

Connecticut Health Care Partners, d/b/a Woodlands Health Center and New England Health Care Employees Union, District 1199, AFL-CIO, Petitioner. Cases 34-CA-7260, 34-CA-7263, and 34-RC-1364

February 10, 1998

DECISION, ORDER, AND DIRECTION

BY CHAIRMAN GOULD AND MEMBERS LIEBMAN
AND BRAME

On September 5, 1997, Administrative Law Judge Steven Fish issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

The Board has considered the decision in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order as modified and set forth in full below.³

ORDER

The National Labor Relations Board orders that the Respondent, Connecticut Health Care Partners, d/b/a Woodlands Health Center, Waterbury, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Suspending or discharging its employees because of their activities on behalf of or support for New England Health Care Employees Union, District 1199, AFL-CIO.

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

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

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

² In the absence of exceptions, we adopt, pro forma, the judge's finding that Carol Brag's comments regarding waiver of union initiation fees to employee Michelle Saunter were objectionable under *NLRB v. Savair Mfg. Corp.*, 414 U.S. 270 (1973), and warranted setting the election aside. We find it unnecessary to pass on the Respondent's exceptions to the judge's failure to find that other statements were objectionable under *Savair*, because the findings of such additional *Savair* violations would be cumulative and would not affect the result herein.

³ We modify the recommended Order to comply with the Board's decision in *Indian Hills Care Center*, 321 NLRB 144 (1996), as modified by *Excel Container, Inc.*, 325 NLRB No. 14 (Nov. 7, 1997).

(a) Within 14 days from the date of this Order, offer Lisa Magnano and Yvonne Gilliams full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.

(b) Make Lisa Magnano and Yvonne Gilliams whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspensions and discharges of Lisa Magnano and Yvonne Gilliams, and within 3 days thereafter notify them in writing that this has been done and that the suspensions and discharges will not be used against them in any way.

(d) Preserve, and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Waterbury, Connecticut facility copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since October 2, 1997.

(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 had taken to comply.

IT IS FURTHER ORDERED that Case 34-RC-1364 is severed and remanded to the Regional Director for Region 34.

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

DIRECTION

It is directed that, within 14 days from the date of this Decision, Order, and Direction, the challenged ballots of Lisa Magnano and Yvonne Gilliams in Case 34-RC-1364 be opened and counted by the Regional Director and that a revised tally of ballots be issued.

IT IS FURTHER DIRECTED that if the revised tally of ballots reveals that the Petitioner has received a majority of the valid ballots cast, the Regional Director shall set aside the election and conduct a second election. If, however, the revised tally shows that the Petitioner has not received a majority of the ballots cast, the Regional Director shall issue a Certification of Results of Election.

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 the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT suspend or discharge our employees because of their activities on behalf of or support for New England Health Care Employees Union, District 1199, AFL-CIO.

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

WE WILL, within 14 days from the date of the Board's Order, offer Lisa Magnano and Yvonne Gilliams full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Lisa Magnano and Yvonne Gilliams whole for any loss of earnings and other benefits resulting from their suspensions and discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspensions and discharges of Lisa Magnano and Yvonne Gilliams and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the suspensions and discharges will not be used against them in any way.

CONNECTICUT HEALTH CARE PART-
NERS, D/B/A WOODLANDS HEALTH CEN-
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Margaret A. Lareau and Darryl Hale, Esqs., for the General Counsel.

Thomas R. Gibbons, Esq. (Jackson, Lewis, Schnitzler & Krupman), of Hartford, Connecticut, for Respondent-Employer.

John M. Crane and Kevin A. Creane, Esqs. (Law Firm of John M. Creane), of Milford, Connecticut, for the Charging Party-Petitioner.

DECISION

STATEMENT OF THE CASE

STEVEN FISH, Administrative Law Judge. Pursuant to charges filed in the Cases 34-CA-7260 and 34-CA-7263 on October 5 and 11, 1995,¹ respectively, New England Health Employees Union, District 1199, AFL-CIO (the Union, Charging Party, or Petitioner), the Acting Regional Director for Region 34, issued an order consolidating cases, consolidated complaint and notice of hearing on March 14, 1996, alleging in substance that Connecticut Health Care Partners, d/b/a Woodland Health Center (Respondent or the Employer),² violated Section 8(a)(1) and (3) of the Act by suspending and terminating the employment of Lisa Magnano and Yvonne Gilliams because of their activities in support of and assistance to the Union.

The above cases were consolidated for hearing with Cases 34-RC-1364, by Order of the Acting Director on March 20, 1996.

The trial with respect to the issues raised by the pleadings was held before me on September 25, 26, and 27, and November 6, 1996, in Hartford, Connecticut. Briefs have been filed by all parties and have been carefully considered.

Based upon the entire record, including my observation of the demeanor of the witnesses, I make the following:³

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Respondent is a Connecticut corporation with an office and place of business in Waterbury, Connecticut, where it is engaged in the operation of a nursing home providing inpatient medical and professional health care services.

During the 12-month period ending February 29, 1996, Respondent derived gross revenues in excess of \$100,000 and purchased and received at its facility goods valued in excess of \$50,000 directly from points outside the State of Connecticut. Respondent admits, and I so find that it is and has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and has been a health care institution within the meaning of Section 2(14) of the Act.

It is also admitted and I so find that the Union is and has been a labor organization within the meaning of Section 2(5) of the Act.

¹All dates herein referred are in 1995 unless otherwise indicated.

²The correct name of Respondent appears above as amended at the hearing.

³While every apparent or non-apparent conflict in the evidence may not have been specifically resolved below, my findings are based on my examination of the entire record, my observation of the witnesses' demeanor while testifying and my evaluation of the reliability of their testimony. Therefore, any testimony in the record which is inconsistent with my findings is hereby discredited.

II. THE REPRESENTATION CASE

The Union filed its petition to represent Respondent's employees on September 29. On October 13, the Director approved a stipulation election agreement which provided for an election to be conducted among Respondent's employees in a unit of service and maintenance employees on November 9.

At the election, 21 ballots were cast for Petitioner and 21 votes against representation. Two votes were challenges,⁴ which were determinative of the election. Thereafter, the Employer filed timely objections to the election.

On March 20, 1996 the Acting Regional Director issued a report on challenges and objections, wherein he found that the challenges to the ballots of Magnano and Gilliams, as well as the Employer's objections Nos. 1-5 raised substantial and material issues of fact that may best be resolved at a hearing. On the same day, he issued an order consolidating the representation and unfair labor practice cases to be heard before an administrative law judge.

III. FACTS

A. *The Alleged Unfair Labor Practices*

Respondent's facility, located in Waterbury, Connecticut, is a 90-bed nursing home providing both intermediate and skilled care, with a total complement of approximately 90 employees, approximately half of whom are employed in the bargaining unit.

Lawrence Clark is the administrator of the facility and has held that position for 3 years. That position is essentially the chief operating official of the facility and he has responsibility for the care and welfare of the residents and is the ultimate supervisor of all employees. The facility is organized into six functional departments including nursing and food service. Virginia Allen is the director of nurses and an admitted supervisor of Respondent, and has been in that position for 11 years.

Richard Cruz was during the material events herein, Respondent's food service supervisor. In that position Cruz directly hired numerous employees under his supervision and/or effectively recommends their hire as an employee of Respondent. He also was in charge of scheduling employees, was included in supervisory staff meetings, was considered by Clark to be part of Respondent's supervisory team, and was excluded by Respondent from the eligibility list in the election. Based on the above, I conclude that Cruz was a supervisor and agent of Respondent within the meaning of Section 2(11) of the Act.

During the summer of 1995, the Union began organizing employees at Respondent's facility. Several union meetings were held outside the facility during late August and early September in which a number of employees attended along with a number of union officials including Paul Fortier a vice president of the local. Lisa Magnano and Yvonne Gilliams were among these employees who attended the meetings.

Fortier appointed between 10 and 12 employees as leaders of the campaign, who were given authorization cards to distribute to other employees. Magnano was one of these leaders, along with employees Yolanda Klimas, Barbara

Mulcahey, Carol Bragg, Candace Carreiro, and Karen Gilliams is the sister of Yvonne Gilliams.

Magnano was one of the most active union supporters, and she distributed cards to and spoke to and solicited support from a number of employees along with another employee, Bernadette Martin. They would generally engage in this activity in the break room or at the nurses station. Most of these conversations occurred on the night shift, which consisted of eight unit employees. Magnano, although primarily assigned to the night shift, also would on occasion be assigned to the day shift, during which she also spoke to several employees about the Union during break time. Magnano also had several conversations with Connie Nolan, the supervisory charge nurse, during which Magnano told Nolan that she felt "we should get a Union in here."

On or about September 29, Fortier, along with employees Klimas and Mulcahey met with Clark and demanded recognition. Clark responded that he would have to speak to his attorney and could not give Fortier an answer at that time. On the same day, September 29, the Union filed its petition for an election.

Also on September 29, Fortier distributed Union buttons to a number of employees to wear and to distribute to other employees. Both Magnano and Yvonne Gilliams wore these buttons on and after that date. Magnano was seen wearing her button by Clark on September 29. He looked directly at her button, and was silent, instead of greeting her as was customary.

Gilliams who was given her button by her sister, was seen by Allen wearing the button.⁵

Clark admits that he saw Magnano wearing a union button, and testified at an unemployment insurance hearing, that he was aware that Magnano was one of the leaders on the second shift of the Union's organizing drive. Clark also testified that he was not aware of whether Yvonne Gilliams wore a union button or whether she was a supporter of the Union.

On October 2, during break time, Magnano was discussing the benefits of unionization with a number of employees, including Brenda Dalie. Dalie spoke out against the Union, saying that she was afraid of strikes.

Clark had several meetings with employees during which he expressed Respondent's opposition to the Union, as well as expressing similar sentiments in campaign literature that was distributed to employees. Clark also conducted two meetings with department heads during which he discussed the union campaign. He expressed Respondent's opposition to the employees being represented by a Union during these meetings, including stating at one point that Respondent "did not want a Union in there, no matter what."

Shortly after the petition was filed, sometime in early October, Clark conducted the second of these meetings with his supervisory staff. During this meeting he cautioned the supervisors that they should not threaten, interrogate, promise, or surveil employees about their union activities or sympathies. During the course of this meeting, one of Respondent's supervisors, Joe Bartosavage became upset and frustrated, because he could not do anything to relieve the tension in his department which he attributed to the Union orga-

⁴These were the ballots of Magnano and Gilliams, the alleged discriminatees herein.

⁵I note in this connection, that although Allen testified on other matters, she did not deny that she saw Yvonne Gilliams wearing a union button.

nizing. He got up and walked out of the meeting, and said, "I don't want any part" of it "in the presence of some employees." Clark left the meeting, came after Bartosavage and instructed him to come back into the meeting. Bartosavage complied and returned to the meeting.

During this meeting Clark also instructed the supervisors that they should be on top of things as far as who the union leaders were, and try to push them and make it tougher for these employees. He also told the supervisors that if the supervisors made things tougher on the employees, and the employees gave them—the supervisors could give the employees warnings. Clark specifically named three employees of Respondent, Klimas, Bragg, and Carreiro as union leaders that the supervisors should "be on top of," and added that the supervisors would know who the union people are, because they would be wearing union buttons.

After the meeting concluded, Cruz left the meeting and spoke separately to three employees, Barbara Mulcahy, Steve Casey, and Carol Bragg. He told the employees that they should watch their backs, because Respondent was looking for ways to fire employees who were union supporters, and mentioned that Clark had so indicated at the meeting that Cruz had just attended. Cruz also informed the employees that Clark had made specific reference to Klimas, Bragg, and Mulcahy as among those who Respondent was looking to take action against.

Klimas, Bragg, and Mulcahy were all leaders of the union organizing drive, and each of them wore union buttons at the facility. Additionally Bragg is Mulcahy's sister.

My findings above with respect to the meetings conducted by Clark, and the subsequent conversations related thereto is derived from a compilation of the credited testimony of various witnesses. I have essentially credited the testimony of Cruz as to Clark's comments concerning making it tougher for union advocates as described above, despite denials of Clark, Allen, and Bartosavage that Clark made any such statements at the meeting. I found Cruz to be a believable, although somewhat confused witness. He was clearly reluctant to testify herein, which is understandable since he had been terminated by Respondent, allegedly for dishonesty. However, I was impressed with his sincerity, as well as his candid admissions that some of his assertions, such as his statement to the employees that they could be terminated because of their union activities was based on his assumption and was not directly stated by Clark. It is not unreasonable in my judgment for Cruz to have made such an assumption, since Clark did say as I have concluded above, that union supporters should be watched carefully, and given warnings if necessary.

Respondent argues that Cruz should not be credited because he was terminated by Respondent for dishonesty, and that he denied any hostility towards Respondent because of such discharge. I do not agree. Although I do not doubt that Cruz was not pleased with Respondent for terminating him, I am not persuaded that his testimony should not be credited on that basis. Significantly, in this regard, Mulcahy substantially credited Cruz' testimony that he informed her of Clark's statements immediately after the meeting. Thus Cruz made these comments to Mulcahy while he was still employed by Respondent as a supervisor and spontaneously after the meeting. I find that such credited testimony of

Mulcahy's significant corroboration of Cruz as to what Clark said to the supervisors at the meeting.⁶

On October 2, at 11 p.m., Gilliams and Magnano were performing evening rounds in the same room with Brenda Dalie, another certified nurses aid. Magnano went over to patient Mary Clark. While Magnano was attempting to get Clark dressed, the patient began to lunge at Magnano and in the process began to scratch Magnano's arms. Magnano at that point crossed Clark's arms in front of her, and put her own arms around Clark very tightly. She also began to yell at Clark, "shut up," "shut up," "stop it," and "stop scratching."

Dalie heard Magnano's comments and approached Magnano. Dalie told Magnano to let go of Clark, and Magnano did so. When Magnano released Clark, Dalie noticed that Clark was bleeding, and saw what Dalie believed to be fresh nail marks on Clark's arm. Magnano told Dalie that she was going to the charge nurse to get a band aid.

Magnano then reported to charge nurse Alice Hubbell that she believed that an old "skin tear" of Clark's had opened and that she needed a band aid. Hubbell gave Magnano the band aid, which Magnano proceeded to place on the patient after she washed the area.

At around the same time, Dalie noticed Gilliams shouting at the patient with whom she was dealing "get up, get up, get in bed, now." At the same time Gilliams grabbed Speck's arm and pulled her up from the chair and repeated in a loud voice, "get in bed now." Dalie approached Gilliams, asked her what was wrong, and not to treat Speck that way. Gilliams replied, "mind your own business and do your own patients."

Dalie at that point became very upset, and reported both incidents that she had observed to Hubbell. Hubbell in turn requested that Dalie inform Allen about what she had seen and heard. Dalie did so, and meanwhile Hubbell went to check on the patients. Hubbell found Speck asleep, and then checked on Clark. She observed two marks on Clark's left forearm which Hubbell believed to be open nail marks, and little bit of blood. Hubbell did not recall whether there was a band aid in the area of the nail marks. Clark said to Hubbell, "I'm so sorry."

According to Hubbell, Clark did not elaborate to Hubbell as to what she was "so sorry" about, nor did Hubbell ask.

Upon hearing Dalie's report of her observations, Allen proceeded to the Assistant Director of Nurses' office where she summoned Administrator Lawrence Clark. Dalie repeated her accusations to Clark. At that point Magnano was called into the office to provide her version of the events of that evening. Clark related to Magnano that Respondent had received a report that she had verbally and physically abused Mary Clark earlier that evening.

⁶Respondent argues that Mulcahy should not be credited because of her uncertainty as to the date of the meeting, as well as the fact that no discipline was taken against Mulcahy, or any other of the employees singled out by Clark. Once again, I do not agree. Mulcahy's inability to recall the date is insignificant, and whether or not discipline was actually exacted on Mulcahy or the other employees is irrelevant. Moreover, Mulcahy was still an employee of Respondent at the time of the trial, and was not a discriminatee herein. Thus she is testifying against her own self-interest, and this factor is supportive of her credibility. *Stanford Realty Associates*, 306 NLRB 1061, 1065 (1986), and cases cited therein.

Brenda Dalie was brought into the meeting, and she repeated in the presence of Magnano what she had observed as related above. After Dalie left, Magnano denied that she had said “shut up” to the patient, but admitted that she had raised her voice to Clark and said, “stop it, stop scratching,” and explained that Clark who was a combative resident, had lunged at her and scratched her while she was attempting to put clothes on Clark. Magnano demonstrated on Allen how she was holding Clark during the incident. Allen commented that in her judgment, Magnano’s demonstrated restraint was too forceful for an elderly person. Magnano responded that she did not think that she was restraining Clark that hard.

At that point, Hubbell entered the room and reported that she had checked on Clark and noticed what appeared to be two fingernail marks on Clark’s arm and a little bit of blood. Hubbell also reported that Mary Clark had said to her that “she was so sorry.” While as noted Hubbell did not recall any further elaboration by Clark on this comment, Allen testified that Hubbell informed her that Hubbell had asked Clark what she meant and Clark had replied, “I caused trouble.”

Magnano responded to Hubbell’s accusation by denying that her fingernails could have made the marks on Clark’s arm. She also asserted that she was in accordance with company policy, wearing gloves at the time. Magnano also related that at 8 p.m. on that same evening, she had noticed a “skin tear” on Clark’s arm, and that she believed that the skin tear had opened and bled while she was attempting to restrain Clark.⁷

At that point, Allen went with Hubbell to check on Mary Clark, and for Allen to observe what Hubbell had seen. However, before Allen returned with her report, Clark decided to suspend Magnano immediately, pending further investigation. He wrote up a suspension notice on Respondent’s form entitled “Employee Warning Record.”

The warning alleges that Magnano physically restrained patient Clark, verbally yelled at her, and forcibly held her arms down. Further it was noted that another CNA asserted that Magnano told the resident to “shut up.” Magnano was given the opportunity to write a response on the form. She did so, and asserted that she did not feel that she was being physically abuse, and added that she had to restrain the resident in order to prevent being scratched. Magnano did admit in her response that she yelled at the resident to “stop it, stop scratching me,” but added that “I quickly calmed down and calmed the resident down.” She also commented that an old scab came off in the process.

Clark informed Magnano, which he confirmed on the form that she will be suspended until further investigation of the incident, and he would notify her of his decision in 48 hours. According to Clark, he made his decision to suspend Magnano because she admitted that she yelled at the patient, Allen had commented that she felt that Magnano had used excessive force, and Hubbell had reported the marks on the resident’s arm. Clark admitted that he never utilized this procedure, i.e., suspending an employee pending further investigation, without a warning, with respect to a unit employee. He did testify, however, that although normally Respondent gives warnings to employees before disciplining them fur-

ther, it depends on the severity of the offense. According to Clark, when he discharged two supervisors, Cruz for dishonesty (punching an employee’s timecard), and a business office manager for dishonesty involving a company audit, he did utilize this procedure of suspending these two supervisors immediately, without a warning, pending further investigation, which eventually resulted in their terminations.

Upon being informed that Clark intended to conduct an investigation, Magnano informed Clark that Yvonne Gilliams was in the room during the incident, and he should ask her what happened. Clark replied that he was going to question Gilliams, but that Magnano should leave the building and not return until she was notified of Respondent’s decision.

Shortly thereafter, Allen returned to the office and confirmed to Clark in accordance with Hubbell’s previous report, that she had also observed two marks on the resident’s arm that she believed to be fingernail marks. Allen told Clark that she did not believe that the marks were from a “skin tear,” as Magnano had asserted. Clark asked Hubbell if Magnano was wearing gloves during the incident, and she did not remember. Dalie was called back into the office and asked if Magnano was wearing gloves earlier in the evening during the interaction with the resident. Dalie informed Clark that Magnano was not wearing gloves.

Gilliams was then summoned into the office. Clark informed Gilliams that he had received a report that she had verbally and physically abused Helen Speck. Dalie was called in, and she repeated her accusations concerning what she observed with respect to Gilliams, as related above. Gilliams simply denied Dalie’s assertions, and claimed that nothing had happened.

According to Clark he decided to suspend Gilliams at that time pending further investigation, as he had done with Magnano. He explained his decision as follows:

Brenda Dalie did come in and tell her what she saw. And then I believe that time, Yvonne, you know, she said nothing happened. I didn’t do this.

And at that time, just with what had gone on previous with the statement from Brenda Dalie, and with Lisa saying, yeah, I did yell at her, I was, you know, she did restrain her. I knew that you know, something was, something really did, something went on in the room. I mean, there was—some problems in that room.

So I decided at that time I was going to suspend her also. And you know, so I could investigate further and determine what I would do.

The suspension notice prepared by Clark, once again on a form entitled “employee warning record,” asserts that it was reported by a CNA that Gilliams pulled patient Speck up by her arm while yelling at Speck to get into bed. This was characterized by Clark as “verbal and physical abuse.” Gilliams’ written response states that she disagrees “with what happened. I did not abuse the patient at all.” As with Magnano, Clark suspended Gilliams until further notice, with a statement that he would notify her within 48 hours. Clark asked Gilliams no questions about what she observed with Magnano, and conversely did not ask Magnano about what she observed with respect to Gilliams.

Gilliams testified that during the course of her interview, Allen and Clark left the room and had a conversation outside

⁷ Gilliams essentially confirmed Magnano’s testimony as to the 8 p.m. incident involving Clark and Magnano.

the door that Gilliams was able to overhear since the door was opened a little bit. According to Gilliams, Allen asked Clark "shall we keep Brenda on the second shift, to see who else we could set up." Clark allegedly answered "yes." I do not credit Gilliams' testimony concerning this conversation which was credibly denied by Clark.⁸ I note particularly that this conversation was not mentioned in Gilliams' affidavit which was given shortly after the charges were filed. While it is understandable that sometimes particular evidence or conversations are omitted from the affidavit because the employee forgets or does not recall it at the time, I conclude that is unlikely that this conversation would have been forgotten by Gilliams if it had occurred. This alleged conversation is so significant and indicative of discriminatory conduct, that I do not believe that Gilliams would have forgotten when giving her affidavit, as she now asserts.

Moreover, I also find it highly improbable that Allen or Clark, who are both intelligent and experienced professionals would either risk their reputations or careers to "set up" an employee for discharge, or even if they were to do so, to talk about it within earshot of Gilliams, one of the employees whom they allegedly "set up."

I therefore do not credit Gilliams' testimony in this regard.⁹

At some point on October 2, Hubbell and Dalie filled out incident reports detailing what they had observed and/or what they had been told. Hubbell's forms characterized both Speck and Clark both before and after the incident as "alert and confused."

The day after the suspensions, October 3, Clark conducted a meeting with employees during which he showed the employees an antiunion video, and the topic of unionization was discussed. During the course of this meeting, showing the antiunion video, Clark mentioned that the employees may have heard that two employees were suspended for abuse and that he was letting them know that he would not tolerate abuse at the facility. Employee Klimas then spoke up and mentioned that Respondent had tolerated abuse in the past with respect to employee Rochelle Watterworth. Clark replied that there were no witnesses to the incidents involving Watterworth, and that he did not want to hear any more about Watterworth at the meeting.

After the suspension, Allen checked Clark's medical file to see if there was any indication of an "old skin tear," as Magnano had claimed. She examined Charge Nurses' notes, which revealed no skin tears in the past 30 days. While a skin tear was recorded on August 19, 6 weeks before the October 2 incident, this tear was located on the left elbow, while the wounds herein were located on Clark's forearm. Allen reported his findings in this regard to Clark.

Clark also reinterviewed Dalie and Hubbell who confirmed their earlier versions of what they had reported. Clark also examined the personnel files of Magnano and Gilliams. Ac-

⁸Allen credibly denied that she was involved in the suspension interview of Gilliams.

⁹I am also not convinced by Magnano's attempted corroboration of Gilliams by her testimony that Gilliams informed her of the conversation on the night of the suspension. I note that Magnano's version of Gilliams' alleged statement to her concerning the conversation differed significantly from Gilliams' testimony herein. Additionally, Magnano also failed to include this significant evidence in her affidavit as well.

ording to Clark, he discovered through this process, that Gilliams was still a probationary employee, and had been absent an excessive amount of times over the period of her employment. The records introduced by Respondent which Clark alleges that he relied upon, revealed five absences between September 8 and 22, 1995. Gilliams started working for Respondent on July 31.¹⁰

According to Clark, he did not talk to Magnano about Gilliams situation, nor Gilliams about Magnano, because he had sufficient information to make a decision, and because he felt that since both of them were accused and in "compromising positions," with respect to recounting versions of the other employees' actions.

Further, although Clark admits that he was aware that Mary Clark told Hubbell that she was "so sorry" concerning the incident with Magnano, he did not speak to her or Speck about the conduct of Magnano or Gilliams. Clark asserted that he did not do so, because he was informed that the residents were agitated, confused, and incoherent. When asked why he did not speak to them or direct that they be interviewed the next day, Clark replied, "I don't know, I just, I think with what was going on, I probably didn't think of it. I believe that I had . . . the reports that I had was . . . enough information for me to make a decision."

Clark testified further that he made the decision to terminate both Gilliams and Magnano based upon the information that he had in his possession with respect to Magnano, Clark asserts that he discussed Allen's investigation and relied on the fact that Allen had concluded that Magnano used force in restraining Mary Clark, and that in Allen's opinion the fingernail marks inflicted upon Mary Clark were caused by Magnano.¹¹ Clark did not believe that he asked Allen for a recommendation whether or not to terminate Magnano, but that he informed Allen of his decision and she agreed. He also denied that the subject of giving a warning or some other discipline to Magnano came up in their discussion.

Allen, for her part, corroborated Clark's testimony that there was a discussion between them concerning Magnano, and that she agreed with Clark's stated intention to terminate Magnano. According to Allen, the reason for her concurring with Clark's view were the nail wounds on Mary Clark's arm¹² and the excessive force demonstrated by Magnano "was a little too much for an elderly person." However, Allen, contrary to Clark, testified that the subject was discussed between them that Magnano had not received any prior warnings. According to Allen, it was stated that no warnings were required because "we felt this was abuse." Allen testified further that the fact that Magnano allegedly said "shut up" was a minor thing compared to the wounds.¹³

¹⁰Respondent had a probationary period of 90 days.

¹¹Clark also testified that another factor that he relied was the report made to him, from whom he could not recall that there was blood under Magnano's fingernails.

¹²In this connection, Allen conceded that Mary Clark had a history of throwing her arms out, hitting things and bruising herself. Allen also conceded that Mary Clark would from time-to-time scratch herself, although she did not believe that the marks that she observed were self inflicted.

¹³In that connection, Clark testified specifically that Magnano was not fired for yelling or raising her voice, but because of the marks on the patient's arm and the excessive force.

As for Gilliams, Clark testified that he decided to terminate her, because he believed Dalie's version of events, the fact that he found excessive absences in Gilliams' file, and she was a probationary employee. He also asserts that he informed Allen of his decision and she agreed.

On October 5, Magnano met with Clark and Allen, along with employees Klimas and Mulcahy, who Magnano brought along as witnesses. Clark informed Magnano that based on his investigation she was being terminated for "patient abuse." In that regard Allen referred to the fingernail marks on Mary Clark's arm. When Magnano insisted that she had gloves on, Allen added that Magnano had blood under her fingernails. This was the first time that Magnano had been confronted with this accusation. Magnano again insisted that she always wore gloves and did so on that occasion, so how could she have had blood under her fingernails, Magnano also asserted that she believed that she was terminated because of her union activities. Clark replied that union activities has nothing to do with it, and that she was fired for "patient abuse."

Klimas brought up the fact that Respondent had taken over 3 years to dismiss employee Rochelle Watterworth for patient abuse. Clark and Allen both responded that in essence Respondent was unable to find any witnesses to corroborate the allegations against Watterworth. Allen also informed Klimas that Allen had counseled Watterworth, and that when she spoke to the alleged complaining witness, that witness backed off and said it's all right and that they did not want anything to happen to Watterworth. Klimas also brought up another situation of an employee Respondent hired, although there were pending abuse charges against her. Allen replied that she knew who Klimas was referring to, and that she had received an anonymous call about the person, and had checked with the Public Health Department and found nothing to establish that there was a problem with that employee.

Clark gave and read to Magnano a copy of Respondent's termination notice, dated October 5, which states that she was terminated for "physical and verbal abuse to a resident." The notice states that the incident was observed by another CNA and that Magnano admitted that she yelled at the resident. Finally the notice stated that an investigation by Allen indicated "signs of physical abuse," and that Allen found two scratch marks which were fresh with blood on two open areas of the patient's arm. The notice made no mention of the demonstration that Magnano had given on Allen, or her alleged use of "excessive force." Nor was there a reference to the allegation of blood under Magnano's fingernails.

While, Clark admitted that blood under Magnano's fingernails was reported to him, (by who he did not recall), and that this was a factor in his decision to terminate Magnano, neither Allen Hubbell nor Dalie, furnished any testimony about observing or reporting any blood under Magnano's fingernails.

Gilliams was also informed of her termination on October 5 by Clark, again in the presence of Mulcahy, Klimas, and Allen. Clark told her that he believed that she committed physical and verbal abuse on a resident, and that she during her probationary period, had been excessively absent. Gilliams again denied that she had abused any patients. She made no comments about the absence complaints.

However, in that regard, Gilliams testified, without contradiction that she had never been spoken to or warned by anyone from management concerning her absence or attendance. Gilliams had always called an hour before her shift was to start, notified Respondent that she was going to be absent because she was sick.

The discharge notice for Gilliams stated she was terminated for "improper absences (5 absences in a month)." The notice elaborated further Gilliams still in a probation period, and that it was reported that Gilliams "yelled and pulled at a resident while on duty." The reference to excessive absences was also repeated as well as the contention that Gilliams was "terminated for verbal and physical abuse to a resident."

As noted above, Klimas made reference to Respondent's treatment of employee Rochelle Watterworth at both Respondent's meeting with employees and at the discharge meeting with Magnano. Watterworth's personnel file revealed that between September 17, 1993,¹⁴ and April 12, 1995, Watterworth received 12 written warnings for conduct which involved either physical and/or verbal abuse of patients, as well as other problems. These warnings include a warning on September 17, 1993, indicating that a nurse heard what she believed to be slap to a resident by Watterworth, but that the supervisor had asked the resident who was confused who denied that anyone slapped her. Watterworth's statement indicated that the resident had stated to the charge nurse that Watterworth had slapped the resident, but that in fact the resident had slapped Watterworth. The written warning which was also signed by Larry Clark reflects that he instructed Watterworth that if she had further problems with residents being abusive to her, she should report the incident to a charge nurse immediately.

On October 9, 1993, a charge nurse heard Watterworth call a resident a "bitch," confronted Watterworth with this, and Watterworth responded to the charge nurse, that the resident, "was one anyway." the charge nurse told Watterworth that this was not acceptable behavior, and a written warning was prepared, and signed by the charge nurse, as well as by Allen on October 12, 1993. The warning also reflects that Watterworth refused to sign the warning notice. On that same date, Watterworth was given an employee warning stating "this is a final warning for inappropriate or unacceptable behavior or verbalization toward a resident. The very next time any such complaint or similar infraction is reported will result in suspension and/or termination." The notice refers to three prior warnings (9/12/93, 10/9/93 and 6/4/93). The record does not include a copy of the warning issued on June 4, 1993, nor any evidence of the circumstances of that incident.

Notwithstanding this alleged "final warning," 3 days later, Watterworth committed four separate acts of improper conduct, which resulted in only another warning signed by Allen on October 29, 1993. The conduct involved in this warning notice included calling a resident a "slob," refusing to give a resident a towel and a pillow case and telling the

¹⁴ Watterworth's also disclosed a written warning dated January 8, 1992 for leaving early, frequent tardiness, watching TV on duty and too many phone calls. The management response indicates that Watterworth will be given 2 weeks to show improvement. The notice also reflects that on March 5, 1992 Allen wrote "accomplished."

resident it wasn't her job while she was reading the paper. The resident stated that she intended to report Watterworth to the resident meeting.

On November 7, 1994, Watterworth received another written warning, regarding an incident on November 6, wherein Watterworth left a patient (who happened to be Mary Clark the same patient allegedly abused by Magnano), unattended sitting on a toilet, which resulted in the patient attempting to get up herself, falling, hitting her head, and biting her tongue. Watterworth was reminded by Allen that patients are not to be left alone in the bathroom, particularly Clark who always tries to get up on her own.

A few days later, November 11, 1994, Watterworth was issued but another warning, by Allen, based on a report from an RN. The RN overheard a resident saying to Watterworth, "don't you ever kick me again." The warning also reflects that an LPN reported to the RN that the resident was very apprehensive and had complained that Watterworth was being very cruel to her. The RN later on that morning heard and witnessed Watterworth yelling at the resident, "sit down, I'm tired of this." The RN told Watterworth not to speak to a resident in this manner and also observed "rough handling of resident by Watterworth when he attempted to get the resident to sit down. The RN also wrote in the warning, "verbally degrading statements." The warning also reflects that Allen spoke to Watterworth about the incidents, and that Watterworth denied any abuse, but admits "harsh speaking."

Two other written warnings dated the same day, November 11, 1994, signed by the RN and the charge nurse respectively, which detailed the specifics of the prior warning, were issued to Watterworth. The warning signed by the charge nurse, reflects that she was told by the resident that she had been hurt and threatened by Watterworth, and that the resident was upset and afraid to talk. Allen, according to the warning, investigated and questioned Watterworth and another CNA who was present during the alleged abuse. Since the other CNA supported Watterworth's assertion that she had not hurt or abused the resident, Allen wrote on the warning that she was satisfied with the word of Watterworth and the other CNA. The other warning, signed by RN Struskey, reflects that the patient complained to her that Watterworth kicked her in the right hip and was always swearing Struskey also reported that she had criticized Watterworth for the way she was speaking to the resident, and Watterworth responded, "you try it for 6-4 everyday and see if you can do it." Struskey then asked Watterworth to leave the room, and she proceeded to assist another CNA in completion of the care of this resident.

Allen's management response consisted of verbally chastising Watterworth in regards to tone of voice and language used. Watterworth answered Allen this would not happen again.

On January 14, 1995, Watterworth was issued still another written warning, for leaving a patient unattended and lying on the floor.

On February 22, 1995, Watterworth received yet another written warning, signed by RN Lynne—detailing her observations on February 20, 1995. Lynne reported that other employees complained to her that Watterworth was not "carrying her weight" that they were "sick of doing her work," and that Watterworth had been off the floor for over an half an hour. When Lynne confronted Watterworth with these ac-

cusations, Watterworth became angry and screamed at the other employee. Lynne also reported that she observed Watterworth roughly pick a patient out of her chair. Later on that day Lynne was informed by supervisor Ruiz that Watterworth in the presence of several residents, had thrown a cart knocked over glasses, told Ruiz that "she wasn't putting up with this," and left the job.

The management response to this incident, as reflected in Allen's comments was simply "walked off job."

On April 12, 1995, Watterworth received four written warnings, for four separate incidents on that day, including "yelling at a resident and using harsh, impatient manner," ignoring instructions from a nurse saying it wasn't her job, and then hollering at a resident resulting in the resident "becoming extremely upset," and two warnings for again shirking work, including a report that Watterworth was sitting at the desk with her feet up on the desk. Watterworth refused the instruction of a social worker to remove her feet from the desk. This warning also reflects that the RN spoke to her about this incident, as well as the fact that Watterworth left a resident alone in the toilet who was a nonambulatory, high fall risk patient.

Finally, these warnings, as well as Watterworth's prior warnings, resulted in a 5-day suspension on April 13, 1995. The notice to Watterworth, signed by Allen reflects that the above violations (of April 12, 1995) and all warnings attached, resulted in suspension for 5 days, until April 22, 1995. While Clark's name did not appear on this suspension notice, he admitted that he was aware of the suspension, and that Allen would not have suspended Watterworth without his knowledge and approval.

On May 2, 1995, an RN signed a written warning reflecting that a resident Mary Ensero reported to her that Watterworth had said to her, "you'll go to the dining room if I have to carry you." The resident was very upset over the incident. The notice also reflects that the employee statement was simply "I will get a wheel chair to bring her in," when confronted by the RN about the incident. The warning also reflects that Clark and Allen spoke to Ensero on May 10, 1995, and that she confirmed having the above statement spoken to her, but was unsure of the name of the employee.

A warning record dated May 10, 1995 and signed by Clark, indicates that he had received a complaint from the resident of verbal abuse, but Watterworth denied making the statement. The form notes further that although there were no witnesses, Clark felt that Watterworth's past record was enough proof, plus this allegation to terminate Watterworth. She was given the option of termination or voluntary action and Watterworth chose resignation, which she effectuated by letter of May 11, 1995, with her last day of employment to be May 19, 1995.

Finally, the file reflects that on May 18, 1995, a RN Struskey received a call from a relative of a resident, requesting that Watterworth not be allowed to administer any care to the resident. Allen documented this report on May 18, 1995, and indicated that Watterworth has terminated her employ at Respondent's request as of May 19, 1995 due to several other similar complaints and after other verbal and written warnings issued and a suspension given.

The record also reflects that sometime in April 1995, Klimas was informed by two employees Mary Albert and Irma Leone that Watterworth had pushed the wheelchair of

patient Isabel Brennan very quickly and that when the chair hit the wall, Brennan hit her head. Klimas reported this to RN Struskey, but did not reveal the names of the witnesses to the event. Struskey instructed Klimas to make her report directly to Allen, but added that she shouldn't expect much from Allen, because Struskey had previously reported Watterworth for verbal abuse of patient Ethyl Smith, as well as to her, and nothing was done about it.¹⁵

Accordingly Klimas did report the incident to Allen, but refused to furnish the names of the witnesses, telling Allen that the witnesses were afraid of Watterworth. Nonetheless, Allen did investigate the incident, and was able to determine who the alleged witnesses were by checking the schedule to see who was working with Watterworth at the time. Both Allen and Clark confronted these witnesses with Klimas' assertions. They agreed that Watterworth had wheeled the chair down the hall very swiftly, but denied that the resident had banged her head.

No action was taken against Watterworth as a result of this incident, and in fact no written warning or any document appeared in Respondent's file concerning this particular allegation. Clark conceded that something should have been placed in the file about this incident, since it was confirmed that Watterworth pushed the wheelchair too rapidly, and that Watterworth should have been spoken to about it. Allen furnished no testimony as to why she did issue a verbal or written warning to Watterworth about the matter. In fact Allen did not even testify whether or not she even asked Watterworth about whether the incident occurred.

Both Clark and Allen furnished testimony purportedly explaining Respondent's contrasting treatment of Watterworth vis-a-vis Magnano and Gilliams. According to Clark, his actions to separate Watterworth's employment began in May 1995, when he and Allen received a report from Struskey that Watterworth had verbally abused resident Mary Ensero. At that point, Clark contends that he and Allen confronted Watterworth with the accusation and she denied making the comments attributed to her. Further, Clark asserts that when he spoke to Ensero about the incident, she did not really remember what happened and was not sure what was said to her.¹⁶

Clark further testified that after this incident, for the first time he looked at Watterworth's file and saw the extensive record of warnings issued to her. Clark also recalled at that time the accusation against Watterworth concerning her use of the wheelchair, but claims that although he and Allen investigated that incident, and were both confronted by Klimas as to why they had not taken any action against Watterworth because of it, that he did not look at Watterworth's file while that matter was being investigated.

According to Clark, once he saw that file, even though there were no witnesses to the Ensero incident, he decided that the resident was upset, and he believed, particularly in light of Watterworth's past record, that she had engaged in improper conduct, and he no longer wanted her as an em-

ployee. therefore, he decided to offer her the option of resigning, and if not she would be terminated. Further, Clark asserts that he gave Watterworth "so much leeway," because she was there quite a few years, she was a decent person, a lot of people liked her, and he did not have an eye witness to prove the accusations against Watterworth.

Allen testified that the difference between the prior warnings issues to Watterworth, and Magnano and Gilliams was that in the case of these latter two employees, she had a witness on the spot who made an immediate report, and that she had personally seen the wounds on Mary Clark's arm. Allen also testified that in the prior warnings concerning Watterworth, she "never could get anyone to say positively that she had done something, that they had seen her do something wrong." Allen also added that when she investigated these prior incidents regarding Watterworth, with the nurse writing the report, the nurse would "back off" and say Watterworth's conduct wasn't so bad, that's just "her way," and allegedly would ask Allen not to take any action against Watterworth "this time."

The other allegation made by employee Klimas with regard to alleged "disparate treatment," involved employee Lucille Daversa. Klimas accused Allen of hiring an employee (Daversa) who was accused of abuse at her prior job. According to Allen, she had received an anonymous call from someone telling her not to hire Daversa, because she had been accused of abuse, but that she had checked with the CNA registry in Pennsylvania, as well as the Public Health Department in Hartford, and found that there was nothing in the record against this potential employee. However, Allen admitted that she did not call her prior employer for a reference, because according to Allen "that's not the protocol that we do." Allen claims that in the industry the only information disclosed about an employee is their dates of employment, and asserts further that if she had called the former employer and asked about if there was an abuse problem with Daversa, the employer would not answer the question, and would furnish only the dates of hire. After Daversa was hired, Allen admitted that Daversa asked her for a day off to appear before a state panel on an abuse charge, and that she made no inquires of Daversa concerning the nature of these charges against her.

With respect to attendance problems, no evidence was adduced that any employee had ever been terminated by Respondent for this reason. Clark admitted that during his tenure as administrator, no employee was fired in whole or in part for this reason. Respondent's records revealed that on June 24, 1996, employee Michele Miranda received a written warning and an extension of her probation which was up on June 25, 1996, for an additional 30 days. Her record revealed 11 instances of tardiness and 1 absence during the 90-day probationary period. The personnel form states that with no recurrence, the employee will retain her employment. This personnel action was signed by Clark as well as Allen.

Further, employee Velma Jones was issued a written warning. On July 8, 1996, for tardiness, due to 30 instances of lateness during a 3-month period of March to May 1996. The warning reflects that her tardiness must "cease now or more decisive steps must be taken." This warning notice was signed by both Allen and Clark. Her file also reflected four absences during this period of time of 3 months which were reflected in an attachment to the warning which consisted of

¹⁵ This comment of Struskey apparently refers to the warning letter of November 11, 1994 described above.

¹⁶ However, as noted above the warning letter issued to Watterworth concerning this incident reflects contrary to Clark's testimony that Ensero confirmed to him and Allen that the abusive statement was made to her, but that she did not remember the name of the aide at the time.

copy of the Respondent's handbook page entitled "Absenteeism and Tardy Policy." This document details Respondent's policy in these areas, and adds that her absenteeism and tardiness have been closely monitored since March 1, 1996, and that she has not been in compliance with Respondent's policies and procedures by 30 "tardies," and 4 absences, (referred to as call outs), 1 in March and 3 in May.¹⁷ Additionally the file of Jones revealed in addition to these four absences, two absences in June of 1996, six absences in January of 1996 and one in February of 1996, which were not reflected in any warning notices. Moreover, her file also includes a performance evaluation dated May 28, 1996, which states with respect to Jones, for the period covering January 1995 to 1996, "needs improvement badly in call-outs and tardiness."

Respondent introduced into the record various documents from its personnel manual with regard to discipline. Section 6.1 states as follows:

6.1 DISCIPLINE POLICIES: Action Occurring on Premises

Disciplinary Actions

All companies, no matter what their business, must have certain rules of behavior which we must all observe as good citizens and good employees. Our company is no exception. Generally no conduct which is immoral, unethical or illegal will be tolerated. Violations of these rules will lead to disciplinary action which, based on the circumstances of the individual case, could result in corrective action up to and including discharge. Several examples of this type of activity follow:

- Physical and or verbal abuse of residents.
- Insubordination
- Foul or abusive language.
- Unauthorized use or possession of intoxicants or drugs on Company premises or reporting to work while under the influence of intoxicants or drugs.
- Sleeping on the job.
- Fighting on the job or the threat of bodily injury to others while on the job.
- Willful or careless destruction or damage to company material or equipment or to that of another employee.
- Unauthorized removal of company or another's personal property.
- Unexcused absence or tardiness or leaving the job without permission.
- Insufficient work or excessive unacceptable work.
- Violation of safety or operating rules.
- Horseplay.
- Carrying or possessing weapons of any kind on company property.
- Dishonesty.
- Excessive absenteeism or tardiness.
- Falsifying reports or company records.
- Punching of another person's time card or having someone else punch your time card.
- Smoking in "No Smoking" areas.

¹⁷This document also included a comment signed by Clark, "must improve."

- Any discriminatory actions, including sexual harassment.

If a supervisor concluded that any improper conduct or deficient work performance has occurred, corrective or disciplinary action may be taken. Whether the action involves counseling, the issuance of a warning, or dismissal is within the facility's discretion. If you believe that any disciplinary action, up to and including discharge, is improper you should use our complaint resolution procedure.

The President may grant an exception depending on the seriousness of the charges, following a request from Administrator

Other sections of the manual which make specific reference to Respondent's probationary period and its policy in regard to tardiness and absences reflect as follows:

2.7 Introductory Period

The first ninety (90) days after your date of hire or rehire is considered an introductory period. During this time, your potential abilities will be carefully evaluated in determining whether you are suited to your worked assignments. Your performance will be formally reviewed at the end of your introductory period. Your supervisor will provide you with information about work standards and expectations. You are encouraged to ask questions so you will have an accurate understanding of your job. Once you have satisfactorily completed the introductory period, you will be eligible for regular job status.

During the introductory period you will not be eligible to receive paid sick time, paid holidays, paid vacations or paid bereavement days.

During the introductory period either party may terminate employment for any reason.

4.2 Tardiness

Staff are considered late if they report to their work stations after the time their shift begins. There will be an appropriate payroll deduction for tardiness. Persistent tardiness will lead to disciplinary action.

4.3 Unscheduled Absences

Absenteeism as well as tardiness adversely affects our ability to provide quality care. You are required to report your absence to the facility at least 2 hours prior to your scheduled starting time. Failure to report your unscheduled absence is grounds for disciplinary action or dismissal. Repeated absenteeism will be cause for dismissal.

All employees of Respondent, including Gilliams and Magnano received of Respondent's personnel manual, which reflect the above policies and procedures.

As noted therein, while Respondent's disciplinary procedure does refer to progressive disciplinary procedures, including counseling and warnings, it does receive the right to Respondent to dismiss an employee without any prior disciplinary warnings or other steps in various situations, including physical and verbal abuse of residents or excessive

absence or tardiness. However, both Clark and Allen admit that generally Respondent does follow and utilize a policy where employees are not performing properly, of giving verbal warnings, written warnings, and/or a suspension prior to a termination. However they both assert that in the cases of Gilliams and Magnano, because of the abuse that they believed had occurred, that no prior warning was required.

No other instances of any other employee being fired for abuse of residents by Respondent was introduced into the record. During the tenure of Allen (11 years) and Clark there were no such discharges. The only bargaining unit employees terminated by Clark were Magnano and Gilliams.¹⁸ Clark as also noted above, supervisors Cruz and an office manager, were both terminated for dishonesty.

Finally, Respondent introduced into the record a copy of a document entitled "Abuse Policy," which was allegedly distributed to all employees on July 31, 1995, although the file of Magnano did not include a signed receipt for it, which was reflected in Gilliams' file. This documents states as follows:

ABUSE POLICY

Residents and patients in this facility are to be treated with dignity and respect at all times and under any circumstances. Mistreatment in the form of verbal or physical abuse of any nature will not be tolerated. Any employee guilty of abusing a resident or patient is subject to immediate discharge. Local authorities will be notified immediately and criminal charges may be filed against any employee guilty of abuse. Employees may be fined up to \$5,000.00 and sentenced to three years in prison.

This document is an abuse policy that was required by Respondent's present company to be signed by all of Respondent's employees. Respondent in its brief asserts that this policy was consistent with Respondent's "existing one, but is more detailed. Both proscribe any form of abuse of residents."¹⁹ Moreover, there is no record testimony from any witness of Respondent that this "Abuse policy" as issued on July 31, 1995 was responsible for its decision to terminate Gilliams or Mangano, or that this policy caused it to treat Gilliams and Magnano differently than it had dealt with Watterworth with respect to "abuse" allegations.

My factual findings detailed above are derived from a compilation of the credited testimony of the various witnesses who testified, as well as written reports of the various incidents described therein prepared at the time. In many respects the testimony of the witnesses does not significantly differ. However, where there is a substantial conflict, such as between Dalie versus Gilliams and Magnano, concerning the conduct observed by Dalie, I have generally credited Dalie, whose testimony is supported by her written account prepared shortly after the events. Additionally, while I did find Dalie to be rather emotional, and with a tendency to exagger-

¹⁸As noted above, however, Watterworth resigned voluntarily, rather than face discharge by Respondent because of her record, which included allegations of abuse.

¹⁹Moreover, Respondent in another portion of its brief asserted that its prior policy that prohibited physical and verbal abuse of patients, was "reaffirmed" with the aforementioned "Abuse Policy."

ated, I did conclude that for the most part her testimony was accurate and truthful.²⁰

I also do not credit the testimony of Allen, that Magnano admitted in the first meeting with Clark that she said "shut up" to Mary Clark, since this alleged admission was not contained in any written reports prepared by any of Respondent's witnesses, and in fact was contradicted by the testimony of Lawrence Clark.

IV. ANALYSIS

I conclude that a strong prima facie case has been established by General Counsel that a motivating factor in Respondent's decision to suspend and ultimately discharge Gilliams and Magnano was their activities on behalf of/and support for the Union.

Respondent admits and the record demonstrates that it had knowledge of the leadership role and open union activities of Magnano.²¹ However, Respondent vigorously denies based on the testimony of Clark, that it knew about any union activities engaged in by Gilliams.

I find that the record amply supports the conclusion that Respondent knew about Gilliams' union activities and support, as well as that of Magnano. Thus I have credited the testimony of Gilliams that she was seen wearing a union button by admitted supervisor Allen. It is therefore appropriate to impute knowledge to Respondent of Gilliams' union activity based on Allen's having seen her wearing a union button. *Ready Mixed Concrete Co. v. NLRB*, 81 F.3d 1546, 1552 (10th Cir. 1996), affg. 317 NLRB 1140, 1143-1144 (1995); *Pinkerton's, Inc.*, 295 NLRB 538 (1989).

Moreover, while Allen did testify on behalf of Respondent with respect to a number of issues, including the disciplinary actions taken by Respondent against Magnano and Gilliams, she furnished no testimony concerning whether she had seen Gilliams wearing a union button or whether she was aware of Gilliams' support for the Union. It is well-settled that when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. *Ready Mix Concrete*, supra, 81 F.3d at 1552; *United Parcel Service of Ohio*, 321 NLRB 300 fn. 1 (1996); *International Automated Machines*, 285 NLRB 1122, 1123 (1987). This rule has also been applied, where, as here a witness testifies, but does not provide any testimony concerning a crucial of which that witness has knowledge. *Asarco, Inc.*, 316 NLRB 636, 640 (1995); *Kut Rate Kid and Shop Kwik*, 246 NLRB 107, 121 (1974). I shall therefore draw an adverse inference from Allen's failure to testify as to this issue that both she and Respondent were aware that Gilliams was a supporter of the Union, and I do not credit Clark's denial that he had no such knowledge.

Animus towards the Union is firmly established by virtue of the statement made by Supervisor Cruz to Mulcahy that

²⁰However I have not credited her testimony that there was "blood all over" Mary Clark, as this testimony was not corroborated by anyone else, and was in fact contradicted by the observations of Hubbell and Allen

²¹In that regard, Magnano was one of the Union's designated "leaders" on the second shift, she distributed cards to and solicited employees to support the Union, and wore a union button in the presence of Clark.

Respondent intended to terminate supporters of the Union, and more significantly by the credited testimony of Cruz that Clark informed its supervisors at a meeting to carefully watch Union Leaders make it tough for them, and issue them warnings. Most important of all, Clark specifically informed Respondent's supervisors that they would know who the Union people are because they are wearing buttons.

These statements not only establish animus towards the union activities of Respondent's employees, but constitute compelling evidence of a link between such union activities of its employees, and the discipline taken against Gilliams and Magnano. Inasmuch as both Gilliams and Magnano were suspended and ultimately discharged shortly after they seen Respondent's supervisors wearing the union buttons that Clark made reference to during his meeting with Respondent's supervisors.

Another highly significant indication of discriminatory motivation is the timing of the disciplinary actions of the employees in relation to the Union activities of the employees. *Trader Horn of New Jersey, Inc.*, 316 NLRB 194, 198 (1995). Here the Union made its demand for recognition on September 29, and the employees were seen by Respondent's supervisors wearing union buttons on the same day. Three days later, October 2, they were suspended and then ultimately discharged on October 5. Such a coincidence in time between the Respondent's knowledge of its employees' union activities and the disciplinary actions taken against them is strong evidence of an unlawful motive for their discharge. *Id.* at 198. Indeed, timing alone may be sufficient to establish that antiunion animus was a motivating factor. *Sawyer of Napa, Inc.*, 300 NLRB 131, 150 (1990).

Thus, having concluded that the General Counsel has established that union activities of Magnano and Gilliams were motivating factors in their respective disciplines, the burden shifts to the Respondent to prove by a preponderance of the evidence that it would have taken the same action against these employees, absent their protected conduct. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

I conclude that the Respondent has fallen far short of meeting its burden in that regard. I note initially that the Respondent has failed to show that it has ever discharged any employees for the alleged acts of misconduct committed by Magnano or Gilliams. The failure of an employer to show that it has treated employees in the past in a similar manner for engaging in similar misconduct to the alleged discriminatees, has been held to be an important defect in the employer meeting its *Wright Line* burden. *10 Ellicott Square Corp.*, 320 NLRB 762, 775 (1996), *enfd.* 104 F.3d 354 (2d Cir. 1996); *New Jersey Bell Telephone Co.*, 308 NLRB 277, 283 (1992); and *Phillips Industries*, 295 NLRB 717, 718 (1989). "Under *Wright Line*, an employer cannot carry its burden of persuasion by merely showing that it had a legitimate reason for imposing discipline against an employee, but must show by a preponderance of the evidence that the action would have taken place even without the protected conduct." *Hick Oils & Hicksgas*, 293 NLRB 84, 85 (1989), cited in *New Jersey Bell*, *supra*.

Here not only has the Respondent failed to show that it has discharged any employees for abuse or attendance problems, but the only evidence disclosed where the Respondent

enacted any discipline on employees for engaging in such conduct, demonstrates that the Respondent treated other employees who engaged in similar or worse conduct than Gilliams and Magnano in a much more lenient manner. Such conduct substantially detracts from the validity of the Respondent's attempt to meet its *Wright Line* burden. *10 Ellicott Square*, *supra* at 774-775; and *Pope Concrete Products*, 305 NLRB 989, 990 (1991).

In that regard, I note particularly the Respondent's tolerant if almost incomprehensible treatment of employee Rochelle Watterworth. Thus, on October 12, 1993, Watterworth received her fourth written warning, which was designated as a "final warning" for "inappropriate or unacceptable behavior or verbalization toward a resident." The conduct involved in those prior warnings included slapping a resident and calling a resident a "bitch,"²² conduct clearly far more serious than the alleged conduct committed by either Gilliams or Magnano.

However, notwithstanding this alleged final warning which threatened Watterworth with suspension or discharge, for any further infractions, Watterworth continued to engage in egregious abusive behavior, with no more discipline than additional warnings, until she was finally suspended for 5 days on April 13, 1995. These additional written warnings issued to Watterworth, once more included several serious examples of patient abuse, such as calling a resident a "slob," telling resident it wasn't her job to get the resident a towel, several instances of leaving a patient unattended (including Mary Clark on one occasion) resulting in patient injury; kicking and yelling at a resident; several instances of "rough" handling of a resident; in the presence of residents, throwing a cart, knocking over glasses, and telling a supervisor that she wasn't "putting up with this," and walking off the job; as well as a number of complaints from other employees that she was shirking work. What is even worse about this record of Watterworth, is her reaction to those complaints when confronted by supervision. The file reveals a number of instances of rank insubordination to her superiors, as well as the lack of indication that she realized that her conduct was improper. For example when RN Struskey criticized Watterworth for the way she had spoken to a resident, Watterworth responded, "you try it for 6-4 everyday [sic] and see if you can do it." At that point Struskey asked Watterworth to leave the room and proceeded to assist another C/N/A in the completion of the resident's care that Watterworth was supposed to be performing. Incredibly, the only reaction by management to this incident was Allen chastising Watterworth for tone of voice and language used.

As noted above, the Respondent finally took stronger disciplinary action against Watterworth on April 13, 1995, when it suspended her for 5 days, after she received four warnings in 1 day for conduct of instances including of yelling and hollering at a resident, ignoring instructions from a nurse saying it wasn't her job, shirking work, and leaving a non-ambulatory high risk patient alone on the toilet.

After Watterworth returned to work from this suspension on April 22, 1995, her problems continued, and she was ac-

²²Not only did Watterworth call a resident a "bitch," but when confronted by the charge nurse about it, Watterworth neither denied it, nor expressed any remorse for making such a comment, but told the charge nurse, that the resident "was one anyway."

cused of pushing the wheelchair of a patient too fast resulting in the patient hitting her head against the wall. According to Clark and Allen, they investigated this incident, and were told by the witnesses that the patient had not banged her head, but that Watterworth had in fact pushed the wheelchair very swiftly. Clark in fact conceded that event though the witnesses did not confirm the allegation that the resident was injured, Watterworth should have at least been spoken to about pushing the wheelchair too fast, if not issued a warning. However, no written or verbal warning was given to Watterworth concerning this incident.

On May 2, 1995, Watterworth was issued still another written warning by Struskey for threatening resident Ensero to "carry" her to the dining room if she persists in not going herself, which greatly upset resident Ensero. After this incident was investigated, Clark asserts that he, on receiving Watterworth's past record, decided to offer her the option of resigning, on penalty of termination, which option Watterworth chose on May 11, 1995, effective May 19, 1995.

On evaluating Watterworth's record vis-a-vis the treatment of Gilliams and Magnano, who were suspended and terminated without even a single warning, I can hardly imagine a more blatant example of disparate treatment. Frankly, it is difficult for me to believe that any employer would tolerate the conduct of Watterworth such a long time before taking action to terminate her. It is of course not for me to make a business judgment for the Respondent, or to decide that it should have taken more stringent action against Watterworth at an earlier time. However, it is appropriate for me to compare its treatment of Watterworth for engaging in much more serious and prolonged misconduct than committed by Gilliams and Magnano, in assessing whether it has met its burden of establishing that it would have taken similar action against them absent their union conduct. The Respondent's significant leniency in dealing with Watterworth prior to any union activities, as compared to its precipitous terminations of Gilliams and Magnano, immediately after their union activities became known, leads to the obvious conclusion, which I draw, that such union activities of these employees was responsible for the Respondent's differing treatment.

Respondent did attempt to explain this disparity of treatment by the testimony of Allen and Clark. However, I found their testimony in this regard to be contrived, unconvincing, and not credible. Clark contends that after being advised of the "Ensero" incident, and discussing it with Watterworth, he for the first time looked at her file and discovered her prior record, which along with the incident in question, precipitated his decision to ask for her resignation. I find this testimony of Clark not to be believable or persuasive. Initially, I note that whether or not Clark actually looked at Watterworth's file prior to May 1995 is not determinative. Clark did not deny that he had knowledge of Watterworth's past record, prior to May 1995, and in fact admitted that he was aware of her suspension in April. Indeed, one of the very first warning notices issued to Watterworth on September 17, 1993, was signed by Clark himself.

Moreover, I do not credit in any event Clark's testimony that he did not inspect Watterworth's file prior to May of 1995, since I find it unlikely that he would not have done so when he approved her suspension in April, or when he investigated the "wheelchair" incident also in April of 1993.

Clark's further testimony that he gave Watterworth so much "leeway" because she was there quite a few years, she was a decent person, a lot of people liked her, and he did not have an eyewitness to prove the accusations against her, is even more suspect and incredible. While Watterworth was there quite a few years, most of these years were filled with warnings. As for Clark's contention that Watterworth was "a decent person," and well liked by the other employees, I find these comments dubious at best, in light of the numerous warnings Watterworth received that other employees were constantly complaining that she shirked work, and that her fellow workers had to cover for her. Moreover, Magnano was also employed by the Respondent for several years, had no prior warnings, and the record contains no evidence that either Magnano or Gilliams were not also "decent" persons and well liked by other employees. Thus the failure to afford them similar leeway to Watterworth cannot be justified by Clark's unconvincing testimony.

Allen testified, as well as Clark that another reason for their differing treatment of Watterworth, was the absence of any witnesses to Watterworth's misdeeds, as contrasted with the present case where, as Allen testified, it had "a witness on the spot." Indeed the absence of witnesses was the only reason given by Clark to employee Klimas when she complained about how long it took for the Respondent to terminate Watterworth as opposed to its immediate suspension and discharge of Gilliams and Magnano. I find this testimony of Clark and Allen to be even less convincing, since the written warnings issued to Watterworth contain numerous examples of direct witnesses to Watterworth's improper conduct, as well as insubordinate responses by Watterworth when she was confronted by supervision concerning these transgressions. Allen further testified that when she investigated the prior warnings issued to Watterworth, the nurse who had written the warning would "back off," and say Watterworth's conduct was not so bad, and would allegedly ask Allen not to take action against Watterworth. I find this testimony also not to be credible. I note initially that Allen furnished no specifics as to which particular nurse allegedly "backed off," their original warnings, and/or told Allen that Watterworth wasn't so bad or allegedly asked Allen not to take any action against Watterworth. Moreover, the Respondent did not produce any of these nurses or other employees to corroborate Allen as to their alleged "change of heart" with respect to Watterworth. Finally I note the credible testimony of Klimas, that when she reported the "wheelchair" incident involving Watterworth to RN Struskey, she was told by Struskey to report it to Allen. Significantly, however Struskey informed Klimas, not to expect much action from Allen, since she (Struskey) had previously reported Watterworth for verbal abuse of resident Ethyl Smith, as well as to Struskey herself, and nothing was done about it. Thus it does not seem likely that Struskey, who was the author of a number of Watterworth's warnings, would have asked Allen not to take action against Watterworth. Thus having rejected all of the Respondent's explanations for its egregious disparate treatment of Magnano and Gilliams as opposed to Watterworth, I conclude that the only logical explanation in the record for this disparate treatment, was the union activities of Magnano and Gilliams. Thus for this reason, I conclude that the Respondent has failed to meet its *Wright Line* burden of proof.

However, the record contains numerous other factors which also lead to that conclusion. Indeed additional evidence of disparate treatment, even apart from the Watterworth situation, is disclosed by the evidence herein. The Respondent admittedly hired employee Lucille Daversa, even though it had been informed that she had been accused of abuse. While Allen testified that she did check out the anonymous tip with various sources, she admits that she failed to check with Daversa's prior employer about the accusation,²³ and that she failed to confront Daversa herself with the accusation, even after Allen was told about the necessity for Daversa to attend a hearing concerning abuse allegations. This incident has far less prominence than the Watterworth situation, since even to this date Daversa has not been found guilty of any improper conduct. However, Allen's rather cavalier treatment of the accusation, even failing to ask Daversa about the specifics of the allegations against her, do reflect a much more lenient attitude towards abuse allegations against employees than Respondent exhibited in its dealings with Gilliams and Magnano.

Additionally, while Clark asserted that he discharged Gilliams in part, because he discovered a poor absence record in her file, the record reflects that the Respondent did not treat other employees who engaged in similar misconduct in a similar manner. Thus employee Miranda, who was like Gilliams a probationary employee, received a written warning for poor attendance during her probationary period, including 11 tardies and 1 absence, and had her probationary period extended for an additional 30 days. No explanation was given by any of the Respondent's witnesses, as to why Gilliams was not afforded a similar extension of her probationary period.

Moreover, the Respondent's files with respect to employee Velma Jones revealed a much more extensive and prolonged record of attendance problems (lateness as well as absence), and yet she was never suspended, much less discharged, and received written warnings for this conduct, signed by Clark himself, with a comment, "must improve." No testimony was adduced from Clark or Allen concerning employee Jones, and no explanation was given why Gilliams was not afforded the same opportunity as Jones to "improve."

This brings me to the next problem with the Respondent's defense, which is somewhat related to the disparate treatment issue, but also somewhat different. Thus it is undisputed that neither Gilliams nor Magnano received either a written or verbal warning for their alleged transgressions, and that the Respondent generally followed a policy of progressive discipline. I therefore find that the Respondent's failure to issue a warning to the discriminatees herein, contrary to its prior practice of utilizing progressive discipline, is further evidence undermining Respondent's defense and detracting from its burden of establishing that it would have suspended and terminated Gilliams and Magnano absent their protected conduct. *Allegheny Ludlum Corp.*, 320 NLRB 484, 505 (1995); *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 534 (1995).

I recognize that the Respondent's personnel manual reserves to itself the right to exact penalties up to and includ-

²³I also find dubious, Allen's testimony that had she called Daversa's prior employer and asked about the abuse accusation, that the Employer would have refused to disclose any information to her about it.

ing discharge for various infractions, including abuse and absenteeism. However, as I have detailed above, and as admitted by both Allen and Clark, Respondent has generally followed a policy in the past of verbal warnings, written warnings, and suspensions, prior to a discharge. Indeed, as noted this was the policy followed in dealing with Watterworth, as well as employees Jones and Miranda.

The testimony of Clark and Allen that in effect, the conduct of Magnano and Gilliams was of such serious magnitude to warrant a departure from its normal practice, and justifying a discharge without a warning is not convincing. They both rely heavily on the presence as a witness on the spot (DaLie). However, as noted, Watterworth's file is filled with other examples of more serious and frequent misconduct with witnesses "on the spot," and only written warnings were issued. They also rely the fact that marks were found on Mary Clark's arm, which Allen attributed to Magnano's nails. However, since the circumstances of how these marks came to be found on Clark's arm were not totally clear, and subject to significant dispute, it is doubtful in my view that this factor would have warranted a departure from Respondent's consistent past practices of issuing warnings, absent the union activities of Gilliams and Magnano.

I also note that there was no such evidence with respect to Gilliams, and her case was nothing more than a one-on-one credibility dispute between Gilliams and DaLie. Yet Gilliams was also suspended and terminated without a warning, or as also noted above, an extension of her probationary period as the Respondent permitted in the case of employee Miranda.

Still another reason for my rejection of the Respondent's defense is the fact that the Respondent did not conduct a meaningful or adequate investigation of the allegations against Magnano or Gilliams, which is supportive of unlawful motivation, since it demonstrates that the Respondent was not truly interested in determining whether misconduct had actually occurred. *Lancer Corp.*, 271 NLRB 1426, 1427 (1984); *United Supermarkets*, 261 NLRB 1291, 1311 (1982); *W. W. Grainger v. NLRB*, 582 F.2d 1118, 1121 (7th Cir. 1978).

In this regard, I find particularly significant the Respondent's failure to question Mary Clark and Helen Speck, the two residents that Magnano and Gilliams were accused of abusing. The explanation given by the Respondent's witnesses, Clark and Allen, for not interviewing these potential witnesses is not convincing. They assert that both Mary Clark and Speck were "confused," and that they did not believe that the residents would be able to provide any useful information. However, I note particularly that Mary Clark was sufficiently alert and coherent to report to Hubbell (which was in turn reported to Clark & Allen) that she (Mary) was so "sorry that she caused trouble." Those comments by Mary Clark not only indicated that she blamed herself for the problem involving Magnano, but also that she was aware of what was going on, and that it was likely that she would be able to shed light on the events in question. Thus there were several issues in dispute such as how the marks that appeared on Clark's got there, whether Magnano was wearing gloves, whether Magnano said "shut up" to Mary Clark, and whether there had been a prior incident at 8 p.m., wherein an old "skin tear" had opened up, as

Magnano had asserted. Mary Clark might well have been able to give information with respect to these issues. Yet the Respondent failed to even try to interview her on the day of the incident, or even the next day when her mental state might have improved.

Similarly, the Respondent failed to question Helen Speck about her interaction with Gilliams. This failure is even more puzzling, inasmuch as the case against Gilliams was a simple one-on-one credibility dispute between DaLie and Gilliams with no other evidence available.²⁴ Thus, Clark had no reason at the time of the initial suspension to necessarily believe DaLie as opposed to Gilliams, and his explanation for suspending Gilliams I find quite revealing. Clark asserted in effect that since Magnano had admitted that she yelled at and restrained Mary Clark, therefore something went on in the room, and therefore he did not believe Gilliams' denial that she did not do anything wrong. I find this alleged circular reasoning to make little sense. Although Gilliams and Magnano were in the same room, and were accused by the same witness, they were not working together, and were not caring for the same resident. Therefore, why should an admission by Magnano that she yelled and restrained Mary Clark, have any bearing on whether Gilliams engaged in abusive conduct towards Helen Speck. In my view, the only logical reason that Clark decided to treat Clark and Gilliams in effect as a "team" and treat their cases the same way was because he viewed them both as union adherents.

The failure of the Respondent to question the two residents is even more damaging to the Respondent's defense, since in the past when investigating past instances of abuse, the Respondent's officials routinely interviewed residents, even where the resident was confused. *Lancer*, supra, 271 NLRB at 1427. Thus a number of prior warnings issued to Watterworth reflect that officials of the Respondent spoke to the resident about accusations made against Watterworth, including the final incident prior to the Respondent deciding to offer her the option to resign or be fired, where Clark himself as well as Allen questioned resident Mary Ensero.

Also pertinent to this issue is Clark's decision to suspend Magnano, even before Allen came back with her report concerning her observations of Mary Clark's arm. Lawrence Clark gave no explanation for this precipitous decision, which further indicates his lack of a true desire to uncover the truth about whether or not Magnano (or Gilliams) truly engaged in misconduct. There was no reason for such a hasty action, and indeed no cogent explanation by Clark as to why he decided to suspend both Magnano and Gilliams pending the results of the investigation.

I note that such a procedure is contrary to the Respondent's past practice with respect to employees,²⁵ as in none of the past instances of abuse allegations against Watterworth, did the Respondent suspend her pending further investigations. Moreover, even when Watterworth was finally

²⁴ This is unlike Magnano where at least the Respondent did have some other evidence, i.e., the existence of marks on the residents arms.

²⁵ While Clark did testify that he utilized this procedure of suspending while the investigation was being conducted with respect to two supervisors, those cases are not comparable, since they involved all allegations of dishonesty, where it is understandable that the Respondent would immediately not want an employee under suspicion of such conduct to remain in its employ.

given the option to resign or be terminated, after her abysmal record of abuse and other problems as outlined above was admittedly known by the Respondent, she was permitted to remain an employee of the Respondent from May 11 to May 19, 1995. Yet the Respondent found it necessary to suspend Gilliams and Magnano²⁶ for 48 hours, pending investigation of their cases, when Clark had never even looked at their files. The only reasonable explanation for such conduct by the Respondent, which I find, is that the Respondent viewed Gilliams and Magnano as union supporters. This conclusion is fortified by the fact that Clark mentioned the suspension of Gilliams and Magnano at an antiunion meeting when he showed an antiunion video, and wherein he announced that the Respondent would "not tolerate abuse." These comments from Clark, particularly in light of the Respondent's history of leniency with respect to abuse allegations, were likely to instill in the employees a connection between union support and the Respondent's sudden "crack down" on abuse allegations, as demonstrated by its suspension of Gilliams and Magnano.

Additionally, it is also noteworthy that the Respondent failed to interview Gilliams about Magnano's incident, and vice-versa. Clark's explanation for failing to do so is again not persuasive. He asserts that he did ask either one about the other's conduct, since they were both accused. However, there is no allegation or contention that they acted together or in concert in their particular incidents, so why should Clark believe that they would not be likely to answer truthfully about the other's conduct. Once more, the most probable reason for Clark's refusal²⁷ to speak to them about the other's conduct appears to me to be that he viewed them both as union adherents' and likely to support each other.

Thus based on the foregoing, I conclude that the Respondent's failure to conduct an adequate investigation of the allegations against Gilliams or Magnano demonstrates that it was not interested in determining the real egregiousness of their conduct,²⁸ but that the Respondent seized upon DaLie's accusations as a pretext to rid itself of two known union adherents. *Clinton Food 4 Less*, 288 NLRB 597, 598 (1988); *United Supermarkets*, supra at 1311.

Finally, I also conclude that the Respondent has presented shifting and vacillating defenses, which is another factor that indicates discriminatory intent. Thus while both the suspension and discharge letters state that Magnano was disciplined for physical and verbal abuse, the testimony at trial by both Allen and Clark conveniently eliminated the verbal abuse allegation as a factor in the discharge decision. Although Clark

²⁶ I note again that at that time neither Gilliams nor Magnano had received a single warning.

²⁷ I note in this regard that Magnano specifically requested Clark to ask Gilliams about Magnano's incident.

²⁸ Although I have in large part credited the testimony of DaLie vis-a-vis Gilliams and Magnano, as to her observations of their conduct, as the Respondent claims that it did as well, such findings are not determinative of whether the Respondent has met its burden of proof. The issue is not whether the Respondent was correct in believing DaLie's version of events, but whether the Respondent would have acted the same way with respect to its treatment of Gilliams and Magnano, absent their union activities. For the reasons described above, particularly its disparate treatment, failure to warn employees, as well as its failure to conduct a meaningful investigation, I conclude that the Respondent has not established that it would have done so.

placed great emphasis on the fact that Magnano had admitted to raising her voice at Mary Clark prior to his suspension decision, he totally eliminated that as a factor in his discharge decision. He asserted that the reasons for his decision were that Allen had concluded based on her investigation that Magnano had used excessive force in restraining the resident, that in Allen's opinion, Magnano had inflicted fingernail marks on Mary Clark, and that it was reported to him that there was blood under Magnano's fingernails. Clark admitted that Magnano was not fired for yelling at/or raising her voice to the resident, which is as noted contrary to the Respondent's written notice that she was discharged for physical and verbal abuse.

Similarly, Allen also played down the verbal abuse aspect of Magnano's behavior, and asserted that she concurred in Clark's stated intention to terminate Magnano, because of the nail wounds on the resident's arm, and the excessive force used by Magnano was "a little too much for an elderly person." Allen also asserted that the fact that Magnano said "shut up" to Clark was a "minor thing." As noted above, I did not credit Allen's testimony, which was not corroborated by Clark, that Magnano admitted saying shut up to Mary Clark.

It is also noteworthy that Clark testified that he also relied on the fact that blood was found under Magnano's fingernails as one of the reasons for terminating her. However Magnano was not even confronted with this allegation until she was notified about her discharge, Allen did not mention it in her testimony and neither of the written notices issued by the Respondent with respect to Magnano mentioned this factor.

It is not surprising that the Respondent's witnesses sought to distance themselves from the "verbal abuse" accusations against Magnano, in view of the extensive record of verbal abuse complaints against Watterworth as described above, which resulted in far lesser discipline than exacted upon Magnano or Gilliams. However this action by the Respondent's witnesses does indicate that the Respondent has vacillated in offering a consistent explanation for its actions, which leads to the inference that the real reason for its actions is not among those asserted. *Ellicott Square*, supra; *Robin Transportation, Ltd.*, 310 NLRB 411, 417 (1993). The drawing of such an inference is appropriate here, and substantially detracts from the validity of the Respondent's defense, and its attempt to meet its *Wright Line* burden of proof. *Ellicott Square*, supra; *Robin Transportation*, supra.

Accordingly, based on foregoing analysis and authorities, I conclude that the Respondent has not met its burden of establishing that it would have suspended or discharged either Magnano or Gilliams absent their protected conduct, and that it has therefore violated Section 8(a)(1) and (3) of the Act.

V. THE OBJECTIONS

A. Facts

As detailed above, during the Union's organizing campaign at the Respondent's facility, the Union's vice president, Paul Fortier, appointed a number of employees as "leaders" to assist in organizing. Among those leaders designated by Fortier were, in addition to Magnano, Yolanda Klimas, Carol Bragg, Barbara Mulcahy and Candace Carreiro. Fortier distributed buttons to these employees to

give to other employees at the facility. The record also revealed from the undisputed testimony of Mulcahy that authorization cards were distributed to employees by Mulcahy, Klimas, Bragg, and Carreiro.

Additionally, when Fortier made a demand for recognition upon the Respondent to Clark, he was accompanied by employees Klimas and Mulcahy.

Respondent presented four witnesses in support of its objections that the Union, by statements of alleged employee agents, engaged in objectionable conduct under the principles of *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973). The testimony of these four employees was not contradicted or denied by any of the employees who made the allegedly improper comments, and is therefore credited.

Thus, about a month before the election, Klimas put a union authorization card in the uniform pocket of employee Irma Leone, and asked her to sign it. A few days later, Klimas asked Leone whether she had signed the card. Leone replied no. Klimas responded that if the Union ever does come into the facility, she would still have to pay the union fee for joining the Union, whether or not she signed a card, and whether or not she was in favor of the Union. Leone did not in fact sign a card at any point during the campaign.

Employee Alissa Ann Calabro was also spoken to by Klimas about signing a card. Klimas had union authorization cards with her when she pulled Calabro into the bathroom. Klimas informed Calabro that if she signed the card now, she wouldn't have to pay any union fees or dues. Klimas added that if the Union should come in and she did not sign the card, then she would have to pay the union fees. Calabro recalled that Klimas mentioned an amount that she would have to pay, but was unsure if Klimas stated \$25 or \$30.

Calabro could not recall when this conversation took place, other than that it was "at the beginning or starting of the election, "—a couple of weeks after it started," when the Union stuff was going on." Calabro did not know whether this conversation occurred before or after the Union filed its representation petition at the National Labor Relations Board.

However, Calabro did recall that the conversation took place after she had signed a petition that employees were given to sign if they were in favor of the Union. She did not testify as to who had given her this petition, but admits that she signed the petition which also asked the Respondent to recognize the Union. The record does not reflect whether or not Calabro ever signed an authorization card for the Union.

Michele Santoro was informed by Carol Bragg that if she didn't sign an authorization card that day, then if the Union would come in, they would take \$30 out of her pay "like a penalty" if she didn't sign a card then.

Three or four weeks after this conversation, Santoro signed an authorization card for the Union. Santoro did not recall the date of the conversation or when she signed the card, but the record does reveal that the authorization card signed by Santoro was dated September 25, 1995, 4 days before the Union filed its petition.

Respondent's final witness, Brian Cyr, overheard a discussion amongst other employees, who he could not recall. He heard employees say, "if you sign a card now, you won't have to pay \$30 later. If you don't sign a card, then you will have to pay \$30." He did not recall the employees stating

how they had gotten this information, and denied that any employees' names were mentioned in this discussion.

B. Analysis

The Supreme Court in *Savair*, supra, concluded that a union's offer to waive initiation fees for only those employees who signed authorization cards before the election impairs employee's free choice and constitutes objectionable conduct warranting the setting aside of an election.

Respondent argues that the statements made by the employee card solicitors to employees Leone, Calabro, and Santoro are violative of *Savair* and that the testimony of Cyr establishes that these improper statements were disseminated to other employees.

The Petitioner-Union raises several arguments in defense of its conduct. Initially it argues that the Union is not responsible for the statements made by employees Bragg and Klimas to their fellow employees. I disagree.

When a union authorizes or acquiesces in employees' soliciting authorization card on their behalf, it vests these employees with apparent authority to obtain cards on its behalf, thereby creating a special agency relationship and making the union responsible for representations made by these employee solicitors concerning its fee waiver policies. *Davlan Engineering, Inc.*, 283 NLRB 803, 804-805 (1987); *University Towers, Inc.*, 285 NLRB 199, 200 (1987).

The Petitioner seeks to distinguish this line of cases by pointing out that the record contains no evidence that any union representatives made cards available to either Klimas or Bragg, or that the Union acquiesced in these employees soliciting cards on its behalf. The Petitioner additionally argues with respect to Bragg, that the evidence fails to disclose that Bragg had an authorization card in her possession at the time that she made her comments to Santoro.

However, the record does disclose that Fortier appointed both Bragg and Klimas, as well as other employees, as "leaders" to assist in organizing, and that he distributed buttons to them to in turn pass out to other employees. Moreover, Bragg and Klimas did distribute authorization cards to employees, and Klimas accompanied Fortier when he demanded recognition from the Respondent. In these circumstances, I do not find that the absence of direct evidence that Fortier gave cards to Klimas or Bragg to be controlling. I conclude that the above evidence is sufficient to establish that the Union authorized and acquiesced in their solicitation of cards from employees, and that Bragg and Klimas were "special agents" of the Union for the purposes of card solicitation. *Gaylord Bag Co.*, 313 NLRB 306 fn. 2 (1993); *Davlan*, supra; *University Towers*, supra.

The Petitioner also argues that the testimony of Calabro and Santoro did not establish that the allegedly improper statements made to them took place during the critical period between the date of the filing of the petition and the election. *Ideal Electric Mfg. Co.*, 134 NLRB 1275 (1961); *Mountaineer Bolt, Inc.*, 300 NLRB 667 (1990). While the Petitioner concedes that there are some limited exceptions to this rule,²⁹ it asserts that *Savair* allegations are not within the ex-

ceptions to the *Ideal Electric* critical period definition. I do not agree.

Since most solicitations to sign authorization cards occur prior to the filing of a petition, limiting the application of *Savair* cases to past petition conduct would severely circumscribe the doctrine required by the Supreme Court. *Gibson's Discount Center*, 214 NLRB 221, 222 (1974). Indeed in *Savair* itself, the Supreme Court considered the fact that 28 employees signed cards prior to the filing of the petition. 414 U.S. at 273, 277. Therefore, I conclude that the standards set forth in *Savair* applies to both pre and postpetition conduct. *Weyerhaeuser Co.*, 247 NLRB 978 fn. 2 (1980); *Wyandanch Day Care Center*, 322 NLRB 385 fn. 2 (1997); *Gibson Discount*, supra.

Turning to a consideration of whether the statements made to the employees by the agents of the Union, are violative of the *Savair* standards, I agree with the Petitioner that Klimas' comments to Leone are not. Klimas informed Leone that if the Union comes in, Leone would still have to pay the union fee, whether or not she signed a card. This statement is clearly not improper, as it does not offer any inducement to Leone to sign the card. *Hydrotherm, Inc.*, 270 NLRB 1131 (1984). I therefore find that Klimas did not interfere with the election by these remarks to Leone.

However, Klimas' comments to Calabro are more troublesome. She informed Calabro that if she signed a card now, she wouldn't have to pay any union fees, but if she did not sign the card, she would have to pay the fees should the Union come in. This statement, standing alone is a classic violation of the *Savair* standards. However, I agree with the Petitioner that the rationale of *Savair* is inapplicable to these statements, because Calabro had previously demonstrated her support for the Union, by signing a petition in favor of the Union's representing the Respondent's employees, prior to the offending remarks by Klimas. Thus the element of a quid pro quo that the statement unfairly pressures employees is missing from the instant situation. *De Jana Industries*, 305 NLRB 294, 295 (1991). Moreover the *Savair* Court was concerned that a waiver of initiation fees only for employees who sign cards before an election constitutes a buying of endorsements by the Union, paints a false portrait of the extent of employee support during an election campaign, and may cause some employees who sign up as a result of the waiver to vote for the Union out of a sense of moral obligation. *Dyna-Fab Corp.*, 270 NLRB 394 (1984).

Thus where, as here, the statement of Klimas "did not result in the execution of any authorization cards³⁰ or membership applications, no endorsements were purchased, no false portraits of employee support could have been painted. Nor would any employees have felt formally impelled to vote for the Petitioner based on a benefit extended by the Union in connection with signing a card or joining." *Dyna-Fab*, supra at 394.

Accordingly, based on the above analysis I conclude that Klimas' comments to Calabro do not run afoul of *Savair* standards, and that they not constitute grounds for setting aside the election.

²⁹ *Servomation of Columbus*, 219 NLRB 504, 506, (1975); *Willis Shaw Frozen Express*, 209 NLRB 267, 268 (1974). (Evidence of violence that create an atmosphere of fear and coercion); *Weatherseal*,

Inc., 161 NLRB 1226, 1229 (1996) (unlawfully assisted union on the election ballot).

³⁰ Indeed the record does not reflect that Calabro ever signed such a card.

Employee Michelle Santoro was informed by “special agent” Carol Bragg that if Santoro did not sign an authorization card that day, and if the Union comes in, they would take \$30 out of Santoro’s pay “like a penalty,” if she did not sign a card then. Santoro signed an authorization card for the Union, several weeks later.

I conclude that these statements of Bragg are violative of *Savair* standards, and are virtually identical to the language used by card solicitors in *University Towers, Inc.*, 285 NLRB 199, 200 (1987), found to be objectionable conduct. There, the employee-solicitors told an employee, “I should sign the card before the election. If I don’t they will take it out of my check for the initiation fee.” The Board, reversing the Hearing Officer, concluded that these statements, which mirror the comments made herein by Bragg, “means that an initiation fee waiver was conditioned on signing an authorization card prior to the election.” *Id.* at 200.

The Petitioner argues however that the comments even if violative of *Savair* standards should not be found to have affected the results of the election, since they were isolated and not disseminated to any other employee. *Detroit Receiving Hospital*, 277 NLRB 1225 (1985); *Station Operators, Inc.*, 307 NLRB 263 (1992); *Rock Island Franciscan Hospital*, 226 NLRB 291, 298 (1976). I disagree.

Since Bragg has been found to be an agent for the Union, the test to be applied is whether her conduct “reasonably tended to interfere with the employees free and uncoerced choice in the election.” *Phillips Chrysler Plymouth, Inc.*, 304 NLRB 16 (1991). While the Board considers a number of issues in making that assessment, the closeness of the vote is an especially significant factor, particularly where as here, a “shift of one vote could have changed the outcome.” *Phillips-Chrysler*, supra. *Copps Food Center, Inc.*, 296 NLRB 395 (1989) (single threat to employee found to be sufficient to overturn election, primarily because vote of person threatened could have determined outcome of election). *Hopkins Nursing Care Center*, 309 NLRB 958, 959 (1992) (Board placed great emphasis on fact that a switch of but one vote would have altered the election outcome in concluding that single threat made by employer was not “de minimis,” and constituted objectionable conduct). *Pepsi Cola Bottling Co.*, 289 NLRB 736, 737 (1978) (union videotaping of two employees as they exited premises found to have interfered with the election, and not isolated since a change in one vote would have altered outcome of election).

Indeed, even where the Board evaluates objectionable conduct under the more stringent standard of “third party conduct,” which requires the “creation of a general atmosphere of fear of reprisal” in order to set aside elections, the closeness of the election is considered to have substantial weight. *Smithers Tire & Automotive Testing of Texas, Inc.*, 308 NLRB 72, 73 (1992) (threat made by other employees to a single employee, along with threat made by union agent to another employee, sufficient to set aside election, since the votes of the two threatened employees could be determinative of the election). *Buedel Food Products Co.*, 300 NLRB 638 (1990) (single threat to employee by former employee found sufficient to set aside election, since employee threatened “might have voted against the Petitioner absent the intimidation,” which could have changed the outcome of election).

Thus based on the above authorities I cannot find the conduct herein to be isolated or de minimis.

Santoro was unlawfully induced to sign an authorization card, and one of the problems with such conduct, as stated by the Supreme Court was the possibility that the employee who signed a card under such circumstances, may feel obligated to carry through on their stated intention to support the Union. Thus since the possibility exists that Santoro’s vote might have been influenced by the Union’s conduct, and that a change in her vote could have changed the outcome of the election,³¹ I conclude that a new election is warranted.

Moreover, I also note that the Supreme Court was concerned in *Savair* with the Union’s potential use of its improperly obtained card to influence other employees to support the Union, and to paint a false portrait of employee support during the election campaign. While the record contains no evidence that the Union used Santoro’s card to influence any other employees, it was the mere “potential” of such use that disturbed the Court, and that “potential” is but another reason for me to conclude that the Union’s conduct was not isolated had a reasonable tendency to interfere with the free choice of employees. Therefore I find that by Bragg’s statements to Santoro, the Union committed objectionable conduct sufficient to set aside the election.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging its employees Lisa Magnano and Yvonne Gilliams because of their activities on behalf of and support for the Union, Respondent has violated Section 8(a)(1) and (3) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. The challenges to the ballots of Lisa Magnano and Yvonne Gilliams should be overruled.

6. The Petitioner has committed conduct sufficient to overturn the results of the election

THE REMEDY

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

Having found that the Respondent discriminatorily discharged Lisa Magnano and Yvonne Gilliams, I shall recommend that the Respondent offer them immediate and full reinstatement to their former jobs or a substantially equivalent position without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them. All backpay provided shall be computed

³¹ I note in this connection that the vote was 21-21 with two challenges, Gilliams and Magnano. Even assuming that their votes consistent with my decision are to be opened, and that they vote for the Union, a possible change in Santoro’s vote would result in a tally of 22-22. Thus Santoro’s vote could affect the election results.

with interest on a quarterly basis in the manner prescribed by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest computed in the manner and

amount prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]