**RRI West Management, LLC, an affiliate of The Westmont Hospitality Group, d/b/a Red Roof Plus San Antonio Downtown-Riverwalk *and* Diandra Marie Diaz.** Case 16–CA–278283

April 17, 2026

## DECISION AND ORDER

BY CHAIRMAN MURPHY AND MEMBERS PROUTY AND MAYER

On May 13, 2022, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief. The General Counsel filed a cross exception and a supporting brief. The Respondent filed an answering brief, and the General Counsel 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 and to adopt the recommended remedy[2] and Order as modified.[3]

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, as modified below, and orders that the Respondent, RRI West Management, LLC an affiliate of the Westmont Hospitality Group, doing business as Red Roof Plus, San Antonio Riverwalk, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

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

[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 these findings. However, we do not rely on the judge's inference that, even though the Respondent's witnesses Melissa Lipton and Darryl Fenner no longer work for the Respondent, their testimony was influenced by their desire to remain "on good terms with Respondent."

In affirming that the Respondent unlawfully demanded that Diaz stop counseling employees, we rely on GC Exh. 2 and GC Exh. 3 instead of GC Exh. 5, which was inadvertently cited by the judge.

In the absence of exceptions, we adopt the judge's finding that the Respondent did not violate Sec. 8(a)(1) of the Act when Hotel General Manager Carlos Ortiz called employee Diandra Diaz' complaints about COVID "gossip." Similarly, in the absence of exceptions, we adopt the judge's finding that the Respondent did not violate Sec. 8(a)(1) of the Act by orally promulgating a rule prohibiting employees from discussing their concerns about COVID, wages, work schedules, and other terms and conditions of employment.

[2] The Respondent excepts to the judge's backpay remedy, arguing that the backpay awarded to Diaz should be reduced by the amount of unemployment compensation already paid to her. In support, the Respondent asserts that it is a "reimbursing employer" in Texas's "chargebacks" program, under which the Respondent has chosen to make contributions to former employees to receive a reduced state unemployment insurance tax rate. *Unemployment Insurance Tax Rates*, TX. WORKFORCE CMM'N, https://www.twc.texas.gov/businesses/unemployment-insurance-tax-rates (last visited April 7, 2026). The Respondent argues that, through this program, it has already made a direct payment to Diaz through unemployment compensation, and the backpay award should be reduced by the amount already paid to Diaz.

The Board typically leaves backpay considerations for compliance hearings, but here the Respondent has excepted to the judge's backpay award and there are sufficient facts to decide this issue on the record before us.

The Board's long-established policy is that it does not deduct unemployment insurance payments in computing backpay. *Superior Protection, Inc.*, 347 NLRB 1197, 1197 fn. 1, 1198 (2006) (citing *NLRB v. Gullett Gin Co.*, 340 U.S. 361 (1951); *Demi's Leather Corp.*, 333 NLRB 89, 91 (2001)). In *Gullett Gin Co.*, the Supreme Court upheld the Board's policy and dismissed arguments like those advanced by Respondent, holding that the payments made by employers to Louisiana's unemployment system "were not made to discharge any liability or obligation of respondent, but to carry out a policy of social betterment for the benefit of the entire state." 340 U.S. at 364. In this case, the mode of payment by the employer to the state entity is a matter of state law, designed to effectuate a public policy which is outside the ambit of the Board's concern. As the Supreme Court explained in *Gullett Gin Co.*, supra, with regard to the alleged consequences on state tax rates for employers due the payment of unemployment compensation to discharged employees, "[w]e doubt that the validity of a back-pay order ought to hinge on the myriad provisions of state unemployment compensation laws." Id. at 365. Here, this is also the case for any employer participating in a chargeback program under Texas's unemployment program. As found by the Court in *Gullett Gin Co.*, the Board has the discretionary authority under the Act to not deduct unemployment compensation in calculating backpay awards. We therefore uphold the judge's backpay award as amended herein and reject the Respondent's argument that the award should be reduced by the amount of unemployment compensation Diaz received under Texas's chargebacks program.

[3] In accordance with our decision in *Thryv, Inc.*, 372 NLRB No. 22 (2022), enf. denied on other grounds 102 F.4th 727 (5th Cir. 2024), we have amended the make-whole remedy and modified the judge's recommended Order to provide that the Respondent shall also compensate the employees for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful discharge, including reasonable search-for-work and interim employment expenses, if any, regardless of whether these expenses exceed interim earnings. Compensation for these harms shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). We shall substitute a new notice to conform to the Order as modified.

As stated in *Performance Plumbing, LLC,* 374 NLRB No. 48, slip op. at 2 fn. 2 (2026), and *Lodi Volunteer Ambulance Rescue Squad, Inc.*, 374 NLRB No. 26, slip op. at 3 fn. 3 (2026), Chairman Murphy and Member Mayer find no need at this time to express an opinion whether the novel remedies announced by the Board majority in *Thryv* are permissible under the Act. They would be open to reconsideration of that precedent in a future proceeding, but in the absence of a three-member majority to overrule it at this time, they agree to apply *Thryv*.

(b) Make Diandra Marie Diaz whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, and for any other direct or foreseeable pecuniary harms suffered as a result of the unlawful discharge, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

2. Substitute the following for paragraph 2(h)

(h) Within 14 days after service by the Region, post at its San Antonio Riverwalk facility copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 16, 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, the 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 material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at the Red Roof Plus, San Antonio Riverwalk at any time since January 11, 2021.

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

Dated, Washington, D.C. April 17, 2026

_____
James R. Murphy, Chairman

_____
David M. Prouty, Member

_____
Scott A. Mayer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[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."

## 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 discharge or otherwise discriminate against any of you for engaging in or planning to engage in protected concerted activity, including but not limited to discussing wages, hours and other terms and conditions of employment.

WE WILL NOT tell you to stop counseling other employees with regard to their wages, hours or other terms and conditions of their employment.

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, offer Diandra Marie Diaz full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Diandra Marie Diaz whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest, and WE WILL also make Diandra Marie Diaz whole for any other direct or foreseeable pecuniary harms suffered as a result of the unlawful discharge, including reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Diandra Marie Diaz for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL file with the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Region Director may for good cause shown, a copy of Diandra Marie Diaz' corresponding W-2 form(s) reflecting the back pay award.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Diandra Marie Diaz, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

RRI WEST MANAGEMENT, LLC

The Board's decision can be found at https://www.nlrb.gov/case/16-CA-278283 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

*Phillip H. Melton, Esq.,* for the General Counsel.
*William S. Helfand* and *Elliot J. Kudisch, Esqs. (Lewis Brisbois Bisgaard & Smith, LLP)* of Houston, Texas, for the Respondent.

## DECISION

### STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried by Zoom virtual technology on March 21, and March 22, 2022. Diandra Diaz filed the charge giving rise to this case on June 9, 2021. The General Counsel issued the complaint on December 6, 2021. The General Counsel alleges that Respondent, RRI West Management, d/b/a Red Roof Plus violated Section 8(a)(1) of the Act by discharging Charging Party Diaz on January 11, 2021, because she engaged in protected concerted activity. Respondent alleges it discharged Diaz for poor performance in her job as a sales representative. The General Counsel also alleges that Respondent violated Section 8(a)(1) by telling the Charging Party that her protected activities were gossip and instructing her to stop gossiping with other employees and by promulgating an oral rule prohibiting employees from discussing their concerns about COVID, wages, hours and other terms and conditions of employment.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

Respondent, a corporation doing business nationwide, operates the Red Roof Plus, a hotel in San Antonio, Texas, on the Riverwalk, where it derived gross revenues in excess of $500,000 in the 12-month period ending on December 30, 2021. During that period, it purchased and received at its San Antonio facility products, goods and materials valued in excess of $5000 directly from points outside of Texas. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

#### II. ALLEGED UNFAIR LABOR PRACTICES

The Charging Party, Diandra Diaz,[2] was hired by Respondent in October 2019 as Assistant General Manager of the Red Roof Plus, San Antonio Riverwalk. In October 2020, she and the General Manager were terminated by Senior Vice President Joe Maddux.[3] However, Respondent offered Diaz a position as a sales representative at the same salary. It did so because Diaz felt the poor performance of the hotel was due to the General Manager, not her (Tr. 394). Since Respondent offered Diaz the sales position, I infer that Maddux thought this might be the case. Shortly afterwards, Carlos Ortiz became the General Manager of the hotel and Elizabeth Wycoff became the Assistant General Manager. Regional Vice President Darryl Fenner, who 3 months later fired Diaz, was concerned from the outset that employees would go to Diaz for direction, Tr. 395.

Melissa Lipton, a sales director for Respondent at a Chicago hotel was to coach and mentor Diaz in her new position.[4] Lipton provided Diaz training for her sales position via Zoom virtual technology. Respondent's previous Director of Sales at the Riverwalk hotel had been furloughed. As a result, Diaz had to document her work using Lipton's company log-in.

During her 3 months as a sales representative, Diaz reactivated a dormant account with Smoke's Barbeque Restaurant. That restaurant moved to a location next to the Red Roof Plus and was undergoing renovation. Diaz did not bring in any new business or reactivate any other dormant accounts despite such activities

[1] Tr. 97, line 21 should be Mr. Helfand, not this judge. The bookmarked pdf of General Counsel exhibits includes GC Exh. 8a, 9, 10, 11 and 11(a), although the index to the GC exhibits stops with GC Exh. 8.

I have credited conflicting testimony based upon the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. *Panelrama Centers,* 296 NLRB 711, fn. 1 (1989). I have relied on demeanor little, if at all.

[2] Also known as Diandra Preciado, GC Exh. 11(a).

[3] I see no reason to include the name of that General Manager in this decision since he has no relevance to the issues in this case and because his professional reputation could be unnecessarily harmed by doing so if one could access this decision on the internet.

The circumstances of Diaz' termination as assistant general manager is not before me and is irrelevant to the resolution of this matter.

[4] Lipton also had oversight responsibilities for sales at 3 other properties.

as cold-calling and visiting the parking lots of other hotels. However, she managed an existing account the hotel had with the American GI Forum which had "a good deal of administrative needs" (Tr. 376–377, 124–125).

That Diaz did not make sales between October 2020 and early January 2021 is not surprising since, in the words of Melissa Lipton at (Tr. 379–380):

> What exactly was shut down?
>
> Meaning traditional business, travel, you know, had all but ceased. You know, as a result, you know, the travel that the hotel was picking up was very much leisure based for I'd say specialty travel such as a sports or tournament team.

Respondent did not give Diaz any performance criteria for the sales representative position and anticipated promoting her to director of sales at the Riverwalk hotel (Tr. 342–343).[5]

Despite Respondent's reliance on Diaz' lack of sales to justify her termination, it did not monitor whether Diaz was making any sales. This was due to the impact of the COVID pandemic on the hospitality industry (Tr. 369–370).

Lipton's testimony at (Tr. 380–382) indicates that Respondent did not expect Diaz to make many sales during this period.

> When Mr. Maddux asked you to mentor Ms. Diaz, was the expectation that she had to make a certain number of sales or was the expectation that she had to show a consistent effort at the sales job?
>
> A It was the latter.

Diaz submitted a weekly log to Melissa Lipton for several weeks and then stopped doing so. Diaz testified that Lipton told her to stop because she was spending most of her time administering the American GI Forum account. Lipton disputes this. Regardless, there is no credible evidence that Lipton or anyone else chastised Diaz for not continuing to submit these logs or ordered her to continue submitting them. On the other hand, Diaz' testimony that Lipton told her that she was doing a good job, is uncontradicted (Tr. 129). I therefore credit it as well as her testimony that she did not receive any negative feedback from Respondent for her job performance as a sales representative.

I discredit Lipton's testimony indicating that she was dissatisfied with any aspect of Diaz' job performance due to the lack of any documentation supporting her testimony.[6] For similar reasons I discredit the testimony of Respondent's witnesses, Senior Vice President Joseph Maddux and former Regional Vice President Darryl Fenner as to their dissatisfaction with Diaz' performance and their testimony about discussions amongst Respondent's management personnel about her performance.

Lipton testified that she expected Diaz to continue sending her progress reports. (Tr. 369.) However, she did not testify that she ever communicated this to Diaz. Lipton also testified that she reported to Fenner that Diaz had stopped reporting her sales efforts to her, she did not testify as to when she made such a report. Moreover, the testimony is nonsensical because Lipton did not expect Diaz to make many or any sales (Tr. 370).

On January 11, 2021, Derrick Fenner, a Regional Vice-President of Respondent called Diaz and terminated her employment. He did not give her a reason for her termination. Although Respondent prepared a termination document, it did not provide it to Diaz. Fenner told Diaz that Respondent would not contest any claim she filed for unemployment compensation. It did not do so, and Diaz collected unemployment insurance benefits until she found other employment.

Respondent contends that Diaz' sales position was a 90-day probationary appointment. There is no evidence that anyone told that to Diaz. I therefore discredit this testimony. Respondent's October 20, 2020, letter to Diaz, offering her the sales position, does not indicate that Diaz was to be a probationary employee (GC Exh. 9). In an email to human resources vice-president Stephanie Dougherty on October 9, Senior Vice President Joe Maddox stated:

> We advised the current AGM [Diaz] she is no longer in management in that capacity. We will keep her current salary as it is now while she assists in her main focus in Sales through the end of the year. We will evaluate her performance and contribution in her role and title TBD with Stephanie and I Monday.

(R. Exh. 2, Tr. 367.)

There is no evidence that Maddux and Dougherty determined that Diaz' job performance would be evaluated in 3 months.

Stephanie Dougherty's testimony at (Tr. 311) also leads me to conclude that Respondent never told Diaz that her post was a 90-day probationary appointment. Dougherty testified:

> Q All right. Now did you understand whether there was some kind of condition of Ms. Diaz' -- that Ms. Diaz had to satisfy to remain in this sales role when Mr. Maddux made this decision.
>
> A My understanding is that it was going to be a 90-day period in which Ms. Diaz would be in this sales role and that her performance in sales would be reviewed at the end of that 90 days.

I do not credit this testimony. First of all, Dougherty did not testify to the source of her understanding. Secondly, she did not testify that her understanding was ever communicated to Diaz. I also do not credit Dougherty's self-serving undocumented assertion that Respondent treats an orientation period as a probationary period. Nor do I credit her hearsay testimony that Senior

[5] There is no evidence that Diaz was told about being evaluated in January 2021 other than Respondent's self-serving testimony, which I discredit.

[6] Lipton ceased working for Respondent on June 10, 2021, and thus she has less of a stake in the outcome of this proceeding than a current managerial employee. However, since Respondent called Lipton as a witness, I infer that Lipton remains on good terms with Respondent. I also conclude her desire to stay on good terms with Respondent influenced her testimony. If Lipton counseled Diaz or complained about her performance or lack of reports, Respondent should have documentation to prove this. I reach a similar conclusion with regard to former Regional Vice President Darryl Fenner, who retired from Respondent in August 2021, after Diaz was terminated. While Fenner also has less of a stake in the outcome of this proceeding than if he still worked for Respondent, I infer he would like to stay on good terms with it and assist it in avoiding liability for Diaz' discharge.

Vice-President Joe Maddux told her that Diaz had agreed to a 90-day probationary period.[7]

Melissa Lipton was not consulted with regard to Diaz' termination. She did not recall ever telling Fenner or Maddux that Diaz was not very productive (Tr. 388). I find she did not do so.

*Events leading to Diaz' termination from her sales position*

On January 5, 2021, Elizabeth Wycoff, the Assistant General Manager at the Red Roof Inn sent the following email to HR Vice President Stephanie Dougherty and Regional Vice President Darryl Fenner.

> I did want to inform you that we had an employee here with us in Maintenance named Martin that is currently self-quarantining as a member of his family tested positive he is taking 14 days off. I did also have a housekeeper Alicia that had contact with someone as well she did test and is negative. With our current Covid situation with Jenna Cruz it has caused some issues for concern so Diandra Diaz in sales will be working from home until the 11th as she does not want to possibly compromise her father that is going into surgery. With that being said Jenna Cruz did post her results on Facebook and Diandra is stirring the pot with the front desk associates stating that all employees need to quarantine and test. Please let me know if you need any further information from me and I did make the crisis hotline aware of the situation and the report number is 131663022. (Diandra Diaz and the front desk have been going back and forth lately on numerous instances and is causing the front desk to feel uncomfortable).

Dougherty replied to Wycoff and Darryl Fenner stating that General Manager Ortiz had the right to tell Diaz that the hotel honored her request to work temporarily from home and "the situation is being properly handled and there is no need to advise the front desk on this issue any further."

(GC Exh. 2.)

General Manager Ortiz talked to Diaz on the phone on January 6, 2021. He told Diaz that the situation with the sick staff member was being properly handled and there was no need for Diaz to advise the front desk about this. In an email to Darryl Fenner, Ortiz stated, "that call turned into a 38 minute[s] phone call that suck[ed] the air out [of] me" (GC Exh. 4, Bates # 000025)[8].

Diaz complained to Ortiz about a number of matters including a housekeeper who was back to work after contracting the virus from her family.

On January 7, Ortiz emailed a summary of his conversation with Diaz to Darryl Fenner at 7:07 a.m. (GC Exh. 3 or 4). Bates #s 000023-24. Ortiz stated:

> She mention[ed] this on Sunday January 3, 2021 and again today that on January 1, 2021 that I was not feeling well and throwing-up and why I went into work and the whole staff members knew that I was not feeling well. I told her that I ate some menudo with a bayleaf in it and did not settle well in my stomach so I only had diarrhea. The only person I told was Liz Wycoff. I was there at the hotel that day from 9am to about 2pm, did the due-outs at 1pm. Said Happy New Year to the Guest and Staff Members I came across with. As of this date, No One has asked me how am feeling and heard that I was sick. That's when I got upset because she said I was only there for 30mins.
>
> I did mention to her that it was brought to my attention she was at Smokes Restaurant and then came into the hotel. She denied being there at the restaurant and only came into the Sales Office to get some paperwork. That was January 3, 2021, the day she called me asking if she can work from home because everyone is sick and that her father was going to have surgery soon and did not want to contract anything.
>
> The last day that Diandra was working at the hotel was on Dec. 30, 2020, for just the morning hours, then she went home. The persons giving her the information are Jenna and Karen from the front desk.[9]

(GC Exh. 3 or 4, Bates #000024.)

That evening, Fenner, for the first time, proposed terminating Diaz, in an email to VP Stephanie Dougherty (R. Exh. 4), stating:

> I want to discuss terminating Diandra.
>
> Productivity isn't there. Despite requests from Carlos and I, Diandra has not provided any documentation of what she is doing, and no business has been booked. Part of this is that there are very few people to contact and very little to do which validates the earlier decision to lay off Tony.[10]
>
> We've talked to Diandra about refraining from getting involved with operations, but employees continue to turn to her. She is providing them with poor advice and has set herself apart from the current management team.
>
> The decision to retain Diandra after [the prior General Manager] was let go has not worked out. Carlos and Liz cannot move the hotel forward with Diandra as an alternative voice to the employees.

In addition to talking to Ortiz, Diaz had a telephone conversation during the week of January 1–7 with Fenner in which Diaz discussed employee complaints. (GC Exh. 4.)

On January 7, Dougherty asked Fenner for a date to pinpoint

[7] Maddux did not testify about any such agreement. Most of his testimony is also hearsay as to what he was told by Melissa Lipton. I find that the only conditions or reservations communicated to Diaz, when hired as a sales representative, are those explicitly stated in the October 20, 2020, offer letter, GC Exh. 9, i.e., that she was an at-will employee. If her offer was probationary, the offer letter would have so stated. The fact that Maddux did not communicate any performance criteria to Diaz is also an indication that there was not a 90-day probationary period communicated to her.

[8] It is not clear to me where GC Exh. 3 ends and GC Exh. 4 begins.

[9] Jenna Cruz is the front desk employee who tested positive for COVID. Karen Privado, another front desk employee, has a relationship with Diaz's sibling. Due to this relationship and discrepancies between Privado's testimony and her affidavit, I have given her testimony little or no weight.

[10] There is no evidence that Ortiz or Fenner requested documentation of anything from Diaz, e.g., Tr. 406. Ortiz testified that he was not consulted with regard to Diaz' termination. However, I find that his communication with Fenner was a major factor in Respondent's decision to terminate Diaz.

how long Diaz had been in the sales position. When Fenner informed her that the operative date was October 9, 2020, Dougherty responded, "Excellent . . . that helps our cause because we could chalk it up to "90 days," GC Exh. 4, Bates # 000026.

On January 10, 2021, Dougherty emailed Fenner stating there were 2 choices for terminating Diaz: 1) performance after 90 days in her job or 2) a lay-off due to lack of business due to COVID, GC Exh. 5, Bates # 000028, as to option 1, Dougherty told Fenner "we could chalk it up to "you've been in the position for 90 days and its just not working."

Fenner chose Option 1. He emailed Dougherty on January 10, stating:

> Thanks for getting back to me. We will need to fill the position at some point probably within 2-3 months, so it is probably best to go with choice #1. And we should chalk it up to 90 days, etc. Carlos did tell me that she opened an account for the restaurant next door (business that we were already getting) so although a stretch, she might argue against the "no business booked" point. She may very well also argue that employees have sought her out. But I see it as splitting hairs because it is her prior position in management as well as her personal relationships (she lives with one of the GSRs) that is causing the continued friction. Unless you feel otherwise, I will communicate choice #1.

(GC Exh. 7, Bates # 000036.)

Respondent prepared a termination record for Diaz, which it never provided to her. That document (GC Exh. 8(a)), states:

The following observations have been made with regards to your overall performance in the Sales position:

• Despite repeated requests from the General Manager, you have failed in producing any quantitative documentation as to what you are working on from day to day.

• No business has been booked since you started in the sales position.

• You have continued to involve yourself in employee management and operational issues, which has been communicated to you is not part of your current position.

Based on the continued concerns and business needs of this location, it has been determined that it would be best to separate employment, effective immediately.

Fenner informed Diaz that she had been terminated by telephone. He did not explain to her the reason for which she had been fired, other than to say that she was not a good fit for her position at the hotel (Tr. 63, 148).[11]

Although Fenner testified that he alone made the decision to fire Diaz, Senior Vice President Joe Maddux approved the decision and in doing so gave consideration to the fact that Diaz was "giving guidance to staff of a managerial perspective" (Tr. 348). However, Maddux could not give any examples of her usurpation of a management role. From this I infer he considered Diaz' counseling of employees regarding COVID and other terms and conditions of employment in affirming Fenner's termination decision.

The alleged 8(a)(1) statements

The General Counsel alleges that Respondent by Hotel General Manager Carlos Ortiz violated Section 8(a)(1) in calling Diaz' complaints about COVID "gossip" and instructing her to stop gossiping with other employees. The General Counsel also alleges that Ortiz in a staff meeting in the Laundry Annex orally promulgated a rule prohibiting employees from discussing their concerns about COVID, wages, work schedules and other terms and conditions of employment.

Ortiz denies that he told Diaz that she was passing gossip about his food poisoning (Tr. 90). He also denies holding a staff meeting to discuss COVID concerns and his illness. (Tr. 95.) I find Ortiz' denials as credible as the General Counsel's evidence on these matters. I therefore do not find the allegations as alleged.

Ortiz did hold a staff meeting in which he told employees, if you want to gossip, come to me (Tr. 85). I do not find that this is tantamount to telling employees that they could not discuss COVID or other workplace issues. The comment is just as easily understood as a direction to come to Ortiz if employees wanted accurate information.

Darryl Fenner and/or Carlos Ortiz told Diaz to stop counseling other employees about their workplace concerns (GC Exhs. 2 and 3). I find this directive violated Section 8(a)(1).

Analysis

Section 8(a)(1) of the National Labor Relations 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. Discharging or otherwise discriminating against employees because they engaged in activity protected by Section 7 is a violation of Section 8(a)(1).

Section 7 provides that, "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, *and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection* . . . (Emphasis added)"

In *Myers Industries (Myers 1)*, 268 NLRB 493 (1984), and in *Myers Industries (Myers II),* 281 NLRB 882 (1986), the Board held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." However, the activities of a single employee in enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity.

To establish an 8(a)(1) violation based on an adverse employment action where the motive for the action is disputed, the General Counsel has the initial burden of showing that protected activity was a motivating factor for the action, *Wright Line,* 251 NLRB 1083 (1980).

The General Counsel satisfies that burden by proving the existence of protected activity, the employer's knowledge of the activity, and animus against the activity that is sufficient to create an inference that the employee's protected activity was a

[11] I credit Diaz' account of this telephone call, which is essentially uncontradicted. Moreover, the fact that Respondent did not provide her with her termination document is consistent with Fenner not explaining the reasons for her termination.

motivating factor in his or her discharge. If the General Counsel meets her burden, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. [12]

*Diaz' protected activity, Respondent's knowledge of that activity, animus towards it and its motive for discharging Diaz.*

Diandra Diaz engaged in protected concerted activity by discussing common concerns with other hotel employees and also bringing these matters to the attention of Respondent's management.[13] The various emails in this record establish that Respondent knew of Diaz' activities and bore animus towards her as a result. Respondent also knew these activities involved concerns of employees other than Diaz. Thus, Respondent was aware her activities were concerted, as well as protected.[14]

The timing of Respondent's decision to terminate Diaz strongly suggests discriminatory motive. There is no evidence that her termination was under consideration prior to the emails to Fenner and Dougherty from Ortiz and Wycoff. Moreover, there is no evidence that Respondent communicated to Diaz that it was dissatisfied with her work before receiving these communications.

I find that Diaz' protected concerted activities were the primary motive for her discharge, indeed possibly the only motive. Respondent's alternative explanations. poor performance and failure to filing reports of her work activity are entirely pretextual. The fact that Respondent was deliberating as to a justification for Diaz' termination strongly suggests pretext.

Particularly powerful evidence of pretext is Dougherty's suggestion that Respondent could "chalk it up" to the expiration of 90 days since Diaz had been hired into the sales position. This strongly indicates that neither the expiration of 90 days nor Diaz' job performance was the primary reason for her discharge. Instead, the primary reason was Diaz' protected activities.

## CONCLUSION OF LAW

Respondent, RRI West Management, an affiliate of Westmont Hospitality Group, doing business as Red Roof Plus, San Antonio Riverwalk, violated Section 8(a)(1) of the Act by discharging Diandra Marie Diaz on January 11, 2021, and by directing her to cease counseling other employees about the terms and conditions of their employment.[15]

## REMEDY

The Respondent, having discriminatorily discharged an employee, must offer her reinstatement and make her whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Respondent shall also compensate Diandra Marie Diaz for any reasonable search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, above, compounded daily as prescribed in *Kentucky River Medical Center*, above.

Respondent shall reimburse the discriminatee in amounts equal to the difference in taxes owed upon receipt of a lump-sum backpay award and taxes that would have been owed had there been no discrimination. Respondent shall also take whatever steps are necessary to insure that the Social Security Administration credits the discriminatee's backpay to the proper quarters on her Social Security earnings record. To this end, Respondent shall file with the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[16]

## ORDER

Respondent, RRI West Management, an affiliate of Westmont Hospitality Group, doing business as Red Roof Plus, San Antonio Riverwalk, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any of its employees for engaging in and/or planning to engage in protected concerted activities, including but not limited to discussing wages, hours and other terms and conditions of employment.

(b) Telling an employee to cease counseling other employees regarding wages, hours and other terms and conditions of employment.

(c) In any like or related manner interfering with, restraining,

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[12] In cases in which the employer's motive for allegedly discriminatory discipline is at issue, the *Wright Line* test applies regardless of whether the employee was engaged in union activity or other protected concerted activity, *Hoodview Vending Co.,* 362 NLRB 690 (2015); 359 NLRB 355 (2012).

[13] One example of Diaz' protected activity occurred on or about January 3, 2021. Diaz learned that Carlos Ortiz, the hotel's general manager, was experiencing diarrhea and suggested he should not be at the hotel. When she confronted Ortiz, he told her that his diarrhea was the result of food poisoning, not COVID and thus he was not going to isolate himself. In fact, Ortiz' self-diagnosis was speculative because diarrhea is sometimes a COVID symptom, Tr. 360–361.[13]Exposure to COVID was clearly a group concern of hotel employees.

Diaz was not required to take Ortiz' explanation at face value. Even if Diaz was incorrect, the statement was protected, so long as it was not malicious and made with reckless regard of the truth, *KBO, Inc.,* 315 NLRB 570 (1994). To the contrary, Diaz' statement under the circumstances was reasonable.

[14] Respondent Exhibit 4 establishes that a reason for Diaz' discharge was Respondent's concern that she would continue to be "an alternative voice for employees" in the future. Even assuming that Diaz did not engage in protected concerted activity, her discharge would violate the Act if motivated by RRI's determination to prevent her from doing so in the future, *Parexcel International, LLC,* 356 NLRB 516, 519 (2011).

[15] Respondent has not alleged that, as a sales representative, Diaz was a "managerial employee" excluded from the protection of the Act. It follows thus, that RRI did not meet its burden of proof on this issue, *Union Square Theatre Management,* 362 NLRB 70 (1998).

[16] 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.

or coercing its employees in the exercise of their rights under 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, offer Diandra Marie Diaz full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Diandra Marie Diaz whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the decision.

(c) Compensate Diandra Marie Diaz for her search-for-work and interim employment expenses regardless of whether those expenses exceed her interim earnings.

(d) Compensate Diandra Marie Diaz for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(e) File with the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may for good cause shown, a copy of Diandra Marie Diaz' corresponding W-2 form(s) reflecting the back pay award

(f) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge and within 3 days thereafter notify Diandra Marie Diaz in writing that this has been done and that the discharge will not be used against her in any way.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its San Antonio Riverwalk facility copies of the attached notice marked "Appendix."[17] Copies of the notice, on forms provided by the Regional Director for Region 16, 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, the 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 material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at the Red Roof Plus, San Antonio Riverwalk at any time since January 11, 2021.[18]

(i) 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.

Dated, Washington, D.C May 13, 2022

## 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 discharge or otherwise discriminate against any of you for engaging in or planning to engage in protected concerted activity, including but not limited to discussing wages, hours and other terms and conditions of employment.

WE WILL NOT tell you to stop counseling other employees with regard to their wages, hours or other terms and conditions of their employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Diandra Marie Diaz full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges

[17] 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."

[18] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means.

previously enjoyed.

WE WILL make Diandra Marie Diaz whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest compounded daily.

WE WILL compensate Diandra Marie Diaz for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Regional Director for Region 16 allocating the backpay award to the appropriate calendar quarters.

WE WILL file with the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Region Director may for good cause shown, a copy of Diandra Marie Diaz' corresponding W-2 form(s) reflecting the back pay award

WE WILL compensate Diandra Marie Diaz for her search-for-work and interim employment expenses regardless of whether those expenses exceed her interim earnings.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Diandra Marie Diaz, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

RRI WEST MANAGEMENT, AN AFFILIATE OF WESTMONT HOSPITALITY GROUP, DOING BUSINESS AS RED ROOF PLUS, SAN ANTONIO RIVERWALK

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/16-CA-278283 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.