

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
SAN FRANCISCO BRANCH OFFICE**

**MALCO ENTERPRISES OF NEVADA, INC. d/b/a  
BUDGET RENT A CAR OF LAS VEGAS  
Respondent**

**and**

**Case 28–CA–213222**

**FRANCINE SCOLARO, an Individual  
Charging Party**

*Nathan A. Higley, Esq.*, for the General Counsel.

*James J. McMullen, Jr. Esq., Joseph P. Sbuttoni, III, Esq., (Gordon Rees Scully Mansukhani LLP)*, for the Respondent.

**DECISION**

**STATEMENT OF THE CASE**

**DICKIE MONTEMAYOR, Administrative Law Judge.** This case was tried before me on October 16, 2018, in Las Vegas, Nevada. Francine Scolaro filed a charge on January 17, 2018, alleging violations by Malco Enterprises of Nevada, Inc. (Respondent) of Section 8(a)(1) of the National Labor Relations Act (the Act). Respondent filed an answer denying that it violated the Act. The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. I carefully observed the demeanor of witnesses as they testified and I rely on those observations here. I have studied the whole record, including the post hearing briefs and based upon the detailed findings and analysis below, I conclude that Respondent did not violate the Act as alleged.

**FINDINGS OF FACT**

**Jurisdiction**

The complaint alleges, Respondent admits, and I find

1. (a) At all material times, Respondent has been a corporation with offices and places of business in the area of Las Vegas, Nevada, including an office and place of business servicing McCarran Airport and has been engaged in the business of the rental of vehicles.

5 (b) In conducting its operations during the 12-month period ending January 17, 2018, Respondent purchased and received at Respondent’s facilities goods valued in excess of \$50,000 directly from points outside the State of Nevada.

(c) In conducting its operations during the 12 month period ending January 17, 2018, Respondent derived gross revenues in excess of \$500,000.

10 (d) At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

15 2. At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act.

20	Paulino Ocampo-	City Operations Manger
	Joselito Reyes-	Training and Sales Manager
	Laura Sottile -	Customer Relations Manager
	Michael Montecino-	Station Manager
	Rosalie Perez-	Rental Sales Agent Supervisor

**Alleged Unfair Labor Practices**

25 ***A. Background***

30 Respondent is an independent rental car franchise that operates a retail car rental service in McCarran Airport in Las Vegas, Nevada. The Company provides its services in a manner typical of many airports with a walk up counter and various work stations to process incoming car rental customers. Francine Scolaro began her work with Respondent on April 7, 2015. She held the position of Customer Service Agent/Representative (CSA and/or CSR). As her job title implies, she was responsible for providing first line service to the customers who arrived at the counter to rent vehicles. She was directly responsible for interacting one on one with customers and completing their rental contracts. She and other agents were expected to meet both monthly contract and sales quotas.

***B. The Work and Handbook Rules***

40 During Scolaro’s tenure, Respondent had in place a number of employer policies, work rules and handbook provisions. Specifically, General Counsel alleged violations as it related to the following rules: (1) a verbal rule consisting of a verbal warning in which employees were cautioned to, “never speak negatively about one another in front of others whether it be customers, peers or management.” (GC Exh. 1e); and (2) A handbook provision which provided that employees should, “always conduct him or herself in a polite, professional manner, treating customers and co-workers courteously and respectfully.” (GC Exh. 1e.)

### ***C. The June 26, 2017 Incident***

5 In June of 2017, Respondent had in place a break schedule for Customer Service  
Representatives. The purpose of the schedule was to prevent employees from taking their breaks  
at the same time to maintain coverage. (R. Exh. 2.) As part of this scheduling, the customer  
service agents were specifically directed to advise the Lead\CSR Manager “at all times” when an  
agent left the counter. (R. Exh. 2.)

10 In June of 2017, Scolaro underwent disc replacement surgery and had been off work  
recovering from June 5–18, 2017. She returned to work part–time and during the shift on June  
26, 2017, Scolaro left to use the restroom ten minutes before her scheduled break. While she  
was in the restroom, she heard Perez, the rental agent supervisor, calling her name and asking  
where she was. Perez approached her after she exited the restroom and advised her to return to  
15 her work station. Scolaro became agitated and told Perez to leave her “the fuck alone<sup>1</sup>.” (GC  
Exh. 12.) She further indicated that she was in pain didn’t feel good and had come back from  
major surgery. (GC Exh. 12, Tr. 14.) Scolaro thereafter drafted an incident report in which she  
accused Ms. Perez of “Bullying and Harassment.” (GC Exh. 12.) After the incident took place,  
Paul Ocampo conducted an investigation to determine if any discipline was warranted. On July  
20 8, 2017, he issued an “Employee Warning Notice.” The notice reiterated the basic underlying  
facts of the incident including Scolaro’s verbal utterance and it stated in part, “other employees  
were there to witness this event. All budget employees are expected to conduct themselves in a  
polite, professional manner, treating customers and coworkers courteously and respectfully as  
25 stated in page 4 of our employee handbook. Belligerent speech and excessive arguing is listed as  
inappropriate behavior and is a violation of our handbook.” (R. Exh. 3.) The notice also warned  
that, “any more infractions of this type will result in suspension or termination.” (R. Exh. 3.)

### ***D. The September 5, 2017 Incident***

30 On September 5, 2017, an incident took place in which one coworker took the chair of  
another coworker. After the employee returned from her break, Perez, the supervisor, instructed  
the employee to give the chair back to the person who had returned from break. At this point,  
Scolaro, in front of customers, told Perez she was being “rude” and that she shouldn’t talk to  
employees that way in front of customers. On that same day, Laura Sottile, issued an “Employee  
35 Verbal Warning” to Scolaro. The warning pertained to the chair incident and noted that,  
“Francine was witnessed in front of the Manager Laura reprimanding our Lead Agent Rosalie in  
a lobby full of customers. . . Employees should never speak negatively about one another in front  
of others whether it be customers, peers, or management. As seen in the Employee Handbook  
page 4 under, what is expected of Budget Rent a Car & Sales Employees.” (GC Exh. 6.)  
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<sup>1</sup> At trial she testified that she, “said something along the lines of what the F don’t you understand.”  
(Tr. 150.)

*E. The January 18, 2018 Incident*

5 In early January 2018, an email was sent by Joselito Reyes to supervisors advising  
that CSR's should take the next person standing in line regardless of whether the  
customer was standing in a regular line or a Costco/prepaid line (a line established to  
service Costco customers). The email provided in part, "if there's a line whether Costco  
or not, call the next customer. This is common sense and don't need to be explained  
especially to the supervisors or managers. No confusion at all. If I see a customer  
10 standing in line and an available agent not calling next, it will be "grave" for the agent  
and the manager/supervisor on duty." (GC Exh. 2.) The reference to "grave" in the  
email was a shorthand reference to assignment to the graveyard shift, the least desirable  
shift for employees at the facility. Perez was discussing the email in question with some  
employees and Scolaro overheard the conversation. Scolaro asked for a copy of the  
15 memo as she had not seen any evidence of such. The next day Perez gave Scolaro a copy  
of the email. (GC Exh. 2.) Perez advised Montecino that she had given Scolaro a copy  
of the email. The email was however intended only for managers and not intended to be  
distributed to employees. After discussing the matter with Montecino, Perez attempted to  
retrieve the document from Scolaro. Upon requesting that the document be returned  
20 Scolaro refused stating that, "she was with a customer" and it "didn't feel right" that  
Perez was behind her. (Tr. 228.) Montecino watched what transpired through the  
window then approached Scolaro as she finished with the customer. He approached as  
the next customers were stepping forward and asked for the email back. She responded  
in a loud voice, "do you want me to take the memo out of my bra in front of everyone."  
25 (Tr. 217-218.) She made hand gestures and Montecino responded, "the memo's in your  
front pocket, but let's not talk about that. Let's go to the back office now, please." (Tr.  
217-218.) While proceeding to the back office Scolaro retrieved the memo from her  
front pocket stuck it on the bulletin board and took a picture of it.

30 After the incident, Montecino directed Scolaro to "clock out" and go home. An  
employee suspension notice was thereafter drafted. The notice advised Scolaro that "per  
the Employee Handbook (page 4) under always conduct him or herself in a polite  
professional manner treating customers and co-workers courteously and respectfully,"  
she was being suspended pending investigation. (GC Exh. 4.) Joselito Reyes  
35 investigated the matter and spoke with others present and conferred with Montecino and  
Ocampo. After concluding the investigation, Reyes determined that termination was  
warranted. An employee separation report was thereafter issued on January 10, 2018.  
The report set forth "insubordination" and "failure to follow instructions" as the reasons  
for the termination. (GC Exh. 14.) It also set forth the following narrative summary:  
40 "Insubordination or refusal to comply with instructions or failure to perform reasonable  
duties which are assigned (taunting by Lead) conduct which the company feels reflects  
adversely on the employee or company as per employee handbook (Appendix C, pg. C  
2&3)." (GC Exh. 14.)

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## Analysis

### *A. The Maintenance of the Work Rules was Not Unlawful*

5           In *The Boeing Co.*, 365 NLRB No. 154 (2017), the Board delineated the standards applicable to determine whether or not work place rules are lawful under the Act. In *Boeing* the Board delineated 3 categories of rules. Category 1 rules may be lawful if the rules when reasonably interpreted, do not prohibit or interfere with the exercise of rights guaranteed by the Act, or because the potential adverse impact on protected rights is outweighed by the business justifications associated with the rule. In devising its new standard, the Board cautioned that merely because a rule falls into Category 1 does not mean that the employer may use the otherwise lawful rule to prohibit protected concerted activity or to discipline employees engaged in protected activity. So called “civility rules” or rules that call upon employees to treat employees or supervisors in a polite manner have been found by the Board to generally fall under Category 1 in its newly imagined *Boeing* categorical hierarchy. *Boeing* at 5. N. 15 incorporating by reference *William Beaumont Hospital*, 363 NLRB No. 162, slip op.at 1 (2016), see also (See GC Memorandum 18-04).

20           *Boeing* makes clear that the rules at issue in this case, “never speak negatively about one another in front of others whether it be customers, peers or management,” and “always conduct him or herself in a polite, professional manner, treating customers and co-workers courteously and respectfully,” fall directly under Category 1 and thus under the *Boeing* standards are lawful because the rules when reasonably interpreted, do not prohibit or interfere with rights protected by the Act. Rather they merely act to promote harmony and civility. Accordingly, I find that the maintenance of the rules in question did not violate Section 8(a)(1) of the Act.

### *B. The Application of the Rules Was Not Unlawful*

30           The concept of concerted activity has its basis in Section 7 of the Act. Section 7 of the Act in pertinent part states: “Employees shall have the right to self-organization to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection.” In order for the actions to be protected under the statute they must be both “concerted” and engaged in for the purpose of “mutual aid or protection.” *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 153 (2014). In general, to find an employee’s activity to be “concerted,” the employee must be engaged with or on the authority of other employees and not solely by and on behalf of the employee herself. Whether an employee’s activity is “concerted” depends on the manner in which the employee’s actions may be linked to those of his coworkers. See *NLRB v. City Disposal Systems*, 465 U.S. 822, 831 (1984); *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), supplemented *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). The Supreme Court has observed, however, that “[t]here is no indication that Congress intended to limit [Section 7] protection to situations in which an employee’s activity and that of his fellow employees combine with one another in any particular way.” *NLRB v. City Disposal Systems*, 465 U.S. at 835. *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151 (2014).

The question of whether an employee has engaged in concerted activity is a factual one based on the totality of record evidence. See, e.g., *Ewing v. NLRB*, 861 F.2d 353 (2d Cir. 1988). The Board has found an individual employee’s activities to be concerted when they grew out of prior group activity. *Every Women’s Place*, 282 NLRB 413 (1986). The Board has found that “ostensibly individual activity may in fact be concerted activity if it directly involves the furtherance of rights which inure to the benefits of fellow employees.” *Anco Insulations, Inc.*, 247 NLRB 612 (1980). An employee’s activity will be concerted when he or she acts formally or informally on behalf of the group. *Oakes Machine Corp.*, 288 NLRB 456 (1988). Concerted activity has been found where an individual solicits other employees to engage in concerted or group action even where such solicitations are rejected. *El Gran Combo de Puerto Rico*, 284 NLRB 1115 (1987), *enfd.* 853 F.2d 966 (1st Cir. 1988).

### 1. *Concerted activity*

I find that considering the totality of the evidence, there is no basis to find that the actions of Scolaro fall within the umbrella of the Board’s definition of “concertedness.” “Activity which consists of mere talk must, in order to be protected, be talk looking toward group action . . . [i]f it looks forward to no action at all it is more than likely to be mere “griping.” *Mushroom Transportation Co., Inc.* 330 F.2d 683, 685 (1964). The facts of this case establish that Scolaro’s actions of telling a supervisor to leave “[her] the fuck alone,” opining that a supervisor was “rude” and disingenuously asserting that an email was stashed away in her bra while refusing to return it when directed, all lack the indicia of any actions looking toward a group complaint or action. There is nothing in the factual background of each of the incidents which would objectively establish that Scolaro sought to initiate, induce, or prepare for group action. Therefore, there is no basis from which to conclude that the actions of Scolaro were done other than by and on behalf of herself. *Allstate Maintenance, LLC*, 367 NLRB No. 68 (2019). While because of the nature of the workplace, other employees were present, this fact in and of itself, does not automatically clothe her actions with the requisite “concertedness” to meet the Board’s definition. I find that the General Counsel did not prove that Scolaro engaged in concerted activities. Thus, the discipline and/or discharge of her did not violate Section 8(a)(1) of the Act.

### 2. *Protected activity under the Act*

In order for concerted activity to be “protected” it must be undertaken “for the purpose of collective bargaining or other mutual aid or protection,” 29 U.S.C. § 157 (1976), and actions taken for mutual aid or protection include those intended to improve conditions of employment. The concept of “mutual aid or protection” focuses on the goal of concerted activity; chiefly, whether the employee or employees involved are seeking to “improve terms and conditions of employment or otherwise improve their lot as employees.” *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). Under Section 7, both the concertedness element and the “mutual aid or protection” element are analyzed under an objective standard. An employee’s subjective motive for taking action is not relevant to whether that action was concerted. “Employees may act in a concerted fashion for a variety of reasons—some altruistic, some selfish—but the standard under the Act is an objective one.” *Circle K Corp.*, 305 NLRB 932, 933 (1991), *enfd.* mem. 989 F.2d 498 (6th Cir. 1993). Nor is motive relevant to whether activity is for “mutual aid or protection.” Rather, the analysis focuses on whether there is a link between the activity and matters concerning the

workplace or employees' interests as employees. The motives of the participants are irrelevant in terms of determining the scope of Section 7 protections; what is crucial is that the purpose of the conduct relate to collective bargaining, working conditions and hours, or other matters of "mutual aid or protection" of employees.

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As was the case with the issue of "concertedness" the actions of Scolaro also fail the second prong of the test assuming for the sake of argument the activity was in fact concerted. This is necessarily true because the objective evidence of record is devoid of any indicia that her actions were taken for any purpose that related to mutual aid or protection of others. I find that assuming for the sake of argument Scolaro's actions were concerted, the General Counsel did not prove that Scolaro activities were protected under the Act. Thus, the discipline and/or discharge of her did not violate Section 8(a)(1) of the Act.

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### 3. *Analysis under Wright Line*

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To establish a violation under *Wright Line*, 251 NLRB 1083 (1980) *enfd.* 662 F.2d 899 (CA1 1981), the General Counsel must first prove, by a preponderance of the evidence, that the employee's protected activities were a substantial or motivating factor in the employer's decision to take action against them. *Manno Electric, Inc.*, 321 NLRB 278, 280 (1996). The General Counsel makes a showing of discriminatory motivation by proving the employee's protected activity, employer knowledge of that activity, and animus against the employee's protected conduct. *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999). Proof of an employer's motive can be based upon direct evidence or can be inferred from circumstantial evidence, based on the record as a whole. *Ronin Shipbuilding, Inc.*, 330 NLRB 464 (2000); *Robert Orr/Sysco Food Services*, 343 NLRB 1183 (2004).

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If the General Counsel is successful, the burden of persuasion then shifts to the employer to show that it would have taken the same action even in the absence of the employee's protected activities. *Wright Line*, 251 NLRB at 1089; *Septix Waste, Inc.*, 346 NLRB 494, 496 (2006); *Williamette Industries*, 341 NLRB 560, 563 (2004).

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Once the General Counsel has met its initial burden under *Wright Line*, an employer does not satisfy its burden merely by stating a legitimate reason for the action taken, but instead must persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of the protected conduct. *T&J Trucking Co.*, 316 NLRB 771 (1995); *Manno Electric, Inc.*, 321 NLRB at 280 *fn.* 12.

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I find that General Counsel has failed to meet its burden under *Wright Line* because it failed to make a threshold showing that the actions of Scolaro were concerted and/or protected under the Act. I also find that assuming for the sake of argument that Scolaro had engaged in concerted and protected activities, Respondent met its burden of showing that it would have taken the same action. More specifically, Respondent established that it took the actions in direct response to Scolaro's admitted comments, insubordination and refusal to comply with instructions. I therefore find that Respondent did not violate Section 8(a)(1) if the Act.

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**CONCLUSIONS OF LAW**

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

2. Charging Party did not engage in protected and concerted activities and therefore Respondent did not violate the Section 8(a)(1) of the Act as alleged in the complaint.

10 3. The Respondent did not violate 8(a)(1) by maintaining or enforcing handbook rules that promoted civility in the workplace.

15 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>2</sup>

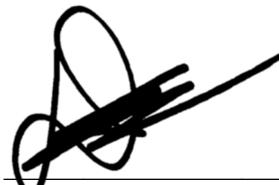
**ORDER**

20 The complaint is dismissed in its entirety.

Dated, Washington, D.C. March 8, 2019

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**Dickie Montemayor**  
**Administrative Law Judge**

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<sup>2</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.