

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AQUA-ASTON HOSPITALITY, LLC d/b/a ASTON WAIKIKI
BEACH HOTEL and HOTEL RENEW

and

Cases 20-CA-167132
20-CA-171004
20-CA-171102
20-CA-181350

UNITE HERE! LOCAL 5

COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF

Submitted by:
Trent K. Kakuda
Counsel for the General Counsel
National Labor Relations Board
Region 20, Subregion 37
300 Ala Moana Boulevard, Rm. 7-245
P.O. Box 50208
Honolulu, Hawaii 96850

Table of Contents

I.	INTRODUCTION.	.1
II.	FACTS	.4
	A. Respondent Interferes With Off-Duty Employees' Distribution of Union Leaflets In the Lower Lobby/Porte Cochere for the Third Time.	.4
	B. Respondent Imposes a Performance Management Plan on Faustino Fabro Due to His Protected Activities.	.5
III.	THE ALJ PROPERLY FOUND THAT RESPONDENT UNLAWFULLY DIRECTED OFF-DUTY EMPLOYEES TO STOP DISTRIBUTING UNION LEAFLETS IN THE LOWER LOBBY/PORTE COCHERE ON MARCH 4, 2016 (Respondent's Exceptions 1-6).	.11
	A. The Board's Findings in <i>Aston I</i> Conclusively Establish That the Lower Lobby Area Where Fabro and Aradanas Were Situated is a Nonwork Area (Respondent's Exceptions 2, 3, 4, and 5).	.12
	B. Fabro and Aradanas Were Engaged in Protected Union Activity When Respondent Directed Them to Leave the Lower Lobby/Porte Cochere (Respondent's Exceptions 1 and 6).	.12
	C. The ALJ's Findings Are Consistent With the Consolidated Complaint's Allegation and Supported By the Evidence (Respondent's Exceptions 1 and 6).	.15
IV.	THE ALJ PROPERLY FOUND THAT RESPONDENT UNLAWFULLY IMPOSED A PERFORMANCE MANAGEMENT PLAN ON FAUSTINO FABRO (Respondent's Exceptions 7-21).	.16
	A. The PMP Was An Onerous Term and Condition of Employment Constituting An Adverse Employment Action Against Fabro (Respondent's Exceptions 8 to 10)	.17
	B. The PMP Was Motivated By Union Animus (Respondent's Exceptions 11 to 13).	.19
	C. The Evidence, When Viewed As a Whole, Establishes That the PMP Was Implemented Based on Pretext (Respondent's Exceptions 14 to 21).	.21
	1. The ALJ Properly Credited Cadaoas' Testimony to Determine Cacacho's and Rivera's Motives (Respondent's Exceptions 17 to 19, 21).	.22

2. Cacacho’s Testimony Was Properly Discredited (Respondent’s Exceptions 16, 19, 21).	.23
3. The Complaints and Petition Were Conveniently Coordinated (Respondent’s Exceptions 14, 15, 19, 21).	.25
4. Pretext Is Also Circumstantial Evidence of Animus (Respondent’s Exceptions 20 to 21).	.26
D. The ALJ Properly Declined to Draw an Adverse Inference (Respondent’s Exception 7).	.27
E. Respondent’s Objection to the Remedy Should Be Rejected.	.28
V. CONCLUSION.	.29

Table of Authorities

Federal Cases

- 1) *Underwriters Laboratories, Inc. v. NLRB*, 147 F.3d 1048 (9th Cir. 1998). .27

Board Cases

- 1) *Aston Waikiki Beach Hotel and Hotel Renew*, 365 NLRB No. 44 (2017). .1-4, 14, 16
- 2) *Aston Waikiki Beach Hotel and Hotel Renew*, 365 NLRB No. 53 (2017). .1, 3-4, 12, 14, 16
- 3) *Avondale Indus.*, 329 NLRB 1064 (1999). .18
- 4) *Carillon House Nursing Home*, 268 NLRB 589 (1984). .18
- 5) *Colgate-Palmolive Co.*, 323 NLRB 515 (1997). .12
- 6) *DeTray Plating Works, Inc.*, 155 NLRB 1353 (1965). .14
- 7) *Ferguson-Williams, Inc.*, 322 NLRB 695 (1996). .18
- 8) *Flexsteel Indus.*, 316 NLRB 745 (1995). .23
- 9) *Golub Corp.*, 338 NLRB 515 (2002). .13
- 10) *Greco & Haines*, 306 NLRB 634 (1992). .25
- 11) *Hawaiian Dredging Construction Co.*, 362 NLRB No. 10 (2015). .27
- 12) *International Business Systems*, 258 NLRB 181 (1981). .27
- 13) *Limestone Apparel Corp.*, 255 NLRB 722 (1981). .27
- 14) *Opelika Welding*, 305 NLRB 561 (1991). .20-21
- 15) *Roosevelt Memorial Med. Ctr.*, 348 NLRB 1016 (2006). .27
- 16) *Steelcase, Inc.*, 316 NLRB 1140 (1995). .15
- 17) *Stevens Creek Chrysler*, 357 NLRB 633 (2011). .23
- 18) *Vanguard Fire & Security Systems*, 345 NLRB 1016 (2005). .11

19) *Whitesville Mill Service Co.*, 307 NLRB 937 (1992). .26

20) *Wright Line*, 251 NLRB 1083 (1980). .18

Other Authorities

1) NLRB Rules & Regulations, Section 102.45(b). .11

I. INTRODUCTION¹

The unfair labor practices at issue in this proceeding represent the latest installment in a series of unlawful actions taken by Respondent Aqua-Aston Hospitality, LLC d/b/a Aston Waikiki Beach Hotel and Hotel Renew (Respondent) in response to a campaign launched by UNITE HERE! Local 5 (Union) in February 2015. In prior proceedings, the National Labor Relations Board (Board) already concluded that Respondent: (1) violated Section 8(a)(3) and (1) of the National Labor Relations Act (Act) on June 30, 2015, by issuing written warnings to employees Edgardo Guzman and Santos “Sonny” Rangunjan; (2) violated Section 8(a)(1) of the Act on May 19, 2015, when Executive Vice President Gary Ettinger (Ettinger) threatened employees with discharge for engaging in union and/or protected activity, ordered employees to cease engaging in union and/or protected activity, and solicited employees to disclose their union sympathies; and (3) violated Section 8(a)(1) on August 11, 2015, when security official Andrew Smith (Smith) threatened employees with unspecified reprisals for handbilling in a nonwork area (*i.e.*, Aston Waikiki Beach Hotel’s lower lobby/porte cochere). See *Aston Waikiki Beach Hotel and Hotel Renew*, 365 NLRB No. 53 (April 10, 2017) (*Aston I*).

The Board’s findings in *Aston I* resurrected earlier unfair labor practice allegations that the parties had initially resolved via a bilateral, informal settlement agreement approved by Region 20’s Regional Director on April 29, 2015. See *Aston Waikiki Beach Hotel and Hotel Renew*, 365 NLRB No. 44 (April 11, 2017) (*Aston II*). Based on its findings in *Aston I*, the Board concluded that Respondent violated at least three of the settlement’s cease-and-desist

¹ The Administrative Law Judge is referred to herein as “ALJ.” References to the ALJ’s decision are noted as “ALJD” followed by the page number(s), colon, and line number(s). References to the transcript are noted as “Tr.” followed by the page numbers(s). References to Counsel for the General Counsel’s exhibits are noted as “GC” followed by the exhibit number. References to Respondent’s exhibits are noted as “R” followed by the exhibit number. Joint exhibits are referenced as “Jt.” followed by the exhibit number. Respondent’s Brief in Support of Exceptions is referred to herein as “RBS” followed by the page number(s). Counsel for the General Counsel is referred to herein as “General Counsel.”

terms in *Aston II. Id.*, slip op. at 2, fn.1. Consequently, the Board set aside the settlement and found that the prior, settled unfair labor practices were deemed admitted by Respondent pursuant to the noncompliance provisions of the agreement. The Board then granted default judgment in favor of General Counsel and found that Respondent violated Section 8(a)(1) multiple times when: **(1)** Security Site Supervisor Andrew Smith, Front Office Supervisor Lillian Mesiona, and Housekeeping Supervisor Elvira Rivera (Rivera) engaged in surveillance of employees' union and protected concerted activities on February 3, 2015; **(2)** Housekeeping Supervisor Inocencio Llamas (Llamas) and Housekeeping Supervisor Rivera interrogated employees about their union membership, activities, and sympathies on February 3, 2015; **(3)** Executive Housekeeper Marissa Cacacho (Cacacho) and Housekeeping Supervisor Rivera interrogated employees about their own union membership, activities, and sympathies and the union membership, activities, and sympathies of other employees on February 3, 2015; **(4)** Housekeeping Supervisor Rivera interrogated employees about their union membership, activities, and sympathies on February 22, 2015; **(5)** Housekeeping Supervisor Connie Quibilan (Quibilan) and Housekeeping Supervisor Llamas directed employees to remove and/or not to wear union insignia on February 14, 2015; **(6)** Housekeeping Supervisor Rivera solicited employee signatures on a petition withdrawing support from the Union on February 19, 21, and 22, 2015; **(7)** Housekeeping Supervisor Rivera threatened employees with adverse employment consequences and/or unspecified reprisals on February 21 and 22, 2015, if the employees did not sign a petition to withdraw support from the Union; and **(8)** Security Site Supervisor Smith impliedly threatened off-duty employees in the lower lobby/porte-cochere with discipline, discharge and/or unspecified reprisals when he threatened to issue them trespass notices for engaging in handbilling in the nonwork area on March 7, 2015. Tellingly, Ettinger's misconduct in *Aston I*

on May 19, 2015, occurred barely three weeks after the Regional Director approved the settlement agreement in *Aston II. Id.*, slip op. at 3. The swiftness with which Respondent abrogated its settlement obligations was matched by its unabashed recidivism. The misconduct in *Aston I* on August 11, 2015, which violated the settlement, involved the same security official (Smith) threatening, among others, the same off-duty employee (Jonathan Ching) for engaging in the same protected activity (handbilling) in the same nonwork area (lower lobby/porte cochere) as the misconduct on March 7, 2015, that Respondent had settled earlier. See *id.*, slip op. at 3; *Aston Waikiki Beach Hotel and Hotel Renew*, 365 NLRB No. 53, slip op. at 10-12.

On April 12, 2017, Administrative Law Judge Jeffrey D. Wedekind issued the most recent decision finding that Respondent once again violated Sections 8(a)(1) and (3) of the Act (*Aston III*). Specifically, the ALJ concluded that Respondent violated Section 8(a)(3) and (1) by placing Housekeeping Inspector Faustino Fabro (Fabro) on a "Performance Management Plan" on June 24, 2016, in retaliation for his Union activities. (ALJD 18:15-18). The ALJ also concluded that Respondent again violated Section 8(a)(1) on March 4, 2016, by directing off-duty employees not to distribute union leaflets in the same areas of the lower lobby that the Board previously found to be nonwork areas in *Aston I*. (ALJD 18:10-13). This third act of recidivism involved the same security official (Smith), same protected activity (off-duty employee handbilling), and same nonwork area (lower lobby/porte cochere) as the violations on March 7 and August 11, 2015. (ALJD 8:17-18).

On June 5, 2017, Respondent filed 21 exceptions to the ALJ's decision and a brief in support of those exceptions. Much of Respondent's exceptions rely upon testimony the ALJ did not credit and/or ignores the substantial record evidence as a whole. Respondent's legal arguments are also inconsistent with established Board law. For the following reasons,

Respondent's exceptions should be rejected and the ALJ's reasoned decision should be adopted by the Board.

II. FACTS

A. Respondent Interferes With Off-Duty Employees' Distribution of Union Leaflets In the Lower Lobby/Porte Cochere for the Third Time

On March 7 and August 11, 2015, security official Andrew Smith interfered with off-duty employees' handbilling in the lower lobby/porte cochere. See *Aston Waikiki Beach Hotel and Hotel Renew*, 365 NLRB No. 44, slip op. at 3; *Aston Waikiki Beach Hotel and Hotel Renew*, 365 NLRB No. 53, slip op. at 10-12. On March 4, 2016, he did it again.²

On the morning of March 4, off-duty employees Faustino Fabro (Fabro) and Cecilia Aradanas (Aradanas) entered the lower lobby/porte cochere to distribute leaflets they received from the Union. (Tr. at 230-31). Fabro and Aradanas each received their leaflets that morning from Union Organizing Director Morgan Evans (Evans) and Union President Gemma Weinstein (Weinstein), respectively. (Tr. at 231, 234, 253-54, 266; GC 17). Weinstein confirmed that the Union had created the leaflets, Evans confirmed that the Union had used it to handbill several times before, and both indicated that it was the Union leaflet used on March 4. (Tr. at 253-54, 266; GC 17).

It is undisputed that Fabro and Aradanas stood in the exact same area of the lower lobby/porte cochere that the Board concluded was a nonwork area in *Aston I*. (Jt. 1; ALJD 8:8-20). After a few moments, Smith approached the two off-duty employees as they stood in the lower lobby/porte cochere and spoke with them. (Tr. at 234-36, 268-69). Organizing Director Evans approached Smith as he spoke to Fabro and Aradanas. (Tr. at 236-37, 268-69, 555-56; GC 16 at 0:39 to 0:42). Smith knew Evans was affiliated with the Union from prior encounters,

² All dates herein refer to 2016 unless specified otherwise.

such as his observation of her activities along Lemon Road on January 13, where the employee entrance is located. (Tr. at 532-34).

By Smith's own admission, he told Fabro and Aradanas "they weren't allowed to pass out flyers in the lower lobby in a working area and to please leave." (Tr. at 555). Respondent also admits that "on March 4, 2016, Smith, in the lower lobby of the Aston Waikiki Beach Hotel, directed off-duty employees to leave the area in which they were standing[.]" (GC 1(m), ¶8).

According to Aradanas' undisputed testimony, and without any challenge on cross-examination, she distributed two leaflets that morning in the lower lobby/porte cochere before Smith advanced upon her and Fabro. (Tr. at 234-35). Fabro, Aradanas, and Evans left the lower lobby/porte cochere following Smith's directive. (Tr. at 237-38, 269-70; GC 16 at 0:41 to 1:20).

B. Respondent Imposes a Performance Management Plan on Faustino Fabro Due to His Protected Activities

Housekeeping Inspector Fabro is an open Union supporter who has participated in various Union activities, as noted by the ALJ. (Tr. at 215-16, 228, 230-34, 256, 270-74, 295-96; GC 16 at 0:20; GC 22; ALJD at 9:5-10). These include Fabro's very public participation in rallies, appearance on Union flyers, and handbilling at the Aston Waikiki Beach Hotel. (Tr. at 215-16, 228, 272-74, 295-96; GC 22). As found by the ALJ, Respondent is aware of Fabro's activities and does not dispute it. (ALJD at 13:30-31). Nor does Respondent challenge this finding in its exceptions.

In May 2016, a suspicious series of abrupt complaints about Fabro suddenly appeared. In all, 16 written complaints appeared in May. (GC 3; GC 4; GC 5). Two were submitted by housekeeping supervisors and dated May 7 and 15. (GC 3(a)-(b)). Eight were signed on May 16 by various housekeeping department personnel (GC 3(c)-(j)), another five on May 24 (GC 4(a)-(e)), and one on May 31. (GC 5). Prior to this sudden barrage, Fabro had worked for

Respondent over ten years and received good evaluations. (Tr. at 90; GC 30; GC 31; GC 32). Moreover, there is no evidence of any disciplinary action issued to him; Rooms Division Director Jenine Webster (Webster), who had worked with Fabro for at least ten years, testified that she was unaware of any discipline issued to Fabro. (Tr. at 90).

The complaints were all received by Executive Housekeeper Marissa Cacacho, who played an important role in preparing them. (Tr. at 412-13; GC 3; GC 4; GC 5). Except for the complaints prepared by the housekeeping supervisors and one handwritten complaint (GC 3(a)-(b), (i)), Cacacho typed all of the other complaints for her housekeeping department workers and had them sign it in her presence. (Tr. at 415-19, 440). Without conducting any investigation on her own, Cacacho forwarded the prepared complaints to General Manager Mark DeMello (DeMello) and Rooms Division Director Webster for follow up. (Tr. at 146, 419, 441-42).

A “Petition Against Faustino Fabro” (Petition), addressed to DeMello, also suddenly appeared around the same time as the complaints in May. (GC 2). The Petition was signed by 54 housekeeping department employees between May 11 and 15. (GC 2). Although addressed to DeMello, Cacacho’s unreliable testimony is that she was given the Petition by Temporary Transfer Inspectress Alona Afable (Afable) after the morning briefing on May 16. (Tr. at 421-23). Cacacho unconvincingly denied knowing about the Petition when Afable gave it to her. (Tr. at 436-38). However, just before the daily housekeeping briefing that same morning, several housekeeping department employees went to Cacacho’s office to sign the complaints about Fabro that Cacacho had typed for them. (Tr. at 438-41). Although every single one of these employees had seen and signed the Petition before then, Cacacho unbelievably claimed that no one mentioned the Petition to her. (Tr. at 441; GC 2; GC 3(c)-(j)). Cacacho doubled-down on her astonishing denial by testifying that no one ever spoke to her about the Petition before Afable

presented it to her, even though it was being circulated in her department and more than half of her employees eventually signed it. (Tr. at 437-38). Cacacho testified that she presented the Petition to DeMello and Webster on the same day she received it. (Tr. at 51-52, 146, 422-23; GC 2).

DeMello and Webster forwarded the complaints and Petition to Human Resources Vice President Janice Wakatsuki (Wakatsuki), General Counsel Liane Kelly (Kelly), and Executive Vice President Gary Ettinger (Ettinger). (Tr. at 358-59, 363-69, 484-86). DeMello and Webster interviewed the employees who submitted complaints against Fabro, and then interviewed Fabro on June 7 about the complaints and Petition. (Tr. at 63-64, 369, 487-88).

In addition to the all-too-convenient timing of their sudden appearance, the complaints contained suspicious aspects which made them appear contrived. Despite these problems, there is also no specific evidence these deficiencies were taken into meaningful account during Respondent's investigation. For example, Housekeeping Supervisor Connie Quibilan kicked off the anti-Fabro complaints on May 7, when she signed a typed complaint with Housekeeping Supervisor Elvira Rivera. (Tr. at 469-72; GC 3(a)). It notes that Fabro failed to offer assistance on one occasion to a room attendant, but does not mention whether Fabro's assistance was requested.³ (Tr. at 475-76; GC 3(a)). Despite being Fabro's supervisor, Quibilan did not know whether Fabro was performing other duties at the time he failed to offer assistance. (Tr. at 475-76; GC 3(a)). Instead she inexplicably rushed to accuse Fabro of wrongdoing by submitting the complaint without knowing this crucial fact. Cacacho compounded this rush to judgment by also failing to follow up with Fabro. (Tr. at 413-14, 441-42).

³ Cacacho claims that the clerk called Fabro for assistance (Tr. at 414), but this testimony is uncorroborated and suspect given Cacacho's problematic credibility.

Quibilan submitted another complaint to Cacacho regarding Fabro, dated May 15, which also complained that Fabro again failed to show up in a timely manner to assist in cleaning a room that he released while still dirty. (Tr. at 414, 472-73; GC 3(b)). But again, Quibilan did not confirm whether Fabro was performing other duties at the time he failed to offer assistance. (Tr. at 476). There is also no indication that she spoke with Fabro to understand the situation or even to simply inform him of what he supposedly did wrong. Instead, Quibilan rushed to present a typewritten accusation to Cacacho, who then did not follow up with any serious investigation of her own aside from chatting with Quibilan. (Tr. at 414, 441-42).

Several of the individual employee complaints are vague and appear unprompted by particular incidents involving Fabro, as though created merely to manufacture documentation against Fabro. For example, several indicate that they are not comfortable working with Fabro just because he does not talk to them. (GC 3(f), (h), (i), (j)). The wording of certain individual employee complaints are also too identical to be a unique, individual report about a specific incident. (GC 3(i), (j)). Another complaint was submitted by a housekeeping clerk who does not work directly with Fabro and would have no conceivable interest in complaining about his work. (Tr. at 438-39; GC 3(d)). Certain complaints also appear to be consciously designed to amplify the documentary record against Fabro. For example, Cacacho typed four more statements which were signed on May 24 by several employees who had just signed statements on May 16. (Tr. at 417-18; GC 3(e), (h)-(i); GC 4(a), (c), (e)).

The Petition's convenient appearance with the unexplained, sudden cascade of complaints raises suspicion in and of itself. But, DeMello and Webster also failed to pursue a basic background investigation into a document both regarded as highly unusual. (Tr. at 130-31, 139, 360-61). Amazingly, DeMello and Webster did not investigate who prepared the petition or

gave it to Cacacho; Webster also did not know who circulated it. (Tr. at 54, 140-41, 382-83). Neither DeMello nor Webster took measures to discover if any of the signers comprehended what they were signing. (Tr. at 141-42, 384). DeMello also never asked any of the complaining employees he interviewed about the Petition. (Tr. at 384, 385). Wakatsuki testified she relied on DeMello's and Webster's investigation, and she did not have any contact with employees who signed the Petition. Wakatsuki also did not inquire as to the origin of the Petition. (Tr. at 499-500).

Following this investigation, Respondent's officials made a collective decision to subject Fabro to a PMP. (Tr. at 372, 487). According to the testimony of DeMello, Webster, and Cacacho, they, along with Wakatsuki, Kelly, and Ettinger, played a role in the process leading to the decision to impose the PMP on Fabro. (Tr. at 66-67, 424-25, 371-72). Ultimately, Wakatsuki claims she suggested imposing a PMP on Fabro, but DeMello confirmed it was a collective decision based on the investigation. (Tr. at 372, 501-02).

On June 24, DeMello, Webster, and Cacacho met with Fabro to inform him of the PMP. (Tr. at 68, 377, 423; GC 6). DeMello gave Fabro a copy of the PMP and reviewed it with him. (Tr. at 68-69, 378-79). Pursuant to the PMP: (1) room attendants assigned to work with Fabro would be given an evaluation of Fabro to complete every day, (2) Cacacho would evaluate Fabro at the end of each week; and (3) a weekly summary of room attendants' responses broken down by evaluation category with a sampling of their comments would be created. (GC 6; ALJD at 10:18-11:24). Fabro's evaluation period began the next day on June 25. (Tr. at 73).

Fabro was evaluated for several weeks by room attendants. (GC 7, 9, 11, 13). Room Attendant Digna Cadaoas (Cadaoas) participated in Fabro's PMP evaluation process. Cadaoas evaluated Fabro for five days as she worked with him. (Tr. at 173, 184). On the second day she

was given an evaluation, Cacacho handed the form to Cadaoas. (Tr. at 174). Cadaoas testified that Cacacho “explained why Tino needs to be evaluated, so that if Tino will be dismissed then there’s no more somebody to lead the rally if he’s no longer there.” (Tr. at 174-75). When she testified, Cacacho did not mention any conversations she had with Cadaoas about the evaluations.

On one of her evaluations of Fabro during the PMP process, Cadaoas testified that she gave him satisfactory ratings in all factors. (Tr. at 175-76). The next day, Housekeeping Supervisor Rivera called Cadaoas and said “Did you know what you signed? Why did you check all of the satisfactory boxes?” (Tr. at 178-79). Cadaoas replied that Fabro had assisted her that day. Rivera said that it would be better for Cadaoas not to put anything if she was going to check satisfactory. (Tr. at 176-80, 194, 199). Cadaoas turned in a blank evaluation form that day. (Tr. at 179-80).

The next day, Cadaoas was cleaning a room at about 4:00 p.m. when Rivera and Quibilan dropped by. (Tr. at 181). Rivera told Cadaoas to fill out the evaluation form. (Tr. at 181). Cadaoas said that Fabro had assisted her. Rivera told Cadaoas that was Fabro’s job and to check the unsatisfactory boxes. (Tr. at 181-82). Cadaoas complied with Rivera’s directive and then submitted the evaluation. (Tr. at 182-83).

Webster and Cacacho met with Fabro on July 7 and 25 and August 9 and 19 to discuss Cacacho’s evaluations and the summary of room attendants’ evaluations.⁴ (Tr. at 75-87; GC 7-14). At the end of each meeting, Fabro was informed that a majority of room attendants rated him unsatisfactory in every category. (GC 7, 9, 11, 13). Cacacho rated Fabro unsatisfactory in all ten evaluation factors on July 7 and on six factors on July 25. (GC 8, 10). On August 3, Respondent was served with an unfair labor practice charge filed against it by the Union,

⁴ Wakatsuki also attended the July 25 meeting. (ALJD at 12 fn.14).

alleging unlawful treatment of Fabro. (GC 1(g)-(h)). Cacacho thereafter rated Fabro unsatisfactory on five factors on August 9, and on five factors again on August 19. (GC 12, 14).

Despite these questionable results, Webster and Cacacho notified Fabro on August 19 that the PMP would be terminated. (Tr. at 87; GC 15). Webster threatened Fabro with discipline if he did not perform at a satisfactory level in the future. (Tr. at 87-88; GC 15). Even though the majority of room attendants still rated Fabro unsatisfactory in all categories prior to August 19, all complaints against Fabro miraculously stopped thereafter, as if someone had simply flicked a switch. (Tr. at 134, 429, 492).

III. THE ALJ PROPERLY FOUND THAT RESPONDENT UNLAWFULLY DIRECTED OFF-DUTY EMPLOYEES TO STOP DISTRIBUTING UNION LEAFLETS IN THE LOWER LOBBY/PORTE COCHERE ON MARCH 4, 2016 (Respondent's Exceptions 1-6)

The ALJ concluded that Respondent violated Section 8(a)(1) when security official Smith told off-duty employees Faustino Fabro (Fabro) and Cecilia Aradanas (Aradanas) that they could not leaflet in the lower lobby on March 4. (ALJD 8:4-21). Respondent excepts to the ALJ's conclusion on several grounds. First, Respondent contends that the lower lobby/porte cochere is a work area where it could lawfully restrict off-duty employee leafleting. (RBS at 21-25).⁵ Second, Respondent appears to argue that Fabro and Aradanas were not actually engaged in protected activity when Smith directed them to leave the lower lobby/porte cochere. (RBS at 20-21). Third, Respondent appears to argue that the ALJ's findings are inconsistent with the allegation in the consolidated complaint. (RBS at 20-21; GC 1(k), ¶9). For the following reasons, Respondent's entire line of argument should be rejected.

⁵ Throughout its brief in support of exceptions, Respondent references its posthearing brief to the ALJ. However, the posthearing brief to the ALJ is not a part of the official record and those references should be stricken. See NLRB Rules & Regulations Section 102.45(b); see also *Vanguard Fire & Security Systems*, 345 NLRB 1016, 1020 (2005) (noting that a posthearing brief is not part of the official record), *enfd.* 468 F.3d 952 (6th Cir. 2006).

A. The Board's Findings in *Aston I* Conclusively Establish That the Lower Lobby Area Where Fabro and Aradanas Were Situated is a Nonwork Area (Respondent's Exceptions 2, 3, 4, and 5)

In *Aston I*, the exact same parties litigated the issue of whether the area where off-duty employees Jonathan Ching (Ching) and Lakai Wolfgramm (Wolfgramm) situated themselves on August 11, 2015, in the lower lobby/porte cochere constituted a work or nonwork area. The Board adopted the ALJ's finding that the area was a nonwork area. 365 NLRB No. 53, slip op. at 10-12. On March 4, 2016, off-duty employees Fabro and Aradanas situated themselves in the exact same places where Ching and Wolfgramm were situated on August 11, 2015. (Jt. 1). Prior to the *Aston III* hearing, the ALJ issued an order barring relitigation of the issue, "absent changed circumstances between August 11, 2015 and March 4, 2016[.]" (GC 1(t)). However, Respondent did not avail itself of the opportunity to introduce evidence of "changed circumstances" which would warrant a conclusion different from the one the Board already reached in *Aston I*. (Tr. at 40-42; ALJD 8 fn.12). Respondent also did not except to the ALJ's pre-hearing order barring relitigation of the issue, absent changed circumstances. Accordingly, ALJ Wedekind properly relied on the Board's finding in *Aston I* to conclude that the area where Fabro and Aradanas situated themselves on March 4 was a nonwork area. And, in the absence of changed circumstances, Respondent's Exceptions 2, 3, 4, and 5 should be rejected for the same reasons the Board found the disputed area to be a nonwork area in *Aston I*.⁶

B. Fabro and Aradanas Were Engaged in Protected Union Activity When Respondent Directed Them to Leave the Lower Lobby/Porte Cochere (Respondent's Exceptions 1 and 6)

Respondent appears to contend that there was insufficient evidence to conclude that off-

⁶ Respondent's citations to Advice Memoranda are inappropriate (RBS at 23-24), as noted in *Aston I*. 365 NLRB No. 53, slip op. at 12 fn.35. Similarly, Respondent's citations to ALJ decisions that the Board has not adopted on exceptions (RBS at 23, 30), are inappropriate because they are of no precedential value. See *Colgate-Palmolive Co.*, 323 NLRB 515, 515 fn.1 (1997).

duty employees Fabro and Aradanas were engaged in protected activity when Smith directed them to leave the lower lobby/porte cochere on March 4. (RBS at 20-21). In support of this, Respondent claims that there was insufficient evidence that Fabro and Aradanas possessed Union-related leaflets on March 4. (RBS at 5). Respondent simply ignores the evidence supporting the ALJ's conclusion that Fabro and Aradanas possessed leaflets when they were in the lower lobby/porte cochere that were given to them by the Union on March 4. Union President Weinstein authenticated the leaflets she provided to Aradanas on March 4 to distribute in the lower lobby/porte cochere; Aradanas also confirmed that she received leaflets to distribute that morning from Weinstein. (Tr. at 231, 253; GC 17). Union Organizing Director Evans also confirmed those same leaflets were used on March 4 and testified that she provided Fabro with the leaflets to distribute that day. (Tr. at 266; GC 17). Weinstein also confirmed that Fabro had the same leaflet as Aradanas. (Tr. at 254). Moreover, and consistent with the testimony, Weinstein's video footage shows Aradanas and Fabro holding papers in their hands while standing in the lower lobby/porte cochere. (GC 16). Thus, the evidence is conclusive that Fabro and Aradanas possessed Union-related materials on March 4.

Respondent also appears to mistakenly believe that whether Fabro successfully distributed leaflets while he was in the lower lobby/porte cochere affects the lawfulness of Respondent's conduct. (RBS at 5, 21). Whether Fabro successfully distributed any leaflets or not is irrelevant. Smith's directive was unlawful if it had a tendency to interfere with the protected activity regardless of his intent. See *Golub Corp.*, 338 NLRB 515, 516 fn.12 (2002). Here, the evidence establishes that Smith's directive actually interfered with protected activity. Aradanas' unchallenged testimony is that she actually distributed leaflets on March 4 and then Smith directed her (as well as Fabro) to leave because they were not allowed to pass out leaflets.

(Tr. at 234, 555). Accordingly, Smith still directed an off-duty employee who had successfully distributed leaflets to leave. Even assuming neither Fabro nor Aradanas successfully distributed any leaflets before being told to leave, Respondent's actions would still violate the Act. It would indeed be absurd for Smith's directive to become lawful because he actually succeeded in halting their protected activity.

To the extent Respondent argues there is insufficient evidence to establish that Fabro was there to distribute leaflets the Union gave him, this argument is contrary to the evidence. Fabro received flyers from Organizing Director Evans (Tr. at 266; GC 17); he positioned himself in the same area where other off-duty employees had previously positioned themselves to leaflet (Jt. 1); and Aradanas confirms that she and Fabro were there to distribute the Union's flyers. (Tr. at 230).

Respondent implies that Smith was unaware that he was interfering with protected activities because he did not know the flyers were related to the Union. (RBS at 6). For the reasons set forth above, this is irrelevant because “[n]o proof of coercive intent or effect is necessary under Section 8(a)(1) of the Act, the test being ‘whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.’” *DeTray Plating Works, Inc.*, 155 NLRB 1353, 1362 (1965) (citations omitted). Even assuming that it matters, the totality of credible evidence establishes that Smith was not a clueless innocent when he approached Fabro and Aradanas on March 4. Smith had twice before interfered with the same type of Union handbilling by off-duty employees in the same nonwork areas on March 7 and August 11, 2015. See 365 NLRB No. 53, slip op. at 10-12 (August 11, 2015 incident); 365 NLRB No. 44, slip op. at 3 (March 7, 2015 incident). It strains credulity to imply Smith did not know what type of handbilling Fabro and Aradanas were

engaged in on this third occasion, especially after Organizing Director Evans approached him while he spoke to Fabro and Aradanas. (GC 16 at 0:40 to 1:16).

C. The ALJ's Findings Are Consistent With the Consolidated Complaint's Allegation and Supported By the Evidence (Respondent's Exceptions 1 and 6)

Respondent contends that the ALJ mischaracterized the allegation in the consolidated complaint by failing to consider whether Smith directed Fabro and Aradanas to leave the lower lobby/porte cochere "while" they were engaged in Union and/or protected concerted activities. (RBS at 20-21). This is a puzzling assertion based on questionable semantics. (GC 1(k), ¶9). As set forth above, "while" Fabro and Aradanas were in the lower lobby/porte cochere to distribute leaflets the Union gave them, Smith told them they could not do so and directed them to leave the area. The record evidence cited above establishes this. This contention makes little sense unless Respondent is claiming the allegation should be interpreted to require proof that Smith actually directed Fabro and Aradanas to leave as they were in the physical process of handing a Union leaflet to another person. And, if Respondent is actually asserting the allegation's wording should be given such an artificial construction, that itself should give pause to considering the argument seriously. Accordingly, the ALJ's finding that Respondent violated the Act is consistent with a common-sense reading of the allegation in the consolidated complaint and supported by substantial evidence.

As for Smith's actual statement to the off-duty employees, he testified that he told them "they weren't allowed to pass out flyers in the lower lobby in a working area and to please leave." (Tr. at 555). It made no difference whether he "asked" them to leave or "ordered" them to leave the area, because both have the same coercive meaning given his position as a security official (*i.e.*, effectively telling Fabro and Aradanas they could not remain in the area to pass out Union flyers). See *Steelcase, Inc.*, 316 NLRB 1140, 1142 (1995) (noting that it makes no

difference whether a supervisor asked or ordered employees to leave). Smith's recidivism also enhances the coerciveness of his statement here. See 365 NLRB No. 53, slip op. at 10-12 (August 11, 2015 incident); 365 NLRB No. 44, slip op. at 3 (March 7, 2015 incident).

Moreover, Respondent admitted that Smith's statements were a directive. (GC 1(m), ¶8).

Based on all of the foregoing, the ALJ correctly concluded that off-duty employees Fabro and Aradanas were engaged in protected activity and that Smith's admitted directive to them was coercive. Because Fabro and Aradanas were in a nonwork area at the time, Respondent violated Section 8(a)(1) of the Act for the third time. Accordingly, the Board should reject Respondent's Exceptions 1 through 6 and affirm the ALJ's findings.

IV. THE ALJ PROPERLY FOUND THAT RESPONDENT UNLAWFULLY IMPOSED A PERFORMANCE MANAGEMENT PLAN ON FAUSTINO FABRO IN RETALIATION FOR HIS UNION ACTIVITIES (Respondent's Exceptions 7-21)

The ALJ concluded that Respondent violated Section 8(a)(3) and (1) when it placed Housekeeping Inspector Faustino Fabro on a Performance Management Plan on June 24, 2016. (ALJD 18:15-18). Respondent excepts to the ALJ's conclusion on numerous grounds. The first group of exceptions challenges the ALJ's conclusion that the PMP constituted an onerous term and condition of employment or any other type of adverse action against Fabro. (See Exceptions 8-10; RBS at 26-33). The second group of exceptions challenge the ALJ's finding that the PMP was motivated by animus towards the Union. (See Exceptions 11-13; RBS at 33-37). The third group of exceptions disputes the ALJ's finding that the PMP was pretextual and that Respondent violated the Act. (See Exceptions 14-21; RBS at 37-49). Respondent also claims the ALJ erred by failing to find an adverse inference against General Counsel because Fabro did not testify during the presentation of General Counsel's case. (Exception 7; RBS at 25-26). Finally, Respondent "objects" to the ALJ's recommended remedy as unwarranted. (Exceptions at p.7).

All of Respondent's exceptions (and objection) lack merit and should be rejected for the following reasons.

A. The PMP Was An Onerous Term and Condition of Employment Constituting An Adverse Employment Action Against Fabro (Respondent's Exceptions 8 to 10)

Respondent avers that it did not subject Fabro to closer supervision by imposing the PMP on him. (Exceptions 8-9; RBS at 27). Respondent's contention is far from persuasive. The unique PMP process created by Respondent specifically for Fabro required him to endure daily evaluations by room attendants who worked with him from June to August. (Tr. at 130, 501; GC 6-7, 9, 11, 13). Management reviewed these evaluations to monitor Fabro's work as part of the distinct PMP process developed for Fabro. (GC 7, 9, 11, 13). This is nothing more than daily job surveillance conducted by room attendants on the orders of Respondent, who would then collect and scour the evaluations for each day.

In addition to the countless eyes Respondent employed to monitor Fabro's daily work, the head of the sizable housekeeping department, Cacacho, also evaluated Fabro on a weekly basis pursuant to the unique conditions imposed on him by Respondent via the PMP (GC 6, 8, 10, 12, 14); there is no evidence that this was the case for any other employees. Even assuming Cacacho based her weekly evaluations on the room attendants' evaluations (RBS at 27 fn.26), it would still constitute increased supervision for the same reasons set forth above (*i.e.*, management used the room attendants as its agents to increase its scrutiny of Fabro to check his work). The meetings Fabro was required to participate in with Webster and Cacacho as part of the PMP process obviously confirm this increased supervision and monitoring. The meetings' purpose was for management to inform Fabro what it had learned from the daily surveillance conducted by room attendants on Respondent's orders. (Tr. at 75-76, 78-79, 81-82, 83-85; GC 7,

9, 11, 13). The meetings were also where Cacacho presented her personal, weekly evaluations of Fabro's individual job performance. (Tr. at 77-78, 80-81, 82-83, 86-87, 130, 501; GC 6, 8, 10, 12, 14). Consequently, as the ALJ aptly concluded (ALJD at 12:27-13:2), the evidence establishes that the unique PMP process imposed on Fabro was a form of increased supervision/monitoring by management.

Respondent's attempts to distinguish the cases cited by the ALJ in his decision by generally arguing that actual managers and supervisors were not physically "supervising" Fabro as he worked fails. (RBS at 27-29). The overarching principle in the cases cited by the ALJ is that management violated the Act by subjecting (or threatening to subject) employees to closer scrutiny and monitoring. (ALJD at 12:31-13:2). In this case, management constructed a process to use the room attendants' evaluations in the same way and to the same effect. Consequently, Respondent's distinction is without difference. Respondent's citation to *Avondale Indus.*, 329 NLRB 1064, 1409 (1999) is also inapt because the credited motive for the employer's closer supervision in that case was not unlawful, which is exactly the opposite from the case here. (RBS at 29-30).

Respondent also claims that the PMP process was not an adverse action under *Wright Line*⁷ and was designed to be a non-disciplinary training program. (Exceptions 8-10; RBS at 31-33). However, as discussed above, increased supervision and monitoring is an adverse action when unlawfully motivated, as found by the ALJ in the instant case. See *Ferguson-Williams, Inc.*, 322 NLRB 695, 700-01 (1996) (closer supervision violated Section 8(a)(3) and (1)); *Carillon House Nursing Home*, 268 NLRB 589, 594 (1984) (closer supervision violated Section 8(a)(3) and (1)). It then becomes no different than on-the-job harassment manufactured by

⁷ 251 NLRB 1083 (1980), *enfd.* 662 F.2d 889 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

Respondent and a “set up” for failure. Indeed, Cadaoas’ credible testimony establishes that Cacacho’s motive was to silence the Union rallies by getting rid of Fabro, and her housekeeping supervisor, Rivera, was manipulating the PMP process to achieve that end. (Tr. at 172-85, 194, 199).

B. The PMP Was Motivated By Union Animus (Respondent’s Exceptions 11 to 13)

Respondent argues that the ALJ improperly relied on Ettinger’s unlawful statements in *Aston I* as the basis for animus in this case. (Exception 12; RBS at 33-36). First, Respondent dissects the testimony of its own witnesses to posit there is no evidence indicating Ettinger played any role in the decision to implement the PMP. (RBS at 33-35). Contrary to this assertion, however, there is ample evidence to support the ALJ’s finding that Ettinger was involved. Wakatsuki’s and DeMello’s testimony indicate that the complaints and investigation results were discussed with Ettinger. (Tr. at 371-72, 487). This would serve no purpose unless it was to involve Ettinger in the discussion on how to address them. The natural flow of DeMello’s testimony is consistent with this conclusion:

Q: Okay. And did you discuss the results of your investigation with anyone?

A: Yes.

Q: Who did you discuss it with?

A: Jenine Webster, Liane Kelly, Gary Ettinger, Janice Wakatsuki.

Q: And do you recall, you know, what the decision was about how to proceed?

A: Yeah, after numerous back and forths, we decided to provide Tino with a performance management plan.

(Tr. at 371-72).

The obvious and logical progression of Wakatsuki’s testimony is also consistent with such a conclusion:

Q: Did you discuss these complaints with anyone else?

A: Yes, we discussed it with Mark DeMello, Jenine, Marissa, and Gary Ettinger, Liane.

Q: Okay.

A: Myself.

Q: Okay. As a result of those discussions, was there any decision made as to what action to take in response to these complaints?

A: Yes. We agreed on performance management program for Tino to help him.

(Tr. at 487). Additionally, the conclusion that Ettinger was involved in the decision to implement the PMP is consistent with his involvement in all other aspects of the PMP process, including the pre-PMP investigation and the decision to conclude the PMP. (Tr. at 363, 380).

Respondent also claims that Ettinger's unlawful statements in *Aston I* were too stale to evince animus a year later. (RBS at 36). Respondent fails to grasp that animus has no clear expiration date, particularly when Fabro's activities were of the same type that motivated Ettinger's unlawful statements in *Aston I*. As noted by the ALJ (ALJD at 13:41-44), the Union's campaign was still ongoing, Fabro was still openly engaging in Union activities that had been the targets of Ettinger's ire in *Aston I*, and the evidence shows that Ettinger participated in the decision to implement the PMP. See *Opelika Welding*, 305 NLRB 561, 566 (1991) (animus in prior case establishes animus in subsequent case). In such cases, it is also proper to rely on that evidence of animus even if it is more than a year old. See *id.* at 562, 568 fn.35 (violations that occurred in March and April 1989 were sufficient evidence of animus to support findings in June through December 1990).

Respondent also claims that the ALJ's reliance on the unlawful disciplines issued to Guzman and Ragunjan in *Aston I* was improper as evidence of animus in this case. (Exception 13; RBS at 36). For the same reasons set forth by the ALJ, those findings are relevant, proper evidence of animus in this case. They demonstrate Respondent's lack of honest belief in the

basis it seized upon to discipline other Union supporters in the past. (ALJD at 14:1-15). This confirms Respondent's proclivity to engage in unlawful retaliation against Union supporters (like Fabro) by citing dishonest reasons (*i.e.*, pretext). In addition, for the same reasons set forth above, this finding is also not too remote in time. See *Opelika Welding*, 305 NLRB at 562, 568 fn.35.

Finally, Respondent takes issue with the ALJ's observation that the absence of post-PMP discipline 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." (Exception 11; RBS at 32). Apparently, Respondent believes it was error for the ALJ to give little weight to the lack of post-PMP discipline as support for its argument that the PMP was lawfully motivated to assist Fabro's job performance. However, Ettinger's 8(a)(1) statements, the 8(a)(3) discipline issued to Guzman and Ragonjan, and the additional reasons discussed *infra* indicating that the PMP was based on pretext, support the ALJ's finding. The totality of credited evidence indicates that the lack of post-PMP discipline was likely intended to avoid generating additional unfair labor practice charges after August 3, rather than confirming any innocent intent to help Fabro better his job performance before August 3.

C. The Evidence, When Viewed As a Whole, Establishes That the PMP Was Implemented Based on Pretext (Respondent's Exceptions 14 to 21)

The ALJ relied on a multitude of evidence to reasonably conclude that Respondent imposed the PMP on Fabro for pretextual reasons. (ALJD at 15:1 – 17:33). Instead of viewing the complete picture created by connecting all of the evidentiary dots, Respondent seeks to isolate each individual dot to deny the composite whole they construct. (RBS at 39-46). Respondent's efforts are unconvincing because substantial evidence in the record allowed the

ALJ to properly find and connect all of the dots necessary to conclude that Fabro's PMP was based on pretext.

1. The ALJ Properly Credited Cadaoas' Testimony to Determine Cacacho's and Rivera's Motives (Respondent's Exceptions 17 to 19, 21)

Some of the most substantial evidence cited by the ALJ in support of his conclusion that the PMP was based on pretext is the credited testimony of Room Attendant Digna Cadaoas. Based on her credited testimony, the ALJ found that Cacacho told Cadaoas that Fabro was being evaluated so that he would be dismissed and there would not be anyone to lead the rallies. (ALJD at 16:20-23). Cadaoas' credited, uncontradicted testimony also led to the reasonable conclusion that the evaluation process was being manipulated by at least one supervisor (Rivera) to reach a predetermined outcome consistent with Cacacho's stated intent (*i.e.*, setting up Fabro for his Union activities). (Tr. at 176-83, 194, 199). With these two crucial findings in place, the remaining dots the ALJ found and relied upon to reach his conclusion fall into place quite easily.

Sensing this, Respondent attempts to discredit Cadaoas' important testimony based on the completeness of her affidavit and dubious conjecture about her evaluation responses. (Exceptions 17-18; RBS at 46-47). But, Respondent's efforts fail for the precise, detailed reasons cited by the ALJ and the record evidence. (ALJD at 16:25-43, 17:24-27). As the ALJ properly noted, Cadaoas testified that her pre-trial affidavit was accurate, but simply not complete. (ALJD at 16:39-43; Tr. at 191-93, 198).

Respondent also argues that Cadaoas' account of Rivera's statements is unreliable because the precise wording varied. (Exception 18; RBS at 47-48). Although there are slight variations in the wording Cadaoas (through an Ilocano interpreter) used to recount Rivera's statement, the meaning of Rivera's message was clear – leave Fabro's evaluation blank instead of writing down anything favorable to him. (Tr. at 179-80; 194). Because Rivera's statement

was made while she was interrogating Cadaoas about the prior day's satisfactory markings for Fabro, the context makes it even clearer. (Tr. at 176-79). Also, the ALJ correctly noted that Rivera's statement was ultimately confirmed by Cadaoas doing precisely what Rivera instructed her to do – not to fill out Fabro's evaluation. (ALJD at 17 fn.23; Tr. at 179-80).

Respondent's hollow attempts to discredit Cadaoas do not take into consideration its own failure to call Rivera, an admitted supervisor, as a witness to dispute Cadaoas' testimony. (ALJD at 17:24; GC 1(n), ¶5(e); GC 1(q), ¶1). Nor, as the ALJ observantly noted, was Cadaoas' testimony about Rivera contradicted by Quibilan's testimony. (ALJD at 17:24-26; Tr. at 474).

Finally, at the time of her testimony Cadaoas was an employee working in the same department under Cacacho and Rivera. Accordingly, Cadaoas testified against her pecuniary interest, thus enhancing her overall credibility. *Flexsteel Industries*, 316 NLRB 745, 745 (1995), *enfd. mem.* 83 F.3d 419 (5th Cir. 1996).

2. *Cacacho's Testimony Was Properly Discredited (Respondent's Exceptions 16, 19, 21)*

Respondent also challenges the ALJ's decision to discredit Cacacho's testimony. (Exception 16; RBS at 41-46). The Board is reluctant to overturn credibility findings and does so only in rare cases. *Stevens Creek Chrysler*, 357 NLRB 633, 635 (2011) (citations omitted), *enfd.* 498 Fed.Appx. 45 (D.C. Cir. 2012). While this is especially true of demeanor-based determinations, if the determination is not based primarily on demeanor, the Board will perform an independent evaluation of credibility. *Id.* (citations omitted). In this case, the weight of the evidence, established facts, inherent probabilities, and reasonable inferences support the ALJ's decision to discredit Cacacho.

Cacacho's credibility is diminished when considered in conjunction with her unadmitted statement to Cadaoas that Fabro was being evaluated so that he would be dismissed and there

would not be anyone to lead the rallies. (ALJD at 16:20-23). Thus, the uncontroverted statement served as a theme for Respondent's efforts to target Fabro. Cadaoas' unrebutted testimony about Rivera's attempts to manipulate the PMP evaluation process to ensure Fabro received unsatisfactory ratings was still another step to further Respondent's plan. (ALJD at 17:9-22). Once Cacacho's ulterior motives are exposed, her testimony must be discredited because it goes against the inherent probability of events established by the record evidence. The sudden, coordinated timing of the complaints is entirely consistent with laying the groundwork to target Fabro with the PMP. (ALJD at 15:1-14). Since Cacacho herself drafted the bulk of the problematic written complaints and she was motivated to rid Respondent of Fabro, it is likely the complaints were contrived to start the process. As noted by the ALJ, there was reason to doubt Cacacho's testimony to the contrary. Several complaints are so imprecise that they appeared unprompted by specific events. (ALJD at 15:20-22; GC 3(e), (f), (g), (i), and (j)). In what appears to be a transparent attempt to pad the documentary record to set up Fabro, Cacacho also typed a complaint for one employee that was identical to another employee's handwritten complaint. (ALJD at 15:22-27; GC 3(i) and (j)). Respondent failed to dispute any of this by calling employee witnesses to verify their individual complaints and to corroborate Cacacho's testimony. (ALJD at 15:19-20).

For the same reasons cited above, the Petition's expedient appearance at the same time as the other complaints is consistent with a coordinated scheme to set up Fabro for the PMP. As noted by the ALJ, Cacacho's denial that she knew anything about the Petition before it was given to her was implausible. It goes against the internal consistency and probabilities of her own testimony that she spoke with numerous employees about their problems with Fabro after they had already signed the Petition. Cacacho's tendency to engage in unreasonable, wholesale

denials is also consistent with, and confirmed by, her exaggerated, dismissive denials cited by the ALJ during her testimony about the interaction with Aradanas. (Tr. at 433-34; ALJD at 3 fn.3). Despite the improbability of Cacacho's testimony about the Petition, Respondent called no witnesses to credibly verify her version of events. The ineffectual, biased testimony of Alicia Baldos (Baldos) lacked any foundation and could not be relied upon to corroborate Cacacho's testimony about the Petition. (Tr. at 451-52; ALJD at 15:33-38). DeMello, Webster, and Wakatsuki never bothered to find out the origins of the Petition. (Tr. at 54, 140-41, 361, 382-83, 384, 385, 499-500). Similarly, as the ALJ noted, there was no testimony from Alona Afable, the purported originator of the Petition, or any other knowledgeable witnesses to establish the Petition's origins. (ALJD at 15:33). Nor was there any explanation as to why Cacacho possessed a Petition addressed to DeMello. (ALJD at 16:4-9).

Based on the foregoing, there is ample evidence and rationale to support the ALJ's decision to discredit Cacacho's testimony, especially where it is not corroborated by more reliable evidence. Once an ALJ discredits a witness, it is well established that the ALJ may infer that the opposite of the witness' testimony is true. *Greco & Haines, Inc.*, 306 NLRB 634, 634 (1992). The ALJ discredited Cacacho's testimony about the Petition and employee complaints. Accordingly, it was proper to infer that Cacacho played a much more substantial and active role in the creation of the employee complaints and Petition. When coupled with her articulated motive to set Fabro up, it confirms that Cacacho was a key player in laying the PMP's foundation by involving herself in the sudden appearance of employee complaints.

3. *The Complaints and Petition Were Conveniently Coordinated (Respondent's Exceptions 14, 15, 19, 21)*

Respondent also contends the evidence does not support the ALJ's finding that the coordinated timing of the Petition and complaints supports a finding of pretext. (Exceptions 14-

15; RBS at 37-41). For the same reasons discussed above, the convenient and coordinated appearance of the complaints and Petition support this inference when viewed in light of undenied evidence of Cacacho's motives and her otherwise discredited testimony concerning her knowledge and involvement. The coordinated timing is also consistent with a set up because there is no evidence that Fabro's work performance changed immediately before the complaints and Petition suddenly appeared. (ALJD at 15:3-5). Nor, as the ALJ found, would employees of Filipino or Hawaiian ethnicity normally complain in such a public manner, as Webster claimed during her testimony. (Tr. at 130-33; ALJD 15:10-13). That is, unless they were influenced to do so by those wanting to set up Fabro. Similarly, the lack of any further employee complaints after Respondent cancelled the PMP despite evidence that the vast majority believed Fabro was still performing unsatisfactorily suggests coordination by those with authority – those with the influence to suddenly churn assorted complaints when convenient to set Fabro up, and to also restrain such complaints when further action against Fabro might generate more inconvenient charges with the NLRB. (GC 1(g)-(h); GC 15). Such authoritative coercion is also consistent with, and supported by, Rivera's actions to manipulate the employees' evaluations to Fabro's detriment. (Tr. at 176-83, 194, 199).

For all the foregoing reasons, the finished picture is remarkably clear once all the credited evidence is pieced together and the dots are simply connected. Accordingly, Respondent's attempt to deconstruct this picture by myopically focusing on individual dots should be rejected.

4. *Pretext Is Also Circumstantial Evidence of Animus (Respondent's Exceptions 20 to 21)*

As referenced by the ALJ (ALJD 13:13-17), evidence of pretext also establishes animus. See *Whitesville Mill Service*, 307 NLRB 937, 937 (1992) (citation omitted). Accordingly, the substantial evidence of pretext also bolsters the ALJ's findings of animus alongside Ettinger's

8(a)(1) statements and Respondent's unlawful disciplinary actions in *Aston I*. Those unlawful disciplinary actions in *Aston I* also support a conclusion that Respondent has a tendency to retaliate against its Union-supporting employees based on unsupported reasons (*i.e.*, pretext), and the evidence above is confirmation that it still continues to do so.⁸

Accordingly, for all the foregoing reasons, the Board should reject Respondent's Exceptions 8 through 21 and affirm the ALJ's well-reasoned conclusion that Respondent violated Section 8(a)(3) and (1) by imposing the PMP on Fabro.

D. The ALJ Properly Declined to Draw an Adverse Inference (Respondent's Exception 7)

Respondent contends that the ALJ erred because he did not draw an adverse inference based on Fabro not testifying during the hearing to confirm the negative effect of the PMP. (Exception 7; RBS at 25-26). It remains the case that the drawing of an adverse inference is within the discretion of the trier of fact. A party has no obligation to call every witness at its disposal to prove its case. *International Business Systems*, 258 NLRB 181, 192 (1981). While adverse inferences may be drawn, it does not follow that they must be drawn. *Roosevelt Memorial Med. Ctr.*, 348 NLRB 1016, 1030 (2006); *Underwriters Laboratories, Inc. v. NLRB*, 147 F.3d 1048, 1054 (9th Cir. 1998). Using his discretion as the trier of fact after examining all of the other evidence submitted by the parties, the ALJ declined to draw an adverse inference. Under *Wright Line*, General Counsel had the burden to establish that Fabro's protected activity was a motivating factor for Respondent's adverse employment action. To prove this motivating factor, General Counsel must ordinarily show union activity, the employer's knowledge of that activity, and evidence of animus. *Hawaiian Dredging Construction Co.*, 362 NLRB No.10, slip

⁸ Respondent by definition cannot meet its *Wright Line* rebuttal burden because the finding of pretext leaves intact the inference of wrongful motive established by General Counsel. *Limestone Apparel Corp.*, 255 NLRB 722, 722 (1981), *enfd.* 705 F.2d 799 (6th Cir. 1982).

op. at 3 (2015), enf. denied 857 F.3d 877 (D.C. Cir. 2017). In this case, the PMP process (see, generally, testimony of Webster, DeMello, Wakatsuki, Cacacho; GC 6-15), Fabro's open union activities (see testimony of Aradanas, Tr. at 215-16, 238; Weinstein, Tr. at 253-54, 256; Evans, Tr. at 272-73; GC 16; GC 22), Respondent's knowledge of Fabro's union activities (see testimony of DeMello, Tr. at 359, 392; Webster, Tr. at 51-52; Smith, Tr. at 554-56; GC 2; GC 16), and animus (see *Aston I*; testimony of Cadaoas, Tr. at 172-85, 190-91) were all established with multiple sources of evidence (much of it without dispute) and did not require Fabro's testimony.

Even assuming the ALJ should have drawn an adverse inference finding that Fabro was not subjectively affected by the PMP in a negative manner (RBS at 26), it would still not affect the outcome. The PMP subjected Fabro to increased monitoring and supervision regardless of how else it impacted him. (ALJD at 12:26-13:2). Moreover, the evidence of that increased monitoring and supervision stems from evidence that did not require Fabro's testimony. (GC 6-14). Accordingly, Respondent's Exception 7 should be rejected.

E. Respondent's Objection to the Remedy Should Be Rejected

Respondent "objects" to the ALJ's recommended remedy as unwarranted. (Exceptions at p.7). For the foregoing reasons, a remedy is warranted and should be ordered by the Board. In addition, Respondent claims that there is no evidence that the PMP was placed in Fabro's file so the ALJ's remedial order is not appropriate. (Exceptions at p.7 fn.2; RBS at 32 fn.27). This contention should be rejected because it has not been properly excepted to by Respondent. In

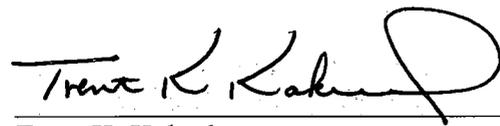
any event, there is evidence such a document exists (GC 6) and such matters are properly left for compliance proceedings.⁹

V. **CONCLUSION**

For the foregoing reasons, General Counsel submits that Respondent's exceptions should be rejected in their entirety. Accordingly, the ALJ's findings and conclusions should be affirmed and his recommended order adopted.

DATED AT Honolulu, Hawaii, this 30th day of June, 2017.

Respectfully submitted:



Trent K. Kakuda
Counsel for the General Counsel
National Labor Relations Board
Subregion 37
300 Ala Moana Boulevard, Rm. 7-245
P.O. Box 50208
Honolulu, HI 96850

⁹ The ALJ's order also appropriately directed Respondent to "remove from its files any reference to the PMP it implemented regarding Fabro," which is more than simply removing the "PMP paperwork." (Exceptions at 7 fn.2; ALJD at 19:18-20).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that Counsel for the General Counsel's Answering Brief in Cases 20-CA-167132, et al. has this day been electronically filed with the National Labor Relations Board's Office of the Executive Secretary and a copy served upon the following persons by e-mail pursuant to Section 102.5(f) of the National Labor Relations Board's Rules and Regulations:

Robert S. Katz, Esq. (rsk@torkildson.com)
Jeffrey S. Harris, Esq. (jsh@torkildson.com)
John Knorek, Esq. (jlkn@torkildson.com)
Christine K.D. Belcaid, Esq. (ckd@torkildson.com)
Torkildson, Katz, Moore,
 Hetherington & Harris
700 Bishop Street, Floor 15
Topa Financial Tower
Honolulu, HI 96813

Jennifer Cynn, Esq. (jcynn@5.unitehere.org)
UNITE HERE! Local 5
1516 South King Street
Honolulu, HI 96826

Dated at Honolulu, Hawaii, this 30th day of June, 2017.



Trent K. Kakuda
Counsel for the General Counsel
National Labor Relations Board, Subregion 37
300 Ala Moana Boulevard, Room 7-245
P.O. Box 50208
Honolulu, Hawaii 96850-0001