Bellagio, LLC *and* Gabor Garner *and* Najia Zaidi.
Cases 28–CA–106634 and 28–CA–107374

August 20, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS JOHNSON AND MCFERRAN

On March 20, 2014, Administrative Law Judge Robert A. Ringler issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. The General Counsel filed cross-exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

For the reasons stated by the judge, we find that the Respondent violated Section 8(a)(1) of the Act by engaging in surveillance of employees' union or other protected concerted activity and by Front Services Supervisor Brian Wiedmeyer's instruction to employee Gabor Garner that Garner not talk about his suspension with other employees.[3] We also agree with the judge that the Respondent did not unlawfully retaliate against employee Najia Zaidi because of her protected concerted activity. Finally, as more fully explained below, we agree with the judge that the Respondent violated Section 8(a)(1) by denying Garner's request for union representation during a disciplinary interview and then suspending him because he refused to participate in an investigatory interview without union representation.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall also substitute a new notice to conform to the Board's standard remedial language and in accordance with *Durham School Services*, 360 NLRB 694 (2014).

[3] Although we agree that Wiedmeyer's instruction violates Sec. 8(a)(1), we do not find, as did the judge, that this instruction constituted the promulgation of an oral rule. Rather, we find that Wiedmeyer' engaged in coercive conduct to compel Garner to cease speaking to coworkers about his discipline. See *Food Services of America*, 360 NLRB 1012, 1016 fn. 11 (2014). We will modify the judge's order to reflect this rationale.

Facts

The Respondent, Bellagio, LLC, operates a casino in Las Vegas, Nevada. Garner, a long-term employee and bargaining unit member worked as a bellman.[4] His duties included assisting guests with luggage and with hotel check-in and check-out. On May 12, 2013,[5] a guest filed a complaint that Garner had acted inappropriately in an attempt to coax a tip and then reacted rudely when the guest withheld the tip. Late in the day on May 13, Wiedmeyer, accompanied by Front Services Supervisor Max Sanchez, called Garner to Wiedmeyer's office to question Garner about the incident.

At the beginning of the meeting, Garner asked Wiedmeyer if he could be disciplined. When Wiedmeyer responded that discipline was a possibility, Garner asked for a *Weingarten* representative.[6] Because Wiedmeyer did not know the whereabouts of a steward, Garner suggested that Wiedmeyer contact employee relations for a roster of stewards. Wiedmeyer then directed Garner to fill out and sign a statement describing his interaction with the customer. Garner declined to do so without a steward and stated that he would return to work.[7] Wiedmeyer and Sanchez left the room to telephone employee relations for assistance, and returned with a Suspension Pending Investigation (SPI) form. Wiedmeyer and Garner signed the SPI form and Wiedmeyer then

[4] Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226, and Bartenders Union, Local 156, affiliated with UNITE HERE represents several classifications of the Respondent's employees, including bellmen, under collective-bargaining agreements.

[5] All dates are 2013, unless otherwise indicated.

[6] *NLRB v. J. Weingarten*, 420 U.S. 251 (1975).

[7] As set forth in Wiedmeyer's written account of the meeting—and corroborated by the written accounts of Sanchez and Garner—Wiedmeyer suspended Garner pending investigation "because [Garner] was going back to work without filling out a statement. I . . . inform[ed] . . . [him] that I could not locate his representation and he would have to. He again refused . . . to fill out a statement . . . I placed him on SPI so he could not return to work until the investigation was completed.

Sanchez' written statement of the May 13 meeting stated that once Garner asked for a representative, "Wiedmeyer explained to [Garner] that it was up to him to find a shop steward that that we could continue with the request of a statement from him. He also told [Garner] that he would have to SPI him if he wasn't willing to find a shop steward and fill out a statement."

Finally, Garner, whose testimony the judge expressly credited, similarly wrote on the SPI form on May 14 that "Was asked to fill out a statement. I asked if this was for discipline and he said it could be. I asked for representative he said no. Asked if I was refusing to fill out a statement and I said no I would like a representative he said if I don't fill it out I would be SPI. I asked for my *Weingarten* rights." Garner's testimony corroborates his written statement; while Garner testified that Wiedmeyer ceased questioning him about the incident once Garner requested a steward, Wiedmeyer continued to press Garner to complete a written statement even after Garner stated repeatedly that he would not do so without a steward.

instructed Garner to immediately leave the building, and followed him out.

The SPI issued to Garner, listed the date of the incident under investigation as May 13, and specified, in relevant part:

> You are being placed on Suspension Pending Investigation effective **05/13/13**. This is not a disciplinary action; it is a process that **Bellagio** utilizes to remove you from the work place in order to investigate a serious situation or policy infraction in which you may have been involved. It is also utilized if you have reached the final step in the progressive disciplinary process.
>
> ***
>
> Upon completion of the investigation . . ., one of the following . . . will occur:
>
> 1. You will be returned to work without disciplinary action . . . ; or
> 2. You will be returned to work with disciplinary action if warranted . . . ; or
> 3. You will be separated from the company . . .
>
> [Emphasis in original.][8]

The next day, Garner met with Employee Relations Manager Susan Moore and Front Services Director Charles Berry. Union Shop Steward Monica Smith was also present. At this meeting, Garner completed a statement describing his version of the incident with the guest and received a verbal warning. He then returned to work. Ultimately, Garner experienced no loss of pay as a result of his suspension.

Discussion

Under *Weingarten*, supra, an employee has the right, upon request, to have a union representative in an investigatory interview that he or she "reasonably fears may result in his discipline."[9] Once a union representative is requested, an employer has three lawful options: "(1) grant the request, (2) discontinue the interview, or (3) offer the employee the choice of meeting without a representative or of no meeting at all." *Consolidated Freightways Corp.*, 264 NLRB 541, 542 (1982).

Here, it is uncontroverted that the May 13 meeting between Garner, Wiedmeyer, and Sanchez constituted an investigatory interview within the meaning of *Weingarten.* Garner, at the beginning of the interview, asked Wiedmeyer if he could be disciplined and Wiedmeyer responded that it was a possibility. Garner then requested a steward.

Once Garner invoked his *Weingarten* rights, the Respondent did not follow one of the lawful avenues available to it. It did not grant Garner's request for a steward because the parties could not locate one. Nor did the Respondent offer Garner the choice of continuing without a representative or having no meeting at all. And, contrary to our dissenting colleague, the Respondent did not merely discontinue the interview. Instead, once Garner renewed his request for a steward, Wiedmeyer continued to press Garner to complete a statement. When Garner refused to do so without a steward, and stated his intention to return to work, Wiedmeyer suspended Garner and ordered him to leave the facility before his scheduled shift ended.[10]

We agree with the judge that Garner's suspension was not based on the May 12 guest complaint but rather, as evidenced by the contemporaneous written statements of all individuals who attended the May 13 meeting, resulted from Garner's refusal to complete a statement in a disciplinary interview without his requested representative.[11]

Further, contrary to the dissent, we agree with the judge that Garner suffered an "adverse employment action" within the meaning of *Wright Line.*[12] Under *Wright Line*, the General Counsel must show by a preponderance of the evidence that, in response to protected activity, "the individual's prospects for employment or continued employment have been diminished or that some legally cognizable term or condition of employment has changed for the worse." *Northeast Iowa Telephone Co.*, 346 NLRB 465, 476 (2006). The General Counsel satisfied that burden here. The Respondent suspended Garner pending investigation in direct response

[8] Wiedmeyer's written statement also characterized Garner's demeanor in the May 13 meeting as argumentative, which the judge expressly discredited. Thus, our dissenting colleague's reliance on Wiedmeyer's characterization of Garner's demeanor at the meeting is misplaced.

[9] 420 U.S. at 256.

[10] Our dissenting colleague cites and relies on Wiedmeyer's testimony that he ceased questioning Garner once Garner requested a steward. However, Garner's credited testimony and the contemporaneous written statements by Garner, Sanchez, and Wiedmeyer himself, discussed supra, all indicate that Wiedmeyer continued to request that Garner complete the statement or face suspension. Clearly, the Respondent's request that Garner complete a statement relating to an incident that could lead to discipline was part of its investigatory interview of Garner.

[11] The judge necessarily credited those documents and Garner's testimony when finding that Garner's request for a steward triggered the SPI. Indeed, the SPI itself supports this finding as it lists May 13—the date of the investigatory meeting—as the incident under investigation, not the May 12 guest complaint.

[12] 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

to his protected conduct. Garner effectively was removed from the workplace; indeed Wiedmeyer personally followed him out of the building to ensure his departure.[13] And, at least while the Respondent's investigation was pending, he faced the prospect of further disciplinary action, including discharge ("separation from the company"), according to the terms of the SPI itself. That Garner ultimately suffered no loss of wages as a result of the SPI and that no other discipline was imposed, does not negate the fact of the suspension (removal from the workplace) or its chilling effect on the exercise of the *Weingarten* right, given the potential for discipline or discharge.[14] Under these circumstances, there is little doubt that Garner's suspension constituted an adverse employment action.

In sum, we find that the Respondent summoned Garner to an investigatory interview where it pressed him to complete a statement even after he requested union representation. When Garner refused to provide the statement without his union representative, he was suspended. We therefore affirm the judge's finding that, by these actions, the Respondent violated Section 8(a)(1) of the Act.

[13] Our colleague asserts that, as a matter of policy, the Board should allow employers to remove employees from the workplace where, "the employer has the impression that the employee's state of mind is such that an immediate return to the workforce would likely result in disruption of the employer's business, damage to customer relations, or further incidents that might themselves require discipline." First, we note that the predicate on which our colleague relies was expressly missing here. The judge credited Garner's testimony that he did not become agitated or angry during the interview. Second, our colleague's approach would fail to properly account for situations, like here, where an employer removes an employee from the workplace precisely because the employee engaged in protected activity. Such removals, even if they do not ultimately result in written disciplinary action or loss of pay, serve to reinforce to employees the employer's ability to quell protected activity at its source.

Furthermore, we disagree with our colleague that our decision here creates a situation where an employee's invocation of rights under *Weingarten* "automatically shuts down an employer's entire ability to investigate a workplace issue." As set forth above, the Supreme Court delineated lawful avenues that an employer can follow in response to an employee's request for representation. The Respondent here followed none of these courses of action and suspended Garner solely because he requested representation.

[14] Indeed, the SPI by its own terms stated it is a "process . . . to remove you from the work place in order to investigate a serious situation or policy infraction." It is clear that the prospect of discipline for engaging in Sec. 7 activity has a coercive chilling effect, whether or not discipline is imposed. See, e.g., *Murtis Taylor Human Services Systems*, 360 NLRB 546, 546 fn. 3, 15 (2014) (finding employer's disciplinary investigation of zealous *Weingarten* representative unlawful, citing chilling effect on representation, despite absence of actual discipline); *Banner Estrella Medical Center*, 362 NLRB 1108, 1112 (2015) (discussing potential chilling effect of employer's disciplinary-confidentiality requirement that included possibility of discipline).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Bellagio, LLC, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Replace paragraph 1(d) with the following.

"(d) Instructing employees that they cannot discuss disciplinary matters with other employees."

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

MEMBER JOHNSON, dissenting in part.

The facts of this case are straightforward. A customer at the luxury hotel Bellagio complained that bell person Gabor Garner had treated him rudely. Garner's supervisor, Front Services Supervisor Brian Wiedmeyer, asked Garner for a statement describing the incident from Garner's perspective. Garner declined to write a statement and requested a union representative. Wiedmeyer asked Garner no further questions, but instead told Garner that he was free to bring in a union representative. Wiedmeyer also attempted to find a representative for Garner by calling the Respondent's employee relations department. When no representative could be found, Wiedmeyer ended the interview and issued to Garner a Suspension Pending Investigation (SPI). The entire interview lasted no more than 20 minutes. The next day, in the presence of a union representative, Garner completed a statement about the customer complaint. The Respondent gave Garner a verbal warning for his conduct towards the customer and reimbursed him for all wages lost during the SPI. My colleagues find, on these facts, that the Respondent violated Section 8(a)(1) of the Act by refusing to allow Garner to be represented by a union representative and by suspending him because of his refusal to participate in an investigatory interview without union representation. I respectfully dissent.[1]

It is well established under *Weingarten*[2] that when an employee who is represented by a union requests the presence of a union representative at an investigatory interview, which the employee reasonably believes may result in discipline, the employer must either grant the request, discontinue the interview, or offer the employee the choice of proceeding without union representation, or

[1] I join my colleagues in finding that the Respondent violated Sec. 8(a)(1) when Wiedmeyer instructed Garner not to discuss the investigation with other employees, although, as discussed below, I do not agree with my colleagues' characterization of the SPI as discipline. I also join my colleagues in affirming the judge's other rulings, findings, and conclusions.

[2] *NLRB v. J. Weingarten*, 420 U.S. 251 (1975).

foregoing any benefit that might have been derived from the interview.[3] Here, the judge concluded that the Respondent violated Section 8(a)(1) by refusing to allow Garner to be represented by a union representative. But even construing the Respondent's unsuccessful attempt to procure a representative as a refusal to allow one to be present, an employer does not act unlawfully by refusing to allow union representation, if the employer does not attempt to proceed with the interview after the employee requests representation.[4]

My colleagues find that rather than discontinuing the interview after Garner requested a union representative, Wiedmeyer continued to press Garner to complete a statement after Garner's request. But the judge did not find that Wiedmeyer sought to continue the interview, and both Wiedmeyer and Garner testified that Wiedmeyer asked no further questions after Garner's request. My colleagues rely on contemporaneous written accounts by Wiedmeyer, Max Sanchez, and Garner to find that Wiedmeyer continued to press Garner for a statement after Garner requested representation. But those accounts establish no such thing. Wiedmeyer's statement says:

> I returned to inform [Garner] I could not locate his representation [sic] and he would have to. He again refused and refused to fill out a statement regarding the issue. I placed him on SPI so he could not return to work until the investigation had been completed. I explained the three possible outcomes of SPI, he signed, had no questions and left.

As my colleagues observe, Sanchez' and Garner's statements establish that Wiedmeyer informed Garner that Garner would be suspended pending investigation if he continued to refuse either to locate a representative for himself or to fill out a statement, and that Wiedmeyer thereafter did, in fact, suspend Garner pending investigation. These consistent contemporaneous accounts establish that Garner refused, throughout the interview, either to locate a representative for himself or to fill out a statement; they do not establish that Wiedmeyer sought to continue the interview after Garner's request. Accordingly, I cannot conclude that the General Counsel has carried his burden of proof on this issue, especially in the light of the unambiguous testimony to the contrary from both Wiedmeyer and Garner. Because Wiedmeyer discontinued the interview when Garner requested representation, the Respondent did not violate Garner's *Weingarten* right.

Nor can I join my colleagues in finding that the Respondent violated Section 8(a)(1) by issuing the SPI. Under *Wright Line*[5] the General Counsel must make an initial showing that an employee's protected conduct was a motivating factor in an employer's decision to take an adverse action against the employee.[6] Here, the General Counsel failed to make the threshold showing that the Respondent took an adverse action against Garner.[7] My colleagues adopt the judge's summary finding that the SPI was disciplinary because it states that the investigation of which it is a part may result in discipline. But they fail to acknowledge that the SPI also states that one outcome of the investigation may be a return to work without disciplinary action and with compensation for any missed worktime. This is consistent with the title of the SPI; it is a suspension "pending investigation," not a suspension levied to make some disciplinary point. Specifically here, the SPI expressly states, in its first paragraph, that it is not a disciplinary action, but rather a part of the Respondent's investigatory process. My colleagues do not acknowledge record evidence that the Respondent neither considers SPIs disciplinary nor retains any record of them in employee personnel files. In this regard, Wiedmeyer's own contemporaneous account of the purpose of the SPI was "so [Garner] could not return to work *until the investigation had been completed*." (Emphasis added.) Thus, the SPI served merely as a functional pause in the investigation so that a union representative could be obtained and a statement from Garner could then be lawfully taken, not as a sign of the Respondent's displeasure. That neither Garner nor the Respondent knew what the outcome of the investigation would be at the time the SPI was issued does not mean that the SPI constitutes an adverse employment action: an investigation is not itself discipline, whether or not discipline ultimately ensues.[8] Finally, the Respondent levied no monetary penalty or detriment against Garner;

[3] E.g., *Washoe Medical Center*, 348 NLRB 361, 361 fn. 5 (2006) (citing *Consolidated Freightways Corp.*, 264 NLRB 541, 542 (1982)).

[4] *Weingarten*, 420 U.S. at 258 ("The employer has no obligation to justify his refusal to allow union representation, and despite refusal, the employer is free to carry on his inquiry without interviewing the employee.").

[5] 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[6] See, e.g., *Mesker Door, Inc.*, 357 NLRB 591, 592 (2011).

[7] The General Counsel does not allege that the verbal warning regarding Garner's conduct towards the customer was unlawful.

[8] The terms of the SPI itself, read in context, could not be clearer in this regard: "*This is not a disciplinary action*; it is a process that Bellagio utilizes to remove you from the work place in order to investigate a serious situation or policy infraction in which you *may have been* involved." (Emphasis added.) This language clearly indicates that the SPI does not prejudge the result of the investigation of which it is a component.

it paid him for the work he missed because of the SPI. On this record, it is clear that the SPI was not disciplinary, and Garner suffered no adverse consequence because of its issuance.[9] Therefore, the General Counsel has not made the initial showing required to find a violation under *Wright Line*.

As a policy matter, the Board would better fulfill our mission of promoting industrial peace by permitting an employer in a situation like this—where an employee has been accused of a serious infraction and circumstances beyond the control of the employer prevent an immediate investigatory interview—to send the employee home pending the prompt completion of the investigation. For example, the immediate return to the workplace of an angry employee could result in disruption of the employer's business, damage to customer relations, or further incidents that might themselves require discipline. An employer should be allowed to make that judgment call as to an employee's state of mind.[10] I regret that my colleagues' failure to recognize commonsense boundaries for *Weingarten* obligations here have transformed them into an unworkable stricture for employers that are faced with the sudden need to investigate a workplace incident, a scenario which happens all too frequently in the modern world. This unfortunate outcome makes *Weingarten* a stumbling block to industrial peace, rather than its intended guarantor. I respectfully dissent.

[9] I vehemently disagree with my colleagues in their finding that either a mere instruction to an employee to leave the workplace or the "prospect of discipline" will have "a coercive chilling effect, whether not discipline is imposed." This is simply circular logic that would make any continuation of a typical investigation—which frequently involves an instruction to the subject employee to go home and uniformly involves at least a prospect of discipline—an automatic adverse action. *Weingarten* cannot be interpreted so that the invocation of the right automatically shuts down an employer's entire ability to investigate a workplace issue. *Weingarten* protects the employee from involuntary personal involvement in an investigatory interview that could result in discipline; the Supreme Court never intended that it be an overall paralytic to investigations.

[10] In this particular case, as my colleagues point out, the judge specifically credited employee Garner's testimony that he was composed and able to work. But contemporaneous written accounts, which the judge did not specifically discredit, show that management had at least a reasonable basis for believing differently: for example, Garner, during the interview, "turned very argumentative," "rudely had asked the same question several times and in a high tone of voice," and then "became even more agitated."

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 deny your request to be represented by a union representative of your choice, while completing witness statement forms or participating in investigatory interviews, which you have reasonable cause to believe will result in discipline.

WE WILL NOT issue you a Suspension Pending Investigation (SPI) or otherwise discipline you for refusing to complete a witness statement form or participate in a disciplinary interview, which you have reasonable cause to believe will result in discipline, where the SPI or other discipline was because of your refusal to complete the witness statement form or participate in the interview without union representation.

WE WILL NOT engage in surveillance of your union or other protected concerted activities.

WE WILL NOT instruct employees that they cannot discuss disciplinary matters with other employees.

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

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful suspension pending investigation that we issued to Gabor Garner, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the suspension pending investigation will not be used against him in any way.

BELLAGIO, LLC

The Board's decision can be found at www.nlrb.gov/case/28-CA-106634 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Nathan Higley, Larry A. Smith, and *Stephen Wamser, Esqs.*, for the General Counsel.

Paul Trimmer (Jackson Lewis, LLP) and *Nathan Lloyd (MGM Resorts International), Esqs.*, for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT A. RINGLER, Administrative Law Judge. Between January 6 and 8, 2014, these cases were heard in Las Vegas, Nevada. The complaint alleged that the Bellagio, LLC (the Bellagio or Respondent) violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by, inter alia: engaging in, and creating the impression of, surveillance; retaliating against Najia Zaidi because of her protected concerted activities; denying Gabor Garner's request for union representation during a disciplinary interview, and then suspending him because he made this request; and orally promulgating a rule prohibiting disciplinary discussions.

On the entire record, including my observation of the demeanor of the witnesses, and after thoroughly considering the parties' briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Bellagio has been a limited liability company, with an office and place of business in Las Vegas, Nevada, where it operates a luxury hotel and casino.

Annually, its gross revenues exceed $500,000, and it purchases goods valued at more than $50,000 directly from points located outside of the State of Nevada. Based upon the foregoing, it admits, and I find, that it is an employer engaged in commerce under Section 2(2), (6), and (7) of the Act. It further admits, and I find, that the Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226, and Bartenders Union, Local 156, affiliated with UNITE HERE (the Union) is a labor organization under Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Bellagio, an elite Five Diamond hotel and casino, is located on the Las Vegas strip.[1] The Union represents its food servers, waiters, bartenders, bellmen, dispatchers, valets, and other employees (the unit). (Jt. Exh. 1.) The parties enjoy a stable, long-term collective-bargaining relationship, which has been memorialized in multiple consecutive contracts.

A. Garner Incident

Gabor Garner, a unit bell man, is generally the first and last employee to interact with his assigned guests. He is, as a result, expected to foster strong first and last impressions, which are commensurate with the Bellagio's Five Diamond rating.

1. May 12, 2013[2]

A guest checked in at the bell desk; he was greeted by Garner, who handed him a luggage claim check. The guest alleged that, after tendering the claim check, Garner rudely hovered over him, in an effort to coax a gratuity. The guest, who was offended by his lack of subtlety, responded by withholding a tip, which allegedly caused Garner to yell, "appreciate it," in close proximity. The guest then filed a formal complaint with management. (GC Exh. 2.)

2. May 13 disciplinary interview

Front Services Supervisor Brian Wiedmeyer,[3] summoned Garner to an investigatory meeting concerning the complaint. Max Sanchez, another front services supervisor, served as a witness. This meeting occurred roughly 15 minutes before the end of Garner's 7 a.m. to 3 p.m. shift. (See GC Exh. 4.) When the meeting began, Garner asked whether he might be disciplined; when Wiedmeyer responded affirmatively, he invoked his "*Weingarten* rights."

a. Bellagio's position

Wiedmeyer testified that, because he did not possess a Union steward list and Garner failed to identify a specific representative, he asked employee relations for help. He stated that they, unfortunately, were also unable to locate a steward.[4] He averred that Garner replied that, if he could not find a steward, he would return to work. He contended, however, that he was reluctant to permit him to return to work because he had become agitated during their meeting, and seemed unable to continue serving guests.[5] He related that, consequently, he placed him on a suspension pending investigation (SPI). His written statement about the incident reported that:

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[1] Less than half percent of lodgings are awarded Five Diamond status by the American Automobile Association.

[2] All dates herein are in 2013, unless otherwise stated.

[3] He supervises the valets, dispatchers, and bellmen (i.e., roughly 235 workers).

[4] Susan Moore, employee relations manager, testified that she does not possess a current union shop steward list, although she generally knows who serves in this role. She added, however, that her colleagues do not share her awareness. She related that she was unavailable to speak to Wiedmeyer on May 13.

[5] Specifically, he testified that "he was beyond what I have seen him on an agitation scale." (Tr. 50–51.)

> I informed [Employee Relations] . . . that I would have to SPI . . . [Garner] because he stated that he was going back to work without filling out a statement. I . . . inform[ed] . . . [him] that I could not locate his representation and he would have to. He again refused . . . to fill out a statement. . . . I placed him on SPI so he could not return to work until the investigation had been completed.

(GC Exh. 3.) Although this statement also described Garner as "argumentative," it conspicuously failed to cite his agitation as necessitating the SPI. (See also GC Exh. 4 (Sanchez' statement).) His account, instead, linked Garner's refusal to "fill out a statement" to the SPI. He confirmed that he did not ask Garner any other questions, once he invoked his *Weingarten* rights. He said that the meeting ended at 2:50 p.m., i.e., 10 minutes before Garner's shift ended.

Sanchez recalled Wiedmeyer telling Garner that:

> [T]he meeting was over because he wanted representation and [none] . . . could be found [and] . . . we would have to SPI him.

(Tr. 97.)

Front Services Director Charles Berry indicated that Garner is somewhat emotional and periodically loses his composure. He agreed, however, that he could not recall an example of another employee being issued an SPI, under similar circumstances. (Tr. 457–58.)

b. Garner's contentions

Garner recounted Wiedmeyer showing him the complaint. He recalled telling him to ask employee relations for a steward list, and suggesting that such a list might also be posted in Berry's office. He said that Wiedmeyer placed a statement in front of him and told him to fill it out, which he declined to do without a steward. He added that Wiedmeyer told him that he would simply SPI him and figure it out later. He said that Sanchez and Wiedmeyer eventually left the room to call employee relations and then issued the SPI upon returning. He denied becoming upset, or being emotionally unable to return to serving guests.

c. SPI

The SPI provided:

> You are being placed on Suspension Pending Investigation effective **05/13/13**. This is not a disciplinary action; it is a process that Bellagio utilizes to remove you from the workplace **in order to investigate a serious situation or policy infraction** in which you may have been involved. **It is also utilized if you have reached the final step in the progressive disciplinary process**. . . .
>
> [Y]ou are not permitted on property except to attend your meeting with Employee Relations. . . . [W]e ask that you treat this as a confidential matter. . . .
>
> Upon the completion of the investigation . . . , one of the following . . . will occur:
>
> 1. You will be returned to work without disciplinary action . . . ; or
> 2. You will be returned to work with disciplinary action if warranted . . . ; or
> 3. You will be separated from the company. . . .

(GC Exh. 25) (emphasis added).

Moore described an SPI as a "holding pattern," which requires a closed investigation before an employee can be returned to work. (Tr. 631.) She stated that SPIs are generally not included in personnel files. She denied retaining records of prior SPIs.[6]

d. Credibility resolution

Because Wiedmeyer testified that Garner's irate state prompted the SPI, and Garner insisted that he was composed and able to work, I must make a credibility finding. I credit Garner. First, if he were truly that irate, he would have received independent discipline, which did not occur.[7] Second, Wiedmeyer's and Sanchez' written statements, which were prepared almost contemporaneously, conspicuously fail to mention that his agitation caused the SPI. Moreover, Wiedmeyer's written statement and Sanchez' testimony expressly provided that his *Weingarten* request and their connected inability to continue the meeting caused the SPI. (See GC Exh. 3; Tr. 97.) Finally, Garner possessed a credible demeanor.

3. Events immediately following the investigatory meeting

Wiedmeyer indicated that, after issuing the SPI, he told Garner to depart. He said that, shortly thereafter, he observed him lingering in the break area recounting his tale to six coworkers. He said that, when he asked him to leave, Garner queried whether he was now prohibited from talking to his coworkers. He added that, as Garner left, he similarly asked whether he was also precluded from departing with his coworkers. (See also GC Exhs. 3–4.)

Garner recounted the following exchange in the bellmen break area:

> We got out of the office . . . I clocked out. . . . [A]s I was walking through dispatch, ... Russ Meyer [asks] . . ., "What's wrong, Bryan?" [I] . . . said, "I just got SPI[e]d . . . [b]ecause I asked for my steward." At that point, while I was talking, . . . Wiedmeyer comes around the corner . . . [and] in a loud voice . . . says, "You can't . . . discuss . . . that matter in here". . . .
>
> I said, "You can't tell me who to talk to," . . . As I walked out of the door to dispatch and . . . down the hall to leave the hotel, my friend Jason Weinman, . . . a bellman . . . , was waiting for me. . . .

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[6] Although Moore said that the Bellagio issues about 5 percent of its SPIs to employees who are "agitated in a meeting with a supervisor" (Tr. 646), she failed to supply corroborating documentation. Given this omission, as well as her inability to cite a single employee as an example, her testimony on this matter has been afforded little, if any, weight.

[7] As stated, he solely received a verbal warning for the guest complaint.

> [W]hen I looked at Jason, . . . I turned around and . . . Wiedmeyer was standing there . . . glaring. . . . And I said, "Are you going to tell me who I can walk out [with] . . . ?" And he . . . said, "Just move along, gentlemen."

(Tr. 121–23) (grammar as in original).

Russ Meyer, a bellman, recounted Wiedmeyer abruptly appearing in the break area, banning Garner from talking about the SPI, and ordering him to depart. He stated that he saw Wiedmeyer following Garner and Weinman out of the Bellagio. Weinman essentially corroborated Meyer's and Garner's accounts.

I credit Garner's account. He was a highly credible witness, whose testimony was corroborated by Meyer and Weinman, who were also credible. Wiedmeyer also conceded the vast majority of Garner's testimony, including his directive to stop discussing the SPI.

4. May 14 meeting

Garner met with Berry, Moore, and Union Shop Steward Monica Smith.[8] He completed a statement concerning the complaint and received a verbal warning for the tip incident. (See GC Exh. 22; R. Exhs. 14, 15, 17.) He was reimbursed for all wages lost during the SPI.

B. Zaidi Allegations

The Bellagio adheres to payment card industry compliance standards (PCI). (R. Exh. 11.) PCI holds merchants liable for credit card data breaches,[9] and requires the maintenance of a secure computer network.

Zaidi, a unit dispatcher, handles tour reservations, wheelchair rentals and other matters. She often receives guest credit card information that must be handled in accordance with PCI.

1. July 31, 2012 emails

Zaidi sent this email to a client, who was representing a large tour group:

> My boss . . . has assigned . . . this reservation [to me]. . . . I understand . . . [your clients] are interested in the Wind Dancer package. . . . I will look forward to receiving the information . . . to my email address Najia7604@yahoo.com. . . . [P]lease make sure to include the following:
>
> - full name of one of the passengers
> - date of tour
> - number of passengers . . .
> - **credit card to hold the tour. . . .**

(GC Exh. 6) (emphasis added). This email violated PCI, inasmuch as it asked a client to send credit card data to an unprotected, personal, email address. (R. Exh. 11.) Zaidi admitted that the email violated PCI, and conceded that she failed to contemporaneously advise her superiors about her breach.

Within minutes, Zaidi, sent out this remedial email:

> I accidentally gave you the wrong email address (najia7604@yahoo.com). The correct address is nzaidi@bellagioresort.com.

(GC Exh. 7.) Her PCI breach then lay dormant for several months; in the interim, she became enmeshed in a protest over a newly constructed valet break area.

2. December 2012 breakroom protest

On December 3, 2012, Zaidi observed that an exclusive valet break area had been constructed.[10] The exclusion of dispatchers and bellmen from this new break area was seen as an affront by Zaidi, which prompted her to distribute a petition seeking their inclusion.[11] (GC Exh. 5.) Later that day, she told Wiedmeyer about her disappointment; he referred her to Erden Kendigelen, then executive director of hotel operations.[12] She recounted also meeting with Kendigelen that day, and relaying the group's concerns.[13] She recollected his frustration, as he chided her that "we're always trying to do something nice and someone always gets in the way." She said that his mind remained unchanged, and that, when she told him about her petition, he hostilely replied that "he did not care if she had 100 signatures."

3. January 31—anonymous letter and meeting

Kendigelen testified that, upon arriving that morning, he observed that the following anonymous letter had been slipped under his office door:

> Najia Zaidi from the bell desk is not being PCI compliant. Having personal information sent to her personal email is against company policy. . . .

(GC Exh. 9.) The letter attached the July 31, 2012 email that contained her PCI violation, but, oddly, omitted the corrective email that was sent minutes later. To date, it remains a full-blown mystery concerning who placed these documents at Kendigelen's doorstep.

Kendigelen testified that he summoned Zaidi to his office, and presented the letter and incriminating email. He recollected her admitting a PCI violation, but insisting that she sent a prompt remedial email, which he lacked at that point. He added that she then oddly stated that she was uncomfortable speaking with him, which prompted him to close the meeting and forward the matter to employee relations. He related that he took no further role in the investigation.

In response to the suggestion that he surreptitiously drafted the unidentified letter, broke into Zaidi's email account to find the incriminating email and created a hoax about the anonymous package, Kendigelen very credibly denied such wrongdoing or retaliation.[14] He added that, while his office is locked

[8] Smith's attendance was arranged by Moore.

[9] Such data includes account numbers, service codes, names, addresses, phone numbers, and signatures.

[10] Valets received keys for the private area, which had couches, flat screen televisions, and other amenities.

[11] She eventually collected 24 signatures on the petition.

[12] He oversaw day-to-day hotel operations; he is currently a hotel manager for the Ritz Carlton Hotels.

[13] Berry stated that, on January 20, Zaidi also complained to him, and that he relayed her ongoing grievance to Kendigelen.

[14] His credibility was greatly buttressed by the General Counsel's conspicuous, and unexplained, failure to call a witness, who was famil-

when he is not there, the suite area that houses his office is accessible to the cleaning crew and employees who use the suite's shared printer. He, as a result, contended that anyone could have slipped the anonymous letter under his office door.

Zaidi testified that Kendigelen told her that her actions were unacceptable, and referred her case to employee relations. She stated that she firmly believed that he orchestrated the entire investigation, in order to retaliate against her for complaining about the valet break area. She could not, however, explain why he waited 2 months to exact his revenge, or how he might have accessed her email account, which is username and password protected.[15]

4. Berry's assistance

Berry testified that he told Wiedmeyer to help Zaidi access the "vault," which is where the system's old emails are stored; he did this in order to help her find the exculpatory email that would aid her defense.[16] Wiedmeyer helped her and she eventually found the email.[17]

5. Security investigation and followup

a. Investigation

Bethany Young, investigations manager, stated that she investigates fraud and misconduct. She added that she investigated the PCI compliance matter, in order to assess whether Zaidi's violation was only an aberration or ongoing misconduct. She was granted approval by her supervisor and the General Counsel to review Zaidi's email account. She said that:

> [She] look[ed] . . . for anything that did not pertain to business . . . . [She] looked at anything . . . forwarded to her external email, as well as anything . . . of a nature that [demonstrated] . . . a disagreement between her and another employee. . . .

(Tr. 485.) She confirmed that she found Zaidi's exculpatory email, and concluded that her infraction was isolated and discipline was unwarranted.

b. February 3 meeting

Zaidi testified that she met with security employees Scott Reekie and Bernard Davis, and *Weingarten R*epresentative Scott Lykens. She stated that she completed a statement, and was told weeks later that the investigation had closed and she would not be disciplined.

iar with the Bellagio's information technology system (e.g., its chief information officer or designee), who could show that: Kendigelen accessed her email account; or that her account was accessed, when she was not there. Kendigelen was also a very believable witness, who was consistent on direct and cross-examination, and thoughtful in his responses.

[15] She stated that she changes her password every 3 months, and assumed that her supervisor could freely access her email account.

[16] He credibly denied informing Zaidi that Kendigelen had accessed her email system or engineered her investigation.

[17] The General Counsel similarly failed to show that Kendigelen held the ability to access Zaidi's email via the "vault" without her consent, or that someone else might have accessed her "vault" account.

III. ANALYSIS

A. Garner and Zaidi Retaliations

1. Legal precedent

Section 7 affords employees these rights:

> [T]he right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .

29 U.S.C. § 157. Under Section 8(a)(l), it is unlawful for an employer to interfere with these rights. This case involves the Bellagio's alleged interference with: Garner's Section 7 right to seek union assistance during a disciplinary interview without retaliation; and Zaidi's Section 7 right to lodge a collective protest without retaliation.

a. Disciplinary interviews

If an employee reasonably believes that he has been summoned to a disciplinary interview, he may request a union representative. *NLRB v. J. Weingarten*, 420 U.S. 251, 260, 263 (1975). Once such a request is made, the employer retains three options: granting the request; discontinuing the interview; or offering the employee the choice between continuing without representation, or ending the interview and relinquishing any associated benefit. *Consolidated Freightways Corp*., 264 NLRB 541, 542 (1982). However, "the selection of an employee's representative belongs to the employee and the union, in the absence of extenuating circumstances, and as long as the selected representative is available." *Barnard College*, 340 NLRB 934, 935–36 (2003) (citations omitted).

b. Protected concerted activity

The Board construes the term "concerted activities" to include "those circumstances where individual employees seek to initiate or induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 971 (1985), and *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). A conversation constitutes concerted activity when "engaged in with the object of initiating or inducing or preparing for group action or [when] it [has] some relation to group action in the interest of the employees." *Meyers II*, supra, 281 NLRB at 887 (quoting *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964)).

c. Analytical framework

If an employee is disciplined after exercising their Section 7 right to request a *Weingarten* representative, or after engaging in concerted activity, the Board will consider whether such discipline constituted unlawful retaliation under the framework established in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd.

662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).[18] The *Wright Line* standard is as follows:

> [T]he General Counsel must prove by a preponderance of the evidence that [the employee's exercise of their Section 7 right] . . . was a substantial or motivating factor in the adverse employment action. The elements commonly required to support such a showing are . . . protected concerted activity by the employee, employer knowledge of that activity, and . . . [connected] animus on the part of the employer.
>
> If the General Counsel makes the required initial showing, the burden then shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of the employee's union activity. To establish this affirmative defense, "[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity."

Consolidated Bus Transit, 350 NLRB 1064, 1065–1066 (2007) (citations omitted). If the employer's proffered defenses are found to be a pretext, i.e., the reasons given for its actions are either false or not relied upon, it fails by definition to show that it would have taken the same action for those reasons, and there is no need to perform the second part of the *Wright Line* analysis. However, further analysis is required if the defense is one of "dual motivation," that is, the employer defends that, even if an invalid reason might have played some part in its motivation, it would have taken the same action against the employee for permissible reasons. *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 223 (D.C. Cir. 2005).

2. Garner's SPI[19]

The General Counsel demonstrated that the Bellagio violated Section 8(a)(1), when it issued Garner an SPI following his request for a *Weingarten* representative. The General Counsel adduced a strong prima facie case, while the Bellagio failed to prove that it would have issued the SPI in the absence of his *Weingarten* request.

a. Prima facie case

The General Counsel has made a prima facie showing that Garner's SPI was triggered by the exercise of his *Weingarten* rights. First, he engaged in protected activity, when he requested a representative at his disciplinary interview.[20] Second, there was close, almost lockstep, timing between the SPI and Garner's exercise of his *Weingarten* rights. Lastly, Wiedmeyer conceded causation in his written statement. (GC Exh. 3) (stating that he, "informed [Employee Relations] . . . that [he] . . . would have to SPI . . . [Garner] because he stated that he was going back to work without filling out a statement").[21]

b. Affirmative defense

The Bellagio failed to show that it would have issued Garner an SPI,[22] absent the exercise of his *Weingarten* rights. It contended that the SPI was not connected to the exercise of his *Weingarten* rights, but instead, resulted from his agitation during the disciplinary meeting and associated need to be removed from the workplace. This stance is unpersuasive for several reasons. First, Garner credibly testified that he maintained his composure. Second, the SPI was issued at the end of his shift, which meant that he could have cooled off during nonworktime without an SPI. This redundancy suggests invidious intent. Third, the Bellagio failed to specifically identify others, who have been issued SPIs under similar circumstances. Fourth, if Garner genuinely lost control at this meeting, he would have received independent discipline, which was not done. Fifth, the SPI form clearly states that it is only reserved for a "serious situation or policy infraction" or employees at the last disciplinary step, which widely exceeded the bounds of Garner's situation. Lastly, it is plausible that Wiedmeyer became frustrated when Garner derailed his meeting by requesting a steward, and issued the SPI out of such frustration. In sum, the Bellagio's contention that his behavior prompted the SPI is unconvincing.

c. Conclusion

The General Counsel has established that Wiedmeyer issued Garner an SPI because he exercised his *Weingarten* rights. The SPI, as a result, violated Section 8(a)(1).[23] See *Safeway Stores*, 303 NLRB 989, 990 (1991) (where "[t]he nexus between the statutory right and the disc[ipline] . . . is clear," the discipline violates Sec. 8(a)(1)).

3. Zaidi's PCI investigation[24]

The General Counsel has alleged that the Bellagio violated Section 8(a)(1), when it investigated Zaidi's PCI compliance. Specifically, it asserts that the investigatory meetings were designed to retaliate against her valet break area complaints. I find that, although the General Counsel established a prima facie case, the Bellagio persuasively adduced that it would have taken the same action against Zaidi, absent her protected activity.

a. Prima facie case

The General Counsel made a prima facie showing that Zaidi's PCI investigation was triggered by her concerted complaints. Her complaints were protected concerted activity; she led a group complaint about the new break area. She amassed

[18] See *Barnard College*, supra, 340 NLRB at 935–936 (*Weingarten* rights); *Mesker Door*, 357 NLRB 591, 592 fn. 5 (2011) (protected concerted activity).

[19] These allegations are listed under pars. 5(f)–(k), 6, and 7 of the complaint.

[20] Wiedmeyer agreed that the interview was disciplinary in nature, with Garner ultimately receiving a verbal warning for the tip incident.

[21] Sanchez also testified that their inability to find a steward and continue the meeting triggered the SPI. (Tr. 97.)

[22] As a threshold matter, the Bellagio's claim that the SPI was nondisciplinary is flawed, given that the SPI clearly contemplates further disciplinary action or potential separation. (GC Exh. 25.)

[23] Although the complaint avers that the SPI also violated Sec. 8(a)(3), it is unnecessary to address this allegation, given that this allegation would not materially affect the remedy. See *Provider Services Holding, LLC*, 356 NLRB 1434, 1434 fn. 3 (2011).

[24] These allegations are listed under pars. 5(a)–(b), (d)–(e), and 6 of the complaint.

24 signatures on a petition, and voiced the group's complaints to Wiedmeyer, Berry, and Kendigelen. Kendigelen demonstrated animus, when he responded angrily.

b. Affirmative defense

The Bellagio demonstrated that it would have investigated Zaidi's PCI compliance, irrespective of her group complaints. First, the Bellagio has a substantial interest in protecting guest credit card information, which was furthered by a PCI investigation that flowed from an anonymous tip. Second, the General Counsel wholly failed to show that Kendigelen even had access to Zaidi's email, which deeply undercuts its retaliation theory. Specifically, Kendigelen credibly denied such access, and no one contradicted this point.[25] Third, the PCI investigation was innocuous, inasmuch as Zaidi was exonerated, without discipline.[26] Given that it is undisputed that her first email violated PCI policy and that she failed to promptly notify management about this breach, the Bellagio acted benevolently by not issuing even a verbal warning for her failure to promptly notify supervision about her breach.[27] Such latitude does not support retaliation. Fourth, even assuming arguendo that Kendigelen was as Machiavellian as suggested, it then becomes inexplicable that he: would have also failed to delete Zaidi's exculpatory email;[28] would have voluntarily relinquished all control over the investigation, solely on the basis of Zaidi's request; or would waited almost 2 months to retaliate against her. Fourth, given that Zaidi's complaints were relatively minor, it is improbable that Kendigelen, a high-level manager, would been even minimally motivated to retaliate against her. This is particularly true, given that, if caught, he could have suffered serious discipline for creating a hoax and breaking into an email account without authorization.[29] Lastly, the Bellagio voluntarily helped her find exculpatory evidence in the "vault," which is deeply inconsistent with retaliation.

c. Conclusion

The General Counsel failed to show that Zaidi's PCI investigation was retaliatory. The Bellagio persuasively demonstrated that it would have commenced the PCI investigation, irrespective of her protected concerted activity, and that the investigation was conducted in an evenhanded manner.

B. Directive to not Discuss the SPI[30]

The Bellagio violated Section 8(a)(1) when Wiedmeyer told Garner to not discuss the SPI with coworkers. Generally, employers cannot ban their employees from speaking to coworkers about discipline. *Hyundai America Shipping Agency*, 357 NLRB 860 (2011).

C. Surveillance[31]

The Bellagio's surveillance violated Section 8(a)(1). An employer unlawfully "surveils employees engaged in Section 7 activity by observing them in a way that is 'out of the ordinary' and thereby coercive." *Aladdin Gaming, LLC*, 345 NLRB 585, 586 (2005). Indicia of coerciveness, include the "duration of the observation, the employer's distance from employees while observing them, and whether the employer engaged in other coercive behavior during its observation." Id. Wiedmeyer aggressively observed Garner's SPI discourse under the auspices of an invalid SPI, banned such discussion, ousted him from the workplace and hovered as he left.

D. Impression of Surveillance[32]

The Bellagio did not create an unlawful impression of surveillance when it searched Zaidi's emails. Statements or actions by employer agents causing employees to reasonably assume that their protected activities are under surveillance violate the Act. *Flamingo Las Vegas Operating Co.*, 359 NLRB 873 (2013). The Bellagio had legitimate cause to search Zaidi's emails in furtherance of its interest in protecting client credit card data. Its investigation ultimately exonerated Zaidi and was nonretaliatory. These actions, which were handled discreetly, would not reasonably cause someone to presume surveillance.

CONCLUSIONS OF LAW

1. The Bellagio 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.

3. The Bellagio violated Section 8(a)(1) of the Act by

(a) Refusing to allow Garner to be represented by a union representative during an investigatory interview, where he had reasonable cause to believe that discipline could result.

(b) Issuing Garner an SPI after being summoned to an investigatory interview, where he had reasonable cause to believe that discipline might result, and where the SPI was issued because he refused to participate in the disciplinary interview without union representation.

(c). Engaging in surveillance of employees' union or protected concerted activities.

(d) Promulgating, maintaining, and enforcing an oral rule prohibiting employees from discussing disciplinary matters under investigation by employee relations.

4. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Bellagio has not violated the Act except as set forth above.

REMEDY

Having found that the Bellagio has engaged in certain unfair labor practices, it must be ordered to cease and desist and to

[25] It is equally probable that a disgruntled coworker could have set up Zaidi, as opposed to Kendigelen.

[26] Moreover, Investigations Manager Young testified that such investigations are routine.

[27] It is likely that, if the Bellagio truly sought to retaliate against her, it would not have overlooked this obvious disciplinary venue.

[28] Simply put, why would Kendigelen have undergone this time-consuming charade only to leave Zaidi with an ironclad defense?

[29] Young testified that approval to access a coworker's email account is arduous, and requires the General Counsel's consent.

[30] These allegations are listed under pars. 5(l) and 6 of the complaint.

[31] These allegations are listed under pars. 5(m) and 6 of the complaint.

[32] These allegations are listed under pars. 5(c) and 6 of the complaint.

take certain affirmative action designed to effectuate the policies of the Act. The Bellagio shall remove from its records any reference to Garner's SPI, give him written notice of such expunction, and inform him that its unlawful conduct will not be used against him as a basis for future discipline.[33] Finally, the Bellagio shall distribute appropriate remedial notices electronically via email, intranet, internet, or other appropriate electronic means to unit employees at the facility, if it customarily communicates with those workers in this manner, in addition to the traditional physical posting of paper notices. See *J. Picini Flooring*, 356 NLRB 11 (2010).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[34]

ORDER

The Respondent, Bellagio, LLC, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Denying employees' requests to be represented by union representatives of their choosing at investigatory interviews, when such employees have reasonable cause to believe that discipline might occur.

(b) Issuing employees an SPI or other discipline after being summoned to investigatory interviews, where they possess reasonable cause to believe that discipline might occur, and where the SPI or other discipline was issued because of their refusal to participate in the disciplinary interview without union representation.

(c) Engaging in surveillance of employees' union or other protected concerted activities.

(d) Promulgating, maintaining and enforcing an oral rule prohibiting employees from discussing disciplinary matters under investigation by employee relations.

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

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

(a) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful SPI, and within 3 days thereafter notify Garner in writing that this has been done and that such discipline will not be used against him in any way.

(b) Within 14 days after service by the Region, physically post at its Las Vegas, Nevada facility, and electronically send and post via email, intranet, internet, or other electronic means, if it customarily communicates with the unit electronically, to its unit employees who were employed at its Las Vegas, Nevada facility at any time since May 13, 2013, copies of the attached notice marked "Appendix."[35] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Bellagio's authorized representative, shall be physically posted by the Bellagio 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 Bellagio 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 Bellagio has gone out of business or closed the facility involved in these proceedings, the Bellagio shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by it at the facility at any time since May 13, 2013.

(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.

[33] A full make-whole remedy is not warranted herein, given that he has already been reimbursed for lost wages.

[34] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[35] 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."