

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

**DROCK GAMING, LLC D/B/A
THE D CASINO**

and

Case 28–CA–219756

XSTAL CAMPBELL, an Individual

Stephanie J. Parker, Esq., for the General Counsel.
William M. Thacker and David Houston, Esqs. (Dickinson Wright, PLLC),
for the Respondent.

DECISION

STATEMENT OF THE CASE

Lisa D. Ross, Administrative Law Judge. On May 4, 2018, Xstal Campbell (Campbell) filed an unfair labor practice (ULP) charge against Drock Gaming, LLC d/b/a The D Casino (Respondent or the D Casino), alleging violations of the National Labor Relations Act (NLRA or the Act). She amended her charge on June 20, 2018. On July 27, 2018, the instant complaint and notice of hearing was issued.

The complaint alleges that Respondent violated Sections 8(a)(1), (3), and/or (4) of the Act by: (1) directing employees to not raise concerted complaints, (2) denying Campbell's vacation leave request, (3) imposing more onerous working conditions on Campbell, and (4) suspending and then discharging Campbell because she engaged in protected activity.

I conducted a trial in Las Vegas, Nevada, on November 14–16, 2018, and by telephone on January 30, 2019, during which I afforded the parties a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.¹ The General Counsel and Respondent filed helpful post hearing briefs that I have duly considered.

Based on the entire record, including the pleadings, testimony of witnesses, my observations of their demeanor, the documents, and the parties' stipulations, I conclude that Respondent did not violate the Act as alleged.

¹ The delay in issuing this decision was due, in part, to my being on extended leave under the Family and Medical Leave Act (FMLA).

FINDINGS OF FACT ²

I. JURISDICTION AND LABOR ORGANIZATION STATUS

5 Drock Gaming, LLC d/b/a The D Casino is a Nevada limited liability company with an office and place of business in Las Vegas, Nevada. Respondent is engaged in operating a hotel and casino that provides food, lodging, gaming, and entertainment. Respondent has admitted jurisdiction as alleged in paragraph 2 of the complaint, and I so find.

10 The Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226 and Bartenders Union Local 165, affiliated with UNITE HERE, AFL–CIO (the Union) presents a majority of Respondent’s 915 employees. It is undisputed, and I find, that at all material times pertinent to this complaint, the Union is a labor organization within the meaning of Section 2(5) of the Act.

15 At all times material, Respondent and the Union have been parties to a collective-bargaining agreement (CBA) (Jt. Exh. 2) covering various categories of the Respondent’s employees, including female “dancing bartenders.”³ Article 8.01 of the contract prohibits, *inter alia*, discrimination because of sex with respect to terms and conditions of employment, in accordance with applicable law.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Respondent’s Business Operation

25 Dancing bartenders work in Respondent’s Food and Beverage Department, which employs about 80 employees on the beverage side, and about 50 employees on the food side. The latter employees technically report to third-party contracted operators. At all times material, David Rosborough (Rosborough) has been the director of the department, with about six beverage managers (or first-level supervisors) reporting to him.

35 At the D Bar, dancing bartenders pour and serve frozen daiquiris, whereas flair bartenders pour and service alcohol from bottles. There is a high turnover rate among dancing bartenders, and the number needed at any one time varies depending on customer levels. The number of dancing bartenders during Campbell’s tenure was approximately seven to ten, sometimes more. Bladen Ficarrota (Ficarrota) and Abigail Lopez (Lopez) supervised Campbell and her coworkers.

² Abbreviations used in this decision are as follows: “Tr.” for the Transcript, “Jt. Exh. #” for the Joint exhibits, “GC Exh. #” for the General Counsel’s exhibits, “R. Exh. #” for Respondent’s Exhibits, “GC Br.” for the General Counsel’s brief, and “R. Br.” for Respondent’s brief. Specific citations to the transcript and exhibits are included where appropriate to aid review and are not necessarily exclusive or exhaustive.

³ The classification of “dancing bartenders” does not appear in the contract. The classification of “cocktail server” in Exhibit 1 is a separate one, and the “flair bartenders” referenced in Side Letter #7 are male bartenders. However, there is no dispute that dancing bartenders are in the bargaining unit.

*B. Campbell's Harassment Complaint Against Ficarrota and
Respondent Directing Employees not to Raise Concerted Complaints*

5 Campbell was hired in March 2017. Prior to December 27, 2017, dancing bartenders,
including Campbell, discussed among themselves their terms and conditions of employment
involving workplace acts that they perceived as unwelcome harassment by Ficarrota. (Jt. Exh.
1). Specifically, from the start of her employment, Campbell felt uncomfortable with working
with Ficarrota because he made inappropriately sexual suggestive remarks to her and engaged
10 in inappropriate touching of various parts of her body. Several other employees voiced similar
complaints about the way Ficarrota touched or spoke to them. Since Respondent did not call
Ficarrota to deny the harassment allegations that Campbell leveled against him, I find the
validity of Campbell's underlying accusations against him are undisputed.⁴

15 In addition, I need not address the conflicting testimony of Campbell and Lopez on
whether, in about mid-December, Lopez told her that management would do nothing if she
complained about Ficarrota because he was considered a knowledgeable and valuable
employee. As described below, management took various steps in response to Campbell's
complaint.

20 I also do not need to consider Respondent's suggestion (R. Br. at 9, et. seq.) that
Campbell's harassment complaint against Ficarrota was motivated by Ficarrota's denial of her
December 18 request for time off on New Year's Eve (R. Exh. 2). As I will later discuss, the
standard for determining whether an employee's activity amounts to protected concerted
25 activity is an objective one, regardless of motive. The General Counsel has not alleged that the
December 18 denial violated the Act, and the matter warrants no further discussion.

30 Turning back to Campbell's sexual harassment allegations, on December 23 or 24,
2017, Campbell called Human Resources (HR) and said that she wanted to make a sexual
harassment complaint. Campbell was transferred to Brian Swartwood (Swartwood),
Respondent's labor relations and risk manager, who said he could meet with her on December
27.

35 Campbell met with Swartwood on December 27. Human Resources Manager
Dominique (Nikki) O'Brien (O'Brien), and Safety Coordinator Kim Beasley (Beasley) also
attended the meeting. There is little disagreement over the gist of what was said. To the extent
that there were differences, I credit Swartwood's and O'Brien's substantially consistent
versions over Campbell's for the reasons stated later in this decision.⁵

⁴ While the merits of Ficarrota's unwelcome harassment is not the subject of this complaint, it serves
as evidence of Campbell's concerted protected activity.

⁵ I have based my credibility findings on multiple factors, including, but not limited to, the consideration
of a witness' opportunity to be familiar with the subjects covered by the testimony given; established or admitted
facts; the impact of bias on the witness' testimony; the quality of the witness' recollection; testimonial consistency;
the presence or absence of corroboration; the strength of rebuttal evidence, if any; the weight of the evidence; the
witness' demeanor while testifying; inherent probabilities; and reasonable inferences that may be drawn from the
record as a whole. *Daikichi Corp.*, 335 NLRB 622, 633 (2001), *enfd.* 56 Fed. Appx. 516 (D.C. Cir. 2003); *New*

During the meeting, Swartwood asked Campbell about the nature of her complaints against Ficarrota, and Campbell described them. Swartwood asked Campbell for the times and dates when the alleged improper touching occurred, but Campbell either could not recall or did not have them.

Campbell stated that other “girls” experienced similar sexual harassment from Ficarrota, but because Campbell was vague with the specifics about her complaints, Swartwood told her to focus on herself and what Ficarrota had done to her so he could begin an investigation. Although Campbell continued to speak about other coworkers, because Swartwood could not get the specifics about Campbell’s complaints, he repeatedly told Campbell that she should focus on herself and provide specifics.⁶ He continued to ask her for specific incidents, but Campbell could not provide them. At that point, Swartwood remarked that possibly surveillance videos might substantiate Campbell’s allegations.

Swartwood asked Campbell what she wanted to see happen. Campbell replied that she wanted Ficarrota to treat everyone professionally and with respect. Swartwood agreed, and he asked Campbell to submit a written complaint, which she did by email the following day (GC Exh.3).

After the meeting, Swartwood asked Rosborough to talk with Ficarrota regarding Campbell’s allegations. Swartwood and Rosborough also agreed that Rosborough would interview other employees to see if they had similar complaints against Ficarrota.

Rosborough met with Ficarrota in Rosborough’s office later on December 27. Ficarrota denied any inappropriate conduct. Rosborough told Ficarrota he did not believe that Ficarrota had done anything malicious or particularly egregious but that whatever Ficarrota had been doing made Campbell uncomfortable, and he should avoid any such behavior. Ficarrota again denied any wrongdoing and confirmed his denial in writing (Id., see also R. Exh. 14).

Rosborough reported back to Swartwood that he was confident that what had occurred between Ficarrota and Campbell would not continue and that the matter was resolved. Swartwood advised Campbell on December 28 that henceforth Ficarrota would treat her in a professional manner (GC Exh. 3 at 1). Campbell testified that this was the resolution for which she was looking.

Shortly thereafter and continuing into February 2018, Rosborough conducted one-on-one meetings in his office with approximately 12 other female employees, mostly dancing bartenders but also a few cocktail servers. Some of them complained that Ficarrota was overly

Breed Leasing Corp. v. NLRB, 111 F.3d 1460, 1465 (9th Cir.), cert. denied 522 U.S. 948 (1997). Credibility findings need not be all-or-nothing propositions, and it is common for a fact finder to credit some, but not all, of a witness’ testimony. *Daikichi Sushi*, supra at 622.

⁶ Swartwood’s and O’Brien’s testimony that Swartwood had difficulty keeping Campbell on track on the basis of her complaints was mirrored in Campbell’s testimony before me.

complimentary of their physical appearance and engaged in occasional unwanted physical contact.

In late February or early March 2018, Rosborough reported his findings to Swartwood. They agreed that Ficarrota should be disciplined and given a final written warning for inappropriate comments and unwanted physical contact (see R. Exh. 15), as well as be required to complete three modules of sexual harassment training (see R. Exh. 16). Ficarrota completed the required training.⁷

C. Denial of Leave Request

In its computerized payroll system (ADP), Respondent maintains a schedule containing all requested time off, including EDOs (extra days off, unpaid), vacation days, and floating holidays. All requested time off requests are time-stamped in and considered on a first-come basis.

On December 26, 2017, Campbell submitted a leave request to Ficarrota to take off between February 16–19, 2018 (GC Exh. 12). Ficarrota told Campbell in January 2018 that Rosborough told him to deny Campbell’s request because Respondent did not allow two “girls” to be on leave at the same time. However, sometime after talking to Ficarrota, Campbell’s coworkers told her that there had been occasions when two dancing bartenders had taken off on the same date, and they showed her schedules reflecting that (see Jt. Exh. 3, schedules in April and June 2017). Campbell brought this conflicting information to Ficarrota.

Ficarrota brought Campbell’s request to Rosborough and asked his advice. Rosborough testified that there is no policy prohibiting two dancing bartenders being off on the same day and if Ficarrota told Campbell that it was untrue. Rather, granting leave requests depended on scheduling needs. Rosborough set the parameters, but managers were delegated the responsibility for making specific determinations based on business levels at the casino. Business levels varied widely from month to month and week to week, depending on what convention was in town and what special events the property has.

Respondent’s Exhibit 17 is the “vacation calendar” for February 16–19, 2018 (it contains all time off, not just vacation per se). It shows that six dancing bartenders requested EDO for February 16, six requested EDO for February 17, eight requested EDO for February 18, and eight requested EDO for February 19. Laura Posse, whose name appears first for EDO on all four days, was the only one who was granted EDO for the above-referenced days based

⁷ As an aside, I note an incident that occurred on January 16, 2017, between Campbell and Lopez. On the day in question, Lopez and Campbell were involved in a series of conflicts, culminating in Lopez having security escort Campbell off the property. However, the General Counsel does not aver that anything Lopez did or said that day violated the Act. Moreover, nothing Lopez said indicated any animus toward Campbell for having complained about Ficarrota. Indeed, Rosborough later reprimanded Lopez for having had Campbell escorted off the property without proper justification, and he warned Lopez that the next such infraction could result in Lopez’s termination. Thus, Respondent’s response to the incident contraindicated any conclusion that it was seeking to retaliate against Campbell. Accordingly, I need not further address the events of that day.

on Respondent's anticipated need for seven dancing bartenders for those dates. Campbell confirmed with Posse that Posse had placed her leave requests before Campbell did.

After the denial of Campbell's leave request, Rosborough suggested that he and Campbell get together and review the calendar and find alternative dates she could take off. Campbell selected a different time frame, and she was granted the leave.⁸

I note that there is no evidence that, in the year 2018, two dancing bartenders were ever granted EDO on the same day.

D. Campbell's No Call/No Show on April 25, 2018

1. Respondent's No Call/No Show policy

Respondent's attendance policy provides, inter alia, that failure to call or show up as scheduled without just cause by the end of an employee's shift will result in termination (R. Exh. 4). Department heads immediately report no calls/no shows to HR, and employees who come to work after a no call/no show are placed in suspension status and must report to HR. HR may further investigate and, if the employee cannot show just cause, such as incarceration, hospitalization, or family emergencies, they are terminated. Put another way, the employee must demonstrate s/he was genuinely incapacitated and unable to call in their absence from work.

2. Events of April 25–26, 2018

It is undisputed that Campbell was scheduled to work a shift starting at either 4:00 p.m. or 6:00 p.m. to 2:00 a.m. or from 7:00 p.m. to 3:00 a.m. on April 25 (Tr. 130). On April 24, Campbell started feeling sick. Campbell could not recall whether she finished her shift on April 24 or whether she left early that day because she had a very bad migraine. Nevertheless, according to Campbell, when she got home around midnight on April 25, her migraine got worse and her entire body began hurting. She went to bed that morning.

Campbell woke up around 6:00 or 7:00 a.m. on April 25. She described phoning and/or texting her cousin, a very close friend, and her father because she was trying to get a home remedy to avoid having to go to the hospital. Campbell also booked a last-minute massage to help her muscle pain.

At between 11:00 and 11:45 a.m. on April 25, Campbell drove to her prescheduled appointment with her counselor at Harmony Healthcare (see GC Exh. 7, which simply states that she was seen that day).⁹ Thereafter, she drove to her massage appointment. Campbell was extremely vague on how long her counseling appointment lasted, how long it took her to drive

⁸ Credited testimony of Rosborough. Campbell testified that she was not able to work out taking other time off but did not deny that Rosborough made such an offer.

⁹ The "doctor" to whom she referred in her testimony and at the May 3 meeting was not a medical doctor.

from her counselor's office to her massage appointment, what time she arrived at and left her massage appointment. I found Campbell's testimony on this point less than fully credible.

5 Although Campbell again could not recall the time, after arriving home at some point in the afternoon, she let her dog out, but, according to Campbell, the rest of the day was "like a blur." (Tr. 184). According to Campbell, she passed out but did not know for how long. She woke up on her living room floor but did not recall the time or how long she had been unconscious.

10 Campbell also did not recall speaking to her cousin and friend after she awoke, but they later told her that she had. However, on cross-examination, Campbell testified that she could not recall how late in the day her phone/text communications went and that they could have gone as late as 6 p.m. or even 10 p.m. She provided no explanation for why she did not call Respondent to call off work after speaking/texting her cousin and friend.

15 In any event, at 11:56 p.m. on April 25, Campbell texted her friend stating that she was going to the hospital (GC Ex. 14), and despite being unconscious for an unknown duration, she drove herself to the emergency room (ER) at The Lakes hospital.

20 Once Campbell arrived at the ER, she was given pain medications and put on an IV. Campbell was ultimately diagnosed with rhabdomyolysis—a breakdown of muscle fibers that could have many causes, including medications. She also testified that the attending doctor told her that her chest pains were due to anxiety and that she was dehydrated.

25 Campbell was given a prescription for pain, and she was discharged at 3:20 a.m. on the morning of April 26, approximately three hours after her admission. Campbell was also given a work release form stating that she was seen in the ER on April 26 and could return to work on April 27, with limited duty for two weeks. (GC Exh. 6).

30 Meanwhile, because Campbell did not call or show for work the evening of April 25, O'Brien was notified of Campbell's absence. O'Brien told Rosborough that, if/when he spoke to Campbell, to tell her to contact HR immediately per Respondent's no-call/no show policy.

35 For her part, despite talking with her cousin and a friend after she awoke on April 25, Campbell testified that she did not call Respondent at any time on April 25, "[b]ecause I was so sick that work did not cross my mind. The only thing that was on my mind was my health." (Tr. 224.) She admittedly did not attempt to contact Respondent on April 26 after she arrived home from the hospital. Rather, according to Campbell, shortly after midnight on April 27, she realized she had missed work, then called Rosborough and left a message. Rosborough called
40 Campbell back around 9:00 or 10 a.m. on April 27. During the call, Campbell apologized to Rosborough and explained why she missed work. In response, Rosborough told her to report to HR and bring her documentation on her next scheduled workday.

45 Campbell met with O'Brien on or around April 27, 2018, in the HR office. Campbell explained what had occurred on April 25–26 and provided O'Brien with the medical documentation and work release from the ER. After reviewing the documentation, O'Brien

was concerned about why Campbell did not call in her absence given the timing of Campbell's absence on April 25 and the doctor's note of April 26. O'Brien ultimately told Campbell that a due process/just cause meeting would be necessary.

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3. May 3, 2018 meeting

It is undisputed that Campbell attended a just cause meeting on May 3, 2018 in the HR office. Campbell, Swartwood, O'Brien, Rosborough, Beasley, Union Representative Joe Cano (Cano), and Richard Danzack (Danzack), Swartwood's and O'Brien's supervisor, were present.

10

Swartwood reviewed Campbell's medical documentation, asked Campbell questions regarding her hospitalization and what she did on April 25 (GC Exhs 6-7). Although Swartwood believed Campbell had gone to the ER, Campbell's activity prior to and after her incapacity caused him concern. While Swartwood noted that Campbell visited her counselor and had gotten a massage on April 25, he was perplexed that, for a period of several hours, Campbell had no memory and was somehow incapacitated but nevertheless spoke to her cousin and friend before going to the ER. Moreover, according to Swartwood, nothing in Campbell's medical records stated that she had been unconscious prior to arriving in the ER or that she had been unable to call in on April 25 per Respondent's no call/no show policy.

15

With no evidence before him documenting Campbell's incapacity, Campbell told Swartwood that she posted about her April 25 illness on social media from her cell phone. Hearing this, Swartwood asked to examine Campbell's cell phone. She agreed to give him her phone, and Swartwood and Cano looked through her call logs, text messages, Facebook posts, and Facebook Messenger to verify whether there were any phone calls, text messages or Facebook posts during time Campbell claimed she was incapacitated. They found nothing, i.e., no evidence of any communications or postings about her illness/hospitalization which Campbell admitted to making.

20

Although Campbell testified that she regularly deletes Facebook posts, she testified that Swartwood could not locate the calls because he did not know how to operate an iPhone. However, Campbell also admitted she did not show him how to do so. Moreover, Campbell had no response to explain why Cano also found nothing on her iPhone to support her version of events on April 25.

25

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At this point, Swartwood suspected that all of Campbell's phone activity had been deleted, so he asked Campbell to get phone logs from her carrier, Verizon. However, Campbell refused to provide this information, stating that giving over her phone to Swartwood was sufficient. Swartwood then told Campbell and Cano that if Campbell provided the phone records that showed she had not made any calls during the time of her incapacitation, she would be put back to work with full benefits.

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At some point thereafter, Campbell told Swartwood that her symptoms had caused her anxiety. In an effort to obtain any information to justify Campbell's inability to call in, Swartwood then asked if Campbell considered anxiety a serious condition, to which she replied, "serious enough to have medication and regularly see a doctor." Swartwood then asked if

Campbell took any medications for anxiety so he could see if the name of the medication appeared in the ER documentation she provided him. Because Campbell could not pronounce the medication, she wrote the medication down. O'Brien stated that she recognized it as a beta blocker and a serious prescription, however the name of the medication was not listed in any of
5 Campbell's ER documentation.

At this point, Swartwood told Campbell that he did not think she had been incapacitated on April 25 and he needed to see Campbell's prescriptions to prove she had anxiety at the time of her incapacity. Swartwood also accused Campbell of deleting text messages and phone calls
10 that showed she used her phone on April 25 thereby demonstrating that she could have called in her absence. Campbell denied deleting anything.

Because nothing was resolved as to whether Campbell was so incapacitated that she could not call in on April 25, another follow-up meeting was scheduled for May 14, 2018. In
15 the interim, Campbell emailed Swartwood on May 3 asking him to email the list of what he wanted to justify her no call/no show on April 25. Swartwood replied that day, copying Cano on the email, detailing that he wanted Campbell's cell phone calls, her text messages from April 25 and 26 and the prescription bottle label for her anxiety medication (GC Exh.8 at 2).

The next day, Campbell emailed Swartwood that Verizon was unwilling and unable to
20 fax or email her phone records. Swartwood replied suggesting that Campbell go to Verizon's website and from there pull and print the information (Id. at 1).

4. May 14, 2018 meeting

On May 14, 2018, Campbell attended the follow up meeting with Swartwood in the HR
25 office. O'Brien, Beasley, and Cano were again present. Danzack did not attend, and Beverage Manager Eric Hillsbeck (Hillsbeck) attended for Rosborough.

Swartwood asked Campbell if she brought her phone records, and she replied, "no."
30 When Swartwood asked Campbell why, she replied that she did not feel comfortable providing her phone logs because she felt Swartwood still would not let her back to work. At that point, Swartwood stressed the importance of the records and that told Campbell if she brought the records and they were verified, she would be brought back to work. Campbell again refused to
35 provide her phone records.

At that point, Hillsbeck, Swartwood, and O'Brien left the room and caucused separately
among themselves. After discussing everything, Hillsbeck decided to discharge Campbell. Swartwood and O'Brien agreed. When they returned, Hillsbeck terminated Campbell for a no
40 call/no show on April 25, 2018.

Respondent's computerized records from its ADP payroll system (R. Exh. 10) show that
45 approximately 148 or 149 employees were terminated for no call/no show for the period from January 1, 2017, to approximately two weeks before the hearing. Only two no call/no show employees were allowed to return to work. One was Bakari Fant (Fant), who produced evidence he was incarcerated (see GC Exh. 19); the other was Lorna Flores (Flores), whose no

do not believe that they concertedly fabricated either their statements or their testimony to discredit Campbell (see R. Exhs. 8, 9).

5 In contrast, Campbell’s testimony was generalized and non-specific and amounted to perfunctory denials that the incident occurred. Most importantly, the fact that Campbell admitted that she called Swartwood, under her breath, “weak shit,” makes no sense in the context of what occurred yet sounds remarkably similar to “white bitch” if murmured. I find that, even the comment that Campbell admitted making, leads me to conclude that Campbell made the “white bitch” comment Swartwood and Dixon heard. Accordingly, I conclude
10 Campbell made the “white bitch” comment attributed to her.¹⁰

III. WITNESSES AND CREDIBILITY

15 In reviewing the entire record, I find as follows:

First, I note that Respondent did not call Ficarrota as a witness. Our system of jurisprudence has what is called the “missing witness rule,” which provides that:

20 Where relevant evidence which would properly be part of a case is within the control of the party whose interest it would normally be to provide it, and he fails to do so without satisfactory explanation, the [trier of fact] may draw an inference that such evidence would have been unfavorable to him. 29 Am. Jur.2d §178.

25 Normally, an administrative law judge has the discretion to draw an adverse inference based on a party’s failure to call a witness who may reasonably be assumed to be favorably disposed to the party and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party’s agent and thus within its authority or control. *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006); see also *Martin Luther King, Sr. Nursing Center*, 231 NLRB 15, 15 fn. 1 (1977); *Underwriters Laboratories Inc. v. NLRB*, 147 F.3d 1048, 1054 (9th Cir. 1998).
30

35 In that event, drawing an adverse inference regarding any factual question on which the witness is likely to have knowledge is appropriate. *International Automated Machines*, 285 NLRB 1122, 1123 (1987), *enfd. mem.* 861 F.2d 720 (6th Cir. 1988). Accordingly, since Ficarrota was not called to testify, I credit Campbell’s accounts of what Ficarrota said to her in conversations that she had with him.

40 However, for a myriad of reasons, Campbell was overall not a reliable or credible witness. Campbell appeared markedly defensive, particularly on cross-examination. In addition, many of her answers lacked clarity, even on direct examination, and she frequently failed to give direct answers to straightforward questions or to answer with reasonable specificity. Campbell was particularly evasive when Respondent counsel’s questions would have required her to answer contrary to her narrative—that she could not have called in her absence at any time before April 27.

¹⁰ The General Counsel made no allegation concerning the “white bitch” comment. However, I included it in the factual section as further evidence of Campbell’s lack of credibility.

Most notably, her account of what occurred on April 25, when she failed to call in or report for her scheduled shift, was ambiguous, unclear, inconsistent, and therefore, unbelievable. Campbell appeared to have specific recall of events that credited her version of events but was particularly evasive on events that discredited her testimony. Specifically, Campbell recalled that on the morning of April 25, she drove to a prescheduled appointment with her counselor and then to a massage, after which she returned home in the afternoon, let her dog out, but then “the rest of my day is like a blur.” (Tr. 184). However, when the General Counsel asked what Campbell meant by “the rest of my day is like a blur,” she answered, “It’s just hard to recall. . . I don’t recall . . . I don’t know how long I passed out. It could have been a minute, 5 minutes, 10 minutes. I don’t know. I just know I passed out.” (Id.). Yet, despite her unconsciousness and inability to account for her actions for several hours, Campbell recalled driving herself to the ER, yet she waited until approximately 11:56 p.m. on April 25 to do so. I found her overall testimony inconsistent, and thus, less than fully credible.

She was equally evasive and inconsistent in her testimony concerning whether she communicated with anyone after her unconsciousness. First, Campbell testified on direct that her cousin and friend told her they had spoken with her around the time she awoke from her unconsciousness on April 25. However, on cross-examination, Campbell could not recall when she awoke from her incapacity or how late she texted or called anyone on April 25. After being pressed by Respondent counsel, Campbell then testified that she could have texted/used the telephone as late at 6:00 or 10:00 p.m. However, record evidence demonstrates her shift began at 4:00 p.m. that day yet Campbell provided no cogent reason why she could not have called into Respondent at this time.

Further, although Campbell was discharged from the ER at 3:20 a.m. on April 26, she did not call Respondent until shortly after midnight on April 27 – approximately 20 hours later. Campbell could not point to any medical condition that would have prevented her from contacting Respondent *after* being discharged from the hospital, and Campbell had no logical explanation why she could not have called in to Respondent at any time on April 26.

Finally, Campbell offered no explanation why, at the May 3 meeting, she helped Swartwood look at her cell phone records at certain times during their conversation, but not others, and did not assist him when he had difficulty with reading information on her iPhone—when she knew the purpose for reviewing her cell phone was to determine how late in the day she texted or made phone calls. Moreover, despite Campbell testifying that she could have texted/used her phone as late as 10:00 p.m. on April 25 and then admitting that her cousin and friend called her during the late afternoon/evening of April 25, curiously, none of those calls were listed on her iPhone log when Swartwood and Cano reviewed it on May 3. Because Campbell’s overall testimony was scattered and inconsistent, I found her to be unreliable and less than fully credible as a witness.

I found that Respondent’s witnesses, Lopez, Swartwood, Dixon, O’Brien, and Rosborough, were consistent on major points, both between themselves, on direct and cross-examination, and with the documents of record. Neither in their demeanor nor in the substance of their testimony did they give me any reason to believe that they were being deceptive. As

can be expected, there were some minor variations in their accounts, but no major differences that would undermine their credibility. Accordingly, I credit them where their testimony diverged from Campbell's.

5

DISCUSSION AND ANALYSIS

I. PROTECTED, CONCERTED ACTIVITY

Before arriving at the heart of the complaint allegations, the General Counsel first asserts that Campbell engaged in protected concerted activity by complaining to her coworkers about Ficarrotta's sexual harassment, then filing her sexual harassment complaint with Respondent and finally, filing the instant ULP charges which forms this complaint. In so doing, the General Counsel contends, Campbell also asserted a right grounded in the collective-bargaining agreement.

15

Section 7 of the Act expressly protects employees' right to "self-organization . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. See, e.g., *NLRB v. City Disposal Systems Inc.*, 465 U.S. 822, 829 (1984). Thus, the conduct must both be "concerted" and have the requisite purpose.

20

The Board defines concerted activity as that which is "engaged in with or on the authority of other employees, and not solely on behalf of the employee himself." *Myers Industries*, 268 NLRB 494, 497 (1983) (*Meyers I*), cert. denied 474 U.S. 948 (1985), supplemented 281 NLRB 882 (1986) (*Meyers II*), enfd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1985). This definition includes instances in which an individual employee brings group complaints to the attention of management. *Meyers II* at 887.

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Whether an employee engaged in concerted activity is determined on the basis of totality of circumstances. *Kingman Regional Medical Center*, 363 NLRB No. 145, slip op. at 17 (2016), citing *National Specialties Installations*, 344 NLRB 191, 196 (2005).

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The Board has found individual action to be concerted where the evidence supports a finding that the concerns expressed by the individual are the logical outgrowth of the concerns expressed by the group. *Mike Yurosek & Son, Inc.*, 306 NLRB 1037, 1038 (1992), citing *Salisbury Hotel*, 283 NLRB 685, 687 (1987). Determining whether the action is concerted depends on whether the employee's actions can be linked to those of her coworkers. *Fresh & Easy Neighborhood Market, Inc.*, 371 NLRB 151, 153 (2014), citing *NLRB v. City Disposal Systems*, 465 U.S. 822, 831 (1984). If discussions with coworkers were an "indispensable initial steps" toward group action, the conduct is protected even if employees do not expressly authorize another employee to act as a spokesperson. *Kingman Regional Medical Center*, above at slip op. 18, citing *City Disposal Systems*, above at 835 (1984).

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Here, it is undisputed that Campbell and other employees complained among themselves about Ficarrotta's verbal and physical sexual harassment prior to Campbell's complaint to Respondent on December 27. It is further undisputed that early in the meeting

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with Swartwood on December 27, Campbell raised the matter of Ficarrota's harassment of her coworkers and repeated that concern more than once. Indeed, Swartwood expressly told her that she should focus on her own situation and not on other employees. When Swartwood asked what Campbell was seeking, she replied, that Ficarrota treat everyone professionally and with respect. Furthermore, after December 27, Rosborough confirmed with several other dancing bartenders/cocktail servers that they also had similar sexual harassment complaints against Ficarrota. In these circumstances, I conclude that Campbell's activity was concerted.

Turning the nature of Campbell's sexual harassment complaint, an employer's Equal Employment practices come under the penumbra of "terms and conditions of employment," and concerted activity protesting racism or sexism is protected. See, e.g., *Continental Pet Technologies*, 291 NLRB 290, 291 (1988); *Diagnostic Center Hospital Corp.*, 228 NLRB 1215, 1217 (1977). Respondent does not dispute the relationship of her complaint to workplace conditions. Indeed, it took her sexual harassment complaints quite seriously. Thus, it interviewed Ficarrota about her complaints, interviewed other employees to see if they had similar complaints, and ultimately disciplined Ficarrota and required him to take additional anti-harassment training.

Although Respondent raised Campbell's motives for filing her sexual harassment complaint, her motivation for bringing the harassment complaint is irrelevant, because the standard for assessing whether an employee's activity was for mutual aid or protection is an objective one, inasmuch as "[e]mployee may act in a concerted fashion for a variety of reasons—some altruistic, some selfish . . ." *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 155–157 (2014) (quoting *Circle K Corp.*, 305 NLRB 932, 933 (1991), *enfd. mem.*, 989 F.2d 498 (6th Cir. 1993); see also *Dreis & Krump Mfg. Co. v. NLRB*, 544 F.2d 320, 328 fn. 10 (7th Cir. 1976). Accordingly, I conclude that Campbell's complaint about sexual harassment against Ficarrota was for mutual aid and protection. Therefore, she engaged in protected concerted activity.

The General Counsel further contends that Campbell's activity also amounted to union activity because she asserted a contractual right, inasmuch as Article 8.01 of the CBA prohibits, inter alia, discrimination because of sex with respect to terms and conditions of employment, in accordance with applicable law.

The General Counsel correctly cites *City Disposal Systems*, above, and *Interboro Contractors, Inc.*, 157 NLRB 1295, 1298 (1966), for the proposition that an individual's assertion of a right grounded in a collective-bargaining agreement is concerted activity that is accorded the protection of Section 7 (see GC Br. at 28). As the General Counsel notes, the Court held that an employee need not explicitly refer to the collective-bargaining agreement, provided "the nature of the employee's complaint is reasonably clear to the person to whom it is communicated, and the complaint does, in fact, refer to a reasonably perceived violation of the collective bargaining agreement. . . ." *City Disposal Systems* at 840.

The problem for the General Counsel is that Campbell never mentioned the collective-bargaining agreement or the Union in her complaints about Ficarrota, there is no evidence that any other employees did so in their conversations with her, and there is no indication in the

record that Respondent construed or should have construed her complaints as having a collective-bargaining agreement component. Indeed, no one from the Union was ever involved. If I accepted the General Counsel’s argument, virtually every complaint of an employee working under a collective-bargaining bargaining could be tied to some provision in a collective-bargaining agreement—including broad-brushed statements of purpose—and deemed the assertion of a contractual right, even if never articulated by or considered by any of the parties. The untenable result would be to wipe out any distinction between protected concerted activity and union activity when it comes to such employees. Therefore, I decline to find that Campbell engaged in union activity.

However, participating in the Board’s processes by filing ULP charges, regardless of whether they are meritorious, is concerted protected activity. See *Anheuser-Busch, Inc.*, 337 NLRB 3, 15 (2001), *enfd.* 338 F.3d 267 (4th Cir. 2003); *Roadway Express*, 239 NLRB 653, 653 (1978) (“There can be no doubt that [filing charges] was protected by the Act.”). Clearly, Campbell’s filing of the original ULP charge was protected activity, as was her cooperating in the investigation thereof. Accordingly, Campbell engaged in protected, concerted activity when she: (1) complained of sexual harassment, (2) filed her harassment complaint with Respondent, (3) filed her original ULP charges and (4) cooperated with the Board’s investigation therein.

II. COMPLAINT ALLEGATIONS

Returning to the merits of the complaint, I conclude as follows:

A. General Counsel Failed to Show that Respondent Created an Unlawful Directive that Prohibited Employees from Raising Concerted/Group Complaints

1. Legal Standard

An employer’s work rule or directive that “reasonably tends to chill employees in the exercise of their Section 7 rights,” violates Section 8(a)(1) of the Act. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enfd. mem.* 203 F.3d 52 (D.C. Cir. 1999). Specifically, the employer’s work rule is unlawful if it: (1) explicitly restricts protected activities, (2) was promulgated in response to protected activities, or (3) is applied to restrict protected activities.” *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646–647 (2004).

However, in *Boeing Co.*, 365 NLRB No. 154, slip op. at 2 (2017), the Board overruled the standard established in *Lutheran Heritage Village-Livonia*, and stated that, when evaluating rules that do not explicitly restrict Section 7 rights, if the rule, when reasonably interpreted, would *potentially* interfere with employees’ rights under Section 7, the trier of fact must balance the nature and extent of the potential impact on Section 7 rights against the employer’s legitimate justifications associated with the rule. *Id.* at slip op. at 3.

2. Analysis

Here, I find that Respondent never promulgated a work rule or directive, unlawful or otherwise, prohibiting employees from raising concerted/group complaints in the first place. While Campbell repeatedly raised the matter of Ficarrota’s harassment of her coworkers to

Swartwood, and it is undisputed that Swartwood expressly told Campbell that she should first focus on her own situation and not on other employees, the record clearly reveals that Swartwood did this because Campbell was vague, ambiguous and inconsistent about her own allegations of sexual harassment. Thus, Swartwood wanted to first pin down the details of Campbell's assertions of harassment before moving to her co-worker's complaints about Ficarrotta. Indeed, after Swartwood managed to obtain a general understanding of Campbell's complaint, he directed Rosborough to investigate Campbell's assertions as well as whether others complained about Ficarrotta. The record demonstrates that Rosborough confirmed Ficarrotta's treatment of Campbell and several other dancing bartenders/cocktail servers that also had similar sexual harassment complaints against Ficarrotta. Ultimately, Respondent disciplined Ficarrotta and required him to take additional anti-harassment training.

I find no evidence that Respondent promulgated a work rule or directive prohibiting Campbell or anyone else from raising group complaints. Accordingly, this allegation is dismissed.

B. Respondent did not Discriminate/Retaliate Against or Subject the Charging Party to any Adverse Actions Based on Section 7 Animus

1. Legal Standard

The framework for analyzing whether an employer has discriminated/retaliated against an employee for engaging in protected, concerted activity is set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). *General Motors Corp.*, 347 NLRB No. 67 fn. 3 (2006) (not reported in Board volumes). The *Wright Line* approach is also used for analyzing alleged violations of Section 8(a)(4) of the Act. *Newcor Bay City Division*, 351 NLRB 1034 fn. 4 (2007); *All Pro Vending, Inc.*, 350 NLRB 503, 515 (2007).

Under *Wright Line*, the General Counsel must make a *prima facie* showing sufficient to support an inference that the employee's protected conduct motivated an employer's adverse action. To do that, the General Counsel must show, either by direct or circumstantial evidence, that the employee engaged in protected conduct, the employer knew or suspected the employee engaged in such conduct, the employer harbored animus, and the employer acted adversely against the employee because of this animus.

Under *Wright Line*, if the General Counsel establishes a *prima facie* case of discriminatory conduct, it meets its initial burden to persuade, by a preponderance of the evidence, that protected activity was a motivating factor in the employer's action.

At that point, the burden of persuasion shifts to the employer to show that it would have taken the same adverse action even in absence of such activity. *NLRB v. Transportation Corp.*, 462 U.S. 393, 399–403 (1983); *Kamtech, Inc. v. NLRB*, 314 F.3d 800, 811 (6th Cir. 2002); *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), enfd. 127 F.3d 34 (5th Cir. 1997) (per curiam). To meet this burden, "[A]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have

taken place even in the absence of the protected conduct.” *Serrano Painting*, 332 NLRB 1363, 1366 (2000), citing *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984).

5 If the employer’s proffered defenses are found to be a pretext, i.e., the reasons given for the employer’s actions are either false or not relied on, the employer fails by definition to show that it would have taken the same action for those reasons, and there is no need to perform the second part of the *Wright Line* analysis. On the other hand, further analysis is required if the defense is one of “dual motivation,” that is, the employer defends that, even if an invalid reason might have played some part in the employer’s motivation, the employer would have taken the
10 same action against the employee for permissible reasons. *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 223 (D.C. Cir. 2005).

2. Analysis

15 After thoroughly reviewing all of the evidence, I find that the General Counsel failed to demonstrate that Respondent violated the Act when it denied Campbell’s vacation leave request, imposed more onerous working conditions on Campbell when she was required to produce evidence to justify her no-call/no show and/or suspended then discharged Campbell on May 14, 2018.

20 Specifically, the General Counsel could not establish a prima facie case of discrimination/retaliation. Although I have concluded that Campbell engaged in protected concerted activity, and I find that Respondent knew about Campbell’s harassment complaint and her ULP charge prior to her termination on May 14, there is no evidence that Respondent
25 either harbored animus against Campbell or took any of the adverse actions against her for engaging in her protected activities.

30 The only independent 8(a)(1) allegation in the complaint is Swartwood’s statement to Campbell, during the December 27, 2017 meeting, that she not make concerted complaints about working conditions or bring them to Respondent’s attention. As I found earlier in this decision, I find no merit to this allegation.

35 Rather, the evidence shows that Swartwood had great difficulty getting information from Campbell concerning the dates and times *she* alleged Ficarrotta harassed her, and as such, Swartwood simply told Campbell to focus on herself. Because an objective standard is used for evaluating alleged violations of Section 8(a)(1)—whether the conduct would reasonably have tended to interfere with the free exercise of employee rights, see e.g., *Westwood Health Care Center*, 330 NLRB 935, 935 fn. 17 (2000); *Wyman-Gordon Co. v. NLRB*, 654 F.2d 134, 145 (1st Cir. 1981), I conclude that, in the context of the meeting, which had the purpose of
40 addressing Campbell’s individual complaints, Swartwood’s statements were not objectively coercive. Accordingly, I dismiss this allegation.

45 The General Counsel next claims that in mid-January, Respondent denied Campbell’s request for EDO leave on February 16–19, 2018. However, the record reveals that Campbell’s request was denied, based on the scheduling needs of dancing bartenders during the time period she requested off. Indeed, Respondent has a policy of granting EDO leave requests based on

the order in which requests are submitted and the business needs of the particular department. In this case, the undisputed record shows that, prior to Campbell's leave request, another dancing bartender had put in a request for the same dates as Campbell and that all other dancing bartenders who submitted EDO requests for those dates were also denied leave. Accordingly,
5 animus cannot be inferred from the denial of Campbell's leave request.

Similarly, I find no discriminatory or retaliatory animus when Respondent subjected Campbell to extensive questioning about her medical condition, required her to provide her cell phone, cellular telephone records, and a medication prescription label for inspection.
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Specifically, the evidence shows that Campbell was asked about her medical condition at the May 3 meeting because she provided no medical documentation that would have explained why she could not have called after she awoke from her unconsciousness or prior to her hospitalization on April 25. Campbell was vague and evasive during her interview with Swartwood (or in her testimony) and could not say for how long she was in a "blur." Campbell
15 was asked to provide her cell phone to justify her absence because, despite Campbell's claims of being ill in the morning of April 25, *she admitted* to Swartwood that she communicated with family members and a friend and drove to appointments with her psychologist and a masseur/masseuse. Thus, I find that questioning Campbell about the nature of her medical
20 issues on April 25 was eminently reasonable under the circumstances.

Additionally, despite the General Counsel's contentions, with regard to Campbell's cell phone records, I find that Swartwood asked to see the records after *Campbell admitted*, in the first instance, that she communicated with family and friends and posted on social media about
25 her illness. Swartwood was willing to give Campbell the benefit of the doubt if she provided him with cell phone records showing that she did not call, text, or make any Facebook postings during the p.m. hours of April 25. However, he could not find any such records on her cell phone—even though Campbell stated that she had engaged in such communications in the morning. Swartwood suspected that Campbell had deleted entries that would have shown
30 activity during the period when she should have called in. As such, Swartwood's request for Campbell's cellular telephone records from Verizon was not the imposition of a more rigorous term and condition of employment. On the contrary, I find that it constituted an attempt to give Campbell another chance to verify that she was unable to call in.

Similarly, Swartwood's request for Campbell's medication prescription label occurred, because Campbell again brought up her medication during the May 3 meeting, and Swartwood wanted to see what effects it might have had on her ability to call in on April 25, when she claimed incapacity.
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Lastly, the record demonstrates that Campbell's suspension and termination was consistent with the way Respondent treated all employees when they returned to work after being no call/no show. The attendance policy provides that termination is automatic if the employee fails to provide evidence justifying the no call/no show, and very rarely has the Respondent deviated from that practice. Indeed, of about 148 or 149 no call/no shows since
40 January 2017, only two employees have been allowed to continue their employment because they established just cause (one was incarcerated; the other was unintentionally misled by her
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