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**Aqua-Aston Hospitality, LLC d/b/a Aston Waikiki Beach Hotel and Hotel Renew and UNITE HERE! Local 5.** Cases 20–CA–167132, 20–CA–171004, 20–CA–171102, and 20–CA–181350.

October 24, 2018

DECISION AND ORDER

BY MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

On April 12, 2017, Administrative Law Judge Jeffrey D. Wedekind issued the attached decision. The Respondent filed exceptions and a brief in support, the General Counsel filed an answering brief, and the Respondent filed a reply brief.<sup>1</sup>

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 affirm the judge’s rulings, findings,<sup>2</sup> and conclusions and to adopt the recommended Order as modified.

<sup>1</sup> Pursuant to *Reliant Energy*, 339 NLRB 66 (2003), the Respondent filed a postbrief letter calling the Board’s attention to recent case authority.

<sup>2</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.

There are no exceptions to the judge’s dismissals of the allegations that the Respondent violated Sec. 8(a)(1) by, through its executive housekeeper, telling an employee that she was hurt by seeing the employee participate in a union rally and by engaging in unlawful surveillance of employees’ union activities outside the employee entrance at the rear of the hotel.

In support of his finding that the Respondent unlawfully imposed a performance management plan (PMP) on employee Faustino Fabro, the judge cited testimony indicating that it would have been unusual for employees of Hawaiian and Filipino descent to complain about another employee in such an open and public way. The Board interprets the judge’s language as describing the testimony rather than relying on any such characterizations in his own analysis. Because the evidence shows that the Respondent implemented the PMP for pretextual reasons, Member Kaplan joins his colleagues in adopting the judge’s finding that the Respondent unlawfully imposed the PMP.

In adopting the judge’s finding that the Respondent violated Sec. 8(a)(1) by directing off-duty employees not to distribute leaflets in the lower lobby area of the hotel, Member Kaplan relies on the Board’s earlier finding that the lower lobby is a nonwork area as extant precedent and expresses no opinion regarding whether that finding was correct. See *Aqua-Aston Hospitality, LLC d/b/a Aston Waikiki Beach Hotel & Hotel Renew*, 365 NLRB No. 53 (2017). Member Emanuel similarly adopts the judge’s finding that the Respondent unlawfully

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Aqua-Aston Hospitality, LLC d/b/a Aston Waikiki Beach Hotel and Hotel Renew, Honolulu, Hawaii, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.<sup>3</sup>

Substitute the following for paragraph 1(c). “(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.”

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

Dated, Washington, D.C. October 24, 2018

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Lauren McFerran, Member

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Marvin E. Kaplan, Member

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William J. Emanuel 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.

prohibited union distribution in the lower lobby area of the hotel in light of the Board’s previous decision, id., which was enforced by the Court of Appeals for the District of Columbia Circuit pursuant to a consent judgment. *Aqua-Aston Hospitality, LLC v. NLRB*, No. 17-1118 (March 20, 2018). He believes, however, that the Board should consider refining its approach to permissible union distribution in hotel lobby and front entrance areas, where critical work functions occur such as greeting guests, valet parking, and security, to better reflect legitimate employer property interests and workplace operation while preserving employees’ rights to engage in protected activity.

<sup>3</sup> We shall modify the judge’s recommended Order to conform to the Board’s standard remedial language.

## 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 prohibit our off-duty employees from distributing union leaflets in front of the two pillars in the open outer area of the lower lobby facing the entrance driveway or in other nonwork areas.

WE WILL NOT discriminatorily place you on a performance management plan or otherwise impose more onerous working conditions on you because of your union or other protected concerted activities or to discourage such activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's order, rescind the performance management plan (PMP) that we implemented regarding relief inspector Faustino Fabro on June 24, 2016.

WE WILL, within 14 days from the date of the Board's order, remove from our files any reference to the PMP we implemented regarding Fabro, and WE WILL, within 3 days thereafter notify Fabro in writing that this has been done and that the PMP will not be used against him in any way.

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

The Board's decision can be found at [www.nlr.gov/case/20-CA-167132](http://www.nlr.gov/case/20-CA-167132) 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.



*Trent K. Kakuda, Esq.*, for the General Counsel.  
*Robert S. Katz & Christine K.D. Belcaid, Esqs. (Torkildson, Katz, Moore, Hetherington & Harris)*, for the Respondent.  
*Jennifer Cynn, Esq.*, for the Charging Party.

## DECISION

JEFFREY D. WEDEKIND, Administrative Law Judge. This is the second of two recent litigated proceedings involving alleged unfair labor practices by Aqua-Aston Hospitality, LLC d/b/a Aston Waikiki Beach Hotel and Hotel Renew (the Respondent) in response to an organizing campaign by UNITE HERE! Local 5. The union organizing campaign began in February 2015, was still active at the time of trial, and included leafleting and regular early morning rallies with off-duty employees and other union supporters who sang and made noise by shaking or banging on cans outside the hotels.

In the prior proceeding (Cases 20-CA-154749 et al.), the General Counsel alleged that Respondent committed several unfair labor practices in May and June 2015 in response to the campaign. Specifically, the General Counsel alleged that Respondent's executive vice president of operations made various unlawful statements to employees, including threatening them with discharge for engaging in such union activities; that Respondent's security officer unlawfully prohibited off-duty employees from distributing union leaflets in the lower lobby of the Aston hotel; and that Respondent unlawfully issued two employees (Edgardo Guzman and Santos Raganjian) written warnings for harassing, threatening, and interfering with the work of another employee in an effort to get him to support the union, notwithstanding that Respondent did not honestly believe they had committed such misconduct. Following a hearing, on May 31, 2016, Administrative Law Judge Mara-Louise Anzalone issued a decision finding that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act as alleged. The Board subsequently affirmed. See 365 NLRB No. 53 (April 10, 2017).

The consolidated complaints in this proceeding allege that Respondent likewise committed several 8(a)(1) and (3) violations between October 2015 and June 2016 in response to the campaign.<sup>1</sup> Specifically, the complaints allege that the Respondent's executive housekeeper unlawfully told an employee that she was hurt by seeing the employee at a union rally; that Respondent's security officers unlawfully engaged in surveillance of union leafleting at the employee entrance and again directed off-duty employees not to leaflet in the lower lobby; and that Respondent unlawfully imposed more onerous working conditions on an employee (Faustino Fabro) by placing him on a performance management plan because of his union activities.

A hearing on these additional allegations was held on December 5-8, 2016. The General Counsel and the Respondent thereafter filed briefs on February 23, 2017. As discussed below, the General Counsel established by a preponderance of the evidence that Respondent's security officer again unlawfully directed off-duty employees not to leaflet in the lower lobby and that Respondent imposed more onerous working conditions on Fabro. However, the General Counsel failed to prove the

<sup>1</sup> The first complaint issued on August 31 (Cases 20-CA-167132, 171004, and 171102). The second, alleging that Respondent discriminatorily placed Fabro on a performance management plan, issued on October 14, 2016 (Case 20-CA-181350). The Board's jurisdiction is uncontested and established by the record.

other alleged violations.<sup>2</sup>

I. ALLEGED UNLAWFUL STATEMENT BY EXECUTIVE  
HOUSEKEEPER CACACHO

The first allegation involves an alleged unlawful statement by Marissa Cacacho, Respondent's longtime executive housekeeper and admitted supervisor, who is responsible for the day-to-day operations of the housekeeping department for both hotels. Specifically, the complaint alleges that, on October 30, 2015, Cacacho unlawfully told Cecilia Aradanas, a room attendant/cleaner at the Aston hotel, that she was hurt by seeing Aradanas participate in a union rally.

As indicated above, the Union began holding the rallies outside the hotels in early February 2015. The rallies were held every 1–2 weeks, usually on Fridays in the early morning, from 6:30–7:30 a.m. It is undisputed that Aradanas, whose shift did not begin until 8 a.m., always participated in the rallies, and that she did so again by banging on a can at the early morning rally on Friday, October 30.

The subject encounter between Aradanas and Cacacho occurred later that day, about 4 p.m., at the end of Aradanas's shift. Aradanas was turning in her paperwork and key at the clerk's station, when Cacacho came out of her office, walked by or approached her, and asked, in a tone and voice that seemed a little angry and louder than usual, who she had been protesting about outside that morning, and whether she had been protesting about her, pointing to her own chest. Aradanas replied that she had not been protesting about Cacacho, and began walking toward the time clock to punch out. Cacacho followed along, again asking Aradanas who she was protesting about and whether it was about her. Aradanas repeated that she was not protesting about Cacacho. Aradanas then punched out, the conversation ended, and Cacacho proceeded to the bathroom.<sup>3</sup>

<sup>2</sup> Citations to the record are included to aid review, and are not necessarily exclusive or exhaustive. In making credibility findings, all relevant factors have been considered, including the interests and demeanor of the witnesses; whether their testimony is corroborated or consistent with the documentary evidence and/or the established or admitted facts; inherent probabilities; and reasonable inferences that may be drawn from the record as a whole. See, e.g., *Daikichi Corp.*, 335 NLRB 622, 633 (2001), *enfd.* 56 Fed. Appx. 516 (D.C. Cir. 2003); and *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1465 (9th Cir.), *cert. denied* 522 U.S. 948 (1997).

<sup>3</sup> The foregoing findings are based on Aradanas's testimony. Cacacho dismissively denied both that the conversation occurred and that she ever saw Aradanas participate in a rally on October 30 or any other day ("of course not"). However, there are good reasons to believe Aradanas's account. First, Cacacho worked Monday–Friday, 7 a.m.–5 p.m.; she was therefore at work during the rallies; and she was undisputedly at work on October 30, both during the rally and at the time the alleged conversation occurred. Second, as indicated above, the rallies had been held every 1–2 weeks for the past 8 months, and Aradanas always participated in them. Third, Cacacho never denied observing the rallies on October 30 or other days (she was never asked). Nor did she deny that she was told or otherwise learned about Aradanas's participation in the rallies (she was never asked that either). Fourth, although Aradanas's testimony contained some arguable inconsistencies, she testified through an Ilocano interpreter and the record as a whole indicates that the inconsistencies were likely due to language and trans-

The General Counsel argues that Cacacho's foregoing conduct was unlawful because "a reasonable employee would conclude that Cacacho's highly personalized statements reflected the boss' very unhappy reaction to Aradanas' noisy participation in that morning's union rally" (Br. 36). However, there is no evidence that Cacacho expressly told Aradanas that she was personally hurt by Aradanas's participation in the rallies as alleged in the complaint. Nor, contrary to the General Counsel's contention, is Aradanas's description of the encounter sufficient to establish that Cacacho did so by implication, or that she otherwise expressed strong personal displeasure at Aradanas's participation in the rallies.<sup>4</sup> As indicated above, Aradanas testified that Cacacho's tone and voice was only "a little like angry" and (in response to the General Counsel's leading question) "a little louder" than normal (Tr. 227). Further, although Cacacho followed Aradanas to the time clock and asked the questions more than once, according to Aradanas's own testimony Cacacho never commented in any way on Aradanas's answers, and Cacacho may well have followed her at least in part because it was the way to the bathroom.

The General Counsel also argues (Br. 37) that Cacacho's conduct must be considered in light of ALJ Anzalone's unfair labor practice findings in the prior case; specifically, her finding that Respondent's executive vice president of operations, Gary Ettinger, made various unlawful statements about the rallies at employee meetings several months earlier, in May 2015, which employees would have reasonably interpreted as an order to stop the rallies or risk losing their jobs. However, as indicated above, Cacacho made no statements or comments whatsoever about the rallies. Her conduct was therefore nothing like Ettinger's previous conduct found unlawful by ALJ Anzalone.

In sum, while a preponderance of the evidence establishes that an encounter between Cacacho and Aradanas occurred, it fails to establish that Cacacho's conduct during the encounter would have reasonably tended to interfere with employees' exercise of their statutory rights. See generally *El Rancho Market*, 235 NLRB 468, 471 (1978), *enfd.* 603 F.2d 223 (9th Cir. 1979); and *Exxel Atmos, Inc. v. NLRB*, 147 F.3d 972, 975 (D.C. Cir. 1998), *cert. denied* 119 S.Ct. 795 (1999) (discussing the standard for finding an 8(a)(1) violation). See also *Rossmore House*, 269 NLRB 1176 (1984), *affd. sub nom. Hotel*

lotion difficulties. Finally, although Aradanas's testimony was not corroborated by any other employees, there is no evidence that any others were present during the conversation and Respondent does not challenge her testimony on this basis. On balance, therefore, Aradanas's testimony about the encounter was more credible than Cacacho's denial.

<sup>4</sup> Respondent's posthearing brief does not specifically object, as violative of due process or the 10(b) statute of limitations, to evaluating whether the evidence supports an 8(a)(1) violation on a different theory or ground than specifically alleged in the complaint. In any event, Board precedent supports doing so. See, *Space Needle, LLC*, 362 NLRB No. 11, slip op. at 4 (2015) (finding that a supervisor's statements to an employee violated 8(a)(1) on the ground that they were coercive, regardless of whether they constituted an unlawful interrogation as alleged in the complaint).

*Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985); and *Sunbelt Enterprises*, 285 NLRB 1153, 1153–1154 (1987) (finding that the employers' questioning of open and active union supporters about why they were supporting the union or striking did not constitute unlawful interrogation under the totality of the circumstances). Accordingly, the allegation is dismissed.

## II. ALLEGED UNLAWFUL SURVEILLANCE BY SECURITY OFFICERS SMITH AND VARGAS

The complaint also alleges that two security officers at the hotels, Andrew Smith and Roberto Vargas, committed certain unfair labor practices.<sup>5</sup> Specifically, the complaint alleges that, on January 13 and 27, 2016, Smith and Vargas unlawfully engaged in surveillance of employees' union activities outside the employee entrance at the rear of the Aston hotel.

As part of their regular duties, Smith and Vargas jointly conducted daily patrols throughout the property. Their first, so-called "awareness" patrol was conducted from about 6–6:15 a.m. until about 7:45 a.m. They always started at the rear of the Aston hotel near the employee stairway entrance and gated parking garage. They did so for several reasons, including the fact that the security office is located there, and because a hostel is located directly across the narrow road behind the hotel (Lemon Road) and homeless persons and drug addicts often congregate in the area. They then walked the property, including the upper and lower lobby and parking areas, keeping notes of the time and location of their observations for use in preparing their daily shift summaries.

Sometimes they walked through areas more than once. And sometimes they stopped and posted themselves in certain areas that had a history of problems. For example, they posted on or by Lemon Road at the rear of the hotel near the employee entrance and parking garage. Again, they did this to monitor the area for homeless and mentally unstable individuals, and also because employees, managers, and vendors used the road to access the hotel. Smith made it a habit to welcome the employees and managers when they arrived for work in the morning and to assist them in entering the garage by using his key fob to raise the gate.

Smith and Vargas also checked during the morning patrols for any signs that a union rally was going to occur, such as union organizers and supporters congregating at the end of Lemon Road. They did so because there had been at least three incidents during 2015 when protestors at the rallies had trespassed onto the hotel property. In one incident, a group of protestors rushed up to the upper lobby area onto the pool deck and hung a banner over the railing. In another incident, a protester entered the property from the rear employee entrance and interrupted a housekeeping briefing by Executive Housekeeper Cacacho on the loading dock.<sup>6</sup> And in a third incident, a group of about four or five protestors entered the housekeeping de-

<sup>5</sup> Both Smith and Vargas were employed by Universal Protection Services at the time, rather than Respondent. However, Respondent admits that they were its agents during the relevant events.

<sup>6</sup> Because of this incident, Smith and Vargas also made it a practice to post near the rear entrance on Lemon Road at the end of each morning awareness patrol.

partment and started yelling at Cacacho to start respecting the employees. Smith and Vargas also checked for signs of a rally because there had been a violent confrontation in the past between a guest and protester. Smith's practice was therefore to call the Honolulu police department to assist with crowd control and safety if it appeared a rally was going to be held.<sup>7</sup>

On January 13, when Smith and Vargas began their awareness patrol as usual around 6:10 a.m., Smith noticed that four individuals he recognized as nonemployee union organizers were gathered at the end of Lemon Road. One was Morgan Evans, the Union's director of new organizing, and two others were organizers he had seen at the union rallies. One of the organizers (Frank Cave-Lacoste) had a prominent handlebar mustache, and the other (Nathaniel Felicitas) was wearing a red union shirt. Instead of conducting a rally, however, around 6:30 a.m., Cave-Lacoste and Felicitas walked down the road and stationed themselves with leaflets at the property line by the employee entrance.

Believing Cave-Lacoste and Felicitas were standing on hotel property, Smith told them to get off it. And they apparently complied. However, they remained standing next to the property line and repeatedly stepped back and forth in a manner that Smith perceived as intended to taunt him into believing they might cross it. Smith and Vargas therefore remained posted in the area to see what the organizers would do and whether they would trespass onto the hotel property. Vargas stood in the employee entrance or by the parking garage entrance. Smith moved around the area; sometimes he stood with or near Vargas and sometimes he stood at the outer edge of the property line, within a few feet of the organizers, and looked up or down Lemon Road. Both Smith and Vargas also occasionally made notes about what they observed, but not about employees who interacted with the organizers or took a leaflet. This continued until around 7:30 a.m., when Cave-Lacoste and Felicitas stopped leafleting and left.<sup>8</sup>

<sup>7</sup> The foregoing findings about the hotel security practices and history are based on the credible testimony of Smith, who is now employed by Respondent as its safety and security officer at both hotels. Although Smith's testimony was not corroborated by Vargas (he was not asked any questions about it), the General Counsel did not present any contrary testimony or evidence. Nor does the General Counsel's posthearing brief offer any reason to discredit Smith's testimony. Indeed, the brief mostly ignores it. The sole exception is Smith's testimony about the three prior instances of trespass by union protesters, which the General Counsel's brief insinuates was false. See Br. at 40 (referring to the three prior instances as "purported" instances). However, insinuation is not argument.

<sup>8</sup> The foregoing findings are based on the credible portions of the testimony given by Smith, Vargas, and Cave-Lacoste, evaluated in light of all relevant credibility factors (see fn. 2, *supra*) and the record as a whole, including photos taken with Cave-Lacoste's camera on January 13 (GC Exhs. 23–25) and the history of prior incidents involving union protesters described above. There is no doubt, as confirmed by the photos, that Cave-Lacoste and Felicitas stood near the employee entrance, and that Smith and Vargas posted nearby and observed them. All other details, however, turn on the testimony and are considerably less clear. Cave-Lacoste's testimony was not corroborated by Felicitas (who was not called to testify); only part of Smith's contrary testimony was corroborated by Vargas; and none of the testimony was entirely consistent with or supported by prior affidavits or reports. For these

Two weeks later, on January 27, Smith again noticed the same four nonemployee union organizers gathered at the end of Lemon Road when he and Vargas began their awareness patrol at around 6:15 a.m. As before, no rally was held; instead, around 6:30 a.m., one of the organizers, Cave-Lacoste, walked over and again began leafleting employees from the same position near the employee entrance. This time, Smith did not accuse Cave-Lacoste of being on the property or otherwise say anything to him. Nor did Cave-Lacoste taunt Smith as he and Felicitas had appeared to do on January 13. Nevertheless, both Smith and Vargas again posted nearby. Vargas stood in the employee entrance, while Smith again moved around, sometimes within a few feet of Cave-Lacoste, and looked up and down Lemon Road. They also again occasionally took notes of their observations, but not of employees interacting with or taking leaflets from Cave-Lacoste. Smith remained posted in the area until shortly before 7:30 a.m., and Vargas remained posted the entire time Cave-Lacoste was there, until shortly after 7:30 a.m.<sup>9</sup>

The General Counsel argues that the foregoing conduct by Smith and Vargas on January 13 and 27 constituted unlawful surveillance because it was out of the ordinary and coercive considering its duration and close proximity to the union organizers, citing, e.g., *Pacific Beach Hotel*, 361 NLRB No. 65, slip op. at 44 (2014) (observing employees engaged in protected activity constitutes surveillance when it is done in a way that is out of the ordinary and coercive, considering such factors as the duration of the observation, the distance from the employees, and whether it was accompanied by other coercive behavior).<sup>10</sup> The General Counsel argues that the cited history of prior trespass by union organizers or supporters was insufficient to warrant or justify the duration and close proximity of their observation because the incidents occurred during union rallies, not during union leafleting, and there was no need to stand so close to the organizers.

As found above, however, it was not out of the ordinary for

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reasons, there is insufficient credible evidence, for example, that Smith and Vargas took notes when an employee received a leaflet, as Cave-Lacoste testified. There is also insufficient credible evidence that Cave-Lacoste and Felicitas ever actually crossed the property line, as Smith testified. However, based on the record as a whole, including the testimony of Vargas (who is no longer employed by Universal Protection Services or any other security company and does not work at the hotels), there is sufficient credible evidence that Smith believed that one or both were on hotel property when he first saw them, and that they thereafter stepped back and forth in a way that suggested to Smith that they might cross the property line. See Vargas's testimony, Tr. 586–593 (confirming that Smith said “You’re on my property,” and told Cave-Lacoste and Felicitas to get off it, when they first observed them by the employee entrance, and that the two organizers thereafter repeatedly moved back and forward a little bit in a “very odd” manner).

<sup>9</sup> The foregoing findings are based on the credible portions of the testimony given by Smith and Cave-Lacoste, again evaluated in light of all relevant credibility factors and the record as a whole, including but not limited to the photographs Cave-Lacoste took (GC Exhs. 27–29). Vargas did not testify about the events on January 27.

<sup>10</sup> The complaint does not allege, and the General Counsel does not contend, that the subject conduct by Smith and Vargas unlawfully created the impression of surveillance.

Smith and Vargas to post near the employee entrance on Lemon Road. Further, the two union organizers stood right up next to the property line, and Smith reasonably believed they were actually on the property when he first observed them by the employee entrance on January 13. Moreover, they continued thereafter to step back and forward in a way that Smith reasonably perceived as intended to taunt him into believing they might cross the property line. Particularly in light of the prior trespass incidents by union organizers or supporters, this was sufficient to warrant or justify the security guards posting in the area for the entire duration of the leafleting on both January 13 and 27, regardless of the arguable contextual difference between leafleting and rallying.

As for the fact that Smith sometimes stood within a few feet of the organizers, there is no evidence that it was unusual for Smith to stand where he did when posting in the area. On the contrary, the record indicates that Smith had to stand out near the property line to get a full view up and down Lemon Road. See, e.g., General Counsel Exhibit 27 (showing how a dumpster blocked Smith's view of oncoming traffic on one side); and General Counsel Exhibit 28 (showing how vehicles turning into the garage ramp could block his view down the road on the other side). Smith was not required to change where he usually stood on the property when monitoring Lemon Road because the union organizers chose to stand where they did on January 13 and 27.

Finally, as found above, there is insufficient credible evidence that Smith and Vargas took notes of employees who interacted with or accepted leaflets from the organizers, or that they engaged in any other conduct that would have reasonably tended to coerce employees not to do so.

Accordingly, the allegations are dismissed. Compare *Traco*, 363 NLRB No. 39, slip op. at 13–15 (2015); and *Hoschton Garment Co.*, 279 NLRB 565, 566–567 (1986) (finding no unlawful surveillance under similar or analogous circumstances).

### III. ALLEGED UNLAWFUL PROHIBITION AGAINST OFF-DUTY EMPLOYEES LEAFLETING IN LOWER LOBBY

The complaint also alleges that, 2 months later, on March 4, 2016, Security Officer Smith unlawfully told two off-duty employees, Aradanas and Faustino Fabro, that they could not leaflet in the lower lobby of the Aston hotel. The allegation is essentially identical to an allegation in the prior proceeding which alleged that Smith had unlawfully told two other off-duty employees the same thing in August 2015. ALJ Anzalone found a violation with respect to that allegation because the open outer area of the lower lobby where the two off-duty employees were standing and leafleting—in front of two pillars facing the entrance driveway—was a “nonwork” area under Board precedent, i.e., an area where only activities incidental to the hotel's primary function were performed, such as security, maintenance, and valet parking (citing *Casino Pauma*, 363 NLRB No. 60 (2015); *Sheraton Anchorage*, 363 NLRB No. 6 (2015) and 362 NLRB No. 123 (2013); and *Santa Fe Hotel and Casino*, 331 NLRB 723 (2000)). And the Board majority

agreed.<sup>11</sup>

Aradanas and Fabro were standing in exactly the same place when Smith directed them to stop leafletting there on March 4. See Joint Exhibit 1 and attached exhibits (photos of the area), General Counsel Exhibit 16 (video of the March 4 events), and (Tr. 230–238, 250–272) (testimony of Aradanas and union officials Morgan Evans and Gemma Weinstein). Accordingly, for the same reason, Smith’s directive violated Section 8(a)(1) of the Act.<sup>12</sup>

#### IV. ALLEGED UNLAWFUL PLACEMENT OF FABRO ON PERFORMANCE MANAGEMENT PLAN

The final complaint allegation is that Respondent unlawfully imposed more onerous and rigorous terms and conditions of employment on Faustino Fabro in late June 2016 by placing him on a performance management plan because of his union activities.

Fabro has been employed by Respondent for several years. At the time of the relevant events, he was an inspector in the housekeeping department. His primary job was to inspect the rooms after they have been cleaned by the room attendants. He was also expected to help clean the rooms if necessary. This would typically happen when there were a lot of checkouts or certain rooms needed to be rushed, such as when there were incoming flight crews who regularly stayed at the hotel pursuant to an airline contract with the hotel. Fabro had served in the position for about 3 years, since mid-2013, and was one of four full-time inspectors/inspectresses at the Aston hotel. The only difference between him and the others was that he was a so-called “relief” inspector who did not have a fixed station, i.e., he was not assigned to the same set of floors each day, but was instead rotated to whatever set of floors did not have a regularly assigned inspector that day (for example, because the regularly assigned inspector was off).

Fabro was also an open and active union supporter. He participated in almost every rally since the union campaign began in February 2015, was interviewed on television, and posted a lot on Facebook in support of the union. As indicated in the previous section above, he also leafleted for the union at the hotel when he was off duty. In addition, he was one of three employee witnesses who testified for the General Counsel at the prior unfair labor hearing in early February 2016 about Executive Vice President Ettinger’s alleged unlawful statements.

Beginning in early May 2016, and continuing throughout that month, Marissa Cacacho, the executive housekeeper, re-

ceived numerous reports or complaints about Fabro. They came from various personnel, including the two housekeeping supervisors (Connie Quibilan and Elvie Rivera), the housekeeping clerk, and several room attendants, and reported or complained that Fabro had failed to properly perform his job in various ways. Specifically, they reported or complained that he failed to help certain room attendants clean rooms; failed to respond to radio calls; sometimes cleared rooms for occupancy that were still dirty; ignored, refused to talk to, acted rude to, and failed to help or respond to requests for help from certain room attendants; failed to notify certain room attendants of their mistakes so they could correct them; and pouted and displayed negativity during work. (GC Exhs. 3(a)–(f), (h), (j), and 5.) Several of the room attendants’ complaints also explicitly mentioned or referenced the union. One attendant complained that Fabro pressured him to support the union during work (GC Exhs. 3(g) and 4(b)). Three others complained that Fabro only helped prounion attendants and/or never greeted pro-company employees (GC Exh. 4(a), (c), (e)). Another complained that Fabro always made him go back and re-do his work, but did not tell prounion attendants to do so (GC Exh. 4(d)).

Except for the two reports submitted by supervisors Quibilan and Rivera, which were typed, and one from an attendant, which was submitted in handwriting, all of the foregoing reports or complaints were made orally to Cacacho. However, Cacacho typed up the oral complaints and had the employees sign and date them.

Around the same time, on May 16, Cacacho also received a typed “Petition Against Faustino Fabro” signed by 54 (well over half) of the nonsupervisory housekeeping department employees, including room attendants, housemen, inspectresses, and the clerk. The petition was addressed to the general manager of the hotels, Mark DeMello, and stated:

We the undersigned team members of the Aston Waikiki Beach Hotel, Housekeeping Department would like to petition Faustino Fabro to be removed as a team member of our department.

The petition listed numerous reasons why Fabro should be removed. Many were identical or similar to the individual complaints or reports, such as he “doesn’t greet the pro-company teammates,” “is unfair [and] chooses who he wants to help,” “displays a negative attitude towards his teammates [and] is always pouting,” “talks about the union when he is on the floors,” “blam[es] us that if not because of us going back to the company, the hotel should have been unionize[d],” “tells us to make up our minds to go back to the union,” and “does not respond to radio calls” or is “mean” when he does. Other listed reasons included that he “went to the broadcast media and ruined the reputation of the hotel by telling lies,” “provides wrong information to us,” “lie[s],” and “creat[es] stories that are not true” about management and support for the union, “doesn’t cooperate with his fellow inspectresses,” and “bad mouth[s] our housekeeping managers.” (GC Exh. 2).

Cacacho forwarded both the petition and the individual reports and complaints to DeMello and the rooms division manager, Jenine Webster. DeMello and Webster in turn forwarded them to the corporate office, specifically Ettinger, HR Vice

<sup>11</sup> ALJ Anzalone also noted that Smith’s order required Aradanas and Fabro to leave the hotel property, not just the lower lobby, and Acting Chairman Miscimarra affirmed solely on this additional or alternative basis. See 365 NLRB No. 53, slip op. at n. 3. In this case, however, the evidence does not support such an additional or alternative rationale. See the testimony of Evans, who spoke with Smith during the incident, Tr. 269–270 (Smith said Aradanas and Fabro could not leaflet in “work areas”).

<sup>12</sup> Although advised of its right to do so both before and at the hearing, the Respondent failed to present any newly discovered and previously unavailable evidence or changed circumstances that would warrant a different finding. See GC Exh. 1(t), and Tr. 40–42.

President Janice Wakatsuki, and General Counsel Liane Kelly. At their instruction, DeMello and Webster then interviewed the individuals who had submitted the complaints. Thereafter, on June 7, they also met with Fabro. They told him about the complaints and the petition and asked for his response.<sup>13</sup>

DeMello and Webster subsequently presented the results of the interviews to Ettinger, Wakatsuki, Kelly, and Cacacho. After some discussion, the six of them collectively decided to implement a 30-day “performance management plan” (PMP). However, as no PMP had ever been implemented before, DeMello and Webster had to prepare one. As ultimately drafted and approved, the PMP consisted of essentially three parts. First, every room attendant that Fabro worked with each day would be given a form to complete at the end of the workday to evaluate his performance as inspector. The form would list the following 8 performance areas or factors:

- (1) Greets team members and guests throughout the shift;
- (2) Begins each day by performing a radio check, checking supplies, and looking at his assignment within his section. Is responsive to radio requests throughout the shift;
- (3) Checks in with each room attendant by 10 am each day, examines their assignment paper, and determines if they are going to have a challenge. Checks in again by 2 pm to see if there are difficulties and reacts by assisting or calling Housekeeping for assistance.
- (4) Follows-up in-person with room attendants when there are room discrepancies that should be addressed. These include, but are not limited to: bed-making, room smell, bathroom cleanliness, amenity supplies, dusting, and lanai details.
- (5) Follows-up with Housekeeping when there are problems with his radio or the room attendants in his section.
- (6) Assists when called upon.
- (7) Assures that the carts in his section are neat, adequately stocked, and corridors are clear of trash and debris.
- (8) Releases rooms which are clean and ready, in a fast, efficient manner. Reacts to rush rooms by informing the room attendant, and assisting if necessary.

Each attendant would be asked to check on the form whether Fabro’s performance on each factor was unsatisfactory, satisfactory, or exceeds expectations, and to provide supporting comments in the space provided after each factor.

Second, at the end of each week, Cacacho would also rate Fabro based on the same eight factors, as well as the following two additional factors:

- (9) Responsive to the requests from Rooms Control and Housekeeping Management, specific to his section or assignment.

<sup>13</sup> The record is unclear how Fabro responded at the meeting on June 7. DeMello testified that Fabro generally denied everything. Webster, however, testified that Fabro admitted speaking to the attendants about the union during working time sometimes, and that he gave inconsistent responses to other questions. Fabro himself was not called to testify.

- (10) Attends departmental briefings for which he is scheduled.

Third, a summary would be prepared showing the number of responses received on each factor, the percentage of responses that rated Fabro unsatisfactory, satisfactory, or exceeds expectations, and a sample of the comments for that week. Cacacho would then meet with Fabro to review it.

On June 24, DeMello, Webster, and Cacacho met with Fabro to inform him about the PMP. They provided Fabro with an unsigned copy of the petition and advised him that they had determined, based on their investigation of the matter and written statements they had received, that there appeared to be “interpersonal conflicts or issues affecting the productivity and well-being of the housekeeping department.” They told Fabro that they had therefore decided to implement a PMP for 30 days, with extensions as needed and/or appropriate. They also described how the PMP would be implemented and provided him with a copy of the evaluation form that the attendants and Cacacho would complete. They assured Fabro that the PMP was “not disciplinary,” but was intended to provide him with an “additional learning opportunity to improve how [he] relate[d] and work[ed] with other team members and provide[d] assistance to the housekeepers whose rooms [he] inspect[ed].” They “encourage[d]” him to “work with the room attendants and [his] managers to improve all areas addressed.” (GC Exh. 6(a); and Tr. 377.)

The PMP began the following day as planned. DeMello, Cacacho, supervisors Quibilan and Rivera, or the inspectresses distributed the evaluation forms to the attendants who worked with Fabro each day and instructed them to complete and return the forms at the end of the workday. Cacacho also completed an evaluation form at the end of each week. Webster then prepared a summary of the results and she and Cacacho met with Fabro to review it.

Webster and Cacacho had four such meetings with Fabro, on July 7 and 25, and August 9 and 19.<sup>14</sup> At each of the meetings, Fabro was advised that well over a majority of the attendants had rated him unsatisfactory on all eight factors. As for Cacacho’s evaluations, Fabro was advised that she had rated him unsatisfactory on all 10 factors the first week; on 6 factors (1–4, 6, and 9) the second week; and 5 factors (1–4 and 6) the third and fourth weeks. (See GC Exhs. 7–14; and Tr. 75–86.)

Nevertheless, at the last meeting on August 19, Webster and Cacacho informed Fabro that the PMP would not be extended further.<sup>15</sup> They advised Fabro that he was expected to perform at a satisfactory level in all aspects of his position in the future, and that the failure to do so “will result in disciplinary action.” (GC Exh. 15; Tr. 87–88.) However, as of the December 2016 hearing, no further complaints or petitions had been made or filed against Fabro, and no disciplinary action had been taken against him.

As indicated above, the General Counsel contends that the PMP violated Section 8(a)(3) and (1) of the Act because it imposed more onerous working conditions on Fabro and was mo-

<sup>14</sup> Wakatsuki also attended the July 25 meeting with Fabro.

<sup>15</sup> The PMP was initially extended beyond 30 days because Fabro was out sick some days.

tivated by union animus. Respondent, on the other hand, contends that the PMP did not impose any onerous terms and conditions of employment on Fabro; that the General Counsel failed to establish union animus; and that the PMP would have been implemented under the circumstances even absent Fabro's union activity. As discussed below, a preponderance of the record evidence supports the General Counsel.

*A. Whether the PMP Imposed More Onerous Working Conditions on Fabro*

There is no evidence or contention that the PMP required Fabro to physically perform any additional or different duties as an inspector.<sup>16</sup> However, as indicated by the General Counsel, the PMP subjected Fabro to closer supervision through daily written evaluations of his work by the attendants, weekly written evaluations by Cacacho, and regular meetings with Cacacho and Webster to review the evaluations. Accordingly, it constituted more onerous working conditions under Board precedent. Cf. *Ferguson-Williams, Inc.*, 322 NLRB 695, 700–701 (1996) (manager subjected a prounion employee to closer supervision in violation of Section 8(a)(1) and (3) of the Act by directing a supervisor to inspect the employee's vehicle every day, make a report of her attitude, make a file on her, and know where she was at all times); and *Pinter Bros.*, 227 NLRB 921, 939–940 (1977) (owner subjected an employee who had filed charges and testified against the company to closer supervision in violation of Section 8(a)(4), (3), and (1) of the Act by criticizing and inquiring into her work), enfd. mem. 591 F.2d 1331 (2d Cir. 1978). See also *Olympic Limousine Service*, 278 NLRB 932, 936 (1986) (manager's statement to prounion employee that, if the union won the election, he would more closely supervise his work by following him around with a pen and pad all day constituted a threat of more onerous working conditions in violation of Section 8(a)(1) of the Act); and *T&T Machine Co.*, 278 NLRB 970, 973 (1986) (plant superintendent violated Section 8(a)(1) of the Act by directing a leadman to "keep an eye out" on every pump built by two employees because of their union activities).

*B. Whether the PMP was Motivated by Union Animus*

The parties agree that the analytical framework set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), is appropriate for evaluating whether the PMP was unlawful. Under that framework, the General Counsel must prove by a preponderance of the direct and/or circumstantial evidence that animus against union or protected activity was a substantial or motivating factor in the adverse employment action. At a minimum, the General Counsel must make an initial showing that the employee engaged in union or protected activity, the employer knew or believed that that the employee did so, and the employer harbored animus against such activity. Animus may be established by the employer's antiunion statements or other unlawful conduct, or inferred from the circumstances, such as the timing of the adverse action and other evidence that the employer's cited

reason for the action was a pretext, i.e. that the employer fabricated the cited reason or did not really believe that it had merit or warranted the adverse action.

If the General Counsel makes the required initial showing, the burden shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of the employee's union or protected activity. However, if the General Counsel shows that the reason cited by the employer for the adverse action was a pretext, the analysis is at an end as the employer by definition cannot meet its burden. See, e.g., *Big Ridge, Inc.*, 358 NLRB 1006, 1029–1032 (2012), reafd. 361 NLRB No. 149 (2014), enfd. 808 F.3d 705, 714–715 (7th Cir. 2015); *Lucky Cab Co.*, 360 NLRB No. 43 (2014); *Metropolitan Transportation Services*, 351 NLRB 657, 662–663 (2007); and *Multi-Ad Services*, 331 NLRB 1226, 1240–1242 (2000), enfd. 255 F.3d 363 (7th Cir. 2001), and cases cited there. See also *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 468–470 (9th Cir. 1966).

Here, there is no dispute that Fabro engaged in union activity and that Respondent knew it. Rather, the primary dispute is over whether Respondent had animus against union activity. As discussed below, there are several factors that establish such animus, including Respondent's prior unfair labor practices, and various other facts and circumstances indicating that the petition and complaints were a pretext to target Fabro with the PMP.

1. Respondent's prior unfair labor practices

*Respondent's prior 8(a)(1) statements.* As indicated by the General Counsel, Executive Vice President Ettinger's statements at the employee meetings in May 2015 about the union campaign, which ALJ Anzalone found violated 8(a)(1) of the Act in the prior proceeding, are sufficient to establish that Respondent harbored union animus. See, e.g., *R.J. Corman Railroad Construction, LLC*, 349 NLRB 987, 989 (2007) (finding that the employer's animus was established by its 8(a)(1) statements). Although the PMP was not implemented until approximately a year after Ettinger made the statements, the union campaign was still ongoing, Fabro was still openly and actively supporting it by leafleting and participating in the rallies, and Ettinger participated in the decision to implement the PMP.

*Respondent's prior 8(a)(3) violations.* As discussed above, ALJ Anzalone also found that Respondent violated Section 8(a)(3) of the Act by disciplining Guzman and Rangunjan in June 2015, assertedly for harassing, threatening, and interfering with the work of another employee during the course of their efforts to get him to support the union. Applying the analysis in *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964)—the appropriate analysis where an employer disciplines an employee for misconduct in the course of otherwise protected activity—ALJ Anzalone found that the discipline was unlawful because Respondent did not have an honest belief that Guzman and Rangunjan had actually engaged in misconduct. Such a finding is essentially equivalent to a finding that the discipline was motivated by union animus. See *Magnolia Manor Nursing Home*, 284 NLRB 825 fn. 1 (1987) (although *Burnup & Sims* only addressed whether or when discipline for misconduct during

<sup>16</sup> The General Counsel does not contend that the 10 factors utilized by Respondent for evaluating Fabro were inconsistent with his normal duties as an inspector.

otherwise protected activity violates 8(a)(1), it follows that such discipline also constitutes 8(a)(3) discrimination if the employer had no good-faith belief that the employee had engaged in misconduct). Accordingly, like the prior 8(a)(1) statements, the prior unlawful discipline of Guzman and Rangunjan demonstrates Respondent's animus.<sup>17</sup>

The General Counsel argues that Respondent's animus is also demonstrated by Cacacho's statements to Aradanas on October 30, 2015, Smith's surveillance of the union organizers' leafleting on January 13 and 27, 2016, and the unlawful refusal to allow off-duty employees to distribute union leaflets in the lower lobby area in August 2015 and March 2016. However, as discussed above, Cacacho's and Smith's forgoing conduct was not unlawful. Nor did it otherwise reflect animus toward the union campaign. As for the unlawful prohibition against off-duty employees leafleting in the lower lobby, given the substantial other evidence of animus, it is unnecessary to decide whether that prohibition also constitutes evidence of animus.<sup>18</sup>

## 2. Evidence of pretext

As indicated by the General Counsel, there are also various facts or circumstances that, considered together, indicate that Respondent orchestrated the complaints and the petition against Fabro and/or seized on them as a pretext for implementing the PMP.<sup>19</sup>

*The coordinated timing of the complaints and the petition.* As discussed above, the individual complaints and the petition were all filed around the same time, in May 2016. However, there is no indication in the complaints or the petition, or any other evidence, that there was any change in Fabro's performance or attitude at work in the previous week or month that precipitated them. Both the complaints and the petition cite a wide variety of grievances, most of which are nonspecific even as to what year, much less what month, week, or day, they occurred. Further, there is no evidence that any similar complaints were made prior to May, and there were admittedly no complaints in the months after the PMP concluded (notwithstanding that a supermajority of the attendants consistently rated him unsatisfactory in every area on the evaluations). Finally, Webster, DeMello, and Wakatsuki acknowledged that it was highly unusual, both for so many complaints to be made in such a short period, and for the employees, especially those of Filipino or Hawaiian ancestry, to complain in such an open

and public way by signing a petition. (Tr. 130–133, 139, 359, 361, 486–487.) Thus, it is a reasonable inference that the complaints and the petition were part of a coordinated and orchestrated effort to target Fabro.

*Cacacho's involvement with the complaints and the petition.* As discussed above, Cacacho typed up all but one of the employee complaints and had the employees sign and date them. According to Cacacho, she did not ask or instruct the employees to make the complaints, but just typed up what the employees orally came and told her. However, none of the employees were called to corroborate Cacacho's testimony. Further, there are reasons to doubt it. For example, several of the initial complaints are extremely general or vague and do not appear to be prompted by any specific incidents. See GC Exhs. 3(e), (f), (g), (i), and (j). Moreover, two of the complaints, one which Cacacho typed and the other which is handwritten, are identical. See GC Exhs. 3(i) (Remy Inez) and 3(j) (Glenda Sebastian) ("There are times that Faustino Fabro is my Inspector and I am bothered by him and not comfortable to work with him because when he comes to my floor, he don't talk to me, always pouting and when he come and inspect, he don't say anything and leave."). Cacacho provided no explanation for this.

There are similar problems with Cacacho's testimony about the petition. Cacacho testified that she received the typed petition from Alona Afable, a room attendant who also serves as a temporary inspectress, on May 16, after the Monday morning briefing, and that she did not know anything about it beforehand. However, again, her testimony was not corroborated. Afable was not called to testify. Respondent instead called Alicia Baldos, another inspectress who signed the petition against Fabro and opposes the union, and asked her if she knew who created the petition. Although Baldos testified that Afable created it, she never explained how she knew this. She denied any involvement in soliciting signatures, and also denied any knowledge of whether Cacacho had any involvement in creating the petition. (Tr. 451–452.)<sup>20</sup>

Further, Cacacho admitted that eight of the employees who orally complained to her about Fabro on May 14–16 did so before she received the petition. As indicated by the General Counsel, it is unlikely that none of them, not even the seven who signed the petition on or before the same day they complained, would have mentioned the petition to Cacacho. Moreover, no explanation was provided why the petition was given to Cacacho. Although she was responsible for the day-to-day operations of the department, the petition was not addressed to her, but to General Manager DeMello. Like Cacacho, DeMello had an office at the hotel, worked a Monday–Friday daytime schedule, and regularly met with and briefed the housekeeping employees.

<sup>20</sup> Room attendant Digna Cadaoas, one of the General Counsel's witnesses, testified that she was asked to sign the petition three times before she signed it; the first two times by Lisa Indencion, another inspectress, and the third time by both Indencion and Afable. (Tr. 159–172, 189, 193.) However, this testimony does not corroborate Cacacho's testimony that she received the completed petition from Afable and that she had no knowledge of or involvement with the petition beforehand.

<sup>17</sup> As indicated above, the Board affirmed ALJ Anzalone's factual findings and legal conclusions.

<sup>18</sup> For the same reason, it is also unnecessary to consider or rely on previous alleged unfair labor practices committed by Respondent in February and March 2015 as evidence of animus. See the Board's recent decision reported at 365 NLRB No. 44 (2017), which set aside a prior informal settlement agreement of those alleged unfair labor practices, found that the allegations were properly deemed admitted by Respondent, and granted the General Counsel's motion for a default judgment with respect to those allegations pursuant to the noncompliance provisions of the settlement.

<sup>19</sup> The complaint does not separately allege that Respondent unlawfully orchestrated the complaints and the petition. However, the General Counsel made clear on the first day of hearing that evidence would be presented regarding management involvement in the complaints and the petition in order to establish pretext (Tr. 39–40, 167).

Thus, based on the record as a whole,<sup>21</sup> 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 generally *NLRB v. Howell Chevrolet*, 204 F.2d 79, 86 (9th Cir. 1953), *affd.* 346 U.S. 482 (1953). See also *Lucky Cab*, 360 NLRB No. 43, slip op. at 6–7 & fn. 15; and *Seaboard Farms of Athens, Inc.*, 292 NLRB 776, 787 (1989) (false or discredited testimony regarding the reasons for an adverse action support a finding of pretext).

*Cacacho's statement to employee Cadaoas about the purpose of the evaluations.* Digna Cadaoas, a room attendant at the Aston, was given a PMP evaluation form to complete on each of the 5 days that Fabro was assigned to her floor during July. Cadaoas testified that, on the second day, the form was given to her by Cacacho, and that Cacacho told her Fabro was being evaluated so that he would be dismissed and there would not be anyone to lead the rallies (Tr. 172–175, 184–185, 191).

There are substantial reasons to credit Cadaoas's testimony. Cadaoas has no apparent interest in the outcome or strong bias in favor of the union or Fabro. She has not participated in the union rallies since 2015, and she signed the petition against Fabro on May 13, 2016 (see fn. 20, *supra*). Moreover, Cacacho did not deny making the statement to Cadaoas. She testified that she distributed the evaluation forms twice during the PMP, and that the first time she did so, she told the attendants the purpose was to “get feedback . . . to help [Fabro] to become a better inspector” (Tr. 426). However, she was never asked what she told the attendants the second time, or whether she ever made any other statements about the evaluations to Cadaoas or any other attendant.

Respondent argues that Cadaoas's testimony should nevertheless be discredited, as her August 5, 2016 pretrial affidavit made no mention of such a statement by Cacacho. Rather, her affidavit only mentioned such a statement being made by Lisa Indencion, an inspectress, when Indencion asked her to sign the petition against Fabro in May (Tr. 191–193). Further, no disciplinary action was taken against Fabro after the PMP ended on August 19. However, Cadaoas explained that her prior affidavit was accurate but simply not complete, i.e. that *both* Indencion *and* Cacacho made such a statement to her, the former when she was asked to sign the petition against Fabro, and the latter when she was asked to complete an evaluation of Fabro (Tr. 191–192, 198). As for the lack of any post-PMP disciplinary action against Fabro, this 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.

On balance, therefore, considering all relevant credibility factors and the record as a whole, Cadaoas's testimony is worthy of belief. See fn. 2, *supra*; and *George W. Kugler, Inc.*, 258 NLRB 122, 124 (1981).

*Supervisor Rivera's conversations with Cadaoas about the evaluations.* Cadaoas rated Fabro unsatisfactory in all eight

<sup>21</sup> See also fn. 3, above, regarding Cacacho's dismissive denial about her encounter with Aradanas on October 30, 2015.

factors on the first PMP evaluation she completed.<sup>22</sup> However, on the second evaluation, she rated him satisfactory in all eight factors. Cadaoas testified that, the next day, supervisor Rivera called her said, “Did you know what you signed? Why did you check all the satisfactory boxes?” Cadaoas responded that she checked all the satisfactory boxes because Fabro had helped her that day. Rivera replied that it would be better for her not to put anything if she was going to check satisfactory. Accordingly, she did not fill out the third evaluation form she was given that day. (Tr., 176–179, 194, 199.).<sup>23</sup>

The next day, Cadaoas was given the fourth evaluation form to fill out. Cadaoas testified that later, around 4 p.m., both Rivera and Quibilan came to see her while she was still cleaning, before she finished her shift and returned the form. Rivera told her to fill out the form so it could be done. Cadaoas responded that Fabro had helped her. Rivera, however, replied that Fabro was obligated to help her, and told her to check all the unsatisfactory boxes. Cadaoas therefore did so and handed the completed form to them. (Tr. 180–183.)

Again, Cadaoas's testimony is uncontradicted. Rivera was not called to testify. As for Quibilan, while she denied that she herself ever asked any employee to check only the unsatisfactory boxes (Tr. 474), she did not deny that Rivera did so (counsel never asked her). Nor is there any other apparent reason to discredit or disregard Cadaoas's testimony. Although Respondent's posthearing brief (p. 56 & fn. 39) argues that the General Counsel failed to present any evidence that Rivera and Quibilan are statutory supervisors, there was no need for the General Counsel to do so. Respondent's answer to the October 14, 2016 complaint admitted that they were both its supervisors within the meaning of section 2(11) of the Act and its agents within the meaning of section 2(13) of the Act at all relevant times. See GC Exh. 1(n), par. 5(e), (f), and GC Exh. 1(q), par. 1.

Accordingly, the General Counsel has clearly satisfied the initial burden under *Wright Line* of showing union animus. Moreover, the General Counsel has also 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. Thus, as discussed above, 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)

<sup>22</sup> Cadaoas testified that she rated Fabro unsatisfactory the first day because inspectresses Afable and Patricia Cuinday told or asked her to (Tr. 173–174, 189).

<sup>23</sup> Cadaoas's testimony about exactly what Rivera said in reply varied somewhat. See Tr. 179 (Rivera said, “It is better that you do not put any comment, because you wrote satisfactory”); 180 (Rivera said, “You better not put anything if [you are] going to write down satisfactory”); 194 (Rivera said, “It [is] not necessary to fill out the comment section if you checked satisfactory”); 194 (Rivera said, “It [is] better not to say anything if you [are] going to check satisfactory”). However, like Aradanas, Cadaoas testified through an Ilocano interpreter, and it is likely that the foregoing variations were due at least in part to variances in how the questions and/or answers were translated. The variations are certainly not sufficient under the circumstances to conclude that Rivera said nothing. As for what exactly Rivera did say, it is most likely that she said what Cadaoas's actions indicate she said (to not fill out the evaluation form at all).

and (1) of the Act as alleged.

#### CONCLUSIONS OF LAW

1. By directing off-duty employees on March 4, 2016 not to distribute union leaflets in front of the two pillars in the open outer area of the lower lobby facing the entrance driveway, 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.

2. By placing Faustino Fabro on a performance management plan on June 24, 2016, because of his open and active support for the union and to discourage employees from supporting the union, the 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.

3. The Respondent did not otherwise violate the Act as alleged in the complaint.

#### REMEDY

The appropriate remedy for the foregoing violations is an order requiring the Respondent to cease and desist and to take certain affirmative action. As requested by the General Counsel (Br. 57), the latter properly includes a requirement that Respondent rescind the unlawfully implemented PMP, remove it from Fabro's personnel file, and notify Fabro that it has done so and will not rely on the PMP in any way. See, e.g., *Saginaw Control & Engineering*, 339 NLRB 541, 547 (2003). It also includes a requirement that Respondent post an official notice to employees advising them of their rights and that Respondent will not violate those rights in any like or related manner. As in the prior proceeding, given that many of the hotel employees speak the Philippine dialects Ilocano or Tagalog, rather than English, as their primary language, the notice must be posted in all three languages.

#### ORDER<sup>24</sup>

The Respondent, Aqua-Aston Hospitality, LLC d/b/a Aston Waikiki Beach Hotel and Hotel Renew, Honolulu, Hawaii, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting off-duty employees from distributing union leaflets in front of the two pillars in the open outer area of the lower lobby facing the entrance driveway or in other nonwork areas.

(b) Discriminatorily placing employees on a performance management plan or otherwise imposing more onerous working conditions on them because of their union or other protected concerted activities or to discourage such activities.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights 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 the Board's order, rescind the performance management plan (PMP) that it implemented regarding relief inspector Faustino Fabro on June 24, 2016.

(b) Within 14 days from the date of the Board's order, remove from its files any reference to the PMP it implemented regarding Fabro, and within 3 days thereafter notify Fabro in writing that this has been done and that the PMP will not be used against him in any way.

(c) Within 14 days after service by the Region, post at its facilities in Honolulu, Hawaii, copies of the attached notice marked "Appendix" in English, Ilocano, and Tagalog.<sup>25</sup> Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the 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. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facilities involved in this proceeding, Respondent shall duplicate and mail, at its own expense, a copy of the notices to all current and former employees employed by Respondent at any time since March 4, 2016.

(d) Within 21 days after service by the Region, file with the 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., April 12, 2017

#### 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.

<sup>24</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>25</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."

WE WILL NOT prohibit our off-duty employees from distributing union leaflets in front of the two pillars in the open outer area of the lower lobby facing the entrance driveway or in other nonwork areas.

WE WILL NOT discriminatorily place our employees on a performance management plan or otherwise impose more onerous working conditions on them because of their union or other protected concerted activities or to discourage such activities.

WE WILL NOT in any like or related manner restrain or coerce our employees in the exercise of the rights guaranteed them by Federal labor law.

WE WILL, within 14 days from the date of the Board's order, rescind the performance management plan (PMP) that we implemented regarding relief inspector Faustino Fabro on June 24, 2016.

WE WILL, within 14 days from the date of the Board's order, remove from our files any reference to the PMP we implemented regarding Fabro, and within 3 days thereafter notify Fabro in writing that this has been done and that the PMP will not be used against him in any way.

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

The Administrative Law Judge's decision can be found at [www.nlrb.gov/case/20-CA-167132](http://www.nlrb.gov/case/20-CA-167132) 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.

