

**Wyndham Resort Development Corp. d/b/a
Worldmark By Wyndham and Gerald Foley.**
Case 28–CA–22680

March 2, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER
AND HAYES

On August 18, 2010, Administrative Law Judge Burton Litvack issued the attached decision. The Acting General Counsel filed exceptions and a supporting brief, and the Respondent (Wyndham) filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings, and conclusions,¹ and to adopt the recommended Order as modified and set forth in full below.²

Introduction

The lone remaining issue in this case is whether employee Gerald Foley was engaged in protected concerted activity when he questioned his supervisor, in front of his coworkers, about a new dress code. The resolution of that issue, in turn, controls whether Wyndham’s written warning to Foley in response violated Section 8(a)(1) of the Act. The judge found that Foley’s conduct was for mutual aid and protection but not concerted, and thus dismissed this complaint allegation. Contrary to the judge, we find that Foley’s activity was both protected and concerted, and we consequently find that the Respondent’s warning to Foley was unlawful.³

¹ There are no exceptions to the judge’s findings that Wyndham violated Sec. 8(a)(1) by inviting its employees to quit because they engaged in protected, concerted activities, by orally promulgating an overly broad work rule prohibiting protected concerted activities, by issuing a disciplinary notice to employee Gerald Foley based on his protected concerted complaints in a sales meeting, and by suspending and discharging Foley because of his protected concerted activities.

² In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB 6 (2010), we shall modify the judge’s recommended Order to require that backpay shall be paid with interest compounded on a daily basis.

We shall also modify the judge’s recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

³ There is no dispute that Foley’s protest was protected under the Act, and Wyndham does not contend that Foley lost that protection at any point. We therefore discuss only the concerted nature of his protest.

Facts

As more fully set forth in the judge’s decision, Wyndham sells time shares and time share credits out of a facility in Las Vegas, Nevada. From June 2007 until his discharge on September 11, 2009,⁴ Foley was employed by Wyndham as an in-house sales representative. Rodney Hill is Wyndham’s vice president of in-house sales.

Prior to September 2, Wyndham maintained a “resort casual” dress code for its employees. Pursuant to that code, many of the male sales representatives wore “Tommy Bahama” style shirts, with a flat hem at the bottom that is split on the sides. Wyndham did not require the sales representatives to tuck those shirts into their pants. Several days before September 2, a rumor began circulating that Wyndham would soon be requiring the male sales representatives to tuck in their shirts and some, if not all, of the male sales representatives were upset by the rule change.

On September 2, Foley was returning to work from a vacation and heard about the rumored rule change. At approximately 7:45 a.m., Vice President Hill approached Foley on the sales floor, in the presence of two of Foley’s coworkers, Charles Feathers and James Robertson, as the sales representatives waited for a daily morning sales meeting to begin at 8 a.m. There is no evidence concerning what type of shirt Foley was wearing at the time, but Robertson testified that Feathers—whom he described as the “Tommy Bahama shirt king” for the frequency with which Feathers wore the shirts—was wearing a Tommy Bahama shirt that day.

Hill mentioned two new company policies to Foley, including that sales representatives had to tuck in their shirts. Foley responded that he had heard a rumor about this change and wanted to know whether it was true. When Hill confirmed the rule change, Foley asked whether it was a company wide policy or “is it just us?” Foley went on to inquire why the new rule was not the subject of a posted memo. Hill replied by asking why Foley wanted everything in writing, and Foley explained that in companies such as Wyndham, “any time they have changes, we always see a memo.” At that point, Feathers interjected a series of assertions, including: “It is pretty restrictive. You know, I might not want to tuck in my shirt”; “I didn’t sign up for this crap”; and “I don’t need the money.” By the end of this exchange seven or eight sales representatives had gathered to watch.

Hill stopped the conversation by telling both Foley and Feathers to go home for the day. He reconsidered moments later and, after instructing a sales manager to conduct the morning sales meeting without him, Hill asked

⁴ All dates hereafter are in 2009.

Foley and Feathers to accompany him to his office. Inside his office, Hill told Foley and Feathers a story about his teenage daughter's refusal to follow the family rules. Afterwards, Foley and Feathers apologized for their behavior and Hill instructed them to return to work.

When they returned to the sales floor, Foley thanked Feathers, saying, "[W]ay to man up in there and stick up for me." Feathers responded that it had been a stupid thing to do.

A few days later, Wyndham issued Foley a written warning, stating:

Gerald [Foley] was visibly and vocally upset over a new policy in which Sales Reps were required to have their shirts tucked in. He continued to argue with me on the sales floor in front of the team. I asked him several times to discuss it later. He continued to press me getting more and more aggravated as he went on. He incited another Rep to join in at which point I asked them both to take the day off because I would not start our day with negativity. At that point, I brought both reps into my office for a little chat.

The warning further noted that it was the second warning issued "for this type of behavior"—a reference to a warning that Foley had received 4 months earlier for raising questions concerning changes to Wyndham's commission payments at a sales meeting.⁵ Feathers, who had spoken up in agreement with Foley, received no discipline.

Discussion

The judge found that, although Wyndham's dress code was a term and condition of employment, Foley's protest of the code's change was not concerted because he acted independently of Feathers, in his own self-interest, without a common goal. In particular, the judge noted the absence of evidence that Foley and Feathers had previously discussed or agreed to raise the dress code issue with Wyndham. Having found Foley's complaint not concerted, the judge dismissed the allegation that his written warning was unlawful. As stated, we disagree with the judge.

In the Board's initial decision in its lead case on concerted activity, *Meyers Industries*, the Board explained that "to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of

⁵ As noted, the judge found the earlier warning unlawful because it was based on Foley's protected concerted activity, and Wyndham does not except to that finding.

the employee himself."⁶ Following a remand from the United States Court of Appeals for the District of Columbia Circuit, the Board reiterated that standard but clarified that it "encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management."⁷

Applying those principles, the Board has consistently found activity concerted when, in front of their coworkers, single employees protest changes to employment terms common to all employees.⁸ The Board reasons that an employee who protests publicly in a group meeting is engaged in initiating group action.⁹ The concerted nature of an employee's protest may (but need not) be revealed by evidence that the employee used terms like "us" or "we" when voicing complaints, even when the employee had not solicited coworkers' views beforehand.¹⁰

We find that Foley's statement was similarly concerted. Foley took the first opportunity to question a newly announced rule affecting all of his male colleagues. He did so in the presence of several of those colleagues. We accordingly find that Foley intended to induce group action. This inference is supported by Foley's own words, which cast his complaint in group terms. As described, he asked if the new policy affects "just us" and explained that when new policies are promulgated "we always see a memo." In addition, Foley knew his fellow sales representatives' penchant for wearing Tommy Bahama shirts untucked, and thus he would reasonably suspect that his coworkers would disagree with the rule change even if, as the judge found, he was unaware of their actual discontent.

Further, any doubt about the concerted nature of Foley's action is removed by Feathers' joining that action. At that point, their actions were incontrovertibly concerted under *Meyers*, as they were undertaken "with . . . other employees."¹¹ In *Colders Furniture*, for ex-

⁶ 268 NLRB 493, 497 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985).

⁷ *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*), enfd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

⁸ See, e.g., *Chromalloy Gas Turbine Co.*, 331 NLRB 858, 863 (2000), enfd. 262 F.3d 184, 190 (2d Cir. 2001); *Whittaker Corp.*, 289 NLRB 933, 934 (1988).

⁹ See *Cibao Meat Products*, 338 NLRB 934, 934 (2003), enfd. 84 Fed.Appx. 155 (2d Cir. 2004).

¹⁰ See *Colders Furniture*, 292 NLRB 941, 942-943 (1989), enfd. 907 F.2d 765 (7th Cir. 1990); *Whittaker Corp.*, supra, 289 NLRB at 934.

¹¹ 268 NLRB at 497.

ample, the Board found that several sales representatives acted concertedly by raising impromptu complaints “with . . . other employees” when their manager announced a new starting time.¹² Likewise, Foley and Feathers raised virtually simultaneous complaints to their supervisor about a change to their dress code—a shared term and condition of employment. Their actions thus fall into the category of concerted activity as defined in *Meyers* and subsequent cases.

Contrary to the judge’s reasoning, it is irrelevant that Foley and Feathers did not agree in advance to protest together. The Board has found concerted activity when a second employee joins an individual employee’s protest without requiring evidence of a previous plan to act in concert.¹³ Thus, Foley’s and Feathers’ failure to consult with each other before questioning the new dress code does not undermine the concerted nature of their activity.¹⁴

Neither do we agree with the judge’s implicit suggestion that Foley’s and Feathers’ motivations were too dissimilar for their activity to be concerted. The record establishes that both were motivated by opposition to Wyndham’s implementation of a rule requiring employees to tuck in their shirts. As described, the record indicates that each took a different tack in protesting the rule. Foley questioned primarily Wyndham’s process of implementing the rule, whereas Feathers objected primarily to the substance of the rule. That difference, however, does not negate the overriding commonality of their action: opposition to implementation of the rule.¹⁵

Finally, it is significant that Wyndham clearly viewed Foley’s action as being concerted. Wyndham’s written

warning to Foley explains that Vice President Hill asked Foley to discuss his concerns later, but Foley persisted in voicing his complaints publicly, “on the sales floor in front of the team.” The warning then documents that Foley “incited another Rep to join in.” Accordingly, it appears that Foley was disciplined precisely because he chose a forum that was likely to induce group action, and for his success in moving Feathers to add his voice to the discussion.¹⁶ The Board has found such discipline—motivated by perceived concerted activity—to be unlawful, whether or not the disciplined employee was in fact engaged in concerted activities.¹⁷ Thus, even if we were to find that Foley’s protest was not concerted, we would still find the warning unlawful because it was based on Wyndham’s perception that Foley was engaged in concerted activity by inciting coworkers to join his protest.

In sum, we reverse the judge’s dismissal of the complaint allegation concerning Foley’s September 2 warning. We find that when Foley questioned the new dress code in front of his coworkers he was engaged in protected concerted activity, and the concertedness of his action was reinforced when Feathers joined him. We consequently find that the warning issued to Foley for questioning Hill on September 2 was unlawful.

ORDER

The Respondent, Wyndham Resort Development Corp. d/b/a Worldmark By Wyndham, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Inviting its employees to quit because they engaged in protected concerted activities.

(b) Orally promulgating an overly broad work rule, prohibiting its employees from engaging in protected concerted activities.

(c) Giving its employees disciplinary notices because they engaged in protected concerted activities.

(d) Suspending and/or discharging its employees because they engaged in protected concerted activities.

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

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

(a) Within 14 days from the date of this Order, offer Gerald Foley full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent

¹² 292 NLRB at 942.

¹³ See, e.g., *Morton International*, 315 NLRB 564, 566 (1994). Accord *Rockwell International Corp. v. NLRB*, 814 F.2d 1530, 1534–1535 (11th Cir. 1987) (employee’s objection in group meeting to employer’s assertion that employees played radios too loudly was concerted, despite absence of prior discussion). The Ninth Circuit, where this case arose, has signaled its agreement with the Board that discussion of a group protest is unnecessary to find activity concerted. See *NLRB v. Mike Yurosek & Son, Inc.*, 53 F.3d 261, 265 (9th Cir. 1995) (affirming—as a primary rationale—the Board’s finding that a refusal to work by four employees was concerted despite no express discussion of group protest; the Board’s finding that the employees’ refusal was a “logical outgrowth” of earlier concerted activity was endorsed only secondarily).

¹⁴ To the extent that *Traylor-Pamco*, 154 NLRB 380, 387–388 (1965), cited by the judge, can be read to require that conduct be preceded by consultation between employees in order to be found concerted, it is clearly contrary to more recent Board authority and, thus, we find that it has been effectively overruled in that respect.

¹⁵ In any event, as the Board has explained in an analogous context, it is “immaterial . . . that each may have been motivated by different reasons.” *El Gran Combo*, 284 NLRB 1115, 1117 (1987), enf.d. 853 F.2d 996 (1st Cir. 1988). Accord *Hahner, Foreman & Harness, Inc.*, 343 NLRB 1423, 1424 (2004).

¹⁶ See also *Avery Leasing*, 315 NLRB 576, 580 and fn. 5 (1994) (observing that an employer’s description of an employee as an “instigator” revealed its belief that the employee was inciting others to engage in protected activity).

¹⁷ See *Liberty Ashes & Rubbish Co.*, 323 NLRB 9, 11–12 (1997); *Morton International*, 315 NLRB at 566.

position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Foley 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 judge's decision, except that interest shall be compounded on a daily basis as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

(c) Within 14 days from the date of this Order, remove from its files any reference to Foley's unlawful disciplinary notices, suspension, and discharge, and, within 3 days thereafter, notify Foley, in writing, that this has been done and that the disciplinary notices, suspension, and 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 backpay due under the terms of this Order;

(e) Within 14 days after service by the Region, post at its facility in Las Vegas, Nevada, copies of the attached notice marked "Appendix."¹⁸ Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other 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 2, 2009.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a re-

sponsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER HAYES, dissenting.

My colleagues reverse the judge to find that the Respondent violated Section 8(a)(1) of the Act when it issued him a written warning for questioning a new rule requiring male sales representatives to keep their shirts tucked in their pants. I disagree. The judge correctly found that Gerald Foley was not engaged in concerted activity, and was therefore not statutorily protected. Although Foley acted in a group setting, there is no basis for finding that he did so on behalf of coworkers,¹ or to induce group action. He acted without any knowledge of coworkers' dissatisfaction with the new dress code. His questions focused on whether the new dress code was companywide and whether a memo announcing it had been posted. There is no indication that he even expressed disagreement with the shirttails-in requirement itself, unlike coworker Charles Feathers, whose brief, spontaneous expression of his personal frustrations about the dress code and his job did not transform Foley's unrelated personal complaint into group action.

The Act protects employees from being disciplined for engaging in concerted activity. The majority correctly states that the Board's longstanding definition of concerted activity is set forth in *Meyers I* and *II*.² As in the recent *Parexel* decision,³ however, it then reduces to meaninglessness the *Meyers* distinction between unprotected individual activity and protected concerted activity. In *Parexel*, the majority held that even when an employee has not engaged in concerted activity, an employer violates the Act by discharging that employee to prevent the possibility that he or she might engage in such activity in the future. In the present case, the majority essentially holds that any employee who voices a complaint in a group setting about working conditions is engaged in concerted activity, thus impermissibly conflating the concepts of group setting and group complaints. In my view, the majority's approach in both cases flies in the face of the requirement that in order to find an employee's individual activity to be concerted, and thus protected, it must "be engaged in with or on the authority

¹⁸ 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."

¹ Unlike my colleagues, I would not permit an individual to bootstrap personal complaints into group action by variant uses of the editorial "we."

² 268 NLRB 493, 497 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert denied 474 U.S. 948 (1985), 281 NLRB 882, 887 (1986) (*Meyers II*), enf. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert denied 487 U.S. 1205 (1988).

³ *Parexel International, LLC*, 356 NLRB 516 (2011).

of other employees, and not solely by and on behalf of the employee himself.”⁴

In sum, I would find that simply voicing an individual complaint about an employment matter within earshot of fellow employees is not an inducement for action, nor a protest for mutual aid and protection, and does not rise to the level of concerted activity. I would affirm the judge’s dismissal of the allegation that Foley’s written warning was unlawful.⁵

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT invite you to quit because you engaged in protected concerted activities.

WE WILL NOT announce an overly broad rule, prohibiting you from engaging in protected concerted activities.

WE WILL NOT give you a disciplinary notice because you engaged in protected concerted activities.

WE WILL NOT suspend and/or discharge you because you engaged in protected concerted activities.

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

WE WILL, within 14 days from the date of the Board’s Order, offer Gerald Foley full reinstatement to his former job or, if that job no longer exists, to substantially equiv-

⁴ *Meyers I*, supra at 497.

⁵ The majority alternatively contends that, even if Foley was not engaged in concerted activity, the Respondent unlawfully warned him based on its perception that he was engaged in such activity. In support, they cite to passages in the written warning stating that Foley voiced his complaints “on the sales floor in front of the team” and “incited another Rep [Feathers] to join in.” Of course, the warning is just as susceptible to the lawful interpretation that the Respondent did not want Foley and others expressing individual complaints on the sales floor. I would give it that meaning.

alent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Foley whole for any loss of earnings and other benefits resulting from his unlawful suspension and discharge, 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 Foley’s unlawful disciplinary notices, suspension, and discharge, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the disciplinary notices, suspension, and discharge will not be used against him in any way.

WYNDHAM RESORT DEVELOPMENT CORP.
D/B/A WORLDMARK BY WYNDHAM

Joel C. Schochet, Esq., for the General Counsel.
David Keene, Esq. (Littler Mendelson, LLP), of Las Vegas, Nevada, for the Respondent.

DECISION

STATEMENT OF THE CASE

Burton Litvack, Administrative law Judge. Gerald Foley, an individual (Foley), filed the original and first amended unfair labor practice charges in the above-captioned matter on September 11 and October 30, 2009,¹ respectively. After an investigation, on October 30, the Regional Director for Region 28 of the National Labor Relations Board, (the Board) issued a complaint in the above-captioned matter, alleging that Wyndham Resort Development Corporation d/b/a Worldmark By Wyndham (the Respondent) engaged in acts and conduct violative of Section 8(a)(1) of the National Labor Relations Act (the Act). Respondent timely filed an answer, essentially denying the commission of any of the alleged unfair labor practices. Subsequently, a trial on the merits of the allegations of the complaint was conducted before me, on January 12, 2010 in Las Vegas, Nevada. During the trial, the General Counsel and Respondent were each afforded the opportunity to call witnesses, to cross-examine witnesses called by the other party, to offer into the record all relevant documentary evidence, to argue their legal positions orally, and to file posthearing briefs. The documents were filed by counsel for the General Counsel and by counsel for Respondent and each has been carefully considered. Accordingly, based upon the entire record, including the posthearing briefs and my observation of the demeanor, while testifying, of each witness, I make the following

FINDINGS OF FACT

JURISDICTION

At all times material, Respondent, a State of Oregon corporation, with an office and place of business located in Las Vegas, Nevada, has been engaged in the business of selling time shares

¹ Unless otherwise stated, all events herein occurred during 2009.

and time share credits. During the 12-month period ending September 11, 2009, which period is representative, in conducting its business operations, Respondent derived gross revenues in excess of \$500,000 and sold time shares valued in excess of \$50,000 at locations outside the State of Nevada. At all times material, Respondent has been an employer within the meaning of Section 2(2), (6), and (7) of the Act.

ISSUES

The complaint alleges and the General Counsel contends that Respondent violated Section 8(a)(1) of the Act by issuing unwarranted and undeserved written warnings to Foley on May 14 and September 4, by suspending Foley on September 2, and by discharging him on September 11. The complaint further alleges and the General Counsel further contends that, on May 2, Respondent violated Section 8(a)(1) of the Act by threatening its employees by inviting them to quit because they engaged in concerted activities, by orally promulgating an overly broad and discriminatory rule prohibiting its employees from engaging in concerted activities at its facility, by threatening its employees with unspecified reprisals because they engaged in concerted activities, and by threatening its employees with discharge because they engaged in concerted activities. Respondent admits giving Foley the above-described warning notices, suspending Foley, and discharging him but denies that the acts were motivated by any concerted activities in which Foley may have engaged.

THE ALLEGED UNFAIR LABOR PRACTICES

The Facts

The record establishes that Worldmark is a time share corporation comprised of the independent owners of a separate corporate entity known as Worldmark, the Club, which operates approximately 70 resorts worldwide; that Respondent is the marketer of time-share credits and the developer for Worldmark, the Club; that, in the Las Vegas area, Respondent maintains four “selling sites,” including two operated by a sister corporation, Fairfield; and that at its facility, located at 8601 South Las Vegas Boulevard, Respondent engages in, what it terms, in-house sales—sales of time share credits to existing owners. The record further establishes that, rather than operating as a traditional time share company, in which individuals purchase and own the rights to a specified week or weeks at a particular resort location (week 26 in Hawaii), the so-called “independent owners” of Worldmark, the Club, purchase and own a specified number of time share “credits,” which they may spend when, where, and how they may desire at the Club’s resort locations. For example, an owner may stay 1, 3, 10, or any number of days at a particular resort location depending upon the size of the unit with the required number of credits solely dependent upon the size, not the location, of the unit. Rodney C. Hill is employed by Respondent as its site vice president of in-house sales and works at the 8601 South Las Vegas Boulevard facility. Hill, who is responsible for recruiting, hiring, training, educating, and directing the work of Respondent’s in-house sales representatives, reports to Derek Milholland, Respondent’s regional vice president of sales, who maintains an office at the same location. Reporting to Hill are two sales

managers, who, nominally, are responsible for supervising the in-house sales representatives,² whose job is to sell Respondent’s time share products to existing owners.³ Regarding the supervision of the sales representatives, according to Hill, “. . . because it is important to me, I have more communication with [the sales representatives] and more responsibility indirectly reporting with sales people than I do with my sales managers.” In this regard, “I set the direction, I set the tempo, I set what is and isn’t allowed on the floor. [The sales managers’] job is to help and assist the sales people with the owners if they have questions . . . while selling.”⁴

Respondent’s marketing department is responsible for promoting its products to existing owners and for booking sales appointments for them, and, when existing owners arrive for their appointments, in-house sales representatives are assigned to work with them during what are referred to as “tours.”⁵ The sales representatives sell two different time share products to existing owners—new time share credits at the current market price or existing time share credits through, what is termed, the owner transfer project (OTP). Pursuant to the latter program, which Respondent implemented in February, an existing owner, who paid for his or her time share credits by securing a bank loan and is facing foreclosure on the loan, may sell the credits to another existing owner, and the latter is permitted to purchase the credits at their original price rather than at the current market rate and without paying any processing fees. The record reveals that, as compensation for selling Respondent’s products, the in-house sales representatives are paid on a commission basis and receive bonuses dependent upon the amount of sales. For sales of new time share credits during the first 9 months of 2009, Respondent paid \$100 to the above employees for every thousand credits sold, with the amount of the down payment also being a determinant.⁶ During the first 9 months of 2009, the commission rate was never changed by Respondent, and the payment of commissions on the sale of new credits was never a problem or issue. However, for sales of credits under the OTP program, Respondent changed the commission

² During the time period February through September 2009, Respondent employed between 12 and 14 sales representatives.

³ The in-house sales representatives work on the second floor of the 8601 South Las Vegas Blvd. facility on which the sales floor is located. This is a “big open area” with round tables, at which the sales representatives meet with current owners, located along the sides.

⁴ Hill testified that “most of the time,” the sales people come to him with day-to-day problems.

Hill abhorred what he perceived as expressions of “negativity” by Respondent’s in-house sales representatives at sales meetings or on the sales floor, which included their complaints about corporate decisions or angry or annoyed comments regarding problems with their commission or bonus payments or similar work-related issues. Specifically, according to Hill, negativity “. . . really defeats what I am trying to do,” which is to have Respondent’s sales representatives work with and convey a “positive upbeat attitude.”

⁵ Foley testified that a “tour” was “. . . the customer. We would go down and pick them up in the lobby . . . and we would take them upstairs and get them coffee and doughnuts and we would sit there and start talking.”

⁶ At one point, Respondent had an incentive program, paying higher commissions for larger credit packages.

paid to its sales representatives twice during the above time period, and the payment of the commissions became a consistent source of irritation and concern for the sales representatives. The Charging Party, Gerald Foley, an in-house sales representative for Respondent for 27 months until his discharge on September 11,⁷ testified that the sales representatives were never certain as to how they were being paid for these sales (“That is what caused all of the questions about OTP commissions”) and that the administrative procedure, implemented by Respondent for processing such sales, resulted in constant delays in the payment of their commissions. In this regard, all legal work, including the contract signing, for ordinary credits sales is performed on site, and commission payments are quickly made to the sales representatives. In contrast, for OTP sales, the customer merely signs a document, stating that the purchaser agrees to relieve the existing owner of his existing loan commitment; thereafter, all paperwork is handled by Respondent’s corporate legal department in Orlando, Florida. According to Foley, Respondent delayed commission payments to the sales representatives until the completion of the signing process and, during this time, purchasers often changed their minds and withdrew from their commitments, resulting in a loss of the sale and the consequent commission payment.

The record reveals that the payment of commissions and bonus payments due to them on OTP sales was a matter of salient and urgent concern amongst Respondent’s in-house sales representatives. Foley testified that he and his fellow sales representatives discussed their concerns “religiously” on a daily basis in the break area and at their desks in the sales room when no clients were present. James Robertson, a former in-house sales representative, agreed, stating that “everyone discussed commissions” and related payment problems on the sales floor during “dead time” on an “almost daily basis.” Likewise, Philip Bridges, who worked as an in-house sales representative for Respondent for a year until July, testified that, when the OTP program was unveiled, Hill informed the sales representatives that they would be compensated as if they had sold regular credits. However, as payment problems developed and persisted, Bridges believed “. . . we were not being compensated as [the OTP] was initially disclosed . . .” and, therefore, began “. . . discuss[ing] the structure and the timeliness of how and when we were being paid” with other sales representatives on the sales floor “in between four times.” He added that “I can’t

think of a day where I didn’t have that discussion.” The record further reveals that Rodney Hill was well aware of these discussions and consistently attempted to discourage them. Thus, according to Foley, overhearing such conversations, Hill would approach, “routinely” tap the shoulder of a sales representative, ask “. . . ‘what is your question’ . . .,” and say, “. . . ‘this isn’t the time or place to be talking about this, guys. You know, we have to keep our heads . . . let’s face it, we can’t do anything about this here. . . it is a new day. Let’s just go out there and get it.’” According to Robertson, Hill overheard such conversations and “frowned upon” them. “I was censured on two occasions about bringing negativity into the office, and he was quite clear that I should be spending more time and effort on learning how to sell rather than discussing stuff he felt was unnecessary.” Hill added that Robertson should do “something productive” rather than “. . . ‘dwelling on something you have no control over.’” Hill conceded that there was much “confusion” over the OTP program as “it was a brand new program . . . so the things that they sent down, I didn’t fully understand . . .” He added that the sales representatives did raise issues with regard to the paying of bonuses and commissions “. . . because it was different, nobody really understood it. . . .” Specifically, as to Foley, Hill conceded that the former would speak to “anyone who would listen Just different folks . . .” and that he was “outspoken . . . where everyone could hear.” Hill added that the subjects of Foley’s conversations “. . . could be anything. It could be policies; it could be the rotation of the wheel”—“who goes out first in priority of the sales.”

Rodney Hill conducts a 30-minute sales meeting, starting promptly at 8 a.m. and ending at 8:30 a.m. every morning, except Sunday, for Respondent’s sales representatives, and the purpose of said meeting “. . . is primarily to congratulate and celebrate the previous day’s sales, acknowledge the team. . . . The second portion of it is . . . informative things that needed to get out to the sales team . . . and, also, it was to prepare and train for the day’s presentation.” Hill testified that the daily meetings are a “very important part of the day” inasmuch as they set the “tone” for the day. As such, he strived to make them a “positive” experience and not a “negative” one and would always end them with an “upbeat” message. Hill conducted one such sales meeting on May 2, and, on this occasion, he began by stating that, apparently, there was a lot of controversy over the sales representatives’ compensation under the OTP program and that he would like to address the issue and answer some questions as everyone seemed to be “sideways” about a “few things.” Thereupon, Foley testified, sales representatives began asking questions. Philip Bridges asked about commissions, which were owed to him but which Respondent “couldn’t track.” Hill responded that he would have to “check on that.” Jennifer Griffin next asked about the effect of the delayed paperwork on their bonus payments. Hill said he did not know. Then Foley raised his hand and asked why, if Fairfield, a sister corporate entity to Respondent, could implement an identical OTP program and process the paperwork on site without any delay, could Respondent not operate its OTP program in a similar manner? Hill had no response; “he didn’t have an answer.” Several more sales representatives asked

⁷ Foley had extensive prior experience in time share sales.

While describing Foley as “a very, very good salesman,” Hill, who assumed his current position in February, had an obvious personality conflict with him. Lamenting that “our greatest strength can be our greatest weakness,” Hill noted that Foley’s “passion” for selling manifested itself in expressions of “bitterness, anger, frustration” and being “the only one who was really outspoken . . .” Continuing, Hill noted that “the only issues I ever had with Mr. Foley [were] that he had the tendency and the ability to create negativity within the sales meetings and/or the sales floor and one on one with sales representatives,” and “. . . he . . . had a tendency to complain and argue with the decisions made by authority to the point that it was very disruptive” during sales meetings and on the sales floor. Asked what Foley’s concerns were, Hill said, “Oh, it could be anything. It could be policies, it could be the rotation of the board . . .” He added that Foley “. . . had a tendency to verbally challenge openly . . . rather than in private and in person.”

questions, and, according to Foley, "I possibly asked a second [question] . . . it just seemed like all of a sudden it [got] out of control a little . . . He didn't have the answers. People were raising their hands. Some were talking over others . . ." Foley recalled one sales representative, Charles Feathers, attempting to stop the questioning; "he was like trying to drown everybody out to shut them up . . . I just leaned over and I tapped his shoulder, and I said 'no, no, no, Chuck. Hold on. Let them finish. Let them finish.'" Suddenly, Foley further testified, Hill "blew a gasket." He noticed Hill developing red blotches on his neck and his cheeks, ". . . and he turned pretty red and he says, 'you know, damn it, you guys . . . you are pissing me off. If you want to work here, I suggest . . . we don't talk about this now. We are just going to end this. It is done. If you want to talk to me, you can talk to me in my office about it.'" Foley recalled that Hill's comment ended the meeting and, rather than following his usual practice of staying and speaking to any sales representatives who waited to speak to him, Hill went straight to his office.

Foley's testimony as to the tenor of the foregoing sales meeting, including Hill's outburst at the end, was generally corroborated by all other witnesses, including Hill; the only significant area of controversy concerns Foley's behavior during the meeting. Thus, Philip Bridges testified that Hill began the meeting by distributing a new commission structure. Then, employees began directing questions to Hill, with Griffin, Foley, and him raising different issues. In particular, Bridges recalled Foley asking why it was taking so long for sales people to receive commission checks and noting that the Fairfield sales people were not required to wait as long as Respondent's employees for commission payments. He further testified that "a couple of other people" might have had comments about compensation and that, at the end of the meeting, ". . . Hill noticeably got very red-faced and aggravated" and said ". . . 'this is a bunch of bullshit and I am tired of it.' He said, 'you have pissed me off, I'm tired of hearing about this. . . . If I ever hear anybody bring this up again, I will fire you.'" Moments later after composing himself, Hill continued, saying he was sorry for what he had just said ". . . 'but you all really pissed me off.'" At this point, according to Bridges, Derek Milholland walked into the room, and not a word was uttered. "It was extremely quiet. You could hear a pin dropping." James Robertson testified that the session began in the manner of a regular sales meeting; however, as there had been significant tension in the facility regarding commissions, "the whole sales meeting's topic was basically on commissions." Hill began by distributing a company memo on the subject and began taking questions. According to Robertson,⁸ "I think it was really just [Feathers] and [Foley] who were

⁸ During cross-examination, Robertson stated that Respondent ostensibly fired him as a result of "his numbers." However, he believes the actual reason was because ". . . we had a sales meeting [in mid-September] where Rod Hill made an outrageous statement about lynching the only African-American employee we had in our office, and I went immediately up to the employee and apologized to him for having to sit through that." Then, according to Robertson, he went to his supervisor and asked her to go to human resources because of what Hill said and told her ". . . if she didn't go to HR, I was going to go to HR." Robertson believed his supervisor reported his threat to Hill, ". . . and I

asking the questions." He added that sales meetings were generally "fairly upbeat" with commissions a "forbidden" topic and that, with the issue now raised, ". . . it was an opportunity for us to start [asking] questions, and Jerry started [asking questions that] everybody had been talking about previously on the sales floor . . ." He ". . . said what everybody would have loved to have said." Feathers ". . . didn't really ask specific questions. He . . . mainly stepped in like a referee would step in [during] a match . . . he started talking but it wasn't really asking questions." Robertson described Foley's manner during the meeting as "direct. . . he wasn't shouting but he was being . . . a bit faster than normal speech" and recalled him asking about OTP paperwork going to Florida when Fairfield handled OTP at its location and about other procedural policies.⁹ Robertson recalled that Foley ". . . asked a few questions when he felt he was just getting misdirected by [Hill]." Finally, after Foley had been asking his questions for a while, Hill ". . . completely lost it, his face went purple, he started shouting and had a meltdown in front of the whole office. He said 'okay, we are not going to have this here. We are not going to discuss this here. Just move on, if any of you guys have any questions from now on about commissions . . . it will now be done in my office in private, and I don't want to hear another peep—I don't want to hear anything at all. If you want to work here, this is what you do.'" The room became "silent" at that point.¹⁰

Charles Feathers, a sales representative who testified on behalf of Respondent, recalled that Hill brought up compensation,¹¹ ". . . and it had something to do with our OTP program, which is basically our short sale of an ownership, and how we are going to be compensated on that. It generated a lot of questions amongst the [sales representatives], and it got kind of heated, a lot of emotion . . . and before [Hill] could even finish asking or answering what someone would say, someone else would bring something else up. It was almost like . . . people throwing or shooting at him . . ." In the midst of it, Hill became "excited" and said ". . . that's enough. That's it. . . it's getting real negative. We are not going to continue to discuss it in this manner. If you have something negative to say, then come see me in my office." He added that Hill did use the term "bullsh-t" at some point. Asked if he was one of the questioners, Feathers replied, "I asked him a couple of questions. . . . I think several people asked a question . . .," including Foley . . . We played off each other a lot. I mean, he could get me going. I could get him going sometimes." He described Foley as being "very involved" in what occurred during the meeting and recalled that Foley's questions seemed to be ". . . personal to him in nature. They would deal specifically with his situa-

was fired for my numbers within three weeks." Rodney Hill failed to specifically deny the incident, enigmatically testifying "honestly, I don't know if I said that or not. . . . I am not [prejudiced]."

⁹ Asked if Foley was voicing the frustrations of the entire sales force, Robertson replied, "absolutely."

¹⁰ Robertson believed Foley's questions caused Hill's outburst as ". . . if Jerry hadn't said those things, he had the blow-up basically at Jerry, and then threatening us all."

¹¹ Feathers contradicted Robertson, denying that Hill tried to keep compensation out of sales meetings—"Oh, never, no. We talk about compensation all of the time."

tion, and . . . [Hill] would always say ‘I want to do it in the office. I don’t want to do it in a group forum.’”

Rodney Hill testified that the May 2 sales meeting began with him “celebrating the successes of the previous day” and that he then distributed a memo on a new compensation program. As “. . . there was some ambiguity about it . . . some of the people were asking questions.” Saying he did not know the answers to some of the questions, Hill told the sales representatives that he “would discuss it at a later time.” However, “Mr. Foley wouldn’t let it go. He continued to incite people. He turned to . . . Feathers and tried to get him stirred up about it, and . . . other representatives told him to be quiet” Hill further testified that the other sales representatives stopped questioning him when he had no answers but that Foley “. . . continued on with the badgering . . . continuing to try to incite” He described Foley’s negativity as not so much his questions; rather, “it was statements that he was making . . . about the compensation plan.”¹² Having had it “up to my eyeballs with [Foley’s] negativity” and “. . . obviously getting frustrated by the continued pecking and hammering that he was doing . . . ,” Hill shouted “. . . You know, that’s enough. This is bullshit, and I said ‘I will not have this in my sales meeting,’ and I was very, very upset over it.” Hill then conceded stating “. . . that my dad always told me that if you don’t like it somewhere, rather than whining and complaining about it, go find another job.”

The next day, Foley began a vacation during which he visited the Fairfield office and decided to seek a transfer to that entity. At some point near the end of his time off from work, Foley received a voicemail message from Hill that he wanted to speak to the Charging Party before the latter returned to work. Foley immediately returned Hill’s call, and the latter informed Foley that Derek Milholland wanted to talk to him about something that was said at the May 2 meeting. Not scheduled to return to work until May 14 but disturbed and “distressed” about having to speak to Milholland, Foley visited Respondent’s facility a day or two prior to the end of his vacation. He approached Hill in a hallway and asked to speak to him in his office. Once seated in Hill’s office, Foley began by apologizing for being “a little forward” in his questions during the May 2 sales meeting but added that Hill himself had solicited the questions. Hill replied that he did not think it was necessary for Milholland to speak to Foley as the former certainly understood that, in sales, you can “sometimes” have a “bad minute” and get over it. Foley responded that he needed his vacation time in order to become more “focused” but that Hill should understand it was hard for him not to ask questions when issues affected him financially and he might approach him again with questions. Then, Foley asked if Hill would be opposed to him seeking a transfer to Fairfield and said that he visited the Fairfield office during his vacation in order to investigate the possibility of transferring. Hill replied that he would not be opposed to Foley transferring but urged him to reconsider. Foley replied that it seemed as though Hill did not want him to leave, and

¹² Negativity, as engaged in by Foley, “. . . defeats what I am trying to do. I am trying to send my team out in a positive upbeat attitude to start the day.”

Hill replied that he thought Foley was a “dynamic” sales person and wanted him to reconsider.

On May 14, Foley returned to work, but, prior to doing so, he went to Respondent’s human resources office, requested, and received a form for transferring to the Fairfield entity. Upon entering Respondent’s facility, he handed the transfer form to Hill, who said they would speak later. That afternoon at approximately 1 p.m., Foley went to Hill’s office, and the latter said they should speak to Derek Milholland. In the latter’s office, Milholland asked Foley how he was feeling and whether everything was alright. Foley replied “excellent,” and Milholland said he was concerned because, prior to his vacation, Foley had blown up a sales meeting and now he wanted to transfer away from Respondent. Milholland added that he had a “problem” with what Foley had done as he “. . . wasn’t supposed to go and talk to [Fairfield] without asking permission.” The Charging Party replied that he did not know he required permission to speak to a sister corporation and that, in fact, he had been “approached” to do so. Thereupon, Milholland handed Foley a document entitled “notice of corrective action,” a “documented” verbal warning notice apparently drafted by Rodney Hill. Said warning notice concerned the May 2 sales meeting and stated, in the first paragraph, that “on several occasions Gerald has been verbally addressed on his open negativity in sales meetings as well as on the sales floor. Gerald has been told that . . . spreading negativity to the sales team cannot be tolerated. . . . Gerald has a struggle containing his negativity. . . .” In the second paragraph, which directly concerns the sales meeting, after stating he had no answers to several of the questions, Hill¹³ wrote, “Gerald continued to object and voice his frustrations to the rest of the group. This resulted in agitating others to the point where another sales representative asked him to leave it alone.” Finally, under “required improvement,” the notice reads, “Gerald must immediately stop and avoid expressions of open negativity in sales meetings and on the sales floor with other Sales Representatives” With regard to the first paragraph, Foley denied that Hill ever raised his so-called “negativity” on several occasions, and, with regard to the second paragraph, after Hill said he would take no more questions, “we stopped.” Further, Foley denied being louder or more outspoken than any other sales representative that morning.

Prior to September 2, Respondent maintained a simple “resort casual” dress code for its employees. According to Foley, “we didn’t have to be wearing suits and ties . . . but just . . . nice dress slacks . . . presentable, professional looking” He added that many men wore Tommy Bahama-style shirts, which were not tucked into pants. According to Foley, he had been on vacation for a few days prior to September 2 and, upon returning to work that day, he became aware that Respondent had implemented a new dress code for men.¹⁴ He arrived at Respondent’s facility that morning at 7:30 and encountered Rodney Hill in the sales room. Two other sales representatives,

¹³ Asked whether he had ever given a warning notice for expressing negativity to any other employee, Hill averred, “I couldn’t tell you.”

¹⁴ Foley stated that, while on vacation, he had heard a rumor of a new dress policy, requiring shirts to be tucked into the pants.

James Robertson and Charles Feathers, were seated at their desks. Foley was wearing a Tommy Bahama shirt, not tucked into his pants; Hill noticed and said, “. . . we have a new rule, shirt tails have to be tucked in.” Foley asked whether this was true as he had heard a rumor of such a change in dress policy. Hill said, yes. Apparently dissatisfied by Hill’s response, Foley first asked whether the dress code change was now corporate policy and, then, if a memo, regarding the policy change, had been posted. Hill responded, asking “. . . ‘why does everything have to be in writing with you?’” Foley replied, saying he asked because, in companies like Respondent, policy changes are announced in memos. At this point, according to Foley, Feathers became “a little boisterous,” announcing that he had not signed up for such “crap” and “. . . I don’t need the money . . . This is not what I signed up for . . .”¹⁵ Thereupon, obviously perturbed, Hill pointed at both sales representatives and said “. . . ‘Go home. You guys can go home for today.’” Foley and Feathers each made a comment, and, then, Hill asked Leila Darling, a sales manager, to conduct the morning sales meeting and ordered Foley and Feathers to come to his office. Foley further testified that, inside Hill’s office, the latter “. . . just went into some kind of third party story sermon about his daughter not obeying the rules . . . and he was talking like being a parent or something, and we just have to live by the rules . . . and that was really the end of our conversation and he let us go back on the sales floor. . . . We both apologized and went back to our job.”¹⁶

James Robertson corroborated Foley, testifying that Respondent published a memo, requiring male sales representatives to wear their shirts tucked inside their pants, and that some men, who regularly wore Tommy Bahama-style shirts, were upset by the new work rule.¹⁷ According to Robertson, Foley returned from a vacation, and, upon being informed of the new policy by Hill, Foley, who was wearing a Tommy Bahama shirt outside his pants, retorted, asking if the new rule was in writing and did said policy apply to the office in which they were working. Hill responded, “[W]hy do you always ask . . . stuff like that. Why does it always have to be in writing with you . . .” At this point, Charles Feathers, who Robertson described as the Tommy Bahama shirt king, interjected with some comments, saying “. . . I don’t need this crap. I don’t have to be working here. My wife has got tons of money, I could retire right now. I don’t have to be dealing with this at all . . .” Hill then said to both men “. . . ‘you guys are out of here right now.’”

With regard to the September 2 shirt incident, Rodney Hill testified that, “in the sales meeting” that morning, he informed the sales representatives “. . . that Wyndham was asking that we

¹⁵ There is no record evidence that Foley and Feathers discussed jointly protesting the newly implemented dress policy that morning. In this regard, Foley conceded that he did not ask Feathers to join in the conversation—“No, he chimed in on his own.”

¹⁶ During cross-examination, Foley stated that he apologized because “. . . if he feels . . . that I was out of line . . . I didn’t want to make him feel like I was trying to be a hard nose . . .” Hill denied that Foley apologized to him for what had occurred.

¹⁷ There is no evidence that Foley was aware that other employees were upset by the new dress rule.

tuck in our shirts.” Asked if anyone reacted to his announcement, Hill stated “Oh, boy, yes there were. . . . Mr. Feathers was upset by it and usually he is pretty docile. Mr. Foley was extremely frustrated by the policy.” Specifically, Foley complained that this new work rule “. . . is not what they signed. They have contracts with the company and that is not what they agreed to.” Hill described Foley as “visibly angry” about the new policy and says he was able to “squench it without a huge . . . uproar in the meeting. We got back on track and then I dismissed everybody for the day’s sales.”¹⁸ As the other sales representatives left the room but with some remaining, Foley again began to “badger” Hill about the change. This, in turn, “incited” Feathers to again complain. Finally, after listening to both,¹⁹ Hill told them to go home, saying, “I will not have this negativity on my sales floor.” However, Hill immediately reconsidered and asked Foley and Feathers to accompany him to his office. There, according to Hill, he told both men that he could not have such negativity on the sales floor and would not start the day like that. Feathers then apologized for his conduct, and Hill told both to go to work and do “what you guys are called to do.”

Charles Feathers contradicted Hill and, in part, corroborated Foley, stating that the incident “. . . was before the sales meeting ever started. . . . this was at a quarter until 8 in the morning on the work room floor” with just one other sales representative present—Robertson. Not recalling whether he or Foley said something first, Feathers testified he said he didn’t know whether he wanted to work with Wyndham’s new dress guidelines—“It is pretty restrictive. You know, I might not want to tuck in my shirt; and then Jerry said something to [Hill] and then . . . Rod kind of said something in retort, and then they kind of really got into it . . .” Foley mentioned a contract, saying Hill was required to announce policy changes in writing.²⁰ Abruptly, Hill ended the dispute, stating that Foley and Feathers should clock out and go home. Asked why Hill included him, Feathers said, “. . . because I was party to what had transpired here. I was . . . an instigator.”²¹ Moments later, Hill asked both sales representatives to come to his office. There, Hill began “. . . this long explanation about his daughter,” who “. . . didn’t want to follow the rules of the home anymore” after becoming 18 years old. Eventually, according to Feathers, Hill told them just to go back to work, and they left the office.²² Feathers added that Foley thanked him for standing up for him, and he replied that it had been a stupid thing to do.

¹⁸ Hill denied asking the sales manager to conduct the sales meeting that morning.

¹⁹ During cross-examination, Hill conceded that, during the incident, Foley and Feathers were concerned about the same issue, the new shirt rule, and that both men spoke against it.

²⁰ Feathers described the conversation as “heated.”

²¹ Feathers testified that, at the point he joined Foley in questioning the new shirt policy, seven or eight employees had arrived on the sales floor.

²² Later in the day, according to Feathers, he apologized to Hill for his behavior.

Foley worked that entire day but had just one sales tour²³ with a husband and wife, who were, of course, current owners of time share credits.²⁴ He testified that he followed his normal procedure, introducing himself to the couple and asking them to accompany him upstairs. According to Foley, early, during the conversation, he had questions about the family's financial condition, and he asked the couple to detail their monthly expenses for him, the "purpose" of which was to learn if "something financially [was bothering] them." From this, he learned "that they were financially able to afford us. They were giving me all the buy signs." Foley stated that he was attempting to sell OTP credits to the couple, and "I told them how fortunate they were to be able to be here because these prices are significantly lower than" the cost of new credits. He added that the customers ". . . were great all the way to the very end. When we got down to the money, they were receptive to the money part but when they came to decision making . . . they decided . . . 'maybe right now is not a good time.'" At this point, trying to save his sale, Foley attempted to ascertain why, and the husband replied that he would probably be able to do a deal in a month or two. Foley then explained that ". . . the price . . . I am showing is the best that he has ever seen or probably will see . . . so if he is looking to do it in two months, it would be advantageous to do it now . . ." The husband and wife continued to say, no.²⁵ Finally, after Foley continued to push a sale, the husband said ". . . that our company always bothered him about coming to these presentations." Foley asked why this bothered him, and the man only replied ". . . but if you guys want to keep calling me and giving me stuff . . ." Becoming exasperated, Foley said that, if Respondent was "bothering" them, he could have their name removed from the call list, and the husband said to do so if such was what Foley wanted. Foley replied he could request they not be contacted for a few months, and the husband replied "that's cool." Thereupon, Foley and the married couple left the sales floor and walked to Respondent's "gifting" counter where, in the customer's presence, Foley asked the "gifting person" to place a note in the customer's account file not to "bother them" for a while. Hearing this, the husband became angered, saying he sensed "animosity" from Foley. The latter responded that they should not take what he had done and said the wrong way and said "I love you guys. You are a fantastic tour and I hope I was informative to you." He added that they should understand his job was to ask them to buy, and they both knew that. At this point, according to Foley, Hill suddenly approached, introduced himself, and said he wanted to hear what was going on. Hill then asked the couple to come with him and would not permit Foley to accompany them.

Foley further testified that, later in the afternoon, Hill asked

²³ According to Foley, the sales presentation had to be concluded within 90 minutes ". . . so we try to pace ourselves so we can get all the . . . questions and everything within that [time period] . . ."

²⁴ As usual, prior to conducting the tour, Foley read notes, prepared by the marketing department, on the married couple including how many such sales presentations the client had attended, their purchase history, if any, and financial history.

²⁵ Foley was not entirely surprised as the marketing notes indicated that the couple had done this "a lot."

him to come to Milholland's office. Inside the latter's office, Milholland asked Foley ". . . what seems to be the problem" and said ". . . 'I come in and I hear you are sideways about the shirt tail. You had a shirt tail incident that bothered you, and then . . . a little later, you get a customer all irritated. What's going on?'" Milholland then told Foley that he was being suspended for a day. Foley asked why, and Milholland replied, mentioning the shirt tail incident and irritating a customer. Foley replied that, with the customer, ". . . 'I don't miss a beat . . . I don't deviate. I do everything properly the same way.'" Milholland replied that the customer intended "to write a letter." Foley then raised the shirt tail incident, saying it had not disrupted the sales floor as just a few people overheard what had been said. He turned toward Hill and said he thought the problem had been resolved and, then, turned back to Milholland, saying it made no sense to him that he was being suspended when nothing was being done to Feathers and accusing Milholland of "messing" with his pay for no reason. Milholland replied the reason for the suspension was to permit them to do an investigation.

Charles Feathers testified that he was able to overhear Foley's conversation with his customers that day as they ". . . sit right across from each other" and that ". . . in my view, [Foley] pushed this guy way too far that day, and I have seen him do it a couple of times in the past and got away with it, and in this case . . . in my opinion, he was very upset from that morning, and . . . with this guy, he was kind of taking it out on him. I mean, he told him he was stupid twice." Feathers added, ". . . the guy was being resistant to buying. It was obvious that he had a need. Gerald had uncovered the need that the guy should buy more credits logically, and he [wouldn't] for whatever reason, and [Foley] was very frustrated with him, and . . . he just told the owner, you know, 'hey, if you don't do this now, you are stupid, and the guy got upset. He was, you know, visibly upset.'" According to Feathers, the customer was upset at the table, and, at one point, the customer arose and he and Foley became "combative." Subsequently, Feathers testified, Foley took the customer to the "gifting" department where the latter was given a gift. But, ". . . on the way out, the guy was really upset and was saying something about . . . he wanted to talk to a manager. He was real upset. . . . Later, Feathers observed the customer speaking to Hill. Feathers further testified that Foley approached him later in the day, attempting to justify what he had said to the customer—"It was not something I hadn't seen before, and it is not something . . . I haven't seen from other people before . . . I just said, 'I think you pushed it a little too far.'"²⁶ Finally, Feathers insisted that he had informed Hill as to what Foley said to the customer.

Rodney Hill testified that, subsequent to the shirt incident on September 4, ". . . everyone had their guests that they were touring or presenting, and Mr. Foley . . . took . . . his guests to the gifting window. They were finished, and I happened to be walking by a few minutes later, and I saw the owner step back in anger and [say] 'Who are you to tell me about my finances?'"

²⁶ Feathers asserted that Foley had belittled the customer. While Feathers asserted Foley twice called the customer "stupid," Foley specifically denied having done so.

Who are you to belittle me in front of my wife?" Foley then "took the guy's arm" and apologized, saying he had not meant it.²⁷ According to Hill, after Foley finished with the customer, he spoke to the customer for between 30 and 45 minutes and listened to his complaints. Hill described the customer as being "extremely irate" and "the customer told me that Mr. Foley told the gifting person . . . something to the effect of flag or mark their account and put them on the don't call back list, that they were wasting company time and company money." Hill stated that he told the customer to prepare a "statement" for documentation, that then ". . . I went to our HR department to find out . . . what I should do, having two incidents in a row that day,"²⁸ and that his inclination was to discharge Foley. Approximately 90 minutes later, Hill testified, Foley approached him ". . . and downplayed the situation as if it were no big deal and the guy got a little frustrated, and I didn't want to discuss it . . . because I had already spoken to HR about [what had occurred] . . ." Finally, I note that, in relating his conversation with the "irate" customer, Hill never quoted the former as stating that Foley ever called him "stupid" and, in this regard, failed to corroborate Feathers that the latter reported overhearing what Foley said to the customer.

Foley testified that he reported for work on September 4, and that, prior to the start of the daily sales meeting, Hill approached him and asked why he was there and had Foley received his text message. Foley checked his cell phone and noticed that Hill had sent him a text message, advising him not to report for work the next day. Foley complained that he was on commission, and Hill was "messing with my livelihood." Thereupon, Hill wrote a note on a piece of paper; the note read, "Gerald Foley is on suspension until further notice for two incidents." Foley failed to hear anything from Respondent until September 10 when Hill telephoned him; they arranged to meet at Respondent's facility the next day. The following morning, Foley met with Hill and Milholland in the latter's office. After saying he was an awesome salesman, Hill informed Foley that he was being discharged. Foley asked why, and Hill said "multiple write-ups."²⁹ Foley replied that he had only received one in May, and Hill handed him two others, one for the shirt tail incident and one for the customer difficulty. GC Exh. 3, a notice of corrective action dated September 4, concerns the shirt incident and states that Foley was "visibly and vocally upset" over the new policy, "continued to argue" with Hill about it in front of "the team," became "more and more aggravated as he went on," and "incited" another sales representative to join him.³⁰ GC Exh. 4, a notice of corrective action dated September 4, concerns Foley's encounter with his customer on September 2 and reads, "Gerald had a major run in with an

²⁷ Asked how a sales representative can control a customer from feeling belittled when the discussion is about in finances, Hill stated that sales people are required to be able to "read" people, to be "diplomatic," and know when customers have had enough.

²⁸ During cross-examination, Hill directly contradicted himself, specifically denying he told the human resources department that Foley had been involved in two incidents that day.

²⁹ Hill failed to deny this portion of Foley's testimony.

³⁰ Foley denied continuing to press Hill, becoming more and more aggravated, or asking Feathers to join in the conversation.

owner that I had to intervene in. The owner was very upset that Gerald was belittling them for not purchasing more credits. He told the gifting personnel to 'flag their account' because they were wasting company time. The owner has filed a written account of the incident."³¹

Rodney Hill³² testified that he made the decision to discharge Foley. Asked why, Hill testified, "I believe that Mr. Foley had taken his frustration and anger and disdain for authority out on his owners having come out of that situation and being frustrated with having to tuck his shirt in, I believe that he took it out on guests of Wyndham and to me . . ." He added that the basic reason was "[Foley] took his frustration out on an owner, I can't have that." Finally, Hill denied suspending and then terminating Foley because he engaged in protected concerted activities.

Legal Analysis

The complaint alleges that Respondent engaged in conduct violative of Section 8(a)(1) of the Act by issuing warning notices to Foley on May 2 and September 4, suspending him on September 2, and discharging him on September 11 because he and other employees engaged in protected concerted activities and, on May 2, by threatening its employees by inviting them to quit because they engaged in protected concerted activities, threatening its employees with unspecified reprisals because they engaged in protected concerted activities, threatening its employees with discharge because they engaged in protected concerted activities, and orally promulgating an overly-broad rule prohibiting employees from engaging in protected concerted activities. In order to determine exactly what occurred and to determine whether any of Respondent's acts and conduct violated Section 8(a)(1) the Act, I must, at the outset, delineate my conclusions as to the respective credibility of the several witnesses. In this regard, by his demeanor while testifying, Gerald Foley impressed me as being an honest witness, one who appeared to be without artifice and to have clearly understood my admonition to tell the truth. I shall rely upon his version of events herein. Likewise, Philip Bridges and James Robertson each appeared to be testifying in a veracious manner, relating to the best of his recollection what occurred during the events at issue. I rely upon each as corroborating the testimony of Foley. Charles Feathers' demeanor was, for the most part, that of a frank witness. Nevertheless, I am convinced that only portions of his testimony are reliable.³³ Thus, while his versions of the May 2 sales meeting and the September 2 shirt

³¹ While denying having belittled the customers, Foley conceded having asked the gifting person to place a note in their file about not bothering them any longer. Nevertheless, Foley denied requesting anyone to "flag" their account for wasting Respondent's time.

Apparently, the customer did submit a written account of what occurred to Respondent; however, the latter failed to offer it as an exhibit and never offered an explanation for its failure to do so. Accordingly, I draw the inference that said "account" would not have corroborated either Hill's or Feathers' versions of what occurred.

³² Hill denied ever implementing a rule, telling employees that they could not speak about their salaries, bonuses, or commissions, or threatening employees for doing so.

³³ I note, of course, that it is natural that a finder of fact believe portions of a witness's testimony and not believe other portions.

incident were corroborated by others, his version of Foley's sales conversation with the married couple on September 2 was utterly uncorroborated and specifically denied by the significantly more trustworthy Foley.³⁴ In this regard, I note that, notwithstanding having, by his account, spoken to the above customers for over half an hour and listened to all their complaints regarding Foley's conduct, Rodney Hill never testified that the husband and wife were "irate" because Foley had twice called the husband "stupid," that Hill failed to corroborate Feathers that the latter reported what he heard to Hill, and that Respondent failed to offer into the record, as evidence, the customers' written statement of what occurred during their tour with Foley.³⁵ Accordingly, I do not rely upon what I perceive as Feathers' feigned testimony concerning Foley's sales conversation with the married couple. Finally, Rodney Hill impressed me as being an utterly disingenuous witness, one who testified in a manner without regard for the truth and solely calculated to buttress Respondent's version of events. In this regard, I do not rely upon any aspect of his testimony, in particular his description of Foley's actions on May 2 or September 2, his characterization of Foley's customers on the latter date as "irate," or his reason for discharging Foley.

Based upon my above-stated resolutions of credibility and the record as a whole, I find that, subsequent to Respondent's introduction of its OTP program in February, delays, uncertainty as to percentages, and mistakes in the payment of commissions and bonuses became commonplace; that such were a constant source of irritation and concern for Respondent's sales representatives, including Gerald Foley; that, on a daily basis, sales representatives discussed the foregoing compensation problems amongst themselves on the sales floor between tours; that Foley took part in said conversations until the time of his discharge by Respondent; and that, during said discussions, Respondent's in-house sales representatives, including Foley, engaged in concerted activities, privileged by Section 7 of the Act. *JCR Hotel, Inc.*, 338 NLRB 250, 252 (2002); *Salisbury Hotel*, 283 NLRB 685, 686-687 (1987). Further, I find that, Rodney Hill, who manifested a rather intense aversion to what he termed "negativity," was well aware of these conversations, routinely interrupting sales representatives and advising them that ". . . 'this isn't the time or the place to be talking about [such problems]'" and that ". . . 'we can't do anything about this here . . .,'" and viewed the subject matter, which obviously involved the sales representatives' terms and conditions of employment, as expressing negativity and as adversely impacting upon the sales representatives' enthusiasm toward selling Respondent's products. Moreover, I find that, at all times material, Rodney Hill evidenced obvious antipathy toward Gerald Foley. Thus, Hill, who professed admiration for Hill's sales ability, concededly perceived Foley as the only "outspoken" sales representative about the commonly-believed OTP problems and blamed him for spreading and creating negativity by his expressions of bitterness, anger, and frustration during his

"one on one" conversations with other sales representatives on the sales floor, concerning the payment of their commissions and their other terms and conditions of employment, and by his "tendency" to complain about and question corporate decisions and policies to Hill and to his fellow sales representatives.

Turning to the alleged unfair labor practices involving the May 2 sales meeting, based upon my credibility resolutions and the record as a whole, I find that said meeting was the usual early morning sales meeting, attended by all of Respondent's inside-sales representatives and conducted by Hill, to discuss sales and employment-related issues; that Hill began the meeting by distributing a new commission structure for OTP sales and solicited questions from the assembled sales representatives; that several employees, including Bridges, Jennifer Griffin, and Feathers, asked compensation and commission-related questions; that Foley asked several questions in a "direct" manner and of a type ". . . everybody had been asking about previously on the sales floor . . ." and "would have loved to have said;" that one of Foley's questions concerned Fairfield's implementation of a similar OTP program and its processing of paperwork on site without any delay and why could Respondent not operate its OTP program in a similar manner; and that Hill perceived Foley's questions as "badgering" him. I further find that Hill was unable to answer many of the posed questions; that, after a while, some sales representatives were asking questions without raising their hands and speaking over other questioners; and that, at one point, Feathers attempted to stop the questioning but Foley, who seated behind him, advised him to let the questioning continue. Next, I find that, eventually, the questioning became heated and emotional; that Hill, who had become red-faced and visibly aggravated, suddenly yelled ". . . 'you know, that's enough. This is a bunch of bullsh--t and I am tired of it. . . . I will not have this in my sales meeting,'" and that he continued, saying ". . . if any of you guys have any questions from now on about commissions . . . it will be done in my office in private, and I don't want to hear another peep—I don't want to hear anything at all. If you want to work here, this is what you do."³⁶

Respondent admits that, on May 14, it gave Foley a written warning for his actions during the May 2 sales meeting³⁷ including expressing his negative comments in front of the assembled sales representatives. As to whether said discipline was violative of Section 8(a)(1) of the Act, the initial inquiry must be whether Foley engaged in protected concerted activities, within the meaning of the Act, during the meeting. In this regard, I have found that the sales meeting, attended by all Respondent's in-house sales representatives, was called and conducted by Hill in order for him to disseminate and discuss the new commission structure related to Respondent's OTP program and that Hill solicited and employees asked questions

³⁶ I note that Hill admitted he uttered almost the identical threat to the employees—" . . . that my dad always told me that if you don't like it somewhere, rather than whining and complaining about it, go find another job."

³⁷ The "required Improvement" paragraph expands upon Hill's admonition at the end of the May 2 sales meeting. In the paragraph, Respondent warned Foley he must cease his "expressions of open negativity" to other sales representatives on the sales floor.

³⁴ With regard to the shirt incident on September 2, wherever Foley and Feathers conflict, I shall rely upon the testimony of the former.

³⁵ I, therefore, draw the permissible inference that the married couple failed to corroborate Feathers' assertions.

related to their compensation and commission payments. At the outset, I agree with counsel for the General Counsel that Respondent's commission payment program, about which the sales representatives expressed their concerns during the May 2 sales meeting, is obviously an integral part of their terms and conditions of employment. Further, the Board has long held that employee questions and comments, regarding changes in their terms and conditions of employment, raised at a group meeting, called by an employer, clearly come within the definition of concerted activity under Board precedent. *Anheuser-Busch, Inc.*, 337 NLRB 3, 11 (2001); *Chromalloy Gas Turbine Corp.*, 331 NLRB 858, 863 (2000); *Neff-Perkins Co.*, 315 NLRB 1229 at 1229 fn. 1 (1994); *United Enviro Systems*, 301 NLRB 942 (1991). In order for concerted activity to be protected within the meaning of the Act, the activity (1) must involve a work-related complaint or grievance; (2) the concerted activity must further some group interest; (3) a specific remedy or result must be sought through the activity; and (4) the activity must not be unlawful or otherwise improper. *NLRB v. Robertson Industries*, 560 F.2d 396, 398 (9th Cir. 1976), cited with approval by the Board in *Northeast Beverage Corp.*, 349 NLRB 1166, 1167 at fn. 9 (2007). Herein, the questions, which were posed by Foley and the other sales representatives, were in furtherance of their interest in comprehending Respondent's commission structure for OTP sales and obtaining answers to their complaints regarding delays and other problems plaguing their commission payments for such sales. Even assuming *arguendo*, Foley was speaking for himself, the record evidence is that his questions expressed group concerns and were of the type other employees desired to ask, and the Board has held that "concertedness . . . can be established even though the individual [speaking] was not 'specifically authorized' . . . to act as a group spokesperson for group complaints." *Herbert F. Darling, Inc.*, 287 NLRB 1356, 1360 (1988). In these circumstances, I believe that Foley was engaged in protected concerted activities during the May 2 sales meeting.

Inasmuch as Foley was disciplined for allegedly engaging in misconduct in the course of his protected concerted activity, for a determination as to whether said discipline was violative of Section 8(a)(1) of the Act, I rely upon the Supreme Court's analytical framework set forth in its *Burnup & Sims, Inc.*, 379 U.S. 21 (1964), decision. Pursuant to this approach, in order to establish a violation of the aforementioned provision of the Act, the General Counsel must first have established that the discipline to Foley occurred; the burden then shifted to Respondent to establish that it possessed a good-faith belief that he engaged in the misconduct; and then the burden shifted back to the General Counsel to establish by a preponderance of the evidence that Foley, in fact, did not engage in the alleged misconduct or that his entire course of conduct constituted protected concerted activity. *Marshall Engineered Products Co.*, 351 NLRB 767, 475 (2007). Utilizing the foregoing analysis, Respondent admitted that Foley received a warning notice on May 14 based upon his asserted misconduct during the sales meeting on May 2, including voicing his frustrations to the group and agitating others. As to whether Respondent established that it possessed a good-faith belief that Foley engaged in misconduct, I think that the assertions in Respondent's May 14 disciplinary notice

were a miasma of embellishment and fabrication. Thus, I simply do not believe Hill's testimony that Foley said anything to "incite" the other sales representatives or was "badgering" him and note that no other witness corroborated him. Moreover, Foley specifically denied engaging in the asserted misconduct, and the record evidence corroborates him. Finally, even assuming Respondent met its burden of proof, and I do not, while he may have asked more questions than the other sales representatives and done so in a direct manner, Foley engaged in no threatening acts or similar conduct. Accordingly, his actions during the sales meeting were not sufficiently egregious to be outside the protection of the Act and to warrant discipline. *Anheuser-Busch, Inc.*, supra at 11; *Chromalloy Gas Turbines*, supra; *Consumers Power Co.*, 282 NLRB 130,132 (1986); *F. W. Woolworth Co.*, 251 NLRB 1111, 1112-1113 (1980). Rather, I believe that clearly angered at the sales representatives' persistent questions and complaints during the sales meeting and perceiving Foley, whom he viewed as the primary purveyor of negativity amongst the sales representatives, as being the leader, Hill issued a clearly unwarranted warning notice to him for engaging in protected concerted activities. In these circumstances, I find that Respondent violated Section 8(a)(1) of the Act.

Next, with regard to Respondent's actions during the May 2 sales meeting, the General Counsel alleges that Respondent violated Section 8(a)(1) of the Act in two other regards. I have found that Hill ended the meeting by informing the assembled employees that any questions, regarding their commission payments must be asked in private in his office and ". . . I don't want to hear another peep—I don't want to hear anything at all. If you want to work here, this is what you do." The General Counsel contends that Hill's dictate constituted the oral promulgation of an unlawful rule, prohibiting employees from engaging in concerted activities. In this regard, in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-647 (2004), the Board articulated the following standard for determining whether an employer's maintenance of a work rule, which impinges upon employees' Section 7 rights, violates Section 8(a)(1) of the Act. Thus, if said rule explicitly prohibits or restricts Section 7 activities, said rule is unlawful. If the rule does not explicitly such activity, said rule is nonetheless unlawful if (1) employees would reasonably construe the language of the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. Clearly, employees enjoy a Section 7 right to discuss their employer's compensation practices with each other. Herein, the record evidence is that the sales representatives regularly, on a daily basis on the sales floor, discussed with each other their problems with and complaints about Respondent's commission payment practices and policies and that Rodney Hill was well aware of said conversations and regularly interrupted them as expressions of "negativity." In these circumstances, I think there can be little doubt that, while uttered in the context of their questions during the sales meeting, given Hill's attitude and past practice, the assembled sales representatives reasonably understood Hill as announcing a new work rule, prohibiting them from engaging in protected concerted activity on the sales

floor.³⁸ Accordingly, I find that Respondent's above conduct violated Section 8(a)(1) of the Act. In addition, the General Counsel contends that Hill's closing comment to the assembled sales representatives, "If you want to work here, this is what you do" or, as he admitted stating, ". . . my dad always told me . . . if you didn't like it somewhere, rather than whining and complaining about it, go find another job," constituted a threat of discharge if employees failed to adhere to Respondent's unlawful, new work rule. I agree. The "if you want to work here . . ." warning was nothing less than a blatant threat of discharge, and the admitted "if you didn't like it somewhere . . . go find another job" comment constituted an invitation to quit, which the Board considers tantamount to an unlawful threat of discharge. *Merit Contracting, Inc.*, 333 NLRB 562, 563 (2001); *House Calls, Inc.*, 304 NLRB 311, 313 (1991). However he phrased it, I find that Hill coercively threatened the sales representatives with discharge unless they adhered to his unlawful work rule and, therefore, interfered with their Section 7 rights in violation of Section 8(a)(1) of the Act. *Id.*

I now turn to the disciplinary written warning, based upon his asserted acts and conduct on the morning of September 2, which Foley received from Respondent on September 11. In this regard, based upon my resolutions of credibility and the record as a whole, I find that, prior to September 2, Respondent had permitted its male sales representatives to wear Tommy Bahama-style shirts while working and did not require said shirts to be tucked inside the trousers; that, on or about the date, Respondent implemented a new dress rule, requiring male service representatives to wear their shirts tucked into their trousers; that some, if not all, the male sales representatives were upset by the rule change; that Gerald Foley, who had been on vacation when the above dress code was implemented, reported for work at approximately 7:30 a.m. on September 2 and encountered Rod Hill on the sales floor; that two other sales representatives, Charles Feathers and James Robertson, were seated at their desks; that Foley, who had heard a rumor about a dress rule change, was wearing a Tommy Bahama shirt not tucked into his pants; that Hill noticed and said Respondent had a new dress rule—shirts must be tucked into the trousers; that Foley, who had no knowledge of any employee dissatisfaction with the new rule, asked whether such was true and Hill replied, yes; that, apparently unsatisfied with Hill's response, Foley asked whether the new rule was a corporate-wide policy change and, if so, why such had not been posted; that Hill replied by asking why Foley wanted everything to be in writing, and Foley responded, saying he asked because in companies, such as Respondent, policy changes are announced in memos; that, at this point, Feathers interjected, saying that "[i]t is pretty restrictive. You know, I might not want to tuck in my shirt . . ." and that he had not ". . . signed up for such 'crap' and '. . . I don't need the money This is not what I signed up for . . . ;" that Foley neither discussed the issue with Feathers beforehand nor requested the latter to join him in protesting the rule change; that, thereupon, Hill told both sales representatives to "go home" for the day; and that, after a moment, Hill recon-

³⁸ Whether Respondent ever enforced Hill's work rule is, in my view, irrelevant.

sidered, told Leila Darling, a sales manager, to conduct the sales meeting, and asked Feathers and Foley to accompany him to his office. I further find that, inside his office, Hill began a long story about his daughter, who, after her eighteenth birthday, announced she no longer wanted to adhere to the family rules; that, eventually, Hill told the two men to return to work; that both Feathers and Foley apologized for their behavior and left the office; that, subsequently, Foley received a written warning for his above-described conduct, stating that Foley was "visibly and vocally upset" by the new dress rule, argued with Hill about it in front of "the team," became more and more "aggravated" as he argued, and "incited" another employee to join him; that Foley denied continuing to press Hill, becoming more and more aggravated, or requesting that Feathers join in the conversation; and that Feathers received no discipline from Respondent for his part in confrontation with Hill.

Contrary to the General Counsel, I am unable to conclude that the warning notice, which was issued to Foley based upon the foregoing incident, was violative of Section 8(a)(1) of the Act. In this regard, I initially find, in agreement with counsel for the General Counsel, that an employer's dress code constitutes a term and condition of employment. *Public Service Co. of New Mexico*, 337 NLRB 193, 199 (2001); *St. Luke's Hospital*, 314 NLRB 434, 440 (1994). In order to be concerted, employee activity must be engaged in with or on the authority of other employees and not solely by, and on behalf of, the employee himself. *Herbert F. Darling, Inc.*, 287 NLRB 1356, 1358 (1988); *Meyers Industries*, 268 NLRB 493, 497 (1984). Moreover, I believe, there must be clear record evidence of some ". . . employee interaction in support of a common goal." *Meyers Industries*, supra at 494.³⁹ As to whether Foley acted concertedly while expressing his concerns to Hill about Respondent's new requirement that shirts must be tucked into men's trousers, there can be no contention that Foley acted in such a manner prior to Feathers joining him. In this regard, Foley seems to have been acting out of his own self-interest, unaware of any general employee dissatisfaction with the new dress rule, and there exists no evidence that Foley sought any form of group action in support of his individual protest. As to whether Foley's individual protest was somehow transformed into concerted activity at the point that Charles Feathers spoke and interjected himself into the confrontation with Hill, I note that there exists not a scintilla of record evidence that Foley and Feathers consulted with each other or in any manner planned to engage in a joint protest of Respondent's new dress rule that morning. What seems to have occurred is that, overhearing Foley's conversation with Hill and upset by the new dress rule, Feathers decided to act independently and in his own self interest by raising his own complaints about the new policy. In

³⁹ In *Meyers Industries*, the Board noted that such was the requirement for concerted activity prior to the Board's decision in *Alleluia Cushion Co.*, 221 NLRB 999 (1975), in which the Board redefined the meaning of concerted activities. Thereafter, in *Meyers Industries*, the Board overruled *Alleluia Cushion* and reverted to an "objective" standard for concerted activity—that which had been the standard prior to *Alleluia*. *Meyers Industries*, supra at 496. Apparently, then, concerted activity again requires employee "interaction in support of a common goal."

these circumstances, I conclude that the two sales associates never acted concertedly and rely upon the Board's decision in *Traylor-Pamco*, 154 NLRB 380 (1965), as precedent. In that case, the respondent was engaged in digging tunnels for a sewer project in the Seattle, Washington area. Its employees normally ate their lunches outside the tunnel in a so-called dry shack. After being instructed to do so in order to minimize downtime during concrete pours, all of the employees, except the two alleged discriminatees, began eating their lunches inside the tunnel. The two other employees continued to eat their lunches inside the dry shack, and the respondent terminated them for insubordination. The Board dismissed the complaint, finding that the two employees had not acted concertedly. In so concluding, the Board noted that there was no evidence that the two alleged discriminatees had ever discussed continuing to eat in the dry shack or had relied upon each other in deciding not to eat lunch inside the tunnel and that, in refusing to eat their lunches inside the tunnel, the association between the employees was merely "accidental." *Id.* at 388.⁴⁰ Accordingly, as I believe that, all times during their confrontation with Hill, Foley and Feathers acted independently of each other with each advancing his own self-interest and without a common goal and that, therefore, at no point, did Foley act concertedly, it follows that the disciplinary notice, based upon his conduct during said confrontation, was not unlawful. Therefore, I shall recommend dismissal of this allegation of the complaint.

Turning to Respondent's suspension of Foley on September 2 and subsequent discharge of him on September 11, bearing in mind the record as a whole and my credibility resolutions, I find that, on September 2, shortly after the above-discussed incident, Foley was assigned to a tour (a husband and wife); that he introduced himself to them and escorted them upstairs to his desk on the sales floor; that, in attempting to sell them OTP credits, he followed his normal sales routine of asking the customers to detail their financial condition and uncovering any financial problems which would negate his sales effort; that he detailed the OTP program to the couple and explained they were in a fortunate position to be able to purchase the available credits at a reduced price; that, when their conversation turned to the price for the credits, the customers ". . . were giving [him] all the buy signs;" that, at the point Foley asked the customers for a decision, the customers said ". . . 'maybe right now is not a good time;" that, in an effort to save the sale, he asked why, and the husband replied that a sale might be possible in a month or two; that Foley explained why purchasing the credits would be more advantageous at the present time but the customers continued to say no; that, at the end of their conversation, the husband told Foley that Respondent ". . . always bothered him about coming to such sales presentations;" that Foley asked why this bothered him, and the husband replied ". . . but if you guys want to keep calling me and giving me stuff . . . ;"

⁴⁰ I view the Board's decision in *Brawly Beef, LLC*, 339 NLRB 476 (2003), as distinguishable. Thus, in said matter, an employee independently joined in the complaints of another employee and, as the former was bilingual, she became the "spokesperson" for the two. On said basis, the Board concluded, they acted concertedly. *Id.* at 478. There is no evidence to suggest that either Foley or Feathers acted or became the spokesperson for both.

that, becoming exasperated, Foley said that, if Respondent was "bothering" them, he could have their names removed from the call list; that the husband told Foley to do so if such is what he wanted; that Foley replied, saying he could have a note placed in the couple's file that they not be contacted for a few months; and that the husband said, "that's cool." Next, I find that, at the conclusion of his 90 minute sales presentation, Foley escorted the couple to Respondent's gifting department; that, in the couple's presence, at the gifting counter, Foley asked the gifting person to place a note in the customer's account file not to "bother them" for a while; that, hearing what Foley said, the husband became angered, saying he sensed "animosity" from Foley; that Foley said they shouldn't take what he did the wrong way, said, "I love you guys. You are a fantastic tour and I hope I was informative to you," and added that they should understand his job was to sell them credits and they both knew that; and, at this point, Rodney Hill approached, introduced himself, said he wanted to hear what had happened, and asked the couple to come with him. Next, I find that Hill spoke to the customers for 30 to 45 minutes and, before they left, asked them to prepare a "statement" for documentation of what had occurred; that he then ". . . went to our HR department to find out . . . what I should do, having two incidents in a row that day;" and that his inclination was to discharge Foley.

I further find that, later in the afternoon, Hill asked Foley to accompany him to Derek Milholland's office; that, inside the latter's office, Milholland told Foley he was being suspended; Foley asked why, and Milholland replied, mentioning the shirt tail incident and irritating a customer; that Foley replied he had followed his normal sales technique, and Milholland replied that the customers intended to write a letter; that Foley then noted that Feathers received no discipline for the morning incident and accused Milholland of "messing" with his pay; and that Milholland then said the reason for the suspension was to permit them to undertake an investigation. Finally, I find that, on September 11, Foley was summoned to Respondent's facility and met with Hill and Milholland in the latter's office; that Hill began by characterizing Foley as an "awesome" salesman and then informed him he was being discharged; that Foley, who was uncontroverted on this point, then asked why, and Hill replied, "multiple write-ups;" that Foley then said he had received just one written warning, and Hill then handed him two others, with the first based upon the shirt incident and the other based upon the sales incident; that the latter accused Foley of having a "run in" with the customers and of "belittling" them for not purchasing credits and noted that the customers had filed a written account of the incident; and that Hill testified that the reason for Foley's suspension and discharge was that Foley had taken his "anger," his "frustration" with having to tuck his shirt in, and his "disdain for authority" out on the customers, Respondent's guests, and "to me." He added, "I can't have that."

The General Counsel contends that Respondent's suspension and discharge of Foley were violative of Section 8(a)(1) of the Act, having been motivated by his protected concerted activities, including questioning the manner in which Respondent calculated commissions and the timeliness of the commission payments to the in-house sales representatives. Inasmuch as

Respondent contends that, rather than for his protected concerted activities, it initially suspended and then discharged Foley for legitimate business reasons, belittling a customer. I believe the legality of Foley's suspension and subsequent discharge must be analyzed utilizing the *Wright Line* analytical framework for mixed motive discharges. In this regard, pursuant to *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the General Counsel had the initial burden of establishing by a preponderance of the evidence that protected concerted activity was a "motivating factor" in Respondent's decision to suspend and discharge Foley. Thus, counsel for the General Counsel had the burden of showing that Foley engaged in protected concerted activities, that Respondent possessed knowledge of Foley's activities, and that Respondent demonstrated unlawful animus against her. Upon such a showing, the burden of persuasion shifted to Respondent to establish that it would have suspended and discharged Foley notwithstanding her protected concerted activities. *Detroit Newspapers*, 342 NLRB 1268, 1269–1270 (2004); *Belle of Sioux City*, 333 NLRB 98, 100–101 (2001); *Senior Citizens Coordinating Council*, 330 NLRB 1100, 1105 (2000).

Utilizing the foregoing approach, the record establishes that, in fact, Respondent harbored unlawful animus toward Foley regarding his protected concerted activities. Thus, as did all of Respondent's sales representatives, Foley regularly participated in their daily conversations, on the sales floor, concerning problems with their commission payments for OTP sales, including delays and mistakes in such payments—conduct, which, I have previously concluded, was privileged by Section 7 of the Act. Further, of course, Foley had joined in the questioning of Hill during the May 2 sales meeting. Next, the record evidence is that Respondent was well aware of Foley's protected concerted activities. Thus, Hill admitted he was aware Foley regularly discussed commission-related problems with other sales representatives on the sales floor and was "outspoken" when doing so. Also, of course, Hill knew that, during the May 2 sales meeting, Foley had participated in the questioning of him, regarding delays and other problems related to the receipt of commissions and had disciplined him for doing so. Finally, there is ample record evidence of Respondent's unlawful animus towards Foley. Initially, I have concluded that, on May 14, Respondent previously had unlawfully disciplined Foley for engaging in protected concerted activities and that the disciplinary warning notice contained palpable falsehoods and embellishments justifying the imposed discipline. Also, in this regard, on May 2, having become angered while listening to their concerted complaints about compensation, Hill effectively admitted threatening the assembled sales representatives with discharge, warning that, if they were dissatisfied with Respondent's terms and conditions of employment, rather than complaining, they should quit and find other jobs. Further, while testifying, Hill riled against what he perceived as Foley's "negativity," by which, I believe, he meant Foley's protected concerted activities. Thus, Hill specifically referred to Foley's daily "one on one" conversations, concerning such subjects as "decisions made by authority," company policies, and priority

for sales with his fellow sales representatives on the sales floor. On this point, in the May 14 disciplinary notice to Foley, Hill specifically required that the former "stop" expressing "open negativity" with other sales representatives on the sales floor. Moreover, during his discharge conversation with Hill and Milholland, when Foley asked Hill why he was being discharged, the latter replied "'multiple write-ups,'" which, presumably included the May 14 disciplinary notice—an admission Hill failed to deny. Accordingly, I believe that the General Counsel has established the existence of ample record evidence that Respondent suspended and subsequently discharged Gerald Foley because he engaged in protected concerted activities.

The burden of persuasion then shifted to Respondent to establish that it would have suspended and subsequently discharged Foley notwithstanding the existence of unlawful motivation. Hill's explanation for the suspension and discharge was that Foley was "... frustrated with having to tuck his shirt in. I believe that he took it out on guests of Wyndham and to me..." and "... I can't have that." In this regard, Foley himself admitted that the married customers became angered when, in their presence, he requested that the gifting person place a note, not to "bother them" for a while, in their file. Normally, it is not the province of an administrative law judge to second guess a management decision, and I am loath to do so especially when the alleged discriminatee admits the misconduct. However, on the basis of my assessment of the credibility of its witnesses and the record as a whole, I am convinced that Respondent has failed to meet its burden of persuasion. Thus, I initially note that Hill was an utterly mendacious witness, one not worthy of belief as to any aspect of his testimony, including his asserted rationale for discharging Foley. Moreover, while Hill characterized the married couple as being "extremely irate" over Foley's instruction to the gifting person, his testimony on this crucial point was uncorroborated. In this regard, while the married couple supposedly provided it with a "written account" of the incident, Respondent failed either to offer the document into the record or to explain its failure to do so. In these circumstances, the inference is warranted that, if the document exists, it does not corroborate Hill's assertion. Further, I have previously concluded that Charles Feathers fabricated his testimony that he overheard Foley's sales conversation with the married couple and that Foley called the husband "stupid" twice. In my view, rather than being offered for the truth, Respondent offered the calumny for the sole purpose of increasing the gravity of Foley's contretemps with the married couple, thereby bolstering Respondent's defense. In these circumstances, notwithstanding Foley's admitted conduct, when motive is of paramount concern, Respondent's demonstrable guile convinces me that I can not rely upon Hill's asserted justification for suspending and subsequently discharging Foley. Put another way, Respondent has failed to demonstrate that it would have suspended and then terminated Foley notwithstanding the existence of ample unlawful animus.⁴¹ Accordingly, I

⁴¹ I think Respondent seized upon an inconsequential incident to rid itself of an "outspoken" employee, the one most responsible for spreading "negativity" in the workplace, by which Rodney Hill meant Foley's penchant for interacting with other sales representatives regarding their

find that Respondent suspended and then discharged Foley because he engaged in protected concerted activities in violation of Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. On May 2, by inviting its employees to quit because they engaged in protected concerted activities, Respondent thereby threatened its employees with discharge and, thereby, engaged in acts and conduct in violation of Section 8(a)(1) of the Act.

3. On May 2, by orally promulgating an overly broad work rule prohibiting its employees from engaging in protected concerted activity, Respondent thereby engaged in acts and conduct in violation of Section 8(a)(1) of the Act.

4. On May 14, by giving its employee, Gerald Foley, a disciplinary notice because he engaged in protected concerted activities during a sales meeting on May 2, Respondent thereby engaged in acts and conduct in violation of Section 8(a)(1) of the Act.

5. On September 2, by suspending its employee, Gerald Foley, because he engaged in protected concerted activities, Respondent thereby engaged in acts and conduct in violation of Section 8(a)(1) of the Act.

6. On September 11, by discharging its employee, Gerald Foley, because he engaged in protected concerted activities, Respondent thereby engaged in acts and conduct in violation of Section 8(a)(1) of the Act.

7. Respondent's above-described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

8. Unless set forth above, Respondent engaged in no other unfair labor practices.

REMEDY

I have found that Respondent engaged in serious unfair labor practices within the meaning of Section 8(a)(1) of the Act. Accordingly, I shall generally recommend that Respondent be ordered to cease and desist from engaging in such acts and conduct. Specifically, I have found that Respondent unlawfully suspended and subsequently discharged its employee, Gerald Foley, because he engaged in protected concerted activities. Therefore, I shall recommend that Respondent be ordered to offer him immediate reinstatement to his former position of employment or, if said position no longer exists, to a substantially equivalent position, with no loss of seniority or any other rights and privileges previously enjoyed and to make him whole for any loss of earnings and other benefits, computed on a quarterly basis from September 2, 2009, to the date of a proper offer of reinstatement to him, less any interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Further, I shall recommend that Respondent be ordered to expunge from its records any references to its unlawful actions against Foley, including its May 14 disciplinary notice to him and its suspension and termination of him, and to inform him that such has been done. Finally, I shall recommend that Respondent be ordered to post notices to its employees, advising them of its unfair labor practices and the steps it is required to take to remedy them.

[Recommended Order omitted from publication.]

terms and conditions of employment—i.e., engaging in protected concerted activities.