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West Maui Resort Partners, a Limited Partnership, consisting of Signature Capital–West Maui, LLC and WHKG-S GEN-PAR, Inc., d/b/a Embassy Vacation Resorts and Hotel Employees & Restaurant Employees, Local 5, AFL–CIO.
Cases 37–CA–5472, 37–CA–5492, 37–CA–5523, 37–CA–5525, 37–CA–5566, 37–CA–5604, 37–CA–5612, and 37–CA–5665–1

September 30, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND WALSH

On February 13, 2001, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions, a supporting brief, and an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order,³ except as indicated below.

For the reasons stated below, we adopt the judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by its suspension and discharge of employees Robbie Fronda, Robert Craddick, Kevin Freitas, and George Balagso because of their known or suspected union activities. However, we reverse the judge's find-

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 Drywall 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 his findings.

² No exceptions were filed to the judge's finding that the Respondent violated Sec. 8(a)(3) by suspending employee Leo Ramelb for 5 days and Sec. 8(a)(5) by making certain unilateral changes without prior notification to and bargaining with the Union as the collective-bargaining representative of its employees. Finally, there are no exceptions to the judge's dismissal of allegations that the Respondent violated Sec. 8(a)(3) by issuing warnings to employees Abraham Pena and Noreen Medeiros.

³ We shall modify the judge's recommended Order and notice in accordance with our decisions in *Ferguson Electric Co.*, 335 NLRB 142 (2001), *Excel Container*, 325 NLRB 17 (1998), *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Ishikawa Gasket America, Inc.*, 337 NLRB No. 29 (2001).

ing that the Respondent violated Section 8(a)(1) by hiring consultant Keith Hunter for the purpose of legitimizing those suspensions and discharges. We also find that the Respondent did not violate Section 8(a)(1) by Housekeeping Manager Cathy Quevido's questioning of employee Abraham Pena about the result of a representation election.

I. THE DISCHARGES OF FRONDA, BALAGSO, FREITAS,
AND CRADDICK

The judge found that the Respondent violated Section 8(a)(3) by suspending and discharging Fronda, Craddick, Freitas, and Balagso because of their known or suspected union activities.⁴ The Respondent excepts to these findings, arguing that the General Counsel did not show, pursuant to *Wright Line*,⁵ that its actions were motivated by antiunion animus. The Respondent further contends that all four employees were discharged because they made threatening or sexually inappropriate statements to fellow employee Cindi Ramelb,⁶ exposing the Respondent (with respect to the sexually inappropriate statements) to potential liability under Title VII of the Civil Rights Act of 1964. We agree with the judge that the General Counsel made the required showing that the suspensions and discharges were motivated by antiunion animus, and that the Respondent did not rebut this showing by establishing that it would have disciplined the four discriminatees regardless of their actual or suspected union activities.

A. *Material Facts*

The relevant facts, described more fully in the judge's decision, are as follows. On September 29, 1998, a year prior to the allegations at issue here, the Union lost an election to represent the hotel's employees by a vote of 126 to 86. The Union filed objections, and a hearing officer, finding the objections meritorious, recommended that a second election be held. While exceptions to the hearing officer's report were pending before the Board, the Union and its employee supporters continued to organize the Respondent's employees, forming employee committees and circulating leaflets on Union-related issues. Craddick and Fronda were both on the union organizing committee, and Freitas (who testified for the Union at the objections hearing) and Leo Ramelb were active union supporters. There is no evidence that Balagso

⁴ As previously noted, the judge also found that the Respondent unlawfully suspended Leo Ramelb for 5 days because of his union activities.

⁵ 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

⁶ "Ramelb," as used herein, refers to Cindi Ramelb unless otherwise indicated.

supported the Union, although there is some evidence, discussed below, that the Respondent's management believed he did. All five employees worked in the Respondent's bell/valet department.

On July 14, 1999,⁷ Cindi Ramelb, another bell/valet employee, complained to Human Resources Director Bernie Delos Santos that Fronda had threatened her and that Leo Ramelb, her brother-in-law, had harassed her. Ramelb told Delos Santos that while she and Fronda were assisting guests, they got into an argument about scheduling, and that at one point during this argument Fronda said, "Cindi don't make me mad." A guest overheard Fronda's statement and remarked to Fronda: "Don't hit her. Don't hit her."

On July 15, Delos Santos suspended Fronda indefinitely, pending possible discharge. In order to avoid the possible appearance of disparate treatment because Fronda was a union supporter, the Respondent retained a third party investigator, Keith Hunter, to investigate Ramelb's allegations.⁸ Hunter interviewed the concerned parties and on August 4 completed a report in which he found that Fronda's "don't make me mad" statement was a threat sufficiently serious to cause an admonition by a passing guest.⁹ Hunter recommended that, consistent with Respondent's written progressive disciplinary policy, Fronda's indefinite suspension be reduced to 5 days and that he be given a written warning noting that further violations would result in termination.¹⁰ Hunter also recommended that the entire bell/valet staff be required to attend an offsite discrimination/sexual harassment training session and a separate offsite "partnering-type" retreat to address interpersonal communication and ethnic diversity issues, both to be conducted by an outside source.

After receiving Hunter's findings, Delos Santos spoke with Ramelb, who said she still felt threatened by Fronda

and was not comfortable working with him. Hunter then spoke with Ramelb and on August 23 issued a supplemental report noting that Ramelb said she was willing to reserve judgment and allow Fronda a reasonable period of time to improve his behavior, provided that she and Fronda would not have to work together. Later the same day, however, the Respondent discharged Fronda. At about the same time, the Respondent unlawfully suspended Leo Ramelb for 5 days, for allegedly harassing Ramelb.¹¹ The Respondent did not, however, pursue Hunter's training and retreat recommendations for the bell/valet employees.

On September 8, the Union advised the Respondent in writing that its organizing committee included Fronda, Craddick, Leo Ramelb, and another employee, Noreen Medeiros. On September 16, the Respondent replied in a letter that it posted on a hotel bulletin board, stating in part that "[y]our organizing committee is comprised of employees who have subjected themselves to disciplinary action up to and including termination." On September 24, the Board adopted the hearing officer's recommendation that the first election be set aside and ordered a second election.

On September 28, in a letter to Delos Santos, an attorney representing Cindi Ramelb alleged that Ramelb had been subjected to sexual harassment at the hotel, describing four incidents involving Freitas, Balagso, and Craddick.¹² On October 4, Delos Santos placed all three employees on suspension pending discharge. The Respondent again retained Hunter to make fact findings on Ramelb's allegations, but this time specifically instructed him not to include recommendations in his report. On October 19, Hunter issued his report, finding that the incidents as alleged by Ramelb had occurred. On October 21, the second election was held and the Union won by a vote of 144 to 68. The Respondent issued letters of termination to Balagso and Craddick on December 2, and to Freitas on December 13.

B. Analysis

The Respondent argues that, contrary to the judge's findings, the General Counsel failed to establish, pursu-

⁷ All dates are in 1999 unless otherwise indicated.

⁸ Hunter owns Dispute Prevention & Resolution, Inc., a firm that provides fact-finding, mediation, arbitration, and special master services in such areas as wrongful discharge, whistleblower, disability, and race and sex discrimination.

⁹ In his report, Hunter placed considerable weight on the guest's comment, concluding that Fronda's statement must have been threatening to prompt such a comment from a stranger. By contrast the judge, on the basis of Fronda's version of the incident, found that the comment was sarcastic rather than a serious admonition. As the judge noted, Fronda was "a very slight individual" while Ramelb was "conspicuously taller and larger," and Ramelb had previously been heard to call Fronda "you skinny little so-and-so . . . only 98 pounds soaking wet."

¹⁰ The Respondent's progressive disciplinary system provides for sanctions ranging from verbal to written reprimands, suspension, and discharge. A comment on discharge in the written policy notes that "*TERMINATION OF EMPLOYMENT IS A SERIOUS MATTER* which normally occurs after corrective discipline has failed." (Emphasis in original.)

¹¹ As the judge noted, Hunter had recommended that Leo Ramelb be given a verbal warning. As in the case of Fronda, however, the Respondent ignored this recommendation.

¹² According to Ramelb, on one occasion Balagso allegedly made a lewd comment to her about a female guest. On another occasion, when she asked Balagso what there was to eat in the café, Balagso replied, "Nothing you would want to eat," and added, "But I have something good for you to eat." Craddick, while working with Ramelb, allegedly pointed to a male guest who was standing naked in the window of his room and made a remark about his anatomy. Finally, Ramelb alleged that Freitas made a sexually inappropriate remark to her about a female guest.

ant to *Wright Line*, that animus towards the known or suspected protected activity of Fronda, Balagso, Freitas, and Craddick was a motivating factor in their suspensions and terminations. The Respondent further contends that it would have discharged these employees even if they had not engaged in protected activity, consistent with its past disciplinary practice and in order to insulate itself from potential liability under Title VII. We find that the evidence supports the judge's findings.

Wright Line, supra, requires the General Counsel to make an initial showing that protected conduct was a motivating factor in an employer's decision to take a disciplinary action. *New Otani Hotel & Garden*, 325 NLRB 928, 938 (1998). Proof of discriminatory motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole. *Ronin Shipbuilding*, 330 NLRB 464 (2000). To support an inference of unlawful motivation, the Board looks to such factors as inconsistencies between the proffered reason for the discipline and other actions of the employer, disparate treatment of certain employees compared to other employees with similar work records or offenses, deviation from past practice, and proximity in time of the discipline to the union activity. E.g., *W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 871 (6th Cir. 1995).

1. Knowledge of union activity

As an initial matter, the judge correctly found that the Respondent knew or suspected that all four employees were union supporters. As noted above, Fronda and Craddick were both active and conspicuous union supporters throughout its first and second organizing campaigns, and both were members of the Union's organizing committee. Freitas was an open union supporter who talked to other employees about the Union and testified on its behalf at the prior hearing on election objections.

There was less evidence that Balagso was a union supporter. He testified—credibly, as the judge found—that he was not an “active” supporter and that he was not “opposed” to the Union. The Respondent's contemporaneous notes, on the other hand, indicate that at the time of his suspension he told management that “if this was a union issue . . . he wanted us to know that he was pro-hotel.” The Respondent contends that the latter evidence establishes that it treated all four employees the same way, without regard to union activity, and that their suspensions and discharges were consequently lawful.

It is clear from the record, however, that the manager of Balagso's own department believed at the time that he was in fact a union supporter. As the judge found from the credited testimony, Neftali Reyes, bellboy/valet department manager, informed Hunter during the latter's investigation of Ramelb's allegations against Fronda and

Leo Ramelb that he (Reyes) believed that all the employees in the department except Cindi Ramelb were pro-union. Reyes had also previously told General Manager Dowsett that “everybody [in the unit] was a yes vote.” Union-motivated disciplinary action taken in the belief—even inaccurate—that the employee supports a union is unlawful. *Handicabs, Inc.*, 318 NLRB 890, 897 (1995), enf. 95 F.3d 681 (8th Cir. 1996), cert. denied 521 U.S. 1118 (1997).¹³

2. Antiunion animus

We also agree with the judge that the Respondent's actions were motivated by union animus. We note first that, as indicated earlier, the Respondent has not excepted to the judge's finding that its suspension of Leo Ramelb was unlawfully motivated. That finding accordingly becomes final. The Respondent's unlawful disciplinary action against one pro-union employee based on antiunion animus helps to support the inference that the same animus motivated its actions against other pro-union employees.

The timeframe of the disciplinary actions is also significant. The Freitas, Balagso, and Craddick suspensions were imposed on October 4, less than 2 weeks after the Board ordered a second election but before that election was held. The discharges were finalized just a few weeks after the Union was certified. The Union, of course, was actively seeking employee support throughout this period. In addition, as noted above, less than a month before the Freitas, Balagso, and Craddick suspensions, the Union had advised the Respondent in writing that Fronda, Craddick, Leo Ramelb, and Noreen Medeiros were members of its organizing committee. The Respondent not only sent its reply to the Union but posted the reply on a hotel bulletin board, stating categorically that the committee “is comprised of employees who have subjected themselves to disciplinary action up to and including termination.” The Respondent thereby suggested publicly that all the committee members, in-

¹³ It is possible that higher management officials did not assume that Balagso was pro-union but nevertheless chose to discharge him in order to prevent the Freitas and Craddick discharges from appearing union-based. This would also have been unlawful. It is well established that, in the context of a union organizing drive, the discharge of a neutral employee in order to facilitate or cover up discriminatory conduct against a known union supporter is a violation of Sec. 8(a)(3). *Bay Corrugated Container*, 310 NLRB 450 (1993), enf. 12 F.3d 213 (6th Cir. 1993); *NLRB v. Excel Case Ready*, 238 F.3d 69, 72 fn. 6 (1st Cir. 2001). See also *Dawson Carbide Industries*, 273 NLRB 382, 389 (1984), enf. 782 F.2d 64 (6th Cir. 1986) (such employees are “pawns in an unlawful design,” and their discharge is consequently unlawful). Here, as in *Bay Corrugated Containers*, supra, the Respondent would have had no justification for treating Balagso, who was also named in the complaint letter from Cindi Ramelb's counsel, in a different manner from Freitas and Craddick.

cluding Medeiros (who had no complaints of misconduct pending against her) might be discharged. The reply letter remained posted for an extended period of time, even after Medeiros protested to the Respondent that it defamed her.

As the judge also found, the Respondent decided to suspend Fronda, and later Balagso, Craddick, and Freitas, pending discharge, without making even a preliminary investigation or giving any of the discriminatees an opportunity to respond to Ramelb's allegations. An employer's failure to permit an employee to defend himself before imposing discipline supports an inference that the employer's motive was unlawful. *Johnson Freightlines*, 323 NLRB 1213, 1222 (1997); *K&M Electronics*, 283 NLRB 279, 291 fn. 45 (1987).

Given the unlawful suspension of Leo Ramelb, the timing of the suspensions and discharges, the Respondent's posted reply to the Union of September 16, its failure to give the discriminatees a chance to respond to the allegations against them, as well as its disparate treatment of the discriminatees, its deviation from past practice, and its pretextual justification for the discharges (all discussed below),¹⁴ we adopt the judge's inference that antiunion animus motivated the Respondent's actions.¹⁵

3. The Respondent's defense

The burden accordingly shifts to the Respondent to show that the discriminatees would have been terminated even absent their union activity. We agree with the judge that the Respondent has not met this burden.

First, as the judge found, the Respondent's proffered reasons for the suspensions and discharges are at odds with its actions. Delos Santos testified that Fronda was suspended and ultimately discharged because, by his alleged threat, he placed Ramelb in fear for her safety. However, the Respondent allowed Fronda and Ramelb to continue to work together (which they did without incident) on at least three occasions after she made her complaint against him but before he was suspended. The Respondent then ignored Ramelb's statement reported by consultant Hunter that she would not object to giving

Fronda a chance to change his behavior, provided that he worked on a different shift.

The Respondent also disregarded the recommendations of Hunter himself, even though he had been hired precisely for his expertise in such cases. As noted above, in his report on the Fronda and Leo Ramelb allegations, Hunter recommended that the Respondent follow its progressive disciplinary system by issuing a written warning to Fronda. He also recommended that the Respondent provide sensitivity training on sexual harassment and on interemployee communication and ethnic diversity, using outside expertise. The Respondent not only ignored these recommendations but categorically directed Hunter *not* to make any recommendations when he was later assigned to investigate the allegations against Freitas, Balagso, and Craddick. Had the Respondent been motivated by the goal of deterring sexual harassment in the future, or by its potential liability for failure to take deterrent action, we believe it would have shown greater interest in Hunter's recommendations.

In addition, the suspension and later discharge of Fronda, Balagso, Craddick, and Freitas, were sanctions far more severe than the actions the Respondent took in response to prior similar misconduct. The judge's decision cites instances where employees threatened coworkers, used profanity on the job, and engaged in profane and rude behavior towards other employees but, unlike here, were not immediately suspended or discharged. Those nonunion employees merely received warnings, short suspensions, or were put on corrective plans to improve their behavior; only after such measures proved unsuccessful did the Respondent resort to suspensions and discharges.¹⁶ As Hunter noted in his report on the Fronda and Leo Ramelb allegations, in previous disciplinary cases involving other employees "[t]he Company went the extra mile to give each of [those] employees every opportunity to turn things around before termination," and "[i]n some instances the Company has bent over backwards to give troubled employees a chance to cure their problems." By contrast, Fronda, Freitas, Crad-

¹⁴ A finding that an employer's stated reason for taking a disciplinary action is a pretext supports the inference that the real motive was unlawful. *ADS Electric Co.*, 339 NLRB No. 128, slip op. at 4 (2003); *Teddi of California*, 338 NLRB No. 157, slip op. at 9 (2003); *Williams Contracting*, 309 NLRB 433 fn. 2 (1992).

¹⁵ Although we find that the evidence cited above establishes the Respondent's antiunion animus, we also note as background evidence the Respondent's antiunion campaign literature, cited by the judge. See *Overnite Transportation*, 335 NLRB 372, 375 fn. 15 (2001); *MediPLEX of Stamford*, 334 NLRB 903, 903 (2001); *Affiliated Foods*, 328 NLRB 1107, 1107 (1999); *American Packaging*, 311 NLRB 482, 482 fn. 1 (1993); *Gencorp*, 294 NLRB 717, 717 fn. 1 (1989).

¹⁶ For example, approximately 1 year prior to the events here, Cindi Ramelb complained that Stacey Kahue had threatened and harassed her. Although Kahue was also the subject of complaints from other employees and had a record of significant work deficiencies, he was not suspended but was put on a 30-day "corrective plan" to improve his performance. He was not actually disciplined until several months later, when he again engaged in threatening behavior and was absent from his workstation. Similarly, employee Jeremy Delos Reyes was given several brief suspensions and a warning for repeated incidents of profanity, threats, and insubordination. Although the judge noted a single instance of sexual harassment by an independent contractor who was working for the Respondent and was removed, that incident involved a sexual assault, a far more serious infraction than any of the verbal incidents Ramelb alleged.

dick, and Balagso—each of whom had positive performance evaluations reflecting a strong work record and few or no prior disciplinary infractions—were peremptorily suspended and subsequently discharged without any effort at corrective or rehabilitative measures.

The disparate severity of the sanctions imposed on Fronda, Freitas, Craddick, and Balagso was also a departure from the Respondent’s own written policy of progressive discipline, which established a gradation of penalties from verbal warnings ultimately to discharge, with suspension normally applicable after a “third offense.” While immediate discharges were permitted for single instances of “serious misconduct,” the policy stated that termination “normally occurs after corrective discipline has failed.” Having applied this policy in previous cases of misconduct, the Respondent wholly disregarded it here.¹⁷

Our dissenting colleague characterizes the alleged misconduct by Balagso, Freitas, and Craddick as “serious,” exposing the Respondent to legal liability under Title VII for failure to prevent sexual harassment. The Supreme Court has described the standard for sexual harassment claims this way:

When the workplace is permeated with “discriminatory intimidation, ridicule, and insult” . . . that is “sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment,” . . . Title VII is violated.

...

Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII’s purview.

Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993).

Here, three of the four specific incidents alleged in detail by Ramelb only involved comments about third persons.¹⁸ It is well established, meanwhile, that Title VII does not require an employer to discharge an employee for engaging in sexual harassment, so long as the employer takes reasonable action to protect the complainant. *Baskerville v. Culligan International Co.*, 50 F.3d 428, 432 (7th Cir. 1995). Against this legal and factual back-

¹⁷ Ramelb herself told Hunter and later testified that she was “shocked” when the three discriminatees were suspended. She also testified that Department Manager Reyes told her that he was also “shocked” by the suspensions.

¹⁸ The judge, however, found from Ramelb’s testimony that “she seemed to believe that in her mind any conduct of which she did not approve, whether sexually oriented or not, constituted sexual harassment since she was the only female in the department and all the others, who may have done something she found objectionable, were male.”

drop, we find it implausible that the Respondent considered the Ramelb allegations to be so serious that they justified immediate suspension, let alone ultimate discharge.

Our dissenting colleague points out that it is not the Board’s function to judge the propriety of how the Respondent chose to protect itself against a potential Title VII lawsuit. That is not in dispute. It is the Board’s function, however, to determine whether the Respondent’s actions were in fact motivated by that concern. The evidence reviewed above convinces us that apprehension of a Title VII lawsuit was a pretext for discharging Freitas, Craddick, and Balagso, not the Respondent’s actual motive.

Indeed, there is significant evidence in the record that even the Respondent’s supervisors and management officials did not believe some of Ramelb’s allegations or believed they were exaggerated. Reyes told Hunter during his investigation that Ramelb was being “overly sensitive” about Fronda and that Fronda “probably did not try to threaten her.” On an earlier occasion, the Respondent’s general manager, Dowsett, told Ramelb that she was “overreacting” to alleged incidents of harassment, and Reyes (who was present) remarked in response that he was having “counseling sessions” with Ramelb.¹⁹

For all of these reasons, we find that the Respondent has failed to establish that it would have suspended and discharged Fronda, Freitas, Craddick, and Balagso if they had not engaged in known or (in Balagso’s case) suspected union activity. We accordingly affirm the judge’s finding that the Respondent violated Section 8(a)(1) and (3) of the Act by suspending and discharging these employees.

II. THE RESPONDENT’S HIRING OF HUNTER

The Respondent also excepts to the judge’s finding that the Respondent violated Section 8(a)(1) by hiring Hunter to investigate Ramelb’s allegations of harassment. The judge concluded that the Respondent hired Hunter with the expectation that he would legitimize the Respondent’s suspension of Leo Ramelb and suspension and discharge of the other discriminatees. Even if this is true, however, we find that Respondent’s hiring of Hunter did not, by itself, constitute an independent violation of Section 8(a)(1).

None of the parties disputes Hunter’s credentials as an experienced, neutral investigator; nor is there any evidence of collusion between Hunter and the Respondent with respect to his investigation or his findings. There is

¹⁹ The judge found that at least two of Ramelb’s allegations either did not occur or were of a much less serious nature than the Respondent alleged.

no allegation or evidence that Hunter was given any instruction that would have affected his ultimate findings, or that he made any references to union activities when interviewing the discriminatees that would have tended to have a coercive impact against their engaging in Section 7 activity.²⁰

III. QUEVIDO'S INTERROGATIONS OF PENA

We find no merit in the General Counsel's cross-exception, which argues that the Respondent violated Section 8(a)(1) when its supervisor, Cathy Quevido, questioned employee Abraham Pena about the results of the second representation election.

Quevido was absent from the hotel when the second election was held. Pena, who had been minimally active for the Union several months earlier, testified that the day after the election Quevido called him at work from outside the hotel, asked him how everything was, and then asked him the election result. According to Pena, when he told her the Union had won, she asked him "how he felt about that," and he responded by saying, "Well, what can I do? . . . There was a lot of activity, you know, with coworkers and they all want the union." Quevido then said, "Oh, okay." Quevido, however, testified that this conversation never occurred.

The judge did not make an express finding on whether the conversation occurred or whether, if it did, Quevido's query of how Pena "felt" about the Union's victory violated Section 8(a)(1).²¹ Like the judge, we shall assume that the conversation occurred as Pena testified, but, contrary to the General Counsel's argument, we find that the conversation was not coercive.

Under *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985), the Board looks to the totality of the circumstances to determine whether an employer's questioning would reasonably tend to restrain, coerce, or interfere with rights guaranteed by the Act. The Board examines factors such as whether the interrogated employee is an open and active union supporter, the background of the

interrogation, the nature of the information sought, the identity of the questioner, and the place and method of interrogation. *Rossmore House*, 269 NLRB 1176, 1178 fn. 20, affd. 760 F.2d 1006 (9th Cir. 1985); *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964); *Sunnyvale Medical Clinic*, supra at 1218.

Taking these factors into consideration, we find that, in context, Quevido's questions were not coercive. First, the questioning occurred over the telephone, rather than in a face-to-face confrontation, or in a location that could intimidate Pena. Second, Quevido explained to Pena her motivation for telephoning him; she had just returned from vacation during which the election had occurred. And, although Quevido and Pena were not particularly close, they did work together in the same department, so contact between them was not unusual. Next, although Quevido asked Pena how he felt about the results, Pena responded in a noncommittal fashion, and Quevido accepted that response without objection or further probing. Thus, viewed in its totality, we find that the conversation between Quevido and Pena amounted to little more than a casual conversation between a supervisor and employee, and was not of the type that would reasonably tend to restrain or coerce employees in the exercise of their Section 7 rights. *Cardinal Home Products, Inc.*, 338 NLRB No. 154, slip op. at 6-7 (2003). Accordingly, we dismiss this 8(a)(1) allegation.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Embassy Vacation Resorts, Maui, Hawaii, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a) and reletter the subsequent paragraphs.

"(a) Within 14 days from the date of this Order, offer employees Robbie Fronza, George Balagso, Kevin Freitas, and Robert Craddick full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Leo Ramelb, Robbie Fronza, George Balagso, Kevin Freitas, and Robert Craddick whole for any loss of wages, including tips or loss of other benefits they may have suffered by reason of the Respondent's discrimination against them in the manner set forth in the Remedy section of the judge's decision."

2. Substitute the following for the current paragraph 2(c).

²⁰ Any failure by the Respondent to provide Hunter with all the information in its possession relevant to his investigations was relevant to the complaint allegations of discrimination under Sec. 8(a)(3). Such failure did not, however, make the hiring of Hunter, by itself, an independent violation of Sec. 8(a)(1).

²¹ For the purpose of deciding whether three disciplinary warnings Quevido gave Pena several months later violated Sec. 8(a)(3), the judge found that "even assuming" the conversation occurred as Pena alleged, it could not have indicated to Quevido that Pena was a union supporter. However, in his analysis of the 8(a)(3) allegation, the judge stated that Quevido "impressed me as a credible witness" when she testified that she did not issue the warnings to Pena for antiunion reasons. The judge went on to dismiss the 8(a)(3) allegation over Quevido's three warnings to Pena, implicitly discrediting Pena's assertion that Quevido was motivated by his union activity, and, as previously noted, the General Counsel does not except to that finding.

“(c) 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.”

3. Substitute the following for the current paragraph 2(e).

“(e) Within 14 days after service by the Region, post at the Respondent’s facility in Maui, Hawaii, copies of the attached notice marked “Appendix.”²² Copies of the notice, on forms provided by the Regional Director for Region 20, after being duly 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. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 21, 1999.”

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

Dated, Washington, D.C., September 30, 2003

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN BATTISTA, dissenting.

I agree with my colleagues that the Respondent’s suspension and discharge of employee Fronda were unlawful. As they correctly conclude, the General Counsel

²² 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.”

satisfied his initial burden under *Wright Line*, and the Respondent did not adequately rebut it.

However, I do not agree that the suspensions and discharges of the three other employees were unlawful. Assuming arguendo that the General Counsel satisfied his initial burden, the Respondent has rebutted it. First, unlike Fronda, these three employees allegedly engaged in *sexual* harassment and misconduct. Such conduct can give rise to liability under Title VII and to damaging publicity to an employer. The Respondent’s investigator found that the conduct occurred, and that there was a hostile work environment.¹ Second, and again unlike the Fronda situation, the victim-employee hired counsel who threatened to sue under Title VII for such sexual harassment and misconduct. Third, the prior situations of lesser discipline (on which my colleagues rely) did not involve sexual harassment in violation of Federal law, and did not involve threatened lawsuits. Finally, the alleged conduct of these three employees was serious, and the Respondent’s policies permit discharge for such misconduct, even for first offenders.

In these circumstances, the Respondent simply wished to avoid a threatened lawsuit and damaging publicity. In my view, the Respondent would have taken the remedial measures irrespective of whether there was a union campaign or not.

The majority and the judge appear to discount the gravity of the threat to initiate legal action against the Respondent. The judge says that there is no requirement under Title VII that the Respondent discharge these employees. However, it is not the Board’s function to pass on the Respondent’s potential liability under the Civil Rights Act or to evaluate the adequacy of steps that the Respondent took to defend against such allegations. Clearly, discharging the employees at issue was an effective—perhaps the most effective—means of avoiding liability under that statute. It is not our place to judge whether some lesser action would have been adequate. In addition, quite apart from a lawsuit, the Respondent has a business interest (and perhaps a moral obligation) to eradicate the hostile work environment that the investigator found to exist.

¹ The judge made no contrary findings. My colleagues find it “implausible” that the Respondent considered the allegations to be sufficiently serious to justify the suspensions of Balagso, Freitas and Cradick. I disagree. Based on Hunter’s report following his investigation of the incidents involving Leo Ramelb and Fronda, the Respondent was on notice that a hostile work environment existed within the bell-valet department. Given Hunter’s report, Cindi Ramelb’s retention of counsel, and the advice of its own attorney, it is hardly implausible that the Respondent felt it was necessary to take immediate action to address Ramelb’s complaints, pending an investigation.

Although my colleagues suggest that the Respondent over reacted by discharging the three employees, they also suggest that the Respondent under reacted by not implementing departmentwide training on the avoidance of sexual harassment. Again, it is not our place to judge the adequacy of the Respondent remedial measures. If the Respondent chose to focus on the culprits, rather than on innocent employees in the department, I would not second-guess that response.

My colleagues say that some of the Respondent's own managers and supervisors questioned some of the allegations. In my view, this contention is quite wide of the mark. The essential points are that neutral investigator Hunter found that improper conduct had occurred, and there was in fact a hostile work environment. In these circumstances, it was not unreasonable for the Respondent to take corrective action against the alleged discriminatees, despite the contrary views of some of its own managers and supervisors.

On this basis, I would dismiss the allegations as to the three employees.

Dated, Washington, D.C. September 30, 2003

Robert J. Battista Chairman

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 or protection

Choose not to engage in any of these protected activities.

WE WILL NOT suspend or discharge employees because they joined, supported, or assisted the Union, Hotel Employees and Restaurant Employees, Local 5, AFL-CIO, or any other union.

WE WILL NOT require you to seek the assistance of your Union representative before coming to our human re-

sources department with your concerns or complaints, if you prefer not to seek such assistance.

WE WILL NOT unilaterally impose changes in your terms and conditions of employment without giving the Union notice and an opportunity to bargain over any such change, for the following collective-bargaining unit:

All full-time and regular part-time employees employed by us at our facility at 104 Kaanapali Shore Place, Lahaina, Hawaii, excluding all timeshare employees, RMI employees, managerial employees, confidential employees, security employees and/or guards, and supervisors as defined in the Act.

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

WE WILL, within 14 days from the date of the Board's Order, offer Robbie Fronda, George Balagso, Kevin Freitas, and Robert Craddick full reinstatement to their former jobs, or if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights, privileges, or benefits they previously enjoyed.

WE WILL make Leo Ramelb, Robbie Fronda, George Balagso, Kevin Freitas, and Robert Craddick whole for any loss of wages, including tips, and for loss of any other benefits they may have suffered as a result of our unlawful discrimination against them.

WE WILL within 14 days from the date of the Board's order, remove from our files any references to the unlawful suspensions and discharges of Leo Ramelb, Robbie Fronda, George Balagso, Kevin Freitas, and Robert Craddick and WE WILL within 3 days thereafter, notify them in writing that this has been done and that that discrimination will not be used against them in any way.

WE WILL, at the request of the Union, rescind the unilateral changes we made in your terms of employment regarding access to our human resources department, enforcement of tardiness rules, and off-duty sign-in requirements, and WE WILL bargain with the Union regarding such matters before making such changes.

EMBASSY VACATION RESORTS

Mary Ann Pacacha, Esq., for the General Counsel.

Wesley M. Fujimoto, Esq. (Dwyer Imanaka Schraff Kudo Meyer & Fujimoto), of Honolulu, Hawaii, for the Respondent.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice a hearing in this matter was held before me in Maui, Hawaii, on September 25–29 and October 2–5, 16, 23, and 24, 2000. The original charge in Case 37–CA–5472 was filed by Hotel Employees & Restaurant Employees, Local 5, AFL–CIO (the Union), and various additional charges were filed by the Union thereafter. On January 31, 2000, the Regional Director for Region 20 of the National Labor Relations Board (the Board) issued an order consolidating cases, consolidated complaint and notice of hearing alleging violations by West Maui Resort Partners, a Limited Partnership, consisting of Signature Capital–West Maui, LLC and WHKG–GEN–PAR, Inc., d/b/a Embassy Vacation Resorts (Respondent) of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). Amended consolidated complaints were issued by the Regional Director on May 26 and August 25, 2000. The Respondent, in its answers to the complaint and amended complaints, duly filed, denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel (the General Counsel), and counsel for the Respondent. Upon the entire record, and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a limited partnership located in Lahaina on the Island of Maui, Hawaii, where it is engaged in the operation of a hotel providing food and lodging. In the course and conduct of its business operations the Respondent annually derives gross revenues in excess of \$500,000 and purchases and receives goods and services valued in excess of \$5000 which originate from points outside the State of Hawaii. It is admitted and I find that the Respondent is and at all material times has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted and I find that at all material times the Union is and has been a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The principal issues in this proceeding are whether the Respondent has violated Section 8(a)(3) and (1) of the Act by suspending and discharging certain employees, and whether the Respondent has violated Section 8(a)(5) and (1) of the Act by making certain unilateral changes without prior notification to and bargaining with the Union as the collective-bargaining representative of its employees.

B. *The Facts*

1. Background

The Respondent assumed the ownership and operations of the Hotel in about November 1997, and currently has an employee complement of approximately 264 full-time and regular part-time employees.

The employees involved in this case were classified as bell/valet department employees unless otherwise specified herein. Bell/valet employees park cars for the guests, bring guests' cars from the garage or parking lot to the front entrance, load and unload luggage from cars as guests leave and arrive, and carry luggage to and from guests' rooms when they are checking in or departing. One employee is classified as a bell/valet clerk, and is essentially a dispatcher who receives phone calls from guests who are checking out and dispatches the next available bell/valet employee(s) to assist the guest.

The Union's involvement with the Respondent commenced on about July 17, 1998, when the Union first filed a representation petition. After a representation hearing, a first election on September 29, 1998 (which the Union lost by a vote of 126 to 86), the filing of election objections by the Union, a hearing on objections, the hearing officer's report on objections dated January 8, 1999, in which it was recommended that the objections were meritorious and that a second election should be conducted, exceptions filed by the Respondent, and, ultimately, a Board decision dated September 24, 1999, upholding the recommendations of the hearing officer and directing a second election, a second election was held on October 21, 1999. The Union prevailed in the second election by a vote of 144 to 68, and on October 29, 1999, the Union was certified as the collective-bargaining representative of the Respondent's employees. Thus, the election process took some 14 months from beginning to end, during which time the Respondent vigorously opposed the Union through meetings and written campaign propaganda disseminated to the employees,¹ and the Union countered with abundant campaign propaganda of its own.

Bernie Delos Santos was hired in March 1998 as the Respondent's human resource director. The union activity began a few months after she was hired, and she was given the responsibility of conducting the Respondent's campaign to oppose the unionization of the Respondent's employees. The Union, by letter to the Respondent dated July 17, 1998, identified three individuals as members of its organizing committee, namely, Noreen Madeiros, a front-desk clerk, and Robert Cradick and Robbie Fronda, both of whom were longtime bell/valet employees. These three employees actively campaigned on behalf of the Union at all material times herein, testified for the Union at the two representation hearings, wrote

¹ For example, a leaflet distributed by the Respondent prior to the first election, entitled "Urgent Communication," states, *inter alia*, that the union people "think you're stupid," and have advanced "Smoke-screen issues, false promises, lies, false guarantees, storybook fantasies of Robin Hood and Alice in Wonderland, and insults to employees and managers of this property. . . . All we ask is that you give the new management a chance to prove itself for one year. . . . Management is making a lot of progress with its new Human Resources Department and does not need any more interference."

and conspicuously disseminated numerous union newsletters and bulletins, and, in this regard, signed their names to the articles they authored which were often in direct response and opposition to the campaign materials written and disseminated by Delos Santos.

Neftali Reyes was hired as the bell/valet department manager in October 1998, and continued in this position until about December 1999 when he became assistant manager of the Hotel. He left the Hotel's employ in February 2000.

The Respondent has a published progressive disciplinary policy, as follows:

If you commit infractions or display improper conduct you will be subject to the following disciplines:

1. A VERBAL REPRIMAND by your supervisor.
2. A WRITTEN REPRIMAND (with a copy placed in your personnel file) for the second offense.
3. SUSPENSION OR DISCHARGE (with a written copy of the violation that resulted in the discharge including reference to any previous verbal or written warnings given) for the third offense. Any third rule violation (It does not have to be the same rule violation) justifies discharge, but could result in a suspension without pay or third and last warning).

4. DISCHARGE may also be imposed for a first offense in cases of *a serious misconduct!*

TERMINATION OF EMPLOYMENT IS A SERIOUS MATTER which normally occurs after corrective discipline has failed. [Emphasis in original.]

2. Suspension and discharge of Robbie Fronda; suspension of Leo Ramelb

Cindi Ramelb (Cindi) was the only female employee in the bell/valet department. On July 14, 1999, Cindi complained to Human Resources Director Delos Santos about harassment by her brother-in-law, Leo Ramelb (Leo), and about a threat by Robbie Fronda, both longtime bell/valet employees, and further, about being subjected to mistreatment by fellow employees for the past 8-1/2 years. She also alluded to perhaps hiring a lawyer if something was not done about the situation. Cindi, according to Delos Santos, was particularly upset and crying, and Delos Santos testified that although Cindi had been "tearful" when she had made prior complaints, she had never seen Cindi so upset. On July 15, 1999, after Delos Santos jointly conferred with Regional Human Resource Director Julie Field and with the Respondent's attorney, Fronda was indefinitely suspended. It was decided to present Cindi's complaints to an impartial third-party investigator. Without exception the Respondent had always performed an internal investigation of employee complaints when necessary, but because of Fronda's union activity and his position as one of the three members of the Union's organizing committee, it was decided that the findings of a third-party investigator would avoid the appearance of discrimination or disparate treatment against Fronda.

Someone from the office of the Respondent's attorney contacted Dispute Prevention & Resolution, Inc. (DPR), located in Honolulu, Hawaii, and the Respondent entered into an Investigation and Fact Finding Agreement with that entity. DPR des-

ignated Keith Hunter, president/CEO of DPR, as fact finder. Hunter and the Respondent scheduled 1 day for Hunter's visit to the Respondent's facility, and his investigation commenced and was completed on the same day, July 28, 1999, during which he interviewed Delos Santos, Cindi Ramelb, Robbie Fronda, Leo Ramelb, bell/valet employee Edgar Inez, and Bell/Valet Manager Neftali Reyes.

Hunter, who testified at length in this proceeding, had been designated to investigate and resolve the two specific allegations simultaneously brought to human resources by Cindi Remelb on July 14, 1999, namely, that Fronda had threatened her on July 13, and that Leo Ramelb had engaged in harassing behavior toward her. However, upon his initial interview with Cindi, he learned that the complaints against Fronda and Leo were just the tip of the iceberg, and that her perceived problems, which she claimed had been festering since she was first hired in 1990, were premised to a great extent on the fact that "the boys" in the bell/valet department were cliquish and would not accept her as an equal, and that because of this she had been harassed² and isolated and treated unequally, unfairly and with disrespect by a former manager and many coworkers alike throughout her 8-1/2 years of employment. Further, she complained to Hunter about having been sexually harassed by many of these same individuals, *infra*, but not by either Fronda or Leo Ramelb. Hunter deemed all these things to be a part of his investigation and, insofar as the record shows, took it upon himself to generally resolve³ and investigate⁴ a multitude of matters raised by Cindi rather than limit his investigation to the two issues presented to him by the Respondent. It was perhaps as a result of the time constraints imposed by a predetermined

² The alleged harassing behavior included "stinkeye" which is not a term of art and is apparently a commonly accepted term in Hawaii that generally connotes any type of look that may, under any given scenario, be perceived as disrespectful or disparaging or unfriendly. As I find below that Cindi Ramelb's testimony should not be credited in any respect, I further find that her perceptions regarding stinkeye, an amorphous and vague term to begin with, are similarly untrustworthy.

³ In his "Confidential Report of Fact Finder" he finds, in effect, under the heading of "Specific Findings of Fact Finder," a pervasive and systemic hostile work environment, and under the heading "Non-Binding Recommendations of the Fact Finder," recommends "That the entire bell valet staff should be required to attend and complete another Discrimination and Sexual Harassment Training sponsored by The Company. I further recommend that the training be conducted by a private outside agency (not affiliated with The Company) and that the training occur off of the Hotel property." And, similarly, he recommends "That the entire bell valet staff should be required to attend a full day 'partnering' type retreat during which communication, teambuilding and problem-solving skills are honed and in which ethnic/cultural/gender diversity awareness is further developed. I also recommend that this retreat be conducted by a private outside agency and held off of the Hotel property."

⁴ In his same confidential report, at fn. 4, he states: "Ms. Remelb indicated that she recalls that the following employees engaged in some form of inappropriate conduct: Mr. Stacey Kahue, Mr. Kimo Paishon, Mr. Robbie Fronda, Mr. George Balagso, Mr. Jeremy De Los Reyes, Mr. Lance Young, Mr. Charley Rapolo, and Mr. Bobby Cradick. She also made it clear that, other than the complaints that are the subject of this investigation, she was not pursuing complaints against these individuals at this time."

1-day investigation that, as found herein, he simply did not elicit from Fronda and Leo Ramelb the salient facts that would have been invaluable to a reasoned analysis of the two matters presented to him.

First, regarding Leo Ramelb, Hunter determined in his August 4, 1999, "Confidential Report of Fact Finder" that:

Consistent with The Company's policy on progressive discipline,⁵ Mr. Leo Ramelb should be issued a *verbal warning* concerning his unprofessional behavior toward his coworker Ms. Cindi Ramelb.⁶ Mr. Ramelb should also be counseled by both the on-site and corporate Human Resource Managers that his *unilateral decision* to not speak and ignore Ms. Ramelb as a means of dealing with his anger toward his brother is not appropriate and does not comport with the Company's expectations of its employees as described in Section 104 Business Ethics and Conduct of the Signature Resorts Policies and Procedures for Team Members booklet. [Emphasis added.]

Thus Hunter did not know what, I find, *infra*, both Human Resources Director Delos Santos and Bell/Valet Manager Reyes knew very well, namely, that for over a year Leo Ramelb had spoken to Cindi Ramelb only on a professional basis as necessary, and engaged in no casual workday conversation with her whatsoever when their shifts overlapped, because of the serious family dispute and threats from Cindi's husband, *infra*; and moreover, that Delos Santos had put her imprimatur on this arrangement in order to avoid on-the-job conflict and arguments between the two and had even praised Leo for handling the situation so maturely. Clearly, contrary to Hunter's finding, the structured "professional-only" relationship between Leo and Cindi may not be fairly characterized as a "unilateral decision" by Leo Ramelb.

Secondly, regarding Fronda, Hunter's report shows that he gleaned from Delos Santos' July 15, 1999 memorandum of her meeting with Fronda, but not from Hunter's investigative interview with Fronda, that a guest who had observed Cindi and Fronda having a verbal exchange said to Fronda, "Don't hit her."⁷ Relying solely upon this information, Hunter reasoned that:

In the face of conflicting accounts of an event like this, a person in search of the truth must look for other sources

⁵ Hunter states in his report that he had "thoroughly reviewed" the Respondent's personnel records of three individuals who had been previously terminated, including the personnel records of Stacey Kahue, and concluded that "[t]he Company went the extra mile to give each of these employees every opportunity to turn things around before termination." Further, under the heading of "Specific Findings of Fact Finder" he finds that, "[t]he Company has been flexible and lenient in its dealings with employees who were or are the subject of disciplinary procedures. In some instances The Company has bent over backwards to give troubled employees a chance to cure their problems."

⁶ In fact, the Respondent disregarded Hunter's recommendation and gave Leo Ramelb a 5-day suspension, *infra*.

⁷ Fronda testified that during his interview with Hunter he was not asked anything about the guest's comment, and did not relate the scenario to Hunter as he believed that Hunter had been advised by Delos Santos that the guest was only joking.

of confirmation, validation and credibility. The fact that a guest who was presumably unaware of the context of the Fronda/Ramelb discussion would be *concerned enough* to make such a comment is compelling evidence of the tone and tenor of Mr. Fronda's words. This is particularly so since it was Mr. Fronda himself who recalls hearing the guest's *admonition*. Furthermore, since Ms. Ramelb had been subjected to other hostile treatment by coworkers but believed this particular statement to be a threat worthy of reporting to management and somehow different than other statements is also telling. [Emphasis added.]

While perhaps Mr. Fronda did not intend to threaten Ms. Ramelb with the statement he made,⁸ the net effect of his conduct is that it was perceived by at least two other people (Ms. Ramelb and the guest) as *threatening* in nature. [Emphasis added.]

Thus, Hunter apparently believed that the guest was truly "concerned" that Fronda was about to hit Cindi and had "admonished" Fronda not to do it. Hunter did not know what both Delos Santos and Reyes clearly knew, namely, that Fronda had told them that the guest was not serious and was laughing and joking when he said, "Don't hit her."

Hunter, after making the foregoing findings, recommended that "[c]onsistent with The Company's policy on progressive discipline,⁹ Mr. Robbie Fronda's indefinite suspension should be reduced to a five day suspension without pay and, further, that Mr. Fronda be issued a written warning that further violations of The Company's policies on appropriate conduct will result in termination."

The Respondent, however, disregarded Hunter's recommendations by terminating Fronda and giving Leo Ramelb a 5-day suspension. Delos Santos testified that the Respondent had no problem with adopting Hunter's recommendations in full, and fully intended to do so, but then changed its mind after consulting Cindi. Thus, on August 16, 1999, Delos Santos met with Cindi to advise her of Hunter's findings and recommendations. Cindi, according to Delos Santos, interjected and said that she did not want Fronda to come back to work because she felt he was a threat to her and she was "not comfortable" with Fronda coming back. She also stated, according to Delos Santos' memorandum of the meeting, that "Leo's looks has not changed since this incident started," and went on to complain that she was "the victim" and that, "[t]he friendly faces that used to say good morning, well, not anymore . . . they will all stick together no matter what. I'm uncomfortable when I come to work." After conferring with Corporate HR Manager Field and Respondent's attorney, Delos Santos then called Cindi back

⁸ Hunter's notes of his interview with Manager Reyes state that Reyes believed Cindi was being "overly sensitive" about Fronda coming up to the desk and that, "maybe she is that time of the month"; that "Robby does get emotional and visibly upset. Robby probably did not try to threaten her"; that, on the following day Cindi told Reyes that she was mad and did not want to talk to him (Reyes), and speculated to Hunter that Cindi perhaps felt that Reyes had "disregarded her"; that he told Cindi "that nothing is going to change unless you are ready for it to change"; and that on July 14 Delos Santos "was brought in—she [Cindi] was invited to make a complaint." (Emphasis added.)

⁹ See fn. 5 above.

that same afternoon and asked if she “could give me a statement in writing of how she feels regarding the recommendation the third party investigator has given.” Delos Santos testified that she typed out the following statement, in Cindi’s words:

I Cindi Ramelb, do not feel comfortable with Robbie Fronda returning to work. I do feel threaten [sic] by Robbie. I do feel he is a physical threat towards me. I do feel that if he returns, it will all start up again like it never stopped.

Even if the company sends him to Anger Management Class, Sexual Harassment Class this will not help him. He has had many opportunities to change and he never did.

I do feel I am the victim here. I’m uncomfortable but, I’m not leaving . . . Cindi will be here.

There is no reference in the statement that Cindi was not comfortable with Leo, or that she believed that Leo should be given a disciplinary suspension.

Next, having obtained this statement from Cindi, Delos Santos phoned Hunter and asked him to contact Cindi about the matter. On August 23, 1999, Hunter issued a one-page document entitled “Supplemental Report of Fact-Finder,” as follows:

Dear Ms. Delos Santos:

This will confirm that, at your request, following the issuance of my Fact-Finding Report, I had a telephone discussion with Ms. Cindi Ramelb regarding her concern that she still feels threatened by Mr. Fronda’s presence in the work place.

During our telephone discussion, I suggested that Ms. Ramelb consider the possibility of reserving her judgment on Mr. Fronda in order to allow the Employer an opportunity to implement the Fact-Finder’s recommendations and/or any other actions the Employer might determine appropriate. While still somewhat uneasy, Ms. Ramelb expressed a willingness to allow a reasonable period of time (2–4 weeks was discussed) to permit the Employer to take its action(s) and to assess whether such action(s), in her view, have brought about any changes in Mr. Fronda’s behavior. Ms. Ramelb also requested that the Employer take whatever steps might be necessary to coordinate the bell valet schedule such that Ms. Ramelb and Mr. Fronda are not scheduled together on any shift.

Please do not hesitate to contact me directly should you have any questions.

Delos Santos testified that she did speak with Cindi on August 23, 1999, after Cindi’s conversation with Hunter. However, she does not recall whether her conversation with Cindi was before or after she had received Hunter’s supplemental report.¹⁰

¹⁰ Hunter’s supplemental report is dated August 23, 1999, and is headed “VIA FACSIMILE,” however, the date stamp of the fax machine on the top of the page bears the date September 16, 1999, while the date stamp of the Respondent shows that it was received on September 7, 1999. The Respondent has not clarified this matter and I find that Delos Santos had this supplemental report on August 23.

During this conversation Cindi told her that she still feared for her safety. Delos Santos did not contact Hunter after that, as Hunter had suggested in his supplemental report. Rather, because of Cindi’s continuing concern, and particularly recalling the emotional state of Cindi when she first complained on July 14, 1999, Delos Santos ignored Hunter’s supplemental report and immediately terminated Fronda on that day.

Regarding Leo Ramelb, the record is clear, abundant record evidence shows, it is not denied by the Respondent, and I find, that since about June 1998, Leo had been given permission by Delos Santos, Manager Reyes, and former manager, Kimo Paishon, to simply not speak to Cindi and to avoid any non-work-related interaction with her whatsoever because of a particularly serious family matter. Briefly stated, Cindi’s husband, Manny Ramelb, who was Leo’s brother, had threatened Leo’s wife and children with serious physical harm, the police were called, and a temporary restraining order against Manny extending for a year was issued by a local court. Leo, believing that Cindi was letting such matters interfere with their relationship at work, and not wanting the matter to affect his job, requested and received permission to not have to socialize or communicate with Cindi on the job unless required by their duties in assisting guests and parking cars.

Regarding Robbie Fronda, Delos Santos called him to her office at the end of his shift on July 15, 1999, and summarily suspended him. Manager Reyes was also present. Delos Santos’ memorandum of the meeting begins as follows:

As Robbie sat down he asked, what did I do now? I stated, this is serious, there has been a complaint of threat by you to Cindi on Tuesday, July 13th, that in a threatening way and a threatening look you told her “You don’t want to get me mad.” She took [sic] as a threat to her. Therefore, I am suspending you pending investigation, which may result in termination of employment. I will not conduct the investigation, we are having a third party investigate the complaint.

I asked Robbie what was said to lead up to this point? He stated, Cindi don’t get me mad, what did I do to you. I did not threaten her.

Frona, according to Delos Santos’ memorandum, went on to explain to her and Reyes what had happened on July 13, as follows: He approached the bell desk because he overheard Cindi speaking with Reyes regarding Fronda’s schedule. Cindi remarked that her conversation with Reyes did not concern him. He responded that if it was private they could go to Reyes’ office and talk. Cindi told him to “shut up.” Reyes then spoke up and said, “[T]o let it go. Stop it, let it go. Robbie don’t push it.” A short time later Fronda said to Cindi, “Don’t get me mad, what did I do to you?” A guest apparently overheard this remark and said, “Don’t hit her.” Fronda then walked back to where Reyes was standing and asked what was wrong with Cindi. Reyes told him “to stop it, let it go. I mentioned to you about negativity and being positive.”¹¹ Cindi seems to be sensitive.”

¹¹ Reyes was apparently referring to the annual review he had recently given Fronda, *infra*.

Upon hearing Fronda's account of the incident, Delos Santos asked him why a guest would make such a comment if it wasn't made in a threatening way. Fronda, according to Delos Santos' memorandum, simply replied that he didn't know but that he did not threaten Cindi.

Delos Santos testified that she customarily would consult Reyes regarding employees' complaints. Thus, she testified that "if there's situations that also occur, I do speak to Nef Reyes about it and for him to, you know, approach the situation. If, you know, comments were brought to my office regarding the bell desk department, I would have him handle the situation." Asked whether prior to making the decision to suspend Fronda she consulted with Reyes, Delos Santos answered, "We discussed this with counsel and Julie Field and we felt that that was the best action to take." Asked again what Reyes said, Delos Santos replied, "I'm not exactly sure what exactly he said." Asked whether or not it was true that in fact Reyes told her that he did not believe Fronda should be suspended, Delos Santos replied, "He may or may not." Moreover, she testified that she was unable to recall whether or not she spoke with Reyes at all regarding the matter.¹²

Leo Ramelb was hired on July 20, 1998. He had an excellent work record. On July 13, 1999, the day prior to Cindi's harassment complaint against him, Leo was given the results of his annual performance appraisal by Reyes. The Respondent's "Performance Appraisal" is a lengthy 10-page document with a rating system from 1 to 5 in each of 20 categories. Leo's overall score was 3.25 which was between 3 (satisfactory performance) and 4 (highly satisfactory—performance exceeds requirements), and at the conclusion of the document Reyes entered the notation that Leo was a "Very good employee."

Leo Ramelb testified that he became involved in the Union's organizing activity in about April 1999, when he was asked by Fronda to help solicit union authorization cards in the bell/valet, housekeeping, and maintenance departments. After getting the cards signed he returned them to bell/valet employee Bobbie Craddick. He and other bell/valet employees would discuss the Union openly at work, and he and the others had a particular hand signal, making an "L" with the fingers of their right hand and holding up all five fingers of their left hand to designate "Local 5"; this hand signal, which had been explained to Reyes, was widely and openly used as a sign of union solidarity. On September 8, shortly after his return from his 5-day suspension, the Union sent a letter to the Respondent advising that the "Union organizing committee includes, but is not limited to, Mr. Leo Ramelb, Ms. Noreen Medeiros, Mr. Robert Craddick, and Mr. Robbie C. Fronda."

Leo Ramelb testified that Reyes was aware that he was a union supporter. Hunter's report includes the statement that "it was related to me that Ms. Remelb [Cindi] was actively op-

posed to the union's organization efforts while various of her coworkers are active supporters of the unionization efforts." This information was given to Hunter by Manager Reyes, who, according to Hunter's notes of his interview with Reyes, was told by Reyes that Cindi was "vocal nonunion," and that "[t]he others are pronoun."¹³

Leo Ramelb testified that from the time Cindi had been hired in 1990 up until May 1998, his relationship with her was very congenial and they would joke around at work. When the situation with Manny began he stopped engaging in social conversation with Cindi at work because he didn't want to provoke any arguments between them and did not want to become upset with her and perhaps lose his job over the matter. Cindi complained to Delos Santos about this, and after that Leo was called to her office. He explained the situation to Delos Santos, told her about the threats and the TRO (which had been issued by the court and was to remain effective for a 1-year period) and his reasons for not talking to Cindi, namely that he believed this was the best way to deal with the situation so "I wouldn't provoke anything between Cindi and I." Delos Santos replied, according to Leo, "Oh, that's good. I'm glad that you went that way—to not talk to her, so that way, you won't provoke anything." And she also said that, "I don't see, you know, anything wrong with that. There's no law saying that you don't—have to talk to your coworker as long as you do your job." Delos Santos told him that she was going to inform Cindi of their conversation and advise her "that that's the way I was going to be dealing with the whole situation at work."

From the foregoing exchange it was understood by Leo that the Respondent appreciated his predicament and had given him permission to interact with Cindi only on a professional, work-related level. Leo testified that after his discussion with Delos Santos he felt very confident that he could go to work the next day knowing that he did not have to talk with Cindi or have any interaction with her except with regard to work-related matters. Further, according to Leo, Bell/Valet Manager Paishon, who preceded Reyes as manager, understood that this was the way the matter had been resolved and he, too, approved of the arrangement. Later, after Reyes became manager, Cindi complained to Reyes about the matter. Leo then explained the situation to Reyes and told him that Delos Santos knew all about it. When Leo told Reyes how he was handling the situation by not speaking to Cindi except on a professional basis, Reyes said, "I don't think there's any problem with that. I guess the main thing is you do what you got to do at your job."

Leo Ramelb asked Reyes and Delos Santos how they wanted him to act toward Cindi when he returned from his 5-day suspension. Reyes replied, according to Leo's testimony, "As professionally as you can be." Leo replied that that is what he had been doing all along.

Leo Ramelb testified that he was worried about returning to work after his suspension because he anticipated further charges by Cindi and did not want to be terminated as Fronda had been the day before. He had not been given any specific

¹² At this point in the hearing Respondent's counsel stated that Reyes, who had left the Respondent's employ and was working on the mainland, had been contacted and would be a witness on behalf of the Respondent in this proceeding. Later during the hearing it was represented that in fact Reyes would not be called as a witness because his current employer would not pay his salary during his absence from work and therefore he was unwilling to voluntarily appear. Reyes did not testify in this proceeding.

¹³ However, Hunter went on to say that there was simply not enough evidence to support a finding that the conduct of either Cindi or Leo or Fronda was motivated by their union sentiments.

instruction about how he was expected to act toward her; and, knowing that because of their overlapping shift schedule he and Cindi would be the only two bell/valet employees on duty for a 1-hour period until the next employee arrived, he was apprehensive of being alone with her as this would give her the opportunity to make false charges that he could not disprove with witnesses. Therefore, he did not return to work on the designated day but rather called in sick because he “felt stressed out to go back to work and was worried because I wasn’t given any advice on how to prepare myself to go back to work and dealing with the whole situation and Cindi.” He returned to work on September 1, 1999, when other employees were present. As he had anticipated, he learned from bell/valet employee Edgar Inez that Cindi had gone to Delos Santos that day to complain about the continuing hostile environment, but that Reyes had told Inez, that “it wasn’t a hostile environment at this time.”¹⁴

In the absence of any instructions by Reyes, Leo Ramelb had decided to be particularly attentive to Cindi’s needs in dealing with guests. Prior to that time he would assist Cindi “if necessary” and she would assist him “if necessary” in helping to load or unload luggage from guests’ vehicles or in opening car doors for guests.¹⁵ Upon his return he made a special effort to assist Cindi in servicing the needs of her guests, and, according to Leo, Cindi seemed to reciprocate in kind, but, insofar as the record shows, he continued to avoid her and did not communicate with her on a casual basis. There were no complaints by management between that time and the time Cindi left the Respondent’s employ as a result of emotional problems, *infra*.

Robbie Fronda began working for the Respondent on December 5, 1988, the day the hotel first opened. The Respondent admits that he was an “exemplary” employee. His annual performance appraisal, given to him by Reyes on July 7, 1999, just 1 week prior to his indefinite suspension/termination, rates him as 3.97 overall (4 being “Highly Satisfactory—Performance Exceeds Requirements”) on a 5-point scale, and included within this score is a rating of 4 under the “Attitude” section of the appraisal and a rating of 4.5 under the “Personal Characteristics” section. Prior to the incident involved herein there have been no complaints against him by anyone, and no warnings of any kind except for a single verbal warning for failing to punch the timeclock.

Frona testified that he was born in the Philippines. His first language is the Filipino Ilocano dialect, and English is his second language.¹⁶ He is the individual who initially contacted the Union and has been actively and conspicuously involved with the Union since that time. After the first election it was anticipated that there would be a second election and the union campaign continued in order to sign up more people and prepare for

a second election. Fronda testified that Leo Ramelb became an active union adherent in April 1998, and thereafter solicited authorization cards from employees, and that the bell/valet employees, including Leo Ramelb, would talk about the Union every day. Sometime after the first election, Housekeeping Assistant Manager Adele Strahan called him aside and whispered to him to, “Watch out. Somebody is watching you. Watch yourself.” He was asked by Reyes and Assistant Bell/Valet Manager Mika Kaleikini to join the “Awesome Committee,” a committee of managers and employees that would apparently plan parties and picnics and perhaps would discuss other employer-employee matters, but he declined the invitation, advising them that he did not want to join because of his involvement with the Union.

Frona testified that on July 13, 1999, he saw Cindi Ramelb talking to Reyes behind the bell desk. He was standing nearby, within a few feet, and observed that Cindi, who was holding a shift schedule in her hand, asked Reyes what was the point of having a 9 a.m. to 5 p.m. shift. That particular shift was Fronda’s shift and he remarked, “Hey, that’s my schedule.” Cindi turned around and said, “This doesn’t concern you,” and she then again asked Reyes why there should be a 9 a.m. to 5 p.m. shift. Reyes, who was not taking the matter seriously, teasingly told Cindi, “I make the schedule because I like Robbie.” This did not set well with Cindi who apparently took Reyes’ remark seriously, and she replied something to the effect that she didn’t know there was favoritism at the Hotel. Then she asked Fronda why he didn’t work the 5 to 1 p.m. shift. Fronda said that he didn’t want that shift and walked away to assist a guest. About 5 minutes later he returned to the bell desk area to put away the guest’s car keys, and Cindi continued, “I don’t do that to you. I don’t listen to manager’s conversations.” Fronda kept silent and Reyes, who was standing nearby, told them both to “Stop it. Stop it already. Let it go.” Then Fronda walked away while Reyes was still talking with Cindi. At this time two vans came to the front entrance and stopped in close proximity to each other. Cindi began assisting the guest in the first van, and Fronda, while walking past Cindi as he was headed toward the second van, suggested that if she didn’t want people listening to her conversations she should go downstairs and talk privately in Reyes’ office. She replied, “Yeah, yeah, yeah. Just shut up.” He looked at her and, with arms outstretched and his palms up in a questioning or shrugging gesture, asked, “What did I do to you?” Cindi didn’t reply and then he said, “Cindi, don’t make me mad.” At about that time he opened the door of the second van. The guest exited and, according to Fronda, in a “smiling and laughing and teasing manner,” said, “Don’t hit her. Don’t hit her.”

Frona testified that the incident occurred between about 11 and 11 a.m. that day, July 13, 1999, and that that he worked with Cindi until 1 p.m. when her shift ended. On the following day, July 14, their shifts overlapped for 4 hours. On the next day, July 15, Cindi was scheduled to be off but volunteered to come in that day to substitute as bell clerk for another bell/valet employee, and their shifts again overlapped for 4 hours. Fronda testified that Cindi was very nice during the remainder of the shift on July 13 and, during the next 2 days when they worked together, that no further words were exchanged and that

¹⁴ No objection was made by counsel to this clearly hearsay testimony.

¹⁵ There is no record evidence that this was ever a problem with either Cindi or Reyes or that it was a part of Cindi’s complaints or Hunter’s investigation.

¹⁶ There were many Filipino-Ilocano speaking employees at the Hotel and the Respondent distributed campaign materials in this language. The Respondent’s policy permitted employees to speak any language to each other while engaged in casual conversation, but they were required to speak English in front of guests.

his interaction with Cindi as bell clerk on July 15 was amicable. It was not until he got off work on July 15 that he was accompanied to Delos Santos' office and suspended, as noted above.

Fronda testified that during his July 15 meeting with Delos Santos and Reyes, after first being told of his indefinite suspension pending termination, he was given only a brief time to explain what had happened, and, upon volunteering the information about what the guest had said, clarified this by specifically stating that the guest was not serious but was laughing and joking. He denied that he threatened Cindi. He signed the suspension notice with the words, "I did not threaten [sic] her." Prior to this meeting neither Reyes nor Delos Santos had told him that there had been any complaint by Cindi.

Fronda further testified that during the 2 weeks between his suspension and the interview with Hunter he couldn't eat or sleep because of the stressful situation, but during the interview he tried his best to explain what had happened. Regarding the comment made by the guest, Fronda testified, "[H]e [Hunter] didn't ask me that so I didn't tell him that . . . I thought he knew already." Thus, Fronda believed that Hunter was already aware of the fact that the guest's statement had been made in jest, as he had previously related this to Delos Santos. Hunter then asked him questions about other people.

Delos Santos phoned him on Friday, August 20, 1999, and told him to come in the following Monday, August 23, 1999. Fronda met with Delos Santos and Reyes on that date.¹⁷ She handed him the termination letter, and said that because of the guest's comment he was being terminated. That was the first time he had been made aware that the guest's comment was deemed to be of any particular significance, and he stressed to Delos Santos that the guest was smiling when he made the statement and was only joking. She repeated that he was being terminated because of the guest's comment. Reyes did not say anything.

It seems very apparent why the guest was joking and smiling. Fronda is a very slight individual, perhaps 5 feet 6-inches tall and weighing about 135 pounds. Cindi, on the other hand, is conspicuously taller and larger. The record is replete with comments by witnesses, counsel, and me regarding Fronda's size, particularly when compared to Cindi. Fronda testified that even Cindi commented to him, when they were unloading bags together, that he was skinny and she was stronger than he was. On another occasion he joked with her that he took a tybo class and was strong now. Former manager Paishon testified that he heard Cindi call him, "You skinny little so and so . . . only 98 pounds soaking wet." Paishon testified further that Fronda weighed less than anyone in the department and that Cindi "was kind of domineering over him." And Bobby Craddick, another bell/valet employee testified that because "Robbie is kind of a small guy," he would assist Fronda with carrying bags. And Hunter testified that Craddick told him, "If you

know Robbie . . . he's not a large guy, kind of a meek fellow." Thus, it is clear that the juxtaposition of Fronda and Cindi in close proximity at the time when they were obviously engaged in a verbal exchange would cause a bystander to find the matter somewhat humorous, and, under the circumstances, it is obvious that the remark made by the guest was in fact a sarcastic reference to Fronda's comparative size rather than an expression of concern in the form of an admonition.

Fronda very favorably impressed me as a candid, credible, straightforward witness, as well as an individual who appeared to be singularly gentle, polite and deferential. Nor did the Respondent attempt to show that his witness-stand demeanor was different than his at-work personality. Given his demeanor and slight physique, without more, I find that no reasonable person could generally view him as "threatening" in any respect.

3. Suspension and discharge of Bobby Craddick, Kevin Freitas, and George Balagso

Cindi Ramelb had never before complained to the Respondent about sexual harassment¹⁸ until the Respondent received a letter dated September 28, 1999, from an attorney representing her. The attorney states that he had been furnished and had reviewed Hunter's report, "which confirms that Ms. Ramelb has been subjected to sexual harassment as a result of a long-standing hostile work environment that continues to the present day," and advises that Ramelb will seek all remedies available to her absent a mutually acceptable resolution of her claims. The letter references an attachment, "Exhibit A," that sets forth "specific examples of the continuing hostile work environment." Exhibit A lists four distinct and separate instances of alleged sexual harassment toward Cindi by three bell/valet employees, namely, George Balagso, Kevin Freitas, and Bobby Craddick that had occurred on various specified days in August 1999.

None of the alleged incidents involved any physical touching of Cindi; rather, it was alleged that the employees made certain sexual remarks that were not welcomed or appreciated by Cindi. Thus, a guest was standing naked in the window of his hotel room, and a remark was made to Cindi, "Look Cindi, he is bending over and showing us his ass . . . he has more hair on his ass than I do"; and another employee said, referring to a woman passing by, "God Cindi, I wish I could slam her right here behind the desk"; and on another occasion an employee told her, after she asked what was being served that day in the cafeteria, that the cafeteria food was no good, "But, I have something good for you to eat"; and finally, as a guest was getting out of her car, an employee made the statement, "Wow, do you think those tits are real . . . I don't think she is wearing any underwear."

On October 4, 1999, some 5 or 6 days after receiving this letter, and again after consulting with Field and the Respondent's attorney, Delos Santos placed the three employees on suspen-

¹⁷ Prior to his meeting with Hunter and prior to this meeting with Delos Santos he had asked Delos Santos if he could bring a witness and Delos Santos said no. This should be contrasted with Delos Santos' practice of permitting other employees to bring witnesses to disciplinary interviews whenever they requested to do, as shown by documentary evidence.

¹⁸ In Hunter's initial report he credits Cindi Ramelb's assertions that she has complained about sexual harassment over the years, but, acknowledging that there is no record of this, concludes that the lack of documentation is due to poor record keeping or management. In fact, the record evidence herein shows, and I find, that Cindi made no such complaints over the years.

sion pending termination. Further, it was decided to handle the matter by again hiring Hunter to conduct a third-party investigation of these allegations, particularly because of Craddick's known involvement with the Union as an active union adherent and a member of the Union's organizing committee. However, this time Hunter was authorized to issue a fact-finders report only, specifically without recommendations, because, according to Delos Santos, the first report "kind of blew up in our face because of Cindi. She was not in agreement with what we were going to do."¹⁹

Hunter investigated the matter in 1 day, October 12, 1999, and issued his 18-page "Confidential Report of Fact-Finder" on October 19, 1999, in which he summarized and specifically "incorporated by reference and made a part" his earlier August 4, 1999 report.²⁰ He determined that the four aforementioned incidents did occur; that a hostile work environment including sexually explicit language and unwelcome and offensive comments of a sexual nature "continues to exist"; and that the "bell/valet department is a highly tense and stressful work environment particularly for Ms. Ramelb. Ms. Ramelb's earlier complaint of feeling like an outcast in the bell valet department is well founded and reasonably supported by the evidence." Rather than issuing any recommendations, he concluded his report by stating that "the complainant, the respondents, the Human Resource Manager, and all of the witnesses in this process were courteous and cooperative. I sincerely hope that a satisfactory resolution of the situation that exists in the bell valet department at EVR will be realized in the very near future."

As a result of this report, Balagso, Frietas, and Craddick were terminated. All were sent identical letters signed by Delos Santos, dated December 2, 1999 (or, in the case of Frietas, December 13, 1999), stating that:

Embassy Vacation Resort-Kaanapali (the "Company") is in receipt of the findings of the third party investigator, Mr. Keith Hunter of Dispute Prevention and Resolution, Inc., which was prepared subsequent to this investigation of Ms. Cindi Ramelb's complaint that you had engaged in sexual harassment.

According to the [Hunter's] report, there is credible evidence that you were made well aware of Company's policy, warned once again since the last incident in July 1999, yet despite this, you made sexually explicit comments to and in the presence of Ms. Remelb of the Bell/Valet Department. Your actions were therefore willful and deliberate disregard of the Company's policy.

¹⁹ Hunter may have been told, as he sets forth at fn. 3 of his report, that he and the Respondent agreed that "due to the time-sensitive nature of this proceeding . . . no recommendations would be issued with the fact-finding report," but the real reason, it seems, is the Respondent's concern that Hunter, who had already demonstrated his understanding of the Respondent's progressive disciplinary policy, would not have recommended the termination of the employees.

²⁰ It is significant that in fn. 2, Hunter summarizes the conclusions regarding Leo Ramelb that he made in his first report, as follows: "It should be noted that the findings concerning Mr. Ramelb's conduct related to 'silent hostility' toward his sister-in-law. No specific finding of sexual harassment by Mr. Ramelb was made."

Based upon the above findings, you have violated Company's policy and due to the severity of conduct involved, and consistent with the Company's policies and past practices, the Company hereby notifies you that you are being terminated from your employment with the Company.

While confirming, disputing or explaining the particular remarks attributed to them by Cindi, both Balagso and Craddick generally admitted to Hunter that they have engaged in such or similar conversation with Cindi from time-to-time as they do with other employees, that they were friendly with her and she was treated as one of them, that sometimes she reciprocated in kind with similar remarks of her own,²¹ and that after working together for over 8 years "she was not viewed by her coworkers as a girl and is considered to be just one of the guys and is treated accordingly." Further, Craddick told Hunter and testified herein that the atmosphere and stress level created by Cindi in the bell/valet department became uncomfortable for the other employees because of Cindi's earlier unfounded complaints against Fronda and Leo; thus, the employees who had to work with Cindi believed that *they* were being subjected to a hostile work environment because they had to be so guarded and apprehensive around her for fear that she would complain to management about them for no reason at all. In fact, they would begin to proactively report incidents to Reyes in anticipation of unfounded complaints by Cindi because they feared for their jobs.

Hunter, stating in his report that he obtained this information from Balagso, concluded that Cindi "frequently told 'the boys' to stop their crass language and crude behavior in her presence," and further, "indicated that in recent times Ms. Ramelb has been quite clear in letting her coworkers know that she wouldn't tolerate their unacceptable behavior." I have carefully attempted to discern this observation from Hunter's notes of his interview with Balagso and I do not find this information in his notes; nor, during Hunter's testimony, did he confirm that this is what Balagso told him. Rather, Hunter's notes reflect that Balagso told him that he "does not recall [Cindi] objecting to [the comments]." Further, although Hunter's notes do state that Balagso told him that Cindi had made comments about "fake breasts" and talked about very "graphic and dramatic" sex in front of him, Hunter does not mention this in his report. According to Hunter, Balagso, who was very remorseful and apologetic, told Hunter that he had not realized that Cindi was offended by statements he may have made to her.

Hunter states in his report that:

Ms. Ramelb reported that she was stunned when three of her fellow employees were suspended from their jobs while she was still at work and felt sick to her stomach about the whole situation. On the day that they were suspended several other employees (both bell valet employees as well as employees of other departments) made comments about the suspension. These comments added to her stress and fear and, as a result, she went home from work early that day.

²¹ Hunter's report implies that Cindi told him that she did not engage in such conversations, and finds them very offensive.

George Balagso has worked for the Hotel since it opened in December 1988. He was given his most recent appraisal by Reyes on July 15, 1999, receiving a score of 4.12 on a 5-point scale, and Reyes wrote that, "George is a great employee. Understands the importance of a team effort." He had only one prior verbal warning for a timecard infraction.

Balagso testified that he had a very good working relationship with Cindi, and that their shifts overlapped about 15 hours each week. Balagso considered himself to be one of her closest friends, and they talked about personal and private family matters that only trusting friends talk about. Sometimes their casual conversations would include banter of a sexual nature. For example, on one occasion Cindi was scheduled to leave work at 1 p.m. and mentioned in a "very dramatic and graphic" way about how her husband begs her to have a "quicke." She also told him that one of the waitresses in the bar had a "boob job" and, on another occasion, referring to another employee, said that, "[t]hose breasts are fake." In front of other employees, including Balagso, she said, "You Filipinos have small ones," clearly an ethnic and sexual reference. She related to him that another bell/valet employee had told her that, "[o]h, that lady looks mighty fine and I wouldn't mind ding her." On one occasion she said that women wear tight jeans because "it turns them on."

Balagso testified that he related to Hunter some of these things that Cindi had said to him. Significantly, he did not tell Hunter that Cindi frequently let the employees know that she would not tolerate such language and behavior from them. Balagso did testify, however, that on about two occasions during the course of such conversations, Cindi told him to "stop it." This surprised him because of their long-term friendly relationship during which sexual references were commonplace and mutual. He would stop on those occasions when she told him to, but thought she was joking because of her propensity to engage in similar conversations with him on subsequent occasions without objection.

Balagso testified that the subject of sexual harassment or admonitions to employees that they should not engage in any sort of unwelcome behavior with Cindi did not come up in employee meetings conducted by Reyes. He also testified that although he was not an active union supporter, he was not opposed to the Union. According to Respondent's notes of the conversation when, on October 5, 1999, he was called to the office and notified of his suspension, he asked, "[I]f this was a union issue, if so he wants to let us know that he is pro hotel."²²

Freitas was hired in May 1998, by Delos Santos. He signed a union card prior to each election, talked about the Union with others at the bell/valet desk, and, in addition, testified on behalf of the Union at the hearing on objections. He was given a performance appraisal by Reyes on July 14, 1999, and received an overall score of 3.44 on a 5-point scale. Upon giving him his evaluation Reyes told him that he was doing good work and that there would be a full-time position opening up soon for him. His only warnings were for attendance. After being given notice of his suspension he met with Delos Santos and denied that he made the comments attributed to him by Cindi. Later he

met with Hunter and denied that he had said these things to Cindi. And at the hearing herein he testified that he did not say these things to Cindi.²³ Thus, Freitas has consistently maintained that Cindi's accusation was absolutely false. Freitas testified that shortly after Fronda had been suspended Reyes told all of the bell/valet people on his shift to watch what they say around Cindi and watch their swearing when Cindi is around.²⁴

Freitas testified that he was hired as a part-time employee and, having relatively little seniority, was given the afternoon shifts. He would work with Cindi for perhaps 1 hour a day when their shifts overlapped, and would generally not work with Balagso, Fronda, Leo Ramelb, Craddick, or those employees who had the greatest seniority. He was not as friendly with Cindi as some of the other longer-term employees, and he and Cindi talked mostly about work-related matters. He told Hunter that he heard Cindi refer to the breasts of another Hotel employee and comment that they were not real.²⁵ Freitas did not make comments of a sexual nature even to the other male bell/valet employees; they talked about fishing and diving and golf and, on occasion, someone would perhaps comment about the figure of an attractive woman who might be passing by.²⁶

Robert Craddick was hired by the Hotel in January 1989. He is currently business agent/organizer for the Union. He was an active union adherent and was on the Union's organizing committee. On July 15, 1999, he was given an annual evaluation by Reyes, and received a 2.72 rating on a 5-point scale, with the statement, "Bobby does the technical side of work. But needs to improve on the service side of his job to be successful." However, the preceding year, on July 20, 1998, he was given an annual appraisal by then-manager, Kimo Paishon, who rated him 4.33 on a 5-point scale.

Craddick testified that he and Cindi became pretty close friends. They discussed many things, and sometimes their conversations would turn to matters of a sexual nature. On one occasion they discussed Craddick's adult movie collection, including which movies he had and which ones could be borrowed. Cindi talked about sneaking in and out of the "Pussy Cat" theater in California to see these movies when she was in high school. In August 1999, he overheard her mention to another employee about how her high school boyfriend had bought her a car so she could get over to his house right away after school was out, but, according to Craddick, "[I]t was a little more graphic than that." She seemed to have a problem with women having breast implants, and would make observa-

²³ Hunter states in his report that this was the only offensive comment she recalled Freitas ever making to her.

²⁴ It is apparent from Freitas' testimony that such statements by Reyes were in no way intended to be official warnings that they should refrain from engaging in sexual or other types of harassment toward Cindi; rather, it appears that Reyes was merely giving them some friendly, confidential advice based on his inside information and belief that Cindi would not hesitate to complain to management about others as she had complained about Fronda and Leo.

²⁵ This information does not appear in either Hunter's notes or report.

²⁶ I credit the testimony of Freitas in its entirety; I further find that that Cindi simply fabricated the sexual harassment statement she attributed to him.

²² I credit the testimony of Balagso in its entirety.

tions about women who were passing by from time-to-time. One time, after Craddick returned to work from having a vasectomy, Cindi initiated the conversation by telling him she was hoping her husband would get one, and they discussed the procedure at some length. According to Craddick, Cindi never seemed offended when he would have conversations of a sexual nature with her, and she never indicated that she was offended or told him to stop it. On occasion, Cindi would use profanity at work.

Craddick testified that the August 29, 1999 incident attributed to him by Cindi never occurred, but that something similar did occur a few months before that: A guest was standing at his window on the second floor drinking a cup of coffee. The guest was nude and was just standing there watching the clouds and the sunrise in a full frontal pose. Craddick reported this to the front desk, as it was embarrassing for the guest and perhaps for others. He did not know whether Cindi observed this or not, although if she was there at the time she would have necessarily observed this as it was in plain view of the bell desk. Craddick denied to Delos Santos, to Hunter, and at the hearing herein under oath that he made any comments to Cindi about the matter whatsoever.

Craddick testified that there was tension in the bell/valet department even prior to the matters with Cindi, as the new manager, Reyes, was making a lot of changes and was trying to basically tighten things up. Other than that, everyone was cordial to each other, and there were only the occasional arguments over shifts and such things. After Fronda was suspended, however, "There was some tension. Nobody really knew what to say or do with her. Everybody was a little nervous of the whole thing . . . they could have been in the same boat [as Fronda]. There was no real clear direction given to us on how to handle Cindi at that point." Regarding this matter, Craddick testified as follows:

The general idea I got from Nef [Reyes] was that we needed to get Cindi back to a point where she felt comfortable at the desk, where everyone was treating her like a fellow employee. Because everything escalated, you know. You suspend one of the people there and everybody is looking at her and it's getting tense . . . this incident made the morale and things at the department worse instead of better . . . everybody was afraid to talk to her, afraid—didn't know what to do with her.

Craddick related that about a month after Reyes was hired Cindi went to him after an apparent argument about shift schedules. Shortly thereafter, Reyes made the comment to Craddick, in sort of a whispering mode at the front desk, "Watch what you do and say to her. She writes everything down and isn't afraid to use it." Craddick already knew this, namely that Cindi would "utilize anything that she had once she got pissed off at you." Prior to October 4, 1999, neither Reyes nor Delos Santos nor any other supervisor told him that Cindi had accused him of sexual harassment or any other type of harassment toward Cindi or anyone else. Nor, during the years that Craddick was a member of the employee council, did Cindi ever make any complaints to the council about sexual harassment.

Craddick testified that Reyes would watch the employees at the bell desk by physically being present while they were working, and by going down to security and watching them on the security camera. And, on occasion, he would position himself in a vacant room up above the bell desk area and observe the employees from there. Craddick knew this because Reyes once came down and told the employees what he had observed while watching them from the room.²⁷

Craddick testified that during departmental meetings conducted by Reyes there was no discussion of sexual harassment or use of profanity or anything of that nature. At one meeting he recalled that Reyes reminded the employees of the fraternization policy and that an employee had been told to basically keep "his hands off the younger guests and stop offering them motorcycle rides." Prior to June 16, 1999, the policy had been that employees could speak their native language to each other, but were required to speak English when guests were around. According to Craddick, Reyes changed this policy on June 16, 1999, and stated that the employees at the bell/valet desk were to speak only English.²⁸

4. Testimony of Cindi Ramelb

Cindi Ramelb left the hotel on about October 4, 1999, upon hearing that Craddick, Freitas, and Balagso had been suspended as a result of her sexual harassment complaints. She testified that she was shocked upon learning this, and that she had only wanted them to receive sexual harassment training as Hunter had suggested in his first report. She testified that Reyes told her that he too was shocked when he learned that these employees had been suspended. It turns out that shortly thereafter, because of emotional difficulties, she was put on administrative leave and never returned to the Respondent's employ. She testified that apparently since July 1999, because of the situation at work, she had been seeing a professional for counseling and that Reyes was aware of this as he had referred her to someone.²⁹

Cindi testified that she did not consider herself "one of the boys," that she did not take part in the joking that was ongoing at work, that the limit of her bad language was the time she recalled stubbing her toe and exclaiming, "Oh shit," and that she never participated in discussions of a sexual nature with any of the other employees. She was "very uncomfortable" with many things that were happening at work, and generally described the workplace as "very uncomfortable . . . a sexual abuse place, very uncomfortable place, not safe. . . . People making comments to me, threatening comments to me, using vulgar language." She testified that employees made comments about her body, and stared at her. She claims that she went to the employee council to complain about such matters. She testified that she kept a diary for 4 years and "wrote down every-

²⁷ In this regard, I do not credit the testimony of Cindi Ramelb that the other employees would be nice to her while Reyes was present but would harass her when Reyes was not watching.

²⁸ I credit the testimony of Craddick in its entirety; I further find that he did not make the statement Cindi attributed to him about the naked guest.

²⁹ However, her testimony regarding seeking professional help is not entirely clear.

thing that went on at the hotel,” and that she gave her lawyer the diary and later discarded it.

Regarding Fronda, Cindi testified that she knew that he was going to be “mad” after coming back from being suspended, “and I just felt very uncomfortable after him being suspended and I didn’t feel safe working with him.” She said that Fronda was a threat to her, that he would say things to her, that he would give her mean looks, that he is a very unpredictable person, that “he would look at me and say things that would scare me,” that he had taken a tybo class and told her, “You better watch out, you know I’m strong now,”³⁰ that he has a “split personality,” that she was always afraid when “this group of people would be working.”

Cindi testified at length in this proceeding during 1 full day. A careful review of her testimony strongly indicates that she is conflicted and troubled by many things, and although I am unable to determine whether she is intentionally fabricating misinformation, or merely is inherently incapable of discerning fact from imagination, or is unable to articulate what she actually means, nevertheless her testimony is simply not credible, perhaps through no fault of her own. She exhibited a very poor recollection, spontaneously made up things, I find, that even the Respondent had to contradict, frequently contradicted herself, and was otherwise simply not believable. Accordingly, it would serve no useful purpose here to summarize her confusing and often contradictory testimony as I would not know what part of her testimony is reliable and what part is not. Therefore, I am hesitant to credit any of it except to the extent that it is corroborated by documentary evidence or the credible testimony of others.

Cindi testified that from “day one,” since she became employed, she has been subjected to “sexual harassment.” It was not until the end of her testimony that she was asked to give her definition of sexual harassment, and she seemed to believe that in her mind any conduct of which she did not approve, whether sexually oriented or not, constituted sexual harassment since she was the only female in the department and all the others, who may have done something she found objectionable, were male.³¹ More importantly, Cindi testified that over the years she has continually complained about sexual harassment to management and to the “employee council,” a formalized committee comprised of managers and employees that existed prior to the time the Respondent hired Delos Santos as human resources manager. Particularly, she said she brought these matters to the attention of the employee council when employees Noreen Madeiros, and Bobby Craddick were members of the council.³²

³⁰ Apparently she did not understand that Fronda was joking with her.

³¹ Hunter, who has had experience with sexual harassment issues, was asked to define sexual harassment. He testified that “it’s a very blurry line between the law of the shop where people maybe use foul language and a pattern, an established pattern of conduct. . . . And I do think in this instance everybody had a little bit of a blurry perception of what it was, including Cindi.”

³² I find that in fact Cindi made no complaints to the employee council or to the representatives of the employee council about anything at any time. This is substantiated by the credible testimony of employees

With regard to one of her foregoing sexual harassment allegations against Balagso, Cindi’s lawyer, apparently taking this information from Cindi’s notebook or diary that she said she had been keeping for 4 years,³³ alleged the following:

Wednesday, August 18, 1999: Ms. Ramelb was going on break around 12:00 noon. She asked George [Balagso] the valet, “What did they have to eat in the Café?” He said out loud, “Nothing you would want to eat, “ and then he said, “But I have something good for you to eat.” Ms. Ramelb just shook her head.

Asked to describe this incident, Cindi testified that when Balagso said this he was looking at her “like dirty,” and added that he grabbed a banana from underneath the desk and placed it in his crotch area. This made her “very uncomfortable.” Cindi further testified that she immediately advised Delos Santos of this incident, stating that she was in the habit of always going to Delos Santos and tell her about things that were happening. Delos Santos testified, however, that she did not recall Cindi advising her of any incident involving a banana, and that in fact Cindi did not tell her about this. I find that in fact there was no banana, because this is something Cindi would not have omitted from her detailed contemporaneous notes of the incident. Nor did she mention the banana to Hunter. It appears that Cindi was prone to say anything that came to her mind, whether based in fact or imagination.

Further, with regard to the incident involving Freitas, Cindi told Hunter that this was the only time Freitas had made a sexually explicit comment to her. In fact, Hunter emphasized in his testimony that Cindi was “very conflicted about coming forward with respect to anything having to do with [Freitas]. This was the one and only run-in, if you will, that she ever had with him . . . I got the feeling she was not comfortable having said something about him.” However, Cindi’s testimony directly contradicts what she related to Hunter: thus, she testified that Freitas had made similar comments to her on other occasions. One simply does not know what part of Cindi’s testimony to believe or disbelieve. And with regard to Cindi’s alleged sexual harassment complaints against former manager, Kimo Paishon, Cindi, in an apparent effort to show that she did not appreciate his alleged conduct, testified that he “crashed” her wedding as an uninvited guest. However, Paishon credibly testified, among other things, that he received a written invitation to Cindi’s wedding and that the two of them were very friendly. And former assistant hotel manager, Alvin Palayo testified that he and his wife and Paishon and his wife attended Cindi’s wedding, that it was a small wedding of 40 or 50 people, that there were seats for the 4 of them, and that they all sat together. I do not know whether Cindi really believed that she had not invited Paishon to her wedding or whether she was deliberately fabricating her testimony to support her belief that Paishon had sexually harassed her, but I find that she did in-

Noreen Madeiros and Bobby Craddick, former Assistant General Manager Alvin Palayo, and former Bell/Valet Manager Kimo Paishon, all of whom were members of the counsel at all material times throughout Cindi’s employment.

³³ Cindi testified that she got rid of the notebook after she left the Respondent’s employ.

deed invite Paishon to her wedding. As a result of the foregoing, and her entire testimony, I find that she is simply not a credible witness.

5. Testimony of James Kimo Paishon, Alvin Palayo, and Edgar Inez

James Kimo Paishon began working for the Hotel when it first opened, and worked there as bell/valet manager until shortly before he left in late 1997. He testified that all of the employees, including Cindi, seemed to get along very well together, and that while there might be the usual bickering about shifts or tips there were no problems of a serious nature. Cindi never complained to him about harassment of any kind by other employees. When the family situation between Cindi and Leo developed, Delos Santos told him that since neither employee was willing to change shifts, Paishon was to find a way to get them to work together. After that, according to Paishon, "They really did not speak to each [sic], you know, but they did continue to work in the best manner they can to perform their job," and they would have to talk to one another if it was job related. During his entire tenure with the Respondent, Paishon was a manager-representative on the employee council, and was cochair of the council for 4 years. Paishon testified that Cindi never once made a complaint to the council about anything. Nor was he ever notified that Cindi had ever made a complaint against him for sexual harassment. He did relate, however, that Cindi once complained to the Hotel's then general manager about Paishon's changing of her shift schedule. Paishon testified that employees could talk amongst themselves about any subject, including talk with sexual overtones, so long as they did not make disparaging remarks about their fellow employees and so long as their conversations could not be overheard by guests. Paishon did receive an invitation to Cindi's wedding and did attend the wedding. I credit Paishon's testimony in its entirety.

Alvin Palayo is currently vice president with Sweeny International Hotels. He was assistant general manager of the Respondent from the time the Hotel opened until late 1997, when the current management took over. Palayo testified that the bell/valet employees, including Cindi, were always laughing and seemed to get along very well "like family." Palayo, who was also a management member of the employee council from 1988 to late 1997, testified that management "depended a whole lot on the council to keep harmony within the Hotel," and that Cindi never came to him to lodge a complaint about sexual harassment by Paishon or anyone else. He testified that both he and Paishon, together with their wives, attended Cindi's wedding, and that Paishon did not "crash" the wedding. He further testified that Cindi was a good employee and that there were no problems with her. I credit Palayo's testimony in its entirety.

Edgar Inez is a bell valet employee and works as a clerk in that department. A clerk is in the nature of a dispatcher, answering the phone and dispatching bell/valet employees to perform bell services for guests. He has been a clerk since about 1995, and has worked with Cindi, Craddick, Freitas, Fronda, Balagso, and Leo since he started. He got along "really well" with Cindi, and had personal discussions with her. Once,

during a conversation about her previous relationships and past boyfriends, she described her sexual activity with one of them. She also would critique women's "body parts and stuff." Inez believed that Cindi and Balagso were pretty close and got along very well; he saw them joking all the time. There came a time when Cindi and Leo would never talk to each other on a personal basis, although this did not affect the performance of their work. Also, he observed no problem between Cindi and Fronda.

Inez testified that he was working on July 13, 1999, the date of the incident with Fronda, and that Cindi did not seem to be upset that afternoon. Moreover, on the next day he observed that Cindi and Fronda interacted well and, according to Inez, "They seemed like there wasn't any problem."

Inez testified that he went to see Delos Santos after Fronda was suspended to express his concerns and the concerns of other coworkers about the matter. He felt that Cindi's claims against Leo and Fronda were not justified, and that they had done nothing wrong. Delos Santos simply responded that the matter was being investigated. He asked Delos Santos if he could speak with Hunter, and did so, telling Hunter the same thing he had told Delos Santos.

6. Ongoing union activity

Craddick testified that Leo Ramelb was one of the main organizers, and particularly was involved with organizing employees in the housekeeping department. In late 1998, shortly after Reyes was hired, Craddick spoke to Reyes about the "L-5" hand signal that union employees would frequently use: One day Reyes approached Leo and asked him what the hand signal meant. Leo told him that it meant "employee unity." Reyes, believing this was a good thing, began using the signal, and happened to give the signal to General Manager Dowsett. Craddick, observing this, ran over to Reyes and said to him, "What the hell are you doing?" Reyes told him that Leo had said it was a sign for employee unity, and Craddick told him that it literally meant "Local 5" but that to Leo, it did in fact mean employee unity. In January or February 1999, at the bell desk, Reyes related to him that he (Reyes) had been talking to General Manager Dowsett, and that Dowsett had told him that things were not resolved with the Union and that there would probably be another election. Reyes related that he told Dowsett that, "As far as he was concerned, everybody was a yes vote."

Sometime after February 16, 1999, the Union distributed a leaflet outside the Respondent's premises entitled "Union-Representation Update." The leaflet sets forth the history of the Union's efforts up to that point, including the fact that on December 15, 1998, "Local 5 along with Robby Fronda, Bobby Craddick and Noreen Medeiros stated their cases before the NLRB." The leaflet goes on to state as follows:

As of February 16, 1999, we are still waiting to hear from the NLRB's Washington D. C. office. *This is what we call the waiting game.* Management files for an appeal so they can prolong another election. [Emphasis in original.]

We, your fellow employees and the organizers of Local 5, want to let you know that we are still fighting for your rights. It's just going to take time. If you have any

questions, please feel free to contact any of us. If any one wishes to have a copy of the hearing transcripts, just ask. They're public record.

Fraternally Yours,
Robby Fronda, Bobby Craddick,
Noreen Medeiros

On September 8, 1999, several weeks following Fronda's termination and Leo Ramelb's 5-day disciplinary suspension, the Union wrote to the Respondent to advise that "the Union organizing committee includes, but is not limited to, Mr. Leo Ramelb, Ms. Noreen Medeiros, Mr. Robert Craddick, and Mr. Robbie C. Fronda."

The Respondent replied to the Union by letter dated September 16, 1999. The letter is signed by Delos Santos and states, *inter alia*, as follows:³⁴

Your organizing committee is comprised of employees who have subjected themselves to disciplinary action up to and including termination.

During a recent investigation of inappropriate as well as alleged illegal activities of certain members of your committee, the employer has not or does not intend to discriminate against employees for their union or non-union activity.

....

We hope that your formal notice letter does not give your committee members a false impression of immunity of the employer's rules, regulations, policies or procedures, as well as federal and state laws;

The employer intends to legally enforce any and all violations of laws to protect our employees from becoming victimized by any and all perpetrators whether it be your committee members or your mastermind local organizers, business agents, officers, etc. or anyone else;

Whether any collective bargaining relationship with your union will exist depends upon the majority of employees and not your looking forward to a collective bargaining relationship with us. The majority has already demonstrated that they do not want your representation.

About 2 weeks before Craddick was suspended, he and others distributed the following leaflet to employees outside the front of the Hotel:

**ATTENTION: ALL
EMBASSY VACATIONS RESORT EMPLOYEES**

An informational picket line will be set up³⁵ soon at the Embassy Vacation Resort to inform the public about

³⁴ Delos Santos posted both the Union's letter and the Respondent's reply letter on the Respondent's bulletin board at the Hotel and they remained posted for an extended period of time even though Madeiros vigorously complained about this to Delos Santos as being unfair and, in effect, slanderous, as the Respondent's letter falsely implied that Madeiros had engaged in inappropriate and illegal activities.

³⁵ It appears, however, that no informational picketing was conducted.

the gross injustices our fellow workers have suffered at the hands of hotel management.

Recently, Leo Ramelb was suspended for his Union activities and Robbie Fronda was terminated for exercising his federally protected right to join the Union. Local 5 has filed charges with the NLRB to get them reinstated.

What Management did to Leo and Robbie shows us how insecure our jobs really are and just how much we need the Union.

NO REASON TO FEAR!

When the picket lines go up, please go to work As usual and as always. . . . Do the best job you can.

Committee Members

Robbie Fronda
Noreen Medeiros
Bobbie Craddick

7. The 8(a)(1) and (5) allegations

Noreen Madeiros is a front-desk clerk. She has worked at the hotel Since August 4, 1990. She was a member of the Union's organizing committee. On October 30, 1999, the day following the October 29, 1999 certification of the Union as the collective-bargaining representative of the unit employees, she received permission from Assistant Hotel Manager David Celli to return to the hotel property to meet a coworker for a social drink after work. She entered the premises, notified her manager that she was on property and would be meeting another employee for a drink at the bar, and proceeded to walk down the stairs in the food and beverage area. While she was "in the back area where the kitchen is," five employees approached her and said that during a meeting with the food and beverage manager they had been notified that they were not permitted to go to human resources if they had any disciplinary problems; rather they were required to contact a union representative.³⁶ They considered Madeiros to be a union representative because she had been a union organizer during the campaign. They asked for her union business card and she handed out three of them.

Then Madeiros proceeded to the bar where she had a drink with a friend. At some point she entered the kitchen again, and spoke to two kitchen employees who also wanted to know what they were to do if they could not go directly to human resources with their problems. She told them she was working on it. Then she passed through the kitchen area and went to the loading dock where she had a cigarette. Another employee came outside on the loading dock on his break. He, too, wanted to

³⁶ Madeiros had already been made aware of the situation, and had previously contacted the Union about this shortly after the election: Thus, an employee who had been written up for being late went to human resources to complain that the writeup was unjustified; he was told by Delos Santos that he could not bring the matter directly to her but first had to contact his union representative and only the Union could bring the matter to human resources. The employee contacted Madeiros about this and Madeiros had contacted the Union's business agent because of the change in the Respondent's practice in permitting employees to come directly to Delos Santos.

know what he should do if he got disciplined, and she gave him one of her cards. And then another employee came out just to say hello. The security guard was in his office nearby, and Madeiros' activity could be observed through the security office window. The security guard came out and asked her what she was doing. On November 1, 1999, she was called into the office by John Roach, assistant general manager, and given a "Verbal Communication" warning notice for being in violation of the Respondent's no solicitation and distribution rule.

A report by her manager, Kathy Catugal states, *inter alia*, that on October 29, 1999, "It was stated that [Madeiros] was talking with several employees and giving out business cards. Later Noreen was observed walking through the kitchen area and was talking with William Pasqua and Paul Badua."

It is alleged in the complaint that the Respondent discriminatorily enforced its no-solicitation and distribution rule against Madeiros because of her union activity. Thus, according to the testimony of Madeiros, the Respondent had permitted other forms of solicitation and distribution by outside vendors on its property. Madeiros testified that in December 1998, after the first election, there were vendors coming onto the property selling burritos; that at about that time the Respondent's general manager purchased a Christmas tree for the hotel from an outside organization that came on the property; that in September 1999, the reservations manager was at the front desk selling tickets for her Soroptomus club, and that Madeiros complained to her front desk manager about this; and that "during the last couple of years" there has been a lady who would come on the premises on Wednesdays selling "lau lau," some type of Hawaiian food, and the lady would stop by the bell desk and the front desk and the flower shop selling lau lau to the employees.

On November 1, 1999, the same day that Madeiros received her warning notice, the Respondent posted a notice to "All Staff," regarding "Signing in While on Property During Off Hours." The notice states:

This is a reminder that *any and all staff* must sign in at Security in the **Vendor/Visitor Log Book** if coming onto Company property other than their scheduled shift.

Additionally, *staff must receive approval by their respective Managers prior to arrival*. Staff must keep out of any Back-of-House areas and must not interfere with any staff on duty.

Please refer to your employee handbook or call Security or Human Resources for any questions concerning this policy. [Emphasis in original.]

Madeiras testified that although this policy had been in existence and that she was aware of it, nevertheless it was not enforced; thus, Madeiros had frequently come to the Hotel during off-duty hours after having obtained prior permission from her supervisor or manager, but was never required to sign in with security. Signing in, she stated, is inconvenient and even an annoyance, particularly when an off-duty employee is being accompanied by nonemployee friends.

Madeiras testified that during her November 1, 1999 meeting with Assistant General Manager John Roach and Manager Kathy Catugal, other matters were discussed in addition to the warning Madeiros received. Madeiros advised them that the

employees were concerned about no longer being permitted to go directly to human resources to dispute a disciplinary warning or other disciplinary problem. Catugal verified this and replied that Delos Santos had stated that everything had to go through the Union and that this was now the new policy. Roach also confirmed that this was the new policy that would be followed. Madeiros advised them that the Union's secretary-treasurer had stated that this was a change of policy that first had to be negotiated with the Union.

In about late January or early February 2000, Madeiros was called to Assistant General Manager Roach's office. Manager Catugal and Neftali Reyes, who had been promoted to assistant hotel manager, were also present. Apparently the Union had sent a letter to the Respondent advising that Madeiros would be the Union's interim representative. Madeiros was told that, "[t]his is just a friendly conversation. We don't want to infringe on anybody, but we need you as a leader, as a front desk lady who had been there for ten years, to help us out." Madeiros testified that Catugal advised her that the Respondent intended to begin enforcing certain policies that had not been enforced in the past, and specifically mentioned the tardiness policy that permitted employees 7 minutes "walking time" before they were considered to be tardy. According to Madeiros, "They were generally asking me to let the employees know that they will be negotiating that in the contract to be at the start of the hour." However, Madeiros also testified that following the election employees began receiving warnings for clocking in a minute or two late. Catugal also said that the Respondent would begin enforcing the policy requiring that off-duty employees sign in and off the property with security.

Abraham Pena currently works in the Respondent's security department. Since August 1999 until about September 15, 2000, Pena worked in the housekeeping department as a rooms control clerk. His manager was Cathy Quevido, executive manager of the housekeeping department. Pena testified that he signed a union authorization card prior to the second election, and that his union activity took place in about May 1999, when he would tell his coworkers about the benefits of the Union and everything; he would also tell them that if they had any problems they should go talk to management or the person in charge. Pena testified that on October 22, 1999, the day following the election, he received a phone call at work from Quevido, who had just returned from a trip. She asked how was everything was, and also asked him the result of the election. He told her that the Union had won. She asked him how he felt about that. He said, "Well, what can I do? . . . there was a lot of activity, you know, with coworkers and they all want the union." She said, "Oh, okay."

Pena testified that after that he received several verbal warnings from Quevido on February 19, 26, and 27, 2000. He believes that they were not warranted and that they resulted from Quevido's belief that he had been active on behalf of the Union.

Quevido testified that the foregoing conversation on October 22, 1999, never happened, that she did not single Pena out but treated everyone equally, that she did not know whether Pena had supported or was supporting the Union, that the three warnings she gave him within a short period of time were warranted

due to some work-related deficiencies he exhibited, and that the fact that Pena happened to receive three of the five warnings that she issued during a particular time period was by mere coincidence.

C. Analysis and Conclusions

1. The suspensions and discharges; hiring of the impartial investigator

Abundant record evidence shows that prior to the events herein the Respondent's human resources manager, Bernie Delos Santos, made it her practice to conduct an internal investigation of employees' complaints if she believed the complaints were significant enough to warrant any investigation at all. Further, after investigation, any subsequent disciplinary action was governed by the Respondent's four-tiered progressive disciplinary policy. Indeed, as concluded by Hunter in his first report, the Respondent tends to go "the extra mile to give . . . employees every opportunity to turn things around before termination. . . . The Company has been flexible and lenient in its dealings with employees who were or are the subject of disciplinary procedures. In some instances The Company has bent over backwards to give troubled employees a chance to cure their problems." Moreover, the Respondent's disciplinary policy specifically emphasized that, "TERMINATION OF EMPLOYMENT IS A SERIOUS MATTER which normally occurs after corrective discipline has failed."

Thus, for example, on October 27, 1998, Cindi Ramelb complained to Delos Santos about bell/valet employee Stacey Kahue.³⁷ Delos Santos' memorandum of Cindi's complaint states that Cindi "felt very distressed" about harassment from Kahue. She told Delos Santos that Kahue "intimidates her," that she fears saying anything to him about his conduct as he "will chew my head off, he's done it before so I won't say anything," that he commonly uses foul language and this makes her very uncomfortable, that she is "afraid of him due to his aggressive nature," and that she "fears for her job that an altercation may ensue, so she wanted to say something to management to see if we could remedy the situation." Delos Santos "attempted to reassure Cindi that I will do everything possible to remedy the situation. That I will be speaking to all the employees of my expectations and the things we will be required to do to better serve our clients and fellow employees." Delos Santos also noted that Cindi was "clearly upset" over this situation, and was so "considerably hindered by Kahue that she "notices in herself a big change in attitude and mood when this person arrives to work." Delos Santos "discussed with Cindi her rights to a safe work environment and how we will manage her concerns. That we in management support a safe and unhostile atmosphere and will do everything to correct the situation."

The manner in which Delos Santos handled the Kahue situation is instructive in contrast with the discipline imposed on the alleged discriminatees in this matter. Unlike Fronda, Kahue was not immediately suspended even though Cindi complained that Kahue intimidates her and she is afraid of him due to his aggressive nature. Indeed, Kahue's personnel records show no

warnings or discipline by management until December 23, 1998, when Reyes completed and provided Kahue with a "Progressive Disciplinary Plan" and "Corrective Plan" as part of a work performance evaluation. This four-page detailed document was signed by Reyes, Delos Santos, and General Manager Dowsett. Reyes determined after a thorough investigation that Kahue was deficient in nineteen areas under the general headings of "Disrespect," "Tardiness," "Creates a Hostile Environment," and "Work Performance." Among his other deficiencies it was found that he shows little or no respect to either his supervisor or coworkers; that he refuses to cooperate with others or with department policies; that his manner in talking back to his supervisors, guests and coworkers are rude and threatening; that he is insubordinate to his supervisor and turns his back on guests; that he has created by the "serious and substantiated" complaints of coworkers a "very hostile environment"; and that he has engaged in "verbal outbursts" with Manager Reyes.

The "Corrective Plan" developed for Kahue provided that if any of the deficiencies "have not improved" within a 30-day timeframe from December 23, 1998, "a second review will be completed at which time a decision will be made as to any further disciplinary action or termination." On January 28, 1999, Reyes issued a "30 Day Probationary Period Re-evaluation" finding that Kahue had in fact improved and had therefore passed his 30-day probation. However, in about May, Kahue apparently began to revert to certain prior conduct that had been found to be unacceptable. An "Employee Disciplinary Log" entry dated May 18, 1999, notes, inter alia, that he has difficulty accepting direction and counseling; that he argued with an employee (Plinio) in front of guests and had to be told three times to stop as this was not the place for such conduct; and that he leaves his post frequently and has a "combative attitude" toward supervisors and fellow employees when questioned. An "Employee Disciplinary Log" entry dated May 20, 1999, notes that he was absent from his work station, that he argued with a supervisor in front of guests, and that he was asked by Reyes more than once to stop arguing. On May 21, 1999, he was given a 5-day suspension pending termination. On May 26, 1999, during an investigative interview, he was provided an opportunity to state his position and Delos Santos told him that she "would investigate the disciplinary action further." Apparently he did not return to work after May 21, 1999, and was permitted to resign his employment.

Similarly, Respondent's records show that on November 13, 1998, employee Jeremy Delos Reyes was given a 2-day suspension for willful disregard of policy and leaving his post without cause after telling Manager Reyes that "he was leaving before he will punch a guest or employee," because he was upset with that day's scheduling; on February 5, 1999, he was given a written warning for profanity by posting a note at the bell desk, in view of employees and guests, stating, "Stop fucking with my name tag cause I'm getting pissed off. Jeremy"; and on April 22, 1999, it appears that he was given a 5-day suspension for a multitude of things, including stating to Manager Reyes, who had asked him a work-related question, "what did you say to me? Don't you ever talk to me that way again," and walking away from servicing a guest so that Reyes had to

³⁷ It appears that Cindi was not the only person complaining about Kahue at this time.

finish with the guest. Finally, at a meeting attended by Delos Santos on May 5, 1999, during which Reyes outlined the various deficiencies of Jeremy Delos Reyes, the employee asked Manager Reyes if he had a personal problem with him. Manager Reyes answered no, and the employee said that he feels there is a problem because of the way Manager Reyes speaks to him and “when people talk to him that way he usually gets pissed off and gets physical.” Delos Santos responded by saying that everyone needed to work together, and Manager Reyes agreed, asking the employee “to give it a try.”³⁸

In contrast, Cindi complained about Fronda and Leo Ramelb on July 14, 1999, and, without any investigation whatsoever, the Respondent thereafter suspended Fronda, one of the Union’s three known leading activists and admittedly an employee with an exemplary ten-year employment history. Indeed, Bell/Valet Manager Reyes was present or in the immediate vicinity throughout the July 13, 1999 incident about which Cindi complained, and was even involved in the initial exchange of words between Cindi and Fronda, yet there was no evidence presented by the Respondent that Delos Santos even asked for Reyes’ evaluation of the matter. In fact, Delos Santos was highly evasive when asked about this, and testified that, while she would customarily consult Reyes regarding employees’ complaints against other employees, she could not remember whether she did so on this occasion, and that in fact Reyes “may or may not” have told her that he was opposed to suspending Fronda over this matter. I find from her evasive response that she did not consult with Reyes. Thus, rather than consulting with the single individual who clearly was most familiar with what had transpired and with the personalities and working relationship of Fronda and Cindi, Delos Santos instead consulted with her human resources superior, Julie Field, and the Respondent’s attorney, two individuals who knew nothing about the working relationship between Cindi and Fronda or about the verbal exchange between the two on July 13.

I found Delos Santos, who testified at length in this proceeding, to be a singularly untrustworthy witness. She was evasive, often nonresponsive, and testified in abbreviated, conclusionary language that simply did not convey candor or exhibit a convincing rationale for the Respondent’s actions, and particularly its deviation from past practice in dealing with the suspensions and discharges herein. Specifically, I do not credit her repeated assertion that Cindi’s alleged emotional demeanor on July 14, 1999, without more, was the motivation for the July 15 suspension and the subsequent discharge of Fronda.³⁹ Thus, Fronda

³⁸ Respondent’s personnel records, reflecting disciplinary action taken against employees Lance Young, Clement Kaleikini, Helene Sado, and others, for insubordination, discourteous, and rude behavior to guests, and discourteous, profane and rude conduct toward other employees, document the Respondent’s pattern of leniently enforcing its progressive disciplinary policy. Further, contrary to Delos Santos’ testimony, such personnel records show that employees are not necessarily given “progressive” discipline and that sometimes “regressive” discipline is given; thus, Clement Kaleikini was given various written warnings subsequent to a suspension that was given for essentially similar conduct.

³⁹ Indeed, Delos Santos’ Board affidavit states that she decided to suspend Fronda only after he advised her of the guest’s “‘Don’t hit her”

was not suspended until after he had worked with Cindi on three subsequent overlapping shifts following the July 13 incident. This alone was sufficient, I find, to demonstrate to Delos Santos that Fronda did not pose a real physical threat to Cindi and that Cindi’s alleged fears were unfounded. Indeed, Delos Santos did not even contemplate putting Cindi and Fronda on different shifts that were not overlapping. Moreover, it seems apparent that at the July 14 meeting Cindi was not simply complaining about Fronda; she was also complaining about 8-1/2 years of alleged mistreatment. Hunter understood this and, testifying that Cindi was crying and emotional during “a fair amount” of his nearly 2-hour July 28 interview with her, made the observation that her emotional demeanor “was really the culmination of a lot of pent up feelings that she had about things that occurred at the workplace over the last decade.”

Further, the statement that Cindi attributed to Fronda, “Don’t make me mad,” clearly is a spontaneous statement that does not constitute an implied threat of any sort that would, without more, put a reasonable person in fear of her safety. And because Cindi was a regular visitor to Delos Santos’ office and was certainly not reluctant to voice any dissatisfaction with any of her coworkers, it is clear that Delos Santos knew that Cindi had never accused Fronda of exhibiting any aggressive behavior toward her.⁴⁰ These considerations, coupled with Delos Santos’ incomprehensible failure to follow past practice and first investigate Cindi’s claim or to gather what would certainly have been invaluable input from Reyes, compels the conclusion that Fronda’s suspension was motivated by considerations entirely distinct from Cindi’s complaint.

This conclusion is graphically enforced by Delos Santos’ departure from Hunter’s recommendation in his August 23, 1999 supplemental report after he had conferred with Cindi pursuant to Delos Santos’ request. Hunter related to Delos Santos that Cindi was amenable to working with Fronda during a 2- to 4-week trial period to assess whether there was a change in Fronda’s behavior. Delos Santos, however, was not amenable to this resolution, and summarily discharged Fronda without further input from Hunter. Again, for the reasons set forth above, I do not credit Delos Santos’ testimony that she believed

comment, “because I thought that indicated that if a guest was concerned enough to make that statement, that Robbie must have been very angry.” In fact, however, Delos Santos testified and the record evidence shows that the Respondent had decided to suspend Fronda before investigating the matter, before summoning him to Delos Santos’ office that day, and before ever being advised by Fronda of the guest’s statement.

⁴⁰ On December 23, 1998, Cindi was obviously very emotional and had to be sent home for her full shift after a meeting with Delos Santos, Reyes and General Manager Dowsett regarding alleged harassment by Fronda and Kahue. During this meeting, according to the notes of Delos Santos, Cindi stated that employees tease her, pick on her, and make jokes, and repeatedly said that she wasn’t putting up with this anymore, and “if I have to sign something today I will.” Dowsett suggested to Cindi that she was overreacting to these things, and then Reyes explained, apparently to Dowsett and Delos Santos, that he was having “counseling sessions” with Cindi. This complaint by Cindi against Fronda was not even relayed to Fronda, apparently because management did in fact believe that Cindi was overreacting and that Fronda was not at fault.

that Cindi had any reasonably based fear of Fronda in any respect. Clearly, Delos Santos and the Respondent had an agenda of their own that was different from that of Hunter and even Cindi, who had expressed a willingness to accept Hunter's recommendation and endeavor to work with Fronda during at least a trial period. This particular agenda of the Respondent was dictated, I find, by Fronda's highly visible and active union advocacy, and by the further consideration that the discharge of one of the Union's leading union adherents would demonstrate the Respondent's antiunion resolve to other employees during a time when the Respondent was anticipating a second election.

I find that Delos Santos was well aware of the fact that the guest's statement to Fronda, "Don't hit her," was made in jest. I credit Fronda and find that he told her this on July 15, 1999, during his suspension interview, and again on August 23, 1999, during his discharge interview. As noted above, I found Fronda to be a particularly trustworthy and reliable individual who seemed to take his duty as a witness under oath with the utmost seriousness. Moreover, Delos Santos did not deny that this is what Fronda told her, and gave no reason for neglecting to include this fact in her memorandum. Further, I find, that given the comparative size of Fronda and Cindi, Delos Santos readily understood, as would any reasonable observer, why a guest would find the situation to be somewhat humorous. Finally, I find that Delos Santos' knew that Hunter's reliance on her deficient memorandum was misplaced and that Hunter really did not understand the dynamics of the situation, and, accordingly, that Hunter's conclusion was erroneous. Accordingly, I do not credit Delos Santos' testimony to the effect that she accepted Hunter's report at face value and believed that in fact the guest was actually admonishing Fronda not to hit Cindi. Fronda was admittedly upset with Cindi, but even Cindi did not relate to Delos Santos or anyone else that Fronda had made any gesture toward her that could be described as threatening.

I credit the testimony of Leo Ramelb in its entirety. Ramelb was acutely sensitive to the potential effect that his awkward relationship with Cindi, due to the family dispute, could have on his work performance, and sought to deal with the situation by seeking permission of Delos Santos, Paishon, and Reyes to simply not speak to Cindi except when their work-related duties required some communication. I find that Delos Santos, Paishon and Reyes had assured him that he could do this, and that for approximately a year this is the precisely the working relationship between the two that had been sanctioned by supervision and management. Delos Santos did not deny this during her testimony, and I do not credit the denials contained in her affidavit.⁴¹

Hunter was the only one who did not understand the relationship between Leo and Cindi. Thus, Hunter found in his report that in fact Leo was harassing Cindi by giving her the silent treatment and, in so doing, was violating Respondent's rules regarding employee conduct. Delos Santos, however, knew very well that Hunter's conclusions regarding this matter were erroneous. Nevertheless she seized upon this and, ignoring Hunter's recommendation that Leo was sincere in doing

what he thought best and should be given simply a warning and nothing more, imposed a 5-day suspension. Clearly, Leo had not violated any policy and his silence toward Cindi, having been approved, could not be characterized as harassment. Accordingly, I conclude that the Respondent was motivated by other considerations. I do not credit Delos Santos' testimony that she was unaware of Leo's union activity. Rather, I find that Reyes and therefore the Respondent clearly knew that Leo was an active union adherent as demonstrated by the credited testimony of Leo and Craddick, and as further demonstrated by Manager Reyes' similar statements to Hunter and to Craddick that, to his knowledge, all the bell/valet employees were union except for Cindi.

With regard to employees Balagso, Craddick, and Freitas, it is clear that they were considered to be very satisfactory employees, that there had been no past claims against them of sexual harassment or of any other type of harassment by Cindi or anyone else, and that the claims made against them by Cindi's attorney were statements they allegedly made to Cindi about third parties and, except perhaps for the one statement, "I have something good for you to eat," which was clearly said in jest, were not directed personally to Cindi. Under these circumstances, there appears to be no reason for the Respondent's immediate suspension of these employees without any preliminary investigation whatsoever, and in total disregard of its four-step progressive disciplinary policy that requires first a verbal warning, then a written warning, and only after these two steps, a possible suspension. Accordingly, given the Respondent's union animus, coupled with its awareness of the union activity of Craddick and Freitas, and its belief that all the bell/valet employees with the exception of Cindi were prounion, I conclude that the General Counsel has made a strong showing that the suspensions of these three individuals was discriminatorily motivated.

Hunter concluded that these three employees did make certain unwelcome remarks to Cindi that amounted to sexual harassment. Having been given the benefit of a lengthy 11-day hearing during which the parties were represented by competent counsel, I respectfully disagree with Hunter's conclusions. Nevertheless the Respondent maintains that it discharged the employees in reliance upon Hunter's second report. Delos Santos testified that she was aware that the three employees had nothing in their personnel files "showing a progressive discipline for complaints." Asked then, by Respondent's counsel, why she terminated the three employees even though the Respondent's progressive disciplinary policy was not applied to them, Delos Santos testified that she was attempting to be consistent with the action she had take previously against an individual who had been suspended and terminated for sexual harassment, infra, and she considered the behavior of the three employees to be comparably serious; moreover, according to Delos Santos, the three employees had been given formal sexual harassment training in 1997, and "had training after that by [Reyes] talking to them."⁴²

⁴¹ Although her affidavit was introduced into evidence as an exhibit, I do not regard the affidavit as a substitute for live testimony.

⁴² Delos Santos testified that this is what she meant in the termination letter by the words, "you were . . . warned once again since the last incident in July 1999," namely, that Reyes had spoken to them or had

The comparable incident to which Delos Santos was referring involved a male independent contractor who was also apparently a manager or supervisor in the Respondent's timeshare office. That person, according to Delos Santos' notes, was "removed from the floor immediately due to a [sic] alleged harassment claim against him." The complaint against him was by a female office worker who complained to her superiors, one of whom happened to be a witness to the incident, that as she was standing at the copy machine the male individual grabbed her and pulled her towards him, and, saying he was "going down for a box," then "bit her on the butt, leaving a saliva print on her buttock." She let out a scream and seemed to be in shock. She said that she was afraid of him and didn't know what to do. The matter was extensively investigated by Delos Santos and the individual was discharged.

The difference between the situations is that one may be fairly characterized as sexual assault and the others as isolated instances of sexual banter.⁴³ I do not credit Delos Santos' testimony to the effect that she believes the two are comparably serious as this defies common sense.

Nor am I persuaded by the Respondent's further rationale that such action had to be taken against all five of the employees due to the Respondent's fear of a lawsuit by Cindi for failure to address her complaints. In this regard, it is important to note that Hunter, in his first report, found that sexual harassment and other forms of workplace harassment against Cindi were pervasive and ongoing; and he recommended that all of the employees in the bell/valet department, not only Fronda and Leo Ramelb, be required to attend and complete "Discrimination and Sexual Harassment Training" and that they also be required to attend a full day retreat in which "ethnic/cultural/gender diversity awareness is further developed." Further, in his second report, Hunter found evidence to confirm his "earlier finding that a hostile work environment continues to exist in the bell valet department." Delos Santos testified that she accepted these findings as valid and attempted to contract with private outside agencies to provide such training but was unable to do so because of scheduling conflicts.

given them additional sexual harassment training after the July 1999 suspension of Fronda. In fact, I find there had been no such additional training, and I credit Craddick's and Balagso's testimony to the effect that during periodic departmental meetings where matters of general interest were discussed, Reyes did not give the employees any further sexual harassment training of any kind at any time.

⁴³ See *Baskerville v. Culligan International Co.*, 50 F.3d 428 (7th Cir. 1995), where the Seventh Circuit stated that "occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers" does not violate title VII of the Civil Rights Act, and that an "employer's legal duty is thus discharged if it takes reasonable steps to discover and rectify acts of sexual harassment of its employees. Here we add that what is reasonable depends on the gravity of the harassment." It is clear that the Seventh Circuit sanctioned the employer's reasonable response to a number of sexual remarks over a period of several months and after one prior warning: "The matter was promptly investigated, and both the director of the department, and Hall's immediate supervisor, told him that his offensive behavior must cease immediately. He was also placed on probation and a salary increase was held up for several months. He got the point."

I simply do not credit Delos Santos' testimony: as noted, she was generally an incredible witness; it seems inherently implausible that such training was unavailable or could not have been scheduled at any time from July through October 1999; and the Respondent has provided no documentary evidence substantiating Delos Santos' cursory testimony that she made any effort whatsoever to contact outside agencies for the purpose of scheduling such training. I find that, in the absence of any credible evidence to the contrary, she did not even attempt to do so. Moreover, Delos Santos neither met with the employees herself nor directed Reyes to do so in order to sensitize them to the problems pointed out by Hunter. It is clear that if the Respondent had truly been concerned about a lawsuit it would have scheduled such training immediately upon receiving Hunter's August 4, 1999 report. I find that the Respondent's failure to act upon Hunter's recommendations in any manner supports the conclusion that the motivation for the suspensions and discharges of the employees herein was unrelated to any potential lawsuit.⁴⁴

The record evidence shows that during the relevant time period, from July 15, 1999, when Fronda was suspended, until October 4, 1999, when Balagso, Freitas, and Craddick were suspended, the union campaign was still very much ongoing and the Respondent was anticipating a second election. Indeed, the October 4 suspensions of Balagso, Freitas, and Craddick occurred only several weeks before the October 21 rerun election. The Respondent was abundantly aware of the fact that at all times material Fronda and Craddick were leaders of the union movement, and that the other employees were either union adherents or, at the least, suspected union adherents. Moreover, the Respondent, as evidenced by the tenor of its abundant and caustic campaign rhetoric, has demonstrated its strong opposition to the Union. These facts, coupled with the failure of the Respondent to follow its progressive disciplinary policy with respect to the individuals involved herein, warrant the conclusion that their union activity or suspected union activity was the motivating reason for their suspensions and discharges. For the reasons set forth above, I find that the Respondent has not met its burden of proof under *Wright Line*⁴⁵ by demonstrating that the employees would have been sus-

⁴⁴ There is no requirement that, as suggested by the Respondent, removal of an employee accused or suspected of sexual harassment or, indeed, even found to have engaged in sexual harassment, is required by title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e—2(a)(1). See *Baskerville v. Culligan International Co.*, *supra*. The cases cited by the Respondent are clearly inapposite: *Meritor Saving Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (employee's conduct included many acts of physical contact including rape); *Newsday, Inc. v. Long Island Typographical Union Local 915*, 915 F.2d 840 (2d Cir. 1990) (employee's conduct included "chronic" sexual harassment including physical contact); *Stroehmann Bakeries, Inc. v. Teamsters Local 776*, 969 F.2d 1436 (3d Cir. 1992), cert. denied 506 U.S. 1022 (1992) (employee's conduct included intimate touching together with "sexually charged" remarks); *Transportation Workers v. Burlington Northern R. Co.*, 864 F.Supp. 138 (D. Or. 1994) (employee's admitted sexual harassment, not specifically set forth, found to be "gross misconduct").

⁴⁵ *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

pended or discharged even in the absence of their union or suspected union activity. Accordingly, I find that by such conduct the Respondent has violated Section 8(a)(1) and (3) of the Act as alleged.

Near the conclusion of the hearing the General Counsel was granted leave to amend the complaint by alleging that Hunter has been an agent of the Respondent within the meaning of Section 2(13) of the Act. The General Counsel maintains, essentially, that Hunter was hired by the Respondent in furtherance of the Respondent's unlawful purposes. As a result of the belated timing of this amendment to the complaint, and Hunter's unavailability on short notice, the parties agreed that Hunter's testimony would be conducted by teleconference. Hunter testified at length. I find him to be a forthright witness who was professionally and in good faith attempting to resolve the matters presented to him both by the Respondent and Cindi Ramelb, as thoroughly, expeditiously, fairly, and correctly as possible given the information presented to him and within the time constraints imposed upon him. In sum, there simply is no evidence of collusion between Hunter and the Respondent. This is graphically demonstrated by Hunter's detailed first report in which he recommends resolution of the matters in accordance with the Respondent's progressive disciplinary policy which he researched thoroughly. Thus, he did not sanction the actions that the Respondent, in ignoring Hunter's recommendations, decided to take.

An employer may certainly hire a third-party impartial investigator for valid business-related reasons, for example, because of lack of internal investigative resources or, as alleged in this case, to demonstrate a lawful intent to act in a nondiscriminatory manner. However, the Respondent's motive in this regard is suspect. Thus, it first summarily suspended Fronda, and thereafter Balagso, Freitas, and Craddick, in obvious disregard of its progressive disciplinary policy, and, I have found, in violation of the Act. Indefinitely suspending the employees in the first instance is likely to convey a message to an outside investigator that the Respondent believes the alleged conduct did in fact occur, and that it is serious enough to warrant immediate discipline; as a fait accompli it is a subtle way, I find, to influence the results of the investigation. For the Respondent to then maintain that it was attempting to present the matter to an impartial investigator in order to demonstrate lawful, nondiscriminatory, good-faith conduct, seems intentionally deceptive. Rather, the sequence of events suggests that the Respondent hired Hunter with the expectation or hope that Hunter would validate and legitimize the Respondent's unlawful conduct and, in effect, become the Respondent's accomplice in a scheme to rid itself of the union adherents. Hunter, as noted above, did so only in part, and the Respondent found itself in the dilemma of having to choose between either adopting the impartial investigator's recommended resolution of the matter or of ridding itself of Fronda. In selecting the latter option it is clear that the Respondent considered the discharge of Fronda to be more important than a purported demonstration of impartiality. I find that the facts, reasonably considered, show that the Respondent, unbeknownst to Hunter, hired Hunter in furtherance of its unlawful purposes. As this matter appears to be reasonably encompassed within the aforementioned amendment

to complaint alleging Hunter as an agent of the Respondent, I find that the Respondent's hiring of the Hunter was unlawfully motivated in violation of Section 8(a)(1) of the Act.

2. The 8(a)(1) and (5) allegations

I do not find that the verbal warning given to Madeiros was unlawful. Madeiros did come on to the property during off-duty hours and was essentially conducting union business in unauthorized areas. Thus, she handed out her union business cards and spoke to on-duty employees about union-related matters in kitchen areas where she was not supposed to be. It appears that she violated the provision included within the Respondent's off-duty sign-in policy providing that "[s]taff must keep out of any Back-of-House areas and must not interfere with any staff on duty," and that this was, at least in part, the reason for the warning she was given. Thus, the fact that the Respondent may have permitted certain outside vendors to sell merchandise on the premises in violation of its solicitation and distribution policy is not dispositive of this matter, as the Respondent was attempting to enforce a different policy vis-à-vis Madeiros. The fact that prohibition of off-duty employees from being in "back-of-house areas" is included in the Respondent's off-duty sign-in policy which, I find below, was unilaterally enforced, does not alter my conclusion because it appears that the two rules, although appearing in one document, are distinct. I shall dismiss this allegation of the complaint.

Medeiros' testimony was somewhat confusing regarding the alleged unilateral changes, particularly the policy regarding tardiness. On the one hand it seems that the Respondent was simply advising her, as a representative of the Union, that it intended to negotiate this with the Union. On the other hand, Madeiros did clearly testify that in fact the Respondent began enforcing both the tardiness policy and the off-duty sign-in policy, which were previously in existence but had not been enforced, prior to negotiating such matters with the Union. The Respondent did not present any evidence regarding these matters, but takes the position in its brief that there has been no change in policy and that the Respondent was simply reminding its employees of existing policy. In the absence of any evidence from the Respondent regarding these matters, I find that following the Union's certification the Respondent did in fact violate Section 8(a)(1) and (5) of the Act by enforcing its pre-existing policies regarding tardiness and off-duty sign-in without prior notification to and bargaining with the Union.

It is admitted that for a period of time following the certification the Respondent required employees who received discipline from their supervisors to first present the matter to the Union so that the Union, in turn, could bring the matter to the human resources department. This clearly precluded an employee from going directly to human resources with the problem, and was an abrupt departure, of course, from past practice. The Respondent maintains that while it did so require employees to contact the Union in the first instance, it has since returned to its prior policy of permitting direct employee access to the human resources department. This appears to be correct. Nevertheless, I find that the unilateral change complained of would likely cause consternation among those bargaining unit employees who may not have desired union assistance in pre-

senting their concerns to human resources. Moreover, it appears that in fact at least one employee was turned away from human resources for this reason. As the convenience of employees' access to the human resources department may certainly be deemed to be a term or condition of employment, and as the Respondent unilaterally changed its policy without prior notification to and bargaining with the Union, I find that by such conduct the Respondent has violated Section 8(a)(1) and (5) of the Act as alleged.

I find that the warning notices to Pena from Housekeeping Manager Quevido were not discriminatorily motivated. Even assuming that Quevido did ask him whether the Union won the election and how he felt about it, Pena's answers were non-committal and did not convey to Quevido that Pena was a union advocate. Moreover, Pena's union activity, insofar as his testimony shows, was minimal at best. Nor is there any showing that Quevido singled out other, more active, union adherents for discriminatory treatment. Quevido impressed me as a credible witness. I find that in fact she did not know whether Pena was pro-union, and that she issued the warnings to Pena for legitimate reasons unrelated to Pena's alleged union activity. I shall dismiss this allegation of the complaint.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has violated Section 8(a)(1), (3), and (5) of the Act as set forth herein.

THE REMEDY

Having found that the Respondent has violated and is violating Section 8(a)(1), (3), and (5) of the Act, I recommend that it be required to cease and desist therefrom and from in any other like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act. As it has been found that the Respondent unlawfully terminated and/or suspended employees Leo Ramelb, Robbie Fronda, George Balagso, Kevin Freitas, and Bobby Craddick, it shall be required to offer these employees immediate and full reinstatement to their former positions of employment, without loss of seniority or other benefits, and make them whole for any loss of wages, including tips, or loss of other benefits they may have suffered by reason of Respondent's discrimination against them in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Further, the Respondent shall be required to expunge from the personnel files of the employees any reference to their unlawful warnings, suspensions or terminations, and advise them in writing that this has been done. In addition, the Respondent shall be required to cease and desist from engaging in the unilateral conduct found unlawful herein. Finally, the Respondent shall be required to post an appropriate notice, attached hereto as "Appendix."

ORDER⁴⁶

The Respondent, West Maui Resort Partners, a Limited Partnership, consisting of Signature Capital-West Maui, LLC and WHKG-S GEN-PAR, Inc., d/b/a Embassy Vacation Resorts, Maui, Hawaii, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Suspending and discharging employees because of their interest in and activity on behalf of the Union.

(b) Hiring the services of an independent investigator in furtherance of an attempt to unlawfully suspend and discharge employees.

(c) Engaging in unilateral conduct affecting wages, hours, and working conditions of employees without prior notification to and bargaining with the Union regarding such matters.

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

2. Take the following affirmative action which is necessary to effectuate the purposes of the Act.

(a) Offer employees Leo Ramelb, Robbie Fronda, George Balagso, Kevin Freitas, and Bobby Craddick immediate and full reinstatement to their former positions of employment, without loss of seniority or other benefits, and make them whole for any loss of wages, including tips or loss of other benefits they may have suffered by reason of Respondent's discrimination against them in the manner set forth in the remedy section of this decision.

(b) Within 14 days from the date of this Order, remove from the personnel files of the employees any reference to their unlawful warnings, suspensions, or terminations, and within 3 days thereafter, advise them in writing that this has been done and that their suspension and termination will not be used against them in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay, including tips, due under the terms of this order.

(d) Upon request by the Union rescind its announced intent to enforce its policies regarding tardiness and off-duty sign-in requirements, and bargain with the Union regarding such matters prior to implementation.

(e) Within 14 days after service from the Regional Office, post at the Respondent's facility copies of the attached notice marked "Appendix."⁴⁷ Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by Respondent's representative, shall be posted immediately upon

⁴⁶ 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.

⁴⁷ 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."

receipt thereof, and shall remain posted by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Within 21 days after service by the Regional Office, 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 the Respondent has taken to comply.

Dated: February 13, 2001

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Act gives employees the following rights

- To organize themselves;
- To form, join, or support unions;
- To bargain as a group through representatives of their own choosing;
- To act together for collective bargaining or other mutual aid or protection;
- To refrain from any or all such activities.

After a hearing in which all parties had the opportunity to provide evidence it has been determined that we have violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT suspend or discharge employees because of their interest in or activity on behalf of Hotel Employees & Restaurant Employees, Local 5, AFL-CIO, or any other labor organization.

WE WILL NOT hire the services of an independent investigator in order to further our attempt to suspend or terminate employ-

ees because of their interest in or activity on behalf of the Union.

WE WILL NOT require you to seek assistance from your union representative before coming to our human resource department with your concerns.

WE WILL NOT unilaterally impose changes in terms and conditions of employment without prior notification to and bargaining with the Union as the collective-bargaining representative of employees in the following collective-bargaining unit:

All full-time and regular part-time employees employed by the Employer at its 104 Kaanapali Shore Place, Lahaina, Hawaii location, excluding all timeshare employees, RMI employees, managerial employees, security employees and/or guards and supervisors as defined in the Act.

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

WE WILL offer employees Robbie Fronza, George Balagso, Kevin Freitas, and Bobby Craddick immediate and full reinstatement to their former positions of employment, without loss of seniority or other benefits, and we will make Robbie Fronza, George Balagso, Kevin Freitas, Bobby Craddick, and Leo Ramelb whole for any loss of wages, including tips or loss of other benefits they may have suffered by reason of their unlawful suspension or termination.

WE WILL remove from the personnel files of the employees any reference to their unlawful warnings, suspension, or termination, and advise them in writing that this has been done.

WE WILL, upon request by the Union, rescind any unilateral changes that we made to your terms and conditions of employment regarding immediate access to the human resource department, tardiness, and off-duty sign-in requirements, and we will bargain in good faith with the Union regarding such matters prior to implementation.

EMBASSY VACATION RESORTS