

modified April 17, 2017 (“the Decision” or “ALJD”).¹

I. INTRODUCTION

The CGC eloquently and poetically waxes that the ALJ did not err by finding that Respondent violated the Act. However, Respondent did not violate the Act, and the CGC’s arguments fail for the following reasons.

First, the CGC curiously characterizes the two, distinct alleged unfair labor practices at issue here, which occurred on March 4, 2016 and June 24, 2016, as representing “the latest installment in a series of unlawful actions taken by Respondent.” CGC Answering Brief (“AB”) at 1. There is no such “series.” See <https://www.merriam-webster.com/dictionary/series> (last visited July 10, 2016) (A series is “a number of things or events of the same class **coming one after another** in spatial or temporal succession.”) (emphasis added). The instant alleged unfair labor practices are in no way temporally connected to the violations in *Aston Waikiki Beach Hotel and Hotel Renew*, 365 NLRB No. 53 (April 10, 2017) (*Aston I*) or *Aston Waikiki Beach Hotel and Hotel Renew*, 365 NLRB No. 44 (April 11, 2017) (*Aston II*). The violations in *Aston I* and *II*², most of which are presently on appeal to the Court of Appeals for the District of Columbia Circuit, occurred in February through August 2015. There were **no** findings that Respondent committed *any* unfair labor practices from August 12, 2015 through March 3, 2016, a total of two hundred and four days. Moreover, the ALJ found that Respondent did not commit two of the four alleged unfair labor practices in the instant case. Thus, the alleged March 4 and June 24, 2016 unfair labor practices plainly are not part of a “series” of unfair labor practices, which ended over two hundred days prior to March 4. Further, the fact that since the Union began its campaign in February 2015, Respondent issued two written warnings (*Aston I*) and one

¹ The Counsel for the General Counsel (“CGC”) did not file Cross Exceptions to the two unfair labor practice charges dismissed by the ALJ.

² The Board found that Respondent did **not** violate two of the settlement agreement’s terms in *Aston II*.

performance management plan (this case) to Union supporters hardly shows that Respondent has “a tendency to retaliate” against Union supporting employees. AB at 27.

Next, the CGC incorrectly classifies Respondent’s exceptions as “rely[ing] upon testimony the ALJ did not credit.” AB at 3. Rather, Respondent explained that the ALJ reached conclusions based on speculation that ignored uncontroverted evidence, without *any* explanation as to why he ignored it, and made credibility determinations without considering all the required factors, including demeanor. See *E.I du Pont de Nemours & Co. v. NLRB*, 489 F.3d 1310, 1314 (D.C. Cir. 2007) (“[T]he Board acts arbitrarily when it departs from its own precedent without a reasonable explanation.”).

II. RESPONDENT DID NOT VIOLATE THE ACT.

A. The ALJ erred in finding that Respondent unlawfully directed off-duty employees not to distribute union leaflets in front of the two pillars in the open outer area of the lower lobby on March 4, 2016.³

First, as Acting Chairman Miscimarra indicated in *Aston I*, the lower lobby is undoubtedly a work area. See *Aston I*, slip op. at 1 n.1. In *Aston I*, Acting Chairman Miscimarra joined in affirming the ALJ’s conclusion that Respondent violated Section 8(a)(1) regarding the handbilling issue involved there not because he found the lower lobby to be a nonwork area but “solely because the record supports the judge’s finding that the Respondent’s statement related to the entire property, not just to the lower lobby.” *Id.* As such, the Board’s findings in *Aston I* do not “conclusively” establish that the lower lobby is a nonwork area. Further, Respondent did avail itself of the opportunity to present an Offer of Proof in support of its contention that the lower lobby is clearly a work area. See Respondent’s Exhibit (“R Ex.”) 1.

³ The CGC incorrectly urges the Board to strike Respondent’s references to the post-hearing brief from its Brief in Support of Exceptions because it is not part of the official record. The Board should not strike those references to the extent that they refer to portions of the transcript, which is part of the official record. Furthermore, those post-hearing brief references simply incorporate Respondent’s arguments into the Brief in Support of Exceptions.

The lower lobby is a work area when analyzed under the proper standard of whether work is performed in the area or even under the indoor casino standard. Respondent's Brief in Support of Exceptions ("RBS") at 22-25. The lower lobby is a guest check-in and rest area serviced around the clock by a variety of employees and contracted employees, including security officers, doormen, bell attendants, bell valets, bell captains, housekeepers, housemen, and maintenance engineers. *See* R Ex. 1. In addition to their bell and valet duties, the employees who work at the Bell/Valet Desk in the lower lobby help guests arrange for transportation and provide concierge services. *See id.*

Secondly, the CGC states that Respondent *appears* to argue that Faustino Fabro ("Fabro") and Cecilia Aradanas ("Aradanas") were not actually engaged in protected activity when Security Officer Andrew Smith ("Smith") directed them to leave the lower lobby and that Respondent *appears* to argue that the ALJ's findings are inconsistent with the allegation in the Consolidated Complaint. The CGC is correct about what Respondent argues, as plainly spelled out in Respondent's Brief in Support of Exceptions.

In what *appears* to be an effort to correct his specifically worded Complaint allegation, the CGC mischaracterizes the ALJ's conclusion by stating, "The ALJ properly found that Respondent unlawfully directed off-duty employees to *stop* distributing union leaflets...." AB at 11 (emphasis added). The ALJ did not conclude that Smith directed off-duty employees to *stop* distributing union leaflets, but rather that he told them *not* to distribute union leaflets. ALJD at 18; *see also* Tr. at 555:3-12 (Smith told the employees "that they weren't allowed to pass out flyers in the lower lobby in a working area and to please leave."). This distinction is important because the ALJ did not find that Fabro or Aradanas were distributing leaflets at the time that Smith spoke to them or that Smith spoke to them "while the off-duty employees were engaged in

Union and/or protected concerted activities,” as alleged in the Complaint. *See* GC Ex. 1(k) at ¶ 8. Rather, the ALJ did not even address whether Aradanas or Fabro were holding Union leaflets at the time that Smith spoke to them or whether they distributed or attempted to distribute Union leaflets prior to Smith approaching them because there was no testimony that they were doing so when Smith approached and spoke to them.

The CGC’s analysis regarding whether Fabro and Aradanas were holding or distributing Union literature at the time Smith spoke to them is speculative. Although Aradanas testified that she distributed two leaflets at some unknown location and at some unspecified time before Smith approached her, she never identified that the leaflets she held and previously distributed were Union-related. Fabro did not testify at all, so there is no evidence that Fabro distributed any leaflets prior to Smith approaching him, and there is no direct evidence that either Fabro or Aradanas were holding Union leaflets at the time that Smith spoke with them. RBS at 5-6. Although Organizing Director Morgan Evans testified that she gave “leaflets” to Fabro on March 4, and she identified GC Exhibit 17 as a “leaflet that we used [sic] a lot of rallies, but also for the on [sic] property leafleting on March 4th,” she did **not** testify that she gave GC Exhibit 17 to Fabro or that she gave any Union leaflet to Fabro on March 4. *See* Tr. at 265:7 – 266:17.

Thus, the lower lobby is a work area, and the CGC did not prove that Smith spoke to the employees “**while** [they] were engaged in ... protected ... activities.” Further, as per the ALJ, **Smith did not require the employees to leave the entire hotel property, only the lower lobby because it is a work area.** ALJD at 8 n.11.

B. The ALJ erred in finding that Respondent unlawfully placed Fabro on a Performance Management Plan (“PMP”) that imposed more “onerous and rigorous” working conditions on Fabro because of his union activities.

To satisfy the Complaint allegation that Respondent subjected Fabro to “onerous and rigorous terms and conditions of employment” by providing him with the non-disciplinary

training PMP, the CGC suggests that the PMP required Fabro to “endure” daily evaluations by room attendants, whose eyes Respondent “employed” to “monitor” Fabro’s daily work, and that the PMP imposed “unique conditions.” AB at 17. First, Fabro did not testify (and thus did not claim to have “endured” anything), and as the ALJ noted, the evaluation factors are consistent with Fabro’s normal duties, leading to the undisputed conclusion that no additional or unique conditions were imposed. ALJD at 10 n. 13, 12 n.16. It is undisputed that Fabro’s hours, schedule, and duties did not change. Secondly, there is no evidence that Respondent used the attendants’ eyes as spies to “monitor” Fabro’s daily work. Respondent simply asked the attendants to reflect on their work experience with Fabro at the end of the workday. ALJD at 11:42-43. The attendants did not provide a raw score or a recommendation for performance improvement, and the four brief evaluation review meetings between Fabro, Cacacho, and Rooms Division Manager Jenine Webster were training meetings, not surveillance meetings.

The CGC unsuccessfully tries to salvage the clearly distinguishable cases cited by the ALJ in support of his onerous conditions finding by stating that “[t]he overarching principle in the cases ... is that management violated the Act by subjecting (or threatening to subject) employees to closer scrutiny and monitoring.” AB at 18. The CGC leaves out that **managers** more closely supervised the employees in *all* of the ALJ’s cases. *See Ferguson-Williams, Inc.*, 322 NLRB 695 (1996) (project manager); *Pinter Bros., Inc.*, 227 NLRB 921 (1977) (majority stockholder and board chairman); *Olympic Limousine Svc.*, 278 NLRB 932 (1986) (manager); *T&T Machine Co.*, 278 NLRB 970, 973 (1986) (superintendent); RBS at 29.

The CGC does not appear to dispute that the employer must have imposed an “adverse action” on Fabro. However, the CGC cites two cases, one of which the ALJ did not rely upon, for the proposition that increased supervision and monitoring is an adverse action when

unlawfully motivated: *Ferguson-Williams, Inc., supra* and *Carillon House Nursing Home*, 268 NLRB 589 (1984). AB at 18. Neither of those cases even mention an adverse action. Thus, what remains is the sour reality (for the CGC), that “[t]o meet its burden of proving that an adverse employment action has taken place, the government must establish by a preponderance of the evidence that the individual’s prospects for employment or continued employment have been diminished or that some legally cognizable term or condition of employment has changed for the worse.” *See Ne. Iowa Tel. Co.*, 346 NLRB 465, 476 (2006). The CGC did not meet that burden, as the record shows that the PMP did not cause Fabro to suffer any “change in hours of employment, ... pay, [or] ... location of employment”; and Fabro’s job duties did not “change[] in any way which reasonably would make the work less desirable to [him]” – particularly because “[Fabro] did not testify that the job had become any less pleasant or any more onerous.” *See id.* (finding no adverse employment action because of the quoted reasons); RBS at 31-33. Moreover, under *Ne. Iowa Tel. Co.*, the ALJ should have drawn an adverse inference based on Fabro not testifying because his testimony about the way the PMP subjectively impacted him is necessary for the adverse action analysis. *See id.* Furthermore, the CGC did not prove increased monitoring or supervision, as discussed *supra*.

Regarding animus, the evidence that the CGC presented in support of the ALJ’s finding that Vice President of Operations Gary Ettinger (“Ettinger”) played a role in the decision to implement the PMP is insufficient. There is no evidence as to what Ettinger’s involvement was among the various managers weighing in on the PMP. AB at 19-20. Respondent previously explained why the evidence does not establish this fact. RBS at 33-36. In addition, the CGC’s reliance on *Opelika Welding*, 305 NLRB No. 561, 566 (1991) is misplaced because the Board’s decision in that case was based on the fact that the alleged discriminatees in that proceeding

engaged in the same protected activities which led to the previous proceeding's discrimination finding. Here, Fabro did not engage in the same protected activities **as the discriminatees** in *Aston I* (i.e., Santos Rangunjan and Edgar Guzman), who repeatedly asked a co-worker to sign a Union authorization card and take a photo for the Union. Instead, Respondent provided Fabro with the non-disciplinary training PMP because of complaints about his work performance from his subordinate room attendants, not because he was out promoting the Union.

Also regarding animus, the CGC's bare assertion that the record shows "that the lack of post-PMP discipline was likely intended to avoid generating additional unfair labor practice charges" is pure speculation, and the ALJ did not offer any such finding as the basis for his Decision. *Compare* ALJD at 16:43 – 17:2 to AB at 21; RBS at 32. In addition, that Executive Housekeeper Marissa Cacacho ("Cacacho") rated Fabro unsatisfactory in 6/10 evaluation factors on July 25 and 5/10 on August 9 and 19 does not imply that Cacacho was influenced by the August 3 charge. AB at 10-11. In her August 9 and 19 evaluations, Cacacho rated Fabro as satisfactory in the ninth category regarding his responsiveness, although she had rated Fabro unsatisfactory in that category on July 25. *See* GC Exs. 12, 14. The CGC presented no evidence that Fabro did not improve in the ninth category due to the PMP training, and the ALJ did not include this argument as part of his reasoning, but simply included it as a fact. ALJD at 12:3-5.

Regarding pretext, the CGC offers an impressionistic painting of the evidence as opposed to a preponderance of probative evidence. AB at 21-22. Under 29 U.S.C. § 160(c), an unfair labor practice finding must be based on a "preponderance of the testimony," and under 29 U.S.C. § 160(e), findings of fact must be supported by "substantial evidence on the record considered as a whole." The ALJ did not comply with those sections and failed to explain why he rejected substantial evidence leading to opposite or different findings. *See BE&K Constr. Co.*, 351

NLRB 451, 454 n.32 (2007). Regarding Cacacho's alleged statement to Room Attendant Digna Cadaoas ("Cadaoas") that Fabro was being evaluated so there would not be anyone to lead the rallies, if it were true, why did the CGC not add to the Complaint an 8(a)(1) violation regarding that statement? With respect to Supervisor Elvira Rivera's ("Rivera") alleged statement to Cadaoas that she should leave the third evaluation form blank, under *Int'l Bus. Sys.*, 258 NLRB 1818, 192 (1981), cited by the CGC to defend his failure to call Fabro, Respondent was not required to call Rivera to dispute this – especially since Cadaoas did not include this statement in her pre-trial affidavit, as stipulated to by the CGC. *See* Tr. at 194:12 – 196:17.

Regarding Cacacho's testimony as evidence of pretext, the CGC parrots the ALJ's reasoning to support the discrediting of Cacacho's testimony and the inference of the opposite – that Cacacho instructed the employees to make the complaints or created the complaints herself and had knowledge of and involvement with the petition before it was submitted. AB at 6-8, 23-25. The discrediting and inference fail for the following reasons: (1) they are not based on testimony⁴; (2) Cacacho denied the opposite; (3) Cacacho testified she did not ask any of the employees to make a complaint, and she typed the complaints from memory when she had time; (4) there is no testimony that Cacacho forced any employee to make a complaint or sign the petition; (5) Inspectress Alicia Baldos ("Baldos") testified that Relief Inspectress Alona Afable ("Afable") – not Cacacho – created the petition; and (6) the ALJ failed to consider Cacacho's demeanor although he purportedly applied the *Daikichi Sushi* test. ALJD at 2 n.2; Tr. at 417:7-10, 418:20-23, 440:7-11, 451:5-22. In addition, it is more likely that Afable gave the petition to Cacacho than to General Manager Mark DeMello ("DeMello") because: (1) Cacacho sees the Housekeeping employees every weekday, and her office is in the Housekeeping Department (*see*

⁴ The CGC had the petition long before the hearing began and certainly could have subpoenaed any number of signatories as witnesses to testify to his conspiracy theory or Fabro to deny the complaints, yet he failed to do so.

Tr. at 417:13), whereas DeMello's office is in the Executive Offices far from the Housekeeping Department, and he is so busy during the week that he does not often see the Housekeeping employees (*see* Tr. at 357:14-16); (2) Cacacho, unlike DeMello, is Filipino and speaks the employees' native languages (*see* Tr. at 401:1-10); and (3) the employees' past practice has been to give complaints to Cacacho, who then shares them with DeMello (*see Aston I*, slip op. at 4).

The CGC also repeats that the timing of the complaints and the petition "raise suspicion," supporting the pretext finding. AB at 8. An equally if not more plausible, simpler explanation than Cacacho having orchestrated the complaints and petition, is that the employees reached their breaking point with Fabro not working as part of the team. Based on the logic of Occam's razor (given two equally plausible explanations, the one that makes the fewest assumptions is preferred), the ALJ should have adopted that simpler explanation. *See United Parcel Svc. of Am., Inc.*, 362 NLRB No. 22, 2015 NLRB LEXIS 133, at *104 (Feb. 26, 2015) ("Occam's razor dices the plot theory in favor of the simpler explanation, that management was trying to help Thomas become more efficient. The record provides no support of Thomas' conjectured plot.").

III. CONCLUSION

The Board should render a decision concluding that Respondent did not violate the Act.

DATED: Honolulu, Hawaii, July 14, 2017.

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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 July 14, 2017, a copy of *Aqua-Aston Hospitality, LLC D/B/A Aston Waikiki Beach Hotel And Hotel Renew's Reply Brief in Support of 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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