

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

VALLEY HOSPITAL
MEDICAL CENTER, INC.

and

Case 28-CA-21047

NEVADA SERVICE EMPLOYEES
UNION, LOCAL 1107, affiliated with
SERVICE EMPLOYEES
INTERNATIONAL UNION

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DECISION

I. Statement of the Case

Lana H. Parke, Administrative Law Judge. This matter was tried in Las Vegas, Nevada on March 27 through 28, 2007¹ upon Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (the Complaint) issued January 31, 2007 by the Regional Director of Region 28 of the National Labor Relations Board (the Board) based upon charges filed by Nevada Service Employees Union, Local 1107, affiliated with Service Employees International Union, (the Union or the Charging Party), alleging that Valley Hospital Medical Center, Inc. (Respondent) violated Sections 8(a)(1) and (3) of the National Labor Relations Act (the Act). On March 27, 2007, the Regional Director approved the withdrawal of all charges except for allegations relating to the discharge of Joan Wells, as addressed in the unfair labor practice charge 28-CA-21047.² The Respondent essentially denied all allegations of unlawful conduct.

II. Issue

Did the Respondent violate Sections 8(a)(1) and (3) of the Act by discharging employee Joan Wells on October 20, 2006?

¹ All dates herein are 2006 unless otherwise specified.

² The Regional Director's Order Approving Withdrawal Request and Withdrawing Complaint Allegations states, apparently inadvertently, that the suspension of Joan Wells remains in issue. At the hearing, the parties agreed the suspension was not at issue. Accordingly, I consider the allegation of unlawful suspension also withdrawn.

III. Jurisdiction

5 The Respondent, a Nevada corporation, with an office and place of business in Las Vegas, Nevada (the hospital) has, at all relevant times, been engaged in the operation of a hospital providing inpatient and outpatient medical care. During the 12-month period ending
 10 October 24, the Respondent, in conducting its operations, derived gross revenues in excess of \$250,000 and purchased and received goods valued in excess of \$5,000 directly from points outside the State of Nevada. The Respondent admits, and I find, it has at all relevant times been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) and a health care institution within the meaning of Section 2(14) of the Act. The Union has been a labor organization within the meaning of Section 2(5) of the Act.³

IV. Findings of Fact

15 Since the Union's 1999 certification as the collective-bargaining representative of the Respondent's registered nurses (RNs), the Union and the Respondent have entered into successive collective-bargaining agreements. In 2006, the parties commenced negotiations (the negotiations) on the terms of a collective-bargaining agreement to succeed the agreement effective June 1, 2004 to May 31 (the Agreement). During the period of negotiations, Joan
 20 Wells (Ms. Wells) was employed by the Respondent as an RN in the Medical Intensive Care Unit (MICU) and part-time by the Union, serving as a chief steward, an executive vice president for the Respondent's RN unit, and a member of the negotiating committee.⁴

25 At all relevant times, the Respondent had in effect a Healthcare Peer Review (HPR) reporting procedure that provided a system for employees to report patient/visitor incidents inconsistent with the "routine care of a patient and/or the desired operations of the facility [and which] requires or could have required (near miss/potential) unexpected medical intervention, unexpected intensity of care, or causes or had the potential of cause an unexpected health care
 30 impairment." Each HPR report was reviewed by a risk manager for referral to appropriate hospital personnel.

The Respondent's code-of-conduct policy, in effect at all relevant times, stated, in pertinent part:

35 II. PURPOSE

To establish guidelines for employee communication that will portray a positive professional image of staff to clients and the community as well as promote a safe, efficient and harmonious work environment that is conducive to quality customer interactions.

40 III. POLICY

45 When acting on behalf of or representing VHS in any capacity, employees will conduct themselves in a manner which promotes a positive image to patients, visitors, physicians, and other staff members, which is in line with the VHS philosophy.

³ Unless otherwise explained, findings of fact herein are based on party admissions, stipulations, and uncontroverted testimony.

50 ⁴ Ms. Wells had served as chief steward since 2004 and was identified on the Union's website as the Union's executive vice president of the Respondent's RN unit.

The Respondent's Standards of Conduct, in effect at all relevant times, cautioned: "Conduct that...brings discredit on the Hospital...will not be tolerated."

5 During 2006 in the exercise of her chief steward/executive vice president duties, Ms. Wells engaged in the following union-related activities: attended negotiating sessions that Dana Thorne (Ms. Thorne), HR Administrator, also attended; accompanied another employee to a fact-finding discussion with Ms. Thorne; and headed a group of RNs in a visit to the Respondent's Human Resources (HR) office to discuss nurse orientation issues. Following the visit, by letter dated June 27, Ms. Thorne, wrote to Ms. Wells, in pertinent part:

10 This letter is in response to your visit to Human Resources on Monday, June 26 regarding SEIU presentations during nurse orientation.

The RNs representing the SEIU made a negative impression on everyone in the Human Resources office as they interrupted employees and visitors.....

15 Finally, in response to your note regarding the monthly employee reports, both May and June reports have been sent to the SEIU...⁵

20 On September 13 the Las Vegas Review Journal (LVRJ), a local newspaper, ran an article entitled "Hospital nurse-to-patient ratio rated," in which it was reported that the Union had assigned several Las Vegas-area hospitals, including the Respondent, failing grades for patient care. The news article stated that union officials cited staffing ratios as the primary collective-bargaining disagreement in the Union's negotiations with various area hospitals. The LVRJ article quoted Ms. Wells as saying that because of a shortage of nurses at the Respondent,

25 You don't get medications to patients on time. They (patients) could be lying in their own excrement for who knows how long. You can't even do the basic things you want to do.

30 According to Ms. Wells, her criticism was based on the reports of other nurses made during 2006-negotiation caucuses and on her own experience. Ms. Wells testified that during one caucus a floor nurse, whose name Ms. Wells could not recall, said she was unable to get medications to patients on time because of staffing issues. At the hearing, Ms. Wells detailed her experiences as follows:

35 When you have a [patient who keeps you very busy]...you don't get back to your other patient in time sometimes...to give meds that are timed—they are timed for specific times of the day. So you might be late giving them which is why you

45 ⁵ Ms. Thorne denied that she knew Ms. Wells was a steward of the Union at any time through Ms. Wells' termination date of October 20. Insofar as that testimony implies that Ms. Thorne did not know Ms. Wells had any official function within the Union, I cannot accept it. The June 27 letter refers to the nurses who visited HR on June 26 as representing the Union. Ms. Thorne wrote to no other nurse regarding the visit, and Ms. Thorne's directing the letter to Ms. Wells and giving her information about reports sent to the Union justify an inference that

50 she understood Ms. Wells had a leadership position in the Union.

don't get them on time...If...you have one patient that is taking all your time, you don't get to [give basic care, e.g., make sure patients are clean, dry, hydrated, turned, free from pain].⁶

5 On September 13, the same date the LVRJ article was published, a story (web story) by Ms. Wells appeared on the "Share Your Story" page of the "Quality Care Nevada" website maintained by the Union:

10 The level of care for patients at Valley Hospital is a growing concern because management isn't giving us the staff we need. Here's an example: In the past, there were four Telemetry Technicians that would watch the heart rhythms for all of the patients in the hospital. Recently, the hospital has cut staff down to two people on most days.

15 This means that one person is watching the heart rhythms for the twenty-five critically ill patients in the Medical ICU plus about 44 other hospital patients, and the other technician is watching the heart rhythms of all remaining patients in the hospital... Do you want to be one of one hundred sixty-nine people depending on one overworked Telemetry Technician?

20 On medical-surgical floors, nurses may have eight or more patients. An irregular heartbeat can develop quickly, and fast action is needed. This means that without the help of the technicians watching patients' heart rhythms a patient could have a heart attack and possibly die.

25 UHS, the for-profit company that owns Valley Hospital, makes more than enough money to pay for additional staff. Right now, they are choosing not to, and that's just not acceptable. As nurses and patient advocates, we're committed to fighting for safe and enforceable staffing ratios.

30 Ms. Wells based her assertion of reduced telemetry technician staffing on conversations with Virginia Hinkle, a telemetry technician scheduler who expressed concern that only two telemetry technicians worked on many shifts, and on her having seen only two telemetry technicians at work rather than the customary four. Although Ms. Wells could not specify when she had observed reduced telemetry technician staffing, it "seemed quite often" to her: "one week it might happen once or twice and then maybe it wouldn't happen for another week."⁷

40 After publication of the LVRJ news article and the web story (the September 13 publications), Ms. Thorne and Michelle Nichols (Ms. Nichols), chief nurse officer discussed their content and thereafter directed Antoinette Pretto (Ms. Pretto), Risk Manager,⁸ to investigate Ms. Wells' allegations that patients could be lying in excrement, not getting medications on time, and insufficiently monitored by telemetry technicians. In

45 ⁶ Although Ms. Wells testified that she had utilized the Respondent's procedures for reporting failures to provide patients with quality care, she also testified that she had no time to complete "Incident Reports." No such reports were introduced into evidence. I find that regardless of what Ms. Wells may have observed, she never reported improper patient care to the Respondent.

50 ⁷ Ms. Wells had no information from any source that Ms. Hinkle was instructed to cut telemetry technician staff from four to two on any day.

⁸ The function of a risk manager is to minimize risk to patients.

early October, after some scheduling delays,⁹ Ms. Pretto interviewed Ms. Wells with Cheryl Bunch (Ms. Bunch), union representative, also present. Ms. Pretto asked Ms. Wells for dates, times, and names underlying the content of the September 13 publications. Ms. Wells said her statements were “general statements” but that she had personal experience. When Ms. Pretto again asked for specific supporting information, Ms. Wells said, “No comment,” as she feared discipline for herself and other nurses who, like her, had been unable to give medications on time. Ms. Wells testified that she also told Ms. Pretto she could look on medication administration records (MAR), where nurses were required to enter medication delays.¹⁰ Ms. Pretto asked for specific information relating to patients lying in excrement. Ms. Wells told Ms. Pretto that her comment in that regard had also been a “general statement.”¹¹ With regard to telemetry technician understaffing, Ms. Wells gave Ms. Pretto no specifics beyond saying that she had seen instances of only two telemetry technicians working.¹²

On October 4, Ms. Pretto provided Ms. Thorne with a summary of her interview with Ms. Wells, stating essentially that Ms. Wells had failed to provide specific examples or information regarding untimely administration of medication, patients lying in excrement, or reduction in telemetry staffing. The summary quoted Ms. Wells as saying she did not “keep notes everyday when [she] worked” and that her publicized comments were “general statements based on working in ICUs during [her] career.” Ms. Pretto told Ms. Thorne that inasmuch as Ms. Wells could not substantiate her assertions, she believed the publicized statements were false.

Normally, the Respondent assigned only two MICU patients to an RN per shift.¹³ On October 7, an RN scheduled for the 7:30 MICU shift called in sick. To cover for her absence, the MICU charge nurse revised the assignment schedule. At about 7 a.m. when scheduled RNs, including Ms. Wells, reported for their 7:30 a.m. shifts, the dry-erase assignment board

⁹ The Respondent contends that Ms. Wells was resistant to the investigation into her allegations; resolution of that question is not relevant to the issues.

¹⁰ Although Ms. Wells directed Ms. Pretto to MARs for substantiation, it is reasonable to infer that she did not expect the reports to provide supportive evidence; she testified that “if you don’t have time to give the medication on time, you are not going to have time to stop and do all this paperwork” and that she did not have time to make notes on “every single instance” of medication delay.

¹¹ Ms. Wells admitted that she had never brought the issue of patients lying in excrement to management’s attention.

¹² The Respondent’s post-hearing brief asserts that the number of technicians was reduced from four to three per shift after relocation created increased efficiency. The record does not reflect such evidence, and I disregard the assertion. Ms. Thorne testified that Ms. Wells’ statement that the telemetry technician staff had been halved was untrue, but the Respondent provided no further staffing evidence.

¹³ The Respondent utilized a “buddy” system in which one RN cared for her own and the patients of another (i.e. four patients) during regular and brief, unscheduled breaks. If patient acuity were low enough, the Respondent might assign three patients to one nurse, but such assignments were apparently unusual; in the nearly three years that Ms. Wells worked on MICU, she had only once been asked to care for more than two patients, which request she refused.

showed more than two patients assigned to some of the RNs.¹⁴ After discussion among the reporting nurses, all MICU day shift nurses except one refused to accept assignments, i.e. “take report”¹⁵ until more nursing coverage was obtained. By telephone Ms. Wells informed the shift supervisor and Karen Pels Jaminez (Ms. Jaminez), the appropriate union representative, that the MICU day shift nurses would not take report until more staff was found. About five to ten minutes later, Ms. Jaminez telephoned Ms. Wells and told her that if the nurses did not take report, they could be fired for insubordination, which caution Ms. Wells reported to the nurses. Thereafter, the Respondent having arranged for additional nursing coverage, the scheduled nurses filed individual Assignment Despite Objection (ADO) forms¹⁶ with the MICU charge nurse and took report. Only one RN took report on more than two patients for the full shift, accepting report for three.

On Saturday, October 7, following the refusal-to-take-report incident in MICU (the October 7 incident), Judith Eaton (Ms. Eaton), MICU day shift charge nurse, told Ms. Canty that Ms. Wells was taking the union thing too far. Ms. Canty also heard Mark Trowbridge (Mr. Trowbridge), MICU night shift charge nurse, say that Ms. Wells needed to be quiet. When Ms. Thorne and Ms. Nichols, shortly thereafter, commenced an investigation, both Mr. Trowbridge and Ms. Eaton informed Ms. Thorne they believed Ms. Wells was the ringleader of the nurses who declined to take report.¹⁷ On the following Monday, Ms. Nichols told Ms. Canty that she had heard Ms. Wells had “corralled” the other RNs and “coached” their actions, which Ms. Canty denied.

On October 12, Ms. Thorne conducted a telephone fact-gathering interview with Ms. Wells in which Ms. Bunch participated. In the course of the interview, Ms. Wells told Ms. Thorne that on October 7, the assignment board in MICU had shown four patients assigned to Ms. Canty. Following the interview, Ms. Thorne notified Ms. Wells that she was suspended pending investigation of the September 13 publications and the October 7 incident.

¹⁴ Evidence of the assignment breakdown is neither entirely clear nor consistent. Ms. Wells testified that when she reported to work on October 7, she observed that two nurses named on the dry-erase board were assigned three patients each and that Tracy Canty was assigned four patients. When Ms. Canty reported for work at about 7:00 a.m., several nurses laughingly told her she had been assigned four patients, but when she looked at the dry-erase board about five minutes later, she saw only three patients’ names next to hers. On Assignment Despite Objection forms completed on October 7, Ms. Wells and three other RNs noted, respectively, that three RNs were assigned three patients each. Judith Eaton, MICU day shift charge nurse, denied she had assigned four patients to Ms. Canty but was equivocal as to whether four patients’ names had at some point been listed next to Ms. Canty’s name on the dry-erase board. She agreed that until the nurse shortage was worked out, at least two MICU day shift RNs were assigned three patients.

¹⁵ Accepting patient assignments is commonly called “taking report,” that is accepting the medically documented report of the patient’s treatment from the nurse of the preceding shift.

¹⁶ Under the terms of the Agreement, RNs who take issue with an assignment are expected to accept the assignment but may complete an ADO.

¹⁷ It is unknown on what factors the two supervisors based their belief. Ms. Eaton initially testified that Ms. Wells filled out all of the ADO forms completed on October 7, but later admitted that each form had different handwriting and text and agreed that Ms. Wells had not completed ADO forms for other RNs. Mr. Trowbridge did not testify, and of the RNs involved in the October 7 incident, only Ms. Wells and Ms. Canty testified.

At the end of the week following the October 7 incident, Ms. Canty overheard Mr. Trowbridge gloating, "I got her; I got her; I got her." On another occasion, Ms. Canty overheard Ms. Eaton and Mr. Trowbridge discussing the possibility of a strike at the hospital and heard Mr. Trowbridge say, "I don't have to listen to her mouth no more." Ms. Canty assumed Mr. Trowbridge referred to Ms. Wells.

On October 13, the Union distributed a flier at the hospital bearing the Union's logo and a photograph of Ms. Wells (the October 13 flier). The heading read: "UHS' New ICU Standard: 4 Patients for Every Nurse"¹⁸ and quoted a portion of Ms. Wells' speech given at a union rally:

I was suspended yesterday for standing up, with my co-workers, to management's doubling of the patient load in ICU. Expanding intensive care patient loads to 3 and even 4 patients is simply unsafe, unacceptable and needlessly endangers patients. Now more than ever, we have to stand together for our patients.

Ms. Thorne considered Ms. Wells' October 13 statement to convey false information on two counts: (1) that the Respondent had doubled the patient load in MICU from two patients per nurse to four, and (2) that Ms. Wells' suspension was disciplinary rather than investigatory. Ms. Thorne, Ms. Nichols, and Greg Boyer, the Respondent's CEO, discussed Ms. Wells' September 13 publications and her statement in the October 13 flier, asking what the Respondent would do if Ms. Wells were a "regular" employee of the hospital.¹⁹ Concluding that a regular employee would be terminated for making false and disparaging statements about the hospital, they decided that Ms. Wells' union activity should not protect her from the consequences of her conduct and that she should be terminated. The Respondent made no decision to discipline any RN for participation in the October 7 incident.²⁰ Thereafter, Ms. Thorne prepared a written Employee Counseling/Corrective Discipline Notice (termination document) for Ms. Wells on which the September 13 publications were listed as offenses.

On October 20, Ms. Thorne met with Ms. Wells. Sue Lewark (Ms. Lewark), director of nursing operations, and Ms. Bunch were also present. Ms. Thorne intended to terminate Ms. Wells absent an ameliorative presentation by Ms. Wells and/or Ms. Bunch. In response to questioning by Ms. Thorne, Ms. Wells acknowledged that she had made the statement attributed to her in the October 13 flier. Ms. Thorne asked Ms. Wells which nurse had been assigned four patients, and Ms. Wells named Ms. Canty but admitted that Ms. Canty had not, in fact, cared for four patients. Ms. Thorne asked Ms. Wells and Ms. Bunch to step out of her office. Believing that Ms. Wells had admitted to making a false statement in the October 13 flier, Ms. Thorne added that offense to Ms. Wells' termination document, and she and Ms. Lewark signed it. When Ms. Wells and Ms. Bunch returned to Ms. Thorne's office, Ms. Thorne gave Ms. Wells the termination document, which cited Ms. Wells for policy violations including "Falsification," with the following explanation:

¹⁸ Ms. Wells did not compose the heading, the wording of which was presumably provided by the Union.

¹⁹ Ms. Thorne explained that by "regular" employee, she meant an employee who was not a part of the negotiating committee and not involved in the union activity that was occurring at the hospital. In her view, Ms. Wells was "more active [in union matters] than a lot of other nurses."

²⁰ As of the hearing, no discipline had been administered to any participating RN.

Joan Wells made statements published in the newspaper, a web site, and a flyer which she has admitted she had no factual basis to support (see attached²¹). These statements discredited the hospital and were intended to harm the hospital and/or undermine patient confidence in the hospital.

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Upon receiving the termination document, Ms. Wells wrote, "All statements made were based on fact, therefore true" in the Employee Statement section and signed it. No further discussion occurred.

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V. Discussion

A. Positions of the Parties

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The General Counsel contends that the Respondent discharged Ms. Wells because of her activities on behalf of the Union. The General Counsel argues the Respondent had no justifiable basis for discharge, as the statements made by Ms. Wells in the September 13 publications and the October 13 flier appropriately and accurately publicized working conditions germane to contemporaneous collective bargaining issues. Counsel for the General Counsel asserts that a *Wright Line*²² analysis is unnecessary herein, as the Respondent admittedly discharged Ms. Wells for her statements in the September 13 publications and the October 13 flier, and since Ms. Wells' statements constitute union activity, the discharge violated Section 8(a)(3) of the Act. Even if unmotivated by antiunion animus, Counsel argues, the Respondent's discharge of Ms. Wells would violate Section 8(a)(1) of the Act under the principles enunciated in *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964). In Counsel for the General Counsel's view, under either an 8(a)(3) or an 8(a)(1) analysis, the only issue is whether Ms. Wells' statements "were so opprobrious as to lose the protection of the Act." Counsel argues that they were not and that the Respondent's discharge of Ms. Wells for making protected statements violated the Act. Counsel further asserts, however, that the real reason the Respondent discharged Wells was to silence her as a union proponent. Although intertwined with Counsel for the General Counsel's basic argument, this further contention alleges an unadmitted antiunion motive for the discharge that requires a *Wright Line* analysis.

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For its part, the Respondent contends that it bore Ms. Wells no animus for either her position with or her protected activities on behalf of the Union, maintaining that its sole basis for discharge was Ms. Wells' publication of maliciously false, disparaging, and disloyal statements regarding the quality of patient care at the hospital. The Respondent argues that Ms. Wells' statements were unprotected and in clear violation of company policy, thereby providing legitimate basis for termination.

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B. The Discharge of Ms. Wells

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Counsel for the General Counsel argues that the Respondent had a disguised motive in terminating Ms. Wells, i.e. to silence a vocal union leader irrespective of the September 13 publications and the October 13 flier. Under the Board's analytical framework for deciding cases turning on employer motivation,²³ the General Counsel meets his evidentiary burden by

²¹ Copies of the September 13 LVRJ article in which Ms. Wells was quoted, Ms. Wells' September 13 web story, and the October 13 flier were attached.

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²² *Wright Line*, 251 NLRB 1083, 1089 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982)

²³ *Wright Line*, Id.

showing that an employee's protected conduct was a motivating factor in the employer's decision to take adverse action against the employee. The elements of discriminatory motivation are union or protected activity by the employee, employer knowledge of the activity, and employer animus. *St. George Warehouse, Inc.*, 349 NLRB No. 84, fn. 28 (2007); *Willamette Industries*, 341 NLRB 560, 562 (2004); *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991). If the General Counsel establishes each element, the burden of persuasion shifts to the employer "to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra at 1089; *Corrections Corporation of America*, 347 NLRB No. 62 at slip op.3 (2006); *State Plaza, Inc.*, 347 NLRB No. 70 at slip op. 1 (2006). The burden shifts only if the General Counsel establishes that protected conduct was a "substantial or motivating factor in the employer's decision." *Budrovich Contracting Co.*, 331 NLRB 1333 (2000). Put another way, "the General Counsel must establish that the employees' protected conduct was, *in fact*, a motivating factor in the [employer's] decision." *Webco Industries*, 334 NLRB 608, fn. 3 (2001).

In determining whether the General Counsel has met his evidentiary burden, Ms. Wells' union or concerted activity must be considered in two parts: (1) her activity as a chief union steward/executive vice president separate from her statements and (2) her three commentaries relating to the Respondent: the September 13 publications and the October 13 flier.

As to Ms. Wells' involvement in union leadership activities, e.g. participating in grievance processing, addressing collective-bargaining concerns to management, and participating on the negotiating committee, her activities were indisputably protected.²⁴ Moreover, in spite of the Respondent's denial that its managers/supervisors knew of her specific positions with the Union, it is clear, as noted earlier, the Respondent was aware Ms. Wells was not a "regular" employee, that she held some union leadership position, and that she energetically supported the Union. Thus the General Counsel has established the first two elements of his evidentiary burden: union activity by the alleged discriminatee and employer knowledge of it.

The General Counsel's proof as to the third element—employer animus—is less unambiguous. Counsel for the General Counsel and Counsel for the Charging Party argue that the following facts demonstrate the Respondent's animus toward Ms. Wells' union activities: (1) following Ms. Wells' suspension, Mr. Trowbridge was overheard saying, "I got her" and (2) the Respondent unwarrantedly identified Ms. Wells as the "ringleader" of and treated her differently from all other RNs involved in the October 7 incident.²⁵

Reasonable minds might suspect Mr. Trowbridge referred to Ms. Wells when he boasted he had "got her," but suspicion is no substitute for evidence, see *Caribe Ford*, 348 NLRB No. 74 (2006). Moreover, no basis exists for concluding that union animus rather than personal antagonism prompted his satisfaction. The statement does not, therefore, demonstrate animus. However, the Respondent's identification of Ms. Wells as the ringleader of the October 7 incident does. From their respective contemporaneous statements to other employees that

²⁴ I do not include as protected activity Ms. Wells' conduct during the October 7 incident, which the Respondent argues constituted an illegal, partial strike or Ms. Wells' statements, the protected or unprotected status of which is at issue herein.

²⁵ Neither Counsel for the General Counsel nor counsel for the Charging Party have argued that the Respondent demonstrated antiunion animus by Ms. Eaton's statement to another RN that Ms. Wells was "taking this union thing too far," or by Mr. Trowbridge's statement that Ms. Wells needed to be quiet, but the statements give context to the supervisors' identification of Ms. Wells as the ringleader of the October 7 incident.

Ms. Wells needed to be quiet and that she was taking the union thing too far, it is apparent that Mr. Trowbridge and Ms. Eaton had Ms. Wells' union partisanship in mind when they singled her out as instigator. The Respondent presented no evidence to support the two supervisors' conclusions, and Ms. Eaton's purported substantiation, i.e. that Ms. Wells had filled out all of the October 7 ADOs, was demonstrably erroneous. The Respondent also presented no evidence that any participating RN named Ms. Wells as initiator or facilitator of the refusals to take report. Indeed, Ms. Canty specifically denied to Ms. Nichols, the Respondent's investigating manager, that Ms. Wells had "corralled" or "coached" the RNs. The Respondent considered the RNs' October 7 refusal to take report to be misconduct, and although unable to provide proof of a reasonable or good-faith belief that Ms. Wells had catalyzed the misconduct, the Respondent nonetheless blamed her for it.

Ascribing responsibility for misconduct in the absence of a reasonable belief that an employee has engaged in misconduct evidences animus. See *McKesson Drug Co.*, 337 NLRB 935, 936 fn. 7 (2002) (Respondent "must show that it had a reasonable belief that the employee[s] committed the offense, and that it acted on that belief when it discharged [them]."); *Midnight Rose Hotel & Casino, Inc.*, 343 NLRB 1003, 1005 (2004) (employer must establish, at a minimum, that it had reasonable belief of employee misconduct); *GHR Energy*, 249 NLRB 1011, 1012-1013 (1989) (demonstrating reasonable, good-faith belief that employees had engaged in misconduct sufficient). Based on the evidence of record, the Respondent had no reasonable or good faith basis for concluding that Ms. Wells had led the October 7 refusals to take report except for her prominence in union activity. These circumstances support an inference that the Respondent bore animus toward Ms. Wells' for her union activities and that such animus was a motivating factor in the Respondent's decision to discharge her.²⁶ *Wright Line*, supra at 1089.

Having proven the three elements of discriminatory motivation, the General Counsel has met his initial burden. Such a finding does not mean that Ms. Wells' discharge was in fact "unlawfully motivated." *Id.* As the Board has noted, "The existence of protected activity, employer knowledge of the same, and animus...may not, standing alone, provide the causal nexus sufficient to conclude that the protected activity was a motivating factor for the adverse employment action." *Shearer's Foods, Inc.*, 340 NLRB 1093, fn. 4 (2003); see also *American Gardens Management Company*, 338 NLRB 644, 645 (2002). The General Counsel's establishment of the *Wright Line* factors does, however, shift the burden to Respondent to establish persuasively by a preponderance²⁷ of the evidence that it would have (not just could have) discharged Ms. Wells even in the absence of her protected union activity. *Desert Toyota*, 346 NLRB No. 3, slip op. 2-3 (2005); *Webco Industries*, 334 NLRB 608, fn. 3 (2001); *Avondale Industries, Inc.*, 329 NLRB 1064, 1066 (1999); *T&J Trucking Co.*, 316 NLRB 771 (1995).

²⁶ No evidence contradicts the Respondent's assertion that Ms. Wells' role in the October 7 incident formed no part of the decision to discharge her, and the General Counsel has not alleged Ms. Wells' suspension pending investigation of the incident as an unfair labor practice. The Respondent's lack of a good faith belief in Ms. Wells' October 7 instigatory role is relevant solely to the question of whether the Respondent had animus toward Ms. Wells for her protected union activities.

²⁷ A "preponderance" of evidence means that the proffered evidence must be sufficient to permit the conclusion that the proposed finding is more probable than not. McCormick Evidence, at 676-677 (1st ed. 1954).

The Respondent contends that irrespective of Ms. Wells' protected union activity, she would have been discharged for publicly disparaging the quality of the Respondent's patient care. In this regard, the threshold question to be resolved is whether Ms. Wells' statements at issue herein were protected under the Act.

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Employees do not lose Section 7 protection by communications to third parties that are (1) related to an ongoing labor dispute, *NLRB v. Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953), and (2) not "so disloyal, reckless, or maliciously untrue to lose the Act's protection." *Emarco, Inc.*, 284 NLRB 832, 833 (1987) citing *Jefferson Standard*.²⁸ The Act protects employees seeking "to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." *Five Star Transportation, Inc.*, 349 NLRB No. 8, slip op. 3 (2007), quoting *Eastex v. NLRB*, 437 U.S. 556, 565 (1978); *Endicott Interconnect Technologies*, 345 NLRB No. 28, slip op. 3 (2005) enf. den. 453 F.3d 532 (D.C. Cir. 2006). However, employee disparagement of an employer's product as opposed to publicizing a labor dispute, is not protected. *Five Star Transportation, Inc.*, supra, citing *Jefferson Standard*.

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The Respondent initially argues that Ms. Wells' statements, made through channels outside the immediate employee-employer relationship, were unprotected because they did not pertain to wages or working conditions. Respectively, Ms. Wells' September 13 statements were reported to a local newspaper and published as a web story on the publicly available union website; her October 13 statement was disseminated by flier to employees and union representatives.²⁹ All of Ms. Wells' statements related to the Respondent's RN and telemetry technician staffing levels. Staffing ratios were of significant interest to the RN bargaining unit and a primary topic of contemporaneous collective-bargaining in which Ms. Wells was involved as a union officer. Ms. Wells' LVRJ statement was in the context of a news article about the collective-bargaining controversy between the Union and area hospitals while her web story and October 13 flier also touched on staffing issues of collective-bargaining concern. Viewed in their "entirety and in context," Ms. Wells' statements reveal a clear nexus to terms and conditions of employment,³⁰ as the statements related directly to, and were inextricably intertwined with, collective-bargaining issues. Ms. Well's failure to mention the labor dispute did not vitiate the protection of the Act where her remarks were a clear extension of a legitimate and ongoing labor dispute, defined under Section 2(9) of the Act as "any controversy concerning terms, tenure or conditions of employment." See *Emarco, Inc.* supra at 833.

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The Respondent next argues that Ms. Wells' statements were unprotected because they were false, defamatory, disloyal, and publicly discreditable to the hospital. In assessing whether employee communications have lost the Act's protection, the Board considers whether "the attitude of the employee is flagrantly disloyal, wholly incommensurate with any grievances which

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²⁸ "A critical...determination is whether the conduct bears 'a sufficient relation to [employee] wage, hours, and conditions of employment,'" *Five Star Transportation, Inc.*, at slip op. 4, quoting *Vandeer-Root Co.*, 237 NLRB 1175, 1177 (1978), but employees' failure to specifically reference the labor dispute does not remove their remarks from the protection of Section 7 of the Act. *Emarco, Inc.*, supra.

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²⁹ While Ms. Wells' must have intended her September 13 statements to be read by an audience outside her employee-employer relationship, it is not clear that the October 13 flier was addressed to any but those inside that relationship. Nevertheless, for expediency, I have considered Ms. Wells' October 13 statements in the same posture as the September 13 publications.

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³⁰ *Five Star Transportation, Inc.*, at slip op. 4, quoting *Endicott Interconnect*, supra.

they might have, and manifested by public disparagement of the employer's product or undermining of its reputation ..."³¹ or whether employee communications are maliciously false, i.e. statements made with knowledge of their falsity or with reckless disregard for their truth or falsity. *TNT Logistics North America, Inc.*, 347 NLRB No. 55, slip op. 2 (2006). Nonmalicious employee communications to third parties regarding terms and conditions of employment, albeit offensive to the employer, are protected: "great care must be taken to distinguish between disparagement and the airing of what may be highly sensitive issues...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." *Allied Aviation Serv. Co. of New Jersey, Inc.*, 248 NLRB 229, 232 (1980). The burden of showing malice falls on the Respondent. See *Diamond Walnut Growers*, 316 NLRB at 36, 47 (1995) citing *Springfield Library & Museum*, 238 NLRB 1673 (1979).

Ms. Wells' LVRJ statement asserted that because of a shortage of nurses at the hospital, RNs were unable to provide timely medications to patients or give them basic care with the result that patients "could be lying in their own excrement for who knows how long." Her website statements focused on the Respondent's alleged reduction of telemetry technicians, resulting in one technician "watching the heart rhythms [of] twenty-five critically ill patients in the Medical ICU plus about 44 other hospital patients [while] the other technician is watching the heart rhythms of all remaining patients in the hospital...[one hundred sixty-nine people]." Her October 13 flier statement, under the heading "UHS' New ICU Standard: 4 Patients for Every Nurse," accused the Respondent of suspending her because she protested doubling the RN-ICU patient loads to "3 and even 4 patients [which is] unsafe, unacceptable and needlessly endangers patients." While Ms. Wells' accusations were perhaps over generalized and certainly hyperbolic, the Respondent has not met its burden of showing they were maliciously false.³²

Although the Respondent demonstrated that before making her September and October 13 statements, Ms. Wells had neither investigated hospital staffing data nor documented specific examples of the problems she cited, the Respondent did not show that Ms. Wells knew her statements were false or recklessly disregarded their truth or falsity. Ms. Wells' September 13 statement that nurse shortages could result in delayed medication and neglected patients was based on her own observations and RN grousing during negotiations. While the underpinnings for her statement may not have been substantial or even persuasive, there is no evidence they were demonstrably false. Moreover, Ms. Wells posed the criticism in the conditional, i.e., that nurse shortage "could" result in "patients lying in their own excrement for who knows how long," rather than averring that such was actually taking place. Ms. Wells' statements certainly insinuated that nurse shortages at the hospital produced sub-standard patient care, and it was understandably offensive to the Respondent, but absent a malicious motive, which the Respondent has not proved, Ms. Wells' "right to appeal to the public is not dependent on the [Respondent's] sensitivity." *Allied Aviation Serv. Co. of New Jersey, Inc.*, supra at 232. As for Ms. Wells' September 13 web story regarding telemetry technicians, she based her assertions of staff cuts on conversations with the technician scheduler and her own observations. Ms. Wells may have been mistaken in the inferences she drew from her conversations and/or her observations, but the Respondent has not proven her statements were clearly erroneous, much less that they were maliciously false. Finally, Ms. Wells' October 13 comments, while hyperbolizing RN assignments made during the October 7 incident, were not clearly unfactual. The facts are that on October 7 the Respondent, at least momentarily,

³¹ *Vandeer-Root Co.*, at 1177.

³² See *Cincinnati Suburban Press*, supra, (affirmative evidence of malice necessary).

assigned four MICU patients to one RN and on that day as well as on others assigned three patients to one RN. Moreover, although the Respondent may have suspended Ms. Wells on October 12 for investigational expedience, Ms. Wells' belief that she was suspended for her October 7 conduct is not so unreasonable as to constitute malicious falsity.³³

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In sum, none of Ms. Well's statements at issue herein are "so misleading, inaccurate, or reckless, or otherwise outside the bounds of permissible speech," as to lose the protection of the Act. See *Beverly Health and Rehabilitation Services, Inc.*, 346 NLRB No. 111 (2006) (negative statements to a local newspaper reporter about the quality of patient care protected where related to labor dispute and no evidence of malicious intent or knowledge of falsity); *St. Luke's Episcopal Presbyterian Hospital*, 331 NLRB 761, 761-762, enf. Denied 268 F.3d 575 (8th Cir. 2001) (employee's television newscast criticism of patient care protected where statements neither "disloyal, recklessly made, nor maliciously false;" *Titanium Metals Corp.*, 340 NLRB 766, fn 3 (2003), vacated in part on other grounds, 392 F.3d 439 (D.C. Cir. 2004) (newsletters critical of working conditions that described employer's credibility as "in the toilet" and its leadership as "crap" protected); *Veeder-Root Co.*, supra (statements not deliberately or maliciously false or made with reckless disregard for the truth); *National Steel Corp.*, 236 NLRB 822, 824 (1982) (action protected whether or not employees reasonable or correct in their good-faith belief); *Cincinnati Suburban Press*, 289 NLRB 966, 967-68 (1988) (though allegedly inaccurate, employee's publication of "Dirty Tricks in the Newsroom" was not so disloyal, reckless, or maliciously untrue as to lose the Act's protection); *Emarco, Inc.*, supra (remarks in the context of a labor dispute that reflect bias or hyperbole will not be considered reckless or maliciously untrue so as to lose the protection of the Act); *Diamond Walnut Growers*, supra (employees' statements that scabs were packing 'walnut with mold, dirt, oil, worms and debris' not maliciously false); but see also *Five-Star Transportation, Inc.*, supra at slip op. 5 (letters describing company as a "substandard company" that recklessly employed alcohol abusers, drug offenders, and child molesters unprotected); *Sprint/United Management Co.*, 339 NLRB 1012 (2003) (e-mail to employees stating anthrax had been confirmed at the employer's facility deliberately false and unprotected); *Jefferson Standard*, supra, (employees' public disparagement of the quality of the employer's broadcasting without discernible relationship to an ongoing labor dispute, unprotected); *American Golf Corp.*, 330 NLRB 1238 (2000) (public, disparaging attack on the employer's product and policies with an undisclosed purpose of pressuring the employer during negotiations unprotected); *TNT Logistics North America, Inc.*, supra (employees' letter to employer's most important customer accusing employer of requesting employees to fraudulently record log book times, unprotected as maliciously false).

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Inasmuch as Ms. Wells' September 13 and October 13 statements are protected under Section 7 of the Act, the Respondent has failed to meet its *Wright Line* burden. Accordingly, the Respondent violated Sections 8(a)(1) and (3) of the Act by discharging Ms. Wells on October 20.³⁴

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Conclusions of Law

The Respondent violated Sections 8(a)(3) and (1) of the Act by terminating Ms. Wells on October 20, 2006.

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³³ In the absence of supporting authority, I decline to consider the Respondent's contention that Ms. Wells' employment by the Union manifests malicious falsity.

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³⁴ The conclusion that Ms. Wells' statements were protected resolves the General Counsel's remaining theories of the case. See *Five Star Transportation, Inc.*, supra at fn. 8.

Remedy

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

The Respondent having discriminatorily terminated Joan Wells, it must offer her reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of termination to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³⁵

ORDER

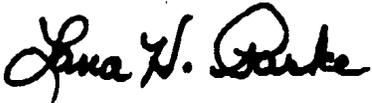
The Respondent, Valley Hospital Medical Center, Inc., Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Terminating any employee for engaging in union or other concerted, protected activities.
 - (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act:
 - (a) Within 14 days from the date of this Order, offer Joan Wells full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.
 - (b) Make Joan Wells whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.
 - (c) Expunge from its files any reference to Joan Wells' unlawful termination and thereafter notify her in writing that this has been done and that the termination will not be used against her in any way.
 - (d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

³⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

- 5 (e) Within 14 days after service by the Region, post at its facility in Las Vegas, Nevada
copies of the attached notice marked "Appendix."³⁶ 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
immediately upon receipt and maintained for 60 consecutive days in conspicuous
places including all places where notices to employees are customarily posted.
Reasonable steps shall be taken by the Respondent to ensure that the notices are
not altered, defaced, or covered by any other material. In the event that, during the
10 pendency of these proceedings, the Respondent has gone out of business or closed
the facility involved in these proceedings, the Respondent shall duplicate and mail,
at its own expense, a copy of the notice to all current employees and former
employees employed by the Respondent at any time since October 20, 2006.
- 15 (f) Within 21 days after service by the Region, file with the Regional Director a sworn
certification of a responsible official on a form provided by the Region attesting to the
steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 23, 2007

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Lana H. Parke
Administrative Law Judge

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50 ³⁶ If this Order is enforced by a Judgment of the United States Court of Appeals, the words
in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD"
shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF
APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

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 do anything that interferes with these rights. More particularly,
WE WILL NOT terminate employees because they engage in union or other concerted,
protected activities.

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

WE WILL offer Joan Wells full reinstatement to her former job or, if that job no longer exists, to
a substantially equivalent position, without prejudice to her seniority or any other rights or
privileges previously enjoyed.

WE WILL make Joan Wells whole for any loss of earnings and other benefits resulting from her
termination.

WE WILL remove from our files any reference to the unlawful termination of Joan Wells and **WE
WILL** notify her in writing that this has been done and that the termination will not be used
against her in any way.

Respondent, Valley Hospital Medical Center, Inc.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

2600 North Central Avenue, Suite 1800

Phoenix, Arizona 85004-3099

Hours: 8:15 a.m. to 4:45 p.m.

602-640-2160.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 602-640-2146.