Fiesta Hotel Corporation d/b/a Palms Hotel and Casino *and* Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226 and Bartenders Union, Local 165, AFL–CIO, a/w Hotel Employees and Restaurant Employees International Union, AFL–CIO. Case 28–CA–17853

August 15, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On September 30, 2003, Administrative Law Judge Burton Litvack issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

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, and conclusions only to the extent consistent with this Decision and Order.[1]

The judge found, and we agree, that the Respondent violated Section 8(a)(1) of the Act by interrogating employee Martin Perez, impliedly threatening him with discharge, telling employees that they were prohibited from discussing their working conditions,[2] and promulgating and maintaining in effect a rule prohibiting employees from loitering on company premises before or after working hours.[3] We reverse, however, the judge's findings that the Respondent violated Section 8(a)(3) of the Act by issuing a warning notice to Perez and by discharging him. We also reverse the judge's finding that the Respondent violated Section 8(a)(1) by promulgating and maintaining a rule prohibiting employees from engaging in "conduct which is or has the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with" other employees.

1. Regarding the 8(a)(3) allegations, we find, contrary to the judge, that the Respondent established that it would have issued the warning notice to Perez and discharged him even in the absence of his union activity. The Respondent issued the warning notice to Perez after he engaged in misconduct unrelated to union activity and subsequently discharged him along with 30 to 40 other employees as part of a general staff reduction.

During the fall of 2001, the Respondent hired most of the approximately 2000 employees needed to staff its new hotel and casino, which opened on November 17, 2001. All the newly-hired employees were probationary. Andrew Pike, who was in charge of the Little Buddha Restaurant in the hotel during that period, gave uncontroverted testimony that, when a new restaurant is opened, it is normally staffed 25 to 30 percent "heavy" and that, after the employees become proficient at their jobs, it is not necessary to have the "extra hands."

Perez, an experienced cook and a union member, was hired by Harris Okashige, the Respondent's executive chef, and began working at the Respondent's Fantasy Market Buffet on November 27. After starting work, Perez received a letter from the Union about an upcoming organizing rally. He had three conversations with coworkers encouraging them to attend the rally. Perez carried a sign at the rally in front of the Respondent's facility on December 3, which about 500 people attended. Three of the Respondent's security guards observed the rally.

Perez subsequently engaged in several incidents of misconduct or poor performance during his probationary period:

(1) In November, Okashige noticed empty pans and pans crusted over with food at Perez' buffet station and told Perez that they were not up to the Respondent's standards. Perez responded that he was waiting for the pans to be totally empty before changing them. Okashige repeated that the pans were not up to the Respondent's standards. Perez stated that he would change the pans.

(2) Sous chef James Kinney, a supervisor, intervened in an argument between Perez and fellow cook Beverly Egbert. Kinney called them into the buffet office and told Perez that they had been taught how to cook Lebanese food by a Lebanese chef and that Perez could not

[1] The judge dismissed complaint allegations that the Respondent unlawfully changed employee Carlos Interiano's days off schedule and laid him off. The Respondent excepts to the judge's subsidiary findings that Interiano engaged in concerted protected activities and that the General Counsel presented a prima facie case of discrimination against Interiano. No party excepts to the dismissals of the allegations concerning Interiano's days off schedule and layoff. Therefore, we find it unnecessary to pass on the Respondent's exceptions concerning the judge's subsidiary findings and related legal analysis.

There are no exceptions regarding any other complaint allegation that the judge dismissed.

[2] We agree with the judge that Supervisor Juan Medina's statement to a group of employees that they should "stop it" when they were discussing complaints about overtime pay and lack of breaks violated Sec. 8(a)(1). However, we do not agree with the judge's characterization of Medina's statement as promulgation of a rule. We find, rather, that Medina's statement was simply an unlawful order. We shall revise the judge's Order accordingly.

[3] See, e.g., *Lutheran Heritage Village-Livonia,* 343 NLRB No. 75 fn. 16 (2004). Member Schaumber notes that the Board's holding here does not suggest that a more narrowly tailored rule with respect to loitering might not survive scrutiny.

Contrary to his colleagues, Chairman Battista would find that the Respondent's rule regarding loitering is lawful. Id. at fn. 4. The rule does not explicitly forbid Sec. 7 activity. Further, it was not promulgated in response to Sec. 7 activity, nor has it been applied to such activity. Finally, employees do not ordinarily, or reasonably, refer to their organizing activities as "loitering." Accordingly, Chairman Battista would not find that the rule violates Sec. 8(a)(1).

change recipes without first speaking to Okashige. At hearing, Perez first denied refusing to follow Kinney's directions about recipes but then admitted that he had done so on one occasion.

(3) In a separate incident, Supervisor Kinney told Perez that he was slicing meat improperly. According to Egbert, the Respondent could not use the meat because Perez had sliced it too thick, so it had to be thrown away. Cook Richard Morrow and cook's helper Ernestina Guerrero similarly testified that Perez was carving meat the wrong way and that room chef Michael Kingston, Perez' supervisor, showed him the proper way. However, when Kingston walked away, Perez stated that he had been in the business a long time and knew how to do things, and he continued to carve the meat improperly. The judge credited Egbert, Morrow, and Guerrero, finding them all to be candid and veracious witnesses.

(4) On about December 1, Perez was assigned to assist Egbert at the Lebanese buffet station. Perez initially followed Egbert's directions but subsequently "started changing things" and telling her how he thought the food should be cooked. He refused to follow her direction to remove a chicken from the oven and "started to not want to do anything." According to Egbert, "He would just walk around and talk to his friends." Egbert complained to Kingston that Perez was not preparing food the way that the owner required. Kingston told Perez that he needed to follow the guidelines because that was the way that the owner wanted it. At the hearing, Perez admitted that he had refused to follow Egbert's directions.

(5) While working with Morrow, Perez repeatedly called Morrow derogatory names under his breath in Spanish, which were translated as "snitch, bitch, a variant of gay . . . or whore."[4] According to Morrow, who the judge credited, Perez uttered these epithets numerous times a day and continued to do so as long as he worked in the buffet. Morrow was quite upset by Perez' conduct. He complained to Kingston that Perez was calling him names and making his life miserable, and Kingston said that he would take care of it. However, when Perez' name-calling did not cease, Morrow complained to Okashige and threatened to quit over Perez' misconduct. According to Okashige, he had Perez brought to his office and spoke to him regarding Morrow's allegations, but Perez denied them. At the hearing, however, Perez admitted that he called Morrow names five times. Perez asserted that he eventually stopped calling Morrow names.[5]

During the last week in December, Perez spoke to coworker Guerrero about supporting the Union and asked her for her address and phone number. Guerrero told Perez to leave her alone, not bother her about the Union again, and reported him to Kingston. On December 28, Perez was called to Okashige's office and questioned by Okashige and Fred Harmon, the Respondent's director of human resources. Harmon asked Perez if he had talked to his coworkers about the Union. Perez denied doing so. Harmon said that Perez should not solicit during worktime but could do so during breaks and lunch. Harmon added that they did not want the Union and that the Respondent would be providing improved pay and benefits. Perez replied that he did not like or want the Union either. Harmon and Okashige began laughing, and Okashige said that he did not want to fire Perez because of his work experience and that they were going to keep him.[6]

On Monday morning, December 31, Perez, who had been diagnosed with bronchitis the prior Friday, decided when he awoke that he was too ill to work. Perez understood that the Respondent's policy required employees to notify their supervisor of any expected absence as soon as possible and, preferably, no later than 4 hours prior to their shift. Nevertheless, rather than promptly telephoning Kingston, Perez did not inform the Respondent that he was too sick to work until he arrived at the start of his December 31 shift. When provided this last minute information, Kingston glared angrily at Perez and told him to go home. Perez returned to work on January 2, 2002, after obtaining a medical release.

On Monday, January 7, Kingston gave Perez a written warning, dated December 31, stating that, when he reported for work at 8 a.m. and said he was sick and could not work, Perez violated rule no. 6 of the team member guide by "violating the 4 hour call in policy and not giving management proper notice to replace him for the day, hurting business by not being set up on time." The call-in policy, set forth in the Respondent's team member guide, requires employees to "personally notify your supervisor or a Member of your department of your expected absence . . . as soon as possible, preferably no later than four (4) hours prior to the beginning of your scheduled shift."

[4] See judge's decision, fn. 39.

[5] Perez denied ever being questioned by anyone "regarding the bad language." However, he never denied that Okashige spoke to him regarding Morrow. Perez testified that he would have ceased using epithets against Morrow "because I would have gotten tired of telling him." The judge cited this testimony as an example of assertions by Perez that "defied belief." See judge's decision at fn. 56 and accompanying text.

[6] On the basis of this meeting, the judge found that the Respondent unlawfully interrogated Perez and impliedly threatened him with discharge. As noted above, we adopt these findings.

During the second week of January, Executive Chef Okashige attended management meetings, where it was pointed out that employees were getting close to the end of their probationary period, that staffing levels were higher than anticipated, and that business tapers off after the holiday season. In light of the reduced staffing needs, Okashige began terminating probationary employees who were not meeting the Respondent's expectations.

On the following Monday, January 14, Supervisor Kingston informed Perez that he had been fired and would be replaced because he "didn't pass probation." Kingston escorted Perez to Okashige's office. Okashige gave Perez his termination notice, dated January 9, which stated as the reason for separation: "Introductory period[.] Did not meet introductory standards or department standards and expectation of management."

Applying *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the judge found that the General Counsel met his initial burden of showing that the Respondent had knowledge of Perez' union activity and that antiunion animus was a motivating factor in the Respondent's decisions to issue the warning to him and to discharge him. The judge further found that the Respondent failed to show that it would have taken the same actions against Perez even in the absence of his union activity. We do not agree. Contrary to the judge, we find that the Respondent established that it would have taken the same action against Perez even in the absence of his union activity.

After initially hiring a large staff for its November grand opening and the upcoming holiday season, the Respondent found itself overstaffed when business slowed down after the holidays. Additionally, many of its employees were nearing the end of their probationary periods. Therefore, to determine how to reduce its excess staffing, Executive Chef Okashige reviewed personnel files and obtained feedback from the chefs regarding which probationary employees were not meeting the Respondent's standards.

Based on this information, Executive Chef Okashige discharged 30 to 40 employees, including 7 to 10 from the Fantasy Market Buffet, out of a kitchen staff of approximately 200. Perez, as well as his fellow buffet cooks Corbett Sayles, Jin Zhan Ma, and Marvin Cabrera, were among those discharged. According to Okashige, he selected Perez for discharge based on performance issues, which included the empty food pans at his buffet station, Kinney's report that Perez was not following his instructions, Egbert's complaints about Perez' refusal to cooperate with her, Perez' insulting epithets toward Morrow, Perez' harassment of Guerrero, and Perez' failure to notify his supervisor promptly that he would be unable to work on December 31. Sayles, Ma, and Cabrera were selected for discharge based on similar shortcomings—problems in getting along with their coworkers and poor food presentation at their buffet stations. There is no contention or evidence that Sayles, Ma, or Cabrera were union supporters.

In sum, Perez was discharged as part of a staff reduction of probationary employees prompted by business reasons. There is no evidence or contention that the general staff reduction was unlawfully motivated. Further, it is undisputed that Perez engaged in multiple incidents of misconduct and poor performance, several of which generated complaints from his coworkers. Additionally, other buffet cooks who had not engaged in union activity and whose performance, although flawed, was not as deficient as that of Perez were also discharged as part of the staff reduction. Accordingly, we find that the Respondent has met its burden of showing that it would have discharged Perez even in the absence of union activity.

The judge reached a contrary conclusion, but we find his reasoning unpersuasive. The judge found "compelling" the fact that the Respondent failed to discipline or immediately discharge Perez after any individual act of misconduct but instead took action against him only after it learned of his support for the Union. The judge found the Respondent's supposed inaction was "tantamount to condonation" of the misconduct. Further, the judge specifically relied on Perez' testimony that no supervisor ever spoke to him about his misconduct.

Even the judge's own account of the facts, however, makes plain that the Respondent *did,* in fact, speak to Perez about various incidents of misconduct. Thus, Executive Chef Okashige informed Perez that the empty pans and pans crusted over with food at Perez' buffet station were not up to the Respondent's standards. Sous Chef Kinney intervened in an argument and told Perez that he was not permitted to change recipes without Okashige's approval. Kinney told Perez on another occasion that he was slicing meat improperly; indeed, Perez admitted receiving "verbal counseling" for refusing to follow Kinney's directions. Room Chef Kingston told Perez that he needed to follow the Respondent's food preparation guidelines after Egbert complained to Kingston that Perez was failing to do so. After Guerrero complained to Kingston that Perez was bothering her by asking her to support the Union and requesting her address and phone number, Director of Human Resources Harmon told Perez that he should not solicit during work time. Accordingly, the judge's finding that, prior to the

Respondent's learning of Perez' support for the Union, no supervisor ever spoke to Perez about his misconduct is contrary to the record.

More importantly, the judge failed to consider that Perez' discharge occurred in the context of a general reduction in staff in which the Respondent sought to select for discharge its poorest performing employees. Thus, while no single instance of misconduct by Perez prompted the Respondent to discharge him at the time it occurred, Perez' cumulative record of misconduct and complaints against him by his coworkers made him a logical candidate for inclusion in the staff reduction. Indeed, even in this respect Perez was treated the same as buffet cooks Sayles, Ma, and Cabrera, who were concurrently chosen for discharge based on their cumulative poor performance, rather than discharged immediately following any particular instance of poor performance. Thus, even though Perez was selected for discharge at a time when the Respondent knew of his union support, this does not undermine the Respondent's strong showing that, irrespective of his union support, Perez would been included in the staff reduction based on his poor work performance. We, therefore, find that the Respondent has shown that it would have discharged Perez even in the absence of union activity. Accordingly, we shall dismiss the complaint allegation that the Respondent's discharge of Perez violated the Act.

We also find, contrary to the judge, that the Respondent's January 7 warning to Perez did not violate the Act. The Respondent issued the warning to Perez for failing to notify it prior to his starting time that he would be unable to work on December 31. The warning cited Perez for not complying with rule 6 of the Respondent's team member guide by "violating the 4 hour call in policy and not giving management proper notice to replace him for the day, hurting business by not being set up on time." Perez was aware of the Respondent's requirement that employees notify their supervisor of any expected absence as soon as possible and preferably no later than 4 hours prior to their shift. Rather than promptly informing his supervisor when he decided that he was too ill to work, however, Perez did not give notice until the actual start of his shift on December 31. The Respondent was understandably displeased by Perez' failure to call in, particularly as New Year's Eve was an especially busy day for the Respondent's business. Indeed, as the warning notice stated, in "not giving management proper notice to replace him for the day," Perez "hurt business by [preventing the Respondent from] being set up on time." Given Perez' breach of the Respondent's established rule by failing to call in regarding his absence on an especially busy work day, and in light of Perez' prior performance deficiencies, we find that the Respondent has shown that it would have issued the warning to Perez regardless of his union activity.

In reaching a contrary conclusion, the judge noted the warning notice stated that Perez had violated the Respondent's "4 hour call in policy," but that the Respondent's rule required an employee to notify his supervisor of his absence "as soon as possible," and not necessarily 4 hours prior to his reporting time. The judge also found that Kingston's and Okashige's testimony concerning the warning to Perez was inconsistent. Finally, the judge noted that it was unusual for the Respondent to give a written warning to a probationary employee, such as Perez. We find the judge's reasoning unpersuasive.

Although the warning notice issued to Perez used the term "4-hour call in policy" to refer to the rule, the rule itself requires each employee to notify the Respondent of absences "as soon as possible, preferably four (4) hours prior to the beginning of your scheduled shift." By failing to promptly telephone the Respondent to give it advance notice when he decided that he was too sick to work, Perez violated the rule in that he failed to notify the Respondent as soon as possible of his absence.[7] The fact that the Respondent used the term "4-hour call in policy" in Perez' warning to refer to the rule was inconsequential. Perez was aware of the rule's requirements. In any event, the warning further stated that Perez failed to "giv[e] management proper notice to replace him for the day," and thus identified the precise nature of Perez' infraction.

Additionally, unlike the judge, we do not find particularly significant the fact that there were discrepancies between Kingston's and Okashige's testimony concerning the warning to Perez. While Kingston and Okashige had different recollections regarding which of them drafted the warning, and Okashige recounted Perez' prior misconduct as a factor in deciding to issue the warning while Kingston focused solely on Perez' failure to call in to give notice of his absence, we do not find these accounts so fundamentally at odds as to undermine the legitimacy of the warning notice. Whether expressly stated or not, Perez' record of prior misconduct undoubtedly was a factor the Respondent's decision to issue him the warning. Moreover, given Perez' record of misconduct, we do not find it remarkable that the Respondent chose to issue him a written warning for this incident, even though it was unusual for the Respondent to issue

[7] We do not agree with the judge that Perez arguably complied with the Respondent's rule by dressing and driving to the Respondent's facility to report his inability to work. Such action was clearly contrary to the rule's express requirement that the Respondent be notified "as soon as possible" concerning an employee's absence.

written warnings to probationary employees. Accordingly, as we find, contrary to the judge, that the Respondent has shown that it would have issued the warning to Perez even in the absence of union activity, we reverse the judge and dismiss the complaint allegation that the Respondent's issuance of the warning to Perez violated the Act.

2. The Respondent's team member guide, distributed to all employees, contains standards of conduct rules. Standards of conduct rule 10 forbids employees from engaging in "any type of conduct, which is or has the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with fellow Team Members or patrons." The judge found that the Respondent's promulgation and maintenance of rule 10 violated Section 8(a)(1) because the rule was facially violative of the Act. We do not agree.

In determining whether the Respondent's maintenance of rule 10 violated Section 8(a)(1), we look to the analysis set forth in *Lutheran Heritage Village-Livonia*.[8] In that case, the Board stated:

> [A]n employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). In determining whether a challenged rule is unlawful, the Board must, however, give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights. Id. at 825, 827. Consistent with the foregoing, our inquiry into whether the maintenance of a challenged rule is unlawful begins with the issue of whether the rule explicitly restricts activities protected by Section 7. If it does, we will find the rule unlawful.
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> If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.[9]

Applying the above analysis, we find first that the Respondent's rule 10 does not explicitly restrict activities protected by Section 7. Rule 10 prohibits "conduct which is or has the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with fellow Team Members or patrons." In barring such conduct, rule 10 does not explicitly restrict Section 7 activities.

Additionally, the Respondent did not promulgate rule 10 in response to union activity nor has it applied rule 10 to restrict the exercise of Section 7 rights.[10] Indeed, there is no complaint allegation that the Respondent unlawfully enforced rule 10.

We therefore turn to the issue of whether, absent any evidence that the Respondent has ever impermissibly applied—or even threatened to apply—the rule to Section 7 activities, its employees "would reasonably construe" rule 10 to prohibit Section 7 activity. We find that the General Counsel has not established that a reasonable employee reading rule 10 would construe it to prohibit conduct protected by Section 7.

As the Board stated in *Lutheran Heritage Village-Livonia,* supra, in determining whether a challenged work rule is unlawful, the rule must be given a reasonable reading, phrases should not be read in isolation, and improper interference with employees' rights is not to be presumed. In adopting that standard, the Board was guided by, and cited to, the D.C. Circuit's decision in *Adtranz ABB Daimler-Benz Transp., N.A. v. NLRB*, 253 F.3d 19 (2001), denying enf. in part to 331 NLRB 291 (2000). In *Adtranz*, the D.C. Circuit vacated as "utterly without merit" the Board's finding that a handbook prohibition against the use of "threatening or abusive language" potentially chilled the exercise of Section 7 activity and therefore violated the Act. In so holding, the *Adtranz* court stressed that threatening and abusive language are not inherent aspects of union organizing or other Section 7 activities,[11] and specifically rejected the argument that the mere "unrealized potential" that "the rule could reasonably be interpreted as barring lawful union organizing propaganda" rendered the rule facially invalid. 253 F.3d at 25–26 (internal quotation omitted).

In our view, the D.C. Circuit's reasoning in *Adtranz* applies with equal force to rule 10, which by its terms, prohibits only "conduct which is or has the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with fellow Team Members or patrons." Such conduct is no more inherently entwined with Section 7 activity than the "threatening and abu-

[8] 343 NLRB No. 75 (2004).

[9] Id., slip op. at 1–2 (fn. omitted).

[10] An example of a rule that would be unlawful because it was promulgated in response to protected union activity would be a no-solicitation rule adopted shortly after organizational activities had begun under circumstances in which the employer previously permitted solicitations and there was no legitimate business justification for the new rule.

[11] The court observed: "In the simplest terms, it is preposterous that employees are incapable of organizing a union or exercising their other statutory rights under the NLRA without resort to abusive or threatening language." 253 F.3d at 26.

sive" language at issue in *Adtranz* or the prohibitions against "verbal abuse," "abusive or profane language," or "harassment" found lawful in *Lutheran Heritage Village*. Nor are the rule's terms so amorphous that reasonable employees would be incapable of grasping the expectation that they comport themselves with general notions of civility and decorum in the workplace. Indeed, even our dissenting colleague does not appear to dispute that the conduct prohibited by rule 10 is, in many instances, unprotected by the Act. Concededly, there may be instances where protected conduct has an untoward effect on an employee (e.g. he/she is subjectively offended by a peaceful solicitation). However, the rule has never been applied, or intended to apply, to that situation. We would not speculate that a reasonable reader of the rule would read the rule as applying to that situation.[12]

Our dissenting colleague also argues that the inclusion of the language "or has the effect of being" injurious, etc., exacerbates the ambiguity she perceives in rule 10. In her view, the rule would chill a reasonable employee from engaging in the exercise of peaceful Section 7 activity because such an employee would: (1) reasonably construe the rule as applying to a situation where a hypersensitive employee is subjectively offended by peaceful Section 7 activity, (2) would reasonably anticipate that the subjectively offended hypersensitive employee would report the complaint to management, and (3) would reasonably anticipate, in the absence of any evidence of such a predilection, that management would conclude that the peaceful, objectively inoffensive conduct which inspired the hypersensitive reaction violated the rule and warrants discipline. The mere recitation of the premises underlying our colleague's argument effectively answers it. We are simply unwilling to engage in such speculation in order to condemn as unlawful a facially neutral workrule that is not aimed at Section 7 activity and was neither adopted in response to such activity nor enforced against it.

Finally, nothing in the Board's decision in *Lutheran Heritage Village* or our decision today is inconsistent with the principle, cited by our colleague, that ambiguities in a document are to be construed against its drafter. As the cases cited by the dissent illustrate, that principle has generally been applied to rules limiting solicitation or distribution of literature.[13] Those rules, of course, explicitly touch upon Section 7 activity.[14] But where, as here, the rule *does not* address Section 7 activity, the mere fact that it could be read in that fashion will not establish its illegality.[15] We hew to the principles articulated in *Lutheran Heritage Village* and the cases cited therein and decline to parse through workrules, viewing phrases in isolation, and attributing to employers an intent to interfere with employee rights, in order to divine ambiguities that will render such rules unlawful. Accordingly, we reverse the judge and find that the Respondent's promulgation and maintenance of rule 10 did not violate Section 8(a)(1).

ORDER

The National Labor Relations Board orders that the Respondent, Fiesta Hotel Corporation d/b/a Palms Hotel and Casino, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees regarding their union sympathies and activities.

(b) Impliedly threatening its employees with discharge because they have engaged in activities in support of the Union.

(c) Informing its employees that they are prohibited from discussing their working conditions.

(d) Promulgating and maintaining in effect, in its team member guide, a standards of conduct rule prohibiting employees from loitering in company premises before or after working hours.

(e) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Expunge standards of conduct rule 46 from its team member guide.

(b) Within 14 days after service by the Region, post at its facility in Las Vegas, Nevada, copies of the attached notice marked "Appendix."[16] Copies of the notice, in English and Spanish, on forms provided by the Regional Director for Region 28, after being signed by the Re-

[12] *Lutheran Heritage Village*, supra, slip op. at 2. See also *Adtranz ABB Daimler-Benz Transp. N.A., Inc. v. NLRB* 253 F.3d 19, 25 (D.C. Cir. 2001) (rule banning abusive or threatening language was lawful).

[13] *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992) (overbroad no-solicitation, no-distribution rule). *NLRB v. Miller*, 341 F.2d 870, 874 (2d Cir. 1965) (overbroad no-solicitation rule).

[14] *Lutheran Heritage Village,* supra, slip op. at 1 fn. 5.

[15] Id. at 2. See also *Cintas,* 344 NLRB No. 118, slip op. at 1, 4 (2005) (applying *Lutheran Heritage Village* standard to confidentiality rule without citing to ambiguity principle relied on by judge). Compare *Lafayette Park Hotel,* 326 NLRB 824, 828 (1998) (applying ambiguity principle in rejecting employer's argument that rule barring access for off-duty employees was narrower in scope that its text suggested).

[16] 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."

spondent'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. 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, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 28, 2001.

(c) 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.

MEMBER LIEBMAN, dissenting in part.

Applying the Board's recent decision in *Lutheran Heritage Village-Livonia,*[1] the majority finds that the General Counsel has not demonstrated that a reasonable employee would construe the standard of conduct rule 10 to prohibit conduct prohibited by Section 7. I disagree, and would instead find that an employee would reasonably construe the rule's language as including protected activity, and would thus be chilled in his exercise of Section 7 rights. For this reason, I would find that the rule violates Section 8(a)(1).[2]

I.

An employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. mem. 203 F.3d 52 (D.C. Cir. 1999). The Board has previously found such work rules to be unlawful when they discourage protected conduct based on whether it is "subjectively offensive" to other employees or managers. See, e.g., *Tawas Industri*es, 336 NLRB 318, 322 (2001). See also *Consolidated Diesel Co*., 332 NLRB 1019, 1020 fn. 6 (2000) (collecting cases). Otherwise, employees' protected activity would be subject to the sensitivities of other members of the work force, thus establishing a labor law variant of the "heckler's veto" forbidden in constitutional law. See *Brown v. State of La.*, 383 U.S. 131, 133 fn. 1 (1966). Indeed, in accord with Section 7's traditional protection of robust and spirited activity—within the limits of the employer's right to an orderly workplace[3]—the Board has found the most persistent solicitation to be protected, even when it annoys or disturbs other employees. See, e.g., *RCN Corp.*, 333 NLRB 295, 300 (2001); *Bank of St. Louis*, 191 NLRB 669, 673 (1971), enfd. 456 F.2d 1234 (8th Cir. 1972).

II.

Here, the Respondent's standards of conduct rule 10 prohibits "conduct which is or *has the effect of* being injurious, offensive, threatening, intimidating, coercing or interfering with fellow Team Members or patrons" (emphasis added). The question, then, is whether an employee reasonably would read the rule as covering unwanted or persistent solicitation—protected activity. I would find that the language of the rule indicates that an employee would reasonably read the rule in this manner.

To begin, the judge was correct in citing the "amorphous nature" of the language used to describe prohibited conduct as the basis for finding rule 10 unlawful. An employee simply cannot be sure what conduct the employer might consider "injurious" or "offensive" or "intimidating" or "interfering with" other workers. The ambiguity of these words gives the employer great discretion in defining them and in deciding when to impose discipline—enough discretion to invalidate the rule under established law. See, e.g., *Advance Transportation Co.*, 310 NLRB 920, 925 (1993). Indeed, it is well-established that any ambiguity in a rule should be construed against the employer. See, e.g., *Lafayette Park Hotel*, supra, 326 NLRB at 828, citing *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992). As the Second Circuit stated 40 years ago in enforcing the Board's invalidation of a confusingly-worded work rule: "[T]he risk of ambiguity must be held against the promulgator of the rule rather than against the employees who are supposed to abide by it." *NLRB v. Miller*, 341 F.2d 870, 874 (2d Cir. 1965).[4]

This ambiguity is exacerbated by the rule's explicit reference to the "effect" of prohibited conduct. The wording of the rule explicitly indicates that an employee's conduct can violate the rule by his conduct's

[1] 343 NLRB No. 75 (2004). Member Walsh and I dissented from that decision. See slip op. at 4.

[2] I concur in the reversal of the 8(a)(3) violations found by the judge involving Martin Perez, as well as the other aspects of the majority's decision.

[3] "No restriction may be placed on the employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline." *NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105, 113 (1956).

[4] As I have observed before, employers might minimize facial challenges to their workplace rules by notifying employees of their rights under Section 7 of the Act and advising them that workrules are not intended, and should not be construed, to interfere with the employees' rights. See *Lutheran Heritage Village*, supra, 343 NLRB No. 75, slip op. at 7 fn. 7; *Safeway, Inc*., 338 NLRB 525, 528 (2002) (Member Liebman, dissenting).

effect on others: a coworker merely needs to feel injured, offended, threatened, intimidated, coerced, or interfered with, by the conduct in question. Thus, an employee's solicitation activity may objectively conform with rule 10 as noninjurious, nonoffensive (and so forth), but would still violate the rule if it were *perceived* by another employee as "offensive," or even "interference," for example. Contrary to the majority, there is nothing speculative about this interpretation—the "effect" language is part of the rule. To avoid discipline, then, an employee would be wise to curtail his solicitation activity, despite its protected status under Section 7. In this way, rule 10, on its face, chills the exercise of employees' rights under the Act.

III.

Today's decision threatens to allow employers to take advantage of the chilling effect of ambiguous rules. To the extent that protected activity is discouraged this way, the employer need never issue an explicit prohibition against it or engage in retaliation after the fact. The result, of course, is every bit as contrary to the Act's goals. Accordingly, I dissent.

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.

WE WILL NOT interrogate you regarding your union sympathies or activities.

WE WILL NOT impliedly threaten you with discharge because of your activities in support of the Union.

WE WILL NOT inform you that you are prohibited from discussing your working conditions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under the National Labor Relations Act.

WE WILL expunge standards of conduct rule 46 from our team member guide

FIESTA HOTEL CORPORATION D/B/A PALMS HOTEL AND CASINO

Winkfield Twyman Jr., Esq. and *Stephen E. Wamser, Esq*., for the General Counsel.

Warren L. Nelson, Esq. (Fisher & Philips LLP), of Irvine, California, for the Respondent.

Richard G. McCracken, Esq. (McCracken, Stemerman, Bowen & Holsbery) and *Kevin Kline,* of Las Vegas, Nevada, for the Charging Party.

DECISION

STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge. Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226, and Bartenders Union, Local 165, AFL–CIO, a/w Hotel Employees and Restaurant Employees International Union, AFL–CIO (Union), filed the original and amended unfair labor practice charges in the above-captioned matter on March 29 and May 31, 2002, respectively. After an investigation, on May 31, 2002, the Acting Regional Director of Region 28 of the National Labor Relations Board (Board), issued a complaint, alleging that Fiesta Hotel Corporation d/b/a Palms Hotel and Casino (Respondent), had engaged in, and continues to engage in, acts and conduct violative of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). Respondent timely filed an answer, essentially denying the commission of any of the alleged unfair labor practices. Pursuant to a notice of hearing, a trial on the merits of the unfair labor practice allegations was held before the undersigned administrative law judge in Las Vegas, Nevada, on October 22 through 24, 2002, and February 4 and March 17, 2003. During the hearing, each party was afforded the opportunity to examine and to cross-examine witnesses, to offer into the record any relevant documentary evidence, to argue their respective legal positions orally, and to file a posthearing brief. Counsel for the General Counsel and counsel for Respondent filed posthearing briefs, and the undersigned closely perused these documents. Accordingly, based upon the entire record herein, including the posthearing briefs and my observation of the testimonial demeanor of each of the witnesses, I issue the following

FINDINGS OF FACT

I. JURISDICTION

At all times material herein, Respondent, a State of Nevada corporation, with an office and place of business located on Flamingo Road in Las Vegas, Nevada, has been engaged in the gaming and lodging industry, operating a hotel and casino, herein called Respondent's facility. During the 12-month period ending March 29, 2002, in the normal course and conduct of its business operations described above, Respondent derived gross revenues in excess of $500,000 and purchased and received at its Las Vegas facility goods, valued in excess of $50,000, directly from suppliers located outside the State of Nevada. Respondent admits that, at all times material herein, it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondent admits that, at all times material herein, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ISSUES

The complaint alleges that Respondent has maintained various work rules, including a confidentiality provision and rules prohibiting injurious, offensive, threatening, intimidating, and coercive conduct, loitering on its premises before and after working hours, and eating and loitering in the employees' dining room on days off, which, on their face, are violative of Section 8(a)(1) of the Act. In addition, the complaint alleges that Respondent changed the work schedule of and, subsequently, laid off its employee, Carlos Interiano, in violation of Section 8(a)(1) of the Act and issued a warning notice to and, subsequently, terminated its employee, Martin Perez, in violation of Section 8(a)(1) and (3) of the Act. Further, the complaint alleges that Respondent engaged in conduct, violative of Section 8(a)(1) of the Act, by prohibiting its employees from concertedly discussing complaints about their wages, hours, and working conditions, complaining to their supervisors about their wages, hours, and working conditions, and directing their fellow employees to complain to their supervisors about their wages, hours, and working conditions, by disparaging employees who engaged in the above-described acts and conduct, by interrogating its employees about their union membership, sympathies, and activities, and by threatening employees with discharge for engaging in union activities. Respondent denied engaging in the alleged unfair labor practices and contends that it laid off Interiano and discharged Perez for legitimate business reasons.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Disciplining and Discharge of Martin Perez

Respondent owns and operates the Palms Hotel and Casino, which is located on Flamingo Road in Las Vegas, Nevada, and which had its grand opening on November 17, 2001. The record establishes that, in addition to three restaurants, which are managed by their owners, who lease space for them from Respondent,[1] there are five food outlets (a coffee shop, the Fantasy Market Buffet, Gardena's Restaurant, the "team" dining room (TDR), and room service) at Respondent's facility and that Harris Okashige is Respondent's executive chef[2] and responsible for the production and quality of the food served by each and for the overall supervision of the employee complement at the above food outlets and the facility's main kitchen.[3] The record further establishes that Respondent's Fantasy Market Buffet is a typical Las Vegas-style buffet and specializes in "stations" for barbeque, Chinese, Lebanese, Mediterranean, and Italian foods and a bakery; that Mike Kingston is the room chef and responsible for all kitchen functions, including the training, scheduling, evaluation, and supervision of the 30 cooks, cooks helpers, and runners working in the buffet; and that James Kinney is a sous chef in that food outlet.[4] The record also establishes that, at all times material herein, Fred Harmon, was Respondent's director of human resources; that his office was located on Flamingo Road across from Respondent's facility; that, in the weeks prior to the opening of the facility, he and his staff interviewed and hired approximately 2000 employees; and that he directed a staff responsible for training and acquainting each of the new hires with Respondent's personnel policies and procedures.[5]

The record reveals that Okashige interviewed alleged discriminatee, Martin Perez, on November 26, 2001 and offered him a job as a cook in the Fantasy Market Buffet and that the latter began working for Respondent the next day, being assigned to the Lebanese station[6] of the buffet. According to Perez, who had been a member of the Union since 1999 and had 12 years experience as a cook but none in Lebanese cooking, on his first day of work, he received training in how to prepare the Lebanese food from a chef, who subsequently left Respondent's employ. Perez testified that, shortly after commencing to work for Respondent, he received a letter from the Union, advising him of the Union's interest in organizing Respondent's employees and of a rally which would be held outside of Respondent's facility on December 4 and that, on the day before the scheduled union rally, and on the day of the rally, he had three conversations with coworkers regarding employment-related problems during which he discussed the Union. The first occurred in the morning, on December 3, when he spoke to two dishwashers in the dishwashing area of the kitchen, and they ". . . started complaining to me that [Respondent] made them work overtime and . . . didn't pay them for [working]." Perez told his coworkers about the Union and invited them to participate in the upcoming rally. The second conversation occurred later in the employees' breakroom when he spoke with three other cooks about work-related problems and told them about the union rally. The third conversation occurred the next morning during which he spoke with three dishwashers, who related complaints concerning their treatment by a manager; Perez informed them of the rally, scheduled for later in the day, and suggested they demonstrate their support for the Union by attending. The record further reveals that, later in the day, approximately 500 supporters of the Union rallied in front of Respondent's facility at 4 in the afternoon. Perez, who was off-duty, attended, and "I took one of the signs up that said no contract no peace and explained about the problems I had." Asked if any managers witnessed his attendance and participation during the rally, Perez, who believed he was the only Respondent employee participating, stated that three

[1] These restaurants are Nines, Alazay, and Little Buddha.

[2] Respondent admits that Okashige is a supervisor within the meaning of Sec. 2(11) of the Act.

[3] Okashige estimated that there are approximately 200 employees under his supervision and that these employees are classified as cooks, cooks helpers, sous chefs, and room chefs.

[4] Respondent admitted that Kingston and Kinney were supervisors within the meaning of Sec. 2(11) of the Act.

A sous chef acts as the assistant to the room chef.

[5] Respondent's employees, in Respondent's vernacular, are known as "team members."

[6] Apparently, as the owner of Respondent's facility is of Lebanese decent, this food station was an important one, and the food had to be cooked to the taste of the owners.

security guards, wearing black suits and sunglasses, stood outside the main entrance of the facility during the rally and observed what transpired.

There is no dispute that, one day in the last week of December an incident, involving Perez and a cook's helper, Ernestina Guerrero, occurred at the barbeque station on the buffet line. While I shall discuss it in greater detail infra, I note that, during a conversation between the two employees[7] as they worked, Perez spoke favorably about the Union, mentioning the benefits which the latter would seek for the employees, and asking for Guerrero's phone number and home address and for her support for the Union.[8] Rather than responding favorably to Perez' requests,[9] Guerrero asked him to leave her alone and not to bother her about the Union again. Executive chef Okashige testified that, upset over Perez' conduct, on December 27, Guerrero came to his office[10] and complained that Perez had been harassing her, by soliciting for the Union and asking for her address and telephone number. Assertedly after speaking to Perez by himself, Okashige informed Respondent's director of human resources, Fred Harmon, about the Perez-Guerrero incident, including Perez' asserted harassment and union solicitation of her. Harmon instructed Okashige to arrange a meeting with Perez for the next day, and there is also no dispute that such a meeting between Perez, Okashige, and Harmon occurred on Friday, December 28.[11]

On that date, at approximately 11 a.m., according to the alleged discriminatee, James Kinney instructed him to report to Okashige's office, and, when he arrived at the executive chef's office, Perez found Okashige and another manager, whose name he did not recall,[12] waiting there for him. "They" closed the door, and the second manager, whose name Perez did not recall, asked ". . . 'We don't know you, but did you talk to coworkers about the Union?'" Perez denied the allegation, "and they started talking to me about the Union, and they said that they didn't want the Union and that they were going to give good benefits to me and better wages." To this, Perez said he did not like the Union and did not want the Union, which was why he was working at Respondent's facility. At this comment, both managers began laughing, and Okashige said that they did not want to fire him because of his work experience and that "'we're going to keep you.'" Perez inquired about a wage increase, and Okashige said Perez would eventually be paid $14 per hour. At this point, the conversation ended, and Perez left the office. During cross-examination, when asked if the person, who spoke to him, mentioned the no-solicitation policy in the employees' handbook, Person replied, "I don't recall too well, but I think they did talk to me about the handbook and that they were going to give the benefits and guarantees."[13] Then, Perez specifically denied being shown the no-solicitation policy but admitted that Okashige and the other manager mentioned that he should not be soliciting during worktime but that he could do so during breaks and lunch.

As to the recollections of Perez and Okashige regarding this meeting, Okashige recalled that, after he introduced Harmon to Perez, Harmon ". . . did all the talking," saying ". . . 'that there were allegations . . . that you are involved in harassing team members and soliciting phone numbers and addresses to give the Union'. . . . Fred also let Martin know that he couldn't solicit while he was on the job. If he wanted to talk about Union issues, he could talk about it on his break time in designated break areas."[14] According to Respondent's executive chef, Perez "denied Harmon's accusation . . . after Fred had said to him about the allegations of soliciting and stuff like that." As to his version of the conversation, Harmon, who, as the management representative for Respondent,[15] remained in the hearing room and listened to Okashige's account, testified, "I explained to [Perez] that we had received a complaint from a fellow team member and that her complaint was that he was disrupting her while she was trying to work. He kind of had a questioned look on his face, so I gave him the specifics of what she had claimed. I told him that she had said . . . he was asking her continuously for her address and . . . her phone number so she could provide it for the Union . . . he was shaking his head and he said . . . I don't like the Union. And I told him this wasn't about whether he liked the Union or not, it was just about being disruptive on the work line. . . . And I explained to him that if he wanted to have those types of conversations . . . he could have [them] down in the break room and also in the team member dining room. . . . I reiterated that he wasn't in trouble. . . ."[16]

[7] Perez testified that the conversation lasted "around ten minutes;" while Guerrero recalled their conversation as lasting for "two hours."

[8] According to Guerrero, Perez solicited her signature presumably for an authorization card.

[9] According to Guerrero, during their conversation, Perez requested her telephone number twice and solicited her signature for the Union six to eight times.

[10] Okashige asserted that Michael Kingston had referred Guerrero to his office. Guerrero, however, testified that she only told Kingston about the incident and specifically denied relating what occurred to Okashige.

[11] Perez placed the meeting as occurring at least 1 week after the incident with Guerrero.

[12] During cross-examination of Perez, Respondent's attorney pointed to Harmon and asked Perez if he was the other person in the room. Perez said he did not recall and added that the man was wearing a coat and tie. During his testimony, Harmon admitted he was the person but denied wearing a coat and tie on that day.

[13] As will be discussed infra, upon being hired, new employees are given copies of Respondent's team member guide, which is the employees' handbook and which contains their terms and conditions of employment. Fred Harmon testified that, during their orientations, his staff informed the new employees of Respondent's "expectations" and their responsibilities pursuant to Respondent's employment policies.

Respondent's solicitation and distribution of literature policy, as set forth in its employees' handbook, prohibits employees from ". . . distribut[ing] literature or printed materials of any kind, sell[ing] merchandise or solicit[ing] for any other cause during working time. . . . [T]eam Members who are not on working time . . . may not solicit from Team Members who are on working time for any cause or distribute literature of any kind to them. You also cannot distribute literature or printed materials of any kind in working areas at any time. . . ."

[14] The transcript incorrectly has the word "could" before the word "solicit" and is hereby corrected.

[15] All other witnesses were sequestered.

[16] Respondent offered into the record a document, R. Exh. 16, dated December 28, 2001, which Harmon identified as a file memorandum he

According to Perez, also on December 28, he became ill and, during the afternoon, consulted a doctor in a local health clinic,[17] was diagnosed with acute bronchitis[18] and was given a prescription for twice-daily doses of a spray from an inhaler. He testified that he last breathed in spray from the inhaler at approximately 8 on Sunday night and fell asleep, intending to report for work the next day but that, when he awoke on Monday morning at 6, he felt "dizzy" and "my head was turning." Asserting that he felt too ill to work and admitting that he was aware of Respondent's attendance/call-in policy, which requires employees (team members) to ". . . personally notify your supervisor or a member of your department of your expected absence . . . as soon as possible, preferably no later than four (4) hours prior to the beginning of your scheduled shift," rather than telephoning Michael Kingston, Perez dressed and drove to Respondent's facility in order to inform Kingston of his illness and ". . . that I couldn't work."[19] Arriving at Respondent's facility,[20] he went up to the buffet area, spoke to Kingston, and explained that he felt too sick to work that day, New Year's Eve. Kingston glared at Perez with "a mad expression" and told him to go home. The next day, New Years Day, Perez reported for work; however, "Chef Mike told me to go back home and told me that I had to show him paper work where the doctor said that I was able to work again." Perez left the hotel, returned to the medical clinic, which he had visited on the previous Friday, spoke to the doctor who had treated him, and obtained a medical release, enabling him to return to work. He returned to work the next day, Wednesday, and worked the remainder of the week without incident.

On Monday, January 7, 2002, Perez reported for work and was given a written warning, termed a " written coaching,"[21] by his supervisor, Kingston.[22] Said document, General Counsel's Exhibit 7, signed, on December 31, 2001, by Okashige and Kingston, states that, when he reported for work at 8 a.m. and said he was sick and could not work, Perez acted in violation of rule no. 6 of the team member guide[23] by ". . . violating the 4 hour call in policy and not giving management proper notice to replace him for the day. . . ."[24] Perez testified that, when Kingston gave him the written warning, he told the alleged discriminatee ". . . that he gave me a warning because I hadn't called four hours before, and that is why he was giving people warnings."[25] While he signed the warning notice, Perez wrote on it, "I don't feel good with this warning because I tried to come to work." A week later, on Monday, January 14, 2002, after clocking in and starting to work, Perez was informed by Kingston that he (Perez) had been fired and would be replaced because he "didn't pass probation."[26] Moments later, Kingston accompanied Perez to Harris Okashige's office where the latter gave Perez his termination document notice.[27] According to Perez, he asked me to sign, and I refused to sign. Then he wrote down that I refused to sign the termination. Perez stated that Okashige failed to explain why he had been discharged, ". . . and I asked him for some paper where it said why I was terminated, and they never gave me it."

drafted after the meeting with Perez and which contains his purported recollection of the conversation.

[17] Perez claimed that he felt ill during the meeting with Okashige and Harmon.

During direct examination, after initially testifying he became ill on or about December 31, after being shown a calendar, Perez changed his testimony, stating that he first became ill on December 28. However, later, during cross-examination, after denying he previously testified that he visited a doctor later in the day on December 28, and after being shown R. Exh. 1, a form with the title "Guadalupe Medical Centers" and bearing the date 12-28-01, Perez conceded he visited the health clinic on December 28.

[18] Perez claimed that he was ill with bronchitis and asthma. However, there is nothing on the clinic's form to indicate he suffered from the latter disease.

[19] Perez explained that he failed to follow the call-in procedure as he had fallen asleep the night before believing he would be well enough to work the next day.

[20] Perez' work shift began at 8 a.m.

[21] Respondent's disciplinary procedure is a progressive one, known as "coaching action." Said procedure, which entails oral, written, and final warnings, culminating in possible termination, is utilized to enforce Respondent's 70 standards of conduct, work rules, and job policies, as set forth in its team member guide, and to ensure its employees' maintain proper job performance, work habits, conduct, demeanor, and "overall attitude."

[22] The first 90 days of employment for all new employees is known as their "introductory" period, which is Respondent's terminology for an employee's probation period. Whether for new employees, unlike those who have completed 90 days of employment, Respondent is required to utilize its progressive coaching action procedure prior to discharge is unclear. Thus, Michael Kingston testified that Respondent's progressive discipline policy is followed on all occasions; however, "depending on the severity of the act," such as a worker stabbing another worker in his head with a fork, it may not be followed. Asked if there is any difference in discipline when an employee is in his introductory period as opposed to after completing 90 days, he replied, "no," and, when asked if he is required to give write-ups prior to dismissal during an employee's introductory period, he answered, "Yes, as a supervisor, I need to do my job." Harris Okashige stated that, during the introductory period, rather than disciplining employees, Respondent ". . . like[s] to try to coach people and train them and teach them our policies and procedures. And then get them headed in the right direction . . . and be part of our team." However, Fred Harmon stated that he has never instructed supervisors not to give progressive discipline to introductory period employees, and he stated that there have been occasions on which progressive coaching action has been taken against new employees. In the latter regard, Okashige stated that, in early 2002, he gave written warnings, for failure to adhere to Respondent's clock-in procedure, to two newly hired cooks in the Gardena's restaurant.

[23] Standard of conduct no. 6 is "Failure to follow rules, directions, instructions, policies or procedures of the company whether oral or written."

[24] There is no mention, in the warning notice, of any prior coaching violations.

[25] The transcript is incorrect as to the word before "called" and is hereby corrected as set forth above.

[26] According to Perez, Kingston told him, "'Martin, I am going to replace you,'" which ". . . 'means you're fired.' . . . And I asked him, `Who personally is firing me?' . . . And he said, 'I personally am firing you.'"

[27] Said document, GC Exh. 8, is signed by Respondent's general manager, Jim Hughes, Carol Bauck, a human resources manager, and Okashige and states as the reason for Perez' discharge, "Introductory period. Did not meet introductory standards or department standards and expectations of management."

With regard to allegation pertaining to the warning notice, dated January 7, Michael Kingston testified that, for a hotel/casino, New Year's Eve and New Year's Day (December 31 and January 1) are the busiest days of the year; that Perez was late reporting for work on December 31, and wore regular rather than a cook's clothing; and that, when he arrived, Perez announced he would not be able to work and produced a doctor's note, which was more than one day old. According to Kingston, inasmuch as Perez reported late for work and was not in uniform and as Perez had a "predated" medical excuse, he decided[28] to issue a written warning to the former.[29] Kingston, who appeared to acknowledge that the handwritten comments on the document were his,[30] conceded the foregoing were his only reasons for giving Perez the warning notice over the December 31 incident.[31] During cross-examination, Kingston explained that, as calling in prior to the work shift ". . . gives us a little more time to get whatever they have to get done, and try to get somebody from another kitchen, and change the workload to make quicker items or whatever it takes," the warning notice emphasized Perez' failure to adhere to Respondent's four hour call-in requirement.[32] In this regard, also during cross-examination, Kingston explained his problem with the dating of Perez' medical excuse—"I believe it was because he had the previous days off," and "he had two days to call before." Finally, Kingston further testified that he brought the coaching document to Okashige for his signature and that, in his presence, Okashige "looked at" and then signed the document.[33] Contradicting Kingston, Harris Okashige asserted that he was the supervisory official who decided to give the January 7 warning notice to Perez and that he was the individual who drafted the document. Thus, when asked who made the decision to do so, Respondent's executive chef declared, "I did at the end . . . it was based on . . . my chef's feedback to me and what [Perez] did as an employee." According to Okashige, ". . . it was brought to my attention from [Kingston] that [Perez] didn't call in on time, and it left him in a jam. Kingston said that he was "frustrated" because "that is one of our busiest days of the season" and that, as Respondent already had "a lot of issues" with Perez, he wanted Okashige ". . . 'to think about it and look at what we have here.'"[34] Okashige agreed to do so, examined his "documentation"[35] on Perez, recalled "some of the issues at hand," and "I just felt at that point . . . it is serious enough that Martin needs to realize that it can't go on any more." Thereupon, Okashige testified that he drafted the warning notice, informed Kingston ". . . that I was going to go ahead and formally write it on the coaching document and issue it to Perez,"[36] and gave it to the alleged discriminatee. Noting that the precipitating reason for the written coaching was Perez' "failure to adhere to Respondent's call-in procedure and by providing notice of his intent to be absent four hours prior to the start of his work shift," Okashige testified that Perez' file contained paperwork pertaining to several past serious coaching "incidents" and, as, after each, he had afforded Perez "opportunities" to correct his misbehavior, he (Okashige) felt giving Perez a warning notice on this occasion was necessary to make the latter realize he needed to become "serious about being a Palms team member." As to these prior incidents, Okashige listed one, involving himself and Perez, Perez' failure to follow directions given to him by a sous chef, James Kinney, problems between Perez and another cook, Beverly Egbert, Perez' penchant for using derogatory Spanish epithets when referring to another cook, Richard Morrow,[37] and Perez' harassment of Ernestina Guerrero.

Concerning the incident between himself and Perez, Okashige testified that, on one occasion towards the end of November, while walking the food line, he came up to Perez' station and noticed empty pans and others crusted over with food. The executive chef explained to Perez that empty food pans and ones crusted over with food were not up to Respondent's standards, and Perez responded that he was waiting for all the pans to be "totally empty" before changing them. Okashige reiterated that such conditions were beneath Respondent's standards, and Perez said he would change the pans.[38] As to the incident between Kinney and Perez, according to Okashige, ". . . James Kinney approached me that he had problems with Martin Perez . . . not following directions from him and wanting to do things on his own and wanting to change things." Regarding Beverly

[28] In response to Respondent's counsel's question as to whether the date of Perez' medical note had any impact on his decision to issue the warning notice to the alleged discriminatee, Kingston replied, "Yes."

[29] Asked what he meant on the warning notice by stating Perez' failure to adhere to the company policy hurt business, Kingston answered, "By not having enough personnel to set up on time it affects the customers that are coming in." Asked if he recalled specifically how Perez' absence affected customers that morning, Kingston answered, "Well, no. . . ."

[30] While Kingston never was asked whether his handwriting appears on the document, he did admit he did not write on the warning notice that Perez was not in uniform when he reported for work on December 31.

[31] Kingston admitted that there is no mention of Perez not being in uniform in the coaching document or of the predated doctor's excuse.

[32] Kingston emphasized that "the proper procedure is to call in four hours before your shift. Martin had had the whole weekend off . . . ." He added that all Perez was required to do was to leave a voice mail message for the department, "or you can leave it with security."

[33] According to Kingston, Okashige said nothing about the absence of previous related coaching dates and reasons in the document.

[34] During direct examination by counsel for the General Counsel, Kingston testified that, subsequent to deciding to issue GC Exh. 7 to Perez but prior to the latter's termination, he was asked by Okashige to provide all of his documentation on Perez to him. Bluntly put, according to Kingston, Okashige did not say why, but "he is my boss. I do what I'm told." Subsequently, he changed his testimony, stating that he gave this material to Okashige prior to December 31.

[35] At one point in his testimony, Okashige stated that he keeps a diary of verbal disciplines. Asked if he maintains an actual diary, Respondent's executive chef changed his testimony, stating that he makes notes on a "piece of paper" as reminders of conversations with his supervisors. Subsequently, he again changed his testimony, stating "I don't keep them. I don't maintain them . . . unless it is a severe situation, and then I will document it . . . in a log book."

[36] Okashige specifically denied that Kingston alone decided to give the warning notice to Perez and minimized Kingston's role in the episode—"His role was just to inform Martin that I needed to see him in my office."

[37] Okashige takes notes of coaching incidents on yellow legal tablets.

[38] Okashige considered this a verbal coaching.

Egbert, Okashige stated this incident occurred at the same time as that between Kinney and Perez and involved Egbert asking ". . . for help from Martin, and Martin didn't want to help. Martin was trying to explain to her how he felt Lebanese cooking should be done, and this is how he knew it was right, and not the way we were doing it. He was giving her a hard time about how her preparation of the chicken was supposed to be." In late December, ". . . Richard Morrow had an incident with Martin Perez. There was some name calling done [with Perez going to Morrow] saying *puta* and *maricon* . . . to . . . Morrow to the point where . . . Morrow was just totally upset and didn't want to function any more for that day.[39] Finally, as described above, the Guerrero incident assertedly involved Perez soliciting the former to support the Union and asking her for her address and telephone number while both were working. Okashige further testified that the only one of the above-described incidents, about which he had personal knowledge, was that which concerned himself and Perez. With regard to the others, according to Okashige, Kinney reported problems with Perez to him; Egbert "flagged [him] down" in the buffet and complained about Perez;[40] and Morrow and Guerrero each came to his office, complaining about Perez' misconduct.[41]

Asked why he failed to give Perez a written coaching notice after any of the above incidents, which occurred prior to December 31, Okashige replied that it was Perez' probation period, and ". . . we like to try to coach people and train them and teach them our policies and procedures. And then get them headed in the right direction . . . and be part of our team." Asked why, in these circumstances, he felt compelled to issue a written warning after Perez' failure to call in 4 hours prior to his shift on December 31,[42] Okashige replied that, while Respondent was affording new employees, such as Perez, "leeway" in adhering to its polices and practices, ". . . we have coached him, and we have helped him . . . we gave him opportunities . . . to stop and then all of a sudden you don't call in for four hours prior to your shift. It kind of shows disrespect for your job." Finally, with regard to General Counsel's exhibit 7, asked, when he presented the written coaching to Perez, whether he explained to the latter the reasons for it, Okashige replied, "I did . . . I explained to him about the handbook and where it states there has to be four hours notice. . . . He said he knew that. I also explained to him that [we had given him many opportunities to improve his behavior] . . . 'We try to help you and correct you. . . . But to me it looks like . . . you really don't care about your job.'" Asked again if Perez understood the warning concerning all of his previous misconduct, Okashige replied, "Yes . . . because I did bring up the other instances." Then, asked why he failed to document the prior misconduct on the warning notice, Okashige said the document was ". . . just items that we had verbally coached him with. . . . I didn't feel that it was so severe that I had to list all those items on the sheet. I mean . . . it was basically for the four hour call-in."[43] Then, when pointed to the fact that Perez' comments on the warning notice only refer to the contents of the document, Okashige insisted he told Perez ". . . that there was a number of items that he was not following."

Tuning to Respondent's defense to the allegation that it unlawfully discharged Perez on January 9, 2002, the former contends that, as were numerous other employees, Perez was terminated as part of its effort to reduce its work force from the level believed necessary for the opening of the facility in November. In this regard, Okashige testified that, in the second week of January, ". . . there were management meetings and at [them], it was brought to our attention that . . . we were getting close to the end of the probationary period . . . our staffing levels are higher than we anticipated because of opening, and now it is time to look at staffing levels."[44] Also, ". . . of course . . . business tapers after the holiday season." Therefore, "given . . . those factors, we decided to look at labor and did we really need as much labor as we hired in to open the hotel. . . . I started reviewing files and talked to other chefs and other outlets and in the buffet outlet for that fact, and gotten feedback. And based on all the feedback . . . we started to go ahead and eliminate team members that we felt wouldn't meet our probationary period because they didn't live up to the standards that we expected them to."[45] In these regards, the record establishes that, as of December 31, 2001, Respondent employed "close to 200" kitchen employees in the food outlets over which Okashige was in charge, that, after Respondent concluded its staffing reductions in these food outlets, Respondent employed between 165 and 170 employees in Okashige's department,[46] that Harris Okashige personally terminated the 30 to 40 employees in his department during the 2-month period after the opening of Respondent's facility, and that, in the buffet, ". . . close to seven to 10 maybe cooks, prep cooks, and runners" were discharged. In the latter regard, Respondent offered evidence regarding three other buffet cooks (Corbett Sayles, Jin Zhan Ma, and Marvin Cabrera), who were discharged on or about January 9, with each selected for discharge for perform-

[39] Apparently, both words are derogatory and insulting Spanish epithets, with *puta* meaning snitch, bitch, or a variant of gay *and maricon* meaning bitch or whore.

[40] According to Okashige, Egbert said Perez wanted to "change things" at the Lebanese station and insisted he had more knowledge as to how to cook the food than did she. As a result, according to the executive chef, he spoke to James Kinney and asked him to make sure Perez did not change any of the Lebanese food recipes.

[41] Okashige testified that he spoke to Perez regarding the Morrow and Guerrero incidents and that Perez denied engaging in any of the alleged misconduct.

[42] According to Okashige, Respondent does not routinely discipline team members for not adhering to the 4-hour call-in rule.

[43] Okashige admitted that, but for Perez' failure to adhere to Respondent's call-in policy, a written coaching document would not have been given to the alleged discriminatee.

[44] As to these management meetings, Okashige testified that he attended "a few" at the end of December and the beginning of January, that these were conducted by the general manager, the assistant general manager, and the director of human resources, and that all department heads, their assistants, and their supervisors attended.

[45] Based upon his review, Okashige concluded his departments were "maybe just a little bit" overstaffed.

[46] Asked if he was actually instructed to reduce his employee complement, Okashige replied, "I wasn't really told to do it. I was told to look at the levels and if that was adequate, did we need that much, did we need more, or did we need less."

ance-related reasons[47] and none for conduct similar to that engaged in by Perez.[48] Specifically with regard to the latter, Okashige testified that he selected Perez for discharge "based upon his performance," which includes, besides the New Year's Eve incident, the empty food pans, which he discovered one day, James Kinney's report that Perez was not following his instructions, Beverly Egbert's complaints about Perez, the latter's use of insulting Spanish epithets directed toward Morrow, and the harassment of Ernestina Guerrero.

Regarding the incident between James Kinney and Perez, while Respondent failed to call the former as a witness, Beverly Egbert, who was hired and continues to work as a Lebanese food cook in the buffet, testified that, one day, she and Perez began arguing; Kinney intervened and called them into the buffet office. He told them that Perez couldn't change the recipes; that they had been taught how to cook Lebanese food by a Lebanese chef, and that, if Perez wanted to change anything, he should first speak to Okashige. On another occasion, according to Egbert, she observed and overheard Kinney objecting to how Perez was slicing meat, and "they could not use it because it was too thick so they had to throw away the meat."[49] Perez denied ever refusing to follow Kinney's directions about recipes, saying ". . . I would always ask for the recipe," and they would say he would be given the recipe "later," but ". . . they would never give it to me." However, during cross-examination, Perez changed his testimony, admitting that he refused to follow Kinney's work directions on one occasion. "I was working and he . . . told me to do something else and I didn't pay attention to him. Then he took me to the office, and he said that when he says something I had to do it at that instant . . . and I didn't pay attention to him."

As to the Beverly Egbert's problems with Perez, she testified that, on or about December 1, 2001, Perez was assigned to work with her at the Lebanese buffet station as a "cook helper"[50] and that, as such, ". . . he is supposed to help me. Whatever I need, he is supposed to help me do it. If I am cooking the food and I have other things that needs [sic] to be done, he is supposed to take on for that and do it."[51] According to Egbert, she showed Perez "everything" for cooking the Lebanese food, and, for a while, he followed her directions. However, "he started changing things" and telling her how he thought the food should be cooked. Asked if she ever saw him actually change a recipe, Egbert said, "No, not when I was there. . . . I did the cooking so he couldn't change anything." Asked if Perez asked to change a recipe, Egbert replied, "He didn't ask. He just said, 'Well, this is what I think.'" Egbert recalled one occasion during which she and Perez argued about cooking a chicken. She instructed him to remove a chicken from the oven, and Perez said he was a cook and not a cook's helper, and "from then on he started to not want to do anything. If I say okay can you do this and do that, he wouldn't do it. He would just walk around and talk to his friends. . . . He didn't do anything."[52] Michael Kingston testified that Egbert came to him with complaints about Perez' work, saying the latter was not preparing food in the way the owners required and was trying to change the recipes. According to him, Egbert ". . . was confused. She said you showed me how to do this like that, and he wants to change it, and he said it should be done like this. She was getting all stressed out." Thereafter, according to Kingston, he approached Perez and said "you need to do it in the guidelines. This is the way you do it . . . 'because this is the way the owner wants it.'" Perez denied ever telling anyone that he wanted to change any recipe without authorization; however, he did admit "the first that I worked at the Palms buffet, the [cook] in charge of the Lebanese food . . . showed me how to cook the Lebanese food. And on the second day when I met [Beverly Egbert], that is when I noticed that she was cooking everything wrong, and I told her and she said that she had started working there when the Palms Hotel had started." During cross-examination, Perez accused Egbert of "always being jealous" and not permitting him to see what she was doing. However, asked if he, in fact, refused to follow her directions, Perez admitted, "That's correct."

Regarding Perez' name-calling directed toward Richard Morrow, the latter testified that, for a while, Perez was assigned to work with him, that other buffet workers, including Egbert, ". . . told me that [Perez] was saying . . . that I was gay and making comments like that, and that he personally heard the alleged discriminatee utter ". . . comments . . . under his breath . . . saying things in Spanish like *maricon* and *puta*. . . ." Morrow further testified that he heard the epithets "numerous times on a daily basis, that such continued as long as Perez worked in the buffet, and that Perez' conduct upset him "very much" to the point that "I actually had to go file a complaint."[53] Accord-

[47] According to Okashige, Sayles, Jin Zhen Ma, and Cabrera were each selected for discharge for basically the same reasons—problems in not getting along with fellow employees and food presentation at their buffet stations.

[48] According to Okashige, of the many employees, who failed to survive their probationary periods, only Perez received a written coaching, and none engaged in acts of name calling and harassment as did Perez.

[49] Richard Morrow, a cook on the barbeque station of the buffet and Ernestina Guerrero, a cook's helper at the station, corroborated Egbert. Morrow testified that, on one occasion while he worked with Perez, ". . . Chef Mike came up and directly told [Perez] how to carve the brisket." When Kingston walked away, Perez said ". . . something about how long he has been in the business, and he knows how to do things. . . ." Guerrero testified that "Mr. Perez was carving meat the wrong way. And Mike Kingston came by to check, and he told [Perez] . . . he was carving it the wrong way, and he showed him the correct way to do that." When Kingston walked away, Perez continued doing the wrong way.

[50] Kingston defined a cook's helper as an individual who does ". . . a little bit less than a cook. They are based on their knowledge as far as how much they can actually do."

[51] Contrary to what Egbert may have believed, Respondent conceded that Perez was classified as a cook.

[52] Whatever her problems with Perez, Egbert did not have much experience working with him as, when asked how long she worked with the alleged discriminatee, Egbert replied, "I would say not even a good week."

[53] Asked for the circumstances of these comments, Morrow replied, ". . . if I was working in the back we have a window where you put food out. He would come to the window and ask for food and he would say 'I need mashed potato *maricon*,' and I know that doesn't mean please."

ing to Morrow, he complained directly to Kingston, and "I told him that [Perez] was . . . calling me names and making my life miserable, and he said . . . he would take care of it."[54] However, Perez' misconduct did not cease, and, eventually Morrow confronted Okashige, threatening to quit because of what was happening. During cross-examination, Morrow conceded that he failed to complain each time he overheard one of Perez' epithets, but "I told Chef Mike, and I filed a written complaint, and I also told him that it had to be stopped."[55] Besides corroborating Morrow that the latter did, in fact, come to his office with his complaint about Perez, Harris Okashige testified that, immediately thereafter, he had Perez brought to his office and told him there were "allegations from a team member" regarding name-calling in Spanish, the meaning of which Perez would know. The latter denied engaging in such misconduct, and Okashige then specified Morrow as the complaining employee. According to Okashige, Perez again denied the allegation. During direct examination, Perez admitted using the pejoratives *puta* three times and *maricon* two times in describing Richard Morrow but averred that the latter did not appear to be bothered by the epithets. During his cross-examination, Perez specifically denied being questioned by Kingston or any other supervisor regarding his alleged use of foul language directed to Morrow and doubted that Morrow would have complained to his supervisors "because they didn't call me to the office." He added that he eventually stopped his name calling as "another co-worker . . . said that [Morrow] was a good worker and for me to stop calling him like that, and that is when I stopped it" and that, in any event, he would have stopped on his own "because I would have gotten tired of telling him."

The final incident, which caused Okashige to select Perez for discharge, was the alleged discriminatee's harassment of Guerrero. In this regard, the latter testified that she was carving meat, work which involved sharp knives and hot food, one day when Perez began speaking to her ". . . about joining the Union." According to her, "[Perez] told me that the Union would give me good benefits, and they would help me in my job if I needed any kind of help, and if I [was] . . . either fired or having problems . . . they would help me out." Also, Perez ". . . wanted my phone number and my address and he also wanted . . . to see if I could sign to be in the Union." Guerrero added that the conversation continued for 2 hours and that, during it, Perez asked for her phone number twice and for her to sign with the Union six to eight times. As she did not "want to be bothered" by Perez, she reported the incident to Mike Kingston, and he requested her to file a complaint form. Although Guerrero specifically denied reporting Perez' conduct to Okashige, the latter testified that Kingston sent Guerrero to his office, that she explained to him what occurred, and that, as a result, he sent for and met with Perez later in the day in his office. According to Respondent's executive chef, he told Perez ". . . that I had a team member come to me and [make] . . . allegations that he was harassing her and that . . . this . . . needed to stop." Perez denied harassing anyone, and Okashige said such conduct would not be tolerated. Assertedly, Perez said he understood. While admitting that, during one 10 minute conversation at their work station, he asked Guerrero for her telephone number and address and asked her to support the Union and that Guerrero responded by saying she did not want to hear anything about the Union and asked him to leave her alone, Perez specifically denied speaking to any supervisor about the incident. According to Harris Okashige, in light of the above-described incidents, he decided to select Martin Perez for discharge to help accomplish Respondent's desire to reduce its staff after the opening of its facility—"At this point . . . I felt that all the issues that Martin had it was time to say goodbye to him."

Michael Kingston's role, if any, in the decisionmaking process is unclear. Thus, asked, by me, if he was directly consulted with regard to the discharge of Perez, Kingston, who testified that Okashige told him he was discharging Perez because of his failure to pass his 90-day probation period, answered, "Yes, I believe I was"; however, when asked the same question again, Kingston stated, "I don't believe so. . . ." Then, asked by me if he recommended that Perez be discharged, Kingston, who admitted having authority to recommend termination of employees, replied, "I think recommendation is my own personal feelings . . . my recommendation is just maybe documentating the stuff that goes on. I mean, I don't go up and say . . . I think we should fire this guy." Subsequently, after stating he was not involved in the discharge decision, when asked by counsel for the General Counsel if he recommended the discharge of Perez, Kingston changed his testimony, saying "I guess I did." Whatever he may or may not have said to Okashige, Kingston was clear that, pursuant to Okashige's request, he provided ". . . all the information that I had on Martin Perez as far as what I had talked to him about, and daily actions, and the witness statements, and that kind of stuff. . . ." Finally, according to Kingston, he did not become aware that Perez had been discharged until Okashige telephoned him with the news and instructed him to tell the alleged discriminatee. As to what Okashige told him, Kingston recalled Okashige merely saying Perez had failed to meet the 90-day probation period. As to his version of the discharge conversation with the alleged discriminatee, Okashige testified that, after reaching his decision to discharge Perez, he met with the latter and explained to him that he was being terminated. Perez became "upset," said he would not sign anything, and walked out of Okashige's office. Asked if he discussed with Perez the reasons for his discharge, Okashige said, "I didn't," and, contradicting Perez, said, because he walked out, ". . . Martin didn't want to give me a chance to discuss anything."

Finally, with regard to Respondent's termination of Perez, counsel for the General Counsel contends that Respondent's position statements, submitted to the Board during the investigation of the Union's unfair labor practice charge, reveal incon-

[54] Kingston corroborated Morrow that the latter came to see him as he was "upset" because Perez was continually calling him "some sort of names," the Spanish equivalents for "whore" and "fag." According to Kingston, he took a statement from Morrow and informed Okashige as to what Morrow reported.

[55] Respondent maintains a "No Harassment Policy" in its team member guide. It states that "any type of harassment—involving coworkers, guests, or other visitors to our property—is illegal and a violation of our company policy." Further, among the prohibited acts of harassment covered by the provision is sexual harassment, and this includes "unwelcome sexual teasing, jokes, remarks, or questions."

sistent and shifting defenses. In this regard, in his position letter, dated March 22, 2002, counsel for Respondent stated that Perez ". . . was terminated during his introductory period for failing to meet the department standards and expectations of the Employer. The Employer considered all aspects of his performance from his hire date . . . through January 7, 2002. During his brief period of employment, Mr. Perez received numerous verbal counselings and a written coaching . . . pertaining to his failure to follow Company rules, policies, and procedures." Counsel then listed Perez' alleged violations of Respondent's policies, including the epithets directed toward Morrow, preparing food in an unauthorized manner and altering recipes on two occasions, telling Egbert and others that they did not have to follow sous chef Kinney's directions, failing to maintain his work schedule and varying it without authorization, and failing to adhere to the proper procedure for providing notice of inability to work.

In determining whether the unfair labor practice allegations of the complaint, pertaining to Martin Perez, are meritorious, I initially must consider the credibility of the witnesses. In this regard, current employees, Richard Morrow, Beverly Egbert, and Ernestina Guerrero impressed me as being candid and veracious witnesses, and each is worthy of belief and credit. None of the other witnesses were as impressive. Thus, while the demeanor of each was not that of a deceitful witness, neither Martin Perez nor Michael Kingston appeared to be entirely forthright. Perez was contradictory and made assertions which defied belief,[56] and Kingston was contradictory and evasive in his responses to questions regarding his role, if any, in the discharge of Perez. However, as between the two individuals, the alleged discriminatee was the more credible witness. Unlike Perez and Kingston, neither the demeanor, while testifying, of Harris Okashige nor the demeanor, while testifying, of Fred Harmon was that of a particularly trustworthy witness. On, at least, one important point, Okashige's testimony was at odds with a more credible witness[57] and not corroborated by another,[58] and Harmon, who remained in the hearing room while others were sequestered and listened to Okashige's account of a crucial meeting with Perez, appeared to be testifying in a manner solely to buttress the defense of his former employer.[59] Accordingly, I shall rely upon Okashige's and Harmon's versions of conversations and events herein only when not controverted by a more credible witness, and, whenever the testimony of Perez and that of Okashige and/or Harmon conflict, I shall give credence to the alleged discriminatee's version of events.

The complaint alleges that Respondent engaged in conduct, violative of Section 8(a)(1) of the Act by interrogating Perez about his activities in support of the Union and by threatening him with discharge because of his union activities. In this regard, there is no dispute that Okashige and Harmon met with Perez in Okashige's office on Friday, December 28, 2001.[60] Based upon my above-stated credibility resolutions, I find that, during said meeting, Harmon asked Perez ". . . we don't know you but did you talk to co-workers about the Union," that Perez denied engaging in the asserted conduct, that Harmon then informed Perez he should not be soliciting during worktime but could do so during breaks and told him of Respondent's antipathy for the Union and of the benefits and wages, which it would be paying to its employees; that Perez replied that he did not like the Union and did not want the Union; that Harmon and Okashige began laughing and the latter said they did not want to fire him because of his work experience and "we're going to keep you." While counsel for Respondent contends that the above-described meeting was prompted not by Perez' union organizing but, rather, by Guerrero's complaint of harassment, it is clear from Harmon's question that his concern was Perez' union solicitation and not Guerrero's asserted inquietude over Perez' conduct. Whether Harmon's question constituted unlawful interrogation depends upon whether, under "all the circumstances," Harmon's question reasonably tended to restrain, coerce, or interfere with Perez' Section 7 rights. *Rossmore House*, 269 NLRB 1176, 1177 (1984). Notwithstanding that Harmon did refer to Respondent's unchallenged no-solicitation rule, I note that Perez was not an open and avowed union adherent, that the interrogation occurred in the executive chef's office and was conducted by Respondent's director of human resources, that both men are admitted supervisors and that, as will be discussed *infra*, the questioning was accompanied by a blatantly unlawful implied threat of discharge. In these circumstances, I conclude that Harmon's interrogation of Perez was coercive and violative of Section 8(a)(1) of the Act. *Eaton Technologies*, 322 NLRB 848, 850 (1997); *3E Co.*, 313 NLRB 12, 16 (1993). Regarding Okashige's comment to Perez that Respondent did not desire to terminate him and would retain him as an employee, I can see no purpose for Okashige's comment, which immediately followed Harmon's interrogation, other than as a thinly veiled threat of termination to ensure that Perez understood Respondent's opposition to the Union and the consequences of his continued conduct in support of the Union. Clearly, "threatening employees, whether explicitly or implicitly, with termination of employment if they engage in union activities is a well-established violation of Section 8(a)(1) of the Act.." *3E Co.*, supra; *Kona 60 Minute Photo*, 277 NLRB 867 (1985). Accordingly, I find that Okashige's implied threat

[56] On this point, I note his denial of ever refusing to follow James Kinney's directions and his contention that he would have ceased his use of epithets against Richard Morrow "because I would have gotten tired of telling him."

[57] His assertion that Ernestina Guerrero personally complained to him about Perez' harassment was specifically denied by Guerrero.

[58] Kingston failed to corroborate Okashige that the former sent Guerrero to his office with her complaint.

[59] At its peril, Respondent permitted Harmon, who, as he was essential to Respondent in order to assist its attorney, to remain in the hearing room during Okashige's testimony. Another disinterested individual could have been selected for this function during the latter's testimony. Further, given my assessment of Harmon's credibility, I place no reliance upon the document, which purportedly corroborates his version of the December 28 meeting with Perez.

[60] I specifically do not credit Okashige that he met with either Guerrero or Perez before the December 28 meeting. In this regard, I believe that Okashige became aware of Guerrero's complaint about Perez from Kingston and that, because of the alleged union solicitation by Perez, Okashige alerted Harmon and the latter instructed Okashige to arrange a meeting between himself and Perez.

of discharge to Perez was likewise violative of Section 8(a)(1) of the Act.

Turning to the warning notice, which Respondent issued to Perez on January 7, 2002, Respondent's discharge of Perez 2 days later on January 9, the complaint alleges, and counsel for the General Counsel argues, that Respondent's acts were undertaken in violation of Section 8(a)(1) and (3) of the Act. In this regard, traditional Board law is well settled. Thus, as explained by the Board in *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999), pursuant to *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir.1981), cert. denied 455 U.S. 989 (1981), approved in *Transportation Management Corp.*, 462 U.S. 393 (1983), in order to establish a violation under Section 8(a)(1) and (3) of the Act, the General Counsel must prove, by a preponderance of the evidence, that antiunion animus was a motivating factor in Respondent's conduct. Once such a showing has been made, the burden shifts to Respondent to demonstrate that the same action would have taken place in the absence of, or notwithstanding, the employee's activities in support of the Union. To sustain its initial burden of proof, that of persuading the Board Respondent acted out of antiunion animus, the General Counsel must show (1) that the employee was engaged in activities in support of the Union; (2) that Respondent was aware of or suspected the employee's involvement in activities in support of the Union; and (3) that the employee's activities in support of the Union were a substantial or motivating factor underlying Respondent's actions. Such motive may be established by circumstantial evidence as well as by direct evidence and is a factual issue. *FPC Moldings, Inc. v. NLRB*, 64 F.3d 935, 942 (4th Cir. 1965), enforcing 314 NLRB 1169 (1994). Four points are relevant to the above-described analytical approach. First, the Board, in determining whether the General Counsel has established a prima facie showing of unlawful animus, will not quantitatively analyze the effect of the unlawful motive. The existence of such is sufficient to make the acts and conduct at issue violative of the Act. *Wright Line,* supra, at 1069 fn. 4. Second, once the burden has shifted to Respondent, the crucial inquiry is not whether Respondent could have engaged in the alleged unlawful acts and conduct but, rather, whether Respondent would have done so in the absence of the alleged discriminatee's support for the Union. *Structural Composites Industries*, 304 NLRB 729 (1991); *Filene's Bargain Basement*, 299 NLRB 183 (1990). Third, pretextual discharge cases should be viewed as those in which ". . . the defense of business justification is wholly without merit" (*Wright Line*, supra, at 1089 fn. 5), and the "burden shifting" analysis of *Wright Line* need not be utilized. *Arthur Young & Co.*, 291 NLRB 39 (1998). Finally, regarding the latter point, "it is . . . well settled . . . when a respondent's stated motive for its actions is found to be false, the circumstances warrant the inference that the true motive is an unlawful one that the respondent desires to conceal." *Fluor Daniel, Inc.*, 304 NLRB 970, 970 (1991); *Shattuck Denn Mining Corp. v. NLRB*, 362 F. 2d 466 (9th Cir. 1966).

As to whether counsel for the General Counsel met their initial burden of establishing that Respondent was unlawfully motivated in issuing the disciplinary written coaching document to Perez, the alleged discriminatee testified that he was a supporter of the Union, attended the Union's rally outside Respondent's facility, and spoke to other employees about supporting the Union. Moreover, of course, Ernestina Guerrero corroborated Perez' admission that, while both were working together on the buffet line one day in late December 2001, he solicited her support for the Union. Further, there can be no question but that Respondent was well aware of the latter solicitation and surely suspected Perez' support for the Union. In this regard, Guerrero testified that she informed Michael Kingston about the incident; Harris Okashige asserted that Guerrero also informed him and that, as he was concerned about the involvement of the Union, he telephoned Fred Harmon, who instructed Okashige to arrange a meeting with Perez. Finally, on this point, I have credited Perez that Harmon's initial question to him, during the meeting on December 28, concerned his alleged conversations, about the Union, with other employees. Regarding the existence of unlawful, antiunion animus, I have previously found that, during the said meeting, Okashige and Harmon coercively interrogated Perez and implicitly threatened him with discharge in order to persuade him to cease supporting the Union. Moreover, the fact that his supervisors, Kingston and Okashige each executed the alleged unlawful warning notice on Perez' next day of work is indicative of the existence of unlawful animus towards him. *Publishers Printing Co.*, 317 NLRB 933, 937 (1995); *Sawyer of Napa*, 300 NLRB 131, 150 (1990). In these circumstances, I believe counsel for the General Counsel have met their burden of proof and established that Respondent was unlawfully motivated in issuing the disciplinary written coaching document to Perez.

Accordingly, the burden of proof shifted to Respondent to show that it would have engaged in the same action against Perez notwithstanding his support for the Union. In this regard, I note that the stated reason for the warning notice was Perez' failure to abide by Respondent's 4-hour call-in rule for reporting an inability to work and that both Kingston and Okashige stressed the importance of this rule and employee adherence to it. However, analysis of the rule discloses that there is the only mandatory requirement for an employee to report an absence or tardiness is that such be done "as soon as possible" and that Respondent merely preferred that such be done 4 hours prior to the start of the employee's work shift.[61] Further, Kingston and Okashige were utterly contradictory as to the decisionmaking process underlying the discipline. Thus, while implicit in the former's testimony was that he was the individual, who decided to discipline Perez, and that he drafted the warning notice and while Kingston maintained that he took the document to Okashige, who read it and then affixed his signature to it, Okashige asserted that he was the management official, who decided to discipline Perez and drafted the language on the document, and that he informed Kingston of the personnel action. Moreover, the two management officials contradicted each other as to the

[61] I credit Perez that he went to sleep on Sunday night, intending to report for work on Monday morning and that, only after awakening and feeling the effects of his bronchitis, did he conclude he was unable to work. Arguably, he complied with the intent of Respondent's absence policy by dressing and driving to Respondent's facility to report his inability to work.

reasons underlying the disciplinary warning notice. Kingston asserted that he issued the written coaching only because Perez reported late for work on December 31, was wearing regular, rather than work, clothing, and gave him a predated doctor's note as an excuse for not being able to work. His testimony is in stark contrast to that of Okashige, who listed as the underlying reasons for disciplining Perez five prior incidents, including one between himself and Perez and others involving James Kinney, Beverly Egbert, Richard Morrow, and Ernestina Guerrero. Significantly, none of these underlying reasons appear on the written coaching document, and, while Okashige insisted that he informed Perez of each of the reasons for the discipline, Perez' written response only refers to the reason, which is stated on the document itself. Finally, Respondent concedes that giving a written coaching notice to a probationary employee is a rare occurrence,[62] and I note that no such action was taken in response to Perez' continued use of insulting and sexually explicit epithets directed toward Morrow, which act was in clear contravention of Respondent's no harassment policy, and the Union solicitation of Guerrero, which was in clear violation of Respondent's no-solicitation rule. In my view, Respondent's failure to do so can only be explained by its apprehension that issuing a warning to the alleged discriminatee immediately after soliciting Guerrero's support for the Union would appear as retaliatory and, hence, unlawful. Given the foregoing, Respondent's defense to the allegation that the warning notice was unlawfully motivated appears to be, at best, addled and, at worst, feigned and a sham. In these circumstances, I believe that Respondent seized upon Perez' inability to work on December 31, 2001, an act hardly deserving of reprobation, and issued the disciplinary coaching document to him because of his support for the Union in blatant violation of Section 8(a)(1) and (3) of the Act.

With regard to Respondent's discharge of Perez, as to whether counsel for the General Counsel has established that Respondent was unlawfully motivated in selecting and then terminating the alleged discriminatee, I have previously concluded above that Perez was a supporter of the Union, attended the Union's rally outside the hotel, and solicited other employees' support for the Union and that, by interrogating him as to whether he had spoken to other employees about the Union, Respondent demonstrated its knowledge or, at least, suspicion, that Perez was an adherent and supporter of the Union. I have further concluded that Respondent's coercive interrogation of the alleged discriminatee and its veiled threat of discharge to Perez were indicative of unlawful motivation and that the unusual written coaching document, which it issued to Perez, was unlawfully motivated. In these circumstances, the General Counsel has met its initial burden of proof, demonstrating that Respondent was motivated by antiunion animus in discharging the alleged discriminatee.

The burden then shifted to Respondent to establish that it would have discharged Perez notwithstanding the existence of unlawful animus. In this regard, its counsel argues that, in light of Ernestina Guerrero's report of being "repeatedly pestered" by Perez for her address and telephone number, Richard Morrow's report that Perez had repeatedly used sexually insulting Spanish epithets in referring to him, Beverly Egbert's report that Perez wanted to substitute his own "concoctions" for Respondent's "official" recipes, and James Kinney's report that Perez refused to follow his directions, Okashige made a business decision to discharge the alleged discriminatee along with several other employees as part of his compliance with Respondent's general reduction of staff after its opening in November 2001. While Respondent's executive chef was uncontroverted that he personally discharged approximately 30 to 40 employees from the food outlets, for which he is responsible, and 7 to10 cooks and others from the Fantasy Market Buffet for performance reasons and while I believe the accounts of employees Morrow, Egbert, and Guerrero regarding Perez' misconduct, I do not believe Respondent established that Okashige would have selected Perez for inclusion in its reduction of staff absent his support for the Union. At the outset, the record is contradictory as to the decision to terminate the alleged discriminatee. Thus, Okashige testified that he was the management official who discharged Perez; however, Michael Kingston failed to deny telling the alleged discriminatee "I personally am firing you" and was vague and contradictory as to whether he recommended Perez' discharge. Further, while Kingston testified that Okashige merely informed him that Perez was being terminated because he failed the probation period, Okashige, of course, listed the above-stated incidents in explanation for his decision to discharge Perez. Notwithstanding the foregoing, what is most compelling, and upon which I place the greatest significance, is Respondent's failure to immediately discharge, let alone discipline, Perez after any of his acts of misconduct, including Morrow's complaint about the alleged discriminatee's insulting name-calling or Guerrero's complaint about his Union solicitation of her, both of Perez' actions clearly contravening important employment policies set forth in Respondent's team member guide. As he deemed these acts of misconduct more serious than the behavior of other employees, whom he terminated in January 2002 for failure to pass their probationary periods,[63] and as he was not constrained to adhere to Respondent's progressive discipline system and authorized to discharge Perez at any point during his probation period[64]—indeed, Perez was discharged fewer than 60 days into his introductory period, Okashige's explanation, that he was giving Perez "some leeway" during his introductory period, appears to be utterly disingenuous. In this regard, noting that Okashige was contradicted by employee Guerrero, who denied any meeting with the former regarding Perez' so-called harassment of her, and that Respondent offered none of Okashige's "documentation" as corroboration of disciplinary meetings with Perez, I specifically credit and rely upon Perez that no supervisor ever spoke to him about his above-described mis-

[62] Contributing to my doubt regarding Respondent's defense is the contradictory testimony it offered regarding the applicability of its progressive disciplinary system to introductory employees.

[63] Unlike Perez, these employees were "close to the end" of their introductory periods.

[64] I find that Okashige clearly believed he was under "no requirements" to provide progressive discipline to introductory or probationary employees.

conduct[65] and find that, prior to becoming aware of his support for the Union and beyond noting employee and supervisory complaints, Respondent's conduct upon receiving reports of Perez' conduct[66] constituted inaction tantamount to condonation. Put another way, Okashige did not decide to discharge the alleged discriminatee until becoming aware of his support for the Union and, then, I believe, seized upon the hotel manager's requirement that he reduce his employment complement in order to rid Respondent of a perceived union adherent. Accordingly, I do not believe Respondent sustained its burden of proof and find that Respondent's discharge of Perez was motivated by his perceived support for the Union and in violation of Section 8(a)(1) and (3) of the Act.

B. The Discharge of Carlos Interiano

The record establishes that one of the privately owned food outlets, which leases space from and is located in Respondent's facility, is the Little Buddha Restaurant. The restaurant is operated by a partnership consisting of the owner of the chain of Little Buddha restaurants[67] and Respondent's owners, and Respondent concedes that, for purposes of labor relations policies and practices, the restaurant and it are joint employers. The record establishes that the concept of the Little Buddha is that of an upscale facility consisting of a restaurant, which serves Asian-French fused cuisine, a bar, and a dance club; that, at all times material herein, the executive chef of the restaurant was Gerald Kamimura, the executive sous chef was Andrew Pike,[68] and Juan Medina was one of the restaurant's sous chefs,[69] and that, shortly after the opening of Respondent's facility, approximately 35 employees (consisting of line cooks, pantry cooks, prep cooks, dishwashers, stewards, and management staff) were working in the restaurant's kitchens.[70]

Carlos Interiano worked as a baker in the Little Buddha restaurant from November 1 until December 23, 2001. Interiano, whose prior experience as a baker was working for Yum Yum Doughnuts and Von's Markets, a supermarket chain, testified that Juan Medina, who was his friend, informed him that he (Medina) had been hired by the Little Buddha restaurant and that the restaurant would need a baker, and ". . . he told me if I wanted, he can help . . . to hire me" in the Little Buddha. Interiano agreed, and Medina arranged for Interiano to meet with Kamimura, the overall supervisor of the restaurant staff. Subsequently, Interiano met with Kamimura at the Little Buddha, and the latter asked Interiano if he was a baker. Interiano said he was, and Kamimura explained the baking recipes, which were utilized at the restaurant. When he finished, Kamimura asked if Interiano would have problems baking according to the recipe instructions. Interiano answered, "no," and Kamimura hired him. The alleged discriminatee began working on November 1, 2 weeks prior to the opening of Respondent's facility. In his first few days of work, "they started to teach me" to prepare pastries, such as liquid chocolate cake, lemon tarts, and sweet rice, utilizing the Little Buddha recipes,[71] and Interiano denied that he had any problem learning to bake in the Little Buddha manner—"I don't have no problem to learn because . . . I love my job. I'm a baker all my life."

Interiano testified that his nominal work schedule was 7 a.m. to 3 p.m. each day but that, in response to Kamimura requesting volunteers, he often worked until 5 or 6 p.m. and sometimes until 8 p.m.—without any breaks during the day.[72] In this regard, according to the alleged discriminatee, while he and the other restaurant employees always clocked in at 7 a.m., they would not actually begin working until 50 minutes later because ". . . they say we had to take lunch and breaks together. So, we need to clock in seven in the morning and start work at 7:50. From [that time] we don't have no break and lunch . . . because we already got it."[73] Interiano further testified that the lack of any breaks during the workday engendered much discontent and discussion amongst the employees.[74] On one occasion, in the team dining room, Medina, who took the 50 minute "break and lunch" with the other employees, listened to their complaints and said ". . . he can't do anything about it because he's not in charge of the schedule. It's Gerald or Patrick," who was over Kamimura in Respondent's supervisorial hierarchy.[75] On another occasion, while working in the second floor kitchen, Interiano and several other employees were talking about the lack of a lunch and a break period, and the alleged

[65] I believe that Okashige fabricated with his accounts of asserted meetings with Perez regarding the complaints of Morrow and Guerrero, and that Kingston was delusive in describing a meeting with Perez regarding the Morrow name calling.

[66] I note that Perez admitted much of the misconduct, which Respondent attributes to him, and I wish to stress my repugnance toward some of it, particularly Perez' despicable use of vulgar sexual epithets referring to Richard Morrow. Clearly, Respondent could have terminated Perez for this continuing misconduct and violation of its work rules, but, as set forth above, what Respondent could have done is not a consideration herein.

[67] Other facilities are located in Paris, France and Los Angeles, California.

[68] According to Pike, when the restaurant opened, the food, as prepared by Kamimura, was not up to the standards of the Little Buddha restaurants, and, whenever Respondent's owner dined at the restaurant, he did not experience the "food" as it should have been prepared. Accordingly, as they had "full knowledge" of the Little Buddha methods, Pike, who assisted in the openings of other Little Buddha facilities, and another chef, Keith Matsuoka, were asked to go to Las Vegas in order to correct the problem and to assist the executive chef, helping him "execute" the recipes in the correct manner.

[69] Respondent admits that Kamimura and Medina are supervisors within the meaning of Section 2(11) of the Act.

[70] According to Pike, the Little Buddha has two kitchens, ". . . basically an upstairs and a downstairs kitchen. The upstairs is a prep kitchen. It's also where we hold all of our walk-ins. . . . It's also the area where we do all the preparation and the pastry. . . . Downstairs kitchen is the service kitchen is where all the food is prepared to order at the time the restaurant is opened. . . ."

[71] Respondent required Interiano to execute a document in which he agreed not to disclose the Little Buddha baking recipes to any other employer or person.

[72] At the time the Little Buddha opened, it served both lunch and dinner to patrons.

[73] According to Interiano, the employees would gather in the TDR and wait until Kamimura wanted them to start working.

[74] Interiano testified that "everyone," all of his coworkers participated in these conversations.

[75] Apparently, Patrick — is one of the partners, who owns the Little Buddha restaurants.

discriminatee suggested "we can go together to talk to Gerald about the [problem] . . . but they say it's up to me." Shortly thereafter, on or about November 27, according to Interiano, while speaking to Kamimura about what he perceived as Respondent's failure to pay him for some overtime hours, he raised the subject of splitting lunch and break times, and Kamimura responded that ". . . it is not me. It's my boss." Interiano responded that sometimes employees needed breaks during the middle of the day. "And he say . . . it's not me. You've got to understand . . . there's nothing I can do about it, so let me talk to Patrick about it, and go back to work." Interiano reported back to his coworkers about what Kamimura had said and raised the possibility of union representation for them or, at least, all the employees together approaching Kamimura about changing the lunch and break practice. The alleged discriminatee added that the employees seemed less than enthusiastic about taking such group action, expressing fears of being fired.

Interiano testified that he and his coworkers often discussed their complaints, about their lack of lunch and break times and their jointly-held belief that Respondent was failing to pay for all overtime hours,[76] while they worked and that these conversations, which occurred every day, included discussions about them going to a "union," calling "somebody for help," or going to "human resources" with their complaints "One time," according to him, Juan Medina overheard such a conversation in a kitchen and told the employees to "stop it. Just start back to work." On another occasion, in the baking area, Medina approached and, after obviously overhearing the content of the conversation, said, ". . . I don't like Las Vegas because, in Las Vegas, everybody is talking about union, everybody is talking . . . . That's why I like Hawaii because . . . nobody say anything . . . about union. Everybody work. In Las Vegas, it's different." Interiano added that, after overhearing employees discuss union representation another time, Medina used "nasty language" and said ". . . he didn't want nobody talk about . . . help."[77] During cross-examination, asked what employees were doing when Medina told them to stop talking about a union and return to work, Interiano denied that he and the other employees were merely "standing around." Rather, "we was working and we was talking . . . about a union because in that time it was . . . the check was short hours, and I say . . . if the casino be in the union, this is not going to happen. . . ." When he heard the mention of a union, Medina said ". . . let's stop talking about union business. He say why do we want to talk about union?"

Interiano further testified that, on or about December 11, he received another paycheck, which, he believed, failed to correctly compensate him for the number of overtime hours he had worked during that pay period. After speaking to Medina, who disclaimed any responsibility, he spoke to Kamimura about his perceived problem. After listening to the alleged discriminatee's complaint, Kamimura replied, ". . . Carlos, you are trouble. You always complain for any reason." According to Interiano, he also mentioned that many other employees had the same complaint—Respondent was not paying for all the overtime hours worked. To this, Kamimura replied, "It's not your business. Every time when you talk to me talk about yourself. They are going to talk to me. It's not your business."[78] In the latter regard, Interiano stated that he regularly translated into English for Spanish-speaking Little Buddha employees,[79] who likewise were complaining about not being paid for perceived overtime hours,[80] when they spoke to Kamimura.[81] On these occasions, according to Interiano, he only served as translator and did not interject himself into the conversation. During cross-examination, while reiterating that, when he met with Kamimura about his own paycheck, he also mentioned the complaints of other employees, who also believed they had not been paid for overtime hours which they had worked, Interiano admitted that he had not been requested by or appointed by his coworkers to mention their complaints to higher management—"I do it by myself."[82] Also, during cross-examination, Interiano said that, sometimes, Kamimura asked him to act as the interpreter for employees, who wanted to complain about their paychecks, and that these conversations were not always friendly, with the former becoming "a little upset" regarding the subject of overtime.

The General Counsel alleges that Respondent unlawfully discriminated against Interiano by changing his work schedule. In this regard, Interiano testified that, at the time of his hire, his days off were Monday and Tuesday of each week and that, in the third week of his employment, Respondent changed his days off to Monday and Wednesday.[83] On this point, according

[76] Apparently, employees of the Little Buddha believed that, whenever they worked in excess of 8 hours a day, they were entitled to overtime pay. However, Respondent's practice was to pay overtime for any hours worked in excess of 40 hours each week.

[77] As Respondent failed to call Medina as a witness, Interiano's testimony regarding the former's comments, was uncontroverted.

[78] Kamimura, who was discharged by Respondent as part of its "downsizing" and has not been replaced, did not testify during the hearing. According to counsel for Respondent, attempts to serve a subpoena upon Kamimura, requiring him to testify during the hearing; were unsuccessful. Accordingly, Interiano's testimony was uncontoverted.

[79] These employees included Pedro Monroy, Rosa —, and Jose —. Monroy corroborated Interiano that the latter interpreted for him when he spoke to Kamimura. Also, according to Monroy, if Kamimura wanted to give him instructions about some work-related matter, the former would ask Interiano to translate ". . . because Gerald liked the way that he translated because he was very fast."

[80] Although alleged in the complaint, there is no record evidence that, other than being asked to interpret, Interiano provoked, fomented, urged, or instigated the employee complaints to Little Buddha management about perceived paycheck problems. Rather, these appear to have been individual acts, perhaps precipitated by group discussions in which Interiano was one of many participants.

[81] Employee Monroy testified that Interiano once telephoned him and said that Juan Medina was accusing him of being the person, who was urging the workers to complain about their "hours." Interiano failed to corroborate this hearsay testimony, and he offered no testimony that Medina made such a comment to him.

[82] In this regard, Pedro Monroy denied that he ever requested Interiano to intercede on his behalf with Respondent over Monroy's claim of "stolen hours," for which he had not been paid by Respondent.

[83] Andrew Pike testified that such was necessary as ". . . having just one basic baker, you don't want someone to have two days off and leave that space with no one in the pastry." Split days are better, for

to Interiano, Kamimura approached him, ". . . and he [asked] . . . do you mind if I change your schedule?" Interiano said no and asked why. Kamimura replied "because Velha, she can't make it, and she don't know how to do the job."[84] In addition, according to the alleged discriminatee, when he informed the former of the above change, Kamimura requested that Interiano do him a favor—". . . would you please do double batch before you go . . . home on Sunday, please do double batch for Monday. . . ." Interiano agreed, and, thereafter, on Sundays and on Tuesdays, he would ". . . do twice in everything and put it in the cooler." Asked if Kamimura ever explained why he wanted Interiano to perform this "double batch," Interiano replied, "Because . . . when I'm off, [Velha] don't know how to do the job. She don't know how to do the right job" and ". . . when Velha is in charge on Monday and Tuesday, they throwed away everything."[85] During cross-examination, asked if there ever was a time Kamimura spoke to him about not leaving enough desserts for the next day, Interiano said, "No. He asked me if I possibly can make a little bit more because they was out the day before." He specifically denied Kamimura saying he made too few pastries in a day. However, when asked if Kamimura ever telephoned him at home to say there were not enough desserts, Interiano answered, "Yes. One time . . . I don't remember the name, it was . . . like a candy, we roll it. And I said no, I didn't. . . . He say . . . Just don't forget to make it tomorrow." According to Interiano, the next day, when he reported for work, he found the candies on a shelf and pointed this out to Kamimura.

Respondent laid off Interiano on December 23. According to Interiano, at approximately 11:15 that morning, he observed Kamimura remove the employees' work schedule from its normal posting space. Shortly thereafter, he approached the alleged discriminatee and said he needed to speak with him later. Then, at approximately 2:30 p.m., Kamimura beckoned for Interiano to follow him outside near the hotel elevators. Interiano followed, and Kamimura informed him that ". . . I changed the schedule, but I had to. It's not me. . . . It's the new manager. . . . He say Carlos, I'm going to put you on call for two weeks." Interiano said "okay," and Kamimura asked if he had "a problem" with that. Interiano said no, and Kamimura said ". . . business is so slow, so please . . . we need to put you on call for two weeks . . . because it's Christmas time."[86] The alleged discriminatee left to turn in his employee badge and timecard, returned to the restaurant, approached Kamimura, and accused the executive chef of firing him. Kamimura denied it and said "I just put you on call for two weeks." Interiano asked if Kamimura would promise to recall him in 2 weeks, and the former replied, "yes." Thereafter, on January 6, Interiano returned to the Little Buddha to obtain his last paycheck and observed Medina teaching another baker. The former noticed Interiano and said hello. Believing he had, in fact, been terminated, Interiano went to the human resources department, spoke to the manager, Fred Harmon, and asked if he could apply for a job in a different food outlet at Respondent's facility. Harmon replied that he would need a letter from Kamimura as it was impossible for him to be employed in two different positions at Respondent's facility. Interiano then returned to the Little Buddha, approached Kamimura, and explained what Harmon had said. Kamimura replied that he would give such a letter to the human resources department. Subsequently, Interiano never heard again from Respondent about a job and heard from another employee in the Little Buddha that Medina said Interiano could not return to work at Respondent's facility as he had been fired. During cross-examination, Interiano stated that he did not know who was doing the baking in the restaurant after his layoff and that he had no idea if Respondent had another baker on staff.

With regard to the layoff of the alleged discriminatee, Andrew Pike, whom Interiano knew as a manager and as a chef "because he teach me how to do the new recipes, him and Keith,"[87] testified that, upon arriving at the Little Buddha on November 24 or 25, his initial responsibilities ". . . were to improve and get the food to how we wanted it to be as in Paris, so I spent 99 percent of my time in the kitchen, in every aspect of the kitchen . . . working with the employees . . . to have them execute [the recipes] in the correct way." Also, at the time of its opening, the restaurant hoped to serve lunch and dinner,[88] and the employee staffing level was planned for this. However, according to Pike, the owners soon reached a decision to have only a dinner service as "they just did not feel . . . it would be economically viable for us to open for lunch."[89] Given this decision, the owners realized "we didn't have enough hours to give everyone to be fair, so, ultimately, we had to be able to trim the employee complement." Therefore, in "mid-December," the decision was reached to cut the staff,[90] and Kamimura, Medina, and Pike were charged with deciding which employees to lay off. According to Pike, who stated that he met with Kamimura "every day to discuss downsizing" as it was their responsibility to accomplish it, of the three managers,

". . . he would take his day, prep, and then take a day. It would be never more than one day when there wouldn't be pastry done. . . ."

[84] Velha Perdomo was a cook at the Little Buddha. Interiano testified that he was charged with teaching Perdomo how to bake so she could do the work when he was off from work. Andrew Pike denied that Interiano was involved with training Perdomo.

[85] Interiano stated that Kamimura was telling him the truth about Velha as "I saw Velha throw away everything."

[86] The alleged discriminatee was not asked about the logical inconsistency in this testimony. Thus, being "on-call" means one will be recalled when needed, and such a status is inherently inconsistent with being laid off for a definite time period.

[87] Interiano testified that he worked with Pike every day for "a little over two weeks" and that Pike taught him how to do "the flambé" and crème-briolette desserts he had never done before. In contrast to Medina and Kamimura, Interiano never complained to Pike about employment-related problems as "[He] doesn't do with nothing about it. It's Gerald and Juan Medina. All the schedules and checks is Juan Medina." He reiterated that Pike had "nothing" to do with such matters, and, asked if Pike was more concerned with the quality of the food, said "right, yes."

[88] This entailed two separate services.

[89] Pike testified that the Little Buddha is a "high end" restaurant, and casino patrons would not pay such high prices or eat that type of food at lunch.

[90] According to Pike, ". . . the owner wanted to reduce staff by minimum at least 30 percent . . . within a two-week period," and he tried to follow instructions "as closely as we could."

he was the one most familiar with the skill level required of the staff at a Little Buddha facility. Thus, in the second and third weeks of December, Jose Acevedo, a prep cook, Ernest Huling, a pantry chef, George Gonzales, a pantry chef, Sandra Maduena, a prep cook, Genero Hernandez, a prep cook, and Francisco Ayala, a dishwasher, were laid off.[91]

Specifically with regard to the layoff of Interiano, Pike, who knew the alleged discriminatee as the pastry chef, testified that the latter ". . . was let go due to downsizing . . . also his performance. It was a joint decision made by myself and Gerald . . . . [Upon my arrival], I had seen the desserts not only being prepared in the daytime but also at night . . . and they . . . weren't prepared properly. They weren't executed . . . the recipes weren't followed the way that we had written them out . . . for the opening of the restaurant." Therefore, as "pastry was one of the first things that we needed to work on," he began working with Interiano "every day," training him. However, Pike did not notice a significant improvement in the alleged discriminatee's pastry preparation, for "he had his set ways of doing things. He'd apparently been doing baking for a while," and was "standoffish" to learning our method, ". . . and I just didn't believe he had the basic pastry skills . . . you need to have." On the latter point, Pike, who trained as a chef for 2 years at the California Culinary Academy and for 2 years at a facility in Rhode Island, testified that Interiano's baking skills were developed from retail store work where baking is rather "generic" in nature and consists basically of finishing what has already been "predone." He added, "I don't think you need to be too technically qualified to work as a baker in those types of places."[92] Thus, in a restaurant, the pastry chef must be proficient at chemical processes and correct temperatures—"It's a very technical part of cooking," and Pike did not believe Interiano ". . . knew many of the processes . . . about chemical reactions and temperatures and just . . . basic knowledge you need to know." This type of knowledge was particularly important in a specialty of the Little Buddha restaurants, a liquid chocolate cake, ". . . which is a chocolate cake completely baked on the outside, still liquid in the center, and it's a very tricky thing to do. . . ." Also, Pike testified, Interiano appeared to have a problem following directions; "we would have par numbers for him, how many he had to make every day . . . he would never follow those." He recalled one occasion on which Interiano was instructed to have "so many chocolate cakes baked." Pike left for the day, ". . . and we ran out of cakes that night. . . . The next day he was reprimanded and he was also told . . . by myself." Interiano failed to specifically deny the occurrence of such an incident.

Pike believed that Interiano should have been laid off because he was making "no progress" in learning baking techniques and ". . . didn't really want to take direction." As a result, according to Pike, the Little Buddha had "major problems" with pastry work. Also, Pike believed that another cook, Cesar Cardena, would become a better pastry chef than Interiano. In Cardena, "we had someone else . . . who could do the job much better than [Interiano] could. He had a much stronger knowledge of pastry, much more forthgiving and working well with . . . people. . . ."[93] Pike testified that, at the time of Interiano's layoff, he had become familiar with Cardena's work, and "I can talk to someone and I can pretty much decipher if they know what they are talking about . . . when it comes to food. It's kind of a technical thing, and he would tell me things that were wrong . . . and I would say absolutely." Further, in contrast to Interiano and his baking experience, "I was familiar with a couple of restaurants [Cardena] worked at and they have nice pastries. I was impressed"[94] and asked Cardena to "do some baking," according to Pike, ". . . he'd do a lemon tart. He'd do a chocolate cake. He'd give me ideas on his own for specials, and . . . once I saw and tasted his work, it was no thought really. I knew right away I had a better candidate to do pastry than Mr. Interiano."[95] Finally, Pike testified that, if the Little Buddha had continued with a lunch service, the alleged discriminatee would not have been laid off[96] "because we would have needed him as well," but, if he had continued showing a lack of improvement, "eventually" he would have been discharged.

As with the discharge of Martin Perez, the credibility of the witnesses is a significant factor in determining whether, as alleged by the General Counsel, Respondent unlawfully changed the work schedule of and, subsequently, laid off its employee, Carlos Interiano, in violation of Section 8(a)(1) of the Act. In this regard, both Carlos Interiano and Andrew Pike impressed me as being frank and reliable witnesses; however, as between them, I found Pike to have been more convincing. Accordingly, while I shall rely upon the testimony of each where uncontroverted, whenever they conflict, I shall upon Pike's version of events in determining what occurred herein. Initially, the General Counsel alleges that Respondent engaged in conduct, violative of Section 8(a)(1) of the Act, by prohibiting Interiano from concertedly complaining to Medina and to Kamimura abut overtime pay and the lack of break periods. Although unclear, this allegation presumably concerns an incident one day during the employees' working time. According

[91] The stated reason for each layoff was "business slow," and, according to Pike, the layoffs were permanent. Interiano confirmed that a series of layoffs occurred prior to his.

[92] According to Pike, in a retail store, a baker is merely assembling and finishing a product; while, in a restaurant, "we do every thing from scratch fresh."

[93] Pike testified that it took him just 4 or 5 days to observe that Interiano lacked significant pastry skills and that he decided Cardena was qualified to do the work "a little bit later" after he baked some pastries at Pike's behest.

[94] Prior to working for Respondent, Cardena had been a chef at Smith & Wollensky, a famous New York City restaurant, with a facility in Las Vegas.

[95] According to Pike, Cardena remains as the pastry chef at the Little Buddha restaurant.

[96] Pike confirmed Interiano's testimony that the latter had been placed on on-call status by Kamimura and was eligible for recall if business had increased. However, he did not believe Kamimura would have told Interiano he would be recalled in 2 weeks as the executive chef ". . . wouldn't know when the business [would permit him to be recalled]." Also, according to Pike, he spoke to Interiano about his status subsequent to his layoff, and Interiano ". . . said I prefer to be terminated and seek employment elsewhere in the hotel." Interiano failed to deny Pike's testimony.

to the candid and uncontroverted testimony of Interiano, while Interiano and other Little Buddha employees were speaking about them going to a union or to Respondent's human resources department for help with their complaints about the lack of breaks and shortages in their overtime pay, Juan Medina approached and instructed the employees to "stop it. Just start back to work." I agree with counsel for Respondent that working time is for work; however, there is no evidence that, at the time Medina made his comment, the kitchen employees were not, in fact, performing their required job duties. Indeed, Interiano was uncontroverted that the employees were not merely "standing around," and counsel cites no work rule, prohibiting employees from talking while performing their jobs. Clearly, Interiano and his coworkers were engaged in protected concerted activities, discussing their group concerns regarding their working conditions and possible group actions to change them. The record evidence establishes that Medina was well aware of the employees' discontent with the restaurant's break and lunch practices and, as will be discussed, had exhibited antipathy for the concept of union representation or any type of group action by the employees. In these circumstances, he was not merely exhorting employees to perform their job duties; rather, in agreement with counsel for the General Counsel, I believe Medina actually promulgated a rule, prohibiting the Little Buddha employees from discussing their working conditions, an inherently protected concerted activity. Accordingly, Medina's comment was violative of Section 8(a)(1) of the Act. *Automatic Screw Products Co.*, 306 NLRB 1072, 1072 (1992).

The General Counsel next alleges that Respondent violated Section 8(a)(1) of the Act by disparaging employees for engaging in protected concerted activities. In this regard, I credit Interiano's frank and uncontroverted testimony that, one day, while he and other employees were discussing their complaints about being short payment for their hours worked and seeking union representation for help, Medina approached and, obviously overhearing the content of the discussion, stated that he did not like Las Vegas because everyone spoke about union representation; while, in Hawaii, rather than concerning themselves with union representation, "everybody work" and "no one say anything . . . about unions." While I disagree with counsel for Respondent's characterization of the employees' actions as "constant non-work related chatter" and note that Respondent's employees' discussions constituted protected concerted activities—conduct which should not be trivialized as mere "chatter," Section 8(c) of the Act gives employers the right to express their views about unionization or a particular union as long as those communications do not threaten reprisals or promise benefits. *Poly-America, Inc.*, 328 NLRB 667, 669 (1999). Here, Medina was merely sharing with the kitchen employees his own negative views of union discussions, and, as his comments contained no threats or promises, they were not violative of Section 8(a)(1) of the Act. Id. Accordingly, I shall recommend dismissal of paragraph 5(c)(2) of the complaint.

Turning to the complaint allegations that, by changing Interiano's days off schedule and by laying him off, Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act,[97] Board law is clear that I am required to analyze and decide these maters, utilizing the *Wright Line*, supra guidelines. *Alldata Corp.*, 327 NLRB 127, 129 (1998); *Hacienda De Salud-Espanola*, 317 NLRB 962 fn. 2 (1995); *Manimark Corp.*, 307 NLRB 1059 (1992), reversed on other grounds 7 F.3d 547 (6th Cir. 1993). At the outset, Respondent does not dispute, and I find, that, at the time of his hire, Interiano's scheduled days off were Monday and Tuesday of each week; that, in the third week of November, Respondent changed his scheduled days off to Monday and Wednesday of each week; and that, concomitant with changing his days off schedule, Respondent required Interiano to make a "double batch" of pastries on the day prior to each off day. Further, Respondent does not dispute that it laid off Interiano on or about December 23. With regard to the former allegation, counsel for Respondent initially contends that his client engaged in no act, which may be found unlawful as, given the change in Interiano's work hours was "minor," he exhibited no resistance in accepting the change, and there is no record evidence that he was forced to work harder, the General Counsel failed to show any adverse impact upon Interiano. While it may be true that Respondent's change of Interiano's work schedule had no adverse effect upon him, such is not determinative with regard to whether an unfair labor practice had been committed. Rather, the sole issue is whether Respondent's conduct was motivated by Interiano's protected concerted activities. If so, no matter how inconsequential the act may appear, an unfair labor practice must be found. Thus, in *Marriott In-Flight Services*, 249 NLRB 496 (1980), the alleged unlawful act was the respondent's instruction to an employee to no longer perform his job duties after lunch and always to return to the respondent's facility and remain there until his work shift ended. There was no record evidence of adverse impact upon the alleged discriminatee,[98] and the sole issue, for the Board, appears to have been the respondent's motivation. Id. at 501. Accordingly, counsel's argument is rejected.

As to whether the General Counsel has established that Respondent changed Interiano's days off schedule and, subsequently, laid him off because he engaged in protected concerted activities, I must initially determine whether he, in fact, engaged in protected concerted activities. As to this, crediting Interiano, I find that he engaged in numerous and extensive discussions with co-workers regarding Respondent's policy, requiring Little Buddha employees to take their combined lunch and break periods after clocking in but prior to actually commencing work, Respondent's perceived failure to pay overtime for all hours worked, and their need for either representation by a labor organization or a group meeting with Respondent's human resources department; that, after he suggested the employees should together confront Gerald about their working conditions, ". . . they say it's up to me;" and that, as a result, on

[97] In their post-hearing brief, Counsel for the General Counsel mistakenly state that Respondent's change of Interiano's days off was allegedly violative of Section 8(a)(1) and (3) of the Act.

[98] In fact, only the respondent was adversely affected as the alleged discriminatee performed "useful work," of which the former deprived itself by its actions.

November 27, while discussing his own paycheck, he raised the above-described group complaints to Kamimura, who disclaimed responsibility. Also, crediting Interiano I find that, either at the behest of co-workers or Kamimura, who apparently liked the way Interiano translated, the alleged discriminatee interpreted for co-workers when they complained to Kamimura about perceived shortages in their paychecks for their hours worked. Finally, Interiano was uncontroverted, and I find, that, on December 11, while again complaining to Kamimura about perceived shortages in his own paychecks, he mentioned co-workers who had identical or, at least, similar complaints-- Respondent was not paying for all the overtime hours, which they worked—and that Kamimura responded, saying it was none of Interiano's business, he should only talk about himself, and, if they desired to do so, the other workers would approach him with their own complaints. There can be no doubt that Interiano's discussions with his coworkers regarding their terms and conditions of employment, particularly their lack of a lunch and other breaktime during the workday and their common complaints about Respondent's perceived weekly failure to pay for all overtime hours worked, and the potential need for or the possibility of union representation or group action as a remedy constitute the essence of protected concerted activities. *Guardian Industries Corp.*, 319 NLRB 542, 549 (1995); *Automatic Screw Products*, supra.[99]

With regard to whether, Interiano likewise engaged in concerted activities when, at the urging of his coworkers, he raised the matter of the employees' lack of lunch and other break periods during the workday with Kamimura on November 27, and whether he engaged in concerted activities when, while complaining about his own paycheck on December 11, he also mentioned other employees' complaints about their paychecks, Board law is more complicated. Thus, in *Meyers Industries (Myers I)*, 268 NLRB 493, 497 (1984), a matter involving the discharge of an employee, who, acting on his behalf but with regard to a matter of common concern amongst the respondent's employees, had complained about the respondent to a state safety agency, the Board stated, "In general, to find an employee's activity to be 'concerted,' we shall require that it be engaged in, with, or on the authority of other employees, and not solely by and on behalf of the employee himself. Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g. discharge) was motivated by the employee's concerted activity." Subsequently, in *Meyers Industries (Meyers II)*, 281 NLRB 882, 887 (1986), the Board considered whether its test for concerted activity would protect an individual's efforts to induce group action and concluded, "We reiterate our definition of concerted activity . . . encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." Later, attempting to elucidate regarding whether apparent individual actions may be found concerted, the Board stated, in *Amelio's*, 301 NLRB 182, 182 fn. 4 (1991), that it would ". . . find that an individual is acting on the authority of other employees where the evidence suggests a finding that the concerns expressed by the individual employee are a logical outgrowth of the concerns expressed by the group." This holding was explicitly affirmed in *Midland Hilton & Towers*, 324 NLRB 1141, 1141 (1997), wherein the Board noted that ". . . an employee need not be expressly 'appointed' or 'nominated' as spokesman in order for his or her actions to be found concerted." Further, in *KNTV*, 319 NLRB 447, 450 (1995), the Board held that while "an employee's activity will be deemed concerted when it is engaged in with or on the authority of other employees and not solely by and on behalf of the employee himself," concerted activity also ". . . encompasses activity which begins with only a speaker and listener, if that activity appears calculated to . . . relate to some kind of group action." Synthesizing these rulings of the Board, it appears that, in order to find that an individual is engaging in concerted activities, he or she must be acting with the authorization of other employees; however, in the absence of direct evidence, an inference of such authorization may be drawn when the individual is bringing clearly group concerns to the attention of management.[100] Applying this principle to instant fact matrix, I find that, on November 27, when he raised the matter of the Little Buddha employees' complaint regarding the lack of a lunch and other break periods during the workday to Kamimura, not only were the said working conditions of common concern to the employees but also, based upon the employees' injunction that it was up to him to express their concerns, Interiano acted with the explicit authorization of his coworkers when he discussed this complaint with Kamimura and that, therefore, Interiano's actions constituted protected concerted activities. *Midland Hilton Hotel & Towers*, supra, at 1141; *KNTV, Inc.*, supra, at 450–452.

In contrast, there is no direct evidence that, when Interiano met with Kamimura on or about December 11 concerning his own paycheck, any of his coworkers had authorized him to raise their complaints, regarding perceived shortages in their own paychecks, with the Little Buddha's executive chef. Further, given that Interiano admitted that he acted on his own volition in mentioning the similar complaints of other employees and that his coworker, Pedro Monroy, specifically denied having authorized the alleged discriminatee to raise this complaint with management, notwithstanding that the matter was obviously a group concern, I doubt that the record would warrant the drawing of an inference that Interiano possessed such authorization. However, I do believe that the record warrants the inference that, on this occasion, Respondent, through

[99] I make no finding as to whether Interiano engaged in concerted activities when he acted as an interpreter for Spanish-speaking Little Buddha employees when they complained about perceived shortages in their paychecks to Kamimura. In this regard, Interiano stated that he only translated and took no part in the conversations.

[100] In this latter regard, the Board is directly at odds with the United States Court of Appeals for the Sixth Circuit, which holds that, in order to find concerted activities, there must be a showing of a connection between the shared concerns of the employees and the individual's reiteration of them to management. *Manimark Corp*., supra, at 550.

Kamimura, perceived Interiano as encouraging other Little Buddha employees to present their complaints to management and as acting concertedly with the authorization of his coworkers. In this regard, I note that the alleged discriminatee had previously confronted Kamimura with the Little Buddha employees' complaint about the lack of lunch and breaks during the workday, that Interiano regularly acted as an interpreter for Spanish-speaking employees, who complained to Kamimura about perceived shortages in their paychecks and that, when, during their December 11 conversation, Interiano raised the similar complaints of his coworkers, Kamimura reproached him, saying "they are going to talk to me. Its not your business." From the foregoing, I believe that Kamimura had ample reason to believe that more employees, than just Interiano, were protesting their working conditions and that, therefore, Interiano was engaged in protected concerted activities when he spoke to Kamimura on December 11. *Alldata Corp.*, supra, at 131; *Arthur Young & Co.*, supra, at 43; *Oakes Machine Corp.*, 288 NLRB 456, 456 (1988).

Having concluded that Interiano had engaged in protected concerted activities, I also conclude that Respondent was aware of, or perceived that, he was engaging in such activities and that Respondent harbored animus against Interiano because of his actions. In these regards, I have found that Interiano directly confronted Kamimura about the Little Buddha employees' complaints concerning their working conditions, specifically Respondent's practice of requiring the kitchen employees to take their lunch and breaktimes prior to commencing to work and Respondent's perceived failure to pay the employees for all their overtime hours. I have also found that Kamimura certainly believed that Interiano's complaints reflected the complaints of many other employees. Moreover, I find that, on December 11, as Interiano began speaking to him, Kamimura admonished him—"Carlos, you are trouble. You always complain for any reason." In my view, the executive chef's rebuke was directly related to Interiano's protected concerted activities and patently demonstrated Respondent's animus against him for his actions. In these circumstances, I believe that the General Counsel has presented a prima facie case pursuant to *Wright Line* regarding both Respondent's change of Interiano's days off schedule and its layoff of the alleged discriminatee.

The burden then shifted to Respondent to establish that it would have changed Interiano's days off schedule and, subsequently laid him off notwithstanding its unlawful animus against him. Initially with regard to the former, I note that, at the time of the change in Interiano's days off schedule, he was the Little Buddha's only baker and that, by his own admission, Velha Perdomo, the individual who was responsible for baking during his 2 days off, performed the job so miserably that Respondent was forced to throw away the desserts, which she prepared. Further, I credit Andrew Pike and find that ". . . having just one basic baker, you don't want someone to have two days off and leave that space with no one in the pastry" and that split days are preferable, for ". . . he would take his day, prep, and then take a day." Moreover, while, at the hearing, counsel for the General Counsel stated that it was Respondent's requirement that Interiano do a "double batch" of pastries prior to each day off, Pike credibly explained that such was necessary as "it would be never more than one day when there wouldn't be pastry done. . . ." In this regard, I note that Interiano, who clearly understood Respondent's problem with Perdomo, never objected to being required to prepare pastries for each day off. Based upon the foregoing, I believe that Respondent's change of Interiano's days off schedule represented nothing more than a necessary business decision and that, therefore, Respondent has met its burden of proof under *Wright Line*. Accordingly, I shall recommend dismissal of paragraph 5(d) of the complaint.

As to Respondent's layoff of Interiano, I again credit Pike, who was uncontroverted, and find that, a few weeks after the Little Buddha opened, its owners decided that it would not be "economically viable" to be open each day for lunch and dinner; that, as a result, in mid-December, the owners decided that the employee complement had to be reduced; that Kamimura, Medina, and him were charged with deciding which employees to lay off; that, of the three managers, he was the one most familiar with the skill level required of the chefs and cooks at the Little Buddha; and that, in accord with its effort to downsize, in the second and third weeks of December, Respondent laid off three cooks, two chefs, and a dishwasher from the Little Buddha. Further, crediting Pike, I find that Respondent laid off Interiano due to its need to reduce its staffing level and his performance; that, based upon the alleged discriminatee's experience, which consisted of generic baking jobs with Yum Yum doughnuts and a supermarket chain, and his lack of knowledge about, and proficiency at, the technical aspects of baking, including chemical processes and temperatures, Pike did not believe Interiano possessed the skills necessary to a pastry chef at a high end restaurant, such as the Little Buddha; and that, unlike Interiano, another Little Buddha cook, Cesar Cardena, did impress Pike as possessing the knowledge and skill level necessary to perform high-end baking; and that, according to Pike, "I knew right away I had a better candidate to do pastry than Mr. Interiano"; and that, therefore, he decided to retain Cardena as the Little Buddha pastry chef. Finally, I specifically credit Pike that Interiano would not have been laid off had the Little Buddha continued with its lunch service. Based upon the foregoing, it is clear to the undersigned that Pike reached a business decision to lay off the alleged discriminatee and, as, in the absence of contrary evidence, I believe his decision should be accorded deference, I believe Respondent has met its burden under *Wright Line*. Accordingly, I shall recommend dismissal of paragraph 5(e) of the complaint.

C. Respondent's Confidentiality and Standards of Conduct Rules

Since its grand opening on November 17, 2001, Respondent has maintained a confidentiality rule and standards of conduct rules in its team member guide, which is distributed to all newly hired employees. The instant complaint alleges that the confidentiality rule and three standards of conduct rules are facially violative of Section 8(a)(1) of the Act. The Board's framework for determining the legality of such provisions is found in *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998): "In determining whether the mere maintenance of rules such as those at issue here violates Section 8(a)(1), the appropriate inquiry is whether the rules would reasonably tend to chill em-

ployees in the exercise of their Section 7 rights. Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement."

Respondent's confidentiality provision reads as follows:

> A key part of our success in the competitive casino resort industry is the confidential nature of our company's operational, financial and business affairs and activities. If you have access to information of that nature during your employment with the Palms Casino Resort, you are responsible for protecting the confidentiality of that information and not revealing, distributing or discussing such matters with outsiders or non-privileged Team Members.
>
> This information includes, but is not limited to: customer or marketing lists or strategies, financial information, computer files or programs, recipes, personnel files, policies and procedures. . . .
>
> If you violate this policy, you may be subject to disciplinary action up to and including separation. . . .

Counsel for the General Counsel argues the above-quoted provision is violative of Section 8(a)(1) of the Act, on its face, inasmuch as the prohibition, against discussion of Respondent's "policies and procedures" with "outsiders" or "non-privileged" team members, may be reasonably construed so as to preclude employees from discussing information pertaining to their terms and conditions of employment, including their own wages and other employees' wage rates, with coworkers or a labor organization. According to Fred Harmon, whose testimony was uncontroverted and who was responsible for formulating and drafting all of Respondent's personnel policies and practices, including those at issue herein, testified that the foregoing provision was "taken" from and "combined" with several similar provisions, found in the hotel and casino industry and that the term "polices and procedures," set forth in the second paragraph, refer to "operational policies and procedures. The first sentence [of the first paragraph] says a key part of our success in the competitive casino resort industry is the confidential nature of our company's operational, financial, and business affairs and activities. That's specifically why that statement was written and this policy was developed." He specifically denied that the rule prohibits discussion of employees' wages and benefits; ". . . on the contrary, the company is very active in communicating those things to the public from a recruiting standpoint." On this point, Harmon noted that wages and other fringe benefit information is published by Respondent in newspaper classified advertisements, and, in interviews prior to the opening of Respondent's facility, he discussed "our wages and benefits. I did a morning show where I actually took in lists of our benefits as well as our wages and shared them on public television." Also, according to Harmon, he gave Las Vegas newspapers copies of employment brochures, which outlined Respondent's benefits plans. Finally, while denying that any employee has ever been disciplined for divulging confidential information, including wage rates and benefit plans, Harmon admitted that Respondent has never instructed employees on how to enforce the confidentiality provision.

Contrary to the General Counsel, I do not view Respondent's confidentiality provision as being violative of Section 8(a)(1) of the Act so as to prohibit Respondent's employees from discussing their terms and conditions of employment amongst themselves or with a labor organization. Thus, in arguing that the confidentiality provision is facially unlawful, counsel for the General Counsel rely upon two recent decisions of the Board—*Iris U.S.A., Inc.*, 336 NLRB 1013 (2001), and *University Medical Center*, 335 NLRB 1318 (2001); however, analysis of both discloses that, while said decisions involve confidentiality provisions, which are nearly identical to each other, they are discrepant with the confidentiality provision at issue herein and that, therefore, the decisions are inapposite. In this regard, *Iris U.S.A., Inc.*, and *University Medical Center* concern alleged unlawful confidentiality provisions, which essentially prohibited the disclosure of confidential information concerning "employees," and, in the latter decision, adhering to clear precedent, the Board held that such a rule ". . . is unlawfully broad because it could reasonably be construed by employees to prohibit them from discussing information concerning terms and conditions of employment, including wages, which they might reasonably perceive to be within the scope of the broadly-stated category of 'confidential information' about employees." *University Medical Center*, supra, at 1322; *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288 (1999); *Pontiac Osteopathic Hospital*, 284 NLRB 442, 445–446 (1987). In contrast, Respondent's confidentiality provision prohibits the disclosure of its "policies and practices," and, in my view, as the listed items in the rule, which precede policies and practices as items precluded from disclosure, include customer or marketing lists or strategies, financial information, computer files or programs, recipes, and personnel files, employees would reasonably understand that what Respondent desires to maintain as confidential is proprietary business information and that they are not precluded from, for example, disclosing their wage information to banks, credit unions, or like financial institutions or to coworkers or labor organizations. *Lafayette Park Hotel*, supra, at 826. While counsel for the General Counsel are correct in stating that an employer may not lawfully prohibit its employees from discussing their wages and that the words "policies and practices" are not defined by Respondent in its confidentiality rule, the rule does not expressly prohibit employees from discussing their wages, wage rates, or other terms and conditions of employment with each other or with a labor organization or forbid conduct, which clearly implicates Section 7 rights.[101] That Respondent's rule does not preclude discussion of wages or benefits as seen from the fact that Respondent itself publishes information, pertaining to its wage rates and employee

[101] This fact distinguishes this matter from other Board decisions, involving confidentiality provisions, which either prohibited discussion of specific terms and conditions of employment or forbade conduct that clearly implicated Section 7 rights. Thus, in *Kinder-Care Learning Centers*, 299 NLRB 1171 (1990), the confidentiality provision expressly prohibited discussion of conditions at facilities and employees' terms and conditions of employment; in *Waco, Inc.*, 273 NLRB 746 (1984), the confidentiality provision prohibited the discussion of wages; and in *Ingram Book*, 315 NLRB 515 (1994), the confidentiality provision prohibited distribution of literature.

benefits, in newspaper classified advertisements, and, as it is reasonable to assume that many employees have applied for jobs with Respondent based upon such advertising, they would reasonably know that the confidentiality provision does not pertain to wage rates or benefits or preclude them from discussing such information with their coworkers. Moreover, the fact the Respondent's confidentiality proviso has never been enforced to prohibit employees from discussing their terms and conditions of employment reinforces this view of its meaning. *Super K-Mart*, 330 NLRB 263, 263 (1999). Finally, given the wording of Respondent's confidentiality provision, a finding that it has a chilling effect upon the employees exercise of their Section 7 rights would depend upon a concatenation of inferences, including that employees would infer that the reference to policies and practices, in the context of the entire rule, referred to their terms and conditions of employment, and that employees would further infer the ban on disclosure of this material to "outsiders" and "non-privileged" team members encompassed their coworkers and a labor organization. *Safeway, Inc.*, 338 NLRB 525, 527 (2002). In my view, this amounts to mere speculation, and, accordingly, I shall recommend dismissal of paragraph 5(a)(1) of the complaint. *Super K-Mart*, supra; *Lafayette Park Hotel*, supra.

As stated above, the complaint alleges that three of Respondent's published standards of conduct rules, for which an employee's failure to adhere "will be subject to coaching up to and including separation of employment," are facially violative of Section 8(a)(1) of the Act. Standard of conduct rule 10 forbids employees from engaging in "any type of conduct, which is or has the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with fellow Team Members or patrons," and counsel for the General Counsel argue that it ". . . potentially prohibits protected speech" and that the "language" of the provision ". . . is indiscriminate and could reasonably chill [employees] in exercising their Section 7 rights." In this regard, counsel points to Martin Perez' union solicitation of Ernestina Guerrero, to the latter's claim she felt bothered by Perez' conduct, and to executive chef Okashige's assertion that Perez had harassed Guerrero. In support of their argument, counsel relies upon three Board decisions—*Lafayette Park Hotel*, supra (rule against "making false, vicious, profane, or malicious statements toward or concerning the [hotel] or any of its employees"); *Cincinnati Suburban Press,* 289 NLRB 966 (1988) (rule prohibiting "false, vicious, or malicious statements concerning any employee, supervisor, the company, or its product"); and *Great Lakes Steel*, 236 NLRB 1033 (1978) (rule prohibiting distribution of literature which was "libelous, defamatory, scurrilous, abusive or insulting or any literature which would tend to disrupt order, discipline or production within the plant"), in which the Board found similar rules facially violative of Section 8(a)(1) of the Act. In *Lafayette Park Hotel*, supra, at 828, the Board noted that the wording of the hotel's rule failed to define the area of permissible conduct in a manner clear to employees and, therefore, would cause them to refrain from engaging in protected activities. Likewise, in *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999), the Board determined the legality of a rule, nearly identical to that maintained by Respondent, which prohibited "disorderly conduct in the hotel, including . . . threatening, insulting, abusing, intimidating, coercing, or interfering with any guests, patrons, or employees," and concluded that the rule violated Section 8(a)(1) of the Act as the words were undefined and could reasonably be interpreted as barring lawful organizing activity. Id. at 295.

With regard to rule 10, Fred Harmon testified that its purpose is to ". . . provide an environment that is free of [the enumerated acts and conduct] for our team members as well as for our guests," and, in arguing that the rule is lawful, counsel for Respondent relies upon the decision of the United States Court of Appeals for the District of Columbia Circuit in *Adtranz AAB Daimler-Benz*, 331 NLRB 291 (2000), rev'd 253 F.3d 19 (D.C. Cir. 2001). At issue in that matter was a work rule, prohibiting "abusive or threatening language to anyone on Company premises," and the Board adopted the administrative law judge's decision that said rule violated Section 8(a)(1) of the Act on its face as it failed to define the stated misconduct and, therefore, could reasonably be interpreted as barring lawful union organizing propaganda. The District of Columbia Circuit reversed, stating that ". . . it is preposterous that employees are incapable of organizing a union or exercising their other statutory rights . . . without resort to abusive or threatening language." 253 F.3d at 322. In so ruling the court rejected the Board's contention that organizing campaigns are heated and often spawn intemperate language, which should not be stripped of its protected status, stating "America's working men and women are as capable of discussing labor matters in intelligent and generally acceptable language as those lawyers and government employees who now condescend to them." Moreover, the court noted that the Board itself in *Atlantic Steel Co.*, 245 NLRB 814 (1979), has held that an employee, who is engaged in protected activities, may lose the protection of the Act if he or she engages in opprobrious conduct. Further, the court noted that the Board's view is "remarkably indifferent" to the plight of employers, who are subject to civil liability for failure to maintain a workplace free from various forms of harassment, including abusive language. 253 F.3d at 323. Utilizing the court's decision as support, counsel argues that the language of rule no. 10 was never meant to chill employees' Section 7 rights; rather it's intent was to establish a "comfortable, harassment-free workplace" for all employees.

Subsequent to *Adtranz AAB Daimler-Benz*, the Board issued its decision in *University Medical Center*, supra, wherein it held violative of Section 8(a)(1) of the Act an employer handbook provision, prohibiting "insubordination . . . or other disrespectful conduct towards a service integrator, service coordinator, or other individual." Noting that concerted employee protests of supervisory conduct and employee solicitations of union support from other employees are protected activities under Section 7 of the Act and that nothing in the language of the provision addressed a legitimate business concern and stating its reliance upon *Lafayette Park Hotel*, supra, the Board found that such activities may reasonably be understood by employees as being prohibited by the above rule and, therefore, the provision had a chilling effect upon Section 7 rights. Id. at 1321–1322. Further, the Board noted that, in *Adtranz AAB Daimler-Benz*, 253 F.3d at 25, the court specifically stated that it would en-

force rulings, which "faithfully" adhere to the former's *Lafayette Park Hotel*, supra, standard and explained that "there are degrees of unwanted overtures," and ". . . defining due respect, in the context of union activity, seems inherently subjective." Id. at 1321. Continuing, the Board stated that an employee, who is being subjected to "vigorous proselytizing" for or against a union, which he preferred to avoid or which reflected a view opposed to his, ". . . might well feel that he was being treated with a lack of respect, even if he did not feel threatened or abused" and that the respondent's rule had been violated by said conduct and he could report it. Finally, the Board noted that employees may believe that the rule acts as a shield against all expressions of unwelcome views, including union promotions and solicitations.

In determining whether Respondent's standards of conduct rule 10 is facially violative of Section 8(a)(1) of the Act, instead of applying tortured analysis, which adumbrates rather than elucidates, I think the best, most expeditious test for determining the legality for such a provision is use of a rule of reason, which simply inquires whether a reasonable employee would understand the work rule's language as chilling his right to engage in activities, privileged by Section 7 of the Act? At the outset, I am cognizant that, in today's litigious environment, employers subject themselves to substantial civil liability for failing to maintain workplaces free of racial, sexual, ethnic, and other forms of harassment and that employers must be able to protect themselves with carefully drafted work rules. However, if such rules conflict with the policies and purposes of the Act and impinge upon employees' Section 7 rights, the latter are paramount, and even the most carefully drafted work rules may, in fact, be unlawful. In this regard, I note that its language of Respondent's rule is far broader than the rules at issue in *Adtranz AAB Daimler-Benz* or in *University Medical Center*, as, rather than just "abusive or threatening language," or "insubordination . . . or other disrespectful conduct," rule 10 prohibits any conduct ". . . which has the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with fellow Team Members or patrons." Applying a rule of reason, it is apparent that the words "injurious" and "offensive" are redolent of ambiguity. Thus, whether acts are "injurious," which the Merriam-Webster dictionary defines as damaging or hurtful, and "offensive," which the same dictionary defines as aggressive, obnoxious, or insulting, is inherently subjective and involves degrees of "unwanted overtures," and, clearly, the identical conduct may be hurtful or insulting to one individual but not to another. Id. at 1321. Moreover, Respondent's work rule does not prohibit acts or speech, which are intrusive, disrespectful, or discourteous,[102] and it is not "condescend[ing]" to this country's working men and women to find, as I do, that employees would experience difficulty in distinguishing between conduct, which is hurtful or insulting—prohibited under Respondent's work rule—from conduct, which is merely disrespectful or discourteous—presumably permissible under Respondent's rule. Further, while I believe that any employee would reasonably understand what would constitute threatening, intimidating, or coercive conduct, or acts, which interfere with other employees' rights not to engage in such activities, and that employees are eminently capable of conducting union organizing without engaging in such misconduct, I also believe, given the degrees of sensitivity inherent in the terms, that employees reasonably may not be able to vigorously solicit or proselytize for a union or engage in protected concerted activities—or effectively tailor their conduct—without risking offending or acting injuriously toward their coworkers. In these circumstances, while the "plight" of employers, phobic about the possibility of lawsuits, is a concern, I agree with counsel for the General Counsel that the amorphous nature of the language of Respondent's rule has the effect of chilling its employees in the exercising of their Section 7 rights, and, therefore, I believe Respondent's standards of conduct rule 10 is facially violative of Section 8(a)(1) of the Act. *University Medical Center*, supra, *Flamingo Hilton-Laughlin*, supra.

Next, the General Counsel alleges that Respondent's standards of conduct rule 46 is facially violative of Section 8(a)(1) of the Act. Said rule prohibits employees from "loitering in company premises before and after working hours." As to this provision, Fred Harmon testified that he "made sure" this rule was included in the team member guide because Respondent's facility ". . . places a big emphasis on ensuring that our team members have the right tools and . . . environment to perform their duties, and, while people are trying to work, we want to make sure that there's not people that are trying to interfere . . . and [be] disruptive." According to Harmon, rule 46 was designed to stop employees, who are finished working, from being in the "back-of-the-house"; while he defined theses areas as "any of the non-public areas," including the TDR, none of the foregoing appears in the rule. Harmon added that employees are off duty "once they're clocked out and are no longer working" and, then, team members are permitted to remain as guests on the property to use the facility's public areas and to speak to on-duty employees in those areas—"It would not be in conflict with this policy. The team members are allowed to be guests . . . when they're off duty." However, as with the areas, into which off-duty employees are forbidden to go, the fact that employees are permitted to visit the public areas is nowhere stated in the rule. On this point, Harmon testified that employees must read Respondent's "visiting the property as a guest policy," which is on page 52 of the team member guide, in order to ascertain that rule 46 does not apply to the public areas of Respondent's facility.[103] Further, according to Harmon, ". . . loitering, even while you're there as a guest is unacceptable," and off-duty employees, who visit public areas, such as the coffee shop, merely to speak to an on-duty employee and not, for example, to order food, would be in violation of rule 46. Finally, while Harmon maintained that the key word in the rule

[102] Thus, Ernestina Guerrero did not wish to be "bothered" by Martin Perez' union solicitations and questions. That Respondent transformed her discomfort into harassment demonstrates the danger inherent in antiharassment rules, such as Respondent's standards of conduct rule 10.

[103] Even this is not entirely clear as the "visiting the property as a guest" policy permits employees to use "many" but, presumably, not all of Respondent's "outlets." Other than guest rooms, it is not clear into which public areas, employees may not go.

is "loitering," I note that the word is also undefined in the team member guide.

In support of the complaint allegation that rule 46 is facially unlawful, counsel for the General Counsel assert that it "arguably" prohibits all activity, including union and other protected concerted activities, before and after working hours, on all company property. There is no dispute that rule 46 pertains to Respondent's off-duty employees, and the legality of off-duty employee access rules is governed by the Board's test, set forth in *Tri-County Medical Center*, 222 NLRB 1089, 1089 (1976). Therein, the Board held that "except where justified by business concerns, a rule which denies off-duty employees entry to parking lots, gates, and other outside, nonworking areas will be found unlawful. The Board also found that a no-access rule, concerning off-duty employees, will be found valid only if it (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activities. I believe that Respondent's rule, prohibiting employees from "loitering in company premises before or after working hours," is ambiguous and unlawful when subjected to the aforementioned test. Thus, notwithstanding Fred Harmon's testimony, regarding the rule's underlying intent,[104] the Merriam-Webster dictionary defines the word premise as "a piece of land with the structures on it" or "the place of business of an enterprise." On its face, then, rule 46 is not specifically limited to the interior, or even the so-called back-of-the-house areas and seemingly encompasses Respondent's entire facility, including the exterior areas. In this regard, Respondent failed to proffer any business justification for such a broad denial of access to off-duty employees. The amorphous nature of rule 46 is further demonstrated by Respondent's failure to define the areas to which off-duty employees are denied access or to include a disclaimer that the prohibition does not extend to the public areas of its facility. Accordingly, as rule 46 can just as readily be understood as prohibiting loitering in the exterior areas of Respondent's facility as prohibiting loitering in the interior areas and as it appears to be deficiently vague in its scope, I find that Respondent's above-quoted standards of conduct rule 46 has the chilling effect of inhibiting its employees from engaging in protected concerted activities and, therefore, is violative of Section 8(a)(1) of the Act. *Ark Las Vegas Restaurant Corp.*, supra, at 1290; *Flamingo Hilton-Laughlin*, supra, at 289–290.

Finally, the General Counsel alleges that Respondent's standards of conduct rule 61 is facially violative of Section 8(a)(1) of the Act. Said rule, which is related to rule 46, prohibits employees from "eating or loitering in the Palms Team Member Dining Room on days off." Respondent's executive chef, Harris Okashige, testified that the team dining room is located in the lower basement of Respondent's facility and that it is divided into an open area, approximately 50 feet long and 40 feet wide, which is the dining room and in which are located snacks, drinks, "and stuff like that," and a kitchen area, in which employees may purchase food, cafeteria style. Food is produced in the latter area, and employees wait on line for what they order. According to Okashige, enough food is produced in the TDR kitchen to feed 1700 employees daily, and, given the size of the dining area, which has a capacity of only 177 people, ". . . we have to ask other departments to stagger their shifts" in order to avoid over-crowding in the TDR." He added that the TDR is normally completely full from 11 a.m. until 1 p.m. and from 5:30 to 6 p.m.; that all team members are eligible to eat meals in the dining room and that, besides lunches, employees often take their break periods there. Finally, Okashige testified that the small size of the TDR was the subject of numerous employee complaints "in the beginning because we had so many team members going in there and the shifts weren't staggered at that point."

Upon scrutinizing counsel for the General Counsel's post-hearing brief, it is not entirely clear what they consider to be unlawful about this provision of Respondent's standards of conduct. Thus, quoting their brief, standards of conduct rule 61 does ". . . not clearly communicate that off-duty employees have access to employees who wish to engage in protected, concerted activity such as communication with their co-workers or with customers about organizing or working conditions." Since Respondent's rule, on its face, concerns off-duty employee access to its facility, the Board's *Tri-County Medical Center*, supra, test is applicable. Thus, the rule is clearly limited to a specific interior area of Respondent's facility—the TDR; it is set forth in the team member guide, which is disseminated to all newly-hired employees; and the rule apparently applies to off-duty employees, who are in the TDR for any reason, including protected concerted activities. Further, although rule 61 does not apply to the exterior areas of Respondent's facility, the latter has presented a valid and substantial business justification for its rule—the small size and limited seating capacity of the TDR and the large number of on-duty employees who eat there. Moreover, as common usage and the Merriam-Webster dictionary define "loitering" as meaning "lingering" or "hanging around idly," it is hardly an ambiguous word. Finally, counsel relies upon the Board's decision in *Chariot Marine Fabricators & Indus. Corp.*, 335 NLRB 339 (2001), as support for their position. However, while the rule, at issue therein, did prohibit loitering, it also contained a prohibition against nonwork-related conversations on the respondent's property during working hours, and, as the latter aspect of the rule was patently unlawful, the Board found the respondent's entire rule violative of Section 8(a)(1) of the Act. Accordingly, for the foregoing reasons, including my belief that Respondent has presented a reasonable business justification for rule 61, I shall recommend dismissal of the applicable portion of paragraph 5(a)(2) of the complaint.

CONCLUSIONS OF LAW

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

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

[104] In this regard, Respondent's rule is as ambiguous as the off-duty access rules in *Ark Las Vegas Restaurant Corp.*, 335 NLRB 1284 (2001), and *Flamingo Hilton-Laughlin*, supra, both of which prohibited access to the respondent's "property."

3. Respondent engaged in acts and conduct violative of Section 8(a)(1) and (3) of the Act by discharging its employee, Martin Perez, because he engaged in activities in support of the Union.

4. Respondent engaged in acts and conduct violative of Section 8(a)(1) and (3) of the Act by issuing a warning notice to its employee, Martin Perez, because he engaged in activities in support of the Union.

5. Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act by interrogating its employees regarding their union sympathies and activities.

6. Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act by impliedly threatening its employees with discharge because of their support for the Union.

7. Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act by promulgating a rule, prohibiting its employees from engaging in protected concerted activities.

8. Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act by promulgating and maintaining in effect, in its team member guide, a standards of conduct rule, prohibiting employees from engaging in conduct having the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with other employees, which has the effect of chilling employees in the exercise of their Section 7 rights.

9. Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act by promulgating and maintaining in effect, in its team member guide, a standards of conduct rule, prohibiting employees from loitering in company premises before or after working hours, which has a tendency to inhibit employees from exercising their rights guaranteed by Section 7 of the Act.

10. The above unfair labor practices effect commerce within the meaning of Section 2(6) and (7) of the Act.

11. Unless specifically found above, Respondent has engaged in no other unfair labor practices.

REMEDY

Having found that Respondent has engaged in serious unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act, I shall recommend that it be ordered to cease and desist from engaging in such acts and conduct. Generally, I shall recommend that it be ordered to cease and desist from interfering with, restraining, and coercing its employees in the exercise of their rights guaranteed by Section 7 of the Act. Specifically, as I have found that it unlawfully discharged employee, Martin Perez, I shall recommend that Respondent be ordered to offer him reinstatement to his former position of employment and, if said position no longer exists, to a substantially equivalent position, with no loss of seniority or other rights and privileges previously enjoyed, and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from January 9, 2002 to the date of a proper offer of reinstatement, less any interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Further, I shall recommend that Respondent be ordered to rescind the warning, which it issued to Perez on January 7, 2002. Also, I shall recommend that Respondent be ordered to expunge from its records, including Perez' personnel file, any references to his unlawful warning and discharge and inform him that such has been done. Moreover, I shall recommend that Respondent be ordered to cease maintaining in its team member guide the standards of conduct rules, which I have found violative of the Act. Finally, I shall recommend that Respondent be ordered to post a notice to its employees, advising them of its unfair labor practices and the steps it is required to take to remedy them.

[Recommended Order omitted from publication]