that the reason she was being suspended was because she had accrued 10 attendance points which triggered the SPI.

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[80] R. Exh. 32.

[81] R. Exh. 9 at 7; Tr. 1155–1156.

[82] R. Exhs. 7, 8, 28; see also Tr. 246–250, 1155, 1183, 1251–1252, 1340.

[83] R. Exh. 6; Tr. 246–247, 1183–1186.

[84] R. Exh. 8; Tr. 1247.

[85] R. Exhs. 41, 48, Tr. 1605–1607, 1677.

[86] R. Exh. 8.

[87] R. Exh. 6.

According to Guzman, Acosta told her he would investigate the matter and contact her with further instructions/information.

At some point, Guzman noted on the disciplinary notice that "I ask [sic] Vani[a Mariscal] on July before I was sick that you guys took me to the hospital how many points I have. She said 7 point[s]. I don't understand why I have 10 points. If I had 7 July, I went up to 10 points."[88] Nevertheless, Guzman refused to sign the disciplinary notice and was escorted off the property.

Thereafter, Acosta conducted the investigation. Some time after her suspension on July 15, Acosta called Guzman to discuss the circumstances surrounding her SPI.[89] While Guzman testified that all Acosta told her was to return to work on July 22, I credit Acosta's testimony where he explained the investigation process. During the telephone conversation, Guzman told Acosta that she gave Magaña her doctor's note for her absences and Mariscal told her she only had seven points. Afterward concluding his conversation with Guzman, Acosta spoke with Mariscal, where Mariscal confirmed that she told Guzman she had seven points back in May, before the additional absences in July pushed Guzman to ten points.

Acosta also spoke with Magaña to confirm whether she received Guzman's doctor's note. Acosta eventually received Guzman's doctor's note from Mariscal where he saw that the note excused her from July 2 through July 5 but not for July 7.[90] Acosta noted that Guzman was not assessed points for the days excused by her note but he found no reason to deduct points for her absence on July 7.

Lastly, Acosta reviewed Guzman's schedule and attendance log for accuracy. He compared the notations on Guzman's attendance calendar with her schedules, time punches, and attendance records. In so doing, Acosta noticed that Magaña had deducted several points from Guzman's attendance records but ultimately determined that Guzman had been given more than enough opportunities to address her attendance issues.[91] At the conclusion of Acosta's investigation, he told Magaña that they would proceed to termination.

On July 22, Acosta met with Guzman and Magaña to discuss Guzman's termination. At the meeting, Acosta told Guzman that, despite the breaks Magaña provided, Guzman reached the maximum number of points allowed under Respondent's attendance policy; therefore she would be terminated. Acosta also told Guzman that he needed to be consistent with all employees and could not give her any more breaks on her attendance. Although Guzman continually testified that she did not understand how she accrued 10 points because her doctor's note excused her until July 7, she admitted that she never mentioned this during her termination meeting with Acosta and Magaña.

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[88] Id.
[89] R. Exhs. 7–9.
[90] R. Exh. 10.
[91] GC Exh. 14; R. Exh. 6; see also Tr. 227–229, 261.

In any event, Acosta gave Guzman a Personnel Action Form ("PAF"), which Guzman refused to sign.[92] On July 22, 2015, Guzman was terminated for absenteeism in violation of Respondent's punctuality and attendance policy.

It is undisputed that, since June 2014 through Guzman's termination, Respondent terminated 14 Housekeeping employees (excluding Guzman, employees terminated for job abandonment [no-call/no show] and probationary employees) for attendance problems.[93]

In making the above factual findings, I credit Acosta's and Magaña's testimony over Guzman's. Specifically, I found Acosta credible in that he listened carefully to questions and maintained the same demeanor regardless of who examined him. Although I did not find Magaña particularly credible concerning other incidents in this case, the documentary evidence corroborated her testimony.[94]

By contrast, I found Guzman wholly incredible for many reasons. First, she misrepresented the facts on numerous occasions, and even when caught in several inconsistencies (by the documentary evidence), she continually maintained her unreliable testimony. For example, Guzman vehemently denied signing one of her suspension notices or writing the comments in the associate remarks. However, in comparing one of her suspension notices in Respondent Exhibit 29, that Guzman admittedly signed, with her suspensions found in Respondent Exhibits 1, 2, and 3, I find that all of the signatures are identical.

Second, Guzman routinely made inconsistent statements throughout her testimony. For example, while Guzman testified that, on July 8, Magaña gave her the "all clear" after Magaña saw Guzman's doctor's note, when confronted with her Board statement (also known as her *Jencks* statement), Guzman admitted that she never mentioned anything about her July 8 conversation with Magaña. In fact, I find that Guzman never gave Magaña her doctor's note on July 8, as she claimed, because Magaña was on vacation that day. Similarly, although Guzman testified that Wandick told her she was being fired for accumulating 10 attendance points, she never mentioned this conversation in her Board statement.

Similarly, while Guzman also testified that Magaña never told her that her attendance was unacceptable, the documentary evidence proved otherwise. Guzman also insisted that her doctor *verbally told* her that he would excuse her from work from July 2–7, 2015. However, when confronted with the *written* doctor's note, her only explanation for the discrepancy was that she never reviewed the note (even after hospital personnel gave it to her); but rather, she simply relied on what her doctor told her. Guzman's explanation defies common sense, and her inconsistent testimony made her totally unbelievable.

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[92] R. Exh. 11.

[93] R. Exh. 49.

[94] See *Daikichi Sushi*, 335 NLRB 622, 622 (2001) (credibility findings need not be all-or-nothing propositions, and it is common for a fact finder to credit some, but not all, of a witness' testimony).

Lastly, Guzman's demeanor on the stand detracted from her overall credibility. Guzman became extremely emotional only after being confronted with her inconsistent statements.[95] Moreover, she gave guarded testimony, particularly on cross examination, which struck me as less than forthright. In fact, Guzman was only forthcoming (to the extent she was) when confronted with the documentary evidence that proved her testimony unreliable. In sum, I did not find Guzman credible, reliable or truthful in her testimony.

III. DISCUSSION AND ANALYSIS

In the complaint, the General Counsel alleges that a number of Respondent's supervisors and agents violated Section 8(a)(1) of the Act when they: (1) interrogated GRAs about their Union activities; (2) surveilled GRAs and created an impression that GRAs' Union activities were under surveillance; and/or (3) threatened employees with reprisals because of their support for the Union. However, before delving into the merits of the allegations, I must address Respondent's contention that Status Clerk Lead Keeran is not a supervisor/agent and that Officers Green and Slovak are not agents of Respondent. I turn to that question now.

A. Whether Keeran, Green and Slovak are Supervisors/Agents of Respondent

Keeran is Not a Supervisor/Agent of Respondent

During the hearing, Respondent orally moved for summary judgment and dismissal of all complaint allegations against Christina Keeran (Keeran) on the grounds that the General Counsel failed to prove Keeran is a supervisor/agent under Sections 2(11) and 2(13) of the Act. The General Counsel requested leave to respond to Respondent's motion in writing within her post-hearing brief, which was granted.[96] Respondent timely filed a reply.

In paragraphs 4, 5(c) and 5(i) of the complaint, the General Counsel alleged that Status Clerk Lead Keeran's unlawful statements to GRA Vargus and Houseman Cortez are attributed to Respondent because she is a supervisor as defined by Section 2(11) of the Act. However, in her brief, the General Counsel abandons this theory and presents no evidence as to Keeran's supervisory status with Respondent. Therefore, and in agreement with the case law and arguments cited by Respondent, I conclude that the General Counsel has effectively waived her claim that Keeran is a supervisor of Respondent; and accordingly, I grant Respondent's motion for summary judgment as to Keeran's supervisory status.[97]

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[95] At one point, Guzman was so tearful she wanted to be excused from the stand because she felt under the weather. However, she recovered almost instantaneously upon being told that she would not be excused without a doctor's note explaining that she was medically incapacitated from testifying and her testimony would be rescheduled.

[96] The deadlines for the parties' responses were set forth on the record.

[97] See *Compact Video Services*, 319 NLRB 131, 144 (1995) (party waived arguments concerning confidentiality of documents which were not raised in the party's brief); *United States v. Kitsap Physicians Service*, 314 F.3d 995, 999 (9th Cir. 2002) (holding that plaintiff waived argument because he failed to present evidence in opposition to the motion for summary judgment in either the written briefs or affidavits); *BlueEarth Biofuels, LLC v. Hawaiian Elec. Co.*, 531 Fed. Appx. 784, 786 (9th Cir. 2013) (plaintiff waived argument by failing to raise it in its opposition to summary judgment).

Alternatively, the General Counsel asserts that, pursuant to Section 2(13) of the Act, Keeran is an agent of Respondent, because the Hotel held out Keeran and "placed [her] in a position in which employees would reasonably understand [Keeran] to have authority to speak on behalf of Respondent."[98] I disagree.

The Board applies common law principles of agency when it examines whether an employee is an agent of the employer if s/he makes a particular statement or takes a particular action. Under these common law principles, the Board may find agency based on either actual or apparent authority. As to the latter, "[a]pparent 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."[99] The test then is whether, under all the circumstances, employees "would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management."[100] The position and duties of the employee alleged to be an agent are relevant in determining agency status.[101] Thus, it is well settled that an employer may have an employee's statement attributed to it if the employee is "held out as a conduit for transmitting information [from management] to the other employees."[102] The Board also considers whether the alleged agent's statements or conduct were consistent with those of the employer.[103]

After reviewing the documentary and testimonial evidence, I conclude that Keeran is not an agent of Respondent.

First, the General Counsel asserts that Keeran was held out as a conduit of information from management to employees by virtue of answering questions and/or communicating with GRAs about scheduling, their attendance points, and/or their requests and/or eligibility for FMLA. However, I find that, to the extent Keeran communicated with employees regarding these tasks, it was general information performed on a purely routine basis in her role as that of a timekeeper.

The record also shows that when Keeran called GRAs to ask them whether they wanted to work a shift or stay home, it was done only at the behest of management after a review of the schedule and needs of the Hotel that day. Keeran never used her own judgment to determine whether to add or reduce the GRAs working on the schedule or to whom she should contact in that regard. Ultimately, Magaña was responsible for the GRA's work hours and schedules.

Similarly, with respect to conveying attendance points and FMLA leave to the GRAs, the evidence reveals that Keeran simply answered routine questions and gave GRAs general information about what their attendance points were and their eligibility/lack thereof for FMLA.

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98 GC Br. at 23.

99 *Southern Bag Corp.*, 315 NLRB 725 (1994). See also *Alliance Rubber Co.*, 286 NLRB 645, 646 (1987).

100 *Waterbed World*, 286 NLRB 425, 426–427 (1987), citing *Einhorn Enterprises*, 279 NLRB 576 (1986).

101 *D&F Industries, Inc.*, 339 NLRB 618, 619–20 (2003), citing authorities.

102 *Debber Electric*, 313 NLRB 1094, 1095 fn. 6 (1994).

103 *D&F Industries, Inc.*, supra.

Again, Magaña was ultimately responsible for answering questions concerning the consequences of accruing attendance points, determining the level of discipline vis-à-vis attendance points, and eligibility for FMLA benefits. Thus, I find that Keeran was simply an experienced employee entrusted with nonsupervisory lead authority in this regard.[104]

I also do not find evidence that other employees would have reasonably viewed Keeran as speaking for management. Keeran rarely, if ever, attended "Trump Talks" or directed other GRA meetings on behalf of management. She did not have authority to hire, fire, train or discipline GRAs. In fact, many of the GRAs who testified were unsure as to Keeran's title or position with Respondent. When asked by the General Counsel the names of Respondent's managers, the majority of the GRAs named "Christina," but they did not know the last name. This is significant because Krystyna (pronounced Christina) Stills was one of Respondent's floor managers, while Christina Keeran was the Status Clerk Lead.

Similarly, Housemen Cortez and Aguayo gave equally vague testimony regarding their knowledge of Keeran's position. While Cortez testified that Keeran was a "manager," he subsequently admitted that Keeran was a "lead." Nevertheless, he admitted that he rarely if ever spoke or had any contact with Keeran. Similarly, Aguayo testified that Keeran was "the attendance lady…the one that tells your attendance and takes your schedule…she takes my schedules and fixes my attendance sometimes."[105]

The General Counsel also argues that GRAs reasonably viewed Keeran as Respondent's agent because Keeran sat at the floor manager's table to perform her duties. However, the General Counsel cites no case law or Board precedent finding that the location of an employee's work station determines agency status. Even if the location of Keeran's work station were a factor in determining agency, while many of the GRAs testified that "Christina" sat at the managers table, it was unclear whether they meant Stills, the floor manager, or Keeran.

The evidence shows that Keeran shared a desk with certain managers but also with other status clerks. Moreover, to distinguish herself from the other managers in the office, Keeran wore a uniform similar to the other status clerks in the office while managers never wore uniforms. However, none of the GRAs testified that they saw Keeran wearing regular clothing. In any event, I fail to see how Keeran's attire or where Keeran sat in the Housekeeping office shows that Respondent held her out as its agent.

Lastly, Keeran's job duties do not reflect that she is or ever was held out to be an agent of Respondent. Although Keeran inputted the GRAs' initial work schedules into a computer

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[104] *Knogo Corp.*, 265 NLRB 935, 935–936 (1982) (a non-supervisory "lead" employee's role as a "conduit of information" to employees was insufficient to warrant agency status; rather, the relaying of information "indicates no more than [the fact that the employee] is an experienced employee entrusted with nonsupervisory lead authority."). See also *Meyer Jewelry Co., Inc.*, 230 NLRB 944, 945 (1977) (declining to find agency status simply because a lead employee may be "entrusted with additional responsibility solely because of their experience and familiarity with an employer's operations.").

[105] Tr. 973–974.

program, the computer populated a "draft" schedule based upon the needs of the Hotel during the time period in question. Thereafter, the schedule was reviewed, adjusted and approved by Magaña. Thus, Keeran's work in creating the 12-day work schedule was of a routine nature, with no evidence showing she exercised independent judgment or had any authority to determine who worked which schedule on a certain day.

As stated above, to the extent that Keeran assisted with housekeeping payroll, she did so by keeping track of employees' attendance points on their computerized attendance calendars. She notified Magaña if a GRA's attendance points triggered a discipline level per Respondent's attendance policy. She did not determine or issue discipline. Keeran also manually entered GRAs' clock-in and clock-out times only when Respondent's computerized fingerprinting system malfunctioned. If Keeran signed off on employees' vacation requests, it was done rarely, under exigent circumstances, and if authorized by management.

On balance, I find that none of Keeran's duties would reasonably lead anyone to conclude that Keeran was speaking or was held out as an agent for Respondent. Rather, as stated above, I find, and the evidence clearly reveals, that Keeran was essentially a timekeeper/lead administrative assistant who was "entrusted with additional responsibility solely because of [her] experience and familiarity with an employer's operations."[106] Accordingly, I conclude Keeran is not an agent of Respondent, and I grant Respondent's motion for summary judgment as to her agency status.

1. Green and Slovak are Agents of Respondent

In its answer to the complaint, Respondent also denied that Officers Green and Slovak were its agents. However, based upon the evidence, I disagree.

An employer may be held liable for unfair labor practices committed by security guards acting in their official capacity.[107] The Board has also found that security guards have apparent authority if they are placed in a position to stop individuals from trespassing and if they give directions related to being present on or distributing literature on the employer's property.[108] As with the analysis regarding Status Clerk Lead Keeran, the test for apparent authority is whether, under all of the circumstances, employees would reasonably believe that the employee in question was speaking/acting on behalf of the respondent.[109]

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[106] *Meyer Jewelry Co., Inc.*, supra.

[107] *Saint Johns Health Center*, 357 NLRB 2078, 2096 (2011), citing *Opryland Hotel*, 323 NLRB 723 fn. 3 (1997) (security guards acting under direct authority from upper management violated Section 8(a)(1) by threatening to have employees charged with trespassing for distributing pro-union literature); *Bakersfield Memorial Hospital*, 315 NLRB 596 (1994); *Southern Maryland Hospital Center*, 293 NLRB 1209 (1989)).

[108] See *Perdue Farms, Inc.*, 323 NLRB 345, 351 (1997) (security guards placed in a position to stop individuals from entering premises are cloaked with apparent authority); *Publix Super Markets, Inc.*, 347 NLRB 1434, 1452 (2006) (as to directives regarding distributing literature on employer's property).

[109] See *Waterbed World*, 286 NLRB 425, 426–427 (1987).

Clearly, both Officers Green and Slovak were given apparent authority by Respondent to ensure the safety of individuals, employees and guests located in and around the Hotel. Their own job descriptions attest to their authority to take control over Respondent's premises and grounds to ensure individuals have right to be on Respondent's property and remove those who are trespassing.[110] In so doing, Green and Slovak have authority to verbally advise or direct persons to certain locations on the premises or, if warranted, for their removal from the property. To find otherwise, Respondent would essentially be asking me to find that unknown persons dressed in a security uniform patrol their property unbeknownst to Respondent without the authority to do or say anything if individuals are trespassing or harming employees or guests in any way. Such a theory is preposterous.

Here, the evidence clearly establishes that Officer Green was given apparent authority to instruct the GRAs whether they could gather outside of the Hotel as part of her overarching duties as a security officer. Thus, to the extent Green told personnel how and where they could gather on Respondent's property, they would have understood Green's instructions as speaking for Respondent.

Similarly, Slovak was instructed by security management to report employee's handbilling if, in his discretion, the handbilling was an annoyance. Thus, to the extent that Slovak said anything to anyone about handbilling, personnel would understand him to be speaking for Respondent. Based on this, a reasonable employee would understand that Green and Slovak had apparent authority to speak on behalf of Respondent with regard to appropriate (or inappropriate) behavior occurring in and around Respondent's facility. I therefore conclude that Green and Slovak acted as Respondent's Section 2(13) agents.

B. Whether Respondent Violated the Act as Alleged

1. Section 8(a)(1)—Interrogation Violations

Turning to the merits of the complaint, the General Counsel first argues that Respondent, through Status Clerk Lead Keeran, Security Officer Green, Floor Manager Wandick and Housekeeping Director Magaña, violated Section 8(a)(1) of the Act by interrogating GRAs about their Union membership, activities and sentiments.

Interrogating an employee about his/her Union support/sympathies violates Section 8(a)(1) of the Act if, under all the circumstances, the questions reasonably tend to restrain, coerce or interfere with Section 7 rights.[111] Factors that may be considered to determine whether an alleged interrogation is unlawful include: the identity of the questioner and his/her status in the employer's hierarchy, the place and method of questioning, the truthfulness of the employee's answer, any background of the employer's hostility, the nature of the information sought, and

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[110] *Poly-America, Inc.*, 328 NLRB 667, 667–668 (1999) (security guards act as employer's agents where they act under employer's specific instructions in ejecting unwanted persons from its property).

[111] *Rossmore House*, 269 NLRB 1176, 1177–1178 (1984), enfd. 760 F.2d 1006 (9th Cir. 1985) (citing *Bourne v. NLRB,* 332 F.2d 47 (2d Cir. 1964).

whether the employee is an open union supporter.[112] While not an exhaustive list that should not be mechanically applied, the aforementioned factors are intended to guide the fact-finder in determining, as a whole, whether the questioning at issue tended to restrain, coerce or interfere with an employee's Section 7 rights. The General Counsel bears the ultimate burden of proving Respondent's conduct interfered, restrained and/or coerced employees from exercising their Section 7 rights.[113]

With regard to the allegations involving Status Clerk Lead Keeran, because I previously concluded that Keeran is not a supervisor or agent of Respondent, Respondent cannot be held vicariously liable for Keeran's statements to GRA Vargus. Accordingly, I dismiss paragraphs 5(c) and (i) of the complaint.

In paragraph 5(d) of the complaint, the General Counsel asserts that Officer Green unlawfully interrogated (and created an impression of surveillance, discussed later in this decision) a small group of GRAs when they gathered to handbill on February 28, 2015. I agree.

Respondent essentially contends that Officer Green's interrogation did not reasonably tend to restrain, coerce or interfere with the GRAs Section 7 rights, because she simply asked, as part of her job as a security officer, what the GRAs were doing gathered together in front of Respondent's premises. However, I disagree.

Although ordinarily, it is not unusual (or unlawful) for a security officer to ask a group of employees what they were doing standing on a public sidewalk outside of Respondent's facility, in this case, the evidence reveals otherwise. Applying the *Rossmore House*/*Bourne* factors, Green's conduct occurred in the context of Respondent's documented hostility toward the GRAs unionizing, in general, and a prior ULP against Respondent involving GRA Vargus, the object of Green's interrogation. Next, Green is an agent of Respondent vested with authority to remove individuals from Respondent's property and report them to the police. Thus, any interrogation by Green about the nature and purpose of the GRAs gathering would reasonably be viewed as coercive.

Although Green testified that she had no idea what the GRAs were doing on the public sidewalk, I do not find her credible since there had been prior efforts by the GRAs to organize Respondent's housekeepers. Even assuming Green was unaware that the GRAs were participating in a Union activity that day, if she had simply observed the gathering after being informed what the GRAs were doing, her actions likely would have been lawful. However, Green did something more.

Rather, the credited evidence reveals that, after she learned the purpose of the GRAs' gathering, Green told them that they could not handbill where they were located. Then, Green

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[112] *Scheid Electric*, 355 NLRB 160, 160 (2010), see also *Manorcare Health Services–Easton*, 356 NLRB 202, 218 (2010); *Westwood Health Care Center*, 330 NLRB 935, 939 (2000); *Evergreen America Corp.*, 348 NLRB 178, 208 (2006).

[113] 29 U.S.C. § 160(c) (violations of the Act are adjudicated "upon the preponderance of the testimony" taken by NLRB).

called for backup while the group prepared to handbill. Such actions, from a security officer, who had authority to remove the GRAs from Respondent's premises and report them to the police, would be viewed as highly intimidating and coercive. Furthermore, I agree with counsel for the General Counsel that the GRAs' truthful response to Green's questioning supports the proposition that Green's interrogation made them fearful that they could be removed from the property or reported to the police if they did not respond truthfully. Viewing the totality of the circumstances, I find that Respondent, through Officer Green, violated Section 8(a)(1) of the Act when she interrogated a group of GRAs who gathered together on the public sidewalk in front of the Hotel to handbill.

I also find that Wandick unlawfully interrogated GRA Vazquez about how she would vote in the Union election. Again, applying the *Rossmore House*/*Bourne* factors, first, Wandick, a floor manager, was the second highest level manager in the housekeeping department below Magaña, the housekeeping director. Second, the nature of the question itself—i.e., how Vazquez would vote in the Union election, is inherently coercive. Despite Vazquez's apparent statement that she would not support the Union, the context of Wandick's interrogation occurred when he had been directed by Magaña to assess each GRA's level of support for the Union. As such, his questioning of Vazquez was even more coercive.

While Respondent made much to do about Vazquez's and Gonzalez's differing testimony about where Wandick questioned Vazquez (inside or outside of Magaña's office), I nevertheless credit the General Counsel's witnesses that the comment was made. Even assuming Wandick questioned Vazquez immediately within the doorway of Magaña's office but still within the housekeeping office, the location was nevertheless intimidating since the interrogation occurred between Wandick, Vazquez and Gonzalez in an area where no one else could hear. Finally, the fact that Vazquez was visibly upset and refused to answer the question also lends credence to the intimidating nature of the interrogation. On the whole, I find Wandick's actions violated Section 8(a)(1) of the Act as his conduct would reasonably be viewed as tending to restrain and/or interfere with Vazquez exercising her Section 7 rights.

Similarly, I find Magaña's questioning about Garcia's union sympathies violated the Act. Here, Magaña, the Director of Housekeeping and Garcia's supervisor, was the highest level manager in housekeeping. Magaña questioned Garcia about why she wore a Union button, which is inherently coercive. Moreover, the location of the questioning, alone in Magaña office, heightens the intimidating nature of the interrogation. In addition, the context of Magaña's interrogation occurred during her directive to assess, rate and report the GRAs' level of support for the Union to HR. While Garcia, to her credit, attempted to defend herself and deflect Magaña's interrogation, I find Garcia's responses indicative of how threatened she was with Magaña's inquiries.

In defending Magaña's remark, Respondent argues that its witnesses were more credible than Garcia and Jamarillo. However, I found otherwise. Alternatively, citing *Print Fulfillment Services LLC,* 361 NLRB No. 144, slip op. at 1–2 (2014), Respondent contends that Magaña's

traitor comment, without an explicit or implied threat of reprisal, does not violate Section 8(a)(1). Here, Respondent argues that since Magaña's statement did not contain any explicit or implicit threat, the comment was nothing more than Magaña's personal opinion about the Union protected by Section 8(c) of the Act.[114] I disagree.

In *Print Fulfillment*, the Board, in agreeing with the ALJ, found Respondent violated the Act when a supervisor told an employee that he was "disappointed" by his employee's support for the Union after he saw the face of that employee, who was also a Union solidarity committee member, on a Union flyer.[115] In agreeing with the ALJ, the Board found that the judge:

> . . . correctly found that a reasonable employee would interpret [the supervisor's] remark as threatening the possibility of reprisals as a result of [his] disappointment in [the employee's] support for the Union. We find in the circumstances presented here that [the supervisor's] statements and actions reasonably tended to convey that he was not merely disappointed in [the employee], but felt strongly enough to take action against [the employee]. To begin, [the supervisor] suggested that he was about to say something better left unsaid ("I've been debating . . . whether I'm going to say anything. . . ."). Next, he indicated that his feelings were strong enough to overcome his hesitation ("I say what I feel."). He then expressed that he was "disappointed" in [the employee]. When [the employee] attempted to deflect [his supervisor's] "disappointment" by suggesting that the flyer's depiction of [the employee] may have been unauthorized, [the supervisor] did not continue the conversation, which might have mitigated the coercive tendency of his statement. Instead, he just turned and walk away "red-faced"—apparently confirming his strong feelings about the matter and demonstrating that he did not wish to hear from [the employee] further. In those circumstances, we find that a reasonable employee in [that employee's] place would fear that his supervisor's stated "disappointment" could manifest itself in subsequent reprisals.[116]

Although Respondent cites *Print Fulfillment* for the proposition that, in order to find a 8(a)(1) violation, a supervisor's interrogating statement must be accompanied by a threat of reprisal, that is not what the Board held in *Print Fulfillment.* Rather, the standard the Board considered was whether, under the circumstances, a reasonable employee would *fear* that a supervisor's remark *could* manifest in reprisals. This is exactly what Garcia feared regarding Magaña's traitor remark.

Like in *Print Fulfillment*, after learning of Garcia's support for the Union, Magaña questioned Garcia's loyalty toward her (and Respondent) and then told her, "At this time, I see

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[114] See 29 U.S.C. § 158(c); see also *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969) ("an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal' or force or promise of benefit'").

[115] *Print Fulfillment*, 361 NLRB No. 144, slip op at 1–2 (2014).

[116] Id. at 2.

you as a traitor . . . I thought you were on my side, but now I see that you are one of the ones who attends the Union meetings." Garcia's fear of reprisal is manifested in her response when she immediately apologized to Magaña for disappointing her, denied that she attended Union meetings but defended her right to show her support for the Union. As such, any reasonable employee in Garcia's position would fear that that they could be punished because of their support for the Union. Viewing the entire exchange as a whole, I find that Respondent, through Magaña, sought to restrain, coerce and interfere with Garcia's Section 7 rights by unlawfully interrogating her about her Union sympathies.

2. Section 8(a)(1)—Surveillance/Creating the Impression of Surveillance Violations

The General Counsel next asserts that, on several different occasions, Respondent, through Supervisor Wandick, Operations Director Vandegrift and Officer Green, violated Section 8(a)(1) of the Act by surveilling/creating the impression that the GRAs' Union activities were under surveillance.

The test for determining whether an employer engages in unlawful surveillance or whether it creates the impression of surveillance is an objective one and involves the determination of whether the employer's conduct, under the circumstances, was such that would tend to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed under Section 7 of the Act.[117] Specifically, the trier of fact must view the evidence on the whole and determine whether the employee would reasonably assume from the employer's conduct and/or statements made that their union activities had been placed under surveillance.[118]

Although an employer's mere observation of open, public union activity on or near its property will not constitute unlawful surveillance, the employer may not, "do something 'out of the ordinary' to give employees the impression that it is engaging in surveillance of their protected activities."[119] The Board's analysis thus focuses on whether the observations were ordinary or represented unusual behavior.[120]

In paragraph 5(d) of the complaint, the General Counsel avers that Respondent, through Officer Green, violated the Act by creating an impression of surveillance concerning the handbilling incident. For reasons discussed in the above analysis regarding this incident, I find that Respondent violated Section 8(a)(1) of the Act as alleged.

Although Green, as part of her duties as a security officer, often patrols Respondent's premises and observes individuals to ensure they are not trespassing, in this case, Green did something more. In fact, rather than first contacting security to determine whether the GRAs had

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[117] See *Broadway*, 267 NLRB 385, 400 (1983) (citing *United States Steel Corp. v. NLRB*, 682 F.2d 98 (3d Cir. 1982)).

[118] See *Fred'k Wallace & Son, Inc*., 331 NLRB 914 (2000).

[119] Id. at 915; *Loudon Steel, Inc*., 340 NLRB 307, 313 (2003); see also *Partylite Worldwide, Inc*., 344 NLRB 1342 (2005); *Arrow Automotive Industries*, 258 NLRB 860 (1981), enfd. 679 F.2d 875 (4th Cir. 1982); *Sprain Brook Manor Nursing Home*, 351 NLRB 1190 (2007).

[120] *Aladdin Gaming, LLC*, 345 NLRB 585 (2005), rev. denied 515 F.3d 942 (9th Cir. 2008).

the right to participate in their Union activity on the public sidewalk, Green told GRA Vargus and the group they could not handbill in the area where they were located. Subsequently, Green called for backup while she watched the union organizers arrive and prepare the union flyers. Moreover, even after the additional security officers were told by Vargus and the Union organizers what the GRAs were doing, Green and the other security officers again told them to leave the premises. As such, in light of the circumstances as a whole, I find that Green's conduct constituted more than "mere observation," but "represented unusual behavior" on the part of a security officer that would reasonably lead Vargus and the group to conclude that their Union activities were under surveillance.[121] Accordingly, I conclude that Respondent violated the Act as alleged.

Complaint paragraph 5(f) alleges that Supervisor Wandick unlawfully surveilled and/or created an impression that Llarull's handbilling activities were under surveillance when Wandick snatched and tore up a Union flyer, crossed his arms across his chest, and stood looking at Llarull before leaving with the employee. However, I do not find that Wandick engaged in the conduct alleged as the General Counsel's witnesses were not credible.[122] Rather, the evidence reveals that, to the extent Wandick left with an employee while Llarull was handbilling, he did so either to introduce the new employee to his trainer, to ensure that the employees were not engaging in side conversations during the Trump Talk, or for some other legitimate reason.[123]

While Wandick may have observed Llarull (and others) distributing flyers in the EDRs, in this instance, he did not engage in conduct so "out of the ordinary" that it rose to the level that one could find that Llarull's activities were under surveillance.[124] Accordingly, I conclude that Respondent, through Wandick, did not violate Section 8(a)(1) of the Act as alleged.

However, I find that Respondent, through Wandick, violated Section 8(a)(1) of the Act when he surveilled and/or created the impression of surveillance around GRA Aleman as he conversed with a fellow coworker. Specifically, I find Wandick's presence behind Aleman particularly troubling in light of the fact that his conduct occurred after being directed to observe, rate and report to upper management how GRAs viewed the Union. As stated earlier, Wandick, a floor manager, is a second level manager behind Magaña. While Wandick may have had a legitimate reason to patrol the EDR before and during Trump Talks, on this occasion, the evidence supports that Wandick did not patrol, but stood relatively close behind Aleman, a known Union supporter, while he conversed with a fellow GRA about the Union. Although Wandick testified that he often stood around employees to ensure they were paying attention during the Trump Talks, I credit Aleman's testimony that Wandick had not engaged in this "heightened presence" previously. Thus, under the totality of the circumstances, I find that, on this occasion, Wandick engaged in conduct "out of the ordinary" which would reasonably lead

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[121] Id.

[122] See Section B(2)(a), supra.

[123] *Lechmere, Inc.*, supra.

[124] See *Glen Rock Ham,* 352 NLRB 516, 521 (2008); *Mid-Mountain Foods, Inc.,* 332 NLRB 229, 237 (2000) (no unlawful surveillance where supervisor, as part of his job to oversee employee's work, observed employee and his work and instructed him "to be more careful").

Aleman to believe that his conversations with his coworker about the Union were under surveillance.[125]

Next, in paragraph 5(k) of the complaint, the General Counsel contends that Supervisor Wandick's "lengthy and heated confrontation" with GRAs Rivera and Vargus in a guest's room amounted to surveillance and created the impression of surveillance. However, the evidence does not support the General Counsel's assertions in any way.

Rather, the credited testimony reveals that Wandick arrived in the guest's room when he learned that the guest's request for a foam mattress insert had not been delivered. When he arrived, he simply asked Rivera and Vargus what they were doing since normally two GRAs were not assigned to service a guest room. The documentary evidence clearly reveals that Wandick did not arrive with a mattress in tow; rather, Wandick put a "rush" on the mattress when he arrived in the guest room and left immediately after. The mattress was delivered to the guest later in the evening. There is absolutely no evidence that Wandick told Rivera or Vargus that they could not speak or talk to guests. Nor did Wandick engage in any "unusual behavior" in his discussions with Rivera and/or Vargus on this occasion. Rather, all the evidence demonstrates that Wandick simply addressed a housekeeping matter as one of Respondent's floor managers.[126] In fact, other than Rivera's and Vargus' testimony, which I did not find credible, I found no evidence that the incident occurred much less had anything to do with Rivera's or Vargus' Union support. Accordingly, I find that Respondent did not violate the Act as alleged in paragraph 5(k) of the complaint.

Finally, complaint paragraph 5(n) asserts that Respondent, by Wandick and Operations Director Vandegrift, violated the Act when they stood by the EDR, greeted employees and told them to vote "no" in the Union election. However, as stated in the factual section above (Section B(2)(c), supra), the General Counsel presented no evidence concerning this allegation. Accordingly, and in agreement with the arguments and case law cited by Respondent, I find Respondent did not violate Section 8(a)(1) of the Act as alleged and dismiss paragraph 5(n) of the complaint.

3. Section 8(a)(1)—Threatening Employees for Engaging in Union Activities Violations

The General Counsel next asserts that Respondent, by Manager Doucette, Status Clerk Lead Keeran, Floor Manager Cretin, and Housekeeping Director Magaña violated the Act by threatening employees with unspecified reprisals for engaging in union activities.

In assessing whether a remark constitutes a threat, the appropriate test is "whether the remark can reasonably be interpreted by the employee as a threat."[127] The actual intent of the

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[125] *Fred'k Wallace & Son, Inc.*, supra at 914.

[126] *Aladdin Gaming, LLC*, supra; see also *Mid-Mountain Foods, Inc.*, 332 NLRB at 237 (no unlawful surveillance where supervisor, as part of his duties to oversee employee's work, told employee to be more careful).

[127] *Smithers Tire & Automotive Testing of Texas*, 308 NLRB 72 (1992).

speaker or the effect on the listener is immaterial.[128] The "threat in question need not be explicit if the language used by the employer or his representative can reasonably be construed as threatening."[129] The Board considers the totality of the circumstances in assessing the reasonable tendency of an ambiguous statement as a veiled threat to coerce.[130]

As you might imagine, determining whether an ambiguous statement is an illegal threat versus an opinion about the possible consequences of unionization has proven difficult. It must be assessed in a fact-specific manner, taking into account the employer's right to freedom of speech under Section 8(c) of the Act, balanced against the employees' right to be free from coercive threats under Section 7. In *NLRB v. Gissel Packing Co*., 395 U.S. 575, 618 (1969), the U.S. Supreme Court addressed this tension, stating:

> It is well settled that an employer is free to communicate to his employees any of [its] general views about unionism or any of [its] specific views about a particular union so long as the communications do not contain a "threat of reprisal or force or promise of benefit." [The employer] may even make a prediction as to the precise effect [it] believes unionization will have on the company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond [its] control.[131]

An employer need not remain neutral during a union campaign, and Section 8(c) permits the employer to campaign against the union and present an alternate view, ensuring that employees are fully informed about their choice.[132] However, employers must present their view without threatening employees. As the Court noted in *Gissel*, "the Board has often found that employees, who are particularly sensitive to rumors of plant closings, take such hints as coercive threats rather than honest forecasts."[133] In balancing these competing interests, the Board has held that threats of job loss or loss of hours in retaliation for engaging in union activities violate Section 8(a)(1) of the Act.[134] Likewise, threats not to promote employees due to their protected activities also violate the Act.[135]

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[128] *Smithers Tire*, 308 NLRB 72 (1992); see also *Wyman-Gordon Co. v. NLRB*, 654 F.2d 134, 145 (1st Cir. 1981) (inquiry under Sec. 8(a)(1) is an objective one which examines whether the employer's actions would tend to coerce a reasonable employee).

[129] *NLRB v. Ayer Lar Sanitarium*, 436 F.2d 45, 49 (9th Cir. 1970).

[130] *KSM Industries*, 336 NLRB 133, 133 (2001).

[131] See also *National Propane Partners, L.P.*, 337 NLRB 1006, 1017 (2002).

[132] See, e.g., *Steam Press Holdings, Inc. v. Hawaii Teamsters*, 302 F.3d 998 (9th Cir. 2002).

[133] *Gissel*, supra at 619–620 (footnotes omitted).

[134] *United/Bender Exposition Service,* 293 NLRB 728, 732 (1989); *Middletown Hospital Association*, 282 NLRB 541 (1986); *Air Express International*, 281 NLRB 932 (1986); *Fiber Glass Systems*, 278 NLRB 1255 (1986); *Foundation of California State University*, 255 NLRB 202 (1981); *Louis Gallet, Inc.*, 247 NLRB 63, 63 at fn. 1 (1980).

[135] *QSI, Inc.*, 346 NLRB 1117, 1118 (2006); *Hospital Shared Services, Inc.*, 330 NLRB 317, 318 (1999); *Prudential Insurance Co. of America*, 317 NLRB 357 (1995); *Marmon Transmotive*, 219 NLRB 102, 113–114 (1975); *Ford Motor Co.*, 251 NLRB 413, 422 (1980).

In paragraph 5(e) of the complaint, the General Counsel claims that Respondent, by Manager Doucette, threatened GRA Blanco with unspecified reprisals when he physically pushed her in/around March 2015. However, the evidence reveals otherwise.

Although physically pushing employees while they are engaged in protected activity or grabbing an employee by the arm and shaking a fist is coercive and violates Section 8(a)(1),[136] neither occurred in this case. Rather, the credited testimony shows that Doucette saw GRA Blanco, whom he did not recognize, attempting to converse with one of his bussers. When he approached, he asked Blanco if she worked for Respondent, to which she, having difficulty understanding English, replied, "No." At that point, Doucette instructed Blanco to accompany him to security to determine her identity and whether she had the right to distribute Union literature in the parking lot. As they walked to the security office, Doucette held the door open for Blanco, and to the extent she touched or came within close proximity to her, it resulted from Doucette moving out of Blanco's path so she could enter the security office. Without the testimony of the busser to corroborate Blanco's version of events, I found nothing about Doucette's statement to Blanco or his conduct during the incident that amounted to a threat of unspecified reprisal resulting from Blanco's protected activities.

Similarly, because I previously concluded that Status Clerk Lead Keeran is not a supervisor or agent of Respondent, Respondent is not vicariously liable for any statements she may have made to Houseman Cortez or Aguayo. Therefore, Respondent did not violate the Act as alleged; and accordingly, I dismiss paragraph 5(i) of the complaint.

I also conclude that Respondent did not violate the Act regarding the discussion between Floor Manager Cretin and GRA Diaz. Rather, the credited testimony demonstrates that when GRA Diaz asked why she was no longer able to train new GRAs, Cretin responded that because Wandick was the new training manager and had established new training procedures, she could not train new GRAs until she took a training class Wandick created. Moreover, the record reveals that Cretin subsequently asked Wandick why Diaz had not been training new GRAs and he confirmed that Diaz had not taken the required training class. I found no credible evidence that linked Cretin's statement to Diaz's Union support or participation.

Similarly, Cretin did not threaten that GRA Aleman would not be promoted because of his support for the Union. Again, the credited testimony reveals that, when GRA Llarull asked Cretin why Aleman did not get promoted to the white house position for which he applied, Cretin candidly told her that Aleman was not promoted because he had prior discipline on his record. She never told Llarull that Aleman did not get promoted due to his support for the Union. While the General Counsel relied primarily on GRA Llarull's testimony concerning this incident, I did not find her credible. Without credible, corroborating evidence, I conclude that Cretin's remarks had nothing whatsoever to do with Llarull's or Aleman's Union support. Accordingly, I

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[136] *Los Angeles Airport Hilton & Towers*, 354 NLRB 843, 844 (2009), adopted by the Board in *Los Angeles Airport Hilton & Towers*, 355 NLRB 602 (2010); see also *Rike's, A Div. of Federated Dept. Stores*, 241 NLRB 240, 252 (1979).

conclude that Respondent did not violate the Act as alleged in paragraphs 5(j) or (o) of the complaint.

Finally, the General Counsel asserts that Magaña threatened GRA Garcia with unspecified reprisals in calling her a traitor. For the reasons previously discussed, I agree with counsel for the General Counsel that, in calling Garcia a "traitor" because she wore her Union button, Magaña's "obvious implication" was that Garcia's support for the Union would result in negative consequences. The Board has found that such statements equating Union activities to disloyalty amount to unlawful threats.[137] Accordingly, Respondent violated Section 8(a)(1) of the Act as alleged in complaint paragraph 5(l)(2).

4. Section 8(a)(1)—Promulgated /Enforced Overly Broad Rules Violations

The General Counsel next avers that Respondent, by Manager Doucette, Supervisor Wandick, and Security Officer Slovak, violated the Act by promulgating/enforcing an overly broad work rule to discourage employees from supporting the Union and/or engaging in protected concerted activity. Respondent vehemently denies that the conduct by any of the named supervisors and/or agents created an overly broad, unlawful work rule much less violated Section 8(a)(1). I agree.

An overly broad work rule will violate Section 8(a)(1) of the Act if it explicitly restricts Section 7 activity.[138] If the rule does not explicitly restrict Section 7 activity, the rule must be evaluated to determine whether: (1) the rule was promulgated in response to union activity; (2) the rule has been applied to restrict the exercise of Section 7 rights; or (3) employees would reasonably construe the language in the rule to prohibit Section 7 activity.[139] The Board must give the rule a reasonable reading and refrain from reading particular phrases in isolation or presume improper interference with employee rights.[140] However, "where ambiguities appear in employee work rules promulgated by an employer, the ambiguity must be resolved against the promulgator of the rule rather than the employees who are required to obey it."[141] Ultimately, the trier of fact must determine, under the totality of the circumstances, whether the rule in question would reasonably tend to chill employees from exercising their Section 7 rights.

In agreement with Respondent, I find that the General Counsel failed to meet her burden to establish that Doucette made the unlawful statements attributed to him much less created, promulgated or enforced an overly broad rule prohibiting employees from distributing union literature. Specifically, the credited testimony shows that Doucette tried to identify who was speaking with his busser in the employee parking lot since he did not recognize Blanco and his

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[137] See *Taffe Plumbing Co.*, 357 NLRB 2034, 2040 (2011); *Hialeah Hospital*, 343 NLRB 391, 391 (2004); *Viracon, Inc.*, 256 NLRB 245, 246 (1981); see also *Print Fulfillment,* supra.

[138] *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004); *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999).

[139] *Lutheran Heritage*, supra.

[140] Id.

[141] *Norris/O'Bannon,* 307 NLRB 1236, 1245 (1992).

busser looked disturbed. Doucette asked Blanco whether she worked for Respondent, and when she responded "no," Doucette asked her to accompany him to the security office. Once Security Director Turner confirmed Blanco's identity and gave permission for Blanco to continue handbilling, Blanco returned to the parking lot without incident. As such, I agree with Respondent that, "At best…you have a manager seeking clarification as to whether Blanco could do what she was doing."[142] In short, nothing about the entire encounter prohibited Blanco (or anyone else) from engaging in Union activities.

Similarly, I find that Wandick never created, promulgated or enforced an overly broad rule concerning the guest room incident. In fact, the credited testimony shows that Wandick never told Rivera or Vargus they could not speak or talk to guests, and I find that the incident as alleged never occurred. Other than Rivera's and Vargus' testimony, which was refuted by the documentary evidence, the General Counsel failed to meet her burden to establish a rule was created, promulgated or enforced.

Lastly, in paragraph 5(m) of the complaint, the General Counsel contends that Respondent, by Officer Slovak, violated Section 8(a)(1) by promulgating/enforcing an overly broad rule prohibiting GRA Blanco from distributing Union literature in the EDR around June 20, 2015. However, like the above-referenced incidents concerning Doucette and Wandick, the General Counsel has failed to satisfy her burden of proof in this regard.

Rather, the credited testimony in the record reveals that Officer Slovak saw Blanco distributing Union flyers in the EDR while he sat in the EDR eating lunch. At that point, Slovak asked an employee sitting next to him whether Respondent had approved handbilling in the EDR, because he had seen security directives that gave contrary instructions. When the employee told him that GRAs were allowed to handbill in the EDR before their tour, during lunch and after work, Slovak finished his lunch and left the EDR. Neither Blanco nor anyone else was prevented from handbilling that day. In fact, there was absolutely no evidence presented that shows that Slovak made the statements attributed to him much less created, promulgated or enforced an overly broad unlawful work rule based upon his comments. Accordingly, I find that Respondent did not violate the Act by promulgating/enforcing an overly broad, unlawful work rule prohibiting employees from engaging in any type of Union activities.

5. Section 8(a)(3) Violation—Guzman's Termination

Lastly, complaint paragraph 6 alleges that GRA Guzman was terminated because she joined and assisted the Union and engaged in protected concerted activities.

Mixed motive cases, like the one in this case, are those where it appears that "unlawful considerations were a motivating factor in the . . . discharge decision, but where the record supports the potential existence of one or more legitimate justifications for the decision."[143] To

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[142] R. Br. at 120.

[143] *Dish Network, LLC,* 363 NLRB No. 141, slip op at 4 (2016)(Mischimarra, concurring).

assess whether a discharge is unlawful under Section 8(a)(3), the Board applies the mixed motive analysis set forth in *Wright Line*, 251 NLRB 1083 (1980).[144] Under *Wright Line*, the General Counsel must first demonstrate, by a preponderance of the evidence, that Guzman's protected conduct was a motivating factor in her termination. The General Counsel satisfies this initial burden by showing: (1) Guzman's protected activity; (2) Respondent's knowledge of such activity; and (3) animus.

Here, the General Counsel established her *prima facie* showing. First, Guzman was a Union supporter and began wearing her Union button in/around April 2015. Second, Magaña and Wandick, the relevant management officials at issue, admitted that they knew Guzman supported the Union and saw her wearing her union button at work. Finally, the record contains evidence of Respondent's general anti-union animus—(1) its statements that it opposed the Union,[145] (2) Magaña's directive to managers to assess and rate the level of GRAs support for the Union,[146] (3) Magaña's unlawful threat of unspecified reprisals toward GRA Garcia for displaying/expressing her support for the Union;[147] and (4) the close timing between Guzman's outward support for the Union and her termination, all of which occurred within two months, further supports the inference of unlawful discrimination.[148]

Once the General Counsel meets her initial burden under *Wright Line*, the burden of persuasion shifts to Respondent to prove that it would have terminated Guzman even absent the protected activity.[149] To do this, Respondent cannot simply present a legitimate reason for its adverse action; rather, it must demonstrate by a preponderance of the evidence that it would have taken the same action in the absence of the protected conduct.[150] If the employer's proffered reasons are pretextual (i.e., either false or not actually relied on), the employer fails by definition to show that it would have taken the same action regardless of the protected conduct.[151]

Here, I find that Respondent has established that it would have terminated Guzman even if she had not supported the Union. First, the evidence shows it was commonplace for Respondent's managers to use their discretion to adjust attendance points depending on the circumstances. There was no evidence that Magaña somehow used her discretion to adjust points more favorably toward employees who had an equal amount of attendance infractions/points as Guzman but had not engaged in protected activity. Rather, I credited Magaña's testimony that

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[144] *Wright Line*, 251 NLRB 1083, 1088–1089 (1980), enf'd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[145] See *Affiliated Foods, Inc.*, 328 NLRB 1107, 1107 (1999) (statements, even if lawful, can serve as background evidence of anti-union animus).

[146] Id.

[147] *Dish Network, LLC*, 363 NLRB No. 141, slip op. at 1, fn. 1 (2016) (citations omitted) (general counsel is not required to show a "particularized animus toward the employee's own protected activity" to demonstrate animus).

[148] See *La Gloria Oil & Gas Co.,* 337 NLRB 1120 (2002), enfd. 71 Fed.Appx. 441 (5th Cir. 2003) (close timing between protected activity and adverse action can be used to infer animus).

[149] See, e.g., *Mesker Door, Inc.*, 357 NLRB 591, 592 (2011); *Wright Line,* 251 NLRB at 1089.

[150] *Bruce Packing Co.*, 357 NLRB 1084, 1086–1087 (2011); see also *W.F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), petition for review denied 70 F.3d 863 (6th Cir. 1995), enfd. mem. 99 F.3d 1139 (6th Cir. 1996).

[151] *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007).

she used her discretion to adjust Guzman's attendance points when warranted in order to work with Guzman and her attendance issues but could no longer tolerate Guzman's pattern of attendance infractions or adjust her attendance points since she did not see Guzman making any effort whatsoever to improve her attendance.

Second, the record demonstrates that Respondent terminated other housekeeping employees, who did not support the Union, for similar attendance related problems. Although such evidence is not dispositive, I find that it tips the balance in Respondent's favor in showing that its motives for Guzman's termination were based on legitimate, nondiscriminatory factors.

Third, I credited Magaña's testimony that her decision to stop adjusting Guzman's attendance points and proceed with a suspension and subsequent termination had nothing to do with Guzman's support for the Union. Again, there is no evidence that anyone else, who had a similarly dismal pattern of attendance as Guzman, who did not support the Union, was treated more favorably under similar circumstances.

To refute Respondent's affirmative defense, the General Counsel argues that the timing of Guzman's discharge is suspect, since Guzman exceeded the requisite attendance points three times before she began wearing her Union button and her attendance points were reduced; however, after she began displaying her Union button and exceeded 10 attendance points, her points were never reduced and she was terminated. However, again, I credited Magaña's testimony that she adjusted Guzman's attendance points when warranted and in an effort to work with Guzman but could no longer do so given Guzman's continuing pattern of attendance infractions. While Magaña admitted that she reached her breaking point with Guzman's excuses soon after Guzman began wearing her Union button, given the record as a whole, I credited Magaña's testimony that the timing was simply coincidental and had nothing to do with Guzman's union sentiments.

With respect to Guzman's "misunderstanding" concerning the absence period covered by her doctor's note, the General Counsel found suspicious Respondent's "sudden deviation from its long-held discipline policy" when Magaña decided to stop taking into account Guzman's explanations for her absences. However, the General Counsel's argument is disingenuous at best.[152]

Rather, the evidence clearly reveals that Respondent never deviated from its discipline policy; to wit—Magaña took into account Guzman's doctor's note and excused those absences covered by the note (July 2-5), per the attendance policy, but *could not* excuse July 7, the date *not* covered by the note. Per the attendance/discipline policy, Guzman was suspended then terminated because her attendance point tally exceeded 10 points after she called off work less than four hours before her shift began on July 7, during a peak period, without justification. In

[152] GC Br. at 41.

fact, the record shows that Magaña disciplined Guzman for her attendance infractions prior to her support for the Union.[153]

Moreover, the fact that Respondent failed to verify Guzman's note or question Guzman about her understanding of the note's instructions, as the General Counsel contends, does nothing to show Respondent's motive was pretextual. Rather, I note that the General Counsel offered no evidence that Respondent undertook or deviated from such a practice with *anyone* in the past.

The General Counsel also argues that Respondent's reasons for discharging Guzman are not to be believed because Guzman exercised the same call in measures – vis-à-vis, her doctor's note, as she had in the past; yet once she began openly supporting the Union, Respondent failed to accept those same measures. However, the General Counsel misstates the facts.

Guzman was not terminated for failing to properly call off during the period covered by her doctor's note; she was terminated when she exceeded 10 points after calling off on a date *not* covered by her doctor's note. Because her attendance points reached the SPI discipline level, she was suspended from work pending an investigation. When HR Director Acosta investigated Guzman's attendance record, someone who knew nothing about Guzman's Union support, he learned that Guzman had been perpetually absent from work but had been given multiple opportunities to improve her attendance. He also discovered that Guzman misled him about the number of attendance points she accrued at the time of her suspension. Finally, when Acosta found no justification for her absence on July 7, the date she called off work that was *not* covered by her doctor's note, he determined that her termination was warranted.

The fact remains that the record is replete with evidence proving Respondent's business justification for Guzman's termination. Specifically, the credited testimony and documentary evidence demonstrates Guzman's history and pattern of excessive absences. Magaña gave Guzman multiple opportunities to improve her attendance, because she was new to Housekeeping and she wanted to work with Guzman. Despite Magaña's courtesy, Guzman continued her pattern of multiple attendance infractions even after Magaña told her (on multiple occasions) she could not continue adjusting her attendance points. While Magaña reached her "wits end" with Guzman's excuses around the time Guzman began wearing her Union button, because I found Guzman completely incredible and unreliable (Section B(8)(d), supra),[154] I credited Magaña's testimony as to the reasons she stopped adjusting Guzman's attendance

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[153] See R. Exh. 1 (While Magaña took off three attendance points, she nevertheless suspended Guzman in December 2014 for having eight attendance points).

[154] Guzman's testimony could not be believed since she repeatedly misrepresented the facts. For instance, one—she testified that she had never been given a second suspension concerning her absences when the documentary evidence clearly showed she had; two—she stated that she never signed or wrote comments on her evaluation when, again, the documentary evidence proved otherwise; three—she stated that she gave her doctor's note to Magaña and Magaña gave her the "all clear" when, in fact, Magaña was on vacation that day; and four—she told Acosta that Mariscal told her that she only had 7 attendance points in July 2015 but she knew Mariscal told her in May that she had seven points. I found Guzman wholly incredible as a witness.

points, suspended then recommended Guzman's termination, all of which I find, had nothing to do with Guzman's protected activity.

Accordingly, based upon the credited evidence in the record, I conclude that Respondent did not violate Section 8(a)(3) of the Act when it terminated Guzman from her employment.

CONCLUSIONS OF LAW

1. Respondent, Trump Ruffin Commercial, LLC, d/b/a Trump International Hotel Las Vegas is an employer within the meaning of Section 2(6) and (7) of the Act.

2. Respondent violated Section 8(a)(1) of the Act by interrogating employees for supporting the Union, displaying/expressing their Union sympathies and/or sentiments and by interrogating employees about how they intend to vote in a Union election.

3. Respondent violated Section 8(a)(1) of the Act by surveilling employees and creating an impression among employees that their concerted protected activities were under surveillance when management increased their presence in the Respondent's Employee Dining Room and stood in close proximity of employees while they conversed about the Union.

4. Respondent violated Section 8(a)(1) of the Act by threatening employees with unspecified reprisals for supporting the Union and/or displaying/expressing their Union sympathies and/or sentiments.

REMEDY

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[155]

ORDER

The Respondent, Trump Ruffin Commercial, LLC, d/b/a Trump International Hotel Las Vegas, its officers, agents, successors, and assigns, shall

[155] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Interrogating employees for supporting the Union and/or displaying/expressing their Union sympathies or sentiments in any way.

(b) Interrogating employees by asking them how they intend to vote in a Union election.

(c) Surveilling or implying that employee's Union activities would be under surveillance.

(d) Threatening employees with unspecified reprisals for supporting the Union or expressing their Union support, sympathies or sentiments in any way.

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

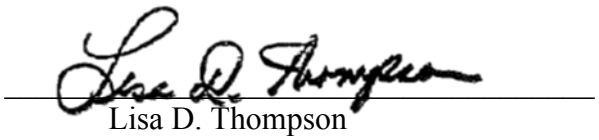
2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at Respondent's hotel in Las Vegas, Nevada, where the unlawful conduct occurred, copies of the attached notice marked "Appendix"[156] in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees and former employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1, 2015.

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

(b) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated: Washington, D.C., July 22, 2016



Lisa D. Thompson
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT interrogate you about your union support, participation, sympathies, sentiments or activities.

WE WILL NOT interrogate you about how you intend to vote in a union election.

WE WILL NOT watch or make it appear to you that we are watching to see if you engage in union activities.

WE WILL NOT, expressly or impliedly, threaten you with unspecified reprisals, because of the way you show your support for the union or for your union participation, sympathies, sentiments or activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

TRUMP RUFFIN COMMERCIAL, LLC
d/b/a TRUMP INTERNATIONAL HOTEL
LAS VEGAS

_____
(Employer)

Dated _____ By _____
(Representative) (Title)

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

2600 North Central Avenue, Suite 1400, Phoenix, AZ 85004-3099
(602) 640-2160, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/28-CA-149979 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (602) 640-2146.