Stanford New York, LLC d/b/a Stanford Hotel *and* Joong Hyun Park. Case 2–CA–35910

April 29, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On October 7, 2004, Administrative Law Judge Steven Davis issued the attached decision. The General Counsel and the Respondent filed exceptions and supporting briefs, and the General Counsel filed an answering brief.

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

Respondent employed Joong Hyun Park as a maintenance engineer from 1998 until his discharge on October 31, 2003.[3] In September 1999, the Board conducted an election in a unit that included all of the Respondent's service and maintenance employees. Park was an eligible voter in the election and appeared on the *Excelsior* list. The parties executed an initial collective-bargaining agreement on October 28, to be effective November 1.

In the morning of October 31, General Manager Kevin Kim asked Park why he wanted to become a member of the Union, advised him not to do so, and told Park that the union contract did not cover supervisors. Kim told Park that there would be a meeting later that day with Union Agent Leo Lanci to determine whether Park would be included in the unit. Kim contended that Park was a supervisor and thus not eligible for union membership. Park maintained that he was not a supervisor and wanted union representation. Kim angrily directed Park to tell Lanci that he was a supervisor.

That afternoon, Lanci and Park met in the employee lunchroom located in the basement of the hotel. Kim entered the room and sat next to Lanci. No other employees were present and Park closed the lunchroom door to further ensure privacy. During the ensuing discussion, Kim continued to insist that Park was a supervisor. Kim threatened Park in Korean that if he did not tell Lanci that he was a supervisor, he would be fired. Park called Kim a liar and a bitch and pointed his finger at him. Kim rose to leave, stating that he could not continue with the meeting. Park loudly called Kim a "f—ing son of a bitch" in English. An employee who had entered the breakroom overheard this remark. Kim again threatened Park with discharge, stating in Korean that he could fire Park at any time because he was a supervisor.

We find, in agreement with the judge, that Park engaged in protected concerted activity when he met with Union Agent Lanci and Kim and asserted his right to union representation and inclusion in the collective-bargaining unit.[4] We also recognize, however, that the "fact that an activity is concerted . . . does not necessarily mean that an employee can engage in the activity with impunity." *NLRB v. City Disposal Systems*, 465 U.S. 822, 837 (1984). When an employee is discharged for conduct that is part of the *res gestae* of protected concerted activities, the pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act. *Aluminum Co. of America*, 338 NLRB 21 (2002). In making this determination, the Board examines the following factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Atlantic Steel Co*., 245 NLRB 814, 816 (1979).

Addressing the first factor, we find that the location of Park's conduct weighs in favor of finding that Park retained the protection of the Act. Park's outburst occurred away from his normal working area in an employee lunchroom in the basement of the building. When the meeting began, no other employees were present, and when Kim entered the room, Park closed the door to maintain privacy. The relatively secluded room and Park's efforts to maintain the privacy of the conversation minimized the potential that Park's outburst would impair Kim's ability to maintain discipline in the workplace. We recognize that, despite Park's efforts, one employee entered the room towards the end of the conversation and overheard Park's intemperate remarks to Kim. However, we find that, on balance, this factor of location weighs in favor of protection even though the outburst inadvertently was overheard by one employee.

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

[2] Because many of the Respondent's employees speak mainly Spanish or Korean, we shall modify the recommended Order to provide that the Respondent post the attached notice to employees in Spanish, Korean, and English.

[3] All dates are in 2003 unless otherwise indicated.

[4] We adopt the judge's finding that Park was an employee and not a statutory supervisor. We therefore find it unnecessary to rely on the judge's finding that even if Park were found to be a supervisor, and thus properly not included in the unit, his efforts to join the Union would still be protected.

With regard to the second factor, the subject matter of Park's remarks also weighs in favor of protection. Park's outburst concerned his desire to be included in the collective-bargaining unit and his disagreement with Kim over his eligibility. In addition, Park's belief that he was not a supervisor was reasonable as evidenced by the fact that he was included on the *Excelsior* list and he voted in the election without challenge.[5] Because Park's conduct occurred in the context of his attempted assertion of a fundamental right under the Act, we find that this factor weighs strongly in favor of a finding that Park's remarks were protected.

As to the third factor, Park's outburst was profane and offensive, which weighs against the remarks retaining the protection of the Act. Park cursed Kim, calling him a "f—ing son of a bitch" while angrily pointing his finger at him. The record does not show that employees regularly used foul language at the hotel or in conversations with General Manager Kim. Nor is there credited evidence that Kim used profanity during the meeting.[6] Indeed, both Park and Kim agreed that cursing is inappropriate in the hotel. We therefore find that this factor weighs against a finding that Park's outburst was protected.

As for the fourth factor, Park's outburst was a direct and temporally immediate response to Kim's repeated insistence that Park declare himself ineligible for union representation, accompanied by threats of discharge.[7] While Kim may not have used profanity, he did unlawfully threaten to discharge Park, and that threat triggered Park's response. Board precedent establishes that an employer generally may not provoke an employee through unlawful conduct to a point where the employee commits an act of insubordination and then rely on that insubordination to discipline the employee. *Vought Corp*., 273 NLRB 1290, 1295 fn. 31 (1984), enfd. 788 F.2d 1378 (8th Cir. 1986).[8] Because Kim provoked Park's outburst by his unlawful conduct, this factor weighs in favor of protection.

We do not condone insubordination and, in other circumstances, Park's outburst might be unprotected. In the circumstance of this case, however, we find that Park was engaged in protected concerted activity in expressing his desire to be included in the collective bargaining unit, and he did not lose the protection of the Act because of his intemperate response while protesting Kim's unlawful conduct. Thus, the factors of place, subject matter, and provocation favor protection, while only the factor of the nature of Park's conduct does not. Accordingly, we find that Park did not lose the protection of the Act by his conduct.[9]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Stanford New York, LLC d/b/a Stanford Hotel, New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(e).

"(e) Within 14 days after service by the Region, post at its facility in New York, New York, copies of the attached notice marked "Appendix."[8] Copies of the Notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's author-

[5] We find unpersuasive the Respondent's assertion in its brief that Park's inclusion on the *Excelsior* list should not be considered probative of his status because it "may only reflect the common attempt of an employer trying to improve its odds of victory in a representation election."

[6] Park testified that Kim did use profanity, but the judge did not credit that testimony.

[7] In finding that Park's conduct did not lose the protection of the Act, the judge relied on *Felix Industries*, 331 NLRB 144 (2000). The Court of Appeals for the District of Columbia Circuit denied enforcement of the Board's Order in *Felix Industries* and remanded the case to the Board. 251 F.3d 1051 (D.C. Cir. 2001). On remand, the Board found that employee Yonta's use of profanity during a grievance-related telephone conversation with a supervisor did not outweigh the other factors favoring the protections accorded Yonta under the Act. 339 NLRB 195 (2003), enfd. per curiam (D.C. Cir. 2004) (No. 03–1221, 03–1239) (unpublished). Chairman Battista dissented because, in his view, Yonta's outburst constituted outrageous conduct and outweighed the other *Atlantic Steel* factors, thereby causing Yonta to lose the Act's protection. Id. at 197. While Member Schaumber did not participate in *Felix Industries*, he agrees with Chairman Battista's dissent. In any event, *Felix Industries* is distinguishable. Here, Park's conduct occurred in a face-to-face meeting with management, with a union agent present, regarding a fundamental right under the Act, and in direct response to Kim's unlawful threats of discharge.

[8] Chairman Battista does not agree with this proposition as stated. In his view, there can be circumstances where the employer's unlawful conduct is relatively minor, and the employee's responsive conduct is egregious. In such circumstances, the response may be unprotected.

[9] In finding that Park's remarks were not so inflammatory as to lose the protection of the Act, the judge relied on *Winston-Salem Journal*, 341 NLRB 124 (2004). There, the Board found that an employee did not lose the protection of the Act when he loudly called his supervisor a "bastard red-neck son-of-a-bitch" about an hour after an initial conversation in which he accused his supervisor of being racist and showing favoritism towards another member of the work crew. The Fourth Circuit, however, recently denied enforcement of the Board's order in that case. *Media General Operations, Inc. v. NLRB*, 394 F.3d. 207 (4th Cir. 2005). In concluding that the employee's outburst was unprotected, the court held that it was merely an expression of personal animosity towards the supervisor, and noted that it was not provoked by any action on the supervisor's part. Here, Park was engaged in protected activity when he met with Union agent Lanci and sought inclusion in the collective bargaining unit. Furthermore, Park's outburst was an immediate, spontaneous response to Kim's threat to discharge Park for attempting to become a member of the Union. The factors of concern to the Fourth Circuit are not present here.

ized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. This notice shall be posted in Korean, Spanish, and English. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since October 31, 2003."

Gregory B. Davis, Esq., for the General Counsel.
Howard R. Flaxman, Esq. (Fox Rothschild LLP), of Philadelphia, Pennsylvania, for the Respondent.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based upon a charge and a first amended charge filed on November 3, 2003, and February 23, 2004, respectively, by Joong Hyun Park, An Individual, a complaint was issued on March 31, 2004 against Stanford New York, LLC d/b/a Stanford Hotel (Respondent).

The complaint alleges that following employee Park's assertion of his right to be included in the collective-bargaining unit of the Respondent's employees represented by Local 758, Hotel & Allied Services Union, SEIU, AFL–CIO (Union), the Respondent (a) threatened to discharge Park if he did not agree to be excluded from the collective-bargaining unit and (b) discharged Park.[1]

The Respondent denied the material allegations of the complaint and asserted that Park is a statutory supervisor who is not entitled to the protection of the Act. On June 22, 2004, a hearing was held before me in New York, New York.[2]

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

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a New York corporation, having its office and principal place of business at 43 West 32nd Street, New York, New York, has been engaged in the business of operating a hotel, and providing lodging and related service to the public. Annually, the Respondent derives gross revenues in excess of $500,000, and purchases and receives at its facility in New York City, goods and materials valued in excess of $5,000 directly from suppliers located outside New York State. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

1. Park's work duties

The Respondent hotel is a 12-story facility containing 121 guest rooms, a lobby, basement, restaurant, bakery, and bar. It employs 37 employees in various departments, the majority being in housekeeping, and two employees in the maintenance department.

Park became employed in1998 and worked in the maintenance department. He worked Monday through Saturday, from 8:30 a.m. to 5:30 p.m. He was called an engineer. His duties included repairing toilets, bed frames, telephone wires, window curtain rods, pictures, shower heads, soap dishes, heating covers, video machines, ice machines, chairs, air conditioner controls, television remote control devices, and chains on doors. He also replaced light bulbs, unclogged leaks in pipes and drains, changed lock cylinders and made keys, painted, did demolition work, checked the batteries in exit lights, fixed vacuums, changed toilet parts, changed closet guides, checked windows, took out the garbage, cleaned wallpaper, replaced hair dryers, checked lamps, opened safety deposit boxes, changed a telephone, checked noise in heaters, changed a radio alarm, and changed an outlet. Park orders supplies for the maintenance department from vendors, but he first must obtain authorization from manager Kim to do so.

Park received his work assignments by wireless radio from the front desk reception personnel, the office, the reservation department, and from the supervisor of housekeeping. He also reviewed the logbook for problems which occurred the evening before. Park was provided with a cell phone on which he was called after hours to return to the hotel in an emergency, such as a leaking pipe. Only one other person, general manager Kinan (Kevin) Kim had a cell phone.[3]

During the period at issue here, October, 2003, two maintenance employees were employed, Park, and Myong Roi Choi.[4] Park recommended his hire as follows: Owner Joong Gab Kwon asked Park to recommend someone for the maintenance department. Park recommended Choi, telling Kwon that he was reliable. An advertisement was placed in a Korean newspaper and other applicants were interviewed, apparently by Kwon, but Choi was hired. Park was asked by Kwon whether he knew any of the other applicants. Park denied knowing them. Choi was the only person Park recommended. Choi worked Monday through Saturday, from 9:30 a.m. to 6:30 p.m.

Manager Kim stated that inasmuch as the hotel was 80 years old, two maintenance employees were needed. The daily main-

[1] The complaint also alleged that the Respondent promised Park more favorable working conditions if he would agree to be excluded from the bargaining unit. However, in his post-trial brief, counsel for the General Counsel moved to withdraw that allegation, and I hereby grant that motion.

[2] The Respondent's unopposed post-hearing motion to correct the transcript is hereby granted, and is received in evidence as Respondent's Exhibit 6.

[3] All references hereafter to Kim will be to general manager Kinan Kim unless otherwise stated.

[4] Choi replaced Kun Jea Moon.

tenance repair reports completed by Park and Choi demonstrate that they both did similar work, and sometimes worked together on the projects set forth above. Park signed a section of the report bearing the notation "approved by maintenance." Prior to October, 2002, the form said only "maintenance." However, after that time, on the order of owner Kwon, the form was changed to read "chief maintenance." Regardless of the change on the form, Park's job duties and wages remained the same. Park was more skilled in pipe repair and electrical work than Choi, but Choi was a better painter. Park's pay was $17.60 per hour whereas Choi's was about $12.55. Park stated that he did not assign work to Choi since Choi knew what work he had to do. Occasionally, Park received an order and told Choi that they could work together on the project. Manager Kim stated that he believed that Park assigned work to Choi. Kim also stated that he and Park supervised the work of outside contractors who renovated the hotel's rooms.

Park and Choi wore a uniform consisting of dark colored pants and shirts, and a tie. They wore nameplates which read "maintenance." However, after Kim became general manager, the nameplate was changed to "engineer." The managers, named below, wore formal business attire.

Park attended meetings with other department representatives on a weekly or monthly basis. The meetings were chaired by general manager Kim. Also in attendance were Sonya Song, front desk reception, Helen Kim, Helen Kang, accounting department, assistant general manager Nick Lee, Joseph Kim, personnel department, Amy Park, sales department, Gino Jang, bar, and Juana Rodriguez, housekeeping department. Occasionally, owner Kwon attended. The meetings consisted of a discussion of each department's problems and methods of resolving them. At one meeting, Park reported that water pipes were leaking, causing wet ceilings, and he asked what should be done. At the next meeting, he was asked if he could repair the pipes. There was no discussion at the meetings of the hotel's finances, marketing or renovations. At the meetings, Park was given instructions, including an order to repair wallpaper.

A letter dated November 4, 1999 from the general manager stated that henceforth, all department heads will be required to attend weekly meetings. The letter was addressed to "all department heads" and listed the front desk, housekeeping, "maintenance – Mr. Park," and the controller. Park denied seeing the letter.

Manager Kim testified that meetings of the supervisors of each department are held on a weekly, monthly, or as needed basis. The discussions include the problems experienced in each department, and their possible remedies. He stated that Park attended the meetings representing the maintenance department, and denied that Choi was in attendance at any meeting.

2. The collective-bargaining background

In September, 1999, an election was held in a unit which included all service and maintenance employees of the Respondent, including maintenance employees, but excluding all supervisors as defined in the Act. Park, and the other maintenance employee employed at the time, were included by the Respondent in the *Excelsior* list of eligible voters, and they voted in the election. In April, 2000, the Union was certified, and a collective-bargaining agreement was executed on October 28, 2003, to be effective on November 1, 2003.

3. The events of October 31

a. The morning meeting between Park and Kim

In the morning of October 31, general manager Kim called Park and asked to meet him at the bar in the hotel. That location was chosen so that their conversation would be private. Kim stated that the purpose of the meeting was to speak about Park's becoming a member of the Union, and he wanted to speak to Park as a friend to advise him not to become a Union member. At the time of the meeting, Kim knew that the Union contract would be effective the following day. He inconsistently testified that he did not know that he would meet with Union agent Leo Lanci on October 31, but then testified that he knew that he would be meeting with Lanci after work that day.

Prior to that day, Kim had spoken to Lanci about Park's job title and his supervisory status. Kim knew that he would be meeting with Lanci about that matter, but denied knowing that Park was to be included in the bargaining unit. This contrasts with Kim's testimony that he knew that the Union contract mentioned Park's job title.[5]

Kim told Park that his wage under the Union contract would be the same as his current wage rate. He admittedly asked Park why he wanted to be in the Union, adding that the union contract did not cover supervisors. Park answered that he voted for the Union and he would receive many benefits as a Union member. Kim testified that he told Park that he compared the Respondent's benefits to the Union's benefits. Kim told Park that there would be a meeting that day to determine whether he would be a Union member or not.

Kim testified that he did not care about Park's job title, or whether Park was a member of the Union or not, but urged him to tell the truth during their meeting with Lanci. The truth, according to Kim, was that Park was a supervisor and not eligible for Union membership. Park replied that he was not a supervisor.

Park testified that Kim told him that the Respondent had to pay an additional $100,000 because the housekeeping employees were included in the unit, and that owner Kwon did not like that.[6] Kim asked him to "reconsider" becoming a member of the Union. Kim told him that, as a Union member, his pay would be less than what he was currently earning since he had to pay union dues, adding that the Respondent's health plan was superior to the Union's. Park then told Kim that personnel manager Joseph Kim prevented him from meeting with Union agents when they visited the hotel previously. Kim then told Park that since he was a supervisor he could not become a member of the Union. Park replied that when he voted in the election he was not a supervisor. Kim then angrily directed him to tell the Union agent that he was a supervisor. Park refused, saying that his Union membership should be no concern of the hotel.

[5] The contract states that it covers the maintenance employees.

[6] There were 23 housekeeping employees, including the housekeeping supervisors.

b. The afternoon meeting Between Park, Kim and Laci

1. Park's version of the meeting

Later that day, Park met with Union agent Lanci in the basement lunchroom. The room, containing a television, tables and lockers, was used by employees to eat their lunch and for their breaks. It is used exclusively by employees of the hotel.

During Park's conversation with Lanci, Kim entered, and sat next to Lanci. Park closed the door when Kim entered. They discussed Park's supervisory status. Lanci asked Park if he was a supervisor. Park said, "no." Kim then asked Park in the Korean language, "you are a supervisor, aren't you." Park again denied being a supervisor. Kim, in Korean, said that he ordered merchandise, and Park again denied that status. Kim asked Park to retrieve the day's maintenance report which he did. Park showed Lanci the jobs that were listed on the form as proof that he was not a supervisor. Kim noted that Park signed the reports as chief of maintenance, and that he also participated in meetings, and also ordered merchandise for the maintenance department. Kim told Lanci that Park is a supervisor and could not become a Union member. He told Park in Korean that if he did not tell Lanci that he was a supervisor, he would be fired.

Park stated that during their conversation, Lanci spoke in English and Park answered him in English, but that Kim interrupted their conversation by speaking to Lanci in English and to Park in Korean. Park "begged" Kim not to interrupt his conversation with Lanci, and to leave.

Park testified that he told Kim, in Korean, that he was a liar. He quoted Kim as saying, as he was leaving, that he could fire Park at any time because he is a supervisor, and called Park a "mother fucker." Park denied cursing Kim during the meeting. After Kim left, Park told Lanci that he may be fired that day. Lanci did not reply.

That evening, Kim called Park on his cell phone and told him that he was fired effective immediately. He was sent the following letter, signed by Kim: "You are terminated as an employee of the Hotel Stanford as of October 31, 2003 for gross improprieties in your conduct with hotel management."

2. Kim's version of the meeting

Kim testified that an employee told him that Lanci was in the lunchroom and that he wanted to meet with Kim. At the meeting, he heard Park attempt to convince Lanci that he was not a supervisor and wanted to be included in the unit. Kim told Lanci that he did not care what Park's job title was, or whether he wanted to be a Union member or not. He told Lanci, however, that Park must tell the truth to Lanci.

Kim told Lanci that Park was a supervisor and gave the following examples: (a) he attended supervisory meetings (b) he had a higher salary than Choi (c) only he and Kim had cell phones (d) he submitted daily maintenance reports and (e) he signing the reports as the chief of maintenance.

Kim testified that Park angrily interrupted his presentation, and then, nearly standing, pointed at him with his finger about one foot from Kim's face, and said in Korean that Kim was a liar, a bitch, was now Park's enemy, and was worse than personnel director Joseph Kim.

Kim told Lanci that he (Kim) could no longer participate in the meeting because of Park's interruption, and was leaving the room when Park loudly called him a "fucking son of a bitch" in English. Kim noticed that housekeeper Rosa Leiva entered the room. He continued to speak for about one minute, and then left. Kim later told Lanci to report the incident to the Union president. Kim, testifying that he was shocked and embarrassed by Park's cursing at him, reported the incident to the owner of the hotel, telling him that Park must be discharged because he could not have in his employ a worker who does not respect him. That was the first time he had been cursed by an employee. The owner agreed, and Park was terminated. Kim and Park agreed that cursing is inappropriate in the hotel.

Kim denied saying that Park could be fired, and denied cursing Park. Kim said that the only time he spoke in Korean during the meeting was when he asked Park to get the daily maintenance report.

Housekeeper Leiva testified that she entered the lunchroom briefly on October 31 to obtain some water, and remained about 3 minutes. She saw Park sitting, and then observed him stand, banging the table with two hands and angrily, in a loud voice in English, call Kim a son of a bitch, and motherfucker. She saw Lanci tell Park to relax and take it easy. She did not hear Kim say anything.

Leiva stated that two other workers were outside the room and could hear Park's comments. She then left the room while the meeting was still in progress. Leiva also testified that, in the past, when Park was directed by housekeeping supervisor Juana Rodriguez to check a damaged item, he always used the word "fucking" in replying to Rodriguez.

Park denied that Leiva entered the room during this meeting. I cannot credit his denial. Leiva was a neutral witness who testified credibly about what she saw and heard.

Analysis and Discussion

I. THE SUPERVISORY STATUS OF PARK

The burden of proving supervisory status rests on the party, here the Respondent, asserting that such status exists. Supervisory status must be established by a preponderance of the evidence.

Section 2(11) of the Act provides:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The above statutory provision is to be read in the disjunctive. If the person possesses any of the authority set forth above, and uses independent judgment in its exercise, that individual is a statutory supervisor.

The only indicia of supervisory authority that it may arguably be claimed that Park possessed is the authority to assign and responsibly direct co-worker Choi, and his recommendation of the hire of Choi.

Park and Choi did similar maintenance work, each sometimes performing work in areas that they were more skilled in.

Park credibly denied assigning work to Choi. Manager Kim's vague statement that he believed that Park assigned work to Choi is unsupported by any credible evidence that he made any assignments. The only evidence of an assignment is Park's testimony that when he received a work order he told Choi that they could work together on the project. Park credibly testified that he did not assign work to Choi since Choi knew what work he had to do. The maintenance repair reports establish that they worked together on various jobs. At most, the evidence may suggest that Park, on that one occasion, made a routine assignment of a common painting job to himself and Choi. The making of routine assignments without the use of independent judgment in the assignment does not confer supervisory authority. *Volair Contractors,* 341 NLRB 678, 680 (2004).

Park did recommend Choi for hire, but owner Kwon apparently conducted his own search for employees by placing an advertisement in a newspaper and interviewing other applicants. The Board has held that interviewing applicants for hire, screening them and recommending them for hire was not evidence of effective recommendations of hire, since the department head chose the applicant who was ultimately hired. *Wake Electric Membership Corp.,* 338 NLRB 298 (2002).

I accordingly find that the evidence does not support a finding that Park assigned Choi to any work or that he effectively recommended the hire of Choi.

The fact that Park's salary was $5 per hour more than Choi's is not evidence, in itself of supervisory status. The difference in salary could be explained by Park's five-year seniority over Choi, and the fact that he had greater responsibilities, for example, he was required to respond to emergency calls after work hours. In the absence of primary indicia as enumerated in Section 2(11) of the Act, secondary indicia, such as higher pay than other employees, job titles, and attendance at management meetings, are insufficient to establish supervisory status. *Volair Contractors*, above, 341 NLRB 678, 679 fn. 8; *DMI Distribution of Delaware*, 334 NLRB 409, 418 (2001); *Aardvark Post,* 331 NLRB 320, 321 (2000); *Carlisle Engineered Products*, 330 NLRB 1359, 1361 (2000). Here, as set forth above, there is absolutely no evidence that Park possessed any of the enumerated statutory authority.

The Respondent alleges that Park possessed certain managerial responsibilities which establish his supervisory status. Thus, it asserts that only he and manager Kim carried a cell phone. However, Park was called on his phone only to answer emergency calls after work hours. Rather than establish supervisory status, this demonstrates that he simply continued to perform maintenance work on an as-needed basis. Park could not order supplies on his own, but he had to obtain the authorization of manager Kim to do so.

The fact that Park was referred to as the "engineer" and signed repair reports indicating that he approved the repairs as "chief maintenance," does not support a finding that Park was a statutory supervisor. The reports were simply a listing of jobs done and who did them. In fact, Choi completed the forms also. In addition, the form originally said "maintenance," later it was changed to "approved by maintenance," and then "approved by chief of maintenance." These later changes by the Respondent's owner did not confer any more supervisory authority than Park possessed before the changes. His duties remained the same before and after the changes. "It is well established that rank-and-file employees cannot be transformed into supervisors merely by being invested with that title; rather, an individual's actual powers, duties and responsibilities control." *Carlisle Engineered Products*, above, at 1360.

Similarly, Park's attendance at manager's meetings proves nothing more than he attended such meetings. In attendance were other department representatives. It is apparent that since he was the senior member of the maintenance department, he would attend such meetings. According to Park's credited testimony, there was a discussion of problems in each department. Park's report of a water leak was presented and he was asked if he could fix it. The mere fact that Park attended the meetings with other department representatives does not establish supervisory status. *Aardvark Post*, above.

The evidence establishes that Park was a maintenance employee performing routine maintenance work in the hotel. The numerous jobs he completed, set forth above, consisted of repair and replacement of broken items. That the Respondent believed that Park was not a statutory supervisor is clear in its inclusion of Park in the *Excelsior* list. Park's duties remained the same before and after the election.

I accordingly find and conclude that the Respondent has not met its burden of proving that Park is a statutory supervisor.

II. THE THREAT TO DISCHARGE AND THE DISCHARGE

Park engaged in protected, concerted activity at the meetings on October 31 by seeking union representation and arguing that he should be included in the collective-bargaining unit. Section 7 of the Act states that employees have the right to join unions, and even by acting alone in this regard, Park engaged in activities protected by the Act. *NLRB v. City Disposal Systems, Inc.,* 465 U.S. 822, 831 (1984). Even if it is found that Park was not properly included in the unit because he was a statutory supervisor, his efforts to join the Union were protected, against which the Respondent could not lawfully retaliate. *Sealy Mattress Co*., 262 NLRB 99, 100 (1982).

I find, as testified by Park, that, as alleged in the complaint, Kim threatened to discharge him if he did not agree to be excluded from the collective-bargaining unit. As set forth above, Kim told Park at the afternoon meeting, that if he did not tell Lanci that he was a supervisor, he would be fired. Kim further threatened Park that he could fire him at any time because he is a supervisor. Those two comments had as their purpose an effort to coerce Park into ceasing his interest in becoming a Union member. Thus Kim escalated the pressure on Park, begun in the morning meeting, to require Park to agree to be excluded from the unit.

I cannot credit Kim's testimony. He gave contradictory testimony about a matter that was obvious—Park's union status. Kim stated that he knew that the Union contract mentioned Park's job title, yet incredibly denied knowing that Park was to be included in the bargaining unit. The admitted purpose of Kim's conversation with Park was to find out why he wanted to become a member of the Union, and to dissuade him from doing so. Clearly, if Kim sought to discourage Park from becom-

ing a Union member, he must have known that he would be included in the unit.

Further, Kim's testimony that he did not care whether Park was a union member or not does not ring true. He cared enough that he attempted to convince him that he was a supervisor and ineligible for union membership. In addition, Kim variously testified that he did not know that he would meet with Lanci on October 31, but then testified that he knew that he would be meeting with Lanci after work that day.

I credit Park's version of the morning meeting. It is undenied that Kim was concerned about Park's becoming a member of the Union. The admitted purpose of the meeting was to advise him against joining the Union. I cannot believe that Kim simply wanted to tell Park, as a friend, to reject the Union because he would receive no benefits from membership therein. The real reason, as testified by Park, was that Kim was anxious to hold down the costs of the contract because the Respondent's owner was not happy about the increased cost to the hotel of the new union contract.

Time was of the essence since Kim was scheduled to meet Union agent Lanci later that day at which the topic of the discussion would be Park's job title and supervisory status. Inasmuch as the contract, which included maintenance employees, was to be effective the day after the meeting, it is obvious that Kim believed that he had to find some way that day to exclude Park from membership. Kim chose two courses of action. According to Park's credited testimony, he first sought to convince Park that he was not eligible for union membership because he was a supervisor, and that he would not benefit from union membership. Later, when Park pressed the matter at the meeting with Lanci, insisting that he was not a supervisor, Kim threatened Park that if he did not tell Lanci that he was a supervisor, he would be fired. When that tactic proved unsuccessful, Kim told Park that he could discharge him at any time because he is a supervisor.

The threat to discharge Park interfered with his right to seek Union membership and violated Section 8(a)(1) of the Act.

Where, as here, it is claimed that the Respondent discharged Park because of his comments to Kim in the course of his protected activity at the afternoon meeting on October 31, the question is whether Park lost the protection of the Act by his remarks. *Felix Industries*, 331 NLRB 144, 146 (2000). Accordingly, the factors set forth in *Atlantic Steel Co.,* 245 NLRB 814, 816–817 (1970), are applicable to that determination.

Under *Atlantic Steel*, the Board examines the following factors in determining whether an employee engaged in protected activity loses the protection of the Act by opprobrious conduct: (1) the place of the discussion (2) the subject matter of the discussion (3) the nature of the employee's outburst and (4) whether the outburst was, in any way, provoked by the employer's unfair labor practice. I will consider those factors in relation to Park's conduct at the meeting with Kim and Lanci.

The discussion took place in the employee lunchroom. At the start of the discussion, no other employees were present, and when Kim entered the room, Park closed the door in an effort to maintain some privacy in their discussion. Although it was not a work area, it was a place where employees entered, as Leiva did that day, and as testified by her, Park's comments could be heard by other employees outside the room. Accordingly, this factor weighs against the protection of Park's comments since they were overheard by other employees and could reasonably tend to affect workplace discipline by undermining Kim's authority. *Aluminum Co. of America,* 338 NLRB 20, 22 (2002).

The second factor, the subject matter of the discussion, clearly related to Park's effort to become a member of the Union and be included in the bargaining unit. The meeting involved an employee's most fundamental right under the Act to join a union. Park had a legitimate belief that he had a right to union representation. He justifiably believed that he was not a supervisor, which belief was supported by his inclusion, by the Respondent, in the *Excelsior* list. This factor weighs heavily in favor of protected conduct.

With regard to the third factor, I credit Kim's version of Park's remarks, essentially since they were, in part, corroborated by neutral witness Leiva. I accordingly find that Park cursed at Kim and angrily pointed his finger at him. However, I do not believe that Park's conduct was so inflammatory as to lose the protection of the Act. "The Act allows a certain degree of latitude to employees when engaged in otherwise protected conduct, even when employees express themselves intemperately." *Winston-Salem Journal*, 341 NLRB 124, 126 (2004). The Board, acknowledging that "tempers may run high in this emotional field, that the language of the shop is not the language of 'polite society,' and that tolerance of some deviation from that which might be the most desirable behavior is required, has held that offensive, vulgar, defamatory or opprobrious remarks uttered during the course of protected activities will not remove activities from the Act's protection unless they are so flagrant, violent, or extreme as to render the individual unfit for further service." *Dreis & Krump Mfg., Inc*., 221 NLRB 309, 315 (1975). Similar curse words were used by an employee in *Burle Industries*, 300 NLRB 498, 504 (1990), where the Board found that such language did not cause the employee to lose the protection of the Act. The Board noted that his conduct was not violent or so extreme as to render him unfit for further service. Here, Park did not threaten Kim, and his language, although intemperate, was not so extreme as to cause him to lose the protection of the Act.

Regarding the fourth factor, it is clear that, in the course of asserting his belief that he was entitled to union representation, Park was provoked by Kim's response to his protected remarks, including the unlawful threat that he would be fired if he did not tell Lanci that he was a supervisor. *Felix Industries*, 331 NLRB at 145. Accordingly, Park's remarks were provoked by the Respondent's unfair labor practice.

I accordingly find that this one, spontaneous, isolated, brief outburst made in the heat of the moment by Park who was understandably frustrated by Kim's attempt to deny him union representation, did not cause him to lose the protection of the Act. *Winston-Salem*, above. Park's discharge, therefore, violated Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. By threatening to discharge Joong Hyun Park if he did not agree to be excluded from the collective-bargaining unit, the Respondent 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.

2. By discharging Joong Hyun Park, the Respondent violated Section 8(a)(1) and (3) of the Act.

REMEDY

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

The Respondent having discriminatorily discharged an employee, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge 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).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The Respondent, Stanford New York, LLC d/b/a Stanford Hotel, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening to discharge employees if they do not agree to be excluded from the collective-bargaining unit.

(b) Discharging or otherwise discriminating against any employee for engaging in protected, concerted activities, or supporting Local 758, Hotel & Allied Services Union, SEIU, AFL–CIO, or any other union.

(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) Within 14 days from the date of the Board's Order, offer Joong Hyun Park full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Joong Hyun Park whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

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

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

(e) Within 14 days after service by the Region, post at its facility in New York, New York, copies of the attached Notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 2, 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 October 31, 2003.

(f) 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.

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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

WE WILL NOT threaten to discharge any of you if you do not agree to be excluded from the collective-bargaining unit.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in protected, concerted activities, or supporting Local 758, Hotel & Allied Services Union, SEIU, AFL–CIO, or any other union.

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

WE WILL, within 14 days from the date of this Order, offer Joong Hyun Park full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Joong Hyun Park whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

[7] 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.

[8] 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 within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Joong Hyun Park, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

STANFORD NEW YORK, LLC D/B/A STANFORD HOTEL