Aqua-Aston Hospitality, LLC d/b/a Aston Waikiki Beach Hotel and Hotel Renew *and* UNITE HERE! Local 5 Cases 20–CA–154749, 20–CA–157769, 20–CA–160516, and 20–CA–160517

April 10, 2017

DECISION AND ORDER

BY ACTING CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

On May 31, 2016, Administrative Law Judge Mara-Louise Anzalone issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief. The Respondent also filed a reply brief.

The National Labor Relations 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 as modified below[2] and to adopt the recommended Order as modified.[3]

AMENDED CONCLUSIONS OF LAW

Insert the following as Conclusion of Law 3(d).

"(d) threatening employees with unspecified reprisals for handbilling in nonwork areas."

ORDER

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

1. Insert the following as paragraph 1(e) and reletter the subsequent paragraph.

"(e) Threatening employees with unspecified reprisals for handbilling in nonwork areas."

2. Substitute the following for paragraph 2(b).

"(b) Within 14 days after service by the Region, post at its facility in Honolulu, Hawaii copies of the attached notice marked "Appendix" in English, Ilocano, and Tagalog.[4] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other

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[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.

In adopting the judge's finding that the Respondent failed to establish that it held a good-faith belief that discriminatees Edgardo Guzman and Santos "Sonny" Ragunjan engaged in misconduct, we note that the record does not support that the employees' solicitation activity would have constituted misconduct under the Respondent's handbook policies. In addition, we do not rely on the judge's citation to *Clear Pine Mouldings*, 268 NLRB 1044 (1984), enfd. 768 F.2d 148 (9th Cir. 1985).

In finding that the Respondent, through Vice President of Operations Gary Ettinger, violated Sec. 8(a)(1) of the Act, we rely solely on the judge's credited account that Ettinger told employees: (1) to stop the rallies or they would lose work; (2) to stop bothering their coworkers about the Union at home or the police would get involved; (3) that they were lucky to have jobs; and (4) that they were welcome to apologize to him.

Acting Chairman Miscimarra agrees with his colleagues that Ettinger violated Sec. 8(a)(1) by inviting employees to apologize to him for their union activity. He finds, however, that the General Counsel did not otherwise sustain his burden of affirmatively showing that Ettinger made any specific statements that would objectively be understood by a reasonable employee to prohibit protected conduct. Rather the General Counsel presented—and the judge relied upon—general employee testimony that was more likely to reflect employees' subjective impressions of Ettinger's message than reliably to report what he actually said. Acting Chairman Miscimarra finds the judge's conclusions in this respect further undermined by the importance that the judge attached to employees' supposed inability to understand Ettinger's language and to Ettinger's position within the Company. Additionally, Acting Chairman Miscimarra does not agree with or rely on the judge's finding that the lower lobby was a nonwork area. See *Sheraton Anchorage*, 362 NLRB No. 123, slip op. at 5 (2015) (Member Miscimarra, concurring in part and dissenting in part). Accordingly, Acting Chairman Miscimarra affirms the judge's conclusion that the Respondent violated Sec. 8(a)(1) by threatening employees with unspecified reprisals for handbilling in nonwork areas solely because the record supports the judge's finding that the Respondent's threat related to the entire property, not just the lower lobby.

[2] We have amended the judge's conclusions of law to conform to her unfair labor practice findings.

[3] We shall modify the judge's recommended Order to conform to her unfair labor practice findings and provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010), and substitute a new notice to conform to the Order as modified.

[4] 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."

material. If 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 May 19, 2015."

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

Dated, Washington, D.C. April 10, 2017

Philip A. Miscimarra, Acting Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act 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 discipline you for engaging in union and/or protected activity.

WE WILL NOT order you to cease engaging in union and/or protected activity.

WE WILL NOT threaten you with discharge for engaging in union and/or protected activity.

WE WILL NOT ask you to disclose your feelings about the union.

WE WILL NOT threaten you with unspecified reprisals for handbilling in nonwork areas of the Hotel properties.

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

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful written warnings issued to Edgardo Guzman and Santos "Sonny" Ragunjan, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the written warnings will not be used against them in any way.

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

The Board's decision can be found at www.nlrb.gov/case/20-CA-154749 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.

Scott E. Hovey, Jr. and *Jeff F. Beerman, Esqs.,* for the General Counsel.

Robert S. Katz and *Christine K. David, Esqs. (Torkildson Katz Moore Hetherington & Harris)* for the Respondent.

Jennifer Cynn, Esq. for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARA-LOUISE ANZALONE, Administrative Law Judge. I heard this case on February 2 through February 5, 2016, in Honolulu, Hawaii. This case was tried following the issuance of an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (the Complaint) by the Regional Director for Region 20 of the National Labor Relations Board (the Board) on October 28, 2015. The Complaint was based on a number of original and amended unfair labor practice charges, as captioned above, filed by UNITE HERE! Local 5 (Local 5, the Union or Charging Party). The General Counsel alleges that Respondent Aqua-Aston Hospitality, LLC d/b/a Aston Waikiki Beach Hotel and Hotel Renew (Respondent) violated Section 8(a)(3) and (1) of the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, et. seq. (the Act). The Respondent filed

a timely answer to the Complaint denying the commission of the alleged unfair labor practices.

At trial, all parties were afforded the right to call, examine, and cross-examine witnesses, to present any relevant documentary evidence, to argue their respective legal positions orally, and to file post-hearing briefs.[1] Post-hearing briefs were filed by Respondent and the General

Counsel, and each of these briefs has been carefully considered.[2] Accordingly, based upon the entire record herein, including the posthearing briefs and my observation of the credibility of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges and the evidence establishes that Respondent, a limited liability company, is engaged in the business of operating hotels, with a place of business in Honolulu, Hawaii, where it operates and manages the Aston Waikiki Beach Hotel and Hotel Renew. The evidence establishes, the parties admit, and I find that, in conducting its business operations, Respondent derived gross revenues in excess of $500,000, and also purchased and received at its Honolulu facility goods valued in excess of $5000 directly from points located outside the State of Hawaii. It is alleged, Respondent admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and further that the Union is a labor organization within the meaning of Section 2(5) of the Act.

Based on the foregoing, I find that this dispute affects commerce and that the National Labor Relations Board (the Board) has jurisdiction of this case, pursuant to Section 10(a) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Respondent's Operations and the Union Organizing Campaign

Respondent manages and operates two adjacent hotels—he Aston Waikiki Beach Hotel and Hotel Renew—in Waikiki, a popular tourist area in Honolulu. Respondent operates the properties as a single entity (the Hotel). Respondent's executive vice president of operations, Gary Ettinger (Ettinger), has overall responsibility for operations; the Hotel is managed by General Manager Mark DeMello (DeMello); reporting to DeMello is Rooms Division Manager Janine Webster (Webster). Until her retirement in October 2015, Valina Haines (Haines) served as Respondent's senior vice president of human resources.

It is undisputed that, beginning in February 2015,[3] Charging Party Local 5 began an organizing campaign at the Hotel, which involved numerous Union-sponsored rallies being held outside the two, adjacent Hotel properties. The allegations in this case concern Respondent's reaction to this campaign.

B. The Written Warnings

The General Counsel alleges that, on June 30, Respondent disciplined maintenance engineer Edgardo Guzman (Guzman) and utility housekeeper Santos "Sonny" Ragunjan (Ragunjan) for engaging in union activity. The discriminatees were each issued a written warning for their conduct in soliciting a third employee, utility housekeeper Dany Pajinag (Pajinag), to sign a union authorization card and requesting him to have his picture taken for a union flyer. Respondent maintains that it disciplined the discriminatees after making a good-faith—and ultimately correct—determination that they had engaged in serious misconduct. According to Respondent's witnesses, Pajinag complained that Guzman and Ragunjan had repeatedly interfered with his work. Respondent contends that its subsequent investigation disclosed that the two men had engaged in an ongoing campaign of harassment that had distracted Pajinag from his work, and that Ragunjan had physically threatened Pajinag.

While it is undisputed that the June 30 written warnings resulted from Pajinag's complaints, the testimony regarding the substance of these complaints, as well as Respondent's response, varied widely both in substance and relative credibility.[4] For the reasons stated below, I find that Respondent's managers and officials did not in fact hold an honest belief that Guzman and Ragunjan had engaged in serious misconduct and therefore find that the written warnings violated the Act.

1. Factual background

a. Respondent's policies

Respondent's employee handbook sets forth various bases for discipline, including the following:

> (Rule #3) Interference with others in the performance of their jobs, horseplay, or disorderly conduct while on working time on Company premises.
>
> (Rule #8) Threatening, fighting or engaging in any act of physical aggression (as well as any attempt or threat to engage in a fight or to provide a fight), either by words or actions.

(R. Exh. 9 at 37–38.) Respondent maintains a workplace violence policy whereby it pledges to "promptly and thoroughly investigate all reports of threats of (or actual) violence . . ." and explicitly retains the right to "suspend employees, either with

[1] Abbreviations used in this decision are as follows: "Tr." for transcript; "GC Exh.__" for General Counsel's Exhibit; "R. Exh. __" for Respondent's Exhibit; "GC Br. at __" for the General Counsel's post-hearing brief and "R. Br. at __" for Respondent's post-hearing brief.

[2] On February 29, 2016, I granted counsel for the General Counsel's unopposed motion to correct the transcript, which was filed the day prior. The record is therefore amended to reflect the proposed changes set forth in that motion.

[3] All dates are in 2015, unless otherwise indicated.

[4] I have based my credibility resolutions on consideration of a witness' opportunity to be familiar with the subjects covered by the testimony given; established or admitted facts; the impact of bias on the witness' testimony; the quality of the witness' recollection; testimonial consistency; the presence or absence of corroboration; the strength of rebuttal evidence, if any; the weight of the evidence; and witness demeanor while testifying and the form of questions eliciting responses. Credibility findings need not be all-or-nothing propositions, and it is common for a fact finder to credit some, but not all, of a witness' testimony. *Daikichi Sushi*, 335 NLRB 622, 622 (2001).

or without pay, pending investigation." Id. at 50. Haines confirmed that Respondent takes workplace threats of physical harm seriously.

b. Pajinag's complaints

According to Respondent's witnesses, Pajinag initially complained to his supervisor, executive housekeeper, Marissa Cacacho (Cacacho). She testified that on May 22, he told her that Ragunjan had approached him the day before while he was working and invited him to have his picture taken and sign a union authorization card. According to Cacacho, Pajinag said that Ragunjan had bothered him several times previously and was interfering with his work. She further testified that, on June 9, Pajinag made similar complaints about Guzman, claiming that, on June 5 and June 9, Guzman had solicited him to sign a union authorization card and to have his picture taken and that he was having trouble concentrating on his job. Pajinag submitted handwritten statements regarding the events of May 21, June 5 and June 9. In each statement, he indicated that the incident he was reporting was not the first of its kind; Guzman, he wrote "always bother[ed]" him and on May 21, Ragunjan asked him to sign a Union authorization card "again." (GC 13, R 13.)

Pajinag's testimony regarding his May 22 and June 9 reports to Cacacho stood in stark contrast to Cacacho's version. First, he adamantly denied that he told her that his work was being interrupted or that he was unable to concentrate, due to being bothered or distracted by either Ragunjan or Guzman. Asked if he had told Cacacho that there had been other, prior incidents with Ragunjan, he initially stated unequivocally that he had not. After counsel pointed out that his written complaint dated May 22 referenced Ragunjan bothering him "again," he changed his story, stating, "I cannot remember what I told [Cacacho]." (Tr. 594.) With respect to Guzman, Pajinag initially could not recall whether he told Cacacho about any prior incidents, and (referring to his written statement), merely stated, "[w]hatever is within there that's what I told her." When reminded that his statement said Guzman "always bothers me," he suddenly recalled, "I told [Cacacho] that Edgar [Guzman] has not just bothered me once or twice." Asked for specifics as to what he told Cacacho, his memory failed again, and he stated, "I don't know. I forgot already." (Tr. 598–600.)

c. Respondent's investigation and the loading dock incident

Respondent's witnesses testified that, after each of Cacacho's meetings with Pajinag, Cacacho reported to her superiors Webster and DeMello and provided them with Pajinag's handwritten statement. According to Respondent, Pajinag's June 9 complaint spurred it to investigate his complaints against Ragunjan and Guzman. General Manager DeMello and Rooms Division Manager Webster took charge. As Webster explained, the decision to investigate was based on their belief that Pajinag was explicitly complaining that Guzman and Santos Ragunjan's conduct was "distracting him from completing his assignments" and that this "harassment or interference" had occurred numerous times. (Tr. 805, 811.)

(i) Guzman's June 10 interview

On June 10, Webster and DeMello interviewed Guzman for approximately 15 minutes. The testimony regarding this meeting was relatively consistent. DeMello asked Guzman if he had ever asked someone to take a picture for any nonwork related purposes during work hours and worktime, and Guzman denied doing so.[5] Guzman repeatedly asked who had complained about him, but DeMello responded that such information was confidential. According to Webster, DeMello then told Guzman, "you are not allowed to do non-work related things on company time during work time while employees are on property." (Tr. 815.)

(ii) Pajinag's June 15 interview

Five days later, Webster and DeMello again interviewed Pajinag; according to Respondent, this interview was precipitated by a new complaint filed by Pajinag that very day.[6] Cacacho testified that Pajinag had approached her "very upset" and "shaking" and reported that, on the prior Saturday, Ragunjan had threatened him in the Ilocano language while they were on the loading dock. (Tr. 568–569) According to Cacacho, the words Ragunjan used literally translated into a warning to "watch your back all the time," but in Ilocano, is equivalent to a death threat. Cacacho typed up a written statement reciting Ragunjan's threat (in English) and provided it to Webster and DeMello, telling them that the statement was "more threatening" in Ilocano and Pajinag was afraid to leave his house. (Id. at 445, 571; R 14)[7]

Webster and DeMello testified that Pajinag was highly distressed during his interview, and, besides reporting Ragunjan's alleged threat, also claimed to be "scared and intimidated" by one of his interactions with Guzman, which had taken place in a dimly lit laundry room.[8] According to DeMello, Pajinag also indicated that there had been additional incidents between him and the two men, but was so distraught and upset that he was unable to give details regarding those incidents. Once again, Pajinag's version of events differed significantly.[9] According to him , he simply reported what Ragunjan had said to him on May 21 and what Guzman had said to him on June 5 and June 9 (in his words, "[t]hat's all that I told them"), but did *not* indicate that there had been additional incidents he was too upset to recall. (Tr. 608) Moreover, his version of the interview did not include any specific mention of the alleged "death threat" Re-

[5] The testimony is unclear as to whether, at this point, Guzman acknowledged his wrongdoing, referring to a workplace poster regarding non-solicitation. Regardless, there being evidence that Respondent relied on any such policy in disciplining Guzman, whether he made such an "admission" is irrelevant.

[6] See Tr. 812 ("we actually reached out to him immediately after we were notified on June 15th that a few days prior to that [] Ragunjan had approached him on the loading dock and threatened him").

[7] Cacacho's typewritten statement refers to the event occurring on June 12, not June 13.

[8] There is no evidence that Pajinag had previously reported being physically afraid of Guzman.

[9] Overall, Pajinag's demeanor while testifying about the meeting was relatively blasé, considering that, according to Respondent, he was describing reporting a then-recent death threat.

spondent claimed precipitated the meeting.[10]

Indeed, in his testimony Pajinag indicated that the "watch your back" threat itself had occurred *prior to* his first complaint to Cacacho on March 22.[11]

While Pajinag's version of this interview is at odds with that of Webster and DeMello in several key aspects, it is undisputed that he did identify a potential employee-witness to at least one of the incidents he had reported, but expressed doubt that this individual had actually overheard the conversation in question.[12] Respondent never interviewed the housekeeper(s) in question. There is no credible evidence that, following this interview, Respondent took any interim steps to prevent a further confrontation between Pajinag and either Ragunjan or Guzman.[13]

(iv) The June 19 interviews

On June 19, DeMello and Webster briefly re-interviewed Guzman and interviewed Ragunjan for the first time regarding Pajinag's complaints. The facts of Guzman's interview are not significantly disputed. Guzman continued to ask for the identity of the person who had complained about him, but was again refused this information. Asked to provide a statement about the incident he maintained had never happened, Guzman wrote a summary of what Webster and DeMello had asked him during the prior interview and stated that he had no change in his response to their accusation. (R 11.)

The same day, Ragunjan was interviewed for the first time regarding his alleged misconduct.[14] DeMello testified that he first asked Ragunjan whether he had ever asked anyone to take a picture for a nonwork related purpose during work time, which Ragunjan denied. Then, according to DeMello, he directly asked Ragunjan whether he had ever threatened anyone on the loading dock, and Ragunjan again said no, this time avoiding eye contact, appearing nervous and almost laughing. (Tr. 488.) Webster's recollection of the interview was similar, except for one critical aspect: she made no mention of confronting Ragunjan with the alleged threat but instead testified he was simply asked was whether he had ever requested that someone take a picture for a nonwork related purpose. (Id. at 812) I credit Webster's account of the exchange; it came across less forced and rehearsed than DeMello's testimony and also squares more accurately with the record as a whole.

d.Respondent disciplines Guzman and Ragunjan on June 30

Respondent's witnesses testified that, at some point between June 19 and June 30, DeMello and Webster provided the results of their investigation to Haines, along with a draft corrective action for each man and their recommendation for discipline. They informed Haines that they believed that Guzman and Ragunjan, based on their demeanor when interviewed, were not being truthful and that in particular Ragunjan did not seem to want to discuss the accusations against him.

Haines concluded that Guzman and Ragunjan had repeatedly interfered with Pajinag being able to do his work, in violation of Respondent's non-interference rule (Rule #3, supra), and that Ragunjan had additionally violated Respondent's anti-threatening rule (Rule #8, supra) by warning Pajinag "about being careful and watching his back." (Tr. 712.)[15] She decided that both Guzman and Ragunjan should receive a written warning for their conduct.[16] On June 30, management presented both Guzman and Ragunjan with their corrective action notices, which they refused to sign. The warning issued to Guzman makes reference to the alleged incidents on June 5 and June 9; Ragunjan's warning refers to the alleged incident on May 21 and the loading dock threat, which Respondent identified as having occurred on June 11. (GC 10, 11.)

2. Applicable legal principles

a. The Burnup & Sims standard

Where the conduct for which an employee is disciplined is intertwined with the employee's otherwise protected activity, the employer's motivation is not at issue, and the proper analytical framework is that found in *NLRB v. Burnup & Sims,* 379 U.S. 21 (1964). Under this framework, an employer may lawfully discipline an employee for engaging in misconduct in the course of his otherwise protected activity, but only if it had a good-faith and correct belief that such misconduct occurred. *Burnup & Sims*, supra at 23–24; see also *La-Z-Boy Midwest*, 340 NLRB 80 (2003).

Under the *Burnup & Sims* framework, the initial burden is on the General Counsel to establish that the employee was disciplined or discharged for conduct occurring during the course of protected activity. The burden then shifts to the employer to show that it held an honest belief that the employee engaged in serious misconduct. *Burnup & Sims*, supra at 23. The test for "serious misconduct" is whether the employee's activity is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate coworkers. *Clear Pine Mouldings*, 268

[10] What he told Webster and DeMello, he testified, was the information contained within his two handwritten statements (GC Exh. 13, R. Exh. 13), *not* Cacacho's typewritten notes.

[11] Pajinag clearly testified, after being asked whether there was anything else he recalled about the May 21 incident, that there was "one thing before" and then described the "watch your back" incident. When Respondent's counsel asked Pajinag to confirm whether it had happened before "or after" the May 21 incident, he stated, "after" and but then claimed he could not recall when, stating, "I need to look at the paper." (Tr. 590.) I credit his original, uncoached testimony that the incident he described happened before May 22, not on the Saturday prior to June 15, as Respondent contends.

[12] According to DeMello, Pajinag identified a room attendant who was present in a guest room during one of the incidents he reported between him and Guzman in early June; Webster recalled that he reported a room attendant-witness to Pajinag's claimed May 21 incident with Ragunjan.

[13] DeMello testified that he and Webster instructed Cacacho at some point to "try to monitor [Pajinag] when he was working" and "keep a sort of a close eye on the whole situation." (Tr. 467.) I do not credit this testimony, which went uncorroborated by either Webster or Cacacho, and had a self-serving ring to it.

[14] Ragunjan did not testify.

[15] It is unclear from the record whether Haines was informed (per DeMello's version of events) that Ragunjan had been confronted with and denied making the loading dock threat to Pajinag.

[16] Haines, whose typical policy was to review cases of similar transgressions to ensure fairness in meting out discipline in a particular case, could not recall whether she did so with respect to Guzman or Ragunjan's written warning.

NLRB 1044 (1984); see also *Fresh & Easy Neighborhood Market, Inc*., 361 NLRB No. 12, slip op. at 5 (2014) (employee's Sec. 7 activity does not lose protection merely because it makes fellow employee uncomfortable) (citing *Frazier Industrial Co.*, 328 NLRB 717, 719 (1999), enfd. 213 F.3d 750 (D.C. Cir. 2000)); *Consolidated Diesel Co.*, 332 NLRB 1019, 1020 (2000) ("[l]egitimate managerial concerns to prevent harassment do not justify . . . discipline on the basis of the subjective reactions of others to [employees'] protected activity").

Once the employer establishes that it held an honest belief in the employee's serious misconduct, the burden shifts to the General Counsel to affirmatively show that the misconduct did not in fact occur. *Rubin Bros. Footwear, Inc.*, 99 NLRB 610, 611 (1952), enf. denied on other grounds 203 F.2d 486 (5th Cir. 1953); see also *Akal Security, Inc.*, 354 NLRB 122, 124–125 (2009), reaffd. 355 NLRB 584 (2010); *Tracer Protection Service*, 328 NLRB 734, fn. 2 (1999); *Desert Inn Country Club*, 275 NLRB 790, 795 (1985). Thus, an employer who disciplines an employee for misconduct within the course of otherwise protected activity will be found to have violated the Act where the evidence discloses that: (a) it did not honestly believe the serious conduct occurred; or (b) even if it did so believe, it was mistaken.[17]

b. The June 30 written warnings violated Section 8(a)(3) *and* (1) *of the Act*

As a preliminary matter, I find that the existence or lack of unlawful animus is not relevant in this matter, as the June 30 written warning issued to Guzman and Ragunjan were admittedly motivated by their protected conduct, i.e., their effort to convince a third employee, Pajinag, to support the Union and its organizing effort at the Hotel. See *Burnup & Sims,* supra.[18] Next, I examine whether Respondent met its burden in establishing that, in issuing the discipline, it held a good-faith belief that Guzman and Ragunjan had engaged in serious misconduct in their interactions with Pajinag. I find that Respondent failed to meet this burden.

Frankly, much of the testimony offered by Respondent's witnesses regarding the events leading to the June 30 written warnings appeared rehearsed. Cacacho, Pajinag's direct supervisor, had trouble remembering which employee Pajinag had complained about and when, and both DeMello and Webster struggled to recite the convoluted questions they claim to have asked when interviewing the discriminatees. Cacacho, Webster and DeMello each parsed their answers in a manner that did not suggest forthrightness. Ultimately, Respondent's management witnesses could not agree on a consistent version of the facts and contradicted each other on significant details, such as whether Ragunjan had ever been confronted with the alleged death threat.

Regarding the complaints, I credit Pajinag's more unvarnished version of events, which departed from Respondent's script in key respects. First, I credit Pajinag's testimony that his specific complaints regarding Guzman were based on two conversations with Guzman four days apart. Likewise, he reported—at most—a single incident with Ragunjan on May 21 and an allegedly threatening comment by Ragunjan occurring some time before that.[19] In this regard, I find this case distinguishable from *BJ's Wholesale Club*, cited by Respondent. See 318 NLRB 684, 685 (1995). In that case, the Board upheld a discipline based, in part, on a coworker's report that the discriminatee had solicited her to sign a union authorization card three times in a single day and that she was "too busy" to be bothered. Moreover, while Respondent's management witnesses stressed, in lockstep fashion, that they were chiefly concerned about the fact that Pajinag had complained that Guzman and Ragunjan were interfering with him getting his work done, this is precisely what Pajinag *denied* complaining about; he clearly testified that he just wanted his coworkers to stop "bothering" him about the Union. See *Chartwells, Compass Group, USA,* 342 NLRB 1155, 1157 (2004) (employer may not lawfully discipline an employee for making pro-union (or anti-union) statements that merely cause another employee to feel uncomfortable) (citing *Consolidated Diesel Co.*, 332 NLRB at 1020 (2000)). This falls far short of the Board's standard for "serious misconduct" in the course of protected activity.

Respondent's investigation into Pajinag's complaints further suggests that it did not honestly believe that either Guzman or Ragunjan's solicitations for a photograph and/or union authorization card had actually interrupted Pajinag's work or otherwise lost the Act's protection. Instead of responding to Pajinag's complaints with interim action, Respondent's managers focused on amassing documentation of the alleged misconduct. Respondent's failure to interview an identified witness (based solely on Pajinag's speculation about that individual's hearing range) and refusal to inform Ragunjan or Guzman (despite the latter's repeated requests) of the identity of their accuser reflects prejudgment of the situation inconsistent with a good-faith investigation. *Arkema, Inc.*, 357 NLRB 1248, 1248–1249 (2011) (failure to allow employee to refute allegation or identify accuser indicates lack of honest belief in misconduct); *Trailmobile Trailer, LLC*, 343 NLRB 95, 106 (2004) (failure to conduct meaningful investigation, including avoiding ignoring potential evidence, suggests that employer "seized upon" complaint to rid itself of union officers).

[17] Holding an employer liable for a good-faith, but mistaken, belief in employee misconduct in the context of protected activity is necessary, "otherwise the protected activity would lose some of its immunity, since the example of employees who are discharged on false charges would or might have a deterrent effect on other employees . . . A protected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith." *Burnup & Sims*, supra at 23.

[18] Respondent's suggestion that this conduct was unprotected because it may have violated a lawful no-solicitation rule is unavailing, in that there is no evidence Respondent relied on any such rule in issuing the written warnings. (See R. Br. at 43, fn. 6, citing cases.)

[19] As noted, I am convinced, based on the testimony and demeanor of the witnesses, that Pajinag never reported that he had been seriously threatened the Saturday prior to June 15, as Respondent claims. While I do not reject Pajinag's testimony that he may, in fact, at some point in time, have felt threatened by Ragunjan, it appears to me that any threat reported by Pajinag was based on long-passed events repackaged by Cacacho to appear more imminent, allowing Respondent to seize upon it as a reason for discipline.

Likewise, Respondent's languid and tepid response to Pajinag's complaint that Ragunjan had recently physically threatened him was not consistent with the actions of a concerned employer seeking to ascertain the truth of the matter, or to otherwise respond to such a serious allegation. While Cacacho testified that Ragunjan's comment was tantamount to a death threat, and DeMello described Pajinag as "distraught" and "scared," Respondent did not contact law enforcement or take any other action to protect Pajinag, such as suspending Ragunjan pursuant to its workplace violence policy. (Tr. 439–440.) Instead, DeMello and Webster inexplicably waited *four* days to interview Ragunjan and then failed to confront him about the loading dock incident. See *Remington Lodging & Hospitality, LLC (Sheraton Anchorage)*, 363 NLRB No. 6, 16 (2015) (failure to elicit accused employee's version of events is inconsistent with good-faith investigation) (citing *K & M Electronics*, 283 NLRB 279, 291 fn. 45 (1987)). Finally, while finding Ragunjan guilty of "threatening" pursuant to its policies, Respondent meted out exactly the same level of discipline it issued Guzman, who was found guilty of no such infraction.

Accordingly, I find that Respondent failed to establish that it disciplined Guzman and Ragunjan based on an honestly held belief that they had engaged in serious misconduct in the course of protected activity; as such, I find that their written warnings violated the Act.

C. The Employee Meetings

The General Counsel alleges that, during meetings with Hotel employees in May 2015, Respondent's executive vice president of operations, Gary Ettinger made various statements in violation of Section 8(a)(1) of the Act. Specifically, according to the General Counsel, Ettinger: (a) directed employees to stop participating in union-organized rallies; (b) directed employees to stop visiting the homes of coworkers to engage in union and/or other protected concerted activities; (c) impliedly threatened employees with the loss of their jobs for engaging in union and/or protected concerted activities by telling them that they were lucky to have jobs; and (d) told employees to apologize to Respondent for engaging in union and/or protected concerted activities.

While Respondent concedes that Ettinger held the meetings in question, it sharply disputes the version of his comments testified to by the General Counsel's witnesses and further suggests that his remarks must be judged by a "reasonable employee" standard that assumes an English-speaking employee who understood his comments fully.

As set forth below, I find that Respondent, by Ettinger, violated the Act as alleged.

1. Factual background

Beginning in February 2015, prounion Hotel employees began holding early morning rallies outside the Hotel during which they chanted and banged pots and pans. Within a week of the first such rally, Respondent began holding meetings with employees to address the union campaign. The General Counsel's allegations concern statements made by Ettinger at two such meetings held on May 19, 2015 in the Aston Waikiki's Lokahi room.[20] Three current employees testified for the General Counsel regarding the meetings: inspector Faustino Fabro (Fabro), breakfast attendant Cecile Daniels (Daniels) and guest service agent Lotuseini Kava (Kava). Respondent presented the testimony of all of the management attendees, as well as Ettinger himself. A single employee, housekeeper Alona Afable (Afable), also testified for Respondent.[21]

The basic background facts regarding the meetings are undisputed. Ettinger addressed 30–35 Hotel employees seated in a circle around him. Webster, Haines and DeMello were seated among the employees. Ettinger spoke from prepared bullet points[22] and did not solicit questions from the attendees. Although the majority of employees attending these meetings did not speak English as a primary language, Ettinger spoke in English without the assistance of a translator. There is no evidence that any employee spoke during the meeting.

Ettinger began by expressing concern about how long the Union's organizing campaign had gone on. He said that guests were complaining about noise from the rallies, and that, going into the Hotel's busy season, he was concerned that this conduct would drive away business and reduce work opportunities. In his words, Ettinger said that the noisy rallies were "disturbing guests," creating an environment not "conducive" to guests enjoying their vacations and "having a deleterious impact on business." Next, according to Ettinger, he said certain employees had complained about being bothered, at home and at work, by pro-Union employees. This conduct, he said, was causing "acrimony" and "discomfort" among the employees. (Tr. 640–641, 644,)[23] He then instructed the employees that they had the right to decide who entered their homes and that, if union supporters refused to leave when asked, the visited employee could contact the police.

General Counsel's witnesses, none of whom speak English as a primary language, testified, to the best of their ability, as to what Ettinger said in English. Not surprisingly, their recollection of his remarks did not include words such as "deleterious" and "acrimony." Instead, they testified that he affirmatively ordered the employees to cease engaging in certain conduct. Fabro and Daniels testified that Ettinger told the employees to stop banging pots and pans and to stop bothering their coworkers at home. Kava testified that Ettinger said the rallies needed to end, because they were waking people up at the Hotel. General Counsel's witnesses recalled a specific aspect of Ettinger's body language during the meeting: he was holding a plastic water bottle and "banging" it back and forth between his hands.

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[20] Respondent's management witnesses, who each attended both meetings, testified consistently that Ettinger's presentation was similar each time.

[21] Afable testified that attendance at the meetings was mandatory.

[22] Under Fed. R. Evid. 611(c) examination, Ettinger adopted his typed bullet points as an accurate reflection of what he said; his counsel's subsequent attempt to have him backtrack on this point was unconvincing. I find that, as he originally testified, he in fact addressed each of the bullet points. (Tr. 657; GC 16.)

[23] DeMello confirmed that Ettinger used terminology such as "discord," "in-fighting" and "dissention" when describing the atmosphere the Union had created. (Tr. 746; R 17.)

Kava also testified that he appeared upset and spoke loudly.[24]

In markedly more plain-spoken language, Ettinger next talked about employees' negative experiences at unionized workplaces in the local area. He then told a story about his own mother being denied his father's union-funded pension benefits after his death, promising the assembled employees that, even if a union came in, they could rest assured that they would still be entitled to their 401(k) account balances. Referring to a pro-union Hotel employee who had recently been interviewed on local radio regarding his prior job at a unionized hotel, according to Ettinger's notes, he then asked the employees, if that employee's experience "was so great," why did he leave to work at the Hotel, a nonunion property? "Why," he asked them, "are there so many jobs posted for union properties? Why are union hotels struggling to keep people[?]" (GC 16)

In his closing remarks, Ettinger returned to the subject of the rallies, asking rhetorically why the Union had not called for a vote yet. Then he told the employees it was because the Union wanted to disrupt the Hotel's business. Ettinger then said that he was angry with the situation because it was "not necessary," that the Hotel was ready for an election and that the Union "should call for a vote, not do things via pots, pans and harassment." (R. Exh. 18, 19.)[25] The General Counsel's witnesses testified that the meeting ended on a much heavier note. All three witnesses testified that Ettinger said—n simple English—they were lucky to have jobs. Finally, according to Fabro and Daniels, he then said they could stop by his office and apologize to him. These remarks—also delivered in easily understood English – were universally denied by Respondent's witnesses.

2. Analysis

a. Credibility

I credit the General Counsel's witnesses with respect to Ettinger's statements. I found Fabro to be especially credible, in that he listened carefully to questions and maintained the same demeanor regardless of who was examining him. Daniels, who testified through a Tagalog interpreter, was clearly nervous, but visibly worked hard to relate what she heard Ettinger say in English. While Kava's recollection was not as complete as the two others, her demeanor was composed and steady, and she struck me as committed to speaking the truth.[26] I attribute enhanced credibility to Fabro, Daniels and Kava, due to their status as current employees. *Flexsteel Industries*, 316 NLRB 745 (1995) (". . . the testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests") (citations omitted), affd mem. 83 F.3d 419 (5th Cir. 1996).

By contrast, I found Ettinger's testimony less than fully credible. His dismissive denials, sometimes accompanied by laughter, struck me as a sign of nervousness and discomfort, particularly regarding the specific statements the General Counsel's witnesses attributed to him. Respondent's remaining witnesses gave guarded testimony that presented as less than forthright. Both DeMello and Afable appeared nervous while testifying, as if unsure which of Ettinger's remarks might damage Respondent's case. Haines, who was present for Ettinger's own testimony, nonetheless appeared uncomfortable testifying about the meetings; she was only to recall vague portions of the meeting and then simply stated denials in response to leading questions.[27] I found Webster to be slightly more credible; I note, however, that she was present during the entire hearing and, as the final witness, had heard all of the other testimony regarding the meetings, which detracts from the reliability of her own testimony.

b. Ettinger's comments violated the Act

Section 8(a)(1) of the Act provides that it is an unfair labor practice to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7, which protects the right of employees to engage in "concerted activity" for, inter alia, their "mutual aid or protection." It is well settled that the Board assesses the objective tendency of a statement to interfere with the free exercise of employee rights rather than considering either the employer's motive or employees' actual subjective reactions regarding the statement. *Miller Electric Pump and Plumbing*, 334 NLRB 824, 825 (2001); *Joy Recovery Technology Corp.*, 320 NLRB 356, 365 (1995), enfd. 134 F.3d 1307 (7th Cir. 1998). The issue, then, is how a "reasonable employee" would interpret the statement considering all surrounding circumstances. *The Roomstore*, 357 NLRB 1690, 1690, fn. 3 (2011).

"The test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction." *Double D Construction Group*, 339 NLRB 303, 303 (2003) (citation omitted). While certain employer statements, taken alone, may be considered noncoercive, they will violate the Act where they "take on the character and quality of coercive comments which accompany them." *Oak Mfg. Co.*, 141 NLRB 1323, 1325 (1963). An employer will be held accountable for misleading or confusing statements that would reasonably tend to chill an employee's protected activity; as Chief Justice Warren stated in the *Gissel* case:

> [a]n employer, who has control over [the employment] rela-

[24] Ettinger's manner during the meeting was described by DeMello as "intense." (Tr. 464)

[25] I credit Webster's meeting notes regarding these remarks; Ettinger related a gentler version, in which he merely said that "the conduct of the people that were outside of the hotel banging pots and pans were creating an environment that wasn't suitable for, you know, the vacation experience." (Tr. 648.)

[26] Respondent's spurious accusation that Kava committed "perjury" when she denied looking at an additional portion of her affidavit while having her recollection refreshed is not well taken; it is quite common for a witness whose recollection is refreshed on one portion of a conversation to then recall subsequent portions.

[27] Especially concerning to me were Haines' typewritten notes of the meeting (R. Exh. 16), which substantially echo Ettinger's testimony and which she claimed to have typed based on her contemporaneous handwritten notes. When the handwritten notes were produced, they consisted of two short notations that could not have possibly served as the basis for the typewritten notes. (Tr. 781–783.)

> tionship and therefore knows it best, cannot be heard to complain that he is without an adequate guide for his behavior. He can easily make his views known without engaging in "brinkmanship" when it becomes all too easy to "overstep and tumble [over] the brink."

NLRB v. Gissel Packing Co., 395 U.S. 575, 620 (1969) (citing *Wausau Steel Corp. v. NLRB*, 377 F.2d 369, 372 (7th Cir. 1967)).

The identity of the speaker and his position of relative power in the workplace are also given consideration; when an employer uses a high-level manager to voice its antiunion message, that message takes on an especially coercive quality and is unlikely to be forgotten. See *Electro-Voice*, 320 NLRB 1094, 1096 (1996); *America's Best Quality Coatings Corp.*, 313 NLRB 470, 472 (1993), enfd. 44 F.3d 516 (7th Cir. 1995), cert. denied, 515 U.S. 1158 (1995); see also *Aldworth Co*., 338 NLRB 137, 149 (2002) (captive audience meetings convey a significant impact when conducted by high-level officials). A high ranking employer official who peppers his remarks with provocative phrases "skillfully chosen to obscure their definitive meaning or to create a double entendre" may violate the Act where they effectively instill fear of economic jeopardy in the minds of the employees listening. *Brandenburg Tel. Co.*, 164 NLRB 825, 831–832 (1967) (citing *International Assn. of Machinists (Serrick Corp) v. NLRB*, 311 U.S. 72, 80 (1940) ("interference must be determined by careful scrutiny of all factors, often subtle, which restrain the employees' choice . . . .")).

In assessing the lawfulness of communications in a multilingual workplace, language barriers cannot be ignored. The Board has noted that "some imprecision inevitably arises" in such settings, particularly where the employer's communication "walk[s] the fine line between lawful descriptions and unlawful threats." *Labriola Baking*, 361 NLRB No. 41, slip op. at 4 (2014). However, the Board has specifically rejected the argument that employers should be granted "greater latitude in addressing non-English speaking workers," instead finding that such statements "deserve careful scrutiny." Id. Thus, an employer will be held responsible for misunderstandings that result from a misunderstood English language statement, even where the coercion takes the form of a mistranslation it unwittingly sanctioned. Id. at 2; see also *Cream of the Crop*, 300 NLRB 914, 917 (1990) (citations omitted). Likewise, where the employer fails to take reasonable steps to ensure that its antiunion message is accurately understood by its multilingual workforce, it engages in the very "brinksmanship" Justice Warren cautioned against, and should be held accountable for the results.

Evaluated under these standards, I find that Ettinger's comments violated the Act. In a speech peppered with outmoded, bookish phraseology, such as "deleterious impact" and "acrimony," critical portions of Ettinger's remarks were virtually ensured to be understood in only the most basic terms by those in attendance.[28] According to the General Counsel's witnesses, those basic terms were: (a) stop the rallies or you will lose work, and (b) stop bothering your coworkers about the Union or the police will be involved.[29] Lest they misunderstand the consequences of failing to 'fall in line,' Ettinger closed his remarks with more readily understandable English phrases, including telling them they were "lucky to have jobs" and were welcome to "apologize" to him. The coercive nature of his remarks was exacerbated by Ettinger's status at the Hotel, as well as by his body language and "intense" demeanor.

Based on the above, I find that a reasonable employee attending Ettinger's meetings, while perhaps confused by certain of his phrases, would have reasonably understood that the Hotel's highest level of management was fed up and angry with their union organizing and noisy protests and was telling them to stop. See *Lancaster Fairfield Community Hospital*, 311 NLRB 401, 401 (1993) (directing employee to "discontinue this disruptive behavior immediately," in reference to employee complaining about working conditions, constitutes an unlawful threat of future reprisal for engaging in such conduct); *American Tool & Engineering Co*., 257 NLRB 608, 608 (1981) (ordering employees to stop wearing union insignia and distributing union literature violates Section 8(a)(1)). I also find that a reasonable employee just ordered by top management to cease pro-union conduct would reasonably feel his job security threatened when he next commented that employees were lucky to have jobs, especially considering that he had earlier suggested that local union hotels were losing money and not able to keep people employed.[30]

Finally, I find that Ettinger's invitation to employees to "apologize" to him constitutes an unlawful solicitation that they disclose their Union sentiments. Having been informed that some employees had already complained to management about the Union, a reasonable employee would feel pressured by Ettinger's invitation to disclose her union sentiments, one way or the other. The Board has found such solicitations to violate the Act. See, e.g., *Barton Nelson, Inc.,* 318 NLRB 712, 712 (1995) (asking employees to make an "observable choice" regarding their union sentiments violates the Act); *Capitol Records, Inc*., 232 NLRB 228, 228 (1977) (soliciting employees to disclose their sentiments regarding the union violates the Act).

D. The Handbilling Incident

The General Counsel alleges that, on August 11, Respondent, by security guard Andrew Smith, unlawfully threatened employees with discipline for distributing union literature near the lower lobby of the Hotel.

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[28] As Ettinger apparently considered the subtlety of his message to require the use of such ornate language, surely it would have made sense to have his comments translated or at least confirmed that those gathered had understood him by taking questions after his presentation.

[29] Frankly, mentally "editing" out Ettinger's excess verbiage from his own admitted account of the meeting leaves me with very much the same impression.

[30] Put in this context, Ettinger's remarks – which did not refer to the assembled employees skill level or the overall job market – effectively linked the employees' ability to remain "lucky" (i.e., employed) with their compliance with his directive that they cease their protected conduct. Cf. *Children's Services International*, 347 NLRB 67 (2006).

1. Factual Background

a. The layout of the lower lobby

The lower lobby acts a main entrance for the Hotel, but is not where guests regularly check in.[31] The lobby is accessed via a porte-cochère (i.e., covered driveway), which is not uncommon among hotel properties. What does make the lower lobby somewhat distinctive is its open-air design; it lacks a structural façade fronting the driveway. Instead, an individual entering the lobby from the driveway would cross over a red-painted curb and walk onto a tiled area containing several red-painted pillars accented by potted plants. (See GC Exh. 5, R. Exh. 3.) Approximately 2 feet beyond those pillars, the flooring converts to wood, and tables and chairs are arranged, along with televisions, in a lounge seating area. I will refer to the tiled area containing the pillars abutting the driveway as the lobby's "entrance area."

Despite its open-air design, the lower lobby offers no overhead or beach views, but instead looks over the covered Hotel driveway and the hotel across the street. The lobby is open to the public as well as Hotel guests.[32] Other than the televisions, the Hotel does not provide entertainment in the lower lobby. The lobby contains a convenience store, as well as two restaurants, none of which are operated by the Hotel. Although guests may "take out" food from these establishments and eat it in the lobby seating area, the Hotel itself does not serve food to guests in the lower lobby. By contrast, Respondent's main, *upper* lobby area – where guests regularly check in – contains a swimming pool and deck and a large restaurant run by the Hotel.

As of August 11, Respondent also hosted "breakfast on the beach" events where it served food to guests in its upper lobby.[33]

Certain Hotel employees perform work in the lower lobby, including the entrance area. From a bell and valet stand (situated far to one side of the entrance area) Hotel employees provide concierge services and are dispatched to handle luggage and valet park vehicles. A "doorman" or "greeter" is also assigned to this operation; this employee greets guests and directs them to the Hotel's registration area on the floor above. A housekeeper lobby attendant is also assigned to the lower lobby and regularly empties trash bins in the entrance area. There was some evidence that maintenance employees sometimes work on repairs in the lower lobby, but are not regularly assigned there. Security guards employed by a third-party contractor regularly patrol the lower lobby.

b. The events of August 10

On August 10, Webster learned that Jonathan Ching (Ching), a Guest Service Agent at the Hotel, was planning to pass out pro-Union fliers in the lower lobby the next day. Along with DeMello and Front Services Manager Makana Kaanoi (Kaanoi), Webster met with Andrew Smith (Smith), who leads the Hotel's outside-contracted security team. Webster and DeMello instructed Smith to order Ching to leave the Hotel property and additionally warn him that he would be "trespassed" if he refused to leave. "Trespassing" means barring an unwanted person from the Hotel property for a year with the threat that, should they return within that year, they would risk arrest. Witnesses agreed that, prior to August 10, no Hotel employee had ever been "trespassed." Webster then instructed Smith that, should Ching fail to comply, he should in fact, be "trespassed." (Tr. 50.) I credit Smith's testimony regarding this meeting; his recollection was concise, and his demeanor was businesslike and matter-of-fact.

The following day, shortly after 7 a.m., Ching and another Hotel employee, Lakai Wolfgramm (Wolfgramm), each of whom were off duty, stationed themselves in the lobby's entrance area, each in front of a red pillar, and prepared to hand out flyers on behalf of the Union. Approximately three minutes later, Smith approached with another security guard as well as Front Office Manager Adam Miyasato (Miyasato), who supervises Ching and Wolfgramm. Smith told Ching he was being given a "verbal warning to stop passing out flyers in the lower lobby" and "you're not allowed to pass out pamphlets on property." He then told Ching that, if they refused to leave, they would be "trespassed." As Wolfgramm approached and joined the conversation, Ching insisted that they had the right to remain, to which Smith responded, "it doesn't matter. You guys can't be here. I'm going to ask you guys to leave." (Tr. 52–53, 106, 160.)

Ching then addressed Miyasato, asking whether there was someone to direct him "other than an outside contractor." (Tr. 72–73) Miyasato gestured towards Smith and stated, "he'll do." Smith confirmed this, telling Ching, "I represent management and [] I speak on their behalf." Miyasato remained silent. Smith again told Ching he would "trespass" him unless he refused to stop handbilling and left the property (which they did). (Id. at 72–74.) Again, I credit Smith's version of events, as corroborated by Ching and Wolfgramm. Miyasato did not testify.

2. Analysis

a. Ching and Wolfgramm's conduct on August 11

It is well settled that, absent special circumstances, the Act guarantees employees the right to distribute union literature on their employer's premises during nonwork time in nonwork areas. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803–804 (1945). Here, there is no contention (and no evidence) that either Ching or Wolfgramm made any effort to impede ingress or egress of persons to or from the Hotel property, interfere with other employees performing their jobs or engage in any

[31] While large groups may check in at the lower lobby, this is relatively uncommon, and no such group was present on August 11.

[32] There was limited testimony from Hotel security guard Andrew Smith that only Hotel guests – not members of the public – were permitted to actually *sit* in the lobby seating area. I found that his testimony lacked foundation, in that he merely claimed to inform anyone he *identified* as a non-guest that the seating was for Hotel guests only. (Tr. 115–116.)

[33] Ettinger testified that this event was held in the upper lobby; later, DeMello testified that, due to a lack of space, guests would "oftentimes" bring their breakfast meal down to the lower lobby and eat it in the lobby seating area. Frankly, I found this portion of DeMello's testimony less than convincing; it was apparent that he was quite focused on "selling" the open-air experience of the lower lobby.

other conduct that would justify Smith's intervention for the purpose of maintaining security or discipline. Thus, Ching and Wolfgramm's attempt to handbill Hotel customers in furtherance of the Union's organizing effort, assuming it was carried out in a nonwork area, constituted protected activity.

b. Smith's agency status

The next issue is whether Smith acted as Respondent's agent. An employer may be held liable for unfair labor practices committed by security guards acting in their official capacity. *Saint Johns Health Center*, 357 NLRB 2078, 2096 (2011) (security guards acting under direct authority from upper management violated Section 8(a)(1) by threatening to have employees charged with trespassing for distributing pro-union literature) (citing *Opryland Hotel*, 323 NLRB 723 fn. 3 (1997); *Bakersfield Memorial Hospital*, 315 NLRB 596 (1994); *Southern Maryland Hospital Center*, 293 NLRB 1209 (1989)). Here, the evidence establishes that DeMello and Webster explicitly delegated to Smith the authority to warn Ching that his handbilling would be handled as a trespass if he did not cease and leave the Hotel property. *Poly-America, Inc.*, 328 NLRB 667, 667–68 (1999) (security guards act as employer's agents where they act under employer's specific instructions in ejecting unwanted persons from its property).

Moreover, Smith's authority was confirmed by Miyasato, who, when asked whether there was a member of management in charge of the situation, told Ching that Smith would be sufficient to serve in that role. Based on this, a reasonable employee would understand that Smith was speaking and acting for Respondent; I therefore find that he had apparent authority to speak on behalf of Respondent on this occasion. See *Perdue Farms, Inc.*, 323 NLRB 345, 351 (1997) (security guards placed in a position to stop individuals from entering premises are cloaked with apparent authority); see also *Waterbed World*, 286 NLRB 425, 426–427 (1987) (test for apparent authority is, whether, under all the circumstances, the employees "would reasonably believe that the employee in question [the alleged agent] was reflecting company policy and speaking and acting for management"). I therefore find that Smith acted as Respondent's Section 2(13) agent.

b. Smith's alleged threat

I next examine whether Smith's words would reasonably tend to unlawfully coerce employees in Ching and Wolfgramm's position. Because Smith did not explicitly threaten to have them arrested and because no Hotel employee had previously been "trespassed," the potential repercussions to Ching and Wolfgramm for disobeying his directive were not clear. However, because Smith (as instructed) specifically invoked the "trespass" procedure—which was known to involve an automatic one-year penalty from the Hotel—I find that a reasonable employee would assume that some level of discipline or reprisal was at stake. In any event, Smith's statements also amounted to an *order* that the employees cease their handbilling conduct or face unspecified consequences. As such, if their activity was protected, this directive constituted an unlawful threat of future unspecified reprisals. See *Lancaster Fairfield Comm. Hospital*, 311 NLRB 401, 401 (1993) (directing employees to cease engaging in protected conduct constitutes a threat of future unspecified reprisals for engaging in such activity); see also *Casino Pauma*, 363 NLRB No. 60, slip op. at 9 (2015) (order that employees cease lawful handbilling constitutes unlawful interference with protected activity in violation of 8(a)(1)).

c. The entrance area as a work vs. nonwork area

Whether Ching and Wolfgramm's conduct on August 11 was protected turns, of course, on whether it was conducted in a work or nonwork area of the Hotel. The Board law is clear that activities such as security, maintenance and valet parking, which typically occur in a hotel lobby, are incidental to a hotel's primary function, and thus insufficient to transform a hotel's front entrance area into a "work area" where an employer may lawfully ban employee distributions. *Casino Pauma*, supra; *Remington Lodging & Hospitality, LLC (Sheraton Anchorage)*, 363 NLRB No. 6 (2015); *Remington Lodging & Hospitality, LLC (Sheraton Anchorage)*, 362 NLRB No. 123 (2013); *Santa Fe Hotel, Inc.*, 331 NLRB 723 (2000). Respondent argues that, due to the lower lobby's open-air design, the refusal to allow Ching and Wolfgramm distribute handbills on August 11 should not be judged by this standard. Specifically, according to Respondent, the Hotel operation's primary function differs from that of a traditional hotel or casino hotel, in that it includes providing "outdoor lounging and food and beverage services to its guests"; the lower lobby, Respondent asserts, is "essential" to this function, in that it provides a setting for guests to enjoy food as well as a tropical, outdoor lounging experience. (R. Br. at 37, 40)[34] Furthermore, Respondent argues that, unlike the handbillers in prior cases, Ching and Wolfgramm were not positioned "outside" a hotel entrance, but rather stood "inside" the hotel; that is, behind the red curb line, which should be considered a work area.

I disagree with Respondent that the Board's prior hotel handbilling cases are inapplicable here. As a preliminary matter, I am not convinced that the lower lobby is significantly different from any other lobby area where departing guests wait with their luggage for the next stage of their travel. While Respondent's guests may enjoy the local climate while they wait, the lobby itself does not provide ocean or sky views, and the record evidence demonstrates that most of the waiting guests are either watching television, napping or engaging with their smartphones. Moreover, unlike the lobby area considered by the Division of Advice in *Hyatt Hotels Corp d/b/a Hyatt Regency Century*, Case 31–CA–088555, Advice Memorandum dated April 11, 2013, the Hotel operates no bar or restaurant in the lower lobby and provides no regular live entertainment

[34] In this regard, Respondent has moved for administrative notice of certain facts, including the temperatures in Anchorage and Honolulu on the days handbilling occurred in this and the prior cases. (See R. Exh. 20) As neither the Board decisions nor the underlying administrative law judge decisions in the *Sheraton Anchorage* cases considered Anchorage's weather in finding that certain handbilling took place in a nonwork area, my taking notice of such facts would be inappropriate. Respondent's Motion to Take Administrative Notice, which additionally requests that I take notice of an unauthenticated photograph of the Sheraton Anchorage hotel, is hereby denied.

there.[35] Under these circumstances, I cannot find that the maintenance of an open-air lobby that allows Hotel guests, along with the general public, to enjoy the agreeable local climate itself renders that space integral to Respondent's provision of lodging and guest services.[36]

I also decline to find that Ching and Wolfgramm lost the Act's protection based on where they stood when Smith confronted them. As a preliminary matter, an area does not gain "nonwork" status based solely on its physical location but rather on the activity that is conducted there.[37] The photographic and testimonial evidence indicates that Ching and Wolfgramm stood in the entry area in front of large pillars and plants, which form the only physical barrier of any kind between the driveway and the lounge area. But for the lack of a structural façade, they were positioned similarly to the employees in the Board's prior hotel handbilling cases, and, as in those cases, in an area where the only operations carried out are incidental to the Hotel's main function.

For the above reasons, I find that the entrance area, as I have defined it above, constitutes a nonwork area of the Hotel, and therefore find that Respondent, by Smith, unlawfully threatened Ching and Wolfgramm with unspecified reprisals if they handbilled there. Finally, I would note that, even were the area where Ching and Wolfgramm stood found to be a working area, Smith's order would be unlawful, in that – based on his explicit instructions from Hotel management – he threatened to "trespass" them if they did not leave the Hotel property, not just the lower lobby. As such, to the extent that his order acted to ban the employees from handbilling anywhere on Respondent's property, it was unlawful regardless of where they stood when Smith issued it.

CONCLUSIONS OF LAW

1. Respondent Aqua-Aston Hospitality, LLC d/b/a Aston Waikiki Beach Hotel and Hotel Renew is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By issuing employees Edgardo Guzman and Santos "Sonny" Ragunjan written discipline for engaging in union and/or protected activity, Respondent has violated Section 8(a)(3) and (1) of the Act.

3. By the following acts and conduct, Respondent has violated Section 8(a)(1) of the Act:

(a) threatening employees with discharge for engaging in union and/or protected activity;

(b) ordering employees to cease engaging in union and/or protected activity; and

(c) soliciting employees to disclose their union sympathies.

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

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[38]

ORDER

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

1. Cease and desist from

(a) Disciplining employees because they engaged in union and/or protected activity;

(b) Ordering employees to cease engaging in union and/or protected activity;

(c) Threatening employees with discharge for engaging in union and/or protected activity;

(d) Soliciting employees to disclose their union sympathies; or

(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 this Order, remove from its files any reference to its unlawful discipline of Edgardo Guzman and Santos ("Sonny") Ragunjan, and within 3 days thereafter notify each of them in writing that this has been done and that this discipline will not be used against him in any way.

(b) Within 14 days after service by the Region, post at its facility in Honolulu, Hawaii, copies of the attached notice marked "Appendix" [39] in English, Ilocano and Tagalog. Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by Respondent's authorized representative, shall be posted by 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 Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event

[35] In any event, an Advice Memorandum does not constitute Board law and has no binding effect on me. I therefore decline to give it any significant weight. See *Glendale Associates, Ltd.*, 335 NLRB 27, 33–34 (2001) (citations omitted).

[36] Respondent's suggestion that it may declare its lobby a work area because it allows handbilling in alternative non-work areas misreads the Board law; where employee access is at issue, the employer's provision of alternative access is not a defense. See *Mazzara Trucking & Excavating Corp*., 362 NLRB No. 79, slip op. at 4 (2015) (discussing differing standards governing lawful restrictions on employee versus nonemployee access for purposes of organizing).

[37] For this reason, I reject as irrelevant Respondent's claim that the employees stood "inside" the Hotel's "entrance" as demarcated by the red-painted curb line. (R. Br. at 35.)

[38] 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.

[39] 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."

that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, 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 May 19, 2015.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 20 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

It is further ordered that the Complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated: Washington, D.C. May 31, 2016

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 the National Labor Relations Act and has ordered us to post and abide by 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 benefits and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything that interferes with these rights. Specifically:

WE WILL NOT discipline you for discussing UNITE HERE! Local 5 (the Union) with your coworkers, including asking them to take pictures for the Union and/or to sign authorization cards for the Union.

WE WILL NOT threaten you with unspecified reprisals for concertedly handbilling at the entrance to the Aston Waikiki Beach Hotel lower lobby or any other nonwork area at the Aston Waikiki Beach Hotel or Hotel Renew (the Hotel properties) seeking to publicize the Union's organizing campaign at the Hotel properties.

WE WILL NOT order you not to engage in rallies in support of the Union.

WE WILL NOT order you not to visit your coworkers' homes to discuss the Union.

WE WILL NOT threaten you with discharge by telling you that you are lucky to have jobs.

WE WILL NOT ask you to disclose your feelings about the Union by inviting you to "apologize" for engaging in conduct in support of the Union.

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 of this Order, remove from our files any reference to the unlawful written warnings issued to Edgardo Guzman and Santos "Sonny" Ragunjan, and WE WILL, within 3 days thereafter, inform each of them in writing that this has been done and that those written warnings will not be used against them in any way.

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

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/20–CA–154749 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.