

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

EXEMPLA LUTHERAN MEDICAL CENTER

and

Case 27-CA-20233

**UNITED FOOD & COMMERCIAL
WORKERS UNION, LOCAL NO. 7,
UNITED FOOD & COMMERCIAL WORKERS
INTERNATIONAL UNION**

Isabel Acosta, Esq., and Bill Daly, Esq.,
Denver, CO, for the General Counsel.
Jessica Inouye, Esq., and Deangelo Starnes, Esq.,
Wheat Ridge, CO, for the Charging Party.
John M. Husband, Esq., Denver, CO,
for the Respondent.

DECISION

Statement of the Case

Gregory Z. Meyerson, Administrative Law Judge. Pursuant to notice, I heard this case in Denver, Colorado, on April 3-4, and May 8, 2006. United Food & Commercial Workers Union, Local No. 7, United Food & Commercial Workers International Union (the Union or the Charging Party) filed an unfair labor practice charge in this case on October 10, 2006. Based on that charge, the Regional Director for Region 27 of the National Labor Relations Board (the Board) issued a complaint on January 31, 2007. The complaint alleges that Exempla Lutheran Medical Center¹ (the Respondent, Lutheran, or the Employer) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying the commission of the alleged unfair labor practices and raising a number of affirmative defenses.²

¹ The complaint was amended at the hearing to reflect the correct name for the Respondent.

² All pleadings reflect the complaint and answer as those documents were finally amended.

All parties appeared at the hearing, and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally and file briefs. Based upon the record, my consideration of the briefs filed by counsel for the General Counsel and counsel for the Respondent, and my observation of the demeanor of the witnesses, I now make the following findings of fact and conclusions of law.³

Findings of Fact

I. Jurisdiction

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The complaint alleges, the answer admits, and I find that the Respondent is a corporation with an office and place of business in Wheat Ridge, Colorado, where it has been engaged in the operation of an acute care hospital (the Respondent's hospital facility). Further, I find that during the 12-month period ending January 31, 2007, the Respondent, in the course and conduct of its business operations, derived gross revenues in excess of \$250,000; and that during the same period, the Respondent purchased and received at its hospital facility goods, materials, and services valued in excess of \$50,000 directly from points and places outside the State of Colorado.

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Accordingly, I conclude that the Respondent is now, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Labor Organization

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The complaint alleges, the answer admits, and I find that at all times material herein, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. Alleged Unfair Labor Practices

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A. The Dispute

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The complaint, as amended, alleges that the Respondent rescinded an offer to hire Kimberly Maddock (Maddock), a registered nurse (RN), because of her previous union activity and to prevent her from engaging in future union activity with the Respondent's employees and/or protected concerted activity with those employees as well as with the employees of a different employer. The Respondent denies that its decision not to hire Maddock was in any way motivated by her previous union activity or any concern that she might engage in union or protected concerted activity in the future. Maddock had previously been employed as a RN by the Respondent. According to the Respondent, the decision not to rehire Maddock as a RN was based primarily on her previous employment record with the Respondent, which allegedly demonstrated certain deficiencies in her performance. It is the contention of the Respondent that these deficiencies prevented Maddock from meeting certain "service behavior standards" that the Respondent insisted all of its employees adhere to. Further, the Respondent contends

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³ The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits, with consideration given for reasonable probability and the demeanor of the witnesses. See *NLRB v. Walton Manufacturing Company*, 369 U.S. 404, 408 (1962). Where witnesses have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

that it was concerned that Maddock's concurrent employment as a nurse practitioner (NP) with another health care provider, some of whose medical personnel worked at the Respondent's hospital facility, would potentially create conflicts, malpractice issues, confusion among patients and medical personnel, as well as "role confusion" on the part of Maddock, assuming she were
5 to be hired to work at the hospital as a RN.

B. The Facts

For the most part, the background facts in this case are not in dispute. Maddock had
10 been employed by the Respondent for almost 15 years as a "per diem" or "per random need" RN in labor and delivery at the Respondent's hospital facility.⁴ While working for the Respondent as a RN, Maddock furthered her education and became a licensed NP. In October 2001, she voluntarily resigned her position as a RN with the Respondent and accepted a
15 position as a NP with Westside Women's Care (Westside), where she currently continues to be employed.

Westside is a private OB-GYN practice. At the time of the hearing, it consisted of nine
20 physicians, six of whom owned the practice. Also employed at Westside were nurse midwives, 4 nurse practitioners (including Maddock), ultra sound technicians, schedulers, and billing clerks. The Westside doctors perform approximately 95% of their deliveries at the Respondent's hospital facility, as well as performing gynecological surgeries there. Westside is responsible for approximately 70% of Lutheran's OB-GYN business. Lutheran "credentials" the doctors, midwives, and NPs from Westside so that, as appropriate, they are able to deliver
25 babies, perform surgery, and cover on call shifts at the hospital facility. These credentialed employees of Westside have "privileges" at Lutheran. In the case of Maddock, a NP, having privileges means being able to deliver babies, treat the patients of Westside who delivered at Lutheran, including postpartum care, conduct "rounds" on those patients, assess their conditions, and ultimately order them discharged.

There are significant differences between the authority and duty exercised by nurse
30 practitioners and registered nurses. A NP possesses a license from a state authority, and generally speaking, has much more authority, autonomy and responsibility than a RN. NPs are allowed to admit patients, access patient medical records, document history, perform physical exams, request consultations, refer patients to other health care providers, and write orders and
35 notes on patient care charts. They are supervised by a sponsoring physician. On the other hand, RNs may admit a patient only with admitting orders from a physician. They have limited access to patient medical records, and must report an assessment to a physician. They may not diagnose and a request for a consultation must be made in collaboration with a physician. A
40 RN can place an order in a patient's chart, but only at the behest of a physician. The RNs are licensed under a different state statute, and are supervised by nurse managers at the particular hospitals where employed. Lutheran does not consider RNs to have "credentials" and they have no "privileges" at the hospital. The privileged NPs have access to the doctors' cafeteria, lounge, and parking lot, while the RNs do not.

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⁴ The terms "per random need" or "per diem" RN are used interchangeably. Such nurses
50 are considered "part time," and are supplemental or additional staff used to augment the regular nursing staff. The record reflects that while such nurses do not receive employment "benefits," instead they receive a salary differential.

Lutheran is a full service, acute care hospital with a four-hundred plus bed capacity. It serves more than 250,000 patients a year, including 70,000-80,000 emergency department patients, 17,000 surgeries, and the delivery of more than 2,000 babies. The hospital employs over 2,500 employees, including 800 physicians.

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It is undisputed that during July of 2000, the Union was engaged in an organizing effort among certain of the Respondent's employees. It is also undisputed that the Respondent was aware of that effort, and was aware that Maddock was actively involved with the Union as a member of its "organizing committee." (G.C. Ex. 8.) Subsequently, unfair labor practice charges were filed by the Union against the Respondent. Those charges were ultimately settled by means of an informal Board Settlement Agreement approved by the Regional Director on May 3, 2001, which contained a non-admissions clause. (G.C. Ex. 3.) The Notice to Employees posted by the Respondent pursuant to that settlement contained a paragraph in which the Respondent agreed to "rescind and expunge from [its] records any reference to the disciplinary warning[] issued to Kimberly Maddock...and to notify [her] in writing that this has been done and that this discipline will not be used as a basis for future personnel actions against [her]." (G. C. Ex. 3.)

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As noted earlier, Maddock voluntarily resigned her position of employment as a RN with the Respondent in October of 2001. She was, thereafter, employed full time by Westside as a NP. Maddock was frequently present at Lutheran in order to care for Westside's patients who were receiving OB-GYN treatment at the hospital. As a "credentialed" NP, she had all of the "privileges" Lutheran awarded such professionals. During July of 2006, Maddock was working for Westside approximately 30 hours per week, primarily Monday through Wednesdays. She heard from certain employees of Lutheran that the Respondent's emergency facilities were short staffed on RNs, especially on night and weekend shifts. According to Maddock, she began to consider applying for such part time work at Lutheran in order to supplement her income, as her daughter would be starting college in the fall and the extra money would help pay college bills. She thought that such part time RN employment at Lutheran would fit perfectly into her schedule, as she could continue to work full time at Westside, Monday through Wednesday, and work at Lutheran as needed, Thursday through Sunday.

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Maddock testified that about July 13, 2006,⁵ she applied for a per diem RN position through the Respondent's online website application process. Shortly after submitting her application, Maddock was at Lutheran and had occasion to speak with Shelly Leavy, the interim manager for labor and delivery, and Marcia Teague, the interim director of postpartum. Maddock mentioned to them that she was interested in returning to Lutheran as a per diem RN and had submitted an application online. Leavy indicated that she would look into the matter, and get the process moving. It was during this conversation that Robin Schroeder, the Respondent's director of women and family services, was introduced to Maddock. Leavy informed Schroeder that Maddock was interested in returning to work at Lutheran as a per diem RN. According to Maddock, Schroeder said that was "great," and she should work it out with Leavy.⁶

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It is important to note that on her application, Maddock indicated that she was currently working at Westside as a NP. She also listed her prior work experience at Lutheran as a "staff nurse/charge nurse" from January 1987 to October 2001. Further, the application form stated

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⁵ All dates are in 2006 unless otherwise indicated.

⁶ While there are small disparities in the parties' respective versions of these conversations, they are insignificant and not material to the resolution of the issues before me.

that the Employer would conduct drug testing and background checks on the applicant. Maddock's application shows her acceptance of these conditions, and her testimony established her understanding that drug testing and background checks would be conducted. (G.C. Ex. 2.)

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In early August, Maddock called Leavy and told her that she was definitely interested in the per diem RN position. Leavy indicated that someone from human resources would be contacting her. Several days later, Maddock received a call from someone in human resources who indicated that the Respondent was extending an offer of employment to Maddock as a per diem RN in labor and delivery. The caller indicated that Maddock would be scheduled for a physical and orientation session. According to the Respondent, this offer of employment was "conditional," pending a reference check and physical exam. However, no witness ever testified that the word "conditional" was used at the time the offer of employment was extended to Maddock. Maddock testified that she understood the Respondent could conduct a background check and drug test on her. Still, she apparently considered that the job offer was final. Leavy, on the other hand, takes the position that the "conditional" offer meant only that Maddock was qualified for the position, but would need to pass the drug test and background review before the offer was final.⁷

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On about August 17, Maddock received a call from someone at Lutheran, presumably in human resources, informing her that the offer of employment was being "rescinded." Maddock asked why, and was told that the offer had been made contingent on a "background check and references." Maddock asked the caller who she could speak with regarding the rescission and was told that the caller would get back to her with that information. When Maddock heard nothing, she decided to call Scott Day, the vice president of human resources.

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According to Maddock, she introduced herself to Day and asked him why her offer of employment had been rescinded. She testified that he told her every employment offer is contingent on background checks and reference checks. She questioned the use of references, stating that she had not been asked to provide any and had not done so. Day mentioned that as Maddock was a former employee, the Employer could talk to past managers and former coworkers to get references. According to Day, he told Maddock that the decision to rescind her "conditional" job offer had been made only after a background check and file review were conducted. Further, he told her that the final decision had been made by Robin Schroeder.

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Maddock brought up the subject of the Union, informing Day that she thought that her offer of employment had been rescinded because of her previous union activity. She told him that she was sure that he remembered her, as he was employed at Lutheran during the period of the union organizational campaign. Maddock reminded Day that as part of the settlement agreement that resolved the unfair labor practice charges, the disciplinary warning issued to her had been rescinded.⁸ Day assured Maddock that her prior union activity had nothing to do with the decision to rescind the offer of employment. She in turn assured Day that she did not want

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⁷ The parties spent a considerable amount of time at the hearing arguing over whether the job offer was "conditional" or not. However, I believe that it is unnecessary to resolve this dispute, as subsequent events establish that whether conditional or not, the job offer was rescinded.

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⁸ Day testified that he recalled Maddock's name when it first came up. He had been the director of human resources at the time the earlier unfair labor practice charges were settled, and had been involved with ensuring compliance with that settlement agreement, including expunging the disciplinary warning from Maddock's personnel file.

to come back to work at Lutheran in order to organize any employees, but merely because she wanted to earn some extra money. The telephone conversation concluded with Day suggesting that Maddock contact Schroeder in order to find out the specific reasons why the job offer had been rescinded.

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That same day, Maddock contacted Schroeder by telephone and asked her why the job offer had been rescinded. She expressed her concern as to how the rescission would look to others. According to Maddock, Schroeder apologized for the situation getting to this point, but mentioned that all offers of employment are made contingent on background checks and references. Maddock reminded Schroeder that she had not provided any references, but would be happy to do so, mentioning a number of doctors who could be contacted.

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According to Schroeder, she explained to Maddock that the decision to rescind that been based on her review of Maddock's previous personnel file, the internal references she had contacted, scope of practice issues, and her concerns that Maddock would not be a good member of the team. Maddock then brought up the subject of her previous union activity, suggesting that it was for that reason she was not being hired. Schroeder denied any knowledge of the prior union organizing campaign or Maddock's involvement with the Union.⁹

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At about this point in the conversation, Maddock asked Schroeder if she would change her mind. When she was told no, Maddock responded by telling Schroeder, "I don't want you to perceive this as a threat," but that as she had already told the doctors at Westside with whom she worked that she would be returning to Lutheran as a per diem RN, "it [would] not look very good for [Lutheran]," if she failed to return. According to Schroeder, she told Maddock that she did perceive Maddock's statement as a threat to damage the relationship between Westside and Lutheran in order to get Schroeder to change her mind and hire Maddock. Schroeder informed Maddock that she considered the relationship with Westside to be very important to Lutheran and she wanted to be sure that no harm or threat came to that relationship. Schroeder asked Maddock what Maddock would do to make sure that did not happen. Schroeder testified that Maddock responded that she "couldn't guarantee anything," and that she was "going to let the physicians know" what had happened.

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During her testimony, Maddock, for the most part, agreed with Schroeder's version of the conversation regarding the "threat" to inform the doctors at Westside about Lutheran's decision not to hire her. However, Maddock's version is not quite as overt, direct, and bold as is that told by Schroeder. To the extent that the witnesses' versions of the conversation vary, I credit the testimony of Schroeder. As to the substance of this conversation, the story told by Schroeder seems more genuine, realistic, in keeping with the context of the situation, and, frankly, sounds more in line with the type of direct, forceful statements typically attributed to Maddock. My observation of Maddock's testimony and her assertive manner leads me to conclude that the statements attributed to her by Schroeder were in fact made. Further, I believe that it would have been reasonable for Schroeder to have considered the statements made by Maddock to constitute a "threat" to harm the relationship between Westside and Lutheran because of Schroeder's decision not to hire Maddock. In any event, the conversation ended with Maddock asking Schroeder to further consider the decision not to hire her, and Schroeder agreeing to do so.

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⁹ Schroeder was not employed by the Respondent at the time of the union organizational campaign, the unfair labor practice charges, or the implementation of the settlement agreement.

5 The following week, not having heard from Schroeder, Maddock placed a call to her. According to Schroeder, she told Maddock that she had not changed her opinion about not hiring Maddock. Schroeder repeated her reasons as being concerns about scope of practice issues, reports from the internal references, a review of Maddock's file, and added the concern that Maddock had threatened Schroeder with harming the relationship between Lutheran and Westside. According to Schroeder, Maddock threatened her yet again, saying that, "Once the physicians find out about this, you're going to be very sorry. This is not going to look good for you." In her testimony, Maddock mentions this telephone conversation with Schroeder, but does not specifically indicate whether there was another reference to the Westside doctors being unhappy about Lutheran's failure to hire her. In any event, I again credit Schroeder's version of the conversation for the reasons expressed above, and conclude that Maddock did again threaten Schroeder with harming Lutheran's relationship with Westside.

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15 Maddock decided that she wanted to review her personnel file, and she contacted Day on August 28 with that intention. Day told her that it was not his normal practice to allow previous employees to review their personnel files, but that because she was privileged and credentialed as a NP at Lutheran, he would provide her with a courtesy review of her file. Accordingly, a meeting was scheduled for August 31 for Maddock to review her file. Present for the meeting were Maddock, Day, and Schroeder.

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25 Apparently, the meeting started off in a friendly fashion. Day began the meeting by telling Maddock that he had fully reviewed her file and that she had been a great nurse and patient advocate during the 15 years that she had been at Lutheran.¹⁰ However, he proceeded to say that he had certain concerns with some of the comments found in her file. Specifically, he indicated to Maddock that he had concerns with references in her yearly appraisals for 1995-1996, 1997-1998, and 1998-1999. For the 95-96 period, Day commented on a "self appraisal" where Maddock herself wrote, "I will continue to work on communication skills and maybe discussing plans of care in a less threatening manner when dealing with 'odd' situations." (G.C. Ex. 6.) Day referenced a comment in the 97-98 appraisal, as follows: "Continue to work on communication skills-Look at the times crosses fine line between assertive vs. aggressive communication." (G.C. Ex. 4.) For the 98-99 appraisal year, Day was concerned with the reference that, "At times Kim's assertiveness is taken as abrasive." (G.C. Ex. 5.) Day indicated to Maddock that these comments in her three yearly appraisals showed serious, recurring problems when communicating with other employees. He characterized her attitude as abusive, aggressive, and threatening.

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40 Another issue from Maddock's personnel file that Day pointed out to her was a letter that she had written on May 3, 1999, to Donna Diaz, a human resources representative. Apparently, the Respondent had reduced the salaries of certain employees, including Maddock, but having failed to initiate the pay cut, expected Maddock to repay the overpayment. According to Day, Diaz took offense to the tone of the letter from Maddock that suggested that Maddock was being "punished for [Diaz'] mistake", which letter allegedly reduced Diaz to tears. He characterized Maddock's tone as aggressive and disrespectful. (G.C. Ex. 7.)

45 Further, Day raised the issue of negative comments in several "peer evaluations." In an evaluation dated January 27, 1997, a fellow employee commented that Maddock needed "to be somewhat more patient/tolerant with others who are not quite so perfect...and quit being so

50 ¹⁰ The Respondent acknowledges that Maddock was a highly proficient nurse with excellent technical abilities.

insolent [with] those M.D.s.”¹¹ (G.C. Ex. 9.) Day also pointed out to Maddock that in a peer evaluation dated February 13, 1998, someone had written, “fine line between assertive/aggressive communication, sometimes she crosses it.” (G.C. Ex. 10.)

5 Day testified that he showed Maddock these various documents from her personnel file in order to demonstrate to her that she had exercised poor communication skills, including abusive, aggressive, and threatening language directed towards fellow workers over a significant period of time when previously employed at Lutheran. Maddock’s response was to ask Day whether he really thought that a few comments over almost 15 years of work were sufficient reason not to hire her. She asked the two managers to reconsider their decision and to hire her.

15 According to Schroeder, she repeated the reasons for rejecting Maddock’s application, which included a review of Maddock’s file, contact with internal references, and the threats Maddock had made to Schroeder about harming the relationship between Lutheran and Westside. Schroeder testified that after listing those reasons, she told Maddock, “I don’t think you’re a good fit, and we’re looking for very specific people to bring onto the team, people who meet our service behaviors, and none of those examples met our service behaviors.” Maddock testified that after Schroeder mentioned “references,” there was some comment that the two persons whom Schroeder had contacted were Irene Lindgren and Stephanie Roderick.¹²

25 Both Schroeder and Day testified that Maddock again threatened to harm the relationship between Westside and Lutheran. According to Day, “Kim indicated that the physicians were going to be very unhappy about [Lutheran’s refusal to hire her], and that Robin could expect to receive phone calls.” Maddock’s testimony is somewhat different. She indicated that Schroeder had mentioned not appreciating being threatened, to which Maddock replied that she did not know what Schroeder was referring to. Once again, I credit Schroeder and Day over Maddock regarding the statements about the doctors being unhappy. As I stated earlier in detail, these statements sound convincingly like something Maddock would have said.

30 Maddock was clearly very upset at this point in the meeting. She does recall Schroeder saying that as two weeks had passed and no complaints had been received from Westside, that perhaps Maddock was not as important as she thought she was. This statement certainly fits into the general context of the conversation, and as the two managers never denied that it was said, I will conclude that Maddock has accurately reported it.

40 In any event, both Day and Schroeder testified that the meeting ended with Maddock getting up, throwing her chair back, grabbing her papers off the desk, and slamming the door on her way out of the room. According to Day, he then turned to Schroeder and commented, “Well, I guess that didn’t go very well.”

45 ¹¹ As this comment is accompanied by a “happy face” and several “ha! ha!”s, it is difficult to know whether it was intended to be serious or not.

50 ¹² Stephanie Roderick was at the time of the hearing the director of women’s and children’s services at Exempla Good Samaritan, a “sister” hospital connected with Lutheran. During at least some of the time that Maddock was employed by Lutheran, Roderick was also employed there as a RN and charge nurse. Renie Lindgren was at the time of the hearing a RN case manager at Lutheran. She had been employed by Lutheran as a RN and later as the RN case manager during at least some of the time Maddock was also employed there.

C. The Respondent's Position

5 Counsel for the Respondent spent a considerable amount of time at the hearing, principally through the testimony of Day, describing a program instituted by the Respondent beginning in 2003 known as the "Best in the Nation" program. This program was instituted several years after Maddock voluntarily resigned from Lutheran. According to Day, Lutheran had significant problems with patient, employee, and medical community relations prior to 2003. In a series of studies contracted for by the Respondent, Lutheran rated poorly in the areas of patient satisfaction, physician belief that the administration was interested in their concerns, and among Lutheran employees who felt that teamwork and cooperation were lacking. As a result of these studies, Exempla Healthcare, Lutheran's parent company, determined that such low ratings were unacceptable, and developed the goal of becoming the best and safest hospital in the nation, with the highest levels of patient, employee, and physician satisfaction. This was the genesis for the Best in the Nation program.

15 Over a period of time, there followed a series of numerous meetings and sessions with employees, physicians, and managers during which feedback was received on ways to implement the Best in the Nation program. Ultimately, the Respondent developed a regimen of "service behaviors" that all employees were expected to adhere to, and against which their performances would be evaluated. These service behaviors were as follows: (1) to act safely, (2) to communicate effectively, (3) to act respectfully, (4) to project a professional image, and (5) to promote teamwork. According to Day, the result was nothing less than a "cultural change," a new work "way of life," which positively impacted all areas of the hospital's operation. Not only were existing employees expected to work in accordance with the service behaviors, but hiring decisions would also be made with the object of ensuring that new employees must meet the service behaviors as well.

25 In an effort to fully implement the service behaviors, Lutheran invested significant amounts of money and time in educating its work force and physicians regarding each of the five enumerated behaviors. Numerous programs were established to explain the service behaviors to employees, laminated copies of the behaviors were distributed, the service behaviors were posted throughout the hospital, training was provided in how to implement the behaviors, and each employee was expected to sign a letter of commitment to patients and fellow workers to uphold the service behaviors. (R. Ex. 2-11.)

35 It is the Respondent's contention that the service behaviors and the Best in the Nation Program have been an unqualified success. Allegedly, Lutheran's overall patient satisfaction has dramatically improved, and the hospital has been nationally recognized for the largest improvement of any hospital in its category for patient care. This has been reflected in patient satisfaction surveys. (R. Ex. 12.) Day testified that the Best in the Nation Program and its service behaviors continue to the present time to be an integral part of the hospital's operation.

40 According to Day, the implementation of the service behaviors has significantly changed the Respondent's hiring practices. The service behaviors are used as a basis for the qualities that the Respondent looks for in an applicant for employment. The behaviors are used in all aspects of the hiring process, including evaluating the application, reference checks, when interviewing the applicant, and in weighing candidates against each other. He testified that applicants are rejected "all the time" because they do not meet the service behaviors. According to Day, it is not enough for an applicant, such as a RN, to be technically proficient. Unless that applicant also meets the service behaviors, he/she will not be hired.

5 In an effort to demonstrate the Respondent's reliance on the service behaviors in the hiring process, counsel offered a written summary of the application process for RNs for the calendar year 2006, during which Maddock applied for work. The summary reveals that in that calendar year, 117 RNs were hired by Lutheran and 65 applicants were not hired. Of those applicants not hired, 35 (more than half) were rejected for reasons relating to the service behaviors. Interestingly, 12 of those RNs rejected were formerly employed by Lutheran, of which 8 were specifically rejected because they did not meet the service behaviors. This summary was admitted into evidence without objection from counsel for the General Counsel. (R. Ex. 14.)

10 Of course, it is the Respondent's position that Maddock was not hired, in part, because she did not meet the service behaviors. As mentioned earlier, after receiving and reviewing Maddock's application, Schroeder contacted Renie Lindgren and Stephanie Roderick, both of whom had previously worked with Maddock. Schroeder testified that her review of Maddock's file had raised a number of "red flags" in connection with Maddock's "communication style, her aggressiveness, [and] her abrasiveness," as reflected in Maddock's yearly evaluations. So, Schroeder decided to do some "internal reference checks."

20 Renie Lindgren testified that she had been employed with Maddock, both as a peer and for a time as Maddock's supervisor. She acknowledged that Schroeder had contacted her in early August of 2006 about Maddock's desire to return to Lutheran as a per diem RN. According to Lindgren, she told Schroeder that Maddock would no longer be a "good fit" at Lutheran, because of the service behaviors that had been instituted. Lindgren felt that Maddock did not like change and would challenge new ideas and procedures. According to Lindgren, Maddock was not a team player. She testified that she gave Schroeder examples of Maddock's lack of cooperation with management and aggressiveness, specifically Maddock's displeasure in cooperating with the Joint Commission for Accreditation of Hospitals (JCAHO), and an incident where Maddock had been issued a disciplinary letter, after which she "wadded the paper up, and tossed it..." Further, Lindgren testified that she expressed her concerns to Schroeder that Maddock would have difficulty switching roles between her duties as a NP with Westside and those of a RN with Lutheran. During cross-examination by counsel for the General Counsel, Lindgren acknowledged that Maddock was involved in the union organizing drive in 2000, but denied that the matter was discussed in her conversation with Schroeder.

35 Schroeder's version of her conversation with Lindgren was similar, but not identical. According to Schroeder, Lindgren told her that Maddock was "very abrasive and intimidating to her peers" and "crossed the line in communication often with physicians." Lindgren mentioned that Maddock spoke of the JCAHO process as being "stupid," and she felt that Maddock would not fit the service behaviors that Lutheran was trying to promote. Lindgren also mentioned her concerns with scope of practice issues with Maddock having to reverse roles between working as a NP and as a RN. According to Schroeder, Lindgren described Maddock as being "mean as a snake," and not someone she would recommend bringing back to Lutheran. Interestingly, Schroeder did testify that during the conversation Lindgren had raised the subject of union activity in 2000, but allegedly Lindgren was vague and uncertain as to whether Maddock was involved and the reference went no further. While there are some differences in their testimony, for the most part Lindgren and Schroeder corroborated each other. While Schroeder's version of the conversation was somewhat more detailed and pointed than Lindgren's, I believe that was likely the result of Lindgren's desire to soften her testimony in the presence of Maddock.

50 Next, Schroeder contacted Stephanie Roderick, who was at the time the director of women's and children's services at the Respondent's sister hospital, Exempla Good Samaritan. Roderick had previously worked with Maddock as a peer. According to Roderick, she was

surprised to hear that Maddock had applied to return to Lutheran, and she expressed concern about potential “scope of practice” issues between Maddock’s RN and NP positions. Roderick informed Schroeder that if Maddock were applying to work for her at Exempla Good Samaritan, she would not hire Maddock. Roderick testified that she told Schroeder that Maddock was
5 “aggressive, intimidating, controlling, and it affects teamwork, and it’s not in line with the service behaviors.” Further, she told Schroeder that Maddock gave favorable treatment to her friends, was negative about management, and intimidated people. Roderick admits that she mentioned to Schroeder that Maddock had been involved in the union organizing campaign in 2000, but she contends that Schroeder asked her no follow up questions.

10 Schroeder’s testimony about their conversation was very similar to that of Roderick. According to Schroeder, Roderick said she would not consider Maddock for rehire at Lutheran nor for hire at Good Samaritan because Maddock was “abrasive... caustic...not a team player,” and wrote schedules to favor her friends. Roderick also expressed her concerns about scope of
15 practice issues. The only item Schroeder adds is the contention that Roderick mentioned Maddock engaging in inappropriate behavior at the nurses’ station, specifically telling jokes and sitting on physicians’ laps.

20 According to Schroeder, in addition to her concerns about Maddock not meeting the Respondent’s service behaviors, she had concerns regarding “scope of practice issues” and “conflicts of interest.” If hired by Lutheran, Maddock intended to work as a per diem RN tending to Lutheran’s patients on certain days of the week, while on other days of the week she would be employed by Westside as a NP performing duties at Westside and also tending to
25 Westside’s patients who were at Lutheran as either over night patients or day patients. Schroeder was concerned that this dual status for Maddock might be confusing for the medical staff at Lutheran and for patients at the hospital who might see Maddock in her role as a NP one day and the next day in her role as a RN. She was also concerned that Maddock might treat Westside’s doctors, patients, and nursing personnel more favorably than Lutheran’s employees and patients, and that Westside’s doctors might become involved in Lutheran’s human
30 resources practices.

Schroeder stressed that a staff RN’s scope of practice is much more limited than that of an independent NP. She contends that if Maddock were hired by Lutheran, there was a risk that Maddock might assume the role of an independent NP, even while serving as a RN for
35 Lutheran. Such a role reversal allegedly might lead to potential conflicts of interest and even potential legal–medical liability issues.

40 It was with these concerns in mind that Schroeder decided not to hire Maddock as a per diem RN. However, because Maddock was a former employee of the hospital and was a current employee of Westside, an OB-GYN practice with which Lutheran had a close relationship, Schroeder discussed the matter with Gillian Sloan, the recruiting manager at Lutheran. Together, they decided that they needed to further discuss Maddock’s application with Day, Lutheran’s vice president of human resources.

45 According to Day, after meeting with Schroeder and hearing of her concerns with hiring Maddock, he agreed that the issues she raised were valid. However, before a final decision was conveyed to Maddock, Day wanted to personally review Maddock’s file. He testified that a number of years earlier, as part of the settlement agreement with the Board, he had personally removed the disciplinary warning from Maddock’s personnel file. Day testified that despite
50 having removed the warning himself, he needed to ensure that with the passage of time and

employees that another copy of the warning had not somehow inadvertently made its way back into the file. He wanted to make sure that neither the deleted warning nor any of Maddock's prior union activity had in any way affected Schroeder's decision not to rehire Maddock.

5 In her post-hearing brief, counsel for the General Counsel emphasized that Day admitted that he was "concerned" with Maddock's union activity. However, as Day pointed out in his testimony, this "concern" was related to ensuring that the disciplinary warning had not somehow made its way back into Maddock's personnel file, and that her union activity had not influenced Schroeder's decision making process. Further, as Maddock was previously involved
10 in an unfair labor practice case before the Board, Day was "concerned" enough to obtain legal advice prior to having the final decision conveyed to Maddock.

After reviewing Maddock's personnel file, Day was satisfied that the disciplinary notice had not reappeared in her file, and also that Schroeder's concerns about Maddock were well
15 founded. He testified that while he agreed with Schroeder's decision to rescind the offer of employment made to Maddock, the ultimate personnel decision was made by Schroeder.

D. The General Counsel's Position

20 As counsel for General Counsel points out, no one disputes Maddock's excellent technical expertise as a RN. This serves as the General Counsel's foundation for her position that, therefore, the reasons put forward by the Respondent in order to justify the decision not to hire Maddock are pretextual. Looking first at the "role confusion" argument, counsel notes that the Respondent has no rule or policy prohibiting a NP from being employed as a staff RN. A
25 number of witnesses, including Maddock and Linda Heller, Westside's practice manager, testified that role confusion would be unlikely as the two jobs were so very different. Still, the evidence is clear that Lutheran has never employed a RN who at the same time was a practicing NP.¹³ Since none of the Respondent's managers were able to document an instance where Maddock specifically, or any RN, had gone outside the "scope of practice,"
30 counsel for the General Counsel argues that the alleged concern that Maddock might slip into such a role reversal as would confuse patients and medical personnel is nothing more than "rank speculation."¹⁴

Regarding the negative comments in Maddock's personnel file, principally related to
35 communication issues, counsel for the General Counsel argues in her post-hearing brief that these relatively few negative comments were usually qualified and "paled in comparison to the glowing comments made in the same evaluations." Such an analysis leads counsel to conclude that this justification by the Respondent is a pretext. Specifically, counsel points to positive
40 comments in the very same evaluations that the Respondent uses to demonstrate Maddock's allegedly poor communication skills.

In Maddock's evaluation for the 1997-1998 year, the evaluator writes under Summary
45 Comments, "Kim is seen as an extremely strong patient and staff advocate....She is incredibly flexible and a team player. She is a strong communicator with staff and MD's though some

¹³ The closest that Lutheran has come to such a situation involves Jayne Meades, a Lutheran staff RN, who immediately prior to being hired was a practicing NP. However, Meades testified that she did not actively practice as a NP once she was employed by Lutheran as a RN.

¹⁴ It was not unusual for RNs employed at Lutheran to simultaneously hold other jobs, such
50 as a child birth educator at Westside. However, there was no history of a RN at Lutheran simultaneously holding a position as a NP.

think she could tone it down a bit.... Kim is definitely an asset to our unit and contributes an incredible amount.” (G.C. Ex. 4.) Another evaluation used by the Respondent to demonstrate Maddock’s allegedly poor communication skills was for the 1998-1999 year, where the evaluator notes that, “At times Kim’s assertiveness is taken as abrasive.” Yet, as pointed out by counsel
5 for the General Counsel, in the very next sentence the evaluator writes, “However, when she realizes it she immediately corrects the situation.” Counsel argues that this demonstrates Maddock’s ability to correct any harshness in her communication style as soon as she recognizes it. Further, the evaluator praises Maddock, saying, “[S]he is very committed to the unit and does go above and beyond. If I could compensate her, I would for exceeding the
10 expectations of the unit.” (G.C. Ex. 5.)

A third evaluation used by the Respondent to demonstrate Maddock’s allegedly poor communication skills was the self evaluation for the 1995-1996 year in which Maddock wrote that she would try and communicate “in a less threatening manner when dealing with ‘odd’
15 situations.” However, as counsel for the General Counsel points out, Maddock also wrote, “I’m a good team player, have good communication skills with both fellow staff and physicians....I have done better with communicating with physicians when upset and held my tongue (mostly!).” (G.C. Ex. 6.)

Also relied on by the Respondent to support its position that Maddock was a poor communicator was the letter she wrote to Donna Diaz on May 3, 1999. (G.C. Ex. 7.) Counsel
20 for the General Counsel argues that while the letter, asking that the hospital take the loss for its financial mistakes, is “direct,” the letter is not insulting or threatening to Ms Diaz. Counsel contends that it is “a stretch” for the Respondent to say the letter was aggressive or abusive. This she argues demonstrates the Respondent’s reliance on minutiae, while ignoring the
25 overwhelmingly positive evidence in Maddock’s personnel file. Again, counsel contends this indicates the Respondent’s desire to simply find a pretextual reason to support its allegedly unlawful conduct.

Arguing in a similar vein, counsel for the General Counsel is dismissive of the Respondent’s service behaviors defense. While Day testified at length that the service
30 behaviors were implemented by Lutheran after Maddock voluntarily left the hospital’s employ, he admitted on cross-examination that the underlying characteristics of the service behaviors have always been traits expected of employees by all hospital administrators when operating a hospital. As an example, Day acknowledged that safety is always emphasized by hospital
35 administrators.

Counsel for the General Counsel further contends that Schroeder did not even attempt to review Maddock’s application in a neutral manner. Maddock had orally mentioned to
40 Schroeder that her references were the Westside doctors, whom Maddock suggested should be contacted. However, the only individuals contacted by Schroeder as “references” were the Respondent’s two supervisors, Roderick and Lindgren, who had not worked with Maddock in over five years, and whose names had not been offered by Maddock.

The fact that both Roderick and Lindgren mentioned Maddock’s previous union activity when being questioned by Schroeder is emphasized by counsel. While not entirely clear to the undersigned, I assume that counsel for the General Counsel would argue that the references to
45 Maddock’s union activity by Roderick and Lindgren demonstrate the reason for their bias against her. However, counsel does not contend that either supervisor was involved in the
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hiring decision making process involving Maddock. Further, no evidence was offered that Schroeder, who clearly was involved in that process, initiated the subject of Maddock's prior union activity, nor asked any follow up questions when the subject was raised by Roderick and Lindgren.

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The General Counsel attempts to support her theory of the case by arguing that a second former employee, Heather Kempzell, was denied reemployment with the Respondent because of her prior union activity. Kempzell was a former per diem RN who had been active in the prior union organizing campaign. She had voluntarily resigned her position at Lutheran, and subsequently had indicated an interest in returning to the Employer in a supervisory capacity. In about July of 2006, the Respondent's human resources department called Kempzell to determine if she would be interested in a position as a clinical manager in labor and delivery. She indicated her interest and, thereafter, went through a series of interviews lasting two days. At the end of her second day of interviews, Kempzell met with Schroeder.

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On direct examination by counsel for the General Counsel, Kempzell testified that Schroeder asked her whether she was familiar with the prior union organizing campaign, whether she knew that there were new efforts at organizing occurring, and whether if selected as a supervisor she would be able to terminate a friend if the need arose. However, when pressed, Kempzell became much less certain. In response to questions from the undersigned, she indicated Schroeder never specified what type of organizing she was referring to. Also, when cross examined by Counsel for the Respondent, Kempzell acknowledged that in her affidavit given during the investigation of the unfair labor practice charge she indicated that she was not sure that Schroeder had said "organize," but rather had perhaps said that "people had tied to get together." Schroeder denied ever asking Kempzell about organizing. Rather, according to Schroeder, the discussion simply arose around her question to Kempzell of whether it would be difficult for Kempzell to discipline subordinates, specifically nurses that she had previously worked with as peers. Ultimately, Kempzell was not offered the position.¹⁵

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I found Kempzell's testimony to be rather nebulous regarding any statements made to her about "organizing." Her initial certainty seemed to dissipate in the face of cross-examination, and her earlier affidavit did not support her testimony. It appeared to me that she was exaggerating and embellishing the conversation with Schroeder in order to prove her point. In this regard, I found Schroeder's testimony much more certain. Schroeder's version better fits the context of the conversation. I find Kempzell's allegations to be inherently implausible. Accordingly, I conclude that Kempzell is mistaken, and that Schroeder did not mention "organizing" during her conversation with Kempzell. It is very unlikely that "organizing" was a concern of Schroeder's in connection with Kempzell, since it was the Respondent that had contacted Kempzell and encouraged her to apply for the supervisory position. Correspondingly, it would not be totally surprising for Kempzell, disappointed at not being hired, to have imagined a connection with her prior union activity.

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Counsel for the General Counsel offers an alternate theory in addition to her primary theory of discrimination based on union activity. The alternate theory is that the Respondent refused to hire Maddock because of concerns that she would engage in protected concerted

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¹⁵ There is no indication from the record that any unfair labor practice charge was filed over the Respondent's failure to hire Kempzell or about the statements that she alleges were made to her by Schroeder.

activity with the employees of Westside, specifically physicians.¹⁶ Westside employs three physicians who do not possess an ownership interest in the OB-GYN practice. The parties disagree as to whether these doctors are supervisors as defined in Section 2(11) of the Act, with the General Counsel taking the position that they are not supervisors. It is the General Counsel's contention that Schroeder and Day declined to hire Maddock as a per diem RN because they were concerned she would potentially involve the non-owner doctors from Westside in any employment problems that she might have at Lutheran. In her post-hearing brief, counsel for the General Counsel points out that Section 2(3) of the Act defines "employee" "as any employee," not limited to the employees of a particular employer. So, counsel argues that it would constitute a violation of the Act for Lutheran to discriminate against Maddock to prevent her, a prospective employee of Lutheran, from engaging in protected concerted activity with the doctors/employees of Westside.

E. Analysis and Conclusions

Counsel for the General Counsel has alleged in her post-hearing brief that the proper legal standard under which to analyze this case is *FES (A Division of Thermo Power)*, 331 NLRB 9 (2000). I agree. This is a classic refusal-to-hire case under Section 8(a)(3) of the Act. I do not believe that the framework for analysis of this case is altered because an offer of employment was initially tendered to Maddock. Regardless of whether that offer of employment was conditional and subsequently withdrawn, as alleged by the Respondent, or whether it was a firm offer subsequently retracted, as alleged by the General Counsel, the ultimate result was the same, that being a refusal to hire Maddock. In *FES* the Board cited *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982) for the proper allocation of burdens, the initial burden resting with the General Counsel to make a *prima facie* showing that protected conduct was a "motivating factor" in the decision not to hire. Under this standard, the General Counsel must show that a motivating factor in Lutheran's refusal to rehire Maddock was the result of her union or protected concerted activity. *Dole Fresh Vegetables, Inc.*, 339 NLRB 785, 795 (2003) (applying *Wright Line* standard to claim for failure to rehire). Only if the General Counsel makes a *prima facie* showing does the burden of proof then shift to Lutheran to show that it would have taken the same action in regard to Maddock's application for employment even in the absence of protected activity. *Wright Line, supra*.

Under *FES*, the General Counsel must prove the following elements in a refusal to hire case: (1) that the employer was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicant had experience or training relevant to the announced or generally known requirements of the position for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that animus contributed to the decision not to hire the applicant. In his post-hearing brief, counsel for the Respondent acknowledges that Lutheran was hiring RNs at the time Maddock submitted her application, and also that Maddock had the experience and training relevant to the RN position. Thus, the Respondent does not dispute the first two elements in the *FES* framework. However, counsel strongly denies that the General Counsel has established element 3, that antiunion animus contributed in any way to the decision not to hire Maddock.

¹⁶ At the hearing, over the objections of counsel for the Respondent, I permitted the General Counsel to amend the complaint to allege this alternate theory. (G.C. Ex. 18, paragraph 5(e) of the amended complaint.)

There is no question that Maddock had engaged in previous union activity at Lutheran and that the Respondent was aware of that activity. Day was employed at Lutheran as the director of human resources at the time of the union organizing campaign in July of 2000. In his position, he was aware that Maddock was a member of the Union's organizing committee.
5 (G.C. Ex. 8.) Further, Day was involved with the subsequent settlement of the Union's unfair labor practice charges, part of which involved the removal of a disciplinary warning from Maddock's personnel file. (G.C. Ex. 3.) Day had personally removed that warning from Maddock's file in an effort to comply with the settlement.

10 In her post-hearing brief, counsel for the General Counsel argues that Day testified that Maddock's prior union activity was a "consideration" in deciding to rescind the employment offer. However, as I noted earlier, Day's consideration about Maddock's union activity, as expressed by him when testifying, was merely that the disciplinary warning that he had personally removed from her personnel file not have inadvertently been returned to the file. Day also testified that
15 his consideration about Maddock's prior union activity was to ensure that the Employer's legal position was sound by consulting with legal counsel prior to informing Maddock that the offer of employment had been rescinded. After a careful review of Day's testimony, I disagree with counsel for the General Counsel's assessment of Day's use of the word "consideration." When placed in the context of his testimony, I believe it is fairly obvious that Day's use of the term
20 "consideration" was not meant to infer that he considered Maddock's prior union activity as a factor in deciding whether to reemploy her. Thus, his reference to "consideration" does not establish animus.

25 The only other references to Maddock's prior union activity by Lutheran's managers, as reflected in the record, were statements made to Schroeder by Renie Lindgren and Stephanie Roderick. After reviewing Maddock's personnel file, Schroeder contacted Lindgren and Roderick, both of whom had previously worked with Maddock. In talking about Maddock, both managers apparently mentioned Maddock's name in connection with the union organizing campaign. However, the record indicates that Schroeder, who had not been employed by
30 Lutheran at the time of the campaign, did not initiate the subject of the Union, nor did she ask any follow up questions or pursue the matter of Maddock's involvement once the subject was raised. Further, there was no evidence offered that either Lindgren or Roderick had any role in the decision making process as to whether Maddock should be hired.

35 The two managers who were obviously involved in deciding whether to hire Maddock were Schroeder and Day. Both testified that Maddock's prior union activity was unrelated to their decision making process. The General Counsel has been unable to point to a single credible direct example of antiunion animus.¹⁷ Instead, the General Counsel is forced to rely on what she terms the Respondent's "pretextual" explanation for its failure to hire Maddock.
40 Counsel argues that as the Respondent's reasons were pretextual, there should be an assumption that the Respondent's true motive was antiunion sentiment. However, the problem with this argument is that I do not agree that the Respondent's reasons for not hiring Maddock were pretextual.

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50 ¹⁷ As I noted earlier, I did not accept Heather Kempself's testimony that in an employment interview with Schroeder, she was asked questions about "organizing." Rather, I accepted Schroeder's testimony, as more reasonable, that the alleged reference to "organizing" was never made.

5 The Board has repeatedly held that the Act is not intended to authorize the Agency “to question the reasonableness of any managerial decision nor to substitute its opinion for that of an employer in the management of a company or business, whether the decision of the employer is reasonable or unreasonable, too harsh or too lenient. The Board has no authority to sit in judgment on managerial decisions.” *Neptco, Inc.*, 346 NLRB No. 6, at *4 n.16 (2005) (quoting *NLRB v. Florida Steel Corp.*, 586 F.2d 436, 444-45 (5th Cir. 1978).

10 As counsel for the Respondent points out in his brief, the Board has found in numerous cases that employers may refuse to rehire prior employees based on their earlier job performances. See, e.g., *Dole Fresh Vegetables*, 339 NLRB 785, 795 (2003) (employer’s decision not to rehire based on employee having previously quit and after a review of his file found lawful); *Rahn Sonoma Ltd*, 322 NLRB 898, 907 (1997) (lawful refusal to rehire based on employee’s unsatisfactory previous work history); *New York Telephone*, 300 NLRB 894, 894-95 (1990) (employee’s “undesirable attitude toward his job” when previously employed sufficient basis on which to refuse to rehire).

20 The Respondent’s “Best in the Nation” program was obviously not instituted and cultivated over a number of years with the object of keeping Maddock from being reemployed. The creation of this program was a major change in the direction of the Employer both in terms of time and money invested. The “service behaviors” were instituted as a means of improving the performance of employees so as to increase patient satisfaction and employees’ moral. According to the Respondent’s statistics, the program was highly successful.

25 In my opinion, there was nothing pretextual about Lutheran basing its hiring decisions in part on those service behaviors. Unfortunately for Maddock, there were a number of criticisms of her communication skills over extended evaluation periods as found in her personnel file. It would not be surprising for a reviewer, such as Day or Schroeder, to conclude that Maddock was frequently abrasive and overly aggressive. While Maddock’s file was also filled with highly complementary and laudatory comments, the Board is not in the business of weighing the respective positive and negative comments in personnel files. Certainly it was not unreasonable for Schroeder and Day to conclude that Maddock’s previous work history did not meet the Respondent’s service behaviors, specifically the requirement that employees communicate effectively, act respectfully, and promote teamwork. I see nothing pretextual in the Respondent’s conclusion that because Maddock did not meet its service behaviors, she should not be rehired.

40 Further, I fail to see how the Respondent’s consideration of the negative recommendations of two of its managers, Lindgren and Roderick, who had previously worked with Maddock, can be considered pretextual. It may be that it would have more objective for Schroeder to have also contacted some of the doctors from Westside that Maddock had orally named as references. Still, it is not surprising that Schroeder relied on two managers, whom she knew, to evaluate a former coworker of theirs. Again, the Board is not in the business of deciding which individuals should be interviewed as reference contacts. Unfortunately for Maddock, Lindgren and Roderick were fairly negative and did not recommend that she be rehired. However, Schroeder’s reliance on their recommendations was certainly not pretextual.

50 The Respondent had never employed a RN, who at the same time was employed by another employer as a NP. That was exactly what would have transpired had the Respondent reemployed Maddock. The situation was further complicated by the fact that Maddock was certified and credentialed to work as a NP at Lutheran. In my opinion, there certainly could be a potential problem with Maddock working at the hospital one day as a RN employee of Lutheran, and then the very next day working at the hospital as a NP employee of Westside. It would not

be unreasonable for the Respondent to be concerned that Maddock might over step her authority as a RN and take on the greater authority and independence of a NP, even on those days when she was strictly an employee of Lutheran. Similarly, it would not be unreasonable for the Respondent to be concerned that patients and medical personnel might be equally
 5 confused about Maddock's role on any given day when having seen her perform both jobs. As I believe these concerns on the part of the Respondent to have been legitimate, I do not believe them to be pretextual.

In an effort to establish that there was no pattern of negative action taken against
 10 employees with former union activity, the Respondent offered into evidence a letter dated August 4, 2000, from the Union to the Respondent listing the names of the 16 employees on the Union's organizing committee, including Maddock. (Res. Ex. 15.) Also admitted into evidence at the Respondent's request was a log of those 16 employees listing their names, titles and
 15 department where employed, date of hire and termination (if applicable), the reason for any termination, performance rating, promotion information and pay increase granted to the employee. (Res. Ex. 16.) Day also testified at some length about this log and the preparation of the information contained therein. This unrebutted evidence demonstrates that only 1 of the 16 employees was involuntarily terminated,¹⁸ and 7 of the employees are still employed 7 years after the precipitating events. Further, 4 of the employees were promoted, and all of the
 20 employees who were evaluated over the years received ratings at one time or another as "exceeding expectations." Many of them received the highest rating and all received raises.

It is argued by counsel for the Respondent that the log establishes that there has been
 25 no pattern over the years of harassment or discrimination against the known union supporters. As the evidence supporting the log is unrebutted, I must conclude that such would appear to be correct. The total lack of any probative, credible evidence of union animus in conjunction with the failure by the General Counsel to establish that any of the reasons offered by the Respondent for not hiring Maddock were pretextual, leads me to the inevitable conclusion that the General Counsel has failed to meet her burden of proof to establish by a preponderance of
 30 the evidence that union activity was a motivating factor in the Respondent's conduct.

However, assuming, for the sake of argument, that the General Counsel had established that union activity was a motivating factor in the Respondent's decision refusing to hire
 35 Maddock, under *Wright Line, supra*, a presumption is created that the Respondent's action violated the Act. To rebut such a presumption, the Respondent bears the burden of showing that the same action would have taken place, even in the absence of the protected conduct. See *Mano Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996); *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991). This I believe the Respondent has done.

As I noted above, I have concluded that the reasons proffered by the Respondent for its
 40 decision not to hire Maddock are not pretextual. The Respondent's conclusion that Maddock's personnel file and the negative references from two former coworkers demonstrated an abusive and aggressive communication style that did not comport with its service behaviors is not pretextual. The Respondent's conclusion that Maddock's position as a NP with Westside could
 45 lead to scope of practice and role confusion issues if she were to be simultaneously employed by Lutheran as a RN is not pretextual.

50 ¹⁸ Meg Powell was involuntarily terminated. However, she waived reinstatement through the Board Settlement, which contained a non-admissions clause.

5 The Respondent has produced un rebutted evidence to demonstrate that its decision not to hire Maddock was not an anomaly and that she was not treated in a disparate fashion. The Respondent's written summary of the application process for RNs for the calendar year 2006, during which Maddock applied for work, reveals that in that year, 117 RNs were hired by Lutheran and 65 applicants were not hired. Of those applicants not hired, 35 (more than half) were rejected for reasons relating to the service behaviors. Significantly, 12 of those RNs rejected were formerly employed by Lutheran, of which 8 were specifically rejected because they did not meet the service behaviors. (Res. Ex. 14.) Maddock was merely one of those 8. Accordingly, I believe that the Respondent has established by a preponderance of the evidence that it would not have hired Maddock, irrespective of her prior union activity.

10 In summary, I find and conclude that counsel for the General Counsel has failed to establish a *prima facie* case that union activity was a "motivating factor" in the Respondent's decision not to hire Maddock. However, even assuming the evidence is viewed as having established a *prima facie* case, that evidence still supports a finding that the Respondent would have refused to hire Maddock, even in the absence of her union activity.

15 I will now address the General Counsel's alternate theory, added as an amendment to the complaint at the hearing, that Maddock was not hired because the Respondent feared that she would engage in protected concerted activities with certain of the employees employed by Westside, specifically the doctors. (G.C. Ex. 18.) Counsel for the General Counsel's post-hearing brief clearly sets forth this alternate theory of the case. While counsel does not use the term "alternate theory" to designate this argument, it is so far removed from the General Counsel's primary theory, discrimination based on union activity among Lutheran's employees, that I believe "alternate theory" best describes it.

20 As was noted above, Westside Women's Care (Westside) is a private OB-GYN medical practice, consisting of nine physicians, six of whom own the practice, as well as midwives, NPs, (including Maddock) ultra sound technicians, schedulers, and billing clerks. It is important to understand the close business relationship between Lutheran and Westside. The Westside doctors perform approximately 95% of their deliveries at Lutheran, as well as performing gynecological surgeries there. Westside is responsible for approximately 70% of Lutheran's OB-GYN business. Three of the Westside doctors are non-owners of the practice, namely Drs. Kolrud, McCollom, and Cowles. These three doctors are paid a salary by Westside. However, so far as Lutheran is concerned all the nine Westside doctors are treated equally. All are "credentialed" by Lutheran so that they are able to deliver babies, perform surgery, and cover all shifts at the hospital facility. They also all have "privileges" at the hospital such as access to the medical facilities, equipment, and the doctors' cafeteria and lounge.

25 According to the General Counsel's theory as expressed in her brief, the Respondent was concerned that if it hired Maddock as a per diem RN, she would enlist the aid of doctors Kolrud, McCollom, and Cowles, with whom she worked at Westside, in an effort to assist her "with any employment problems she might have at Lutheran." For that reason, they allegedly declined to hire her. However, in my view this is an imaginative, but highly implausible, convoluted theory.

30 To begin with, it is important to consider that if hired by Lutheran, Maddock would have been an employee of both Westside and Lutheran. Westside and Lutheran have a very close business relationship. That relationship is essential to Lutheran, as 70% of Lutheran's OB-GYN business is dependent on Westside. Keeping the doctors at Westside "happy" is a very practical concern for Lutheran's managers.

It was in that environment that Maddock on several occasions threatened Schroeder with harm to the business relationship between Lutheran and Westside if she were not hired by Lutheran. I find Maddock's denial of any intent to threaten Schroeder as disingenuous at best, and plainly incredible. Simply because Maddock may have prefaced her remarks to Schroeder with the caveat, "Don't take this as a threat," does not lessen the clear intent to do just that. Maddock is an educated, articulate, intelligent individual who certainly knew that she was threatening Lutheran with very significant financial harm as "leverage" in order to get Schroeder to change her mind and hire Maddock. In fact, Schroeder accused Maddock of doing precisely that.

While the employees of different employers can certainly engage in concerted action together, which may in fact be protected under the Act,¹⁹ that was not what the managers at Lutheran feared. Their fear was that Maddock may have had the capacity, and apparently the will, to interfere with the business relationship between Lutheran and Westside. As a coworker at Westside with doctors Kolrud, McCollom, and Cowles, she had the potential ability to influence them into supporting whatever position she might take as an employee of Lutheran adverse to that employer. This was a highly unusual, almost untenable position for Lutheran to find itself in *vis-à-vis* its business partner Westside. Of course, the most practical way to avoid the potential problem was simply to not hire Maddock. That was exactly what Lutheran did.

The Westside doctors, including the three non-owners, were in a unique position to significantly influence Lutheran's financial affairs. These doctors were in effect "business partners" of Lutheran. If they decided to affiliate with another hospital, the financial consequences for Lutheran could be dramatic and severe. Any concerted action by Maddock and doctors Kolrud, McCollom, and Cowles, all of whom were Westside employees,²⁰ to assist Maddock, assuming she were also a Lutheran employee, would not constitute protected activity in the tradition sense. Maddock would be in a position to sabotage the business relationship between Lutheran and Westside. Surely, this is not what the Act is intended to protect.

Employees are engaged in protected concerted conduct under Section 7 of the Act when they act collectively for "mutual aid or protection," such as in attempting to improve wages, hours, working conditions or related issues. They are entitled to the Act's protection. However,

¹⁹ *Eastex, Inc. v. NLRB*, 437 U.S. 556, 564 (1978); see, also, *Service Employees, Washington State Council No. 18, Local 6 (Jill Severn)*, 188 NLRB 957, (1971); *General Electric Company*, 169 NLRB 1101 (1968); *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F. 2d 503 (1942).

²⁰ Counsel for the Respondent and counsel for the General Counsel spent much time and effort at the hearing and in their respective briefs arguing whether or not the non-owner doctors at Westside were supervisors. As I have concluded that the Respondent was not concerned with Maddock engaging in any protected activity with these doctors, their status as either employees or supervisors need not be decided. However, I will simply note that the Board's long established policy is to place the burden of proving supervisory status by a preponderance of the evidence on the party asserting that such status exists. *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006). I do not believe that the Respondent has met that burden. The Respondent's evidence was conclusory and not sufficient to establish that the doctors actually possessed Section 2(11) supervisory authority. See *Golden Crest*, 348 NLRB No. 39, slip op. at 5 (2006); *Avante at Wilson, Inc.*, 348 NLRB No. 71, slip op. at 2 (2006); *Chevron Shipping Co.*, 317 NLRB 379, 381 fn. 6 (1995); *Sears Roebuck & Co.*, 304 NLRB 193 (1991).

there is no evidence that this is what concerned the Respondent's managers. Rather, they were concerned with Maddock interfering with Westside's business relationship with the Respondent. Maddock threatened to do this in several conversations with Schroeder, and the managers of Lutheran were prudent to be concerned.

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In conclusion, I do not believe the evidence supports a finding that the Respondent refused to hire Maddock in order to prevent her from engaging in protected concerted activity with any of the employees of Westside, including doctors Kolrud, McCollom, and Cowles. The General Counsel has failed to prove this allegation by a preponderance of the evidence.

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Further, even assuming the General Counsel had established such a *prima facie* case, I find that the Respondent has met its burden of establishing, for the reasons expressed earlier in this decision, that it would have declined to hire Maddock, even in the absence of any concerns about her potential protected concerted activity. *Wright Line, supra*.

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Accordingly, based on the above, and the record as a whole, I shall recommend that the amended complaint be dismissed in its entirety.

Conclusions of Law

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

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2. The Union, United Food & Commercial Workers Union, Local No. 7, United Food & Commercial Workers International Union, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent did not violate the Act as alleged in the complaint.

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On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²¹

ORDER

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The complaint is dismissed.

Dated at Washington, D.C. on July 20, 2007

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 Gregory Z. Meyerson
 Administrative Law Judge

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²¹ If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.