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The Continental Group, Inc. *and* Local 11, Service Employees International Union

The Continental Group, Inc. and Sunset Harbour South Condominium Association, Inc., Joint Employers *and* Local 11, Service Employees International Union

The Continental Group, Inc. and The Executive Condominium Association, Inc., Joint Employers *and* Local 11, Service Employees International Union

Sunset Harbour South Condominium Association, Inc. *and* Local 11, Service Employees International Union. Cases 12–CA–24045, 12–CA–24196, 12–CA–24448, 12–CA–24070, 12–CA–24097, 12–CA–24132, and 12–CA–24447

September 30, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On March 15, 2006, Administrative Law Judge George Carson II issued the attached decision. Respondent The Continental Group (Continental) filed exceptions and a supporting brief, as did Respondent Sunset Harbour South Condominium Association (Sunset Harbour). The General Counsel filed an answering brief, and Continental filed a reply brief. The General Counsel filed exceptions and a supporting brief, Continental and Sunset Harbour each filed answering briefs, and the General Counsel filed a reply brief to Respondents' answering briefs.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.[2]

I. JOINT EMPLOYER FINDINGS

We affirm the judge's finding that Respondents Continental and Sunset Harbour are joint employers. The applicable test is whether those separate entities "share or codetermine those matters governing the essential terms and conditions of employment." *Laerco Transportation*, 269 NLRB 324, 325 (1984). To establish a joint employer relationship, the evidence must show that one employer "meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction" of the other employer's employees. Id. As the judge found, the agreement between Sunset Harbour and Continental provides for integration of employee compensation and personnel decisions between the two entities. In addition, the record reveals that Sunset Harbour's board president and the Sunset Harbour Board as a whole had meaningful involvement in Continental's personnel decisions. Board President Juan Duarte meaningfully affected the employment status of Continental employee Phillip Gonzalez, stating at a board meeting that he would not consider a petition seeking Gonzalez' return to work at Sunset Harbour. On another occasion, Duarte indicated in a letter to Sunset Harbour residents that the decision to transfer Continental employees Gonzalez and Medina had been discussed and approved by the Sunset Harbour Board. For all of these reasons, we agree with the judge that Continental and Sunset Harbour are joint employers.

II. SURVEILLANCE ALLEGATIONS

On October 28, 2004, Local 11 (the Union) conducted a "mock election" outside the Sunset Harbour building, at which building residents were asked to vote on whether they wanted two employees reinstated. Two

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

In the absence of exceptions, we affirm the judge's findings that (1) the Respondents did not engage in unlawful surveillance on August 19 or September 29, 2004; (2) Respondent Continental did not unlawfully threaten employees on August 20, 2004; and (3) Respondent Continental did not maintain or enforce, on or about February 4, 2005, a rule prohibiting employees from discussing their terms and conditions of employment with residents and condominium Board members.

Respondent Sunset Harbour has filed exceptions regarding the judge's conduct of the hearing. We have carefully reviewed the record, and we find no evidence of bias, prejudice, or other improper conduct. We also affirm the judge's jurisdictional findings. Chairman Schaumber recognizes that it is the Board's established practice to assert jurisdiction over residential condominiums, subject to annual revenue requirements, and, for institutional reasons, affirms the judge's findings on that issue. See *Imperial House Condominium*, 279 NLRB 1225 (1986), enfd. 831 F.2d 999 (11th Cir. 1987).

We also affirm, for the reasons stated by the judge, the judge's findings that Respondents Continental and Executive are joint employers, and that Respondent Continental violated Sec. 8(a)(1) of the Act by interrogating and threatening Marvin White, Sec. 8(a)(3) and (1) by discharging White, and Sec. 8(a)(1) by discharging Leydis Borrero.

[2] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

Continental employees were present. During the event, two Continental managers drove slowly by the mock election and took photographs. Sunset Harbour President Duarte was also present, standing outside the building and watching the event. We affirm the judge's finding that Respondent Continental violated Section 8(a)(1) of the Act by photographing the employees' participation in the mock election event. See, e.g., *F. W. Woolworth Co.*, 310 NLRB 1197 (1993).

In addition, we find that Sunset Harbour, as a joint employer with Continental, violated Section 8(a)(1) of the Act by Continental's conduct. The judge dismissed the allegation against Sunset Harbour, finding that no employees or management officials of Sunset Harbour were involved in the incident. We have affirmed, however, the judge's finding that Continental and Sunset Harbour are joint employers. As a joint employer, Sunset Harbour is liable for the coercive conduct of Continental. See *D&F Industries*, 339 NLRB 618, 618 fn. 2 (2003); *Windemuller Electric*, 306 NLRB 664, 666 (1992), enfd. in pertinent part 34 F.3d 384 (6th Cir. 1994). Therefore, we find Sunset Harbour liable for Continental's unlawful October 28, 2004 photographing of the mock election.[3]

III. ALLEGATIONS RELATING TO PHILLIP GONZALEZ

A. Background

Phillip Gonzalez was employed as a front-desk concierge at Sunset Harbour. In early-to-mid 2004, Gonzalez engaged in protected activity: he signed a union pledge card and permitted the Union to come onto the property to speak with employees.

On August 16, Gonzalez was served with papers seeking an injunction against him for domestic violence. Gonzalez showed the papers to Property Manager Claudia Sculthorpe. The vice president of the Sunset Harbour Board and another Sunset Harbour resident were present during parts of their conversation. In addition, Gonzalez discussed his situation with a third resident, who recommended an attorney to Gonzalez.

Due to a combination of advanced vacation time, scheduled vacation time, and scheduled days off, Gonzalez was off duty from the afternoon of August 16 through 28. On August 18, Gonzalez came to the facility to inform Sculthorpe that he had retained an attorney and was looking for somewhere to stay. Sculthorpe's superior, Sunset Harbour Director of Front Desk Services David Miller, was present and informed Gonzalez that he had been told that Gonzalez was "hanging around the facility" and "loitering in the building." Miller further informed Gonzalez that it had been reported that Gonzalez had been sleeping in a common area of the condominium and living out of his car. Miller told Gonzalez that he could not come to the condominium when he was on vacation, and that he could not loiter in the building when he was not on duty. Miller also told Gonzalez that he should not be discussing his personal affairs with condominium residents.

When Gonzalez reported for work on August 31, Miller informed him that it had been reported that he was continuing to talk about his personal problems and that he had been loitering on the property. Gonzalez admitted that he had been on the property over the preceding weekend and that he had spoken with residents about his personal problems Miller told Gonzalez that he was being removed from Sunset Harbour and should report to Continental's corporate office in Hollywood, Florida, the following morning.

On September 1, Gonzalez went to the Hollywood office and met with Miller and Continental Director of Front Desk Operations Alan Mandelbloom. Miller and Mandelbloom issued Gonzalez two warnings. The first warning read as follows:

> Due to the volatile nature of Mr. Gonzalez's domestic situation, [which] he [personally] has made residents of the property aware of, Mr. Gonzalez has been [counseled] (on 08/18/04) to keep his personal matters private and refrain from frequenting the property while . . . off duty. Mr. Gonzalez ignored those warnings, because it was reported that he was seen loitering on the property on 8/21/04 & 8/22/04 (his vacation days). That's in conflict with Company policy.

The second warning cited Gonzalez for having become "very negative toward Continental," for giving "false information" to residents regarding Continental's treatment of its employees,[4] and for "continuing to tell residents of his personal problems." The warning stated that "this refusal to keep his personal problems to himself was an act of insubordination."

After Gonzalez signed both warnings, Miller offered Gonzalez a position as a floater. Gonzalez rejected that position and indicated that he wanted to remain at Sunset Harbour. Miller told Gonzalez that remaining at Sunset

[3] The General Counsel has excepted to the judge's failure to find that Sunset Harbour engaged in unlawful surveillance during union activity occurring on February 17, 23, and March 17, 2005. In light of our finding that Sunset Harbour engaged in unlawful surveillance on October 28, 2004, however, we find it unnecessary to pass on these exceptions. Any findings of violations based on these additional allegations would be cumulative and would not affect the remedy.

[4] The Respondents had learned that Gonzalez, in response to questions from residents, had informed them that two front-desk employees no longer working at Sunset Harbour had been terminated. In fact, as Gonzalez knew, those employees had not been terminated, but transferred to other Continental properties.

Harbour was not an option and asked Gonzalez if he wanted to resign. At that point, Gonzalez signed a letter of resignation.

B. The No-Access Rule

Continental maintains the following rule in the front desk manual at Sunset Harbour:

> Employees are only permitted to be on property while on duty unless you are picking up a paycheck or otherwise advised by the property manager or the Front Desk Coordinator. If you are coming on property while off duty, we expect that you will still follow guidelines and dress neatly. Once again, remember you represent the building and the company. Employees who violate this policy are subject to disciplinary action.

We agree with the judge that under *Tri-County Medical Center*, 222 NLRB 1089 (1976), this rule is unlawfully overbroad, both as written and as stated by Miller when he told Gonzalez he could not "go to the condominium" while on vacation. Under *Tri-County*, a no-access rule for off-duty employees will be considered valid only if it

> (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. Finally, except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid.

Id. The instant rule does not exclude off-duty employees solely from interior and other working areas of the premises. Thus, we affirm the judge's finding that Continental and Sunset Harbour violated Section 8(a)(1) of the Act by promulgating and maintaining this rule.[5]

C. September 1, 2004 first written warning

The first written discipline issued to Gonzalez on September 1 cited him for "loitering on the property" and "frequenting the property while being off duty," which was "in conflict with Company policy." Citing *Double Eagle Hotel & Casino*, 341 NLRB 112, 112 fn. 3 (2004),[6] for the rule that "[d]iscipline imposed pursuant to an unlawful rule violates the Act," the judge found that this warning was unlawful because it was issued pursuant to Continental's unlawful no-access rule. For the following reasons, we reverse.

We find the circumstances of the instant case distinguishable from those in *Double Eagle* and related cases in which the Board has found discipline imposed pursuant to an unlawful rule to be unlawful. In *Double Eagle*, three employees were disciplined for violating an unlawfully overbroad rule prohibiting employees from discussing tips and the employer's tip distribution policy anywhere on the employer's property. This activity, discussing tips and tip distribution, was protected under Section 7 of the Act. Similarly, in the other cases in which the Board has applied the *Double Eagle* principle, the underlying conduct leading to the discipline has been protected by Section 7. See, e.g., *Saia Motor Freight Line*, 333 NLRB 784, 785 (2001) (discipline for distributing union literature in violation of overbroad no-solicitation/no-distribution rule); *Opryland Hotel*, 323 NLRB 723 (1997) (discipline for discussing the union in violation of overbroad no-solicitation rule); *A.T. & S.F. Memorial Hospitals*, 234 NLRB 436 (1978) (discipline for distributing union literature in violation of overbroad no-solicitation/no-distribution rule).

In contrast, the activities for which Gonzalez was disciplined were not protected by Section 7. Gonzalez's first written warning cites him for "frequenting the property" while off duty and "loitering on the property" on his vacation days. Management had received reports from residents that Gonzalez had been sleeping in a common area of the building, living out of his car, and "hanging around" the facility, both inside and outside the building, and Gonzales did not deny these reports.

Under these circumstances, we find the judge's application of *Double Eagle* to be inappropriate. Section 8(a)(1) is violated by employer acts and statements reasonably tending to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. Here, the conduct that Continental disciplined Gonzalez for was loitering in its facility while off-duty. As such, the conduct was clearly not protected. That the Respondent cited an unlawfully overbroad no-access rule in the disciplinary notice is insufficient in this context to create a reasonable tendency to interfere with Section 7 rights and to make the discipline itself unlawful. Nothing in the notice would have reasonably caused Gonzalez (or some other employee contemplating the exercise of Section 7 rights) to believe that Gonzalez was being disciplined for engaging in protected activity. Thus, we reverse the judge's findings on this issue and dismiss the allegation. Because we find that Continental did not violate Section 8(a)(1) in this instance, we also dismiss the allegation as to Sunset Harbour.

[5] Chairman Schaumber notes that there were no exceptions to the judge's application of the *Tri-County* standard to the instant situation.

[6] Enfd. as modified 414 F.3d 1249 (10th Cir. 2005), cert. denied 546 U.S. 1170 (2006).

D. Alleged Discharge of Gonzalez

We find that Gonzalez was not unlawfully discharged. We do so without passing on Continental's contention that Gonzalez was not discharged, but rather resigned his position. Even assuming Gonzalez' resignation was a constructive discharge, that discharge did not violate the Act.

We affirm the judge's finding that the Respondents did not violate Section 8(a)(3) of the Act by discharging or constructively discharging Gonzalez for engaging in union activity. Although Gonzalez did engage in some union activity prior to his time off in August, the General Counsel failed to establish that the Respondents were aware of this activity. Therefore, the General Counsel has not established an initial case of discrimination in this instance under *Wright Line*.[7] Further, we find that, even assuming that the General Counsel sustained his initial burden, the Respondents showed that they would have taken the same action even in the absence of Gonzalez' union activities. The evidence indicates that Gonzalez's transfer was based on the Respondents' reasonable belief that he had continued to discuss his personal problems with residents and had been loitering in and around the building. This belief constituted a valid, nondiscriminatory basis for the transfer. We therefore dismiss this allegation.

We also find that the Respondents' conduct in this regard did not violate Section 8(a)(1) of the Act. Although the alleged discharge was based in part on the first written warning issued to Gonzalez, we have declined to find that warning unlawful.[8] Therefore, we also decline to find the further action that followed from that discipline unlawful.

ORDER

The National Labor Relations Board orders that

A. The Respondent, Sunset Harbour South Condominium Association, Inc., Miami Beach, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating or maintaining an overbroad rule prohibiting access to all Sunset Harbour property by off-duty employees.

(b) Engaging in surveillance of employees' union and other protected concerted activities.

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

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

(a) Rescind the overbroad rule described in paragraph 1(a), and notify employees in writing that this has been done and that the rule is no longer in force.

(b) Within 14 days after service by the Region, post at its facility in Miami Beach, Florida, in English and Spanish, copies of the attached notice marked "Appendix A."[9] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. 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 May 1, 2004.

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

IT IS FURTHER ORDERED that the complaints are dismissed insofar as they allege violations of the Act by Sunset Harbour not specifically found.

B. The Respondent, The Continental Group, Inc., Hollywood, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating or maintaining an overbroad rule prohibiting access to all Sunset Harbour property by off-duty employees.

[7] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[8] We also find that the second warning issued to Gonzalez on September 1, was lawful. The second warning cited Gonzalez for being "negative" about Continental, for providing residents with "false information" by telling them that the former front-desk employees had been fired, rather than transferred, and for "insubordination" for "continuing to tell residents of his personal problems." We find that this warning did not involve any protected conduct on the part of Gonzalez and, therefore, did not violate the Act. In making this finding, we rely on the fact that the Respondents were not aware that Gonzalez had made any work-related complaints to residents, beyond his knowingly false statements about the former front-desk employees' terminations.

[9] 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."

(b) Engaging in surveillance of employees' union and other protected concerted activities.

(c) Coercively interrogating any employee about union support or union activities.

(d) Threatening employees with unspecified reprisals for engaging in union activities.

(e) Discharging employees for engaging in union activities or protected concerted activities.

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

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

(a) Rescind the overbroad rule described in paragraph 1(a), and notify employees in writing that this has been done and that the rule is no longer in force.

(b) Within 14 days from the date of this Order, offer Marvin White and Leydis Borrero 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.

(c) Make Marvin White and Leydis Borrero whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Marvin White and Leydis Borrero and, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

(e) 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 determine the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its offices in Hollywood, Florida, and at The Executive Condominium, Sunset Harbour South Condominium, and Sands Pointe Condominium, all of which are located in Miami Beach, Florida, in English and Spanish, copies of the attached notice marked "Appendix B."[10] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. 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 May 1, 2004.

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

IT IS FURTHER ORDERED that the complaints are dismissed insofar as they allege violations of the Act by The Continental Group not specifically found.

Dated, Washington, D.C. September 30, 2008

Peter C. Schaumber, Chairman

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX A

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

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT promulgate or maintain an overbroad rule prohibiting access to all Sunset Harbour property by off-duty employees.

[10] 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."

WE WILL NOT engage in surveillance of employees' union and other protected concerted activities.

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

WE WILL rescind the overbroad rule prohibiting access to all Sunset Harbour property by off-duty employees.

SUNSET HARBOUR SOUTH CONDOMINIUM

APPENDIX B

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

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT promulgate or maintain an overbroad rule prohibiting access to all Sunset Harbour property by off-duty employees.

WE WILL NOT engage in surveillance of employees' union and other protected concerted activities.

WE WILL NOT coercively interrogate employees regarding their union activities.

WE WILL NOT threaten employees with unspecified reprisals for engaging in union activities.

WE WILL NOT discharge employees for engaging in union activities or protected concerted activities.

WE WILL NOTin any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind the overbroad rule prohibiting access to all Sunset Harbour property by off-duty employees.

WE WILL, within 14 days from the date of the Board's Order, offer Marvin White and Leydis Borrero full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Marvin White and Leydis Borrero whole for any loss of earnings and other benefits suffered as a result of our discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Marvin White and Leydis Borrero, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

THE CONTINENTAL GROUP, INC.

Shelley B. Plass and *Marinelly Maldonado, Esqs.,* for the General Counsel.

Joan M. Canny, Esq., for the Respondent (The Continental Group, Inc.).

Michael L. Hyman and *Shari Wald, Esqs.,* for the Respondent (Sunset Harbour South Condominium Association, Inc.).

Kathleen M. Phillips and *Katchen Locke, Esqs.,* for the Charging Party.

DECISION

STATEMENT OF THE CASE

George Carson II, Administrative Law Judge. This case was tried for 11 days in Miami, Florida, on September 12–15 and November 14 –17, 2005, and January 9–11, 2006, pursuant to an Order Further Consolidating Cases that issued on August 15, 2005.[1] The complaints allege various violations of Section 8(a)(1) of the National Labor Relations Act and the unlawful discharges of three employees. The Executive Condominium Association, Inc., alleged as a joint employer in Case 12–CA–24097, entered into a settlement that was approved by the Regional Director for Region 12. In order to avoid any confusion, I have not deleted Executive from the case caption; however, in view of the settlement, Executive is no longer a respondent. The answers of The Continental Group and Sunset Harbour deny all alleged violations of the Act. Additionally, they deny that they are joint employers. The answers also deny that the Charging Party Union is a labor organization. As hereinafter discussed, I find that the employers are joint employers. Although finding that the Charging Party is a labor organization, I find that its status is immaterial in determining whether the Respondents violated the Act. I find that, as a joint employer, Sunset Harbour maintained an unlawful no-access rule. I find that Continental, with the exception the allegations relating to the discharge or constructive discharge of Phillip Gonzalez, did violate the Act substantially as alleged in the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Respondent Continental, and the Respondent Sunset Harbour, I make the following [2]

[1] All dates are in 2004 unless otherwise noted. At the hearing, counsel for Continental, although disputing certain service dates, acknowledged receipt of all of the charges. See *Control Services*, 303 NLRB 481 (1991).

[2] Counsel for the General Counsel's unopposed Motion to Correct Transcript is granted and received into the record as G.C. Exh. 70. The General Counsel filed a Motion to Strike the posthearing brief of Sunset Harbour and Sunset Harbour filed a motion for leave to file untimely posthearing brief accompanied with an affidavit from counsel. I deny the motion to strike.

FINDINGS OF FACT

I. JURISDICTION

The Respondent The Continental Group, Continental, a Florida corporation with offices in Hollywood, Florida, is engaged in the business of managing property for condominium associations including various associations located in Miami Beach, Florida. In conducting its business, Continental annually derives gross revenues in excess of $500,000 and purchases and receives goods and materials valued in excess of $50,000 directly from points located outside the State of Florida. I find and conclude that Continental is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent Sunset Harbour South Condominium Association, Sunset Harbour, is a not-for-profit corporation located in Miami Beach, Florida, engaged in the operation of a residential condominium. Sunset Harbour admits that it annually derives gross revenues in excess of $500,000. Sunset Harbour denies "for lack of information" that a substantial portion of those revenues were used for "expenditures largely involving entities in interstate commerce." At the hearing, Sunset Harbour's President Juan Duarte admitted that Sunset Harbour annually pays in excess of $50,000 to Continental for management services and more than $10,000 a month, which well exceeds $50,000 annually, to Florida Power and Light Company, another entity engaged in interstate commerce. See *Florida Power & Light Co.*, 126 NLRB 967 (1960). Sunset Harbour, in its post hearing brief, argues that the Board should "revisit its exercise of jurisdiction" as decided in *Imperial House Condominiums*, 279 NLRB 1225 (1986). Consistent with established precedent, I find that Sunset Harbour is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview and Procedural Matters

This case arises in the context of efforts by the Service Employees International Union, the SEIU, to organize condominium workers in South Florida. In furtherance of those efforts, the SEIU issued a provisional charter to a newly created local union, SEIU Local 11, the Charging Party herein, on January 15. Local 11, in addition to contacting employees individually and meeting in small groups with them, sought support for its efforts from local elected officials, the media, and the residents of the condominiums. Organizational tactics included rallies and demonstrations at various condominiums. The unfair labor practices alleged herein occurred during the period from August 2004 through March 2005.

The arrangements by which management services are provided to condominiums differ among the companies providing those services and, even with the same company, differ with the contractual agreements into which the parties enter. With regard to Continental, in some instances, Continental is the employer of some or all of the employees. In other instances, some or all of the employees are employed by the condominium but supervised by a Continental Property Manager. The foregoing arrangements lead to joint employer issues, of which there are two in this proceeding.

Counsel for Continental argues that the complaint allegation in Case 12-CA-24070 relating to a written no-access rule at Sunset Harbour is predicated upon an amended charge that the General Counsel impermissibly solicited and that the second amended charge in Case 12-CA-24448, which alleges the termination of an employee at Sands Pointe Ocean Beach Resort Condominium pursuant to a rule prohibiting discussions with residents, was solicited.

Longstanding Board precedent establishes that "it is the duty of the General Counsel, in discharging his responsibilities as a public official charged with enforcing public rights, to take proper measures calculated to effectively remedy all of the unfair labor practices . . . revealed by the investigation." *Petersen Construction Corp.*, 128 NLRB 969, 972 (1960). See also *Marbro Co.*, 284 NLRB 1303 (1987). Section 10062.5 of the current National Labor Relations Board Casehandling Manual (Part One) Unfair Labor Practice Proceedings, in pertinent part, provides:

> Where the investigation uncovers evidence of unfair labor practices not specified in a charge, Board agents, with appropriate supervision, must determine whether the charge is sufficient to support complaint allegations covering the apparent unfair labor practices found. . . . If the allegations of the charge are too narrow, not sufficiently specific or otherwise flawed, the charging party or its representative should be apprised of the potential deficiency . . . and given the opportunity to file an amended charge.

Counsel asserts that the amendment of the charge in Case 12–CA–24070 establishes that the General Counsel violated the assurance of confidentiality given to a witness with regard to his affidavit. The assurance of confidentiality that "this affidavit will be considered confidential" relates to the affidavit, not the facts disclosed by the investigation. Board precedent and procedures require that Board agents bring the facts disclosed in an investigation to the attention of Charged Parties and Charging Parties. Furthermore, neither of the foregoing amendments has any bearing upon the resolution of this case. The complaint in Case 12–CA–24070 alleges, in addition to a written no-access rule, that, on August 18, David Miller, a Continental supervisor, "denied off duty employees access to the Sunset [Harbour] facility," thus any remedy would encompass all such prohibitions. In Case 12–CA–24448, I find that the alleged unlawful rule, as clarified, did not violate the Act.

B. The Labor Organization Issue

The answers of both Continental and Sunset Harbour deny that SEIU Local 11 is a labor organization. Notwithstanding the extensive litigation of this issue, the posthearing briefs of the Respondents do not discuss it.

Pursuant to authority set out in Article XIV of the SEIU International Constitution, the International President charted Local 11 on January 15, and issued a temporary constitution and bylaws. The constitution and bylaws, in article I state:

> In order to form a strong and democratic structure in which to organize and represent building service workers in the state of

> Florida, a Provisional Organizing Local Union has been established by order of the International President . . . .
>
> The purpose of this Union is to work to improve the lives of our members and their families by organizing and representing all building service workers in the state of Florida. By doing so, we can build industry power to more effectively win better contracts for our members and to organize more building service workers.
>
> The purpose of this Temporary Constitution and Bylaws is to provide a governing structure for Provisional Organizing SEIU Local 11 until such time as the members of Provisional Organizing SEIU Local 11 can adopt their own permanent Constitution and Bylaws.

Robin Schuler was appointed President of the newly formed local union. Various union employees, including Organizing Director Eric Brakken, who was at that time employed by the International Union, were assigned to the organizational campaign. Union representatives contacted condominium workers and sought to have them support Local 11 in its organizational objectives. Employees participated in Local 11, as explained by Brakken, through meetings with organizers to "discuss strategies in terms of building support among condominium workers in Miami Beach." There were "small groups of workers all the time coming over to the Local to talk about their conditions." Employees Howard Williams, Marvin White, Lloyd Stephens, Kolson Brutus, and Mercedes Medina confirmed being contacted by union representatives. Employees who expressed support for the organizational effort were asked to sign pledge cards agreeing that "Condo Workers have the right to" fair wages, job security, respect for their rights, health insurance, and "A VOICE—the right to join together to improve our conditions without intimidation or threats." Organizing Director Brakken explained that Local 11 has no members because it has not succeeded in obtaining representational rights in an appropriate unit and a collective-bargaining agreement. The SEIU does not require employees to pay dues, a predicate for membership, until it is representing those employees pursuant to a collective-bargaining agreement with an employer. The failure of Local 11 to have succeeded in organizing an appropriate unit of employees is immaterial to its status as a labor organization. *Rainbow Garment Contracting*, 314 NLRB 929, 930 (1994). The lack of a formal structure, the appointment rather than election of officers, and the absence of members are immaterial when determining whether an entity is a labor organization. *New Silver Palace Restaurant,* 334 NLRB 290, 295 (2001).

The evidence establishes that Local 11 is an organization in which employees participate and that exists for the purpose, "in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." I find that at all times material herein, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

The foregoing finding is immaterial to the disposition of the allegations framed by the complaint. There are no representational issues in this case. Insofar as the Respondents believed that they were opposing the organizational efforts of a union, the actual status of Local 11 is immaterial. In *Electrical Contractors, Inc. v. NLRB*, 245 F.3d 109 (2d Cir. 2001), the court of appeals affirmed the Board's finding that the entity therein was a labor organization and also pointed out that the foregoing finding was immaterial in view of "[t]he antiunion letters that ECI [the respondent] circulated to its employees [which] make clear that ECI itself believed that CLMCC [the entity in question] had strong connections to some union."

Both Continental and Sunset Harbour responded to the organizational efforts directed towards employees with antiunion literature. On March 29, Continental's president, Richard Strunin, sent a "Fact Bulletin" to all mangers stating, "As you know, the Service Employees Union is trying to get into our company." The bulletin states that Continental is "100% against a Union getting in here." [Emphasis in the original.] A bulletin, dated April 4, directs all supervisors to "share the following information with employees about how much the SEIU union could cost them . . . . " A bulletin dated June 16 from President Strunin states, "We must continue taking a strong stand against the Union because of recent tactics they have chosen to take against our company." On October 27, Sunset Harbour sent to its unit owners a document relating to alleged misstatements by SEIU Local 11 that begins, "You may be aware that the SEIU Local 11 Union is entangled in a legal battle with the Continental Group . . . ."

In this case, as in *Electrical Contractors, Inc.*, the documents of Continental and Sunset Harbour "make clear" that both believed that they were dealing with organizational efforts undertaken by a labor organization. The Board has long held that the Act is violated if an employer "discriminates against an employee in the belief that the employee has engaged in union activities, even if the employer is mistaken. *Handicabs, Inc.*, 318 NLRB 890, 897 (1995); *Henning & Cheadle, Inc. v. NLRB*, 522 F.2d 1050, 1052 (7th Cir. 1975)." *Krystal Enterprises*, 345 NLRB 227, 230 fn. 15 (2005). Continental and Sunset Harbour believed that they were opposing the organizational efforts of a union. Even if that belief was mistaken, it is the belief upon which the Respondents acted. Thus, whether Local 11 is or is not a labor organization is immaterial.

C. The Joint Employer Issues

Continental denies that it was, at the times relevant herein, a joint employer with Executive, which has entered into a settlement with regard to the allegations against it. At the times relevant to the complaint, Continental provided a property manager to executive who oversaw the work of housekeeping and maintenance employees, employees of Continental, as well as the work of the valet employees who were employees of Executive. Schedule I of the contract between Continental and Executive provided that terminations, new hires, and salary adjustments had to be approved by Executive's Board of Directors. The Board, in *Riverdale Nursing Home, Inc.*, 317 NLRB 881 (1995), held that in determining whether two entities are joint employers, the appropriate inquiry is whether "the two employers 'share or codetermine those matters governing the essential terms and conditions of employment.' *TLI, Inc.*, 271 NLRB 798 (1984), citing *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117 (3d Cir. 1982). The employer in question must meaningfully affect 'matters relating to the employment relationship

such as hiring, firing, discipline, supervision, and direction.' *TLI*, supra." Id. at 882. Continental, in its posthearing brief, argues that the oversight of the Executive valet employees by the Continental property manager was "limited and routine." I disagree. The supervisory decisions of the property manager affected the daily working conditions of valet employees as well as their continued employment. If a valet employee was not dressed appropriately, the property manager would speak with the employee and would send the employee home if he or she repeated the conduct. The property manager set the work schedule and work assignments of the valet employees. Angela Arrango, who became Continental's property manager at Executive on August 9, changed the work schedule of former employee Kolson Brutus who had worked a regular shift from 4 p.m. to midnight under former Continental Property Manger David Keller but who, under Arrango, had his schedule "changed every week." Keller assigned valet Marvin White the additional work duty of key control. As hereinafter discussed, Continental contends that the foregoing assignment was to a specific position and that White was terminated pursuant to action by the Executive Board of Directors eliminating that position. The action of the Board of Directors was predicted upon a recommendation by Property Manager Arrango that this position, to which White had been assigned by Continental's Property Manager, be eliminated. The actions of Continental's Property Manager in supervising employees of Executive, assigning their jobs, and recommending the elimination of positions to which employees had been assigned meaningfully affected matters relating to their employment. See *Mar Del Plata Condominium*, 282 NLRB 1012, 1018 (1987). I find that Continental and Executive, at the relevant times herein, were joint employers of the valet employees.

The answers of Continental and Sunset Harbour deny that they are joint employers. At the relevant times herein, all employees at Sunset Harbour who were supervised by Continental supervisors were employees of Continental. Their wages, however, were controlled by Sunset Harbour. Schedule I of the agreement between Sunset Harbour and Continental provides that on-site personnel, including the concierge, "shall be employees of the Manager [Continental]," and that Sunset Harbour shall reimburse the Manager for "actual wages paid." The final sentence of Schedule I provides, "Any terminations, new hires, or salary adjustments shall be approved by the Board of Directors." Thus, from the standpoint of collective bargaining in the event that the Union succeeded in organizing the employees of Sunset Harbour, the Board of Directors of Sunset Harbour would be involved in grievances involving terminations and would have the final say regarding employee compensation since it reimburses Continental for wages and must approve all salary adjustments. As noted in *D & S Leasing*, 299 NLRB 658 (1990), "[p]erhaps the two most important terms or conditions of employment from the employees' viewpoint were wages and hours of employment. Here it is undisputed that Central [the entity that contracted for labor] dictated what wage employees would receive." Id at 672. Similarly, the Board has found a joint employer relationship where the wage rates paid by a subcontractor "were limited and substantially determined by the agreement between the Company and CES, under which CES billed the Company on the basis of labor supplied, at an hourly rate, depending on the employee's qualifications, e.g., whether journeyman or apprentice. The Company thereby 'exercised indirect but effective control over the [referred employees'] compensation."' *Windemuller Electric*, 306 NLRB 664, 666 (1992), citing *W.W. Grainger, Inc.*, 286 NLRB 94, 96 (1987). I find that Continental and Sunset Harbour are joint employers.

D. The Surveillance Allegations

1. August 19, 2004

In late 2003 and early 2004, Florida International University conducted a survey relating to the working conditions of condominium employees. The Union requested Professor Bruce Nissen, author of the report of the survey, to speak about the findings at a press conference that it arranged at the Wyndham Hotel in Miami Beach. The Union made the reservations for the facility. Press releases issued by the Union did not specifically identify the Union as the sponsoring organization of the press conference. Continental's president of property management Tom Roses asked director of front desk operations Alan Mandenbloom if he would like to go to that public event. Mandenbloom was aware that the SEIU was involved with the event, "probably before I left" to attend the event, because it was on the SEIU website.[3]

At the conference, Mandenbloom sat with Roses, Madeline Perl, Continental's director of human resources, and two of Continental's public relations employees. An individual whom he did not know photographed those Continental officials. Mandenbloom, who carries a cellular telephone that also takes photographs, reacted and used his cellular telephone "to pretend I was taking their picture." He acknowledges that this occurred "two or three times." Mandenbloom denied that he actually took any photographs at the press conference.

Howard Williams, an employee of Continental, is a front desk concierge at the Belle Plaza condominium. He learned of the activities of Local 11 when representatives of the Union came to the facility at which he worked and spoke informally with employees. He was invited to attend the press conference and did so. He rode to and from it with Holly Hutchinson, a senior organizer with the SEIU International Union assigned to the organizational campaign, in a vehicle driven by Union Representative Steve Moronto. The Union took a photograph of Williams at the conference. Williams is the only nonsupervisory Continental employee who is identified in the record as having attended the conference. Williams did not testify that he observed any Continental management official taking photographs inside the conference room.

Following the presentations at the conference, Williams waited with others for their vehicles to be brought from the parking area. Because of the number of people, the valets at the

[3] At the hearing, I excluded all evidence relating to the survey because the allegation of surveillance related only to the press conference event. Counsel for Continental filed for special permission to appeal my ruling, arguing that it prevented Continental "from eliciting testimony and obtaining evidence to demonstrate that the research report and its underlying survey were *not* 'union' activity." [Emphasis added.] Mandenbloom, the only witness presented by Continental concerning this allegation, admitted being aware of the Union's involvement.

Wyndham were quite busy. The wait was 15 or 20 minutes. While waiting, Hutchinson observed that Mandenbloom appeared to be taking pictures with his cellular telephone because he was "pointing [it] at people." Williams also observed that Mandenbloom, whom he did not know at the time, appeared to be "taking pictures of the guests" as they were getting into their cars "and tag numbers." He was holding the cellular telephone out, "directing it to the object." When their vehicle arrived, Moronto sat in the driver's seat, Hutchinson got into the front passenger seat, and Williams got into the back seat. Williams observed Mandenbloom, with his cellular telephone, near the vehicle.

Although Williams recalled that the individual he now knows to be Mandenbloom appeared to be taking pictures, Hutchinson, whom I credit, recalled that Moronto commented that "that guy," referring to Mandenbloom, is "writing down license plate numbers." Hutchinson suggested that he inform Mandenbloom that the Union would be "happy to provide that information to him." Moronto got out of the car and made that comment. Mandenbloom responded that he "could get it himself" and not to "mess with him" because he was "law enforcement." Hutchinson asked to see his badge number and Mandenbloom replied that he did not have to give her anything and began walking down the driveway. Moronto obtained a camera from another union representative and took two photographs of Mandenbloom.

Mandenbloom confirms that, while waiting for a ride, he was writing notes to himself on "little cards." Holly Hutchinson had been introduced at the press conference. Mandenbloom testified that, while writing notes, he was confronted by an individual who he had seen "talking with Union people, like Ms. Hutchinson." The individual asked if he was "getting tag numbers" and then asked if he "would like me to help you get ta[g] numbers." Mandenbloom, who did not deny telling the individual not to "mess with him," testified that, to avoid an altercation, he began walking down the ramp. The individual called to him and, when he turned, he observed that the individual had a camera. Mandenbloom then raised his cellular telephone as if to take a picture, but "I never took any pictures."

Moronto did not testify. Mandenbloom, consistent with the testimony of Hutchinson, agrees that Moronto accused him of recording tag numbers. He denies doing so. His admission that he was writing notes gave the appearance that he was recording something. The incident at the car related to the license tag, not the occupants of the vehicle.

The complaint alleges that Continental engaged in surveillance by photographing employees and writing down license plate numbers. Williams, the only employee of Continental identified as being at the conference, observed that Mandenbloom, whom he did not know, appeared to be taking pictures of guests following the conference. Williams did not claim that Mandenbloom ever appeared to photograph him. The evidence establishes that Mandenbloom appeared to be writing down the license tag number of a vehicle driven by a union organizer. The predicate for unlawful surveillance is coercion or interference with the Section 7 rights of employees. The foregoing actions by an individual whom employee Williams did not know did not impinge upon the rights of employees. I shall recommend that this allegation be dismissed.

2. September 29

On the evening of September 29, the Union sought signatures on a petition seeking the reinstatement of two employees, Mercedes Medina and Phillip Gonzalez, to their positions at Sunset Harbour. At least six individuals were present including Medina and Gonzalez, Continental employee Howard Williams, who worked at Belle Plaza, and three union organizers. These individuals were on the sidewalk near the driveway to the Sunset Harbour parking garage. They approached residents who were driving and walking. Mandenbloom took a photograph which shows at least four adults and an object, identified in testimony as a stroller, on the sidewalk adjacent to the driveway. The photograph establishes that, at the time it was taken, the sidewalk was blocked; however, no other person was present, thus the photograph does not establish that the access of any person was actually impeded. Julia Daniel, a former Organizer with the Union, acknowledged that law enforcement officers spoke with the group and cautioned them not to block the sidewalk. Mandenbloom testified that he took the photograph and showed it to the law enforcement officers because he was concerned that, upon observing the officers, the individuals would cease to block the sidewalk and deny that they had done so.

It is not unlawful for employers to photograph union activity in order to document that the participants are trespassing or blocking ingress and egress. *Chariot Marine Fabricators*, 335 NLRB 339, 348 (2001). I shall recommend that this allegation be dismissed.

3. October 28

About a month after the circulation of the petition on September 29, the Union conducted a mock election outside the Sunset Harbour facility. Residents were asked to vote to determine whether a majority of the residents wanted Medina and Gonzalez to be reinstated. Between eight and 15 individuals participated in this activity on behalf of the Union including Gonzalez, Medina, Howard Williams, and various representatives of the Union. Both Medina and Williams were employees of Continental at other facilities.

At dusk, Continental District Manager Karen Dubose and Claudia Sculthorpe, Continental's property manager at Sunset Harbour, drove slowly by the individuals conducting the mock election. Sculthorpe raised a camera and took a photograph. Medina and Gonzalez identified Dubose and Sculthorpe as this occurred. Counsel for Continental did not produce any photograph pursuant to subpoena but represented that "two pictures were attempted by Ms. Sculthorpe . . . but that they came out simply as blurs."

The Board, in *F. W. Woolworth Co.*, 310 NLRB 1197 (1993), reaffirmed longstanding precedent that "absent proper justification, the photographing of employees engaged in protected concerted activities violates the Act because it has a tendency to intimidate." Unlike the situation on September 29, there is no claim that the employees were blocking the sidewalk. The Respondent Continental characterizes the actions of the two Continental managers as "limited attempted phototak-

ing" and points out that the only Continental employees present, Medina and Williams, had permitted the Union to take and publish their photographs. Such consensual cooperation with the Union by the employees does not grant a respondent the right to surveil. Notwithstanding any blurred images, photographing occurred. Counsel did not present the photographs for examination regarding the quality of the images. The Respondent Continental offered no justification for the photographing.

Sunset Harbour, as a joint employer, is alleged as a Respondent with regard to this violation. No employees who worked at Sunset Harbour and no management officials of Sunset Harbour were involved in the incident. I find no violation as to Sunset Harbour. I find that by photographing protected union activity in which employees of Continental were participating, the Respondent Continental engaged in surveillance in violation of Section 8(a)(1) of the Act.

4. February 17, 23, and March 17, 2005

On the foregoing three dates the Union engaged in demonstrations on the sidewalk across from the Sunset Harbour. Organizer Julia Daniel testified that, after the mock election on October 28, in which residents voted whether "they wanted Mercedes [Medina] and Phillip [Gonzalez] to go back," the Union would "regularly, like almost weekly, . . . be out there protesting." No employee of Continental who worked at Sunset Harbour was involved in those demonstrations, which were loud and which disturbed residents of Sunset Harbour. On the three alleged dates, Sunset Harbour President Juan Duarte went outside of the condominium, onto the sidewalk, with a video camera. On the first occasion, he neglected to put a videotape in the video camera. On the other two occasions he acknowledges videotaping the demonstration for several minutes. The Sunset Harbour concierge, Carlos Pedroza, a Continental employee, observed the demonstrations from the front steps of the facility, including the occasions that Duarte was videotaping. There is no testimony that any other Continental employee observed the demonstrations.

The complaint concerning these allegations alleges that Sunset Harbour, by Duarte, "engaged in surveillance of employees engaged in union activities . . . by videotaping them." Sunset Harbour has moved to dismiss the foregoing allegations because no employee of Continental who was working at Sunset Harbour was involved in any of the demonstrations.

In *Washington Fruit and Produce Co.*, 343 NLRB 1215, 1217 (2005), the Board sets out the standard upon which surveillance allegations are evaluated as follows:

> [T]he fundamental principles governing employer surveillance of protected employee activity are set forth in *F. W. Woolworth Co.*, 310 NLRB 1197 (1993). The Board in Woolworth reaffirmed the principle that an employer's mere observation of open, public union activity on or near its property does not constitute unlawful surveillance. Photographing and videotaping such activity clearly constitute more than mere observation, however, because such pictorial record keeping tends to create fear among employees of future reprisals. … The inquiry is whether the photographing or videotaping has a reasonable tendency to interfere with protected activity under the circumstances in each case." [Citations omitted.]

The General Counsel, citing *Holly Farms Poultry Industries, Inc.*, 186 NLRB 210 (1970), argues that the photographing herein "occurred in the presence of employees." Id. at fn. 1. That case involved handbilling and the issue was whether photographing purportedly limited to photographing of the union organizers rather the employees receiving the handbills coerced employees in violation of Section 8(a)(1) of the Act. As aptly noted in *Barnes Hospital*, 217 NLRB 725 (1975), there is "no way of separating the activities of an outside, paid union organizer, in solicitation activities, from the simultaneous cooperation of the employees themselves." Id. at 727. This case does not involve solicitation or any other activity directed to employees at Sunset Harbour. The demonstrations on behalf of the employees for whom the Union was seeking reinstatement were directed to Sunset Harbour, the joint employer.

The complaint allegations regarding these three incidents in 2005 relate only to Sunset Harbour, not Continental. In *Washington Fruit*, employees of that employer were involved in the demonstration. No employee who worked at Sunset Harbour participated in the demonstrations at issue in this case. In *Titan Wheel Corp. of Illinois*, 333 NLRB 190 (2001), the Board did not comment upon the administrative law judge's observation that the General Counsel had cited "no authority for the proposition that an employer coerces its employees when they see its agents taking photographs only of nonemployees." Id. at 195. "The inquiry is whether the photographing or videotaping has a reasonable tendency to interfere with protected activity under the circumstances in each case." *Washington Fruit and Produce Co.*, supra. In the circumstances of this case I find no basis for concluding that any observation of the demonstration by any employee of Sunset Harbour at a time that President Duarte was videotaping the activities interfered or coerced employees of Sunset Harbour in violation of the Act. I shall recommend that these allegations be dismissed.

E. The Discharge of Marvin White

1. Facts

Marvin White was hired as a valet at the Executive in early July by Property Manager David Keller, a supervisor of Continental. He was discharged less than 2 months later, on August 24, purportedly because the Board of Directors of the Executive eliminated the key control position. When hired, White's duties included parking cars and assisting residents with their packages. He also served as a front desk concierge and, on occasion, was responsible for cleaning the pool. About 2weeks after he began working at the Executive, Keller assigned White the job of key control. This duty required White to escort crews who were remodeling the building to the locations at which their work was to be performed. On those occasions that construction crews needed access to locations inside the facility, White would go to the manager's office and obtain the master key for the particular unit to which the crew needed access from secretary Cheryl Moore.

In 2004, before he left as property manager, Keller distributed a 2 page document on Continental letterhead signed by

President Richard Strunin and addressed "To our employees and their families." The letter notes that "union organizers are trying to get our employees to attend union meetings, and sign union cards or union petitions" and that Continental is "100% *AGAINST* A UNION GETTING INTO OUR COMPANY." [Emphasis in the original.] Keller distributed a second document informing employees that if they had signed a union authorization card they could "write the union and ask them to cancel the card."

Keller ceased to serve as property manager in late July. After a 2 week hiatus, Angela Arrango became the property manager on August 9.

During that hiatus, White had his first contact with the Union. White, who was at the front desk, observed valet Kolson Brutus speaking with someone. He called to Brutus and reminded him of the policy prohibiting personal visits when an employee was working. Brutus informed White that the individual was "from the Union" and that she had been there before. White asked Brutus to bring her in. White introduced himself and Union Representative Stephanie Lauria introduced herself. They spoke and made an appointment to meet off of the property at a local fast food restaurant the following week. They did so, with Laurie picking White up from the Executive when he got off of work. They discussed the Union and "what the Union was trying to do as far as trying to get better pay for the workers inside the buildings, such as workers in my position, the valets, the front desk." Lauria gave White a union pledge card which he signed. Thereafter, he met with her once a week.

White brought some of the pledge cards back to the facility. He spoke about the Union with his coworkers including Front Desk Manager Georges Legros, a nonsupervisory employee. Legros reminded White that he should not let "them [people from the Union] come on the property." He also said not to get in any trouble. White asked him how he could get in trouble. Legros replied that he did not know, "but just don't get into any trouble."

During the hiatus between Keller and Arrango, White informed former Property Manager Keller, who called a couple of times to assure that there were no problems, that he had talked with a union representative and asked whether Keller knew if the Board of the Executive was going to give the employees better benefits and pay raises, "because those were the things that the workers. . . were always talking about." Keller informed White that the Board's annual meeting was in September and that it had been discussed that the employees might receive benefits and a pay raise.

After White was hired, a new employee, Mark, "an older guy," was hired as a valet. White believed that he was hired part time. Arrango did not dispute that testimony.

In mid-August, shortly after Arrango became property manger, Lloyd Stephens, another valet, was present at the front desk. Dr. Merry Haber, secretary of the Executive board of Directors, drove up and observed White speaking to Lauria outside of the building. When Dr. Haber entered the building, she came to the front desk and asked Stephens who White was speaking with. Stephens, who had previously spoken with Lauria, informed Dr. Haber that he was talking to the lady "from the Union." Dr. Haber stated, "[T]hey don't belong on the property." Dr. Haber then went into Arrango's office and, shortly thereafter, Arrango came out and asked who the individual was and whether she was "from the Union." Stephens told Arrango that the individual was from the Union, and Arrango directed him to "go outside and have her leave the property, and . . . not to come back on the property." White was still speaking with Lauria when Stephens asked her to leave.

Shortly after this, White and Stephens were both at the front desk. White recalls that Arrango came to the desk, looked at it, and stated "this will not do." She began picking up business cards, fast food menus, and other papers that were spread out upon it. As she was picking up the various papers, she picked up the union pledge cards that White had brought to the facility. Stephens recalled that the union document was a pamphlet. I credit White's recollection since he brought the cards to the facility. White credibly testified that, when Arrango saw the pledge cards, he "thought she was going to have a heart attack," that she "became very red and she became very, very upset." She asked, "What are these? How did these get here? Who do these belong to?" White did not respond. Stephens answered, "I don't know." He recalls that Arrango stated that she did not want anything involving the Union, "she doesn't want to see it . . . [s]he doesn't want it around," and that whoever is found with it is "going to be in big trouble." White, whom I credit, recalls that Arrango stated that "somebody's been helping the Union and I'm going to get to the bottom of this." She told White that she was holding him responsible. She went to her office and then returned. She told White that she knew that union representatives had been coming around, that they were not allowed on the property, and that if they came onto the property to call the police.

Arrango agreed that she had cleaned up the front desk, but testified that Legros was present when she did so and that she simply "put the stuff in boxes" and took it to the office. Legros did not corroborate that testimony. Arrango claims that the first time that she was aware of any activity involving the Union at the Executive was when people appeared at the facility protesting the discharge of White. I do not credit Arrango. Dr. Haber, who went into Arrango's office immediately after Stephens informed her that White was talking to a person from the Union, did not testify. Arrango did not deny speaking with Dr. Haber or questioning Stephens regarding whether the individual outside was "from the Union" and directing him to "go outside and have her leave the property, and … not to come back on the property." I find, consistent with the credible and mutually corroborative testimony of White and Stephens, that Arrango observed Lauria, who was speaking with White, and thereafter became extremely upset when she discovered union literature at the desk.

On the Friday following Arrango's discovery of the pledge cards, she held a meeting of the employees. Although differing with regard to exactly what was said, White, Stephens, and employee Kolson Brutus confirm that Arrango stated that she was aware that representatives of the Union had been coming onto the property, that they were not allowed on the property, and that if they came onto the property to call the police. White recalled that Arrango stated that if she saw any employee

speaking with a union representative, "I'm going to fire you." Stephens recalled only that anyone allowing union representatives on the property would be in "big trouble." I find that White's recollection was of his understanding rather than what Arrango actually said.

The board of the Executive met on Monday, August 23. On Tuesday, August 24, Arrango called White to her office when he reported to work. Dr. Haber, secretary of the board, was present. Arrango told White, "[W]e're going to have to let you go." Dr. Haber informed White that "they could no longer afford the key control position. The budget did not allow it." White recalled that Dr. Haber stated that he was one of their best employees and that "they're not eliminating the man, but they are eliminating the position." White responded that he was not hired for key control, that key control was an added duty that he was "hired as a valet and key control was something that I did in addition to my other duties." He stated that he had not done key control since Arrango arrived and that another valet had been hired after him and "he still had a job." He asked why they did not let that person go. Dr. Haber did not respond. White stated that he knew why he was being fired but that he was "not going to sit here and get into it now." Dr. Haber did not testify.

Property Manager Arrango purports to have initiated the discharge of White because of financial considerations. Arrango had assumed the position of property manger on August 9, and had, therefore, only been at the facility for 2 weeks when the Board met on August 23. In the week prior to the meeting, Arrango individually called the members of the Board and recommended terminating White. I do not credit her denial that she was aware of White's union activities at that time, nor do I credit her claim that she did not apprise the board members of White's union activities when she called them. Her recommendation to discharge White was effectuated by the Board of Directors pursuant to a motion by Dr. Haber. When asked whether she recalled what Dr. Haber told White when he was discharged, Arrango answered, "Not exactly. She mentioned due to the financial restraints on the building, the position, key control position was terminated." Arrango did not deny that White pointed out that he was a valet, that key control was an additional duty, and that another valet had been hired after him.

Although White informed Dr. Haber that he had not performed key control work since Arrango became the property manager, he testified that he had performed the job after her arrival on perhaps two occasions. He explained that Arrango brought her own secretary with her, demoted Cheryl Moore to part time, changed the lock on the door to the closet in which the keys were kept, and informed the employees that if they need keys, "then you come to me." Arrango did not deny changing the lock, but denied that she kept the keys, testifying that they "were in the outside office with a box." She did not deny bringing her own secretary and reducing Moore to part time.

Former employee Kolson Brutus confirmed that Arrango made various changes. Formerly he had worked a regular shift from 4 p.m. to midnight. After Arrango became property manager, there were new procedures, "[w]e had to switch with people, work in the pool, and also the front desk." Brutus testified that his schedule was "changed every week." Arrango did not dispute the foregoing testimony

George Legros confirmed that a schedule prepared by Keller prior to his departure showed White as responsible for key control, but it does not show how often it was necessary for White actually to perform that assignment. White recalled that he performed it about seven times when contractors had to be escorted to condominium units. Legros and Stephens agree that, in addition to performing key control work, White worked as a valet, at the front desk, and at the pool. Stephens recalled that, when no one was covering the pool, White would "take his tie and shirt off" and perform that duty. After White was discharged, Legros performed key control work. Brutus recalled working up to 16 hours and that his work included cleaning the elevator used by the contractors, that White "used to take care of the elevator, to take off all the stuff" after the contractors' work was completed.

Arrango testified that White was terminated pursuant to her recommendation "to terminate the key control position." In a pretrial affidavit signed by Arrango, she initially stated that Georges Legros informed her that White "was used for the key control position." Arrango struck that line from the affidavit so that it stated that Legros told her that White "helped him, did the same thing Georges [Legros] did . . . ." At the hearing, Arrango asserted that she observed White "sitting with George Legros at the front desk doing nothing." When asked whether "he sat there and did nothing and you paid him?" Arrango answered, "Until his position was terminated, yes." I find the foregoing assertion to be incredible.

2. Analysis and concluding findings

The complaint alleges that the Respondent Continental and Executive, on August 17, interrogated employees regarding their activities on behalf of the union, threatened unspecified reprisals for engaging in union activities, and issued a directive prohibiting employees from speaking with union representatives, and, on August 20, prohibited employees from bringing union paraphernalia to work and threatened discharge for engaging in union activities.

There is no credible evidence that Arrango, on August 20, when informing the employees that nonemployee union representatives were not permitted on the property, ever specifically threatened discharge or directed employees not to bring union paraphernalia to work. I shall recommend that the allegations relating to August 20, be dismissed.

Arrango's questioning of White and Stephens regarding how the union pledge cards had gotten onto the front desk and to whom they belonged was coercive. It followed her direction to Stephens to have Lauria leave the property and preceded her stated intention to "get to the bottom of this." Arrango's informing White, who unlike Stephens had not said that he did not know to whom the documents belonged, that she was holding him responsible threatened an unstated reprisal. The threat of reprisal is confirmed by Stephens' recollection of Arrango's remarks which he interpreted as threatening "big trouble." If the possession of union pledge cards was of no concern to Arrango, there would be no need to "get to the bottom of this" or to hold anyone responsible. I find that the Respondent Conti-

nental coercively interrogated employees regarding their union activities and threatened unspecified reprisals for engaging in union activities in violation of Section 8(a)(1) of the Act.

Although Arrango directed that union representatives not be permitted on the property, there is no evidence that she issued a prohibition against speaking with union representatives. I shall recommend that the allegation in that regard be dismissed.

In assessing the evidence concerning the discharge of White under the analytical framework of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), I find that White did engage in union activity and that the Respondent Continental and Executive were aware that he engaged in union activity. The Respondent Continental, by the coercive interrogation and threat by Property Manager Arrango, expressed animus towards employee union activity. The discharge of White was an adverse personnel action. The General Counsel established that White's activities on behalf of the Union were a substantial and motivating factor in the decision to terminate him. Thus, the burden of going forward shifted to the Respondent Continental to demonstrate that the same action would have taken place even in the absence of the protected conduct.

Property Manger Arrango initially testified that she recommended that "the key control position" be eliminated. The record establishes that there was no key control position. Key control was an additional duty. Arrango struck from her pretrial affidavit the line that stated that Legros informed her that White "was used for the key control position." Thereafter, she incredibly claimed that she observed White "sitting . . . doing nothing." Despite this, she did not assign him to do anything or send him home for lack of work. White, front desk manager Legros, Brutus, and Stephens confirm that White performed various tasks, including working as a valet, at the front desk, and at the pool.

The discharge of White was initiated by Arrango. Although purportedly acting because of financial restraints, no financial analysis performed by Arrango was offered into evidence. The agreement pursuant to which Continental managed the Executive provides that all new hires must be approved by the Board of Directors. Thus, notwithstanding any alleged budget restraints, Property Manger Keller had been authorized to hire a valet, and he hired White in early July. Thereafter, he assigned him the additional duty of key control, a function that White performed when construction personnel were present. Keller did not testify.

When White informed Keller that he had spoken with a union representative and that employees were talking about better benefits and pay raises, Keller responded that the Board's annual meeting was in September and that benefits and a pay raise had been discussed. Notwithstanding alleged budget restraints, after White was hired as a valet, an older individual, Mark, was hired as a valet. When Property Manager Arrango assumed her duties on August 9, she brought her own secretary with her, but retained Cheryl Moore, albeit on a part-time basis.

The foregoing facts compel the conclusion that alleged financial constraints were a pretext. Neither Dr. Haber nor any other member of the Executive Board of Directors testified. There is no explanation for hiring White in early July and, thereafter, hiring Mark despite alleged financial constraints. Nor is there any explanation for permitting Arrango to bring her own secretary with her while retaining Moore on a part-time basis.

I have not credited Arrango's denial that she was aware of White's union activities or her claim that she did not apprise the members of the Board of those activities. No Board member testified in corroboration of Arrango's denial that White's union activity was mentioned when she called each of them prior to the Board meeting. The approval of her recommendation to discharge White was effectuated pursuant to a motion by Dr. Haber. White's testimony that he told Dr. Haber that key control was an additional duty and that a valet had been hired after him is uncontradicted. The failure of Dr. Haber give an explanation for the action of the Board confirms that any explanation would confirm that the asserted reasons for White's termination, financial constraints and the elimination of a position that was simply an additional duty, was pretextual and that any explanation would have related to White's union activity. When the asserted reason for the adverse personnel action is either false, or does not exist, the Respondent has not rebutted General Counsel's prima facie case. *Limestone Apparel Corp.*, 255 NLRB 722 (1981).

The Respondent Continental has not established that White would have been discharged in the absence of his union activity. Case 12-CA-24097, insofar as it relates to the joint employer Executive, has been settled; therefore, no finding shall be made with regard to Executive. I find that the Respondent Continental discharged employee Marvin White because of his union activities in violation of Section 8(a)(3) of the Act.

F. The Allegations Relating to Phillip Gonzalez

1. Facts

Phillip Gonzalez began working at the Sunset Harbour condominium in 2001. He was a front desk concierge. In 2004, his hours were from 7 a.m. until 3 p.m. Gonzalez ceased to work on August 31, and on September 1, signed a resignation. The complaint alleges that Gonzalez was discharged or constructively discharged because of his union activities or, alternatively, pursuant to enforcement of unlawful rules.

Prior to April 1, the Continental property manager at Sunset Harbour was Keith Tannenbaum. Early in 2004, Gonzalez had permitted four or five individuals that he understood to be with the Union to come onto the property to speak to employees in connection with a survey they were conducting for Florida International University. Thereafter, Tannenbaum called the employees together and said "negative things about the union people," that "they were after our money" and that "we could have problems with Continental concerning our jobs."

About April 1, Claudia Sculthorpe became Continental's property manager at Sunset Harbour. On May 1, Continental took over the front desk operations at Sunset Harbour and conducted training sessions which included a presentation that, among other requirements, directed employees not to "share personal problems with residents." On Friday, August 13, front desk employee German Ponton was transferred to another facility. On Monday, August 16, Sculthorpe informed front desk employee Mercedes Medina that she was going to be transferred to another facility. Medina testified that she spoke about

this with Gonzalez and other coworkers; however, Gonzalez did not corroborate that testimony. Gonzalez learned that Medina was being transferred when she informed him of her transfer by telephone the day it occurred, August 20.

Gonzalez spoke with Sculthorpe after he learned that Medina was transferred and asked "what was going on." Sculthorpe told him that it was not his concern and to stop asking questions. He asked if he was going to get transferred. Skulthore did not confirm or deny the possibility of a transfer. She told Gonzalez that he was doing a great job and to keep up the good work. Gonzalez also asked Sunset Harbour Board President Juan Duarte about Medina, but did not testify to the response he received.

Gonzalez testified that he had gone by the office of the Union prior to the transfer of Medina because he was "seeing strange things going on . . . at the front desk." He did not explain the nature of the things he was seeing, why he wanted to speak with someone from the Union regarding those things, what he spoke about when he went, or when this visit occurred. Union Representative Serena Perez was told by Medina that she had convinced Gonzalez to support the Union after her transfer. Gonzalez testified that he signed a union pledge card after Medina was transferred because "I had a feeling I was going to be the next one, so I wanted . . . somebody to protect me." The Union received the card on August 25. Gonzalez claims that he spoke with employees about "how they [the Union] can support us" after Medina's transfer; however, he did not work for more than a week after her transfer. No employee with whom he purportedly spoke corroborated his testimony that he began speaking in favor of the Union.

On August 16, Gonzalez had been served with a document seeking an injunction against him for domestic violence. His wife was the petitioner. There was no criminal complaint. Gonzalez was not arrested. Gonzalez was scheduled for 1 week of vacation the following week. His direct supervisor, James Vilson, arranged for vacation to be advanced to Gonzalez. He took off the remainder of August 16, and was on leave from August 17—26. August 27 and 28 were his scheduled days off. Gonzalez returned to work on August 29.

On August 16, Gonzalez showed the papers with which he had been served to Property Manager Sculthorpe. Vice President of the Sunset Harbour Board Winston Lett was also present. Gonzalez recalls that a resident, Alan Fine, came into the room at some point when he was discussing his situation with Sculthorpe. Gonzalez admits speaking about his personal problem with one resident, Bonnie Cutler, who recommended the attorney who thereafter represented Gonzalez.

Continental maintains the following rule in the front desk manual at Sunset Harbour:

> Employees are only permitted to be on property while on duty unless you are picking up a paycheck or otherwise advised by the property manager or the Front Desk Coordinator. If you are coming on property while off duty, we expect that you will still follow guidelines and dress neatly. Once again, remember you represent the building and the company. Employees who violate this policy are subject to disciplinary action.

On August 17, Gonzalez came to the facility and informed Property Manger Sculthorpe that he had an attorney and was looking for somewhere to stay. Sculthorpe's superior, Director of Front Desk Services David Miller, was present. Miller told him that he had heard that Gonzalez had been "hanging around the facility" and "loitering in the building." Although Gonzalez denied having done so, Miller told him that he could not "go to the condominium" while he was on vacation. Miller recalled that he told Gonzalez that it had been reported that Gonzalez had been sleeping in a common area of Sunset Harbour and living out of his car and that he could not "loiter here in the building when you're not on duty." I credit Gonzalez and find that Miller told him not to "go to the condominium," and in doing so I note that, when disciplining Gonzalez for violating this announced prohibition, Continental cited him for "frequenting the property" and "loitering on the property."

Miller also informed Gonzalez that he should not be sharing his personal problems regarding domestic violence with residents because it upset them. Gonzalez testified that he had not done that, but he did not testify that he denied having done so to Miller. His response to Miller was, "I told him I understood."

Gonzalez recalled that on one day, he did not remember the date, he came to the facility to keep Sculthorpe updated. President of the Sunset Harbour Board, Juan Duarte, called Sculthorpe's office and spoke with him, stating that he had heard that Gonzalez had been speaking to residents, that it was not his concern what happened to Medina, that it had been reported that he had been loitering in the building, and that he should keep his mouth shut because it was none of his concern.

Duarte acknowledges telling Gonzalez that he should keep his personal problems to himself, not to share them with residents, and not to loiter in the building. Duarte made no reference to Medina. Gonzalez was on leave when he learned of Medina's transfer on August 20, thus there would have been no opportunity for him to have mentioned Medina to any resident until he returned to work, and Gonzalez did not testify that he did so. I find, consistent with Duarte's testimony, that only personal problems and loitering were mentioned in their conversation. Duarte did not tell Gonzalez that he could not speak with other employees.

The hearing regarding the domestic violence matter was held on January 19. Following the hearing, on January 19, the attorney who represented Gonzalez wrote him confirming that the case was civil, not criminal, that he was to have no contact with his wife, that the judge had made no finding, and that "nothing negative has happened to you." Gonzalez testified that he showed that letter to Property Manager Claudia Sculthorpe "when I returned to work" and that she made a copy of it and "was happy the case was over with and my name was cleared." Gonzalez' days off were Friday and Saturday. The office was closed on Saturday and Sunday. I find it doubtful that Gonzalez would have returned to work on Sunday, the 29th, without having coordinated with Sculthorpe. Since the office is closed on weekends, it would appear that Gonzalez showed the letter to Sculthorpe prior to his actual return to work.

Gonzalez returned to work on August 29. Several residents, observing that Medina was no longer present, asked Gonzalez what had become of her. Gonzalez testified that he would reply

that he thought that he was going to be next. This prompted some residents to ask what was the difference between Continental and Progressive, the prior property management company, and Gonzalez answered that Progressive "would treat us like family."

On the morning of August 31, when Gonzalez reported to work, he saw that Supervisor James Vilson, Director David Miller, and an employee, whose last name was Edison and in whose training Gonzalez had participated, were outside the building. They entered. Miller told Gonzalez that that he needed to talk to him and directed Edison to take the front desk position. At a couch in the lobby, Gonzalez asked what was going on, was he being fired. Miller responded that they could not "speak about this right now." Miller contends that he informed Gonzalez that it had been reported that Gonzalez was continuing to speak about his personal problems and had been loitering on the property and that Gonzalez did not deny doing so. Supervisor Vilson corroborated this testimony, stating that that Miller informed Gonzalez that he had breached their agreement, that he was "still talking to residents about his personal problems" and that Gonzalez acknowledged that he had been on the property over the weekend and that residents were asking him questions "about changes that were being made at the front desk." Miller told Gonzalez that he was being removed from Sunset Harbour and that he should come to the corporate office in Hollywood, Florida, the following morning. Gonzalez went to the union office and reported what had occurred.

The following morning, September 1, Gonzalez drove to the Continental offices in Hollywood, Florida. Union representative Serena Perez accompanied him, but stayed outside in the car. Gonzalez met with Miller and Mandenbloom. He was issued two warnings and signed a resignation. Gonzalez initially testified that Miller told him to "hurry up, I need you to sign this," and that he did so without reading any of the documents. Thereafter he recalled that Mandenbloom stated that he had a bad attitude and that he denied the accusation by referring his years of work at Sunset Harbour. Miller disputes that Gonzalez was told to hurry, pointing out that Gonzalez requested and was provided copies of the documents that he signed. Even if I assume that Gonzalez was hurried, there is no way that he could have failed to read the one sentence letter of resignation that he signed.

The first warning cites Gonzalez for "loitering on the property on 8/21 and 8/22." Gonzalez admits reading the warning sometime after he signed it. He did not deny, either to Continental or at the hearing, coming onto Sunset Harbour property on August 21 and 22.

The second warning, prepared by Miller, states that, on August 30, Miller was informed that Gonzalez "had become very negative toward Continental" and was falsely informing residents that two front desk managers had been fired when, in fact they had been transferred. The warning states that on August 31, Miller was informed that Gonzalez was "continuing to tell residents of his personal problems." Gonzalez's admission that he stated that that Progressive had treated employees like family implied that Continental did not treat employees like family, and he did not deny that he informed residents that two front desk managers had been fired rather than transferred. At the hearing, Gonzalez denied having shared his personal problems with the exception of his conversation with Sculthorpe that was overheard by Vice President Lett and resident Fine and his conversation with resident Bonnie Cutler who assisted him in obtaining an attorney. He did not, however, ever deny to Miller that he had spoken to residents about his personal problems. Gonzalez did not deny informing residents that two front desk managers had been fired instead of transferred.

Miller claims that he offered Gonzalez the opportunity to transfer to another property, but he did not identify the property. Mandenbloom recalls that Miller offered Gonzalez a position as a floater "for a short time until we could find him a property," and that Gonzalez rejected that offer and stated that he wanted to remain at Sunset Harbour. As a floater, Gonzalez would have no regular schedule or fixed location at which he would be working. Mandenbloom recalled that Miller told Gonzalez that remaining at Sunset Harbour was not an option and asked if he wanted to resign. Gonzalez stated that he did. Gonzalez claimed that he was offered nothing at the first meeting and, although contending that he was intimidated, acknowledges that he signed a resignation.

Gonzalez returned to the vehicle. Union Representative Perez examined the documents that Gonzalez had been given and told him that he should not have signed them, to go back. Gonzalez did so. He spoke with Miller and Mandenbloom, telling them, "I refuse all this." Miller suggested that Gonzalez speak with Vilson who had arrived. Gonzalez told Vilson, "I don't accept this. I refuse this." According to Gonzalez, Vilson stated that he didn't know what to tell him and that was the end of their conversation. Vilson recalled that Gonzalez had questions regarding the options that he had been given, that he informed him that he was working on a transfer, that Gonzalez should consider what he was doing and to come back the following day.

Gonzales returned to Sunset Harbour on the evening of September 1, with representatives of the Union and sought signatures upon a petition seeking his reinstatement. He testified that, while doing this, he received a call on his cellular telephone from Miller inviting him to come back to the Continental corporate offices the following day. Gonzalez did so and acknowledges that he was offered a position as a floater on September 2, and that he rejected it. Vilson claims that, on September 2, Gonzalez was offered a full-time position at another condominium and that he rejected the offer, stating that if he could not return to Sunset Harbour he wanted to be terminated. Vilson acknowledges that a floater position was also mentioned. Miller denies calling Gonzalez on the evening of September 1.

I do not credit the testimony that Gonzalez was offered a full-time position at any time. Mandenbloom confirms that he was offered a position as a floater "for a short time until we could find him a property," that Gonzalez rejected that offer and resigned. No document reflecting the offer of a full-time position was offered into evidence. Whether Gonzalez was offered a position as a floater on both September 1 and 2, or only on September 2 is immaterial. He acknowledges rejecting the offer of a floater position on September 2.

A memorandum from Supervisor Vilson to the Sunset Harbour board of directors dated August 20, reports that German Ponton was transferred on August 13, and that Mercedes Medina was transferred on August 19. It refers to the fact that Gonzalez had experienced personal problems and states Vilson's intention, "in the long term," to recommend his transfer.

2. Analysis and Concluding Findings

The complaint alleges that the rule limiting the access of off-duty employees at Sunset Harbour violates the Act, that the Respondents, by Miller, "denied off duty employees access to the Sunset [Harbour] facility" on August 18, that Sculthorpe and Duarte prohibited employees "from discussing their terms and conditions of employment," and, on September 1, in writing, denied off-duty employees access to the Sunset [Harbour] facility and prohibited them from discussing terms and conditions of employment.

There is no evidence that Gonzalez was ever directed not to discuss terms and conditions of employment. The General Counsel's brief sets out no such rule but argues that the prohibition occurred when Duarte forbade Gonzalez to speak about Medina's transfer and when Gonzalez was issued the second warning on September 1 that referred to his falsely telling residents that front desk employees had been terminated rather than transferred. I have found that Duarte did not mention Medina, that he told Gonzalez to keep his personal problems to himself, not to share them with residents, and not to loiter in the building. The prohibition upon employees sharing personal problems with residents does not relate to terms and conditions of employment and does not infringe upon their right to engage in Section 7 activity. Gonzalez knew that Ponton and Medina had been transferred, not fired. Disciplining an employee for making false statements does not infringe upon Section 7 rights. There is no evidence that Gonzalez was, in writing, denied access to the Sunset Harbour facility on September 1. I shall recommend that those allegations be dismissed.

On August 18, Miller told Gonzalez that he could not "go to the condominium" while he was on the vacation leave that he had been given. The foregoing prohibition is consistent with the rule in the front desk manual that prohibits off-duty employees from coming onto the property except to pick up a paycheck or with authorization. *Tri-County Medical Center*, 222 NLRB 1089 (1976), holds that a no-access rule concerning off-duty employees is valid only if it (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity, and that except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid. Although Duarte only directed Gonzalez not to loiter in the building, Miller, speaking for Continental, also spoke for joint employer Sunset Harbour when he told Gonzalez not to come to the condominium.

The Respondents offered no business justification for denying Gonzalez access to Sunset Harbour property while off duty. Continental, in its brief, argues that there are no nonworking areas at the facility that "all of the premises, inside and out, are areas where services are provided to . . . residents and guests." Neither the Respondent Continental nor the Respondent Sunset Harbour adduced any evidence to that effect at the hearing. Director Mandenbloom photographed the blocking of the sidewalk at the entrance to the driveway that leads to parking, a nonworking area. Duarte testified to expenses for the repair of construction defects. The area in which repair materials would be stored and in which construction debris would be deposited would not be frequented by residents or guests and would be nonworking areas when construction crews were not present. By promulgating and maintaining a no-access rule, the Respondents, joint employers, violated Section 8(a)(1) of the Act.

The complaint alleges that the Respondents, on September 1, issued two disciplinary actions to Gonzalez and "discharged or constructively discharged" him because he engaged in union activities, protected concerted activities, and "based upon the rules described above."

In assessing the evidence under the analytical framework of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), notwithstanding the Respondents' animus towards employee union activity, there is no evidence that the Respondents were aware that Gonzalez had engaged in any union activity and there is no evidence that he engaged in protected concerted activity.

Regarding union activity, Gonzalez testified that he had a feeling that he was going to be the next to be transferred before allegedly engaging in any union activity. He signed the union pledge card given to him by Medina because he wanted "somebody to protect me." Whether he had gone by the Union office prior to signing the card is immaterial insofar as there is no evidence that anyone was aware of that visit. He did not work at Sunset Harbour from August 17 until Sunday, August 29. He does not claim to have mentioned the Union when stating that the former employer, Progressive, unlike Continental, had treated employees like family. The discipline issued to Gonzalez does not mention the Union or conversations with employees. The General Counsel presented no employee witness who testified in corroboration of the conversations in support of the Union that Gonzalez claimed to have had following Medina's transfer. He does not admit having returned to the facility, except to speak to Sculthorpe, until August 29. There is not a scintilla of evidence that any supervisor or management official of Continental or Sunset Harbour was aware of any union activities or prounion statements by Gonzalez prior to his removal from the facility.

There is no evidence that Gonzalez engaged in any protected concerted activity unrelated to the Union. Although the brief of the General Counsel refers to his "protesting the transfer of others," Gonzalez did not claim that he spoke with any employees about Medina. He asked Sculthorpe what had happened and was told it was not his concern. Thereafter, when he was asked by residents what had become of Medina, he obliquely replied that he thought that he was going to be the next to be transferred.

The Respondents' no-access rule violates Section 8(a)(1) of the Act. The first warning issued to Gonzalez on September 1, cites him for "loitering on the property on 8/21 and 8/22" after

being told not to be on the property when off duty. Director Miller testified that he issued that warning based upon a report that he had received. He testified that, when Gonzalez was removed from Sunset Harbour on August 31, he admitted to Miller that he had been on the property. Gonzalez did not deny being on the property on those dates. Miller admitted that "loitering is not acceptable behavior for front desk individuals" and that the discipline was administered consistent with the "document of policies." The discipline issued to Gonzalez on September 1, cites him for "frequenting the property" and "loitering on the property." "[A]ny ambiguity in the rule must be construed against the Respondent as the promulgator of the rule." *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998).[4] Discipline imposed pursuant to an unlawful rule violates the Act. *Double Eagle Hotel & Casino*, 341 NLRB 112 fn. 3 (2004). By warning Gonzalez for being on Sunset Harbour property when off duty, the Respondent Continental violated Section 8(a)(1) of the Act.

The warning of September 1, was a first written warning in Respondent Continental's progressive discipline system. There is no probative evidence that he was removed from Sunset Harbour for violating that unlawful no-access rule more than a week prior to returning to work. Sunset Harbour had no involvement in the warning and ceased to be a joint employer when Gonzalez was removed from the facility on August 31. Thus, I shall recommend that this allegation be dismissed insofar as it relates to Sunset Harbour.

The second warning refers to Gonzalez having "become very negative toward Continental" and cites him for falsely informing residents that two front desk managers had been fired rather than transferred and "continuing to tell residents of his personal problems." The General Counsel points out that the Act's protection extends to statements that are not knowingly false; however, Gonzalez knew that Ponton and Medina had been transferred, not fired. He was not questioned regarding this aspect of the warning. He did not deny informing residents that two front desk employees had been fired rather than transferred. After returning to work, Gonzalez admits informing residents that Progressive had treated employees like family, implying that Continental did not treat employees like family. Although Gonzalez, at the hearing, denied having shared his personal problems, he did not deny to Miller that he had done so, and he signed the warning. There is no evidence that the Respondent Continental did not reasonably believe that he had continued to share his personal problems with residents. Even though there was no rule prohibiting comments that reflected negatively upon Continental, a Board majority does not believe that rules prohibiting "'disloyal, disruptive, competitive, or damaging' conduct, can reasonably be read as encompassing Section 7 activity." *Tradesmen International*, 338 NLRB 460, 461 (2002). The rule prohibiting discussion of personal problems with residents does not infringe upon Section 7 activity. I shall recommend that the allegations relating to the second warning be dismissed.

The Respondent Continental offered Gonzalez a position as a floater notwithstanding the fact that he had made comments about Continental that it perceived as critical and its belief that he had continued to discuss his personal situation with residents at Sunset Harbour. In view of the Respondent's discharge of Marvin White, I have no doubt that, if the Respondent believed that Gonzalez had been engaging in either union or protected concerted activity, he would not have been offered a position as a floater, an offer that Gonzalez admits he refused. He would have been discharged. I shall recommend that the allegations that Gonzalez was discharged or constructively discharged for engaging in union activity, protected concerted activity, or pursuant to an unlawful rule be dismissed.

G. The Discharge of Leydis Borrero

1. Facts

The complaint alleges that Continental discharged employee Leydis Borerro for engaging in protected concerted activity. Borrero worked for Continental from 1995 until her termination on January 28, 2005. For over 2 years she had worked at the Sands Pointe Ocean Beach Resort Condominium, Sands Pointe. She was assigned to housekeeping and was responsible for the lobby and the gymnasium. On January 9, 2004, Emilia Nabais became the property manager at Sands Pointe.

The basic facts are not in dispute. Employee Mario Cifuentes worked as a maintenance employee of Continental at Sands Pointe. In late November, he sought a leave of absence in order to return, for personal reasons, to his native country, Columbia, South America. He was granted a 45 day leave of absence and his last day of work was December 4. Cifuentes did not return to work within 45 days. The 45th day would have been January 18, 2005. Cifuentes returned on January 27, 2005. He went to Property Manager Nabais and asked if his "position was there to continue working." Nabais informed him that it was not, because he was gone for longer than his approved absence. She suggested that he should "present myself at another condominium." Cifuentes, although aware that he had returned after more than 45 days, protested that Nabais had said she would keep his job for him. Nabais repeated that the position was not available, "she did not have it any more."

Cifuentes remained on the property and, at lunch, spoke with employee Leydis Borrero. He explained to her that Nabais had informed him that "they did not have my position ready any more." Borrero informed Cifuentes that a board member she knew as Peter had been asking about him and that, if Cifuentes wanted to, she would "go up to his penthouse" with him. Cifuentes recalled that Borrero said that she would talk to a person on the board of the condominium "to see if they could help me in something so that I could start working again." Borrero, accompanied by Cifuentes, went to the unit of Board Member Spiro Colivas, the individual who Borrero knew as Peter.

According to Cifuentes, Borrero did most of the talking, in Spanish and "a little bit of English." Board Member Colivas, according to Cifuentes, speaks English and a "very little Spanish." Borrero informed him of Cifuentes' situation, contenting that "they had taken me out of the condominium without any

[4] Whether the discipline was issued pursuant to the written rule or the verbal prohibition stated by Miller on August 18, is immaterial. Even if it be assumed that Gonzalez could have lawfully been disciplined for sleeping at Sunset Harbour, the discipline issued on September 1, was not for sleeping; it was for "loitering" on August 21 and 22.

just cause." Coliovas stated that he would speak to Nabais "to see what happened with my position."

Borrero recalled that she explained to Colivas that they had come to see him because Nabais did "not want to give him his position." According to Borrero, Cifuentes asked why they were not giving him his position, "what was going on." Cifuentes and Colivas were speaking in English "because Mario [Cifuentes] speaks a little bit of English, a little more than me." Cifuentes began to try to say that he worked harder than other employees, but Borrero interrupted and stated that they were not there "to talk about who works and who doesn't work," that they were there "to try to get his own job back." Borrero recalls that Colivas and Cifuentes exchanged telephone numbers.

Board Member Colivas sent an e-mail to Nabais at 4:06 p.m. on January 27, 2005, identifying Cifuentes as "Mario" who "used to work in receiving" and explaining that Borrero had approached him when she saw him walking in the facility about Cieuntes "not being allowed to come back," that he explained that he did not have any power to hire or fire people, but that he agreed "to talk with you [Nabais] to see what the circumstances were and if he was eligible to come back . . . . " The e-mail continues, stating that, shortly after that conversation, Borrero and Cifuentes appeared at his apartment. He stated that he repeated his commitment "to connect with you [Nabais] . . . by phone or e-mail to discuss the matter," and that Cifuentes gave him his telephone number. The e-mail concludes, "When you get a chance, please let me know when we can get together discuss Mario and what the situation is or was. Thanks for your time."

Nabais sent the e-mail to her supervisor, Ophelia De La Torre, a Continental district manager responsible for eight to ten condominiums including Sands Pointe. De La Torre testified that she called Colivas who she claims was dumbfounded that Borrero had approached him and stated that he did not want "anyone coming to my home and disturbing my peace to talk about a friend and trying to get their friend hired." De La Torre says she also received a call from Board President Isaac Alian, "about this situation," but she did not place a date or time upon that conversation.

I do not credit De La Torre. Neither Colivas nor Alian testified. The e-mail from Colivas reveals that he knew that Mario, who he identified by name, had worked at Sands Pointe in receiving and that the issue was his "not being allowed to come back." The e-mail confirms that, although informing Borrero that he had no authority to hire or fire, Colivas committed himself to contact Nabais to see "if he was eligible to come back." I find it incredible that Colivas, having contacted Nabais and requested a meeting with her regarding "Mario's" eligibility to "come back" would, as asserted in De La Torre's hearsay testimony, claim that Borrero was "disturbing his peace" by trying to get her "friend" hired. If that had been his attitude, he would, after informing Borrero that he had no authority, told her to take the problem to Nabais or to her superior.

The following day, around 4 p.m., Borrero was called to Nabais's office. The secretary was present and a supervisor, Frank, was in and out of the room during the short meeting. Nabais and Borerro spoke in Spanish. Nabais informed Borrero that she was fired, to turn in her keys and radio. Borrero asked why she was being terminated and Nabais replied "because I had gone to help Mario to speak to the Board." Borrero answered that if that was a problem, "I accept it." Nabais commented that Borrero had thrown away her time with Continental. Borrero answered that she was not going to change, "that is my way of being by helping other people." Nabais asked why she had "gone to speak with the Board," and Borrero replied, "[N]o, what I did was accompany Mario to the penthouse."

The termination document signed by Nabais and dated January 28, 2005, states:

> Employee has been individually coached several times. She does not care nor take pride in her work. Finally addressed directly a board member to intervene on behalf of another employee that has requested for a leave of absence. Documents attached.

The termination document does not reflect that addressing a member of the Board violated any rule or instruction or that any board member complained about being contacted.

On February 27, 2004, Nabais issued a memorandum to employees relating to conversations that, inter alia, stated, "Employees are not allowed to converse with the Residents unless to greet them. . . . Conversation among the employees is to be kept to a minimum unless on break in the employees lounge. 'Gossip' between employees and/or residents will be subject to termination of the employee involved."

On March 9, the memorandum was revised to provide, "Employees are not allowed during work hours to converse the Residents unless to greet them. . . . Conversation among the employees is to be kept to a minimum unless on break in the employees lounge. 'Gossip' between employees and/or residents will be subject to termination of the employee involved."

District Manager De La Torre testified that the policy published by Nabais did not accurately reflect the policy that she stated to the employees in a meeting early in 2004. That policy, according to De La Torre, was that employees should not "be speaking either with residents, Board members, or among themselves during working hours" but that there was no problem "with them speaking with anyone about anything during their breaks or their lunch hour, or even afterward." De La Torre noted that the employees at Sands Pointe did not read English so they would not have understood the memorandum published by Nabais.

According to De La Torre, she held that meeting after Supervisor Nabais reported that Borrero was spending time away from her work speaking with residents. She acknowledges that she did not single out Borrero, but addressed all the employees. Borrero recalled that, shortly after Nabais became the property manager, she informed the employees that she did not want them to talk to people from the Board, but that "we had it understood that it was with the old Board." Borrero, on cross-examination, acknowledged that after October of 2004, when the new Board was elected, the employees were not told that they "were prohibited from talking to residents or Board members."

De La Torre testified that when a board member complains about an employee, it is Continental's policy to see if the employee has any write-ups and that, if they have been in compli-

ance with their work, "we definitely try to relocate them." That effort was not made in Borrero's case because, according to De La Torre, Nabais "faxed me over some write ups" and "based on her latest thing" that she did not "feel comfortable in relocating" Borrero. I do not credit that testimony. The document prepared and signed by Nabais relating to the termination of Borrero is dated January 28, 2005. It does not state any complaint by a Board member. It cites her conduct, including the action that she took with and on behalf of Cifuentes. De La Torre signed the termination document as well as a written warning that had been issued to Borrero on September 28 on February 7, 2005, 10 days after Borrero was terminated. Nabais did not testify.

2. Analysis and Concluding Findings

The complaint alleges that Respondent has maintained and on or about February 4, 2005, enforced "a rule prohibiting employees from discussing their terms and conditions of employment with residents and Board members." The rule, as revised by Nabais in March, limits the prohibition upon conversation with residents to "work hours" and De La Torre told the employees that lunch period is not work hours, that there was no problem "with them speaking with anyone about anything during . . . their lunch hour." Any presumptive invalidity in the English written rule was corrected when De La Torre informed employees that the rule did not apply during breaks or lunch period. There is no evidence that Borrero or any other employee understood that there was any restriction when they were not working. Borrero and Cifuentes approached Board Member Colivas during her lunch hour. Thus they were not in violation of the rule. I shall, therefore, recommend that this allegation be dismissed.[5]

The complaint alleges that Borrero was discharged for engaging in the protected concerted activity of "attempting to assist another employee in resolving a dispute about his employment at Sands Pointe" or, alternatively, pursuant to the foregoing rule that I have found does not unlawfully prohibit nonwork time conversations with residents and which Borrero did not violate. Respondent Continental argues that Cifunetes was not an employee and that "Borrero's activity had nothing whatsoever to do with terms and conditions of employees" of Continental.

Contrary to that argument, it is clear that Property Manager Nabais considered Cifuentes to be an employee because the termination document states that Borrero sought to intervene "on behalf of another employee." There is no evidence that, as of January 27, Cifuentes had been terminated. Nabais told him that his position was no longer open and suggested that he "present himself at another condominium," not that he apply for employment. Even if Cifuentes was not a current employee, employees are "members of the working class generally," including "former employees of a particular employer." *Little Rock Crate & Basket Co.*, 227 NLRB 1406 (1977). Cifuentes' effort to resume his former position made him at the least an applicant for employment and "[a] job applicant for employment is an employee under Section 2(3) of the Act. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1951)." *Labor Ready, Inc.*, 327 NLRB 1055, 1058 (1999).

The nature of the employment claim concertedly made by Borrero and Cifuentes does not remove it from the protection of the Act. In *S.M.K. Mining & Construction Co.*, 306 NLRB 718 (1992), the administrative law judge, citing *Cub Branch Mining*, 300 NLRB 57, 58 (1990), pointed out that "[t]he Board has consistently held that concerted employee action, when invoked peaceably, to further an employment claim, such as a wrongful discharge, albeit personal in nature, remains within the protective mantle of Section 7 of the Act. See, e.g., *Buck Brown Contracting Co.*, 283 NLRB 488, 489, and cases cited at 513 (1987). . . .By this very process [workers making common cause to reverse management's judgment on a personnel matter] management was put on notice, that its work force would not stand idly by in the face of unfair treatment. . . ." Id. at 721. The concerted activity of Borrero and Cifuentes was predicated upon the employment claim that Continental's failure to reinstate Cifuentes was unfair.

The concerted request by Borrero and Cifuentes to have a board member intervene on behalf of Cifuentes was protected. In *Cleanpower, Inc.,* 316 NLRB 496 (1995), the Board affirmed the finding of the administrative law judge that a threat to have a third party intercede on behalf of employees pursuing a complaint regarding working conditions was protected. The judge concluded that the two employees "were reaching out to Gulden [the third party] to seek his assistance in helping to resolve a work dispute and this was protected activity." Id. at 498. See also *NC License Plate Agency*, 346 NLRB 293 (2006). Leydis and Cifuentes sought to have Board Member Colivas intervene on behalf of Cifuentes. He agreed to do so and requested a meeting with Nabais. The termination document prepared by Property Manager Nabais establishes that Borrero was fired because, with Cifuentes, she "addressed directly a board member to intervene on behalf of another employee." The termination of Leydis Borrero for engaging in protected concerted activity violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Local 11, Service Employees International Union, the Charging Party, is a labor organization within the meaning of Section 2(5) of the Act.

2. The Respondent Continental and Executive were, at all relevant times herein, joint employers of the valet employees who worked at the Executive.

3. The Respondent Continental and the Respondent Sunset Harbour are joint employers of the front desk employees at Sunset Harbour.

4. By promulgating and maintaining an unlawfully broad rule prohibiting access to all Sunset Harbour property by off-duty employees except to pick up a paycheck or pursuant to authorization by the property manger or front desk coordinator, the Respondent Continental and the Respondent Sunset Har-

[5] The complaint does not allege a prohibition upon discussion of wages, hours, and working conditions among and between employees. Although the brief of the General Counsel refers to the "gossip" aspect of the rule, no witness addressed that aspect of the rule. No amendment to the complaint was offered, the issue was not fully litigated, and I make no finding in that regard.

bour have engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

5. By engaging in surveillance of employee union activities, coercively interrogating employees regarding their union activities, and threatening employees with unspecified reprisals for engaging in union activities, the Respondent Continental has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

6. By warning Phillip Gonzalez for coming onto the property of Sunset Harbour while off duty, the Respondent Continental has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

7. By discharging Marvin White because of his union activities, the Respondent Continental has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

8. By discharging Leydis Borrero because she engaged in protected concerted activity, the Respondent Continental has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent Continental and the Respondent Sunset Harbour having promulgated and maintained an unlawfully broad rule prohibiting access to all Sunset Harbour property by off-duty employees except to pick up a paycheck or pursuant to authorization by the property manger or front desk coordinator, the Respondents must rescind that rule insofar as it prohibits access to outside nonwork areas of the facility, remove it from the front desk manual, and advise the employees in writing that the rule is no longer being maintained.

The Respondent Continent having unlawfully warned Phillip Gonzalez on September 1, 2004, it must rescind that warning.

The Respondent Continental, having discriminatorily discharged Marvin White on August 24, 2004, and Leydis Borrero on January 28, 2005, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the dates of their respective discharges to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondents must also post appropriate notices. In view of the diversity of the workforce, I recommend that the notices be translated into Spanish and posted in both English and Spanish.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.[6]

ORDER

A. The Respondent Sunset Harbour South Condominium Association, Inc., Miami Beach, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating or maintaining any rule prohibiting access to all Sunset Harbour property by off-duty employees except to pick up a paycheck or pursuant to authorization by the property manger or front desk coordinator.

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

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

(a) Rescind the rule prohibiting the access of off-duty employees to Sunset Harbour property insofar as it prohibits access to outside nonwork areas of the facility, remove it from the front desk manual, and advise the employees in writing that the rule is no longer being maintained.

(b) Within 14 days after service by the Region, post at its facility in Miami Beach, Florida, copies of the attached notice marked "Appendix A."[7] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt 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 May 1, 2004.

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

IT IS FURTHER ORDERED that the complaints are dismissed insofar as they allege violations of the Act by Sunset Harbour not specifically found.

B. The Respondent, The Continental Group, Inc., Hollywood, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating or maintaining any rule prohibiting access to all Sunset Harbour property by off-duty employees except to pick up a paycheck or pursuant to authorization by the property manger or front desk coordinator.

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[6] 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.

[7] If this Order is enforced by a Judgment of the 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."

(b) Disciplining employees for violating an unlawfully broad no-access rule.

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

(d) Coercively interrogating employees regarding their union activities.

(e) Threatening employees with unspecified reprisals for engaging in union activities.

(f) Discharging employees for engaging in union activities or protected concerted activities.

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

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

(a) Rescind the rule prohibiting the access of off-duty employees to Sunset Harbour property insofar as it prohibits access to outside nonwork areas of the facility, remove it from the front desk manual, and advise the employees in writing that the rule is no longer being maintained.

(b) Within 14 days from the date of this order rescind the warning issued to Phillip Gonzalez on September 1, 2004, for loitering on Sunset Harbour property and within 3 days thereafter notify him, in writing, that this has been done and that the warning will not be used against him in any way.

(c) Within 14 days from the date of this Order, offer Marvin White and Leydis Borrero 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.

(d) Make whole Marvin White and Leydis Borrero for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter, notify Marvin White and Leydis Borrero in writing that this has been done and that the discharges will not be used against them in any way.

(f) 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 determine the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its offices in Hollywood, Florida, and at The Executive Condominium, Sunset Harbour South Condominium, and Sands Pointe Condominium, all of which are located in Miami Beach, Florida, copies of the attached notice marked "Appendix B."[8] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt 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 May 1, 2004.

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

IT IS FURTHER ORDERED that the complaints are dismissed insofar as they allege violations of the Act by The Continental Group not specifically found.

Dated, Washington, D.C. March 15, 2006

APPENDIX A

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

The National Labor Relations Board had found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT publish or maintain any rule prohibiting your access to all Sunset Harbour property when you are off duty.

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

WE WILL rescind our rule prohibiting your access to Sunset Harbour property when you are off duty insofar as it prohibits access to outside nonwork areas of the facility.

SUNSET HARBOUR SOUTH CONDOMINIUM ASSOCIATION, INC.

APPENDIX B

[8] If this Order is enforced by a Judgment of the 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."

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

The National Labor Relations Board had found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT publish or maintain any rule prohibiting your access to all Sunset Harbour property when you are off duty.

WE WILL NOT discipline any of you for violating an unlawfully broad no-access rule.

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

WE WILL NOT coercively interrogate you regarding your union activities.

WE WILL NOT threaten you with unspecified reprisals for engaging in union activities.

WE WILL NOT discharge you for engaging in union activities or protected concerted activities.

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

WE WILL rescind our rule prohibiting your access to Sunset Harbour property when you are off duty insofar as it prohibits access to outside nonwork areas of the facility.

WE WILL, within 14 days from the date of the Board's Order, rescind the warning issued to Phillip Gonzalez on September 1, 2004, for loitering on Sunset Harbour property and within 3 days thereafter notify him, in writing, that this has been done and that the warning will not be used against him in any way.

WE WILL, within 14 days from the date of the Board's Order, offer Marvin White and Leydis Borrero 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.

WE WILL make whole Marvin White and Leydis Borrero for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges, and within 3 days thereafter, notify Marvin White and Leydis Borrero in writing that this has been done and that the discharges will not be used against them in any way.

THE CONTINENTAL GROUP, INC.