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**Aliante Gaming, LLC d/b/a Aliante Casino and Hotel and Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226 and Bartenders Union Local 165, affiliated with UNITE HERE.** Case 28–CA–145644

August 25, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA  
AND MCFERRAN

On October 30, 2015, Administrative Law Judge Gerald Michael Etchingham issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed answering briefs, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to adopt the judge’s rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order as modified.<sup>2</sup>

Applying *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily suspending and discharging employee Lourdes Flores. We agree.

The Respondent’s primary argument is that the General Counsel did not make a sufficient showing of anti-union animus to meet his initial burden under *Wright Line*.<sup>3</sup> We reject this argument. We agree with the judge

<sup>1</sup> The Respondent has excepted to some of the judge’s credibility findings. The Board’s established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> In accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), we shall modify the judge’s recommended tax compensation and Social Security reporting remedy. Accordingly, we shall modify the judge’s recommended Order and substitute a new notice to reflect this remedial change.

<sup>3</sup> The Respondent also argues that the General Counsel failed to show that it had knowledge of Flores’ union activities and that there was a sufficient “nexus” between those union activities and her suspension and discharge. We reject both arguments. In adopting the judge’s finding that the General Counsel proved knowledge, we do not rely on the August 2014 conversation between Flores and her supervisor, Kevin Sparks. As to the Respondent’s assertion that the General Counsel’s initial burden under *Wright Line* contains an additional “nexus” re-

that several factors, including the pretextual nature of the Respondent’s asserted reason for suspending and discharging Flores;<sup>4</sup> the failure of Risk Manager Heidi Heath to even speak to Security Supervisor Charles Rand about his false statement that Flores twice tried to “sneak” a view of the surveillance video after being told not to do so, in contrast to her discharging Flores for “dishonesty” and “filing a false report”; and its failure to apply progressive discipline to Flores all evince animus. We find particularly compelling evidence of animus in the Respondent’s numerous failures to follow its own internal procedures both in the “due process” hearing and in the course of the overall investigation, also cited by the judge, especially as those failures were on the part of the very official, Heath, who authored those procedures.<sup>5</sup>

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Aliante Gaming, LLC d/b/a Aliante Casino and Hotel, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(b).

“(b) Make Lourdes Flores whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the judge’s decision, as amended in this decision.”

2. Substitute the following for paragraph 2(c).

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quirement, we have repeatedly rejected that argument, and do so again here. See, e.g., *Auto Nation, Inc. and Village Motors, LLC d/b/a Libertyville Toyota*, 360 NLRB No. 141, slip op. at 4 fn. 10 (2014), enfd. 801 F.3d 767 (7th Cir. 2015); *Encino Hospital Medical Center*, 360 NLRB No. 52, slip op. at 2 fn. 6 (2014).

<sup>4</sup> We have viewed the surveillance videotape of the incident cited by the Respondent in suspending and discharging Flores, and we adopt the judge’s interpretation of it.

<sup>5</sup> Additional, but not essential, evidence of animus can be found in the Respondent’s antiunion statements at its September 2014 group meetings. An employer’s lawful expressions of its opinions against a union may support a finding of animus in appropriate circumstances. See *Sunshine Piping, Inc.*, 351 NLRB 1371, 1387 (2007); *Affiliated Foods, Inc.*, 328 NLRB 1107, 1107 (1999). We do not, however, rely on the judge’s characterization of those statements as a “bad faith attempt to unfairly criticize the union.”

In adopting the judge’s findings on animus, we do not rely on timing to the extent that it is dependent on an earlier informal settlement agreement that contained a nonadmissions clause. The judge also relied on the factual findings of Judge Chu in earlier litigation involving the Respondent. See *Aliante Gaming, LLC d/b/a Aliante Casino & Hotel*, 28–CA–126480, 2015 WL 1205366 (NLRB Div. of Judges). Although we would not rely on the findings in that litigation to establish animus by themselves, we would consider them as part of the totality of the circumstances. We find, however, that the General Counsel met his burden to establish animus even absent consideration of the findings in the earlier litigation.

“(c) Compensate Lourdes Flores for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).”

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C., August 25, 2016

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Mark Gaston Pearce, Chairman

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Kent Y. Hirozawa, Member

\_\_\_\_\_  
Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD  
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 suspend, discharge or otherwise discriminate against you for supporting Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226 and Bartenders Union Local 165, affiliated with UNITE HERE, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above, which are guaranteed you by Section 7 of the National Labor Relations Act.

WE WILL, within 14 days from the date of the Board’s Order, offer Lourdes Flores full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges she previously enjoyed.

WE WILL make Lourdes Flores whole for the wages and other benefits she lost as a result of our unlawful suspension and discharge of her, less any net interim earnings, plus interest.

WE WILL compensate Lourdes Flores for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

WE WILL, within 14 days from the date of the Board’s Order, remove from our files any references to the January 16, 2015 suspension and the January 26, 2015 discharge of Lourdes Flores, and WE WILL, within 3 days thereafter, notify Lourdes Flores in writing that this has been done and that the suspension and discharge will not be used against her in any way.

ALIANTE GAMING, LLC D/B/A ALIANTE CASINO AND HOTEL

The Board’s decision can be found at [www.nlr.gov/case/28-CA-145644](http://www.nlr.gov/case/28-CA-145644) 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.



*Nathan A. Higley, Esq.*, for the General Counsel.  
*Anthony B. Golden, Esq.* and *David B. Dornak, Esq.*<sup>1</sup>(*Fisher & Phillips, LLP*), for the Respondent.  
*Eric B. Myers, Esq.* (*Davis, Cowell & Bowe, LLP*), for the Charging Party.

<sup>1</sup> Dornak filed Respondent’s closing brief after Golden defended the case at hearing for Respondent.

## DECISION

## STATEMENT OF THE CASE

GERALD MICHAEL ETCHINGHAM, Administrative Law Judge. This case was tried in Las Vegas, Nevada, on June 9 and 10, 2015. The Culinary Workers Union, Local 226 affiliated with UNITE HERE, whose correct name is Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226 and Bartenders Union Local 165, affiliated with UNITE HERE (the Union or Charging Party) filed the charge on February 2, 2015<sup>2</sup> and the General Counsel issued the complaint on March 30. The complaint alleges that Respondent violated Section 8(a)(3) and (1) of the Act when on January 26, it discharged employee Lourdes Flores (Flores). Respondent Aliante Gaming, LLC, d/b/a Aliante Casino and Hotel (Respondent or Aliante) answered the complaint on April 13 denying the substance of the allegations and adding affirmative defenses to the charges.

On the entire record,<sup>3</sup> including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent,<sup>4</sup> I make the following

## FINDINGS OF FACT

*A. Jurisdiction*

Respondent admits and I find that it operates the Aliante Hotel and Casino, providing lodging, food and beverage services, and gambling amenities in North Las Vegas, California, where it annually derives gross revenues in excess of \$500,000 and purchases and receives at its facility goods valued in excess of \$50,000 directly from points outside the State of Nevada. The Respondent also admits, and I further find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Union is a labor organization within the meaning of Section 2(5) of the Act.

*B. General Background*

The Respondent is not associated with any other gaming or hotel facilities in Las Vegas, but was previously one of 10 casin-

no and hotel operations, collectively known as the Station Casinos (Station). The Respondent was purchased when Station was reorganized in a bankruptcy proceeding. The Respondent is not affiliated with any of the facilities owned by Station after 2013 that continue to operate after bankruptcy. However, Station continued to manage the Respondent's operations until November 1, 2012, when the Respondent came under partial new management. The Respondent hired the majority of the workforce employed by Station and retained the employee handbook.

The work force at Aliante is small relative to other Las Vegas properties and it is divided into several departments including, but not limited to, stewarding, housekeeping, buffet, and internal maintenance. (Tr. 556.) Within each department, there are managers, supervisors, and staff or team members. Pertinent to this case, the internal maintenance department includes porters, both general porters and utility porters. The work that porters and utility porters perform consists of upkeep and cleaning of the casino floors, restrooms, machines, and general floor facilities.

Aliante utilizes a prominent human resources department (HR) to regulate its employees in their day-to-day operations at the hotel and casino. Employees at Aliante interact with HR repeatedly—from initial hiring procedures to routine informational meetings, performance reviews, and any disciplinary actions that take place. The HR “Team” is made up of the following individuals: Richard Danzak (Danzak), vice president of human resources (HR); Barbara Kelly (Kelly), HR manager; and Heidi Heath (Heath), risk manager/team member relations manager.<sup>5</sup> Terry Downey (Downey) is the general manager of Aliante. Heath, Kelly, Michelle Garcia/Huntzinger<sup>6</sup> (Garcia/Huntzinger) and Downey also came to Respondent from Station.

At least 20 percent of Aliante's current management simply stayed on from their work at Station. The Respondent has hired additional employees and has updated its handbook since 2012. Though Aliante employs around 900 staff members at its hotel and casino, Danzak described Aliante's overall workforce as small in number when compared to other Las Vegas properties, particularly those located at what is known as “The Strip.”

In March 2013, HR developed and issued to employees a new version of its Team Member Handbook (Handbook), detailing company policies and expectations. (R. Exh. 1.)<sup>7</sup> The Handbook also lays out disciplinary practices, including which violations and conduct will give rise to progressive discipline and which will warrant immediate suspension pending investigation or immediate discharge.<sup>8</sup> Respondent also allows a sec-

<sup>2</sup> All dates are in 2015 unless otherwise indicated.

<sup>3</sup> The transcripts in this case are generally accurate, but I correct the transcript (Tr.) as follows: Tr. 3, bottom of page references “Lourdes Sanchez” should be “Lourdes Flores”; Tr. 219, l. 6: “of” should be “or”; Tr. 219, l. 7: “her” should be “here”; Tr. 240, l. 24: “GOLDEN” should be “MYERS”; Tr. 243, l. 2: “Mr. Rand” should be “Ms. Flores”; Tr. 303, line (l.) 15; “decreasing” should be “increasing”; Tr. 304, l. 17: “Sanchez” should be “Flores”; Tr. 417, l. 13: “no secretly” should be “not secretly”; Tr. 472, l. 7: “sent” should be “sit”; Tr. 473, l. 25: “her” should be “here”; Tr. 519, l. 5: “door rate supervisor” should be “dual-rate supervisor”; Tr. 537, l. 7: “tell” should be “towel”; Tr. 539, l. 14: “211 status” should be “[Evidence Code] 611(c) status”; Tr. 548, l. 20: “difficulty” should be “at different times”; Tr. 551, l. 2: “have” should be “half”.

<sup>4</sup> Other abbreviations used in this decision are as follows: “GC Exh.” for General Counsel's exhibit; “R. Exh.” for Respondent's exhibit; “CP Exh.” for Charging Party's exhibit; “GC Br.” for the General Counsel's brief; “R. Br.” for the Respondent's brief, and “CP Br.” for Charging Party's brief. Although I have included several citations to the record to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are based not solely on the evidence specifically cited, but rather are based on my review and consideration of the entire record.

<sup>5</sup> Danzak and Heath testified in the hearing.

<sup>6</sup> Apparently some time before the hearing in this matter, Michelle Garcia was married and is now known as Michelle Huntzinger. I will refer to her as Garcia/Huntzinger in this decision.

<sup>7</sup> The Handbook is written in English, but translations are made available to employees in Spanish.

<sup>8</sup> The Handbook is both broad and somewhat inconsistent; many of the violations listed therein may lead to either progressive discipline or immediate discharge, or both. Offenses that warrant immediate suspension or discharge include, but are not limited to, dishonesty, gross misconduct, failure to report on-the-job injuries, and “violation of any

ond layer of review for disciplinary decisions though none of these secondary reviews has ever resulted in a modified or reversed disciplinary decision.<sup>9</sup>

Accidents, such as the one described below in this case, are subject to “due process” meetings between the injured employee and Heath in her position as manager. The Respondent’s policy is stated to require a thorough investigation of the accident at the scene of injury or as soon thereafter as possible in a manner that is not interrogatory in nature. (Tr. 383–385; GC Exh. 15(K)-(L).)

*C. The Internal Maintenance Department at Aliante and Flores’ Employment*

Porters are part of the Internal Maintenance Department (IM). There are porters on duty at Aliante twenty-four hours a day, including during the “graveyard shift” from 11:00 p.m. to 7:00 a.m. Regular porters clean slot machines and restrooms at the casino while utility porters drive cleaning machines that clean casino floors and upper lighting fixtures of the casino.

Elizabeth Barahona (Barahona) has been the IM manager since July 2012 with authority to discharge employees. (Tr. 135.) Barahona’s employment started at Station in June 2000 and she became a supervisor there in August 2008 and continued to the present. (Tr. 162–163.) Barahona, while at Station, was found to have violated Section 8(a)(1) of the Act through her antiunion comments on April 1, 2011, by threatening employees with unspecified reprisals, additional work, and losing benefits if they chose to support the Union. See *Station Casinos, LLC*, 358 NLRB 1556, 1584 (2012).

Kevin Sparks (Sparks) is an IM supervisor on the graveyard shift and Rosa Jimenez is an IM supervisor on the day shift. Lourdes Flores (Flores), during the time period of January 2015, was an IM porter on the graveyard shift. Given the timing of these shifts, these individuals knew each other and would interact during shifts and between shift changes. Sparks opined that all Aliante employees and supervisors go to Heath in HR with all personnel problems. (Tr. 66–67.) “A” bucks are given to employees for exemplary work habits and Flores regularly earned “A” bucks at Aliante, last being paid an “A” bucks payment 2 weeks before her January 26, 2015, discharge dis-

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policy set forth in the Handbook[.]” Essentially, Aliante reserves its right to immediately terminate any employee for any enumerated violation. Danzak admitted that the rule allowing termination for violation of any policy at Respondent dilutes the meaning of the serious offenses separate from the catch-all rule. Tr. 578–579.

<sup>9</sup> As stated above, while most offenses will lead to immediate suspension or discharge, Aliante allows employees to make use of its “Team Member Peer Review Policy.” R. Exh. 2; R. Exh. 3. Employees against whom action has been taken by the company may file a request for review in which the employee’s case is reheard by what Aliante represents as an “impartial Board of Review” consisting of two other team members from the employee’s same department and one management representative from another department. In addition, an HR representative presides over the Board of Review. The Board of Review may choose to uphold, overturn, or modify HR’s original decision. The normative benefit of the Board of Review policy for employees is debatable; since 2013, Aliante has only conducted between four and five Boards and each resulted in an upholding of HR’s prior disciplinary action.

cussed below.

Flores and Sparks have worked together since 2008 when they both worked at Station. Throughout her employment at both Station and later, at Aliante, from 2008 through December 2014, Flores had been recognized as a competent, good employee, and experienced team member. (Tr. 42, 72, 136.) She had received positive feedback in the form of written evaluation in 2012 from Barahona when Respondent was owned by Station and was even asked by Barahona to receive extra compensation by being a job coach for newer employees, based on her knowledge of various areas of the casino. (Tr. 136; GC Exh. 9.)

Flores ceased being a job coach after repeatedly not receiving the promised extra compensation for each of her three separate job coach assignments. She was eventually paid only *after* speaking with Supervisor Sparks and Manager Barahona with no results, and finally after her third job coach assignment Flores spoke to Manager Garcia/Huntzinger and was paid for her three job coach assignments. Prior to that time, however, Flores complained to Sparks that she thought it unfair that she should continue to train new employees because she had not yet been paid for the three prior times she had trained new employees. (Tr. 310–311.) On cross-examination, Sparks was not credible when he incredibly stated that he had no idea why Flores did not want to continue as an unpaid job coach despite knowing that it is common for job coaches to be paid extra for training new employees and also knowing that Flores had complained to him about not receiving extra pay for her job coaching. (Tr. 82–83, 86.)

Flores received her first disciplinary warning in April 2014, however, for refusing to participate in a fourth job training *before* she finally received her delayed job coach pay for her three earlier assignments. Consequently, Aliante, on three separate occasions, failed to pay Flores, as promised, for her extra work as a job coach, yet in April 2014, Aliante issued Flores a “trumped-up” written warning for her complaining about not being paid and refusing to continue to participate as an unpaid job coach for a fourth assignment. (Tr. 181.) Prior to the incident at issue here that led to Flores’ discharge, this false black mark on her employment record with Aliante was the only negative discipline criticism of Flores as an employee during her entire 6 years of employment for Station/Aliante as a porter. (Tr. 82–83, 268–270, 310–313.)

There was repeated testimony at the hearing regarding Flores’ lack of ability to speak, read, or write fluent English and she initially testified through the use of a translator. Later, Flores testified without the use of a translator and admitted that she has a much more difficult time reading and writing English than she does understanding English spoken to her and responding in English. Security supervisor Charles Rand (Rand) confirmed this and brought in Max Vasquez to assist Flores in filling out a written report of the January 15 incident referenced below. (Tr. 108–109.) Supervisor Rosa Jimenez also opined that she always spoke to Flores in Spanish because Flores’ ability to communicate in English was not very good.

*D. 2014 Union Organizing Campaign at Aliante and Respondent’s Super Vigilant Monitoring Program*

Union organizing at Station properties began in 2008 while

Aliante was still a part of Station. Station left management of Respondent in November 2012 although Danzak estimated that approximately twenty percent of Station managers stayed on with Aliante after November 1012. (Tr. 561.)

The organizing campaign carried over from Station and first appeared at Aliante in February 2014 after Aliante became separated from Station and continues through to the present with the Union maintaining a presence mostly in the team member dining room or cafeteria (the TDR) and the casino parking lot. In this proceeding, Danzak acknowledged that Respondent opposed union organizing at Aliante even after it spun-off from Station and wanted to remain non-union. (Tr. 590.) In early 2014, the Union began organizing at Aliante and submitted a card check recognition demand to Respondent in February 2014. (Tr. 529.)

As such, HR, managers, and supervisors at Aliante have been active in monitoring and responding to the attempted unionization of its employees. Various emails were circulated among HR describing reported union activity on Aliante premises. (CP Exh. 1; CP Exh. 2). Sparks had knowledge of continuous union activity at Aliante seeing certain employees wearing union badges or handing out information concerning union activities mostly in the TDR. (Tr. 76, 84.) Sparks opined that in late fall 2014 through January 2015, he was aware of 5–6 employees on the graveyard shift who were openly union supporters and he specifically identified four of them as Florentino Martinez (Martinez), Maria a/k/a Patty Orosio or Marosa (Orosio or Marosa), Carlos Obano (Obano) and Margarita Garcia (Garcia). (Tr. 76–77, 158, 182–183.) Sparks, however, testified that he did not consider Flores to be openly supportive of the Union. (Tr. 85.) Barahona also observed employees in the TDR where employees openly distribute union cards or literature. (Tr. 1183–184.)

In April 2014, Respondent discharged union supporter Lourdes Cruz and in June 2014, it discharged another union supporter Fernanda Chavez (Chavez). Aliante and the Union were again opposite each other before Administrative Law Judge Kenneth W. Chu in a case tried in Las Vegas on October 14–15, and December 1 and 2, 2014. On March 17, 2015, Judge Chu ruled that Aliante had illegally fired Chavez in retaliation for her union activity. *Aliante Gaming, LLC*, 2015 WL 1205366 (2015) (*Aliante I*). That case is currently on appeal with the Board.

As indicated above, the Respondent has filed exceptions to Judge Chu's decision, which remain pending, and thus his findings are not final. Nevertheless, it is appropriate to consider and rely on those findings in deciding the issues in this case. The issues decided by Judge Chu were fully litigated before him, and relitigating or revisiting those issues de novo in this related proceeding, while the matter is before the Board, would be antithetical to judicial efficiency and economy and potentially lead to inconsistent results and unnecessary delays. See *Wynn Las Vegas, LLC*, 358 NLRB 690, fn. 1 at 693–694 (2012) (Board affirmed judge's ruling that the respondent company was precluded from re-litigating lawfulness of suspension, an issue fully litigated and decided by another judge in a prior case, even though that decision was pending before the Board on exceptions); *Grand Rapids Press of Booth Newspapers*, 327

NLRB 393, 394–395 (1998), *enfd. mem.* 215 F.3d 1327 (6th Cir. 2000) (judge relied on another judge's findings in an earlier case as evidence of animus even though the case was pending before the Board on exceptions).

Here, I rely on Judge Chu's findings and take administrative notice that:

There was increased union activity in February [2014] known to the managers and supervisors at Aliante. Downey testified that he was aware of union activity before and after February. Downey did not believe the union activity was at the level of an organizing campaign, but he nevertheless knew about the handbills, placards, button wearing, and flyers in the employee cafeteria [the TDR]. Other management officials, such as Heath, Welk and Kelly were also aware of the flyers in the cafeteria and raised concerns over visits by union activists at employees' residences. Garcia/[Huntzinger] described the union activity as a "spike" in February. Heath agreed that there was an "upsurge" of union activity in February. Danzak was also aware of union activity at Aliante. Although Danzak denied that there was an increase, he described the activity as a "slow roll." At the same time, the chief executive officer and a board member of Aliante became aware of union activity when they were sent letters by the union requesting check cards and neutrality agreements. Downey and Danzak were also aware and expressed concerns over the letters. Lou Dorn, the general counsel for Aliante at the time, described the union's letter for check card and neutrality agreements as a "very unusual letter". Danzak met with Dorn and Downey over the contents of the letter. . . .

[Aliante] management was aware of Cruz's union activities. Cruz was the union committee leader and often met with employees at the cafeteria [TDR] to discuss labor and management issues. . . .

Downey was opposed to the union representing Aliante employees. Downey specifically did not like the spike in union activity [citation omitted]. Garcia/Huntzinger also believed there was a spike in union activity in February and wrote on the management electronic bulletin board that "I'm concerned about the recent (seemingly) spike in union activity . . . it bums me out." Downey replied, "I agree. I am very concerned" [citation omitted]. Heath also was upset over the visits of union members at employees' residences. Heath suggested that the employees call the police and file criminal charges if they felt harassed. Danzak directed the director of security to discard any union flyers or handbills in the employee cafeteria. Danzak and Downey were also upset over the union flyer regarding the health benefits cost incurred by Aliante employees as compared to employees in union casinos. Both were concerned and met over the union's request for card check and neutrality agreements.

*Aliante I* at 12–13.

As stated above, Chavez was another union supporter who worked on the graveyard shift as a porter at Aliante with Martinez and Flores. (Tr. 221, 407–410.) According to Sparks, Chavez was the only other employee he had supervised, before Flores was discharged, who he knew had been discharged by

Respondent. (Tr. 69, 407–411.)

As referenced above in *Aliante I* and at hearing in this case, in February 2014, Danzak forwarded to Kelly and Heath comments of Garcia/Huntzinger that he had received from Downey stating: “. . . I’m concerned about the recent (seemingly) spike in union activity . . . bums me out that we have TMs [team members] who believe that’s a better way. I’m sure it’s the same tactics as w/ Stations, but it feels more personal since we aren’t part of that big corporation anymore . . . it’s disappointing that our TMs are being solicited on their breaks & at their homes.” (CP Exh. 4 at 8–9.)

Chavez filed charges against Respondent with the NLRB after she was discharged for allegedly lying in June 2014 but Chavez got her job back in December 2014 according to Flores “because she’s [Chavez] a good worker. . . And she’s a very good person. . .” (Tr. 412) and “[b]ecause she’s [Chavez] not lying when she say . . . [s]he say the truth.” (Tr. 410.)<sup>10</sup> Respondent did not dispute this testimony by offering Sparks’ testimony refuting these statements or any other witness at hearing. I take administrative notice here that Chavez sought reinstatement in her complaint against Respondent in Case 28–CA–131592 prior to Chavez’ settlement based on the same grounds under Section 8(a)(3) and (1) of the Act as Flores does in this case. I also note that union supporter Chavez returned to work at Respondent in December 2014.

In August 2014, Flores had a conversation with her supervisor Sparks in the IM storeroom about her coworker Chavez being discharged by Aliante and Flores told Sparks that she thought Chavez’s discharge was unfair for the reasons referenced above. (Tr. 411–412.) Sparks did not refute this statement by Flores about Chavez’ discharge. Later in the same conversation with Sparks, Flores asked Sparks what he thought of the Union and he first said that he could not tell her anything about the Union but he also said that if “you know something is good for you, do something.” (Tr. 412–413.) I find that based on this conversation and Respondent’s super vigilant monitoring program referenced below that would directly communicate to management all of Flores’ union activities in the TDR and the casino parking lot, Sparks knew that Flores supported the Union in August 2014.

Respondent continued to receive reports of union activity throughout the summer of 2014. Danzak claimed that several employees separately approached Heath, Kelly and him with questions about union authorization cards that they were being asked to sign. (Tr. 595.)

By August 2014, Danzak was aware that there were some prounion employees in the steward, housekeeping, internal maintenance (IM), and buffet departments at Respondent who were circulating union authorization cards. (Tr. 603–605.) Danzak identified internal maintenance where Flores worked as

being one of the first departments where the Union was enjoying some success at Aliante. (Tr. 610; GC Exh. 10(b).)

Flores was involved with the Union during her time at Aliante. She signed a Union authorization card in January 2014 that she received from her coworker on the graveyard shift, Martinez, another graveyard shift porter and a union organizing representative committee member known to Respondent’s management as a visible union supporter. (Tr. 222.) Flores also took an active role and disseminated authorization cards among employees and got information out to them regarding the Union campaign. (Tr. 272–274.) Flores handed out ten authorization cards on break periods in the TDR and parking lot areas of the casino. (Tr. 274, 333–335.) TM Employees, supervisors, and security personnel frequented the TDR together on a regular basis in 2014. (Tr. 348.)

In September 2014, Danzak, after receiving several emails from employees and managers regarding unwanted union communications,<sup>11</sup> set up and conducted a series of small group meetings between HR, managers, and employees regarding the Union presence at Aliante and employees handing out union authorization cards. (Tr. 78–79, 548–549.) Danzak sent an email to Garcia/Huntzinger and Barahona that instructed, among other things that “We would like to arrange meetings with groups containing non-union supporters before we get to groups with heavy culinary [Union] interest when possible to isolate the two. This gives the non-union supporters a better opportunity to listen and ask questions about protecting their identity.” (CP Exh. 4 at 5.) Danzak also created a “script” for use during these non-union supporter employee meetings and sent it out to department managers along with handouts which were distributed to employees. (Tr. 597; CP Exh. 3).

The script provided, among other things, that “a small group of union pushers have been trying to sell the idea of bringing a union in here is a good idea—EVEN IF WE DON’T AGREE WITH THEM . . . we are hearing from more team members who tell us they do not want to be bothered by the prounion pushers anymore. . . union pushers may be trying to talk our team members into *giving up* your valuable personal *signatures and identity information*, . . . [o]nce you give the paper to a stranger from The Union, how do you know what could happen to that information? *THE ONLY WAY* that Culinary Workers’ union supporters can TRY to bring a union in here is if they can talk a bunch of you into signing up on *OFFICIAL UNION CARDS*, . . . the Union is asking you to turn over your legal rights to stand up for yourself to them.” (CP Exh. 3 at 1–2.) (emphasis in original).

At the end of the meetings, Danzak distributed a take-home flyer to remind non-union supporters that Aliante did not like the Union. It stated: “Before you ever agree to give up your individual signature and social security number with no guarantees of what could happen with your personal information, you need to get **WRITTEN GUARANTEES** from the Union: What exactly can they **DELIVER** to Aliante Team Members? Promises of ‘**we will do our best**’ or ‘**we will try for you**’ are

<sup>10</sup> Chavez filed a charge against Respondent and a complaint was issued by the General Counsel against Respondent by August 2014 which became part of *Aliante I*. Chavez settled her unfair labor practice dispute with Respondent on December 1, 2014, and returned to work with Flores at Aliante in December 2014, approximately a month before the incident in this case and Flores discharge. See *Aliante I*, at 2 fn. 3; Tr. 408–412.

<sup>11</sup> Danzak stated that he had become aware of union supporters and/or representatives visiting team members at their homes unsolicited.

not enough to get your **personal identity** information from you.” (CP Exh. 3 at 5) (Emphasis in original).

These September 2014 meetings were held by departments in which union support was known to be had, including the IM department. Danzak further admitted that he targeted areas where the Union “seemed to be demonstrating support and success in getting people signed up.” (Tr. 610.) Danzak instructed managers to inform him as to which employees were antiunion versus prounion employees so that he could separate the meetings for each department into two groups: one made up of prounion supporters and the other comprised of antiunion supporters to isolate the two groups. (Tr. 165; GC Exh. 10(a)-(c).)

Respondent’s management kept a super vigilant Union activity monitoring watch over all union activity at its small-sized casino and hotel. Each time a supervisor saw any union activity at Respondent, they were instructed to immediately report it up the management chain of command. (Tr. 105, 392–394, 481–482; GC Exh. 10; CP Exh. 4 at 5–12.) Danzak directed his subordinates to separate the antiunion-types from the prounion type employees so he could determine which employees supported the Union and which ones did not as he intended to meet specifically with the anti-union employees. (Tr. 165, 575, 585–586; GC Exh. 10(a)-(c); GC Exh. 11.)

Barahona, Flores’ supervisor’s supervisor, admitted that if in September 2014 she could have prepared a list for Danzak of prounion supporter team members at Respondent for any shift, she could have done so just the same as she prepared a list of anti-union employees at that time. (Tr. 182–183; GC Exh. 10.) In fact, as part of Respondent’s super vigilant antiunion campaign, Barahona jumped into action after receiving Danzak’s instruction to separate employee groups between antiunion supporters and prounion supporters and she quickly provided Danzak with a list of Respondent team member (TM) employees that she was ninety-nine percent certain were anti-union employees in late September 2014. (Tr. 151–152; GC Exh. 10(a)-10(c).) Danzak also admitted that by virtue of identifying which employees were antiunion employees, they would also need to identify who the prounion employees were at the same time. (Tr. 165, 586.) I refer to Aliante’s program where all supervisors and managers monitored all union activities at Respondent’s casino parking lot and the TDR and communicated all findings as to which employees supported the union up the management chain of command as Aliante’s “super vigilant monitoring program.”

Flores estimated that she collected 3 or 4 signed authorization cards at Aliante after September 2014 with the last one handed out and collected in December 2014. (Tr. 272–276, 333.) When she was trying to get a coworker to sign an authorization card from September 2014 through January 2015, Flores would talk to them in the parking lot or TDR about the convenience of having a union at work, the benefits the union provides and that it is an overall good thing to have the union at work. (Tr. 333–335.)

Flores attended a Union rally at the Station casino known as Red Rock in October 2014 and spoke openly about it to her coworkers at Aliante in the TDR both before and after she returned to work on more than one occasion. (Tr. 414–417, 419–

420.) Danzak was also aware of the union rally at the Red Rock casino in October 2014 and forwarded a news article about it to Kelly and Heath on October 8, 2014. (Tr. 612; CP Exh. 4 at 11–12.)

In December 2014, as part of Respondent’s super vigilant monitoring program, Security Supervisor Curtis Walker (Walker) took a photograph of two employees seated in the TDR with a sign calling attention to union information. He emailed the photograph to Security Director Welk with a copy to Rand. (CP Exh. 2.) Welk replied that the employees were fine so long as they were on break. She did not suggest that Respondent was doing anything wrong with Walker engaging in surveillance of employees by photographing as they solicited support for the Union.

Flores and Martinez were often seen together and spoke openly about the Union with other employees in the TDR, in front of supervisors and members of management, who would also eat in the TDR together 1–2 times a week. (Tr. 336.) Union buttons and insignia were present at Aliante around this time and some supporters would wear such items. Though she openly supported the Union, Flores never wore a union button or insignia. One of her relief supervisors, Patricia Rosales<sup>12</sup> (Rosales), however, had seen Martinez ask and distribute authorization cards and Rosales had heard that Flores and three or four other porters on the graveyard shift supported the Union and soliciting signatures.<sup>13</sup> (Tr. 549–550.) Rosales had been a Union member years earlier with a different employer and she appeared to harbor an apparent negative attitude at hearing about the Union based on her demeanor. (Tr. 547.) Rosales regularly communicates and informs Manager Barahona of anything that is going on in the department and Barahona, in turn, informs her manager, Garcia/Huntzinger of the same. (Tr. 546.)

<sup>12</sup> Rosales became a relief supervisor in March 2013 and received a promotion, more work responsibilities and a pay raise and started attending management meetings as a supervisor at that time. Tr. 544–546. Rosales admitted that by the end of 2014, she was often Flores’ immediate supervisor, in place of Sparks, on his days off, at least half or more than half the time Rosales estimated that she works at Aliante. (Tr. 40, 544–546, 550–551.) In addition, Respondent’s counsel invoked privilege due to Rosales’ status as supervisor and being an Evidence Code section 611(c) witness in this proceeding when Rosales was asked the purpose of Aliante management requesting that she view the video of the incident. (Tr. 539.)

<sup>13</sup> Later in her testimony, Rosales unbelievably tried to retract her earlier statement by saying that she had mistaken Flores for Martinez and no longer believed that she heard that Flores was handing out authorization cards. (Tr. 552–554.) After observing Rosales’ testimony, I do not find her to be a credible witness as she was evasive on direct testimony and contradicted herself as referenced above. The questions and answers were clear and at one point, Rosales was asked about both Mr. Martinez and Ms. Flores in the same question and answered without confusion. (Tr. 550.) Also, Rosales’ recollection of events surrounding the incident were inconsistent with other more reliable testimony and video evidence such as the fact that contrary to Rosales’ testimony, the evidence shows that Flores reacted to Washburn’s near-fall before others heard the vacuum hit the floor.

*E. Flores' January 15/16, 2015 Incident*<sup>14</sup>

1. The incident and report

Around 11 p.m. on January 15, 2016, Flores showed up to work at Aliante for her usual graveyard shift. While Flores and other porters were in the supervisor's broader office area to get towels for her shift and set up, another porter, Jason Washburn (Washburn), entered pushing a garbage can just before he crossed toward Flores looking for a Kleenex in Sparks' separate private office. At this time, Flores was talking to coworker Martinez who was also setting up for his graveyard shift. By all accounts, Flores was standing a few feet away from Washburn with her back turned away from him.

As a third porter, Yubicella Cassas (Cassas), was dragging a vacuum across the office, Washburn tripped over the vacuum. Attempting to stop himself from falling, Washburn stretched out his arms.<sup>15</sup> Flores was not facing Washburn so the incident caused her to quickly turn around and face him in obvious surprise. The video shows Flores reacting first to Washburn's contacting her back and turning around before other people in the room closer to the video camera also turn around in response to the noise of Washburn's tripping. (Tr. 377-380, 434, and 459; GC Exh. 16.) The video also shows that Flores' body is obstructed during Washburn's near fall by Washburn's body. (Tr. 377, 381.)

Flores immediately felt pain from what she believed was someone hitting her on the back before hearing the sound of the vacuum being tripped over during Washburn's near fall. Flores reacted to Washburn's near fall by quickly turning around to see who had hit her. (Tr. 284-285, 302-303; GC Exh. 16.) Flores immediately straightened her back and turned around toward Washburn who she believed had hit her and told him that he hit her and she jokingly swatted him with some towels. (Tr. 286, 318-321; GC Exh. 16.)

Rosales disputes this and believed that Flores told Washburn that he "almost" hit her by his stumble. (Tr. 526.) Rosales' written statement of the incident, GC Exh. 7, not only was prepared and signed by Rosales after the decision to discharge Flores was made by Heath, but also does not contain a statement from Rosales that Flores told Washburn that he "almost" hit her. (See GC Exh. 7.) Moreover, Flores' back was turned to Washburn when he fell and I find that Flores would not have known whether Washburn *almost* hit her unless he *did* hit her. I reject Rosales' written statement because I do not find her a credible witness, the statement was not created soon after the event occurred when it would have been fresh in Rosales' memory, her written statement is inconsistent with Flores' more credible version of the incident and actual injury, and the statement is contrary to the video itself. (See GC Exh. 16.)

Next, Flores shifts the towels she was holding from her right hand to her left hand so she could touch her back with her right arm where she felt pain from the incident going up through her back and up to her neck. (Tr. 286, 303, 435; GC Exh. 16.)

<sup>14</sup> Since the incident began around 11 p.m. on January 15, 2015, and continued during Flores' graveyard shift into January 16, 2015, both dates appear and are used interchangeably here.

<sup>15</sup> Washburn did not recall touching anyone during his fall, but he was uncertain of this. (See Tr. at 496; GC Exh. 6.)

Sparks came up to Washburn and Flores after hearing the commotion and asked if everyone was okay and fine and only Washburn responded that he had tripped. (Tr. 45, 321.)

Sparks and Martinez both heard the incident, but did not see it occur. Rosales, a utility porter/supervisor, witnessed the fall and reacted looking surprised after Washburn recovered from almost falling. (Tr. 45, 286-297.) Incredibly, only Rosales denied hearing the incident, though on the video she appears to be closer to the kicked vacuum than Sparks. (Tr. 531.) Rosales also believes that Washburn did not touch or hit Flores by his stumble nor did the vacuum touch Flores as Rosales had an unobstructed view of the incident. (Tr. 531-532.)

The entire incident was caught on video, but the angle at which the camera was located only allows for a straight-ahead view with Washburn in front of Flores and the distance between them is impossible to calculate or observe. (GC Exh. 16.) In the video, Flores can be seen touching her lower back in reaction to Washburn's stumble. (GC Exh. 16.)

Flores experienced increasing pain through her back starting before she heard the sound of Washburn stumble and reported the incident and pain to Sparks around 1:30 a.m.. (Tr. 46, 303, 321.) The pain started at a level of 5-6 of 10 immediately at the time of the incident and increased to 8-8.5 of 10 approximately 2.5 hours into her shift according to Flores. (Tr. 316-317, 322.) She decided that she would say something to Sparks at this point.

Upon hearing of the incident and Flores' increased pain, Sparks asked Flores if she wanted to file a report. (Tr. 47.) She responded by first having Sparks confer with Washburn about the incident because she really did not know how she got injured and thought perhaps Washburn could clarify what happened in the incident resulting in her hurting her back. (Tr. 46, 68, 304-305, 322, 326.) At this time, Flores really did not want to go to security to file a report, go to the doctor for her injury, or ask to go home from the incident. (Tr. 47.)

Washburn was not aware of when he hit Flores during his stumble over the vacuum but told her he apologized if he had hit her causing her pain. (Tr. 304, 322.)<sup>16</sup> Next, Washburn also recommended to Flores that if he were in her shoes, he would file a report of the incident at Respondent's security. (Tr. 48, 72, 304-305.) Since Flores was nearing her meal break after she reported her increased pain to Sparks and Washburn, she did not want to file a report at that time because she wanted to first take her meal break and was hesitant to spend all night at the medical clinic without eating.<sup>17</sup> (Tr. 47-48, 304-305.) In addition, Flores thought maybe she could acquire some Tylenol or other pain reliever during her break to ease the pain. (Tr. 321-323, 326-327.)

After her break around 2 a.m., Flores went with Sparks to the office of Rand, the on-duty security supervisor at the time. Flores told Rand that she did not know what had happened

<sup>16</sup> Later on January 16, Washburn signed a voluntary statement required by Respondent's security department that also said that he did not remember bumping into anyone when he tripped over the vacuum earlier on his shift. (GC Exh. 6.)

<sup>17</sup> Aliante policy is to immediately report injuries and followup at a medical clinic.

exactly but felt that she was hit on her back by Washburn. (Tr. 306.) Sparks and Flores told Rand that the incident occurred between 11 and 11:30 p.m. on January 15.

Rand invited both Sparks and Flores to go view a video of the incident in a separate room outside Rand's interview room so Flores could show both of them where on the video the incident was recorded from the internal maintenance office where the incident took place earlier in the night. (Tr. 58–59, 73, 307–308.) At no time did Rand tell Flores she could not view the video. (Tr. 60, 95, and 473.)

Rand was not credible when he fabricated his version of the events and reported to Heath that Flores twice tried to sneak a view of the video without his permission and even after he scolded her once for the same conduct and told her to stay in the outer security office. (Tr. 240–242; 471–473.) Thus Rand reported falsely to management but suffered no apparent discipline for the false report. (Tr. 243.) Heath opined that it is company policy not to allow employees to view surveillance videos so Rand also violated Respondent's policy without suffering any discipline. (Tr. 366.)

Max Vasquez, another security supervisor, was then brought in around 3 a.m. by Rand to translate for Flores and assist her as she filled out an incident report. (Tr. 62; GC Exh. 1; GC Exh. 2; GC Exh. 3.) Sparks viewed the video two or three times and states that he did not see Washburn hit or in any way touch Flores as part of the incident. (Tr. 85–86.) Rand, however, admitted that the video was not conclusive and he opined that the video does not confirm whether or not Washburn made any contact with Flores when he tripped because the camera angle from the surveillance tape has Washburn's body obstructing the view to Flores to determine whether or not Washburn made contact with Flores. (Tr. 113, 119.) None of the three men, Sparks, Rand, or Vasquez, observed that Flores appeared injured.<sup>18</sup> While Heath also obtained written statements about the incident, immediately from Washburn and 10 days after the incident from Rosales<sup>19</sup>, neither Cassas nor Martinez were asked by Heath for their written observations of the incident. (GC Exh. 7; GC Exh. 8). Rand's report of the accident states that only Washburn witnessed the event and not Flores who was injured in the incident and not Rosales who 10 days later prepared a written statement after Heath had decided to terminate Flores. (GC Exh. 5.)

After filing the report, Rand asked Flores if she wanted immediate medical attention for the alleged injury and that if Flores wanted it, she needed to go right away. (Tr. 308.) Flores responded by asking for pain relief pills like Tylenol so she would not have to go to the hospital. (Tr. 308, 321–322.) Being offered no pills, Flores went to Concentra Medical Center for an evaluation where the attending doctor diagnosed her with cervical and lumbosacral strains, prescribed her medication, and imposed lifting restrictions while referring her for physical therapy. (GC Exh. 8). A followup appointment was also scheduled for Flores. (Tr. 377).

<sup>18</sup> As referenced above, Sparks and Washburn, however, both initially persuaded Flores to file a report.

<sup>19</sup> Despite the incident occurring on January 15, Rosales' statement was signed on January 26, 2015.

At 7 a.m. the next day, Flores went into work to submit the medical paperwork with Rosa Jimenez, the on-duty IM supervisor, who in turn gave the paperwork to HR. While submitting the medical report, Flores was told by Sparks that he had been requested by Heath in HR to communicate to Flores that she had been suspended and was being investigated for possibly violating company policy. (Tr. 63–65, 309, 326.) Heath made the decision to suspend Flores based on Flores' submitted report, Washburn's statement, Rand's opinion that he saw no actual accident on the video, and after reviewing the video of the incident with Kelly and Danzak. (Tr. 191–194, 197; GC Exh. 1, GC Exh. 2, GC Exh. 6, GC Exh. 8, and GC Exh. 16.)

## 2. The resulting investigation and disciplinary action against Flores

Heath obtained input from Rand and Barahona in addition to her review of Washburn's inconclusive statement about the incident. Heath also reviewed Flores' medical report that she received on January 16. (Tr. 189–190, 197; GC Exh. 8.) As stated above, Rand fabricated his version of the events and said that Flores twice tried to sneak a view of the video without his permission. On January 16, Heath immediately made the decision to suspend and then later discharge Flores after reviewing the video of the incident and the corresponding witness statement multiple times.<sup>20</sup> (Tr. 143–149; GC Exh. 3; GC Exhs. 11 and 14.)

Heath obtained little to no information between January 16 and January 21 in her investigation of Flores. (Tr. 203.) Yet, Heath believed that she kept Danzak updated daily as to the progress and results of her investigation of Flores' incident before recommending her discharge on January 26, 2015. (Tr. 199–200, 213, 567.)

On January 21, Heath conducted a "due process meeting" with Flores and another employee-translator, Jesse Carranco (Carranco). During the meeting, Heath came to the understanding that Flores had in fact falsified the accident report by claiming that she was hit by Washburn, when, as Heath represented as evidenced by the video, she was not. Additionally Heath admitted in her testimony that, during the due process meeting, she made accusatory statements towards Flores and frequently cut her off before she could respond to those accusations.

The conversation between Heath and Flores was heated at times and Heath aggressively began by also falsely accusing Flores that she had viewed the surveillance video in Rand's office on January 16 twice without proper permission. (Tr. 240–243.) Heath also misrepresented to Flores that she had multiple witness statements to the incident including statements from Rand and Rosales and that Sparks had witnessed the incident, when, in fact, Heath only had Washburn's inconclusive

<sup>20</sup> Though immediate suspension is Aliante company policy, the swiftness with which Flores' case was dealt seems to have been unusually quick. It is also worth noting again here that Flores' report was taken in Spanish and translated into English by Vasquez, at around 3 a.m. Additionally, the video was taken from an angle that makes viewing the details of the incident difficult, at best. Furthermore, Rosales' statement relied on by Heath with Washburn's statement occurred on January 26, after Heath had already decided to discharge Flores for the incident. (See Tr. 535; GC Exh. 7.)

statement at the time of this meeting. (Tr. 361.) Heath also told Flores that Washburn undeniably confirmed that he had not touched Flores at any time in the incident which also mistakes his written statement. (Tr. 372.) Heath also admitted that she cut off Flores repeatedly after making accusations without allowing for Flores to explain. (Tr. 364.) Heath never reviewed the surveillance video with Flores and could not explain her reason for acting this way during the meeting. (Tr. 205, 363–364.) By the end of their meeting, Heath already decided that Flores would likely be discharged. (Tr. 374.)

Heath took notes from the “due process meeting” but destroyed those notes prior to the hearing. (Tr. 231–232.) When pressed by the General Counsel and Counsel for the Union, Heath further admitted that she believed Flores may have sincerely believed she was hit by Washburn as a result of her cervical and lumbar strains, but was still somehow lying by saying so in the report despite Flores’ apparent difficulty communicating in English. (Tr. 218–220.) Heath further admits that Flores was required to file a report of the incident once she was injured or else she could have been terminated for not filing a report about a work injury.

Despite Heath’s agreement that Flores could have been mistaken about Washburn hitting her, Heath also conceded that Flores could have had a sincere belief that either Washburn or the vacuum cleaner had injured her back since no one doubts that Flores suffered a back injury from the incident. (Tr. 218–220.) Heath also told Flores that Washburn’s statement definitively states that he did not touch Flores during the incident which is untrue and that Heath had a written statement from Rand describing how Flores inappropriately snuck into the video room the night of January 16 which is another false statement that Heath made to Flores during the “due process” meeting. (Tr. 366–373; GC Exh. 6.)

Respondent’s injury and prevention plan handbook provides that all witnesses, including the victim, to an injury accident, however minor, should be interviewed at the scene or as soon thereafter as possible when there is such an accident. (Tr. 383–385; GC Exh. 15(K)–(L).) Neither Rosales, other porters present at the incident, nor Flores were interviewed at the scene or as soon thereafter as a result of the January 16 accident pursuant to this rule. In addition, Respondent never obtained a written statement from Flores for the incident and the handbook also provides that the team member should be allowed to tell the story as they wish without interrogation but Heath admits that the “due process” meeting she conducted in her only interview of Flores was interrogatory in nature further violating Respondent’s accident investigation rules. *Id.*

Barahona informed Heath after reviewing the video twice that she did not see any contact between Washburn or the vacuum and Flores. Barahona and Heath admit that the incident on the video shows Washburn blocking the view of Flores’s body. (Tr. 14–147, 381.) Despite this, Barahona says it is crystal clear to her that neither Washburn nor the vacuum touched Flores at any time and that the video does not show any physical reaction by Flores to Washburn tripping. (Tr. 173–175.) Heath, too, opined that after watching the video, it was absolutely clear to her that there was no contact between Washburn and Flores at the time of the incident. (Tr. 206.)

I find this to be untrue as the video shows Washburn blocking Flores’s body so it is impossible to determine from the video whether he actually touched her. More importantly, the video does show Flores reacting to Washburn’s tripping by Flores’ shifting towels and reaching to grab her back. (GC Exh. 16.) Heath also was in possession of the physician’s report by Dr. Sushil P. Anand who saw Flores on January 16 and diagnosed her as having both cervical and lumbosacral strains and issued her medication to treat the strains. (Tr. 189–190, 217; GC Exh. 8.) Heath acknowledged that Flores might have perceived that she was injured due to contact. (Tr. 218–219.)

These false statements from Barahona and Rand, along with communications between Heath and Danzak, apparently constituted the whole of the investigation. It was Heath’s overall determination that there were material discrepancies between what was shown in the video and what Flores had stated in her injury report—mainly whether Washburn had any contact with Flores during his near fall over the vacuum. Neither Heath, Rand nor anyone in between in management interviewed any of the other porters present when the incident occurred such as Martinez, Juli Sala (Sala), Yubicela Cassas (Cassas), Fernanda Chavez (Chavez), Margarita Garcia (Garcia) or Patty Obano (Obano). (Tr. 78, 120–121, 175, 221.) At no time did Heath seek input from Barahona or Sparks as to Flores’ quality of work, length of employment or past discipline record. (Tr. 143–149, 202.)

On January 22, Heath first requested that Barahona obtain from Rosales a written statement about the incident. (Tr. 361, 364.) Heath conveyed her findings to Danzak and recommended Flores’ termination for knowingly and intentionally making a false statement, which Danzak followed. (Tr. 391–392; GC Exh. 11(a).)

On January 26, Heath finally received Rosales’ late-prepared written statement about the January 16 incident and Flores was terminated from Aliante for violation of policy—dishonesty—making a false injury claim and falsifying of Company records—filed false injury documents. (Tr. 203–204; GC Exh. 7; GC Exh. 11 and GC Exh. 14.) Heath believed that Flores gave a false statement in Heath’s view, whether intentionally so or not. Heath opined that her belief that Flores had falsified her incident report was based entirely on Heath’s review of the video and witness statements. (Tr. 237.) Danzak added that he factored in the delay in Flores reporting her injury from when it first occurred to after her break on January 16 to his decision adopting Heath’s discharge recommendation. (Tr. 583.)

On February 25, Flores invoked her right to an Aliante Board of Review for her termination. Ultimately, the constituted Board of Review upheld Respondent’s January 26 decision to terminate Flores as it had done approximately 4–5 times earlier without ever modifying or reversing a prior termination or other disciplinary decision. (Tr. 466–467.)

#### Analysis

##### *A. Credibility Legal Standards*

A credibility determination may rest on various factors, including “the context of the witness’ testimony, the witness’ demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences

that may be drawn from the record as a whole.” *Hills & Dales General Hospital*, 360 NLRB No. 70, slip op. at 7 (2014), citing *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001). In making credibility resolutions, it is well established that the trier of fact may believe some, but not all, of a witness’s testimony. *NLRB v. Universal Camera Corp.*, 179 F.2d 749 (2d Cir. 1950).

I found Flores to be a credible witness. She testified in a straightforward manner and her testimony did not waver under cross-examination. Her recollection of the events involving the incident and her resulting discharge were frank and forthright despite the obvious fact that English is not Flores’ primary language. Her testimony is consistent with other supporting evidence particularly with respect to the incident and Flores’ union activity in 2014. As such, I credit Flores’ testimony over that of Washburn and Rosales as to the incident events.

In addition, Barahona was evasive and noncredible with her testimony denying the existence of Danzak’s request for separate meetings with the separated prounion and antiunion employees despite her involvement with other management and Danzak in email communications to the contrary. Instead, it is very apparent that Barahona was proud to be at the forefront at Aliante and kept track, documented, and forwarded up the management chain of command which employees she believed were antiunion and prounion supporters especially with respect to the porters like Flores who she was most familiar with at Respondent as a supervisor. (Tr. 151–157; GC Exh. 10.)

In addition, Charles Rand appeared hostile and spoke over the General Counsel during his examination. He also gave testimony that seemed insincere. For example, Rand denied speaking to anyone about the January 15 incident prior to Flores’ discharge and even denied it being standard procedure that he would consult with someone when something is caught on surveillance and an employee faces discharge. (Tr. 100). Rand also made up facts that were later relied on by Respondent’s management in the “due process” meeting with Flores as Rand falsely stated that Flores illegally viewed the surveillance video on January 16 with Sparks and Rand. I find that the evidence supports my finding that Rand and Sparks invited Flores to view the video. (Tr. 58–59, 73, 240–242, 307–308.)

Rand was also not credible when he admitted to recognizing every graveyard shift porter employed by Respondent but retracted this statement and had absolutely no idea who union organizer/porter employee Martinez was despite his admitted super vigilance over union activities at Respondent and that Martinez was a known and visible union supporter.<sup>1</sup> Rand even admitted that his supervisor Welk instructed him to keep an eye on the union organizing in the TDR in 2014 when it occurred. (Tr. 102–103.) Also, Rand initially admitted that he would report back to Welk and Danzak all union activity that he observed in the TDR before he incredibly became evasive and unbelievably denied knowing when this occurred or doing this at all. (Tr. 103–109.)

While Respondent’s witnesses, Danzak, Heath, Rand,

<sup>21</sup> Barahona admitted knowing that Martinez was a union supporter who regularly wears a union button. (Tr. 158.) Heath also admitted that Martinez is a known and visible union supporter. (Tr. 222.)

Barahona, and Sparks, all deny any knowledge of any union activity by Flores in 2014, I find this testimony unpersuasive and not credible, and conclude that the record amply supports the conclusion that I make, that Respondent was aware of Flores’ union activities in 2014 especially as a result of Aliante’s super vigilant monitoring program.

I find the testimony of Respondent’s witnesses to be unpersuasive and not credible concerning knowledge of Flores’ union support, and the existence of any union activity in 2014. Rather, I conclude that the evidence overwhelmingly supports the conclusion that I make, that Respondent was aware of the resurgence of union activities in 2014 at Station’s successor Aliante’s TDR and casino parking lot.

Danzak was not credible when he Danzak claimed that the purpose of the bifurcation of groups was to allow an atmosphere in which non-union supporters would feel comfortable to ask questions. The implication is that splitting up the groups allowed HR to identify prounion supporters from anti-union employees and deal with each group in different ways. Further, Danzak was also not believable when he stated that the script’s purpose was merely to inform employees about their rights and was written in a neutral manner. (Tr. 576.) I find that the language used in these meetings was anti-union in motive and decidedly *not* neutral. See CP Exh. 3—i.e., “\* For the past few months, we have heard that a small group of union pushers have been trying to sell the idea of bringing a union in here is a good idea—EVEN IF WE DON’T AGREE WITH THEM . . . \* This union—and the tactics they use—are not the kind of positive interaction we want to have with each other.” (Emphasis in original script.)

Also, the script infers that the Union might make illegal use of employees’ personal information should they provide it to the Union by signing authorization cards. The script is an obvious attempt by Aliante through Danzak to fight off the Union by misrepresenting to employees that the “union pushers” were somehow allowed to “recruit” at Aliante because Aliante allowed them to rather than to be forthright and honest and say that each employee has a Section 7 right to be recruited by the Union under the Act. It is also disingenuous of Danzak to use a script that intentionally causes fear mongering among employees by having them question the safety of their own personal bank accounts if they sign a Union authorization card without any evidence that this has occurred before.

Heath and Danzak misrepresented the timing of events as presented at hearing when they both believed that Flores did not move on the video until after the vacuum hit the floor and made a crashing sound. (Tr. 443–444.) Flores credibly testified that she moved when she thought Washburn touched her before the noise of the falling vacuum occurred. (Tr. 284–285; 302–303; GC Exh. 16.) Heath was not credible when she testified that the video clearly shows that neither Washburn nor the vacuum touched Flores at any time during the incident. Danzak was also not credible when he stated that he gave Dr. Anand’s report no weight when adopting Heath’s termination recommendation despite the doctor’s diagnosis of Flores having both cervical and lumbosacral strains and issuing her medication to treat the strains on the date of the incident. (Tr. 189–190; GC Exh. 8.) Danzak opined that he did not see anything that could

have triggered Flores' injury by viewing the video although he is not a physician and the video shows Flores sudden movement or flinch in response to Washburn's tripping. When asked if she ever tells a lie, Heath responded by equivocally saying that she tries to be "as honest as possible." (Tr. 243.) Therefore, for the reasons cited here and elsewhere in this decision, I have credited the testimony of Flores and the supporting video, GC Exh. 16, over that of Heath and Danzak. Respondent's managers all ignore what the video and Flores' testimony show - Washburn's hand reaching towards Flores, Flores turning around toward Washburn in a sudden twisting movement in response, and Flores holding her back.

#### B. Flores' Discharge Analyzed Under Wright Line

Section 8(a)(3) of the Act prohibits employer interference, restraint, or coercion of employees for their exercise of the rights guaranteed in Section 7 of the Act. Those rights include "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

The General Counsel alleges in paragraphs 5–7 of the complaint that on January 16, 2015, Respondent suspended Flores, and on July 26, 2015, Respondent discharged Flores because she formed, joined, or assisted the Union, and engaged in other concerted activities, and to discourage employees from engaging in these activities in violation of Section 8(a)(3) and (1) of the Act. The Respondent asserts that Flores was discharged for filing a false injury claim with respect to the January 15, 2015, incident.

In determining whether an employee's discharge is unlawful, the Board applies the mixed motive analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 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). Under *Wright Line*, the General Counsel must demonstrate by a preponderance of the evidence that the employee's protected conduct was a motivating factor in an employer's adverse action. The General Counsel satisfies his initial burden by showing (1) the employee's protected activity; (2) the employer's knowledge of that activity; and (3) the employer's animus. If the General Counsel meets his initial burden, the burden shifts to the employer to prove that it would have taken the adverse action even absent the employee's protected activity. See, e.g., *Mesker Door, Inc.*, 357 NLRB 591, 592 (2011); *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004).

The employer cannot meet its burden merely by showing that it had a legitimate reason for its action; rather, it must demonstrate that it would have taken the same action in the absence of the protected conduct. *Bruce Packing Co.*, 357 NLRB 1084, 1086–1087 (2011); *Roure Bertrand Dupont, Inc.*, 271 NLRB 443, 443 (1984). 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 for those reasons regardless of the protected conduct. *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007); *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003);

*Limestone Apparel Corp.*, 255 NLRB 722, 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

As explained below, I find that Flores engaged in union activity in 2014 and that the Respondent, primarily as a result of its super vigilant monitoring program, had knowledge of Flores' union activities, and harbored animus towards that activity.

#### 1. Flores openly engaged in union activities

The evidence is overwhelming and undisputed that Flores was one of 4-5 primary organizers amongst Respondent's graveyard shift porter employees during the fall and winter of 2014 during the Union's organizing campaign.

Flores signed a Union authorization card in January 2014 that she received from her co-worker on the graveyard shift, Martinez, another graveyard shift porter and a Union organizing representative committee member known to Respondent's management as a visible Union supporter. Flores also openly distributed authorized cards to employees of Respondent, discussed the union and the union cards with employees in various places, including at Respondent's TDR and casino parking lot. In 2014, Flores contacted the Union again, received ten authorization cards from the Union, distributed them to employees on break periods in the TDR and parking lot areas of the casino, discussed the signing of cards with employees there including at Respondent's TDR, and returned signed cards to the Union, 1 to 3 months before she was notified of her termination. Flores estimated that she collected three or four signed authorization cards at Aliante after September 2014 with the last one handed out and collected in December 2014. When she was trying to get a coworker to sign an authorization card from September 2014 through January 2015, Flores would talk to them in the parking lot or TDR about the convenience of having a union at work, the benefits the union provides and that it is an overall good thing to have the union at work.

Flores also showed support for union supporter Chavez by complaining to Sparks that Chavez had been treated unfairly when Respondent fired her in June 2014. Flores also attended a Union rally at the Station casino known as Red Rock in October 2014, and spoke openly about it to her coworkers at Aliante in the TDR both before and after she returned to work on more than one occasion. Consequently, I conclude that Flores openly engaged in union activities at Aliante from January 2014 through the end of December 2014 at Respondent's TDR and casino parking lot and the surrounding area.

#### 2. Aliante harbored antiunion animus

The record contains ample evidence of the Respondent's antiunion animus, as noted above, which can also be inferred, in part, from the timing of Flores' discharge in mid-January shortly after Flores continued collecting union authorization cards openly at Respondent's premises in December 2014 and Chavez returned to work on Flores' graveyard shift as another prounion employee who had been previously discharged herself for allegedly lying at Aliante yet settled her claim against Respondent and returned to work in December 2014. Chavez' return to Respondent shifted its antiunion focus away from Chavez after her return in December 2014 and on to other known union supporters like Flores so Respondent could continue its quest to keep the Union out of Aliante.

Moreover, as referenced above in Section D., I rely on Judge Chu's prior factual findings in *Aliante I* showing that Respondent's management harbored animus toward the Union in 2014:

Downey was opposed to the Union representing Aliante employees. Downey specifically did not like the spike in union activity [(Tr. 224)]. Garcia/Huntzinger also believed there was a spike in union activity in February and wrote on the management electronic bulletin board that "I'm concerned about the recent (seemingly) spike in union activity . . . it bums me out." Downey replied, "I agree. I am very concerned" [(GC Exh. 14)]. Heath also was upset over the visits of union members at employees' residences. Heath suggested that the employees call the police and file criminal charges if they felt harassed. Danzak directed the director of security to discard any union flyers or handbills in the employee cafeteria. Danzak and Downey were also upset over the union flyer regarding the health benefits costs incurred by Aliante employees as compared to employees in union casinos. Both were concerned and met over the union's request for card check and neutrality agreements.

*Aliante I* at 13; CP Exh. 6.

In addition, in September 2014, Danzak was using an anti-union script that was derogatory toward the Union and was used in his small-group meetings where he intentionally separated anti-union from prounion employees at Respondent. (See CP Exh. 4 at 13–15.) The use of this script by Danzak in a bad faith attempt to unfairly criticize the Union and misrepresent the Union's right to organize at Aliante is further evidence of Respondent's antiunion animus. Respondent's super vigilant monitoring program also demonstrates that Respondent was actively surveilling and keeping a record of union activity and suspected or known prounion and antiunion employees. (GC Exh. 10; CP Exhs. 2, 5, and 6.) Respondent portrayed Union activity and the Union in general to its employees with great disdain in a bad faith attempt to prevent the Union from gaining recognition at Aliante.

An employer's failure to conduct a meaningful investigation of alleged wrongdoing by an employee and its failure to give the employee an opportunity to explain are further indicia of discriminatory intent. See *Hewlett Packard Co.*, 341 NLRB 492 (2004). The Board has also found a respondent's failure to conduct an investigation into the alleged misconduct by a discriminatee to be evidence of pretext. See *ManorCare Health Services—Easton*, 356 NLRB 202 (2010).

Here, Respondent failed to follow its own handbook policy on non-interrogatory investigations and its disparate treatment of Flores demonstrates animus. Heath's "due process" meeting with Flores on January 22, was a sham as Heath failed to obtain written statements from other employees present when the incident occurred and in the vicinity of the incident other than Washburn whose statement is inconclusive. Heath also did not obtain Rosales' written statement in a timely manner and did not have it for the "due process" meeting as it was created on January 26 *after* Heath met with Flores and *after* Heath had made up her mind to recommend to Danzak that Flores be discharged. Rosales' statement is contrary to Flores' credible testimony about the incident and video evidence. Heath also mis-

represented facts to Flores telling her that Respondent had additional statements from Rand and that Washburn's statement conclusively stated that neither he nor the vacuum hit Flores on January 15. In addition, Heath relied on Rand's false report that Flores twice snuck into the surveillance video room in violation of Aliante policy with no explanation for why this apparent falsehood by Rand was not subject to discipline. (Tr. 243.)

Also, Heath failed to allow Flores to have a "non-interrogatory" meeting also in violation of Aliante stated policy which requires that all witnesses be interviewed as soon after an injury accident as possible and that Flores be allowed to tell her side of the story without interrogation. (See GC Exh. 15(K)-(L).) Heath also destroyed her handwritten notes from the "due process" meeting which leads to an adverse inference that her destroyed notes contained information helpful to Flores and the General Counsel's case and the destroyed notes are further evidence of Respondent's antiunion animus.

A violation may be found by an enhancement or increase to discipline in response to union or protected activity. *Washington Fruit & Produce Co.*, 343 NLRB 1215, 1237 (2004). The exercise of discretion to skip steps of discipline in Flores' situation supports a finding of an enhancement in discipline due to Flores' protected activities. Despite Respondent's handbook referencing use of progressive discipline and discretion in how to handle reported work injuries, Respondent did not issue any written warning to Flores, nor did Respondent discuss any alternative lesser discipline than discharge with her. Rather, after more than 6 years of discipline-free conduct and exemplary work performance resulting in job coach assignments, Respondent immediately terminated her in January after Flores' continued protected activities in the TDR and casino parking lot and the return of fellow union supporter Chavez in December 2014.

As stated above, Rand falsely reported to Heath that Flores had twice snuck into the surveillance room to watch the video in this case. Rand received no discipline for these false reports to Heath which evidence disparate treatment for submitting a false report. Flores was suspended and discharged for allegedly filing a false report of the incident which I find to be a mere pretext and cover up for Respondent's actual antiunion animus and discriminatory motive for suspending and discharging Flores for her union activities in the fall and winter 2014. As referenced above, Flores' stellar employment record with Aliante warranted progressive discipline but Respondent rushed to suspension and discharge without conducting a proper investigation of the incident and fabricating the substance of the surveillance video. When coupled with Heath's inexplicable leapfrog over the next disciplinary level of a written warning to a final written warning, the evidence strongly supports an inference of discriminatory motivation. *Lucky Cab Co.*, 360 NLRB No. 43 (2014); *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003), *rev. denied* 2004 WL 210675 (D.C. Cir. 2004) (inference of unlawful motive drawn from inconsistencies between the proffered reasons for discipline of employer's other actions, disparate treatment of employees with similar work records or offenses, deviations from past practice, or proximity of discipline to union activity).

Respondent alleges that Flores was terminated for lying

about being hit by Washburn on January 15 when the video shows he did not touch her. However, as described above, the video is at an angle that does not show a clear view of Washburn and Flores when the incident occurred and there was commonly a wide variety of disciplinary actions aside from discharge that could have been imposed on Flores given her obvious physical reaction to Washburn tripping toward her on January 15. I further find that at all times Flores harbored a good faith belief that her sudden physical reaction to Washburn tripping toward her caused her the back injury that was confirmed by a medical doctor. Further, Respondent has not offered sufficient proof to support its allegation that Flores lied about Washburn's conduct causing her injury on January 15. Given Flores' observed difficulty communicating in English, Respondent should have interpreted the January 15 incident as communicated by Flores and as it occurred as shown on the video and not discharged Flores for her imprecise use of the word "hit" when the video shows that a more precise but no less truthful description is "touch," and/or "startled" Flores causing her sudden physical movement and injury as shown in the video. I find that either Washburn actually hit/touched her or Flores physically reacted by suddenly twisting toward Washburn to cause her back injury on January 15 when Washburn tripped toward her. This event caused her first to seek an aspirin or Tylenol to treat the resulting pain but eventually the hit and/or sudden movement caused Flores increased pain to report to Sparks and Rand.

Thus, I find that the reasons given for Flores' discharge were pretextual. My finding of pretext also reinforces my conclusion that Flores' discharge resulted from unlawful motivation. *Id.* (quoting *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966)). As stated above, Respondent's disciplinary warning to Flores in April 2014 was also unwarranted and pretext at a time when the union organizing activities were just getting started at Aliante. Together these two separate sham adverse actions by Respondent against Flores further evidence Aliante's antiunion animus.

### 3. Aliante had knowledge of Flores' union activities

Relief Supervisor Rosales testified that it was general knowledge at Aliante that Flores was distributing Union authorization cards in 2014. It is reasonable that due to Respondent's super vigilant monitoring program that Flores' union activity was passed along by Rosales and known to supervisors and management at Aliante other than Rosales. Also as stated above and based on Flores' August 2014 conversation with her immediate supervisor Sparks about union supporter Chavez and Flores' support for the Union, Supervisor Sparks also had direct knowledge or strong reason to know that Flores supported the Union in August 2014. Once again, Respondent's super vigilant monitoring program would have transferred this direct knowledge up the management chain to Barahona, Heath, and Danzak. In addition, as further evidence that Rosales' and Sparks' knowledge of Flores' union activities must be imputed on to Barahona, Heath, and Danzak, these high-ranking Aliante officials involved themselves in disciplining a low-wage casino maintenance worker. *See State Plaza, Inc.*, 347 NLRB 755, 756 (2006) (knowledge of lower level supervisor should be imputed

to the employer). Other than the discredited denials from these managers, Respondent has not put forth any further evidence that knowledge should not be imputed to its decision-makers. (*See State Plaza, Inc.*, 347 NLRB, supra at 756-757 (supervisor's knowledge of union activities is imputed to employer unless credited testimony establishes the contrary).

Consequently, I find that Aliante had specific direct knowledge of Flores' protected union activities in late 2014.

While there is some specific direct evidence of knowledge in this case, the Board has long held, with court approval, that knowledge of union activity may also be established by circumstantial evidence from which a reasonable inference of knowledge may be drawn. *See, e.g., Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995), *enfd. mem.* 97 F.3d 1448 (4th Cir. 1996); *BMD Sportswear Corp.*, 283 NLRB 142, 142-143 (1987), *enfd. mem.* 847 F.2d 835 (2d Cir. 1988). This principle has been expressly endorsed by reviewing courts as well. *See NLRB v. Grand Canyon Mining Co.*, 116 F.3d 1039, 1048 (4th Cir. 1997); *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1168 (D.C. Cir. 1993), *cert. denied* 511 U.S. 1003 (1994); *Abbey's Transportation Services v. NLRB*, 837 F.2d 575, 579 (2d Cir. 1988); *NLRB v. Health Care Logistics, Inc.*, 784 F.2d 232, 236 (6th Cir. 1986); *NLRB v. Wal-Mart Stores, Inc.*, 488 F.2d 114, 116-117 (8th Cir. 1973). Knowledge of union activity may be inferred from "such circumstantial evidence as the timing of the alleged discriminatory actions; the Respondent's general knowledge of its employees' union activities; the Respondent's animus against the Union; and the pretextual reasons given for the adverse personnel actions." *North Atlantic Medical Services*, 329 NLRB 85, 85 (1999), *enfd.* 237 F.3d 62 (1st Cir. 2001); *see also Montgomery Ward & Co.*, above. Each of these factors is present here.

The Respondent was aware of the union campaign at multiple levels of its management hierarchy due to its super vigilant monitoring program. Aliante's vice president of HR, Danzak, requested and received regular updates on the union campaign from supervisors as it is apparent that Barahona took pride in her quickly reported prouion and antiunion listings of employees to Danzak. Sparks, Rand, and Heath all testified that they recognized Martinez, a known Union organizer at Aliante who Flores frequently accompanied around the TDR and other locations at Respondent. Furthermore, Rand also admitted that he followed management orders and he "kept an eye on" all union activities at Aliante and he reported them up the chain of management in compliance with Aliante's super vigilant monitoring program. Security Guard Walker's surveillance of union supporters engaging in union activities in the TDR in late December 2014 is another example of the super vigilant monitoring program at Aliante. (*See CP Exh. 2.*)

As found by Judge Chu in *Aliante I* and put forth again here by the parties, there was increased union activity in February 2014 known to the managers and supervisors at Aliante. Downey testified that he was aware of union activity before and after February. Downey did not believe the union activity was at the level of an organizing campaign, but he nevertheless knew about the handbills, placards, button wearing, and flyers in the employee cafeteria. Other management officials, such as Heath, Welk and Kelly were also aware of the flyers in the

cafeteria and raised concerns over visits by union activists at employees' residences. Garcia/Huntzinger] described the union activity as a "spike" in February. Heath agreed that there was an "upsurge" of union activity in February 2014. Danzak was also aware of union activity at Aliante. Although Danzak denied that there was an increase, he described the activity as a "slow roll." At the same time, the chief executive officer and a board member of Aliante became aware of union activity when they were sent letters by the union requesting check cards and neutrality agreements. Downey and Danzak were also aware and expressed concerns over the letters. Lou Dorn, the general counsel for Aliante at the time, described the Union's letter for check card and neutrality agreements as a "very unusual letter". Danzak met with Dorn and Downey over the contents of the letter. See *Aliante I* at 12-3; CP Exh. 6.

I also find it reasonable that management knew of Flores' union activities. Flores was one of 4-5 employees who handed out and collected union authorization cards after signing one herself in 2014. She also attended union meetings and a union rally in October 2014. Danzak also followed and reported on the Red Rock rally in October 2014. (See CP Exh. 6.) Flores often met with employees at the TDR to discuss labor and management issues.

Consequently, I further find that the record establishes that the decision makers, Danzak and Heath, were very much aware and were regularly kept apprised of all union activity at Aliante. Further, they were generally aware that other employees believed that Flores supported the union given her close association with Martinez and the openness of her union activities in the TDR and the casino parking lot combined with Rand's, Barahona's, and other Respondent supervisors' constant surveillance of both prounion- and antiunion employees, as Flores ate lunch in the TDR and conducted her union activities in late 2014 in front of supervisors and security guards, who would also eat in the TDR together 1-2 times a week. Thus, the above evidence strongly establishes that starting in February 2014 and continuing through Flores' discharge in January, Rosales, Sparks, Barahona, Heath, and Danzak had either specific knowledge of Flores' protected union activities or general knowledge of these union activities in 2014. The most compelling evidence of Respondent's knowledge of Flores' union activities is Respondent's super vigilant monitoring program.

As stated above, by September 2014, Barahona and other subordinates to Danzak, such as security officer Rand and Rosales, were directed to report all union activities up the management chain and submit ongoing lists of prounion and anti-union employees at Aliante and the reports and lists indicated Flores was a union supporter. Supervisor Rosales also had heard and believed that Flores was a union supporter, and circumstantial evidence suggests that she shared this information and general awareness with Barahona, Heath, and Danzak.

In addition, despite Respondent's argument that Flores acted "secretly" to hide her prounion activities at Respondent, I find, to the contrary, that Flores openly supported the Union by way of her soliciting co-workers at Aliante's TDR and casino parking lot where supervisors and security personnel worked in close proximity with Flores. Since these union activities were conducted openly, it is reasonable to infer that others, anti-union co-workers, supervisors, and security personnel, overheard or observed Flores and easily became aware of her union

support and communicated up the management chain of command due to the super vigilant monitoring program.<sup>22</sup> See *Frye Electronic, Inc.*, 352 NLRB 345, 351 (2008) (I readily infer that it was probable that their conversation was overheard and became the subject of discussion among other persons associated with the Company.)

I also find that Respondent's rationale for suspending and discharging Flores is pretext just the same as Aliante's "trumped-up" disciplinary warning to Flores in April 2014 regarding her refusal to train new employees for no pay. The April 2014 sham discipline brought attention to Flores and was her only black mark in her stellar 7 year career at Aliante. Her complaint of not getting paid the monies owed her for job coach training and her refusal to participate as a job coach in protest brought special attention to Flores in the eyes of management and came at a time that the Union had just started organizing in 2014.

This time around, Flores' credible testimony combined with the January 15 surveillance video evidence and physician report show that Flores was injured from Washburn's near fall on January 15 and Flores should not have been suspended or discharged. As discussed above, the decision to discharge Flores was baseless, unreasonable, and contrived because Respondent's investigation of the incident by Heath and Danzak was woefully inadequate and pre-determined by Heath against Flores, it violated Respondent's own non-interrogatory policy and it contradicted Flores' own testimony of what happened as supported by the surveillance video. Respondent's false reasons for Flores' discharge is a strong factor in inferring Respondent's knowledge of Flores' union activity. See *Frye Electronic, Inc.*, 352 NLRB supra at 352 (calling the pretextual nature of the employer's purported rationale an "equally powerful inferential factor" from which to conclude an employer had knowledge of an employee's union activity.)

The Board has consistently inferred knowledge of union activity from similar circumstantial evidence. See *Montgomery Ward & Co.*, above (knowledge inferred where employer generally aware of union activity, animus towards that activity at highest level, discriminatees openly engaged in union activity and employer had means and practice of monitoring employee activity in plant, discharges came a few days after union activity, and stated reasons for discharge pretextual); *BMD Sportswear Corp.*, above (knowledge inferred where employer harbored animus, had general knowledge of union activity, stated reasons for discharge pretextual, and supervisor observed discriminatees at lunch with primary union activists); and *Medtech Security, Inc.*, 329 NLRB 926, 930 (1999) (knowledge inferred where employer was generally aware of union activity, discriminatee questioned about what he knew of activity, and reasons for discharge pretextual). I do so here as well.

In sum, I find that Flores openly engaged in union activities at Respondent and that as recently as December 2014 she passed out union authorization cards and spoke to employees in support of the Union and attended union meetings and rallies and was known to Respondent as a union supporter based on Respondent's super vigilant monitoring program to monitor

<sup>22</sup> For example, as stated above, it was late December 2014 when Respondent's security guards were photographing employees engaged in union activity in the TDR. (See CP Exh. 2.)

prounion and antiunion employees, Flores' August 2014 conversation with Sparks, her open association with known Union supporters Martinez and Chavez at work, her open discussions of the Union rally she attended in October 2014, reports Rosales had heard that Flores supported the Union, and the list of anti-union and prounion employees that Barahona maintained and forwarded to Respondent's management including Heath and Danzak. Finally, as stated above, there is substantial evidence of Respondent's animus against the Union which further infers Respondent's knowledge of Flores' protected union activities.

Respondent admits that Flores may have been startled by Washburn and not actually hit on January 15. (R. Br. at 19.) As a result, it is undisputed that Flores may have been mistaken about whether her January 15 work injury was caused by actual contact from Washburn or her sudden physical reaction to his near fall. Even Heath agrees that Flores may have reasonably believed she was hit by Washburn. Should a 7 year employee with a stellar work history be discharged for filing a work injury report in good faith where she did not intentionally falsify the report? Perhaps if she had intentionally lied, or Rand had obtained a conclusive written statement from Washburn or a credible and timely written statement from Rosales before Heath had decided to discharge Flores, or perhaps if Respondent's witnesses had been credible and Heath had conducted her investigation according to Respondent's policy and not misrepresented fact and interrogated Flores. Based on the reasons stated above, however, I conclude that the foregoing total circumstances strongly support an inference of unlawful motive and that the General Counsel has amply met his initial burden under *Wright Line* to establish that Flores' protected union activities were a motivating factor in Respondent's decision to suspend and then discharge her.

4. Aliante failed to establish that it would have suspended and discharged Flores absent her union activity

A finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel. *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). Thus, if the evidence establishes that the reasons given for the Respondent's action are pretextual, the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and there is no need to perform the second part of the *Wright Line* analysis. *Rood Trucking, Co.*, 342 NLRB 895, 898 (2004); *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003). As stated above, I find that the evidence here establishes that the reasons for Respondent's January 2015 adverse actions against Flores are pretextual and that the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and there is no need to perform the second part of the *Wright Line* analysis in this case.

Moreover, the main proffered reason for Flores' discharge is her alleged falsification of her injury report of January 16. Viewing the surveillance video and reading Washburn's inconclusive witness statement of the incident does not prove that

Flores falsified her accident report. To the contrary, the evidence shows that Flores physically reacted to Washburn's actual or near contact before anyone else and her resulting sudden movement caused her injury and increasing pain. Flores did not act dishonestly and did not intentionally file a false report. Instead, Flores reasonably believed that she was injured in the incident and she was pressured into filing a report on January 16 after her back pain increased after the initial incident. In view of the overwhelming evidence here, the record does not support a finding that Respondent satisfied its substantial defense burden. See, e.g., *Bally's Atlantic City*, 355 NLRB 1319, 1321 (2010) (when there is a strong showing of unlawful motivation, the respondent's defense burden is substantial).

Accordingly, the evidence does not establish that the Respondent would have suspended and discharged Flores based solely on its investigation findings even in the absence of Flores' protected union activities. Therefore, I find that the suspension and discharge of Flores was motivated by her protected union activities in violation of her rights under Section 8(a)(3) and (1) of the Act.

#### CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226 and Bartenders Union, Local 165, affiliated with UNITE HERE (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. By suspending and discharging employee Lourdes Flores because of her union activities in 2014, the Respondent violated Section 8(a)(3) and (1) of the Act.

4. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

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

Specifically, having concluded that the Respondent is responsible for the unlawful suspension and discharge of employee Lourdes Flores, the Respondent must offer her immediate reinstatement to her former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights and privileges previously enjoyed. I also order that Respondent make Flores whole, with interest, for any loss of earnings and other benefits she may have suffered as a result of the discrimination against her. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In addition, the Respondent shall compensate Flores for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014). The Respondent shall

also be required to expunge from its files any and all references to the suspension and discharge, and to notify Flores in writing that this has been done and that neither the suspension nor the discharge will be used against her in any way. The Respondent shall also post the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010).

In addition, a public reading of my remedial notice is appropriate here. The Respondent's violations of the Act are sufficiently serious and Respondent is a recidivist Act violator that the reading of the notice is necessary to dissipate as much as possible any lingering effects of the Respondent's unfair labor practices, and to enable employees to exercise their Section 7 rights free of coercion. See, e.g., *Sheraton Anchorage*, 363 NLRB No. 6, slip op. at 2 (2015); *Carey Salt Co.*, 360 NLRB No. 38, slip op. at 2 (2014); *HTH Corp.*, 356 NLRB 1397, 1404 (2011), enfd. 693 F.3d 1051 (9th Cir. 2012); *Homer D. Bronson Co.*, 349 NLRB 512, 515 (2007), enfd. mem. 273 Fed.Appx. 32 (2d Cir. 2008). I observe that since a large number of Respondent's supervisors and managers are carryovers from Station Casinos, a previous violator under the Act for multiple claims and in light of Administrative Law Judge Chu's recent finding that Aliante violated the Act in 2014, I further find that Respondent has a high disregard for the Act which is particularly powerful in undermining the employees' free exercise of their Section 7 rights. Therefore, I will require that the remedial notice be read aloud to the Respondent's employees by Danzak (or, if he is no longer employed by the Respondent, the current senior vice president of Human Relations) in the presence of a Board agent or, at the Respondent's option, by a Board agent in that official's presence. Given that a significant number of the Respondent's employees speak Spanish, I will require the notice to be read in both English and Spanish.

On these findings of fact, conclusions of law, and upon the entire record, pursuant to Section 10(c) of the Act, I hereby issue the following recommended<sup>23</sup>

#### ORDER

The Respondent, Aliante Gaming, LLC d/b/a Aliante Casino and Hotel, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully suspending or discharging or otherwise discriminating against Respondent's employees because of their membership in, activities on behalf of, or referral from the Union, or any other labor organization; and

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the right 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 from the date of this Order, offer employee Lourdes Flores immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially

equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make employee Lourdes Flores whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, as set forth in the remedy section of this decision.

(c) Compensate employee Lourdes Flores for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and submit the appropriate report to the Social Security Administration so that when backpay is paid to Flores, it will be allocated to the appropriate calendar quarters.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension and discharge, and within 3 days thereafter, notify employee Flores in writing that this has been done and that the suspension or loss of employment will not be used against her in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days from the date of this order, post at its facilities in and around Las Vegas, Nevada, copies of the attached notice marked "Appendix"<sup>24</sup> in both English and the Spanish language. The attached remedial notice shall be read aloud to the Respondent's employees by Richard Danzak (or, if he is no longer employed by the Respondent, the current senior vice president of Human Relations) in the presence of a Board agent or, at the Respondent's option, by a Board agent in that official's presence. The notice shall be read 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 also be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, 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 by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 16, 2015.

(g) Within 21 days after service by the Region, file with the

<sup>23</sup> 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.

<sup>24</sup> 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."

Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. October 30, 2015

APPENDIX

NOTICE TO MEMBERS  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT do anything that interferes with these rights. More particularly:

WE WILL NOT suspend or discharge you because you engage in activities on behalf of, or in support of, the Culinary Workers Union, Local 226 or any other labor organization.

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

WE WILL offer Lourdes Flores immediate and full reinstatement to her former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority

or any other rights and/or privileges she previously enjoyed.

WE WILL make Lourdes Flores whole for the wages and other benefits she lost as a result of her discharge.

WE WILL expunge and physically remove from our files all references to the January 16, 2015 suspension and the January 26, 2015 discharge of Lourdes Flores, notify her, in writing, that such action has been accomplished and that the expunged material will not be used as a basis for any future personnel action against her or made reference to in any response to any inquiry from any employer, prospective employer, employment agency, unemployment insurance office, or reference-seeker.

ALIANTE GAMING, LLC D/B/A ALIANTE CASINO AND HOTEL

The Administrative Law Judge's decision can be found at [www.nlr.gov/case/28-CA-145644](http://www.nlr.gov/case/28-CA-145644) 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.

