



Applying correct law to the facts found by the Administrative Law Judge (“ALJ”) and conceded by General Counsel (“GC”), the Board will easily conclude Aqua-Aston Hospitality, LLC d/b/a Aston Waikiki Beach Hotel and Hotel Renew (“Respondent”) did not violate the Act. Correcting evidentiary errors made by the ALJ, the Board will without difficulty determine Respondent’s full compliance was manifest.

## **I. ARGUMENT**

### **A. The Written Warnings Did Not Violate the Act.**

The facts found by the ALJ and conceded by GC were:

On May 22, 2015, Utility Housekeeper Dany Pajinag complained to Executive Housekeeper Marissa Cacacho. He reported Santos “Sonny” Ragunjan approached him the day before while he was working, asked him to have his picture taken and sign a union authorization card *again*, and because of this, Pajinag could not concentrate on his work. Tr. at 546:14; Decision at 4:7-10; Respondent Exhibit. (“Resp. Exh.”) 13.

On June 9, 2015, Pajinag complained to Cacacho that on June 5 and June 9 Maintenance Engineer Edgardo Guzman asked him to sign a union authorization card and to have his picture taken and that because Guzman *always* bothers him, he cannot concentrate on his work. Tr. at 597:2-14; GC Exhibit (“GC Exh.”) 13.

On June 10, 2015, Respondent’s General Manager Mark DeMello and Rooms Division Manager Jenine Webster interviewed Guzman regarding Pajinag’s complaint. Decision at 5:3-9.

On or around June 15, 2015, Pajinag complained to Cacacho that Ragunjan threatened him. Decision at 9:1 n.19; Counsel for the General Counsel Answering Brief (“GC Ans. Brief”) at 4.

On June 15, 2015, Cacacho typed a written statement reciting Ragunjan’s threat to Pajinag and provided it to Webster and DeMello, telling them the statement was more threatening in Ilocano and Pajinag was afraid to leave his house. Decision at 5:19-21; Resp. Exh. 14.

On June 15, 2015, DeMello and Webster interviewed Pajinag. Decision at 5:13-33; 6:1-2.

On June 19, 2015, DeMello and Webster re-interviewed Guzman and interviewed Ragunjan regarding Pajinag's complaints. Decision at 6:14-32.

On June 30, 2015, Respondent issued written warnings to Guzman and Ragunjan for repeatedly interfering with Pajinag being able to do his work, in violation of Respondent's non-interference rule, and for Ragunjan additionally violating Respondent's anti-threatening rule. Decision at 7:10-13.

These undisputed facts show Respondent's managers did not violate the Act by warning Guzman and Ragunjan based on their honest belief the two interfered with Pajinag's work concentration and threatened him. Exceptions 52 and 53; *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964). The misconduct the managers honestly believed occurred need not be more "serious" or "egregious" than that. Exception 26. None of the cases cited to by the ALJ to support her version of the *Burnup & Sims* standard use the word "serious" to modify "misconduct." In addition, all cases cited by Respondent do not contain the word "serious" in the explanations of the standard. Resp. Brief at 43-44. GC agrees. GC Ans. Brief at 15.

GC aims to maneuver around the applicable precedent by noting that *Consolidated Diesel Co.*, 332 NLRB 1019, 1020 (2000) stands for the proposition where an employee engages in misconduct in the course of protected activity, that misconduct must be "egregious" or "offensive" to lose its protection under the Act; the GC implies that "serious" is the same as "egregious." GC Ans. Brief at 16, 18. *Consolidated Diesel Co.*, 332 NLRB 1019, 1020 (2000) neither involved nor modified the fifty two year old *Burnup & Sims* test. See *Alta Bates Summit Med. Cntr.*, 357 NLRB No. 31, slip op. at 1-2 (2011) (no mention of *Consolidated Diesel Co.* in discussion of *Burnup & Sims* test). Nor was any particular investigation required to arrive at an honest belief. Exceptions 42, 44, and 51; Resp. Brief at 42-43.

The ALJ:

Completely ignored Pajinag's testimony that he talked to Cacacho

about his May 22 written statement concerning Ragunjan (Tr. at 584:20-22); which said he could not concentrate on his work because of Ragunjan's conduct (Resp. Exh. 13).

Completely ignored Pajinag's testimony that he provided Cacacho his June 9 written statement concerning Guzman (Tr. at 597:12-14), which said he could not concentrate on his work because of Guzman's conduct (GC Exh. 13).

Failed to draw necessary adverse inferences against General Counsel for not calling Ragunjan to deny he interfered with Pajinag's work or threatened him and for not calling Vilma to deny Guzman interfered with Pajinag's work, as their testimony goes to GC's burden to prove that the misconduct did not occur – and especially given that GC fails to explain why it did not call these witnesses. Exceptions 24 and 45; GC Ans. Brief at 16; *Martin Luther King, Sr. Nursing Cntr.*, 231 NLRB 15, 15 n.1 (1977); NLRB Bench Book § 16-611.5. (Because Ragunjan did not testify, there is no testimony contradicting Pajinag's testimony that Ragunjan threatened him with physical harm.)

Erroneously discredited DeMello, Webster and Cacacho for reasons having nothing to do with their demeanor<sup>1</sup>, saying their testimony had a “self-serving ring to it,” “appeared rehearsed,” and they “parsed their answers”. Exceptions 23, 30, and 33; Resp. Brief at 31.

When the Board accounts for Pajinag's written statements and testimony, draws necessary adverse inferences against GC and conducts the independent credibility analysis appropriate when the resolutions are not based on demeanor (Resp. Brief 14), DeMello, Webster and Cacacho's honest belief for issuing the written warnings will be obvious.

**B. The Statements at the Employee Meetings Did Not Violate the Act.**

The testimony of GC's witnesses about Respondent's Executive Vice President of Operations Gary Ettinger's meeting statements was:

---

<sup>1</sup> Demeanor involves appearance, attitude, and manner, none of which the ALJ considered in making the credibility resolutions addressed in Exceptions 23, 30, 33, 64, 70, and 107. See James P. Timony, *Demeanor Credibility*, 49 Cath. U. L. Rev. 903, 904-05 (2000).

Allegation→	1. Stop participating in union-organized rallies	2. Stop visiting the homes of coworkers to engage in union and/or other protected concerted activities	3. Impliedly threatened employees with discharge by telling them they were lucky to have jobs	4. Apologize for engaging in union and/or protected concerted activities
<b>Cecile Daniels</b> →	“It’s about our doing the rally....It’s about us making noise outside....The way we hit cans outside.” Resp. Brief at 22.	“[S]top badgering (or bothering, see Resp. Brief at 23) your coworker, their house or calling them at home or talking to them at work ...if you are home that the Union going to bothering you as your worker, you have the right to call police.” Tr. at 306:24-25; 307:1-4.	“[Y]ou guys so lucky you guys have a job.” Tr. at 308:6.	“[I]f you guys want to stop by – to my office and say sorry.” Resp. Brief at 23.
<b>Faustino Fabro</b> →	“[S]top banging pots and pans.” Tr. at 266:15 (corrected by ALJ’s Errata).	“[S]top bothering workers at their home when they are working.” Tr. at 270:23-24.  <i>No testimony regarding police.</i>	“[You]’re lucky to have work.” Resp. Brief at 23.	“If [you] wanted to stop by [my] office and apology (or apologize).” Resp. Brief at 23.
<b>Lotuseini Kava</b> →	“It has to end,” referring to the banging of the pots and yelling on the microphone. Resp. Brief at 21-22.	<i>No testimony on this or police.</i> Resp. Brief at 24.		<i>No testimony on this.</i>

None of the statements the witnesses testified about contained a threat of reprisal or force or promise of benefit. Exception 78; Resp. Brief at 38; *Farm Fresh Co.*, 361 NLRB No. 83,

2014 NLRB LEXIS 830, at \*81 (Oct. 30, 2014). No reasonable employee would have felt threatened by the statements under the totality of the circumstances (Resp. Brief at 45). Thus, Ettinger's statements did not violate the Act. Exceptions 54 and 85.

None of Ettinger's statements told employees:

To stop participating in rallies, rather than - at most - to stop banging pots and pans (Exception 92; Resp. Brief at 46);

Police would be involved, rather than the employees had the right to call the police (Resp. Brief at 24);

They could be discharged, rather than they were lucky to have jobs given the overall job market (Exception 93; Resp. Brief at 24-25);  
or

To apologize for protected activities or disclose union sentiments, rather than they could stop by the office and apologize, if they wanted to (Exception 97; Resp. Brief at 37).

No *witness* testified about any statements directing the employees to “(a) stop the rallies or you will lose work, and (b) stop bothering your coworkers about the union or the police will be involved,” contrary to the finding in the Decision at 14:19-21. Exception 88 and Resp. Brief at 23-24; *Contra* GC Ans. Brief at 23.

The ALJ:

Failed to draw a necessary adverse inference against GC for not offering Daniels' contemporaneous notes of the May 2015 meeting to compare to testimony by Daniels, Kava and Fabro - and especially given that GC fails to explain why it did not call these witnesses. Exception 98; Resp. Brief at 39; *Roosevelt Mem'l Med. Ctr.*, 348 NLRB 1016 (2006); *Martin Luther King, Sr. Nursing Cntr.*, 231 NLRB 15, 15 n.1 (1977); NLRB Bench Book § 16-611.5.

Erroneously discredited Ettinger for a reason having nothing to do with demeanor (*see* n. 1), saying that he “related a gentler version.” Exception 64; Resp. Brief at 32.

Erroneously credited Daniels for a reason having nothing to do with demeanor (*see* n. 1), saying she was “certain of what she understood Ettinger to have said”

and recounted it in English. Exception 70; Resp. Brief at 32.

When the Board draws the necessary adverse inference against GC and conducts the independent credibility analysis appropriate when the resolutions are not based on demeanor (Resp. Brief 14), it will be apparent that Ettinger's meeting statements did not contain threats or promises.

**C. Remarks About Handbilling Did Not Violate Act.**

All witnesses testified that Jonathan Ching and Lakai Wolfgramm distributed handbills in the lower lobby, not in an "entrance area" (contrary to the finding in the Decision at 15:28-29, 16:28-31) or "near the lower lobby" (contrary to the allegation recounted in the Decision at 15:13-15). Exception 102 and Resp. Brief at 28. The first time there was any mention of a separate "entrance area" was in the Decision. Since the evidence established the lower lobby is a work area and the ALJ did not conclude it was not, Respondent did not violate the Act by restricting distribution of literature there. At the hearing, there was no evidence of business activities Respondent conducted specifically in an "entrance area" or "near the lower lobby" or whether any distribution was restricted there, much less any basis for limiting the analysis to those smaller areas. Exception 118. The Decision provides no analysis regarding why specifically the "entrance area" or "near the lower lobby" is a non-work area. Exception 117; Resp. Brief at 37.

In addition, the ALJ erroneously discredits DeMello's testimony regarding the lower lobby functions for a reason having nothing to do with his demeanor (*see n. 1*); saying "he was quite focused on 'selling' the open air experience." Exception 107; Resp. Brief at 34. When the Board conducts the independent credibility analysis appropriate when the resolutions are not based on demeanor (*see* Resp. Brief 14), the work area status of the lower lobby will be beyond dispute.

The ALJ incorrectly finds Security Guard Andrew Smith threatened Ching and

Wolfgramm with unspecified reprisals if they handbilled in the entrance area because Smith specifically invoked the trespass procedure, which involves an automatic one year penalty from the Hotel. Decision at 18:7-9; 19:22-23. First, “unspecified reprisals” differ from “discipline,” as GC alleged. Second, Smith, whose testimony the ALJ credits (Decision at 17:3-4) did not specifically invoke the trespass procedure on Ching and Wolfgramm. Exception 114. Smith testified that the trespass procedure referenced in the Decision is for non-employees *only*. Resp. Brief at 27.

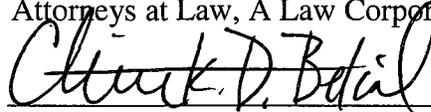
Finally, the ALJ mistakenly finds that Smith’s order would be unlawful even if the entrance area were a work area because “he threatened to ‘trespass’ the employees if they did not leave the Hotel property, not just the lower lobby.” Decision at 19:24-26. However, Smith testified while he, Ching, and Wolfgramm were standing in the lower lobby, he told them “they would be trespassed if they didn’t leave,” not that they would be trespassed if they didn’t leave the Hotel property. Resp. Brief at 28-29. There is no evidence Smith banned their distribution in non-work areas elsewhere on Respondent’s property, and GC did not even make such an allegation. Exception 119.

II. CONCLUSION

For the reasons stated above as well as those stated in Respondent's Brief in Support of Exceptions, Respondent's Exceptions should be sustained, and the Board should find and conclude that Respondent did not violate the Act.<sup>2</sup>

DATED: Honolulu, Hawai'i, July 26, 2016.

TORKILDSON, KATZ, MOORE,  
HETHERINGTON & HARRIS  
Attorneys at Law, A Law Corporation



---

ROBERT S. KATZ  
CHRISTINE K. D. BELCAID  
JEFFREY S. HARRIS  
Attorneys for Respondent  
AQUA-ASTON HOSPITALITY, LLC D/B/A  
ASTON WAIKIKI BEACH HOTEL AND  
HOTEL RENEW

---

<sup>2</sup> Respondent requests leave to incorporate the transcript citations, but not the corresponding quotes, from Appendix A into its Brief in Support of Exceptions. This will not increase the length of the Brief by more than two pages so it will be 50 pages or less.

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

UNITE HERE LOCAL 5,  
Charging Party,

v.

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

Respondent.

CASE NOs. 20-CA-154749  
20-CA-157769  
20-CA-160516  
20-CA-160517

**CERTIFICATE OF SERVICE**

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on July 26, 2016 a copy of *Aqua-Aston Hospitality, LLC D/B/A Aston Waikiki Beach Hotel And Hotel Renew's Reply in Support of Exceptions to Administrative Law Judge's Decision* was electronically filed with the National Labor Relations Office of the Executive Secretary and served via e-mail upon:

Scott Hovey, Counsel for General Counsel  
National Labor Relations Board  
Sub-Region 37  
300 Ala Moana Blvd., Rm. 7-245  
P. O. Box 50208  
Honolulu, Hawai'i 96850-7245  
Scott.HoveyJr@nlrb.gov

Jeff F. Beerman, Counsel for the General Counsel  
National Labor Relations Board  
Sub-Region 37  
300 Ala Moana Blvd., Rm. 7-245  
P. O. Box 50208  
Honolulu, Hawai'i 96850-7245  
Jeff.Beerman@nlrb.gov

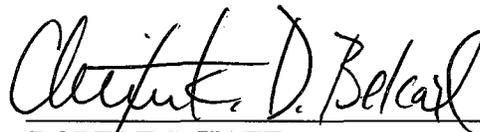
Dale Yashiki, Officer-in-Charge  
National Labor Relations Board  
Sub-Region 37  
300 Ala Moana Blvd., Rm. 7-245  
P.O. Box 50208  
Honolulu, Hawaii 96850-7245  
Dale.Yashiki@nlrb.gov

Jill H. Coffman, Acting Regional Director  
National Labor Relations Board  
Region 20  
901 Market Street, Suite 400  
San Francisco, CA 94103-1735  
Jill.Coffman@nlrb.gov

Jennifer Cynn, Esq.  
UNITE HERE! Local 5  
1516 South King Street  
Honolulu, Hawai`i 96850  
Jcynn@unitehere5.org

DATED: Honolulu, Hawaii, July 26, 2016.

TORKILDSON, KATZ, MOORE,  
HETHERINGTON & HARRIS  
Attorneys at Law, A Law Corporation



---

ROBERT S. KATZ  
CHRISTINE K. D. BELCAID  
JEFFREY S. HARRIS  
Attorneys for Respondent  
AQUA-ASTON HOSPITALITY, LLC D/B/A  
ASTON WAIKIKI BEACH HOTEL AND  
HOTEL RENEW