

Decision, and requests that the Board reject or modify the following findings of fact, conclusions of law, and remedies:

I. THE LOWER LOBBY INTERACTION (20-CA-171102)

Respondent objects to the following mischaracterization of the allegation, misstatement of the record, misapplication of law, findings, and conclusions in the Decision relating to the allegation that on March 4, 2016, Security Officer Andrew Smith (“Smith”) directed two off-duty employees, Cecilia Aradanas (“Aradanas”) and Faustino Fabro (“Fabro”) to leave a non-work area while the off-duty employees were engaged in Union and/or protected concerted activities.

Exception No. 1

Respondent takes exception to the ALJ’s mischaracterization of the allegation: The ALJ incorrectly states that the allegation is that on March 4, 2016, Smith unlawfully told two off-duty employees, Aradanas and Fabro, that they could not leaflet in the Lower Lobby of the Aston Waikiki Beach Hotel (“AWBH”). *See* Decision at 8:4-6.

Exception No. 2

Respondent takes exception to the ALJ’s finding that Smith’s directive violated Section 8(a)(1) of the National Labor Relations Act (“the Act”) because the Lower Lobby is a nonwork area under Board precedent and that Respondent has no right to prohibit off-duty employees from distributing literature in the Lower Lobby. *See* Decision at 8:9-11, 20-21.

Exception No. 3

Respondent takes exception to the ALJ’s implied misstatement of the record that the only activities performed in the AWBH Lower Lobby are security, maintenance, and valet parking. *See* Decision at 8:11-13.

Exception No. 4

Respondent takes exception to the ALJ's improper reliance on ALJ Anzalone's application of the indoor casino standard in analyzing whether the Lower Lobby is a work area. *See* Decision at 8:8-14.

Exception No. 5

Respondent takes exception to the ALJ's misapplication of law that the activities found to be only incidental to the employers' primary functions in the cases ALJ Anzalone cited are the same and only activities performed in the AWBH Lower Lobby, thus making the Lower Lobby a nonwork area under Board precedent. *See* Decision at 8:11-14.

Exception No. 6

Respondent takes exception to the ALJ's conclusion of law that by directing off-duty employees on March 4, 2016 not to distribute union leaflets in the Lower Lobby, Respondent committed an unfair labor practice affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act. *See* Decision at 18:10-13.

II. THE PERFORMANCE MANAGEMENT PLAN (20-CA-181350)¹

Respondent objects to the following mischaracterizations of evidence, misapplications of law, findings, and conclusions in the Decision relating to the allegation that on about June 24, 2016, Respondent unlawfully imposed onerous and rigorous terms and conditions of employment on Fabro by placing him on a PMP because of his Union activities.

Exception No. 7

Respondent takes exception to the ALJ's failure to draw an adverse inference from the failure of Fabro, the alleged discriminate, to testify – yet alone even address Respondent's

¹ Case 20-CA-181350 was transferred to the Board on May 8, 2017, almost one month after the other three Cases were transferred on April 12, 2017, due to an inadvertent error by the Executive Secretary.

argument in favor of the adverse inference. The ALJ merely mentions one time in a footnote that the Counsel for the General Counsel failed to call Fabro as a witness. *See* Decision at 10:13 n.13.

Exception No. 8

Respondent takes exception to the ALJ's finding that a preponderance of the record evidence supports the General Counsel's contention that the PMP violated Section 8(a)(3) and (1) of the Act because it imposed more onerous working conditions on Fabro and was motivated by union animus. *See* Decision at 12:15-17, 20-21.

Exception No. 9

Respondent takes exception to the ALJ's finding that the PMP subjected Fabro to closer supervision based solely on a daily evaluation of his work by the room attendants, a weekly evaluation by AWBH Executive Housekeeper Marissa Cacacho ("Cacacho"), and four brief meetings with Cacacho and AWBH Rooms Division Manager Jenine Webster ("Webster") to review the evaluations. *See* Decision at 12:28-30.

Exception No. 10

Respondent takes exception to the ALJ's finding that the PMP constituted more onerous working conditions under the *Wright Line* test and Board precedent. *See* Decision at 12:28-31, 13:6-10, 13:21-23, 18:1-4.

Exception No. 11

Respondent takes exception to the ALJ's finding that "the lack of any post-PMP disciplinary action against Fabro ... is not particularly probative given that the instant unfair labor practice charge was served on Respondent on August 3 alleging that the PMP was unlawful." *See* Decision at 16:43 – 17:2.

Exception No. 12

Respondent takes exception to the ALJ's finding that the statements made almost one year earlier at May 2015 employee meetings by AWBH Executive Vice President of Operations Gary Ettinger ("Ettinger") are alone sufficient to establish that Respondent harbored union animus because Ettinger participated in the multi-manager decision to implement the PMP. *See* Decision at 13:37-44.

Exception No. 13

Respondent takes exception to the ALJ's mischaracterization of the evidence of animus as "substantial" and that therefore the General Counsel clearly satisfied the initial burden under *Wright Line* of showing union animus. *See* Decision at 14:23-24, 18:1-2.

Exception No. 14

Respondent takes exception to the ALJ's finding that Respondent orchestrated the complaints and the petition against Fabro and/or seized on them as pretext for implementing the PMP. *See* Decision at 14:28-30.

Exception No. 15

Respondent takes exception to the ALJ's finding that the timing of the complaints and the petition create a reasonable inference that the complaints and petition were part of a coordinated and orchestrated effort to target Fabro. *See* Decision at 15:1-15.

Exception No. 16

Respondent takes exception to the ALJ's finding that based on the record as a whole, there is good reason not only to disbelieve Cacacho's testimony about the complaints and the petition, but to infer that the truth is the opposite. *See* Decision at 16:11-13.

Exception No. 17

Respondent takes exception to the ALJ's crediting of AWBH Room Attendant Digna Cadaoas' ("Cadaoas") testimony that Cacacho told her Fabro was being evaluated so that he would be dismissed and there would not be anyone to lead the rallies. *See* Decision at 16:21-25, 17:4-5.

Exception No. 18

Respondent takes exception to the ALJ's finding that AWBH Housekeeping Supervisor Elvie Rivera told Cadaoas not to fill out the evaluation form at all if she was going to check satisfactory. *See* Decision at 17:13-14, 17:15 n.23.

Exception No. 19

Respondent takes exception to the ALJ's finding that the General Counsel has shown by a preponderance of the credible evidence that the PMP was implemented as a pretext to target Fabro because of his prominent role in the union campaign. *See* Decision at 18:2-4.

Exception No. 20

Respondent takes exception to the ALJ's finding and/or conclusion that Respondent cannot establish that it would have taken the same action in the absence of union activity, and the PMP violated Section 8(a)(3) and (1) of the Act as alleged. *See* Decision at 18:4-6.

Exception No. 21

Respondent takes exception to the ALJ's conclusion of law that by placing Fabro on the PMP on June 24, 2016 because of his open and active support for the union and to discourage employees from supporting the union, Respondent committed an unfair labor practice affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act. *See* Decision at 18:15-18.

III. REMEDY

Respondent objects to the remedy recommended in the Decision (*see* Decision at 18:22-33²), the Order (*see* Decision at 18:35 – 19:38), and the Appendix (Notice to Employees) as unwarranted based on the above Exceptions.

DATED: Honolulu, Hawaii, June 5, 2017.

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ASTON WAIKIKI BEACH HOTEL AND
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² The Board should note that there is nothing in the record which indicates that any portion of the PMP paperwork was placed in Fabro’s personnel file. Thus, the remedy that Respondent should “remove it from Fabro’s personnel file and notify Fabro that it has done so” is not appropriate. *See* Decision at 18:27.

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

UNITE HERE LOCAL 5,
Charging Party,

v.

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

Respondent.

CASE NOS. 20-CA-167132
20-CA-171004
20-CA-171102
20-CA-181350

CERTIFICATE OF SERVICE

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I HEREBY CERTIFY that on June 5, 2017, a copy of *Aqua-Aston Hospitality, LLC D/B/A Aston Waikiki Beach Hotel And Hotel Renew's Exceptions to Administrative Law Judge's Decision* was electronically filed with the National Labor Relations Board Office of the Executive Secretary and served via e-mail upon:

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