

**Nos. 06-1173 & 06-1239**

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**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**BEVERLY HEALTH & REHABILITATION SERVICES, INC. and  
BEVERLY ENTERPRISES - PENNSYLVANIA, INC.**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

**ON PETITION FOR REVIEW AND CROSS-APPLICATION  
FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

BEVERLY HEALTH & REHABILITATION	:	
SERVICES, INC., and BEVERLY ENTERPRISES-	:	
PENNSYLVANIA, INC.	:	Nos. 06-1173 &
	:	06-1239
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Petitioner/Cross-Respondent	:	
	:	Board Case Nos.
v.	:	6-CA-28276, et al.
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NATIONAL LABOR RELATIONS BOARD	:	
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	:	
Respondent/Cross-Petitioner	:	
	:	

CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1) of this Court, counsel for the National Labor Relations Board (“the Board”) certify the following:

(A) *Parties and Amici*: Beverly Health & Rehabilitation Services, Inc., and Beverly Enterprises-Pennsylvania, Inc., are the petitioners before the Court and were the respondents before the Board. The Board is the respondent before this Court; its General Counsel was a party before the Board.

(B) *Rulings Under Review*: The case involves a petition for review of a Decision and Order of the Board issued May 8, 2006, and reported at 346 NLRB No. 1111.

(C) *Related Cases:* This case has not previously been before this Court or any other court. *Beverly Health & Rehabilitation Services*, 335 NLRB 635 (2001), *enforced in part* 317 F.3d 316 (D.C. Cir. 2003) was a related case involving the same Beverly facilities as those in the instant case.

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Dated at Washington, DC  
this 9th day of March, 2007

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ON PETITION FOR REVIEW AND CROSS-APPLICATION  
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BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of Beverly Health & Rehabilitation Services, Inc., and Beverly Enterprises - Pennsylvania, Inc.,<sup>1</sup> to review, and the cross-application of the National Labor Relations Board (“the

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<sup>1</sup> It is undisputed that Beverly Health & Rehabilitation Services, Inc., its regional offices, individual facilities, and subsidiaries including Beverly Enterprises – Pennsylvania Inc., constitute a single employer (collectively, “Beverly”).

Board”) to enforce, a Decision and Order of the Board. The Board’s Order issued on May 8, 2006, and is reported at 346 NLRB No. 111. (A22-61.)<sup>2</sup> The Board’s Order is final with respect to all parties.

The Board had jurisdiction over the proceeding below under Section 10(a) of the National Labor Relations Act (29 U.S.C. §§ 151, 160(a)) (“the Act”), which empowers the Board to prevent unfair labor practices. This Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), which provides that petitions for review of Board orders may be filed in this Court, and authorizes the Board to cross-apply for enforcement. Beverly filed its petition for review on May 18, 2006. The Board filed its cross-application for enforcement on June 26, 2006. Those filings were timely because of the Act imposes no time limits on such filings.

### **STATEMENT OF THE ISSUES PRESENTED**

1. Whether the Board is entitled to summary enforcement of its uncontested findings that Beverly committed numerous violations of Section 8(a)(1), (3), and (5) of the Act.

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<sup>2</sup> “A” references are to the joint appendix. “Br” references are to Beverly’s brief. References preceding a semicolon are to the Board’s findings. Those following are to the supporting evidence.

2. Whether substantial evidence supports the Board’s finding that Beverly violated Section 8(a)(3) and (1) of the Act by suspending and discharging employee John Wilson; giving a disciplinary warning to employee Leatha Smith; discharging employees Joyce Kircher, Rose Girdany, Michelle Weaver, and Ruth Ann Pilarski; and reprimanding, suspending, and discharging employee Cheryl Danner, all in retaliation for their union activity.

3. Whether Beverly’s numerous unfair labor practices warrant a corporatewide remedy, even absent court affirmance of all of the contested violations.

## **RELEVANT STATUTORY PROVISIONS**

All relevant statutory provisions are reproduced in the Addendum to Beverly’s brief.

## **STATEMENT OF THE CASE**

### **I. THE BOARD’S FINDINGS OF FACT**

#### **A. Prior Litigation**

Beverly owns and operates nursing homes throughout the United States. Four prior Board cases against Beverly involved consolidated unfair labor practice proceedings arising from Beverly’s unlawful conduct at various nursing homes. In *Beverly California Corp.* (“*Beverly I*”), the Board found that Beverly committed over 130 unfair labor practices at 33 facilities. 310 NLRB 222 (1993). The

Second Circuit enforced the Board's order with respect to all but three violations.

*Torrington Extend-A-Care Employee Ass'n v. NLRB*, 17 F.3d 580 (1994).

In *Beverly California Corp.* (“*Beverly II*”), the Board found that Beverly committed approximately 78 violations of the Act at 17 facilities. 326 NLRB 153 (1998). In *Beverly California Corp.* (“*Beverly III*”), issued the same day, the Board found that Beverly committed another 28 unfair labor practices at 9 facilities. 326 NLRB 232, 237 (1998). *Beverly II* and *III* were consolidated for review before the Seventh Circuit, which affirmed all but 3 of the unfair labor practice findings. *Beverly California Corp. v. NLRB*, 227 F.3d 817 (7th Cir. 2000) (“*Beverly II-III*”), *cert. denied*, 533 U.S. 950 (2001).

In *Beverly Health & Rehabilitation Services, Inc. & Beverly Enterprises-Pennsylvania, Inc.* (“*Beverly IV*”), the Board found that Beverly committed nearly 100 unfair labor practices at 20 facilities in Pennsylvania. 335 NLRB 635 (2001). This Court affirmed all but 2 of the unfair labor practice findings. *Beverly Health & Rehabilitation Services, Inc. v. NLRB*, 317 F.3d 316 (D.C. Cir. 2003).

## B. The Instant Case

This case is known as “*Beverly V.*” It involves over 40 unfair labor practices at 19 of the 20 organized Beverly facilities in Pennsylvania,<sup>3</sup> all of which took place during approximately the same time period and at the same facilities as those that were the subject of litigation in *Beverly IV.* (A22, A40, n.4.)<sup>4</sup> At each of those facilities, employees were represented by Service Employees International Union (“the Union”) and one or more of its affiliates.<sup>5</sup>

The collective-bargaining agreements at 18 of the 20 organized facilities expired on November 30, 1995 and the agreements at Grandview and Lancaster

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<sup>3</sup> The facilities are Blue Ridge Haven Convalescent Center (“Blue Ridge”), Caledonia Manor (“Caledonia”), Camp Hill Care Center (“Camp Hill”), Carpenter Care Center (“Carpenter”), Clarion Care Center (“Clarion”), Fayette Health Care (“Fayette”), Franklin Care Center (“Franklin”) Grandview Health Care (“Grandview”), Haida Manor (“Haida”), Beverly Manor of Lancaster (“Lancaster”), Meadville Care Center (“Meadville”), Meyersdale Manor (“Meyersdale”), Beverly Manor of Monroeville (“Monroeville”), Mt. Lebanon Manor (“Mt. Lebanon”), Murray Manor (“Murray”), Beverly Manor of Reading (“Reading”), Richland Manor (“Richland”), William Penn Nursing Center (“William Penn”), and York Terrace Nursing Center (“York”).

<sup>4</sup> The complaint in the instant proceeding issued during the litigation before the Board of the allegations in *Beverly IV.* The Board General Counsel’s motion to consolidate the two cases was denied, and the charges herein were litigated in this separate proceeding. (A22, A40 n.4.)

<sup>5</sup> The affiliates are District 1199P, Service Employees International Union, CLC (“District 1199P”); Service Employees International Union, Local 585, CLC (“Local 585”); and Pennsylvania Social Services Union Local 668 a/w Service Employees International Union (“Local 668”). (A 22, A23 n.7; A39.)

expired on December 31, 1994. (A22, A40 and n.3.) Most of the unfair labor practices herein occurred after the expiration of those agreements and a 3-day strike that took place at 15 facilities from April 1 to April 4, 1996. Beverly's violations include numerous coercive acts such as antiunion threats, restrictions, and surveillance; discriminatory discharges, suspensions, and discipline; and widespread violations of its bargaining obligations, such as withdrawals of recognition from certified unions, refusals to provide unions with bargaining information, and unilateral changes in working conditions without bargaining.

Beverly fails to contest 35 of the Board's unfair labor practice findings, limiting its challenges to the findings that it unlawfully discharged, suspended, or disciplined seven union supporters, and the Board's issuance of a corporatewide remedial order. In order to avoid repetition and present a narrative limited to the facts underlying the contested violations, those facts are summarized below in the relevant sections of the Argument.

## **II. THE BOARD'S CONCLUSIONS AND ORDER**

Based on the facts and arguments discussed below, the Board (Chairman Battista and Members Liebman and Schaumber) found that Beverly committed numerous violations of Section 8(a)(1), (3), and (5) of the Act (29 U.S.C. § 158(a)(1),(3), and (5)). (A22-33, 40-58.) To remedy those violations, the Board

issued a corporatewide order requiring Beverly to cease and desist from the unfair practices found and from violating the Act in any other manner. (A33-35.)

Affirmatively, the Board's Order requires Beverly to offer reinstatement and back pay to eight employees it unlawfully discharged; make whole eight employees it unlawfully suspended and one employee whose work hours it unlawfully reduced; and remove from its files any references to its unlawful discharges, suspensions, and disciplinary actions. (A35.)

The Board's Order further requires Beverly to recognize and bargain upon request with Local 585 at Grandview and District 1199P at Mt. Lebanon, to bargain with and provide bargaining information to the Union and its affiliated local unions at all 19 facilities involved herein, and to rescind all its unlawful unilateral actions and make whole all employees adversely affected by such actions. (A35.) The Order also requires Beverly to post one of two versions of a remedial notice to employees at each of its facilities: one for the 19 facilities directly involved in this case and at the offices overseeing them, and another for each of Beverly's other facilities and corporate offices nationwide. (A36.)

### **SUMMARY OF ARGUMENT**

The Board is entitled to summary enforcement of its uncontested findings that Beverly committed approximately 35 unfair labor practices in violation of Section 8(a)(1), (3), or (5) of the Act (29 U.S.C. § 158(a)(1), (3), and (5)). Those

findings remain as strong evidence supporting the seven unfair labor practice findings that Beverly challenges.

Substantial evidence supports the Board's finding that Beverly violated Section 8(a)(3) of the Act by discharging, suspending, or reprimanding seven employees because of their union activities. It is undisputed that each of the seven employees was a known union activist and that Beverly was hostile to union activity. The Board was warranted in rejecting Beverly's contentions that it met its burden of showing that it would have taken those adverse actions even in the absence of union activity.

There is no merit to Beverly's contention that the corporatwide scope of the Board's remedial cease-and-desist order should be remanded to the Board for reconsideration in the event that the Court declines to affirm an unspecified number of the seven contested unfair labor practice findings. The Board did not base its corporatwide order on the actions of local facility officials against those seven employees. Instead, it relied on the far-reaching unlawful actions of high-ranking corporate and regional officials in this case, as well as prior Beverly cases, in which this and other courts have repeatedly approved corporatwide relief based on similar unlawful conduct.

## ARGUMENT

### I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS NUMEROUS UNCONTESTED UNFAIR LABOR PRACTICE FINDINGS

Beverly does not contest most of the Board’s findings that it committed numerous violations of its employees’ statutory rights. Those findings include the following violations.

#### Section 8(a)(1) Violations<sup>6</sup>

Beverly does not contest the Board’s findings that it interfered with, restrained, and coerced its employees in the exercise of their statutory rights to engage in union activity at eight of its facilities, as follows:

- Haida Assistant Nursing Director Nancy Piatek told job applicant Margaret Moore that Beverly would not hire her unless she agreed not to cross a picket line in the event of a strike. (A22, 23-24, 41, 59.)
- Franklin Assistant Nursing Director Loretta Bosworth told employee Rickie Piper that Beverly had and would reduce the work hours of employees who had participated in a recent strike. (A22 n.5, A44.)

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<sup>6</sup> Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice for an employer to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7 [of the Act (29 U.S.C. § 157)],” including the “right to self-organization, to form, join, or assist labor organizations [and] to bargain collectively through representatives of their own choosing . . . .”

- Meyersdale Administrator Mike Walker told employee Linda Cochran that she would not have a job if she participated in a strike. (A22 n.13, A40-41.)
- Murray Supervisor Beverly Magill told part-time employee Jeri Tagg that she had made the wrong choice by participating in a strike and that Beverly would not employ her full time because she had participated. (A22, 33, 41.)
- Mt. Lebanon Administrator Anthony Molinaro told a group of employees that if they went on strike they would never get their jobs back and never be allowed back in the facility. (A22, 41.)
- William Penn Staff Development Director Hope Brubaker told employees that off-duty employees were not allowed in the building if they were union members. (A22, 41.)
- Meadville Assistant Nursing Director Judy Coleman instructed employees Leatha Smith and Joyce Kircher to remove their prounion insignia. (A22, 42.)
- Meadville Supervisor Wilma Ishman-Heime told employee Julie Snyder that certain rules of conduct applied only to employees who had engaged in a strike. (A22, 42.)
- Lancaster Administrator Larry Ayers told employees that they had to remove all union insignia. (A22, 42.)

- Grandview officials announced and conducted an unlawful poll among employees to determine if they wanted to rid themselves of their union. (A33 and n.37, A54.)
- Haida management engaged in unlawful surveillance by videotaping picketing employees. (A22, A23 n.14, A41-42.)
- York Terrace Nursing Director Carolyn Nelson suspended employees Antoinette Bainbridge, Ann Marie Daubert, Tina Brown, Shannon Flickinger, and Samantha Yohe because they engaged in protected concerted activity. (A22, A24 n.15, 52-53.)

#### Section 8(a)(3) and (1) Violations<sup>7</sup>

Beverly does not contest the Board’s findings that it unlawfully retaliated against its employees because of their union activity at eight of its facilities, as follows.

- Officials Sedlemyer and Piatek discharged Haida employee Margaret Moore. (A22, 45.)

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<sup>7</sup> Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) prohibits employer “discrimination in regard to hire or tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization.” A violation of Section 8(a)(3) or (5) of the Act results in a “derivative” violation of Section 8(a)(1). *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

- Director Ayers suspended and discharged Lancaster employee Charles Williams. (A33, 50-51.)
- Company officials suspended York employee Susan Spiess. (A22, 25-26, 53-54.)
- Company officials reduced the work hours of Franklin employee Rickie Piper. (A22, 44.)
- Company officials refused to pay Meyersdale employees Aimee Miller and Sheila Oakes for the time that it suspended them pending its investigation of charges of misconduct that was later found not to have occurred. (A22, 46.)
- Officials Stuck and Weaver refused to accommodate William Penn employee LuAnn Riden's request to switch work locations based on her pregnancy. (A22, 49.)
- Supervisor Magill ceased to accommodate Murray employee Jerri Tagg's scheduling requirements and gave her a written disciplinary warning. (A22, 48.)
- Nursing Director Forney gave Monroeville employee Josie Belice a written disciplinary writeup. (A22, 42-43.)

Section 8(a)(5) and (1) Violations<sup>8</sup>

Beverly does not contest the Board's findings that it refused to bargain in good faith with the Union or its affiliates at 15 facilities by taking the following actions.

- Company officials withdrew recognition from and refused to bargain with Local 585 at Grandview, then refused to make required deductions and remittances or to accept and process grievances there. (A22, A31-32 and n.35, A54-55.)
- Company officials withdrew recognition and refused to bargain with District 1199P at Mt. Lebanon. (A22, 32, 55.)
- Company officials refused to provide District 1199P with relevant requested bargaining information regarding newly-hired employees at Franklin, Meadville, Murray, Monroeville, Clarion, Fayette, Meyersdale, Mt. Lebanon, Richland, William Penn, Reading, and Carpenter. (A2, 29-30, and n. 29, A55-56.)
- Company officials refused to bargain at Fayette over the disciplinary policy regarding refusals to work overtime. (A22, 33.)

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<sup>8</sup> Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of its employees."

- Company officials refused to provide the unions with relevant information necessary to process employee grievances at Caledonia and Meadville. (A22, 56.)
- Company officials refused to respond to union requests for information regarding the employees at Clarion, Franklin, Haida, Meadville, Murray, Richland, William Penn, Lancaster, Caledonia, Camp Hill, and Blue Ridge unless the unions agreed to pay the costs of producing that information. (A22, A30 and n.31, A56.)
- Company officials refused to provide the unions with information regarding working conditions and grievances at Richland, Caledonia, and Meadville. (A22, 55, 56.)
- Company officials unilaterally continued the health care coverage of all striking employees at 15 facilities during the 3 days they were out during the April 1996 strike and deducted the premiums from their paychecks. (A22, 29.)
- Company officials unilaterally began to enforce a previously dormant policy at Monroeville requiring a doctor's excuse from employees who "called off" sick on weekends. (A22, 30, 57.)
- Company officials unilaterally imposed new policies and practices at Franklin regarding job performance, discipline, weekend "call offs," and vacations. (A22, 57.)

- Company officials unilaterally terminated the established practice at Murray of allowing an employee to have another employee work one of his shifts. (A22, 57.)
- Company officials unilaterally terminated the established practice at Richland of routinely providing District 1199P with employee work schedules and seniority lists. (A22, 30, 57.)
- Company officials unilaterally terminated the established practices at William Penn of meeting with District 1199P at the second step of the grievance procedure and of allowing employees to dress casually on Fridays. (A22, A32-33 n.36, A57.)
- Company officials unilaterally reduced work hours at Lancaster, and imposed a new timekeeping system, changed the work scheduling, and filled certain positions from outside the facility rather than posting the openings. (A22, 32, 58.)
- Company officials unilaterally terminated the established practice at Caledonia of allowing employee input regarding overtime assignments and time off/holiday scheduling, and unilaterally instituted a new attendance policy. (A22, 58.)

By not contesting the foregoing unfair labor practice findings, Beverly has waived any defenses to them. The Board is therefore entitled to summary

affirmance of those findings and enforcement of the related portions of the Board's Order. *Flying Food Group, Inc. v. NLRB*, 471 F.3d 178, 181 (D.C. Cir. 2006).

Moreover, Beverly's failure to contest these findings does not remove them from the case because they remain relevant as "strong direct evidence of [an employer's] hostility toward unionization." *Ark Las Vegas Restaurant Corp. v. NLRB*, 334 F.3d 99, 105 n.2 (D.C. Cir. 2003) (citations omitted.) Thus, the Court may "draw upon [the uncontested] findings to put the contested . . . firing[s] . . . into proper perspective." *E.C. Waste, Inc. v. NLRB*, 359 F.3d 36, 41 (1st Cir. 2004).

**II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT BEVERLY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY SUSPENDING AND DISCHARGING EMPLOYEE WILSON; GIVING A DISCIPLINARY WARNING TO EMPLOYEE SMITH; DISCHARGING EMPLOYEES KIRCHER, GIDARNY, PILARSKI, AND WEAVER; AND REPRIMANDING, SUSPENDING, AND DISCHARGING EMPLOYEE DANNER, ALL IN RETALIATION FOR THEIR UNION ACTIVITY.**

**A. The Act Protects Employees from Discharge, Suspension, and Other Discipline in Retaliation for their Union Activity**

Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)), as noted above (p.12 n.7), prohibits employer "discrimination in regard to hire or tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization." Accordingly, an employer violates Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by discharging or taking other adverse employment actions against employees for engaging in union activity. *NLRB v.*

*Transportation Management Corp.*, 462 U.S. 393, 397-98 (1983); *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 125 (D.C. Cir. 2000).

The legality of an employer's adverse action generally depends on its motivation. The Board's General Counsel has the burden of showing that an employee's statutorily protected activity was a substantial or motivating factor in the adverse action. Once the General Counsel meets his burden, the Board will find a violation of the Act unless the employer shows, by a preponderance of the evidence, as an affirmative defense, that it would have taken the same action even in the absence of the protected activity. *Ark Las Vegas Restaurant Corp.*, 334 F.3d at 104; *Traction Wholesale Center Co. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000).

The Board can infer unlawful motivation from circumstantial as well as direct evidence. See *Waterbury Hotel Management LLC v. NLRB*, 314 F.3d 645, 651 (D.C. Cir. 2003) (citing cases); accord *Vico Products Co., Inc. v. NLRB*, 333 F.3d 198, 211 (D.C. Cir. 2003). Such evidence includes knowledge of the employee's union activity, an atmosphere of hostility toward union activity as revealed by the commission of other unfair labor practices, and the timing of the employer's adverse action.<sup>9</sup> Unlawful motivation is also demonstrated by the

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<sup>9</sup> *Ark Las Vegas Restaurant Corp. v. NLRB*, 334 F.3d 99, 104 (D.C. Cir. 2003); *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 126 (D.C. Cir. 2001); *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 735 (D.C. Cir. 2000); *Power, Inc. v. NLRB*, 40 F.3d 409, 418 (D.C. Cir. 1994).

employer's failure to fully and fairly investigate the purported conduct that it asserts as grounds for the discharge,<sup>10</sup> its departure from its own established policies and practices in order to impose the discharge or discipline,<sup>11</sup> its according of disparate treatment to employees based on their union activities,<sup>12</sup> and a contrived or implausible explanation of its action.<sup>13</sup>

The Board's findings of fact regarding motivation are conclusive if supported by substantial evidence on the record as a whole. *See* Section 10(e) of the Act (29 U.S.C. § 160(e)). A reviewing court "may [not] displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Federated Logistics & Operations v. NLRB*, 400 F.3d 920, 923 (D.C. Cir. 2005). Rather, the Board's finding must be upheld if "it would have been possible for a reasonable jury to

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<sup>10</sup> *Valmont Industries, Inc. v. NLRB*, 244 F.3d 454, 466 (5th Cir. 2001); *Cumberland Farms, Inc. v. NLRB*, 984 F.2d 556, 560 (1st Cir. 1993); *NLRB v. Advance Transp. Co.*, 979 F.2d 569, 575 (7th Cir. 1992).

<sup>11</sup> *FiveCap, Inc. v. NLRB*, 294 F.3d 768, 778 (6th Cir. 2002); *NLRB v. McClain of Georgia, Inc.*, 138 F.3d 1418, 1424 (11th Cir. 1998).

<sup>12</sup> *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 230 (D.C. Cir. 1995); *NLRB v. General Fabrications Corp.*, 222 F.3d 218, 226 (6th Cir. 2000).

<sup>13</sup> *Davis Supermarket v. NLRB*, 2 F.3d 1162, 1170 (D.C. Cir. 1993).

each the Board's conclusion." *Allentown Mack Sales & Services, Inc. v. NLRB*, 522 U.S. 359, 366-67 (1998); *Ark Las Vegas Restaurant Corp.*, 334 F.3d at 103. The Board's application of a legal standard to the particular facts of a case is entitled to similar deference; it must be affirmed if "supported in the record and reasonably based in law." *Printing Pressman Local 13 v. NLRB*, 598 F.2d 267, 272 (D.C. Cir. 1979).

**B. Beverly Discriminated Against Employees Wilson, Smith, Kircher, Girdany, Weaver, Pilarski, and Danner Because of their Union Activity**

The only contested issues in this case involve the discharge and/or discipline of seven Beverly employees. The Board applied the analysis set forth above to each of those actions and found that factors such as the employee's union activity, Beverly's knowledge of and hostility toward such activity, and other factors, such as timing, established that antiunion considerations were a motivating factor in each of Beverly's actions. In its brief, Beverly does not dispute these findings.

Beverly's sole contention is that it met its burden of showing that it would have taken those actions even absent the employee's protected union activity. As shown below, however, the Board properly rejected those contentions as unsupported by credited evidence or applicable precedent.

### **1. Beverly unlawfully discharged union activist Wilson**

John Wilson was a 10-year employee who worked at Monroeville from 1986 until Beverly fired him on September 27, 1996. (A43; 311.) He was a known union activist, serving as vice president of the Union's local chapter, frequently filing grievances with Beverly officials on behalf of employees, and participating in the April 1-4 strike. (A43; 312-313.) As shown from the numerous uncontested unfair labor practice findings set forth above, Beverly repeatedly demonstrated its hostility to such activity.

Beverly claims (Br 18-22, 41-43) that it lawfully fired Wilson for resident neglect and falsification of records because he failed on one occasion to administer a medication to a resident and failed to record that fact in the facility's books. The facts surrounding Wilson's discharge are as follows. On September 27, Nursing Director Bonnie Forney told Wilson he was being discharged because of a claim by a resident named Charlotte Feldmeier that, 8 or 9 days earlier, Wilson had ignored her requests to give her medication in pill form, and instead had given it crushed in applesauce. Forney handed Wilson a disciplinary form, which she had filled out prior to meeting with Wilson. (A91-96, 176-77, 316, 324-326.) The Board reasonably found that this purported reason for Wilson's discharge was a pretext.

First, Beverly's reliance on this alleged incident of resident neglect is undermined by its failure to investigate the facts behind Wilson's purported action. It is well established that an employer's reliance on an incident allegedly supporting a discharge is undermined by its failure to conduct a full and fair investigation of that incident. *See Firestone Textile Co.*, 203 NLRB 89, 95 (1973), and cases cited. *Accord Guardian Automotive Trim, Inc.*, 340 NLRB 475, 483 (2003). The "full and fair" standard is not satisfied by an "inadequate" or "slipshod" investigation. *Sociedad Espanola de Auxilio de Puerto Rico v. NLRB*, 414 F.3d 158, 163 (1st Cir. 2005). This is particularly true where the employer's investigation is one-sided and does not afford the employee a reasonable opportunity to explain the alleged incident. *Valmont Industries, Inc. v. NLRB*, 244 F.3d 454, 466 (5th Cir. 2001) (citation omitted); *Abbey's Transp. Services, Inc. v. NLRB*, 837 F.2d 575, 582 (2d. Cir. 1998) (employer's failure to allow employee to explain the incident resulting in his discharge "alone raises a serious question whether [it] was attempting to find a plausible pretext to discharge him").

Here, Nursing Director Forney made no effort to get Wilson's version of events regarding the alleged incident. Instead, she filled out a disciplinary action form prior to meeting with Wilson, based on the reports by resident Feldmeier and two employees who had spoken with Feldmeier. Even when Forney met with Wilson, she failed to ask him about the incident, but instead handed the form to

him, and told him he was fired because of the alleged incident. (A43; 313-316.)

Had Forney bothered to obtain Wilson's version of the facts, she might have learned, as Wilson testified, that he had no recollection of an incident involving Feldmeier and that he would have recorded it if he had failed to give her the medication. (A43; 315.)<sup>14</sup>

Moreover, the credited evidence fails to support a finding that the alleged incident reported by Feldmeier even took place. As the administrative law judge observed (A43), the record shows that Feldmeier was "not in full control of her faculties." Employee Josephine Belice, who cared for Feldmeier for an extended period, specifically testified that she had periods of memory lapses and was often confused as to whether someone had been in her room. (A28 n.26, A43; 322-323.) And while Beverly (Br 41 n.5) cites other testimony indicating that Feldmeier, although suffering from Lou Gehrig's disease, was alert and "very oriented," the Board properly concluded (A28-29 n.26) that it is insufficient to rebut the judge's finding of a pretext based on the summary discharge of a 10-year employee without affording him an opportunity to explain.

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<sup>14</sup> Beverly claims (Br 20-24) that Forney explained the reports of the incident in a telephone call earlier that day. However, Forney's notes and testimony contain no details regarding her statements to Wilson. And Wilson's testimony is only that she referred to an unspecified incident. (A313.)

In addition, Beverly's claim ignores its obligation to rebut the General Counsel's prime facie case after the burden has passed. See pp. 16-17, above. As the Board noted (A28-29 n. 26), that obligation made it incumbent upon Beverly to demonstrate that it treated Wilson the same as other employees, by presenting evidence that it had discharged employees because of a patient complaint without hearing the employee's side of the story. Beverly cites no evidence and makes no claim that it followed such a practice. In short, Beverly has simply failed to rebut the Board's finding (A43) that it "seized upon Feldmeier's statements as a pretext" to rid itself of a union activist.

Beverly errs in its reliance (Br 21-22) on the fact that Wilson "did not have a spotless employment record" prior to the alleged incident. His two previous writeups involved minor incidents: his refusal to remove a union hat a few days before the onset of the April strike, and a remark about a Monroeville official that he intended to be taken as a joke. (A43; 317-21; 176-181.)

Moreover, the latter writeup is irrelevant. It issued more than a year before the alleged incident for which he was discharged, and is covered by Beverly's policy of disregarding writeups after one year. (A43; 160, 180-81, 310, 321.) Other writeups cited by Beverly (Br 22) were not mentioned in Wilson's final writeup and could not have contributed to the discharge decision. (A43 n. 11.)

Thus, Beverly has failed to show that it relied in good faith on any past misconduct.

## **2. Beverly unlawfully gave a disciplinary warning to union activist Smith**

Leatha Smith was a Meadville employee with 17 years of service. She had worked as a certified nursing assistant (“CNA”) from August 4, 1979, without receiving any disciplinary action until Beverly gave her a written disciplinary warning in April 1996. (A45; 188-89, 193-194, 197.) Smith was a known union activist, who wore a union pin at work from 1992 until late 1996. She served as Local 585’s representative to the Crawford County Labor Council and also actively participated in the April 1996 strike, picketing at the facility. (A45; 189-93.)

Beverly claims (Br 11-12, 29-32) that it lawfully imposed the disciplinary warning because Smith allegedly failed on one occasion to respond to a patient’s call bell. More specifically, several weeks after the April 1-4 strike, Beverly gave Smith her first-ever written reprimand. The reprimand was signed by Nursing Director Walters, who told Smith that her alleged April 22 failure to answer a bell was based on the statements of two fellow employees, whom she did not identify. Walters had completed the reprimand form before she met with Smith and did not ask Smith for an explanation of the incident. (A28 n.26, A45; 61-65, 101-02, 188-89, 196, 208-09, 213-17.)

These circumstances fully support the Board's finding (A28 n.26, 45) that Beverly failed both to conduct a full and fair investigation of the alleged offense and to prove that the offense actually occurred. Instead, Walters based her action on the reports of two unidentified employees, who turned out to be new hires with limited track records. (A45.)<sup>15</sup> In addition, Walters did not ask Smith for an explanation of the alleged offense. Instead, she presented Smith with a virtual *fait accompli* in the form of a written reprimand that she had completed the night before. (A45; 215-16.) Thus, the Board reasonably found (A28-29 n.26, A45) that Beverly summarily acted on reports of new hires to rid itself of a longtime employee with a spotless record on the basis of an offense it has not shown she committed.

There is no merit to Beverly's contention (Br 11-12, 30-32) that Walters's investigation lawfully met established standards because she followed her normal procedure and gave Smith an opportunity to "explain" in the "comments" section of the disciplinary form she handed her. The failure to ask for an explanation is

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<sup>15</sup> Employee Kelly DeMarches had worked at the facility for 3 months and employee John Gilchrist for only 1 month. (A213-19.) Unlike Smith, they did not support the April 1- 4 strike and worked during it. (A218.) Beverly's contention (Br 30 n.3) that the inexperience of these 2 employees is irrelevant from a "training" point of view misses the Board's point: Walter's eagerness to accept the word of relatively unknown new hires regarding an exemplary 17-year employee.

not cured by soliciting comments regarding discipline already imposed. And, as the Board observed (A29 n. 26), there is no evidence that Smith was ever informed that adding a comment on the completed form could have any influence over already imposed discipline.

### **3. Beverly unlawfully discharged union activist Kircher**

Joyce Kircher was a 23-year employee who worked at Meadville from 1973 until Beverly fired her on April 22, 1996. (A45-46; 198-99, 202-04.) She was a known union activist, who served as Local 585 chapter president for the last 5 years preceding her discharge. Kircher attended grievance meetings with the Meadville administrator and participated in the picketing of the facility during the April 1-4 strike. (A45-46; 199-200, 202-03.)

On April 19, a reporter for the local Meadville newspaper telephoned Kircher at her home and questioned her about the strike. The following day, the newspaper carried an article accurately quoting Kircher as saying that, since the arrival of striker-replacement workers, patient care at the facility was not accomplished in a timely manner and the overall quality of care had “gone downhill.” On April 22, Beverly fired Kircher because of her statement to the reporter. (A24, 45-46; 103, 202-05.) As shown below, Beverly has failed to show that Kircher’s remarks were a legitimate basis for firing her.

The right of employees to engage in protected activities includes the right “to improve their lot as employees through channels outside the immediate employee-employer relationship.” *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66 (1967). *Accord Stanford Hosp. & Clinics v. NLRB*, 325 F.3d 334, 343 (D.C. Cir. 2003). In *NLRB v. Electrical Workers Local 1229*, 346 U.S. 464, 466-67, 476 (1953) (*Jefferson Standard*), however, the Supreme Court upheld a Board ruling denying reinstatement to broadcasting technicians who distributed handbills to the public disparaging the quality of programming by their employer. The decision rested on the fact that the handbills made no reference to the union, the current labor controversy between the union and employer, or to their concurrent collective-bargaining negotiations. Instead, the Court found, in agreement with the Board, that the handbills “attacked public policies of the Company [regarding ‘finance and public relations’] which had no discernible relation to [the labor] controversy” that divided the parties, who had reached impasse over the arbitration of discharges.

Since *Jefferson Standard*, the Board has repeatedly made clear that that decision does not target nonmalicious employee communications to third parties regarding terms and conditions of employment, even if the employer might find them offensive. Indeed, as the Board here noted (A46), “[i]n determining whether an employee’s communication to a third party constitutes disparagement of the

employer or its product, great care must be taken to distinguish between disparagement and the airing of what may be highly sensitive issues . . . [for] ‘absent a malicious motive’ an employee’s right to appeal to the public is not dependent on the sensitivity of [his employer] to his choice of forum.” *See Allied Aviation Serv. Co. of New Jersey, Inc.*, 248 NLRB 229, 232 (1980). *Accord NLRB v. Lummus Indus., Inc.*, 679 F.2d 229, 234 (11th Cir. 1982); *Blue Circle Cement Co., Inc. v. NLRB*, 41 F.3d 203, 211 (5th Cir. 1994); *Mohave Electric Coop., Inc. v. NLRB*, 206 F.3d 1183, 1189 (D.C. Cir. 2000). Thus, criticism of employer operations to third parties such as that at issue here can constitute protected activity. *See, for example, Delta Heath Center, Inc.*, 310 NLRB 26, 43 (1993) (employees engaged in protected conduct when they sent a letter to a government agency that was one of the employer’s principal sources of funding, containing “stinging criticism” of management), *enforced mem.*, 5 F.3d 1493 (5th Cir. 1993); *Community Hospital of Roanoke Valley, Inc. v. NLRB*, 538 F.2d 607, 610 (4th Cir. 1976) (nurse’s statements on television news broadcast were not unprotected disloyalty, despite expression of dissatisfaction with hospital policies and staffing, insinuating patient care to be unsafe).

Consistent with these principles, the Board has established a two-part test, under which communication to a third party is protected by the Act if it is related to an ongoing labor dispute and is “not so disloyal, reckless or maliciously untrue

as to lose the Act's protection." *American Golf Corp.*, 330 NLRB 1238, 1240 (2000), *affirmed sub nom. Jensen v. NLRB*, 86 Fed Appx. 305, 2004 WL 78160 (9th Cir. 2004). *Accord Endicott Interconnect Technologies, Inc. v. NLRB*, 453 F.3d 532, 537 (D.C. Cir. 2006).

Here, Kircher's comments are clearly protected activity under that test. First, the Board found, and Beverly does not dispute, that her comments were related to a labor dispute which continued after the strike. And that dispute included the "central issue" of "Beverly's retention of replacement workers in positions [previously] occupied by many of the strikers." (A46.)

Moreover, Kircher's words were neither so disloyal, reckless, or maliciously untrue as to lose the Act's protection. As the Board observed (A46), there is no evidence that she "acted with malicious intent or . . . knowingly gave false statements." Indeed, Kircher did not initiate any malicious or disloyal action to injure Beverly's reputation, but simply responded to the reporter's initiated phone call and questions. In addition, Kircher's responses to the questions were neither reckless nor untrue. She simply stated the plausible opinion that the quality of care administered by experienced employees had not been maintained by newly-hired striker replacements.

Beverly errs in its reliance (Br 33-34) on *Endicott Interconnect Technologies, Inc. v. NLRB*, 453 F.3d 532, 537 (D.C. Cir. 2006), a case readily

distinguishable on its facts. There, the Court found both disloyal and damaging an employee's public accusation of "gaping holes" in the employer's business and "voids" in its "critical knowledge base" - - remarks that resulted in immediate customer concern about the struggling business. Moreover, the employee followed up those comments with another public accusation, attacking a management official's performance as causing the business to be "tanked" and likely to be "put into the dirt." 453 F.3d at 537.

In the instant case, Kircher's measured comments contain none of those elements. Rather, they are precisely the types of third-party appeals that are protected by the Act. *See Community Hospital of Roanoke Valley*, 220 NLRB 217, 220, 223 (1975) (finding protected nurse's statement in television interview that nurse staffing was insufficient, notwithstanding hospital's claim that impression created with the public was disastrous), *enforced* 538 F.2d 607, 610 (4th Cir. 1976); *NLRB v. Mount Desert Island Hosp.*, 695 F.2d 634, 641 (1st Cir. 1982) (finding protected nurse's letter to newspaper detailing complaints regarding working conditions and level of patient care provided by hospital); *Richboro County Mental Health Council, Inc.*, 242 NLRB 1267 (1977) (finding protected letter protesting discharge of co-worker and asserting that discharge was representative of mismanagement, which "has signified a decrease in quantity and quality of service to clients").

#### **4. Beverly unlawfully discharged union activist Girdany**

Rose Girdany was a 6-year employee who worked at Mt. Lebanon until Beverly effectively fired her in June 1996. (A47; 331, 336, 344-45.) She was a known union activist, who served as vice president of her District 1199P chapter in 1995 and 1996 and participated in the April 1-4 strike. (A47; 332-33.) On or about April 4, following the strike, Beverly sent Girdany a letter advising her that she had been replaced, but would be placed on a preferential hiring list based on her seniority. (A47; 337, 185, 337.) Although Girdany had not been returned to work, she remained active as a union officer in the processing of employee grievances. (A47; 333-355.)

On June 10, Girdany went to the facility as a union representative to attend a grievance meeting. During that meeting, Administrator Anthony Molinaro told Girdany that he did not like her “attitude” or her “mouth.” He then told her that she no longer worked there and that she had to leave the premises. Girdany left as ordered. (A25, 47; 336, 344-45.)

Beverly’s sole contention (Br 43-46) is that Molinaro’s action did not constitute a discharge or any type of change in Girdany’s employment status. That contention is without merit and was properly rejected by the Board. (A25, 47-48.)

It is well established that the test for determining whether an employee has been discharged is whether the employer’s statements or conduct would reasonably

lead the employee to *believe* he has been discharged. *NLRB v. Champ Corp.*, 933 F.2d 688, 692 (9th Cir. 1990) (collecting cases). *Accord Grosvenor Resort*, 336 NLRB 613, 617-18 (2001), *enforced mem.* 52 Fed. Appx. 485 (11th Cir. 2002). Moreover, if the employer's conduct creates uncertainty as to the employee's status, the burden of the ambiguity falls on the employer. *Pennypower Shopping News, Inc. v. NLRB*, 726 F.2d 626, 629-30 (10th Cir. 1984). *Accord Five Cap, Inc.*, 331 NLRB 1165, 1201 (2000), *enforced* 293 F.3d 768, 779-80 (5th Cir. 2002) (incumbent on employer who creates ambiguity or confusion regarding status "to clarify and remove any implication that the employee has been terminated").

Applying these principles, the Board was fully warranted in finding (A25, 47-48) that "Girdany had a reasonable basis to believe that she had been discharged, and that [Beverly] failed to take the necessary steps to clarify that she had not been terminated." It is self-evident that an employee who has been told by the highest-ranking official at her work facility that he does not like her attitude and mouth and that she no longer works there, and then orders her off the premises, has reason to believe she has been discharged. *See A&D Davenport Transportation*, 256 NLRB 463, 465-66 (1981) (employee told "you don't work here any more" and ordered to leave).

Beverly erroneously contends (Br 44) that Girdany could not have considered Administrator Molinaro's words and actions to be a discharge, or any

other change in status, but merely a factual statement that she was not then working at the facility, but a replaced striker on a preferential hiring list. As the Board pointed out (A25) and Beverly concedes (Br 45), Girdany retained her employee status following the strike. Moreover, she continued to represent the Union at grievance meetings. Molinaro's stripping her of that status by ordering her off the premises, together with the finality of his words, could certainly have been interpreted as a change of her employee status. In any event, it at a minimum created ambiguity as to her employment status and it is undisputed that Beverly failed to meet its burden of clarifying any ambiguity or confusion created by Molinaro's actions.

#### **5. Beverly unlawfully discharged union activist Weaver**

Michelle Weaver was an 8-year employee who worked at the William Penn facility from 1988 until Beverly fired her in July 1996. (A48; 231-32, 237-38, 243.) She was a known union activist, who wore union insignia at work, participated in a July 1996 strike, and picketed each day. After the strike, Weaver used her lunch period to openly solicit strike replacement employees to sign union authorization cards. (A48, 231-34.) Beverly had demonstrated its hostility toward such activity through numerous other unfair labor practices and timed its action against Weaver on July 26, only 2 days after her union solicitation of replacements. (A48; 234-38.)

Beverly claims (Br 15-16, 37-39) that it lawfully discharged Weaver for breaking a new work rule by taking a break without notifying her supervisor. The facts surrounding Weaver's discharge are as follows. On July 26, Weaver took her afternoon break at 2:30 instead of 2:15 as scheduled, a type of switch often necessitated by resident care requirements. On this occasion, Weaver took her break 15 minutes late because fellow CNA Laurie Romig had taken *her* break late, at 2:15, and CNAs were not allowed to leave the floor at the same time. Weaver notified Romig, but not the nursing supervisor. (A48; 234-35, 238, 255.) When Weaver returned from her break, Supervisor Karen Sellers told her she would be given an oral warning for failure to notify her supervisor before she went on break. Weaver was unaware that this practice was a rule or that she could be disciplined for not complying with it. (A48; 235, 240.)

Later that day, Staff Development Director Hope Brubaker told Weaver, who had accumulated four prior disciplines during the preceding year, that she, Weaver, had received the new work rules which requires CNAs to notify their supervisor before going on break and that she was being suspended for failing to comply with those rules. Beverly never returned Weaver to work, although it did not convert her suspension to a formal discharge. (A48; 235-37, 239, 243, 269.)

Weaver filed a grievance over her suspension that resulted in a grievance meeting. The union representatives stated that Weaver's discipline was ridiculous,

noting that nursing home employees are always late for breaks because they cannot stop in the middle of patient care. Beverly Labor Relations Manager St. Cyr responded by saying that Weaver had been doing union business on company time. (A48-49; 241-42, 247, 254-57, 266-68.)

The record supports the Board's finding (A22, 49) that Beverly used Weaver's alleged rule violation as a pretext for ridding itself of another union activist. As the Board observed, Beverly official St. Cyr's statement at Weaver's suspension grievance meeting regarding "union business on company time" relates her discipline to her union activity.<sup>16</sup> It therefore constitutes an outright confession of unlawful motivation that eliminates any question regarding other suggested motives. *L'Eggs Products, Inc. v. NLRB*, 619 F.2d 1337, 1343 (9th Cir. 1980). *Accord United Services Auto Assn v. NLRB*, 387 F.3d 908, 916 (D.C. Cir. 2004).

Moreover, Beverly could not have lawfully discharged Weaver for breaking the new rules. For the record supports -- and Beverly does not dispute -- the Board's finding that those rules were never posted near or distributed to, Weaver or any employees other than strike replacements. (A48; 276-81.)

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<sup>16</sup> There is no basis for Beverly's assertion (Br 38 n.4) that St. Cyr's statement was in response to a separate issue. To the contrary, it was in direct response to the union representatives' protest of Weaver's suspension. (A 257.)

Finally, there is no merit to Beverly's claims (Br 16, 37-38) that it lawfully discharged Weaver because Supervisors Sellers and Brubaker nevertheless "genuinely believed" that the new rules had been distributed. Neither Sellers nor Brubaker testified to any such belief. Indeed, the only evidence cited by Beverly (Br 16) is the vague and discredited testimony of Administrator Miller that the rule had been generally posted and may have been distributed.

#### **6. Beverly unlawfully discharged union activist Pilarski**

Ruth Ann Pilarski was a 7-year employee who worked at William Penn from 1989 until Beverly fired her on December 17, 1996. She was a known union activist, who served as chapter president for the 4 years preceding her discharge. (A49; 247-49.) Beverly claims (Br 17-18, 39-40) that it lawfully discharged Pilarski because she failed to renew a leave request in a timely manner. The Board properly rejected that claim. (A22, 49.)

On July 15, Pilarski went on medical leave and, in accordance with the facility's collective-bargaining agreement and company policy, was required to renew her leave by signing a renewal at the facility on the 15th of each month - - the monthly anniversary date. (A49; 250.) On August 15, Pilarski renewed her leave with Assistant Nursing Director Stuck or a secretary named Kay. (A49; 250-51.) Because September 15 fell on a Sunday, Pilarski contacted Kay in advance and asked for guidance as to when to sign her renewal. Kay told her to submit the

renewal on the preceding Friday or following Monday, adding that renewals could be submitted up to 5 days before and 5 days after the anniversary date. On Monday, September 16, Pilarski went in and signed the renewal. (A 49; 251.)

December 15 also fell on Sunday. Because Pilarski was out of town on Monday the 16th and ill on Tuesday the 17th, she called Kay at the facility on Wednesday the 18th and told her that she would come in and sign the renewal the next day -- Thursday, December 19. Director Stuck got on the telephone, and Pilarski repeated what she had told Kay. Stuck responded by telling Pilarski that "we've already sent you a registered letter in the mail stating that you've resigned because you're late signing your medical leave." That letter was dated December 17. Pilarski told Stuck that she had been advised that she had a 5-day grace period, but Stuck replied that that she did not. (A49; 123, 251-53.)

The record refutes rather than supports Beverly's claim (Br 39-40) that it lawfully discharged Pilarski. As the Board observed (Br 28), Beverly simply used a disparate application of an unenforced rule to rid itself of another union activist. There is no evidence, and no contention by Beverly, that it had strictly or consistently enforced the rule, much less fired any employee for being 2 days late in complying with it. To the contrary, the only evidence regarding the rule shows that Beverly allowed two other employees to violate it without imposing any kind of discipline. Employee McCoy never bothered to renew her medical leave as

required on September 4, 1996, and returned to work without incident on September 17. (A49; 244-45.) Employee Branstetter, on medical leave most of 1996, submitted renewals to Stuck 2 days late in July and 1 day late in October without any consequences. (A49; 262-64.) As the Board noted, Beverly has failed to explain this disparate treatment and justify its discharge on lawful grounds.

There is no basis for Beverly's contention (Br 39-40) that it did not treat Pilarski disparately based on her union activity because the two other employees were union supporters "just like Pilarski." For, unlike McCoy and Branstetter, Pilarski, a 4-year union chapter president serving in that capacity at the time of her discharge, was actively involved in processing grievances and meeting with management. Moreover, Beverly had previously singled out Pilarski as a target for discriminatory treatment in *Beverly IV*, by unlawfully changing her break schedule in January to inhibit her in her duty as president to communicate with union members. 335 NLRB at 663, *enforced in relevant part*, 317 F.3d 617. In contrast, Beverly shows only that McCoy was a union member and a former chapter secretary for a single year and that Branstetter wore union pins and T-shirts. (A246, 265.)

Beverly errs in its reliance (Br. 40) on *Midwest Elec. Mfg. Co.*, 260 NLRB 174, 178 (1982). There, all the comparator employees had engaged in the same level of union activity-- attendance at a union meeting -- and there were several

additional factors undermining a finding of discrimination against the employee.

In any event, it is well settled that “a discriminatory motive . . . is not disproved by an employer’s proof that it did not weed out all union adherents.” *Nachman Corp. v. NLRB*, 337 F.2d 421, 424 (7th Cir. 1964). *Accord Clark & Wilkins Industries, Inc. v. NLRB*, 887 F.2d 308, 316 n.19 (D.C. Cir. 1989).

### **7. Beverly unlawfully discharged union supporter Danner**

Cheryl Danner worked at Camp Hill from August 1995 until Beverly fired her on April 9, 1996 following the April 1-4 strike at other Beverly facilities.

Danner was a union supporter who wore union insignia to work every day. (A51; 282-83.) Danner also showed her support for the union activities of her fellow employees, who did not strike on April 1 as at other facilities, but were picketing at the Camp Hill facility. Danner, who was not picketing, reported for work on April 2. Administrator Courtney O’Connor met her at the door and asked her if the picketing made her happy; Danner replied that it did. (A51; 283-84.)

Danner then punched in and reported to her work station. Before beginning her shift, Danner had to wait for the prior shift employees to do their routine report on what had occurred during their shift. While Danner was waiting, she walked into the residents’ dining room and out onto the balcony. She stayed on the balcony for 10 or 15 seconds, waving at and yelling to several friends who were

picketing. She then proceeded to her work station and did not miss any of the report. (A51; 284-87, 295-96, 298-99.)

Later that day, Danner, who had received four disciplines in the preceding year, was given a writeup signed by O'Connor. It stated that Danner was suspended, pending investigation for discharge, for "conduct widely regarded as immoral, improper, fraudulent, or otherwise inappropriate in the work place," specifically "leaving the work area during worktime" without permission and, while on the balcony, "engaging and involving self in mass informational picketing while on duty and on facility property." One week later, Beverly discharged Danner. (A51; 124-25, 287-91.)

There is no merit to Beverly's contention (Br 15, 34-37) that it discharged Danner for misconduct. As the Board found, and Beverly concedes (Br 15), there is no rule against walking onto the balcony and employees do so without reprimand. (A51; 282, 293, 294-97.) Moreover, there is no basis for Beverly's preposterous claim to have based its discharge on Danner's "mass informational picketing" while on the balcony. There is no basis in fact, law, or common sense for converting a few brief waves and greetings during a 10-15 second interlude into picketing of any kind. Indeed, Beverly cites no case support for such a proposition.

Finally, Beverly relies (Br 35-37) on Danner's record of four prior reprimands. It is obvious; however, that Beverly did not consider the incidents that prompted those actions to be grounds for discharge. Instead, it tolerated all of them, individually and collectively, until it could fire Danner on a transparently trivial pretext based on a theretofore unheard of form of mass picketing. Moreover, there is no evidence supporting Beverly's claim (Br 34) that Danner's prior reprimands "had put her on the brink of termination for any subsequent violation," regardless of its lack of severity. There is no evidence that any of those four reprimands, including the fourth, contained any language indicating discharge on the next offense. Indeed, none of the four is cited by Beverly or even included in the record, except by a brief listing of their dates on the writeup used for the discharge. (A124-25.) Moreover, there is no evidence that anyone *told* Danner that she was in danger of discharge upon giving her any of the earlier reprimands or, more importantly, told her or anyone else that the balcony incident was simply the last straw. To the contrary, there is no evidence at all regarding the basis for the initial suspension that led to her discharge. There is no evidence that O'Connor, who signed Danner's suspension document, said anything to her at the time she received it. There is not even any evidence regarding the basis of O'Connor's motivation regarding the suspension and subsequent discharge, because he did not testify.

### **III. BEVERLY’S UNFAIR LABOR PRACTICES WARRANT A CORPORATEWIDE REMEDY, EVEN ABSENT COURT AFFIRMANCE OF ALL SEVEN CONTESTED VIOLATIONS**

In order to remedy the numerous violations in this case, the Board issued a corporatewide cease-and-desist order. (A33.) It made the order corporatewide in response to Beverly’s “continu[ing] . . . proclivity to violate the Act . . . and widespread misconduct demonstrating a general disregard for its employees [statutory] rights” and its recognition that, “absent a corporatewide remedy, [Beverly] remains likely to commit such unlawful actions at its other facilities against other employees.” The Board relied on the fact that this case “is the fifth in a series of cases involving [Beverly] in which there is evidence that corporate officials played prominent roles in directing, approving, or knowingly failing to prevent the unlawful actions that occurred at individual facilities,” and noted that this Court and the Seventh Circuit enforced corporatewide orders in *Beverly IV* and *III*, respectively. (A33 and nn. 39, 42.) See p. 4, above.

Beverly does not contest the appropriateness of the Order. Its sole contention (Br 46-48) is that the Court should remand the corporatewide part of the Order to the Board in the event that the Court declines to affirm an unspecified number of the seven unfair labor practice findings it challenges before this Court. As we show below, however, the corporatewide order remains appropriate even if not all of the seven contested violations are enforced.

### A. Applicable Principles and Standard of Review

Section 10(c) of the Act (29 U.S.C. § 160(c)) directs the Board, if it finds that “any person . . . has engaged in . . . [an] unfair labor practice,” to “issue . . . an order requiring such person to cease and desist from such unfair labor practice . . . .” See *United Steelworkers of America v. NLRB*, 646 F.2d 616, 629 (D.C. Cir. 1981). A remedial notice to employees always accompanies Board cease-and-desist orders. See, e.g., *Pennsylvania Greyhound Lines, Inc.*, 1 NLRB 1, 52 (1935); *May Dept. Stores Co. v. NLRB*, 326 U.S. 376, 390 (1945). The test of the proper scope of a cease-and-desist order is whether it was necessary to prevent further unfair labor practices.

This Court, in *Beverly IV*, and other courts have approved the Board’s imposition of corporatewide cease-and-desist and notice-posting orders where an employer’s past conduct predicted future violations. 317 F.3d at 327 (citing *Steelworkers*, 646 F.2d at 635-636, 640). See also *Beverly II-III*, 227 F.3d at 828; *J.P. Stevens & Co. v. NLRB*, 638 F.2d 676, 688 (4th Cir. 1980); *Florida Steel Corp.*, 222 NLRB 955, 956 (1976), *enforced mem.*, 536 F.2d 1385 (5th Cir. 1976).

The Board’s remedial power “is a broad discretionary one, subject to limited judicial review.” *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 216 (1964). Accord *Steelworkers*, 646 F.2d at 629. Its remedy, therefore, should not be overturned unless it is “shown that the order is a patent attempt to achieve ends other than

those which can fairly be said to effectuate the policies of the Act.” *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943).

### **B. The Instant Case Warrants a Corporatewide Order**

The record fully supports the Board’s finding that Beverly’s unlawful conduct warrants corporatewide relief. In *Beverly IV*, this Court recognized that corporatewide relief can be justified based on the number of the employer’s violations, types of violations, and corporate causation of violations. 317 F.3d at 326-27. In the instant case, the record is replete with evidence demonstrating the strength of all three factors, and none of this evidence would be undermined by this Court’s failure to enforce all of the contested Section 8(a)(3) violations.

As shown above, Beverly committed at least 42 unfair labor practices, including 35 that are uncontested. Beverly’s violation of Sections 8(a)(1) and 8(a)(3) of the Act ran the gamut of unlawfully coercive and discriminatory conduct, including threats, polling, and restrictions to encourage abandonment of union support, coercive surveillance, and targeting union activists for suspension, discharge, and other discriminatory discipline. Beverly also violated Section 8(a)(5) of the Act by ignoring its statutory bargaining obligations in several ways, including withdrawing recognition from certified unions, refusing to provide unions with relevant requested bargaining information, and making various unilateral changes in its employees’ terms and conditions of employment.

Beverly's violations were widespread as well as numerous, affecting employees at 19 facilities. It committed violations of Section 8(a)(5) at 18 of the 19 facilities and independent violations of Section 8(a)(1) at 10. The few Section 8(a)(3) violations Beverly challenges in this Court are, thus, not even the tip of the iceberg, and whether or not they are enforced in no way impacts the magnitude and far-reaching nature of Beverly's unlawful conduct.

Beverly's corporate role in the commission of those violations is also a powerful factor supporting corporatewide relief, and would in no way be undermined by this Court's failure to enforce some of the challenged Section 8(a)(3) violations. As the Board observed (A 34), the record shows that either Beverly Vice President for Labor and Employment Dotson, Vice President of Operations for Central and Eastern Pennsylvania Chapman, or Labor Relations Manager St. Cyr were involved in one or more of the following unfair labor practices: responding unlawfully to union information requests, conducting an unlawful poll and withdrawing recognition based on its results, unlawfully handling employee grievances, and implementing the unlawful policy of deducting health insurance premiums from the pay of former strikers.

Chapman planned Beverly's uncontestedly unlawful failure to provide information at 12 facilities regarding new hires (p.13, above), instructing each facility's administrator to respond in precisely the same manner. (A29-30 and

n.29, A55; 113-18.) He also planned and coordinated Beverly's uncontestedly unlawful refusal to provide the unions with information at 11 facilities unless the unions paid for it (p.14, above), and St. Cyr wrote the unions a letter confirming that refusal. (A56; 230-31, 111-12, 119-20, 127.) Dotson decided to conduct the uncontestedly unlawful poll at Grandview and the unlawful withdrawal of recognition based on it. (A31-32, 55-56; 228, 229.) St. Cyr handled employee grievances, upholding the unlawful suspension of 5 York employees (p.11, above) and firing employee Weaver for her union activity. (A48-49, 52-53; 305-08, 309, p. 34-35, above.) Chapman devised the unlawful scheme (p.14, above) of unilaterally continuing the health care coverage of all striking employees at 15 facilities during the April 1996 strike and then deducting the premiums from their paychecks. He then implemented the plan after consulting with Dotson. (A29, 54; 220-227, 104-10, 126.)

Moreover, the prominent role of these corporate officials in this case does not stand alone. For this Court, in enforcing the Board's corporatewide remedy in *Beverly IV*, noted the Board's finding that high-ranking corporate and regional officials -- including Dotson, Chapman, and St. Cyr -- played prominent roles in Beverly's unlawful actions. 317 F.3d at 327 and n.5. Those actions, at many of the same facilities and during the same time period as those herein, reinforce the propriety of the Board's remedy in the instant case. In addition, the Board and

court decisions in *Beverly I, II, III, and IV* strongly support a corporatewide order here. In *Beverly IV*, this Court affirmed the Board’s reliance on Beverly’s geographically-broad history of unfair labor practices as demonstrated in those earlier cases. *Id.* Here, the historical context is even stronger.

Finally, this Court effectively rejected Beverly’s instant contention in *Beverly IV*. There, Beverly argued (*Beverly IV*, Br. 67)<sup>17</sup> that if the Court “declines to enforce one or more of the [the] challenged findings,” it should “remand the Board’s order in its entirety so that the Board can reconsider the appropriateness and necessity of corporatewide relief.” Nevertheless, the Court enforced the Board’s corporatewide order, without remand, despite its reversal of the Board’s finding that Beverly had unlawfully failed to promptly reinstate 450 employees following the April 1-4 strike. *Beverly Health & Rehabilitation Services, Inc. v. NLRB*, 317 F.2d at 319, 320-21, 326-27.

In sum, the number and types of Beverly’s violations, the corporate participation in those violations, and the compelling historical context all support the Board’s finding (A 33) of Beverly’s “now-familiar pattern of unlawful actions on the part of corporate officials.” Such a pattern clearly warrants corporatewide relief, and does so even absent full enforcement of the challenged violations.

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<sup>17</sup> The cited page is in the Addendum at the back of this brief.

**CONCLUSION**

For the foregoing reasons, the Board respectfully requests that the Court deny Beverly's petition for review and enforce the Board's Order in full.

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March 2007

ADDENDUM

(Name omitted)  
2/12/02 8:00  
06-CA-27873

ORAL ARGUMENT: NOVEMBER 18, 2002

PROOF BRIEF

**No. 01-1405**

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**UNITED STATES COURT of APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**BEVERLY HEALTH & REHABILITATION SERVICES, INC. AND  
BEVERLY ENTERPRISES – PENNSYLVANIA, INC.**

**Petitioner/Cross-Respondent**

v.

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION  
FOR ENFORCEMENT OF AN ORDER  
OF THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
BEVERLY HEALTH & REHABILITATION SERVICES, INC. AND  
BEVERLY ENTERPRISES – PENNSYLVANIA, INC.**

U.S. COURT OF APPEALS  
2002 JUL 23 PM 5:03  
LITIGATION SERVICES  
WASHINGTON, D.C.

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06-CA-27873

**I. The Board's Corporatewide Cease-and-Desist Order and Notice – Posting Requirement Exceeds What is Necessary to Remedy the Unfair Labor Practices in This Case.**

The Board's decision to issue a corporatewide cease-and-desist order and notice-posting requirement is based largely on the findings that Beverly has challenged in this petition for review. If this Court declines to enforce one or more of these challenged findings, then the appropriate step would be to remand the Board's order in its entirety so that the Board can reconsider the appropriateness and necessity of corporatewide relief.

In any such remand order, Beverly submits that the Court should direct the Board to examine more carefully the absence of evidence that corporate level officials "played prominent roles in directing, approving or knowingly failing to prevent unlawful actions . . . ." (D-5). While a few decisions about grievance processing, information requests, union access and management rights issues can be traced to regional officials like Wayne Chapman or Ron St. Cyr, there is no record evidence that corporate officials Bill Mathies or Don Dotson played roles in "directing, approving or knowingly failing to prevent unlawful actions," nor is there evidence of Regional President Claude Lee playing such a role. The Board's decision identifies no supporting evidence for this claim, and the ALJ only mentions Mathies, Dotson and Lee in the context that they were in the general chain of command for decisions related to bargaining and strike preparation (D-

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BEVERLY HEALTH & REHABILITATION :  
SERVICES, INC., and BEVERLY ENTERPRISES- :  
PENNSYLVANIA, INC. : Nos. 06-1173 &  
 : 06-1239  
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 Petitioner/Cross-Respondent :  
 : Board Case Nos.  
 v. : 6-CA-28276, et al.  
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 NATIONAL LABOR RELATIONS BOARD :  
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 Respondent/Cross-Petitioner :  
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) the Board certifies that its brief contains 10,516 words of proportionally-spaced, 14-point Times New Roman type, and the word processing system used was Microsoft Word 2003.

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Dated at Washington, D. C.  
this 9th day of March, 2007

