Youville Health Care Center, Inc. ***and*** **Barry Adams** ***and*** **Meredith Scannell** ***and*** **Marie Waters**. Cases 1–CA–34663 (1–2) and 1–CA–34699

August 27, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS LIEBMAN AND BRAME

On November 10, 1997, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified and to adopt the recommended Order as modified.[2]

1. We agree with the judge that the Respondent violated Section 8(a)(1) of the Act by promulgating at an October 17, 1996 meeting an oral rule restricting employee discussions of working conditions. We do not, however, rely on the judge's rationale for so finding.

Although the judge failed to resolve definitively the specific wording of the rule promulgated by Director of Nursing Terri Poster, such a determination is unnecessary because we find that the rule, even if presumptively valid, was discriminatorily promulgated and is therefore unlawful.[3] It is settled that the presumptive validity of an employer's rule may be rebutted if it can be shown that the rule was adopted for a discriminatory purpose.[4] We find this to be such a case. There is no evidence that any rule restricting employee discussions of working conditions was previously imposed or made known to the employees. Nor does the Respondent argue that prior to the advent of the employees' protected concerted activities involved in this case there were any restrictions on employee discussions concerning working conditions.[5] Thus, the record supports a finding that Poster precipitously adopted a new rule restricting employee discussion of working conditions in response to the employees' protected concerted activity. We find that this conduct supports the conclusion that the rule was established in order to stifle and interfere with the employees' exercise of their Section 7 rights.[6] Because the rule was adopted for a discriminatory purpose, we find that its promulgation violated Section 8(a)(1).[7] Accordingly, we shall order the Respondent to rescind the oral rule established by Poster on October 17, 1996.

2. Our dissenting colleague finds that the Respondent did not violate the Act by disciplining Marie Waters, Barry Adams, and Meredith Scannell, on the ground that they were supervisors within the meaning of Section 2(11) of the Act. We disagree. We adopt the judge's finding that the record is insufficient to establish that these employees were statutory supervisors.

Waters, Adams, and Scannell served in a rotating capacity as charge nurses on the evening shift of the East-2 unit of the Respondent's nursing home. In addition to regular patient care duties, the charge nurse had certain other responsibilities, such as making patient care assignments and scheduling breaktimes. Off-shift supervisors were available for consultation. The charge nurse did not determine the staffing of the unit or decide which nurses would work on a particular evening.

In finding the charge nurse position to be supervisory, our dissenting colleague relies on Section 2(11)'s as-

[1] In his decision, the judge found that the Respondent violated Sec. 8(a)(1) of the Act by, inter alia, issuing development plans to employees Barry Adams and Meredith Scannell for engaging in protected concerted activity. In so finding, the judge concluded that the plans were "punitive" because they contained the following language: "Failure to meet the goals stated will result in Corrective Action up to and including termination." While we agree with the judge that the issuance of the development plans violated Sec. 8(a)(1), we do not rely on the judge's finding that the corrective language in the plans is "punitive." Rather, we find that the plans constituted an adverse change in the employees' terms and conditions of employment instituted because Adams and Scannell engaged in protected concerted activity.

[2] In accordance with *Excel Container, Inc*., 325 NLRB 17 (1997), we shall change the date in par. 2(e) of the judge's recommended Order from October 24 to October 16, 1996, the date of the first unfair labor practice. We shall also modify the judge's recommended Order to conform to the violations found and to provide for rescission of the unlawfully promulgated rule restricting employee discussions of working conditions.

[3] In his decision the judge characterized the rule in three different ways—as a prohibition of employee discussions of working conditions while the employees were "working" or "on duty," and as a prohibition against such discussions during "work hours." It does not appear that the judge specifically resolved exactly what was promulgated because he found at fn. 16 of his decision that there is "no material difference" between Poster's testimony that she told the nurses that "when they were working to attend to patient care issues [and that] if there were matters that needed to be discussed that took away from patient care we would provide an area—or a forum for that to occur," and Poster's statement in Adams' termination letter that she told Adams that "discussions not related to patient care issues should not take place during work hours." Because we find that the rule was discriminatorily promulgated, we find it unnecessary to resolve definitively the specific wording of the rule or to pass on the judge's finding that there is no material difference in Poster's statements.

[4] *Sardis Luggage Co*., 170 NLRB 1649, 1655 (1968).

[5] The Respondent had a written rule concerning charitable solicitations, but the judge found that it did not pertain to discussions about working conditions. No exceptions have been filed to that finding. In any event, the October 17 oral rule was not an application of this written rule. Thus, in its brief to the judge the Respondent affirmatively stated that Poster did not rely on the written charitable solicitation rule to support her oral restriction on employee discussions of working conditions.

[6] See *Ward Mfg., Inc*., 152 NLRB 1270 (1965) ("precipitous" promulgation of a presumptively valid rule violated Sec. 8(a)(1) because rule was adopted in order to stifle the union's organizing campaign).

[7] See *American Commercial Bank*, 226 NLRB 1130 (1976) (respondent violated 8(a)(1) by establishing a "no union talk (and solicitation)" rule for the purpose of interfering with and restraining employees in the exercise of their Sec. 7 rights).

signment and responsible direction criteria. Specifically, he cites the charge nurses' authority to assign staff to patients, assign tasks to staff, assign meal breaks, call in staff in the event of staff illness, and resolve problems relating to patient care or patients' families. There is, however, a second component to the statutory definition of supervisory, i.e., "the exercise of the individual's authority must require the use of independent judgment and be of more than a routine or clerical nature." *Schnuck Markets, Inc. v. NLRB*, 961 F.2d 700, 703 (8th Cir. 1992). Therefore, as the judge correctly recognized, the question presented is "whether the [charge nurses] xercised independent judgment in assigning employees to patients and in directing other employees, or whether the exercise of such authority was merely routine or of a clerical nature."

In our view, the record is insufficient to warrant a finding that the nurses' authority is anything but routine, not requiring the use of independent judgment. With regard to the nurses' duty to call in employees in the event of staff illness, there is no evidence that the charge nurses have the authority to require or order an off-duty employee to fill a particular shift. "[S]eeking off-duty volunteers to help out when the facility is short handed . . . falls short of the supervisory authority to assign contemplated by section 2(11)." *Lynwood Health Care Center, Minnesota, Inc. v. NLRB*, 148 F.3d 1042 (8th Cir. 1998). See also *Providence Hospital*, 320 NLRB 717, 732 (1996), enfd. sub nom. *Providence Alaska Medical Center v. NLRB*, 121 F.3d 548 (9th Cir. 1997). Similarly, we find that the charge nurses' assignment of staff to patients is a routine activity that does not require the exercise of independent judgment. Id. Likewise, the authority to approve breaks has been found to be "a routine clerical judgment"[8] not requiring the exercise of independent judgment, and the assigning of discrete patient care tasks to particular employees has been found to be "merely routine" as well. *Grandview Health Care Center v. NLRB*, 129 F.3d 1269 (D.C. Cir. 1997). Our dissenting colleague's reliance on the charge nurses' "resolving problems such as those relating to patient care or patient's families" is also misplaced. The record is insufficient to warrant a finding that such authority constitutes grievance adjustment or any other indicia of supervisory status within the meaning of Section 2(11) of the Act. See *St. Francis Medical Center-West*, 323 NLRB 1046 (1997).

The burden of proving supervisory status is on the party alleging that it exists. *Bennett Industries*, 313 NLRB 1363 (1994).[9] Here, there is no evidence that the charge nurses had any authority to hire, transfer, suspend, lay off, recall, promote, reward, discipline, or discharge employees, or to adjust their grievances, or effectively to recommend such action. We further find that the record is insufficient to warrant a finding that the charge nurses exercised independent judgment in the assignment and direction of other employees. We conclude, therefore, that the Respondent has not met its burden of showing that Waters, Adams, and Scannell were statutory supervisors outside the protection of the Act.[10] Accordingly, we agree with the judge that the Respondent violated Section 8(a)(1) of the Act by taking adverse actions against these employees for engaging in protected concerted activity.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Youville Health Care Center, Inc., Cambridge, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

"(b) Discriminatorily promulgating a rule restricting employee discussions of working conditions for the purpose of interfering with the employees' exercise of their Section 7 rights."

2. Add the following as paragraph 2(a) and reletter the subsequent paragraphs.

"(a) Rescind the rule promulgated on October 17, 1996, restricting employee discussions of working conditions."

3. Substitute the following for paragraph 2(e).

"(e) Within 14 days after service by the Region, post at its Cambridge, Massachusetts facility copies of the attached notice marked 'Appendix.'[26] Copies of the notice, on forms provided by the Regional Director for Region 1, 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 al-

[8] *Providence Hospital*, supra, 320 NLRB at 732.

[9] Several courts have upheld the Board's position. See *Grandview Health Care Center*, supra, 129 F.3d at 1270 (stating that the employer failed to show supervisory status); *Schnuck Markets*, supra, 961 F.2d at 703 (stating that the employer "bears the burden of proving supervisory status"); *NLRB v. Bakers of Paris, Inc*., 929 F.2d 1427, 1445 (9th Cir. 1991) ("[T]he burden of proving supervisory status rests upon the party asserting it.").

Our dissenting colleague concedes that "[t]he record is not very detailed on the charge nurse position at the Respondent." To the extent that there are any gaps in the record, the Respondent must be held accountable for them, because it is the party with the burden of proof.

[10] The dissent cites selectively to decisions of the Fourth and Sixth Circuits, and fails to acknowledge that the Board's position has been upheld by the Eighth, Ninth, and District of Columbia Circuits. *Lynwood Health Care Center, Minnesota, Inc. v. NLRB*, 148 F.3d 1042 (8th Cir. 1998), enfg. 323 NLRB No. 200 (1997) (not reported in Board volumes); *Grandview Health Care Center v. NLRB*, 129 F.3d 1269 (D.C. Cir. 1997), enfg. 322 NLRB No. 54 (1996) (not reported in Board volumes); *Providence Alaska Medical Center v. NLRB*, 121 F.3d 548 (9th Cir. 1997), enfg. 321 NLRB No. 100 (1996) (not reported in Board volumes).

tered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 16, 1996."

4. Substitute the attached notice for that of the administrative law judge.

MEMBER BRAME, dissenting in part.

I join my colleagues in finding that the Respondent unlawfully promulgated a no-solicitation rule. Contrary to my colleagues, however, I find that the Respondent's charge nurse position is a supervisory one under Section 2(11) of the Act. Accordingly, I find that the Respondent did not violate the Act by disciplining Marie Waters, Barry Adams, and Meredith Scannell, who served in a rotating capacity as charge nurses.

The three alleged discriminatees—Waters, Adams, and Scannell—worked as registered nurses in the East-2 unit of the Respondent's nursing home on the evening shift. Each rotated as charge nurse on that shift, though it appears that Waters normally worked exclusively as a charge nurse, while Adams and Scannell worked in both a charge nurse and noncharge nurse capacity.[11]

The record is not very detailed on the charge nurse position at the Respondent. Nonetheless, it reveals that each unit of the Respondent has a full-time nursing supervisor or a patient care director who primarily works the day shift. In their absence, there is a designated charge nurse on each unit on each shift.

While on duty, the charge nurse is responsible for the operation of the unit for that shift. Duties of a charge nurse include making patient care assignments to staff; assigning meal breaks; assigning additional duties if a new admission were to come in; and problem solving any issues that might arise during that shift.[12] The charge nurse has the authority to call in additional staff in the event there is a sick call by staff. If there is a performance problem concerning staff, the charge nurse is expected to provide input to the nurse supervisor but the charge nurse plays only an anecdotal role in the evaluation process. At the end of a shift, the charge nurse is responsible for recording in a logbook any abnormal occurrence on the shift. The charge nurse also carries his or her own patient case load during the shift, and the charge nurse is paid a differential (about a dollar an hour) for time spent as a charge nurse.

In *Cedar Ridge Nursing & Rehabilitation Center v. NLRB*,[13] the court stated the following regarding the Section 2(11) definition of a supervisor:

> As the statutory language makes clear, an employee must meet three criteria to quality as a supervisor. First, the employee must have the authority to perform at least one of the twelve enumerated duties. See *Monogahela Power Co. v. NLRB*, 657 F.2d 608, 612 (4th Cir. 1981) (stating that the employee need perform only one of the listed tasks to qualify as a supervisor). It is not necessary that the employee actually exercise the authority. See *NLRB v. Southern Seating Co*., 468 F.2d 1345, 1347 (4th Cir. 1972) (noting that the relevant inquiry is whether authority has been delegated not whether it has been exercised) (citing *Turner's Express, Inc. v. NLRB*, 456 F.2d 289, 292 (4th Cir. (1972)).
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> Second, the employee's authority must promote the interest of the employer. See *NLRB v. Health Care & Retirement Corp*., 511 U.S. 571, 583 (1994) (holding that a nurse's patient care satisfies Sec. 2(11)'s "in the interest of the employer" requirement). Finally, the employee's exercise of authority must require the use of independent judgment. The statutory language distinguishes independent judgment from actions that are merely routine or clerical.

The above recounting of facts in this case, when viewed against the necessary statutory criteria, establishes that the Respondent's charge nurse position qualifies as supervisory under Section 2(11) of the Act. Specifically, the facts show that the charge nurse possesses the requisite assignment and responsible direction criteria contemplated by Section 2(11) and that the charge nurse's exercise of this authority requires the use of independent judgment.

Regarding the assignment and responsible direction criteria, in addition to his or her patient care duties, the charge nurse is the highest ranking employee in the unit and is responsible for the operation of the unit. The charge nurse's responsibilities include assigning staff to patients; assigning additional tasks to staff based on new patient admissions; assigning meal breaks; calling in additional staff in the event of staff illness; and resolving unforeseen problems, such as those relating to patient care or patients' families.

Furthermore, the assignment and responsible direction authority exercised by the charge nurse here involves the use of independent judgment. In *Cedar Ridge Nursing & Rehabilitation Center v. NLRB*, supra, the court held that

[11] There was only one charge nurse per shift on each unit.

The Acting General Counsel does not argue that, even if the charge nurse position is a supervisory one, Adams and Scannell worked too infrequently in that position to be considered statutory supervisors. Accordingly, I do not address that issue.

[12] Examples of such issues might include dealing with patient's families and work assignment issues.

[13] 147 F.3d 333 (4th Cir. 1998), denying enf. to 322 NLRB No. 29 (1996) (not reported in Board volumes).

> [T]he authority to assign workers constitutes the power "to put [the other employees] to work when and where needed." *Monongahela Power Co. v. NLRB*, 657 F.2d 608, 613 (4th Cir. 1981). Such decisions are, in our view, inseverable from the exercise of independent judgment, especially in the health care context where staffing decisions can have such an important impact on patient health and well being. An emergency decision regarding the appropriate staff level to accommodate ill patients requires a fact-specific individualized analysis of not only the patient's condition and the appropriate care, but also of the special skills of particular staff members.[14]

These words echoed those of the Board many years ago in *Avon Convalescent Center, Inc.*,[15] where the Board had stated

> [I]n a nursing home servicing elderly and sick patients whose critical needs may momentarily require variations in standard procedures, the nurse responsible for the supervision of other nurses or a shift or a section must obviously be prepared to exercise her discretion in utilizing her training and experience and assign and direct employees placed under her authority more than clerically or routinely.

As the Sixth Circuit counseled in *Beverly California Corp. v. NLRB*,[16] "the use of independent judgment does not become 'merely routine' when exercised in the interest of patients housed in the employer's nursing home." Accordingly, it is clear that the charge nurse's assignment and direction responsibilities here entailed the use of independent judgment.

Thus, because the charge nurse possessed the authority to assign and responsibly direct those on the unit using independent judgment, the charge nurse position is appropriately considered a supervisory one. In so concluding, I note that in *NLRB v. Beacon Light Christian Nursing Home*, 825 F.2d 1076, 1079 (6th Cir. 1987), LPNs "assigned patients to the nurses' aides and were responsible for their work." The court found the LPNs to be statutory supervisors. In *Caremore, Inc. v. NLRB*, 129 F.3d 365, 369 (6th Cir. 1997), the LPNs "assign[ed] aides to . . . particular patients in the event of a staffing imbalance or staffing shortage."[17] Citing *Beverly California Corp. v. NLRB*, supra at fn. 6, the court found the LPNs to be statutory supervisors. And in *Manor West v. NLRB*, 60 F.3d 1195, 1998 (6th Cir. 1995), the LPNs "direct[ed] the work of aides and orderlies." The court found them to be supervisors. The charge nurse here fulfills the same role as the LPNs in *Beacon Light* and *Caremore* and *Manor West* regarding the statutory criteria of assignment and responsible direction and is appropriately considered a statutory supervisor.[18] Accordingly, I dissent from my colleagues' and the judge's finding to the contrary, and I would find no violation of the Act in the discipline given to charge nurses Waters, Adams, and Scannell.

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 discharge, discipline, or otherwise discriminate against any of our employees for engaging in protected concerted activities.

WE WILL NOT discriminatorily promulgate rules restricting employee discussions of working conditions for the purpose of interfering with the employees' exercise of their Section 7 rights.

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

WE WILL rescind the rule promulgated on October 17, 1996 restricting employee discussions of working conditions.

WE WILL, within 14 days from the date of the Board's Order, offer Barry Adams full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Barry Adams, Meredith Scannell, and Marie Waters whole for any loss of earnings and other benefits resulting from the discrimination against them, 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 unlaw-

[14] See *Cedar Ridge Nursing*, above.

[15] 200 NLRB 702, 706 (1972), enfd. 409 F.2d 1384 (6th Cir. 1974).

[16] 970 F.2d 1548, 1553 (6th Cir. 1992).

[17] The LPNs "also were responsible for calling in off-duty aides . . . in the event a scheduled aide failed to report for a shift (although the LPNs did not have the power to compel off-duty aides to report)." 129 F.3d at 367.

[18] See also former Member Cohen's dissent in *Providence Hospital*, 320 NLRB 717 (1996), enfd. 121 F.3d 548 (9th Cir. 1997). See in addition, *Fair Oaks Health Care Center v. NLRB*, 148 F.3d 638 (6th Cir. 1998), denying enf. to 323 NLRB No. 60 (1997) (not reported in Board volumes); *Ridge Nursing & Rehabilitation Center v. NLRB,* supra at fn. 3.

I am aware that in *Beacon Light, Caremore,* and *Manor West* the LPNs involved had responsibilities beyond those of assignment and responsible direction. But Sec. 2(11) is to be read in the disjunctive and the possession of any one of the criteria set forth in that section is sufficient to establish supervisory status. *Jeffrey Mfg. v. NLRB*, 654 F.2d 944, 950 (4th Cir. 1981).

Contrary to the judge, the fact that Director of Nursing Poster may not call the charge nurse "a supervisor" is irrelevant. The facts establish the supervisory authority of the charge nurse and it is those facts, and not Poster's impressions, which are key to the inquiry under the statute.

ful discharge of Barry Adams, the unlawful development plans given to Barry Adams and Meredith Scannell, and the shift changes given to Barry Adams, Meredith Scannell, and Marie Waters, and WE WILL, within 3 days thereafter, notify the employees in writing that this has been done and that these personnel actions will not be used against them in any way.

YOUVILLE HEALTH CARE CENTER, INC.

Michael Fitzsimmons, Esq., for the General Counsel.
Laurence Donoghue, Esq. (Morgan, Brown & Joy), of Boston, Massachusetts, for the Respondent.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Boston, Massachusetts, on May 21 and 22, 1997. The charges in this matter were filed by Barry Adams and Meredith Scannell on October 24, 1996, and by Marie Waters on November 4, 1996.[1] The consolidated complaint was issued February 27, 1997.

On the entire record,[2] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, operates a nursing home in Cambridge, Massachusetts, where it annually derives gross revenues in excess of $250,000. It annually receives at its Cambridge facility goods and materials valued in excess of $5000 from points outside the Commonwealth of Massachusetts. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview

In 1996, Barry Adams, Meredith Scannell, and Marie Waters worked as registered nurses (RN) in the East-2 unit of Respondent's nursing home on the evening shift (3 to 11 p.m.). Each rotated as charge nurse on the evening shift.[3] Scannell and Adams worked at times when they were not the charge nurse. The charge nurse assigned staff to patients, assigned meal breaks, did whatever had to be done with regard to newly admitted patients and dealt with the patients' families. The charge nurse also had the authority to call employees into work if a scheduled staff member called-in sick. However, there is no evidence that the charge nurse could force an employee to come to work involuntarily.[4]

On June 10, Ann T. "Terri" Poster was hired by Respondent as director of nursing. Between September 9 and October 30, a number of complaints were made by employees, some of which were concerted, regarding the staffing of the evening shift. Adams, Scannell, and Waters were prominent in these activities.[5]

On October 16, Respondent placed Adams on a disciplinary "development plan" and changed his shift assignment from evenings to a rotating shift, which would include daytime assignments. On October 18, Adams was fired. Scannell was put on a "development plan" on October 22. In early November, Respondent put Scannell on a rotating shift which included some day-shift assignments. On November 1, Waters was changed to a rotating shift, which included some day shift assignments.[6]

The primary issue in this case is whether these personnel actions were taken in retaliation for protected concerted activities in violation of Section 8(a)(1) of the Act, or whether they were taken for nondiscriminatory reasons. The General Counsel, also alleges, in paragraph 12 of the complaint, that Respondent violated Section 8(a)(1) in promulgating a solicitation and distribution policy which permits employees to solicit and distribute materials to patients, residents, and visitors, only if the solicitation or materials are part of a company-directed work assignment and have prior approval from Respondent. Paragraph 13 of the complaint alleges that Youville violated the Act in enforcing this policy by telling employees that they could not discuss issues related to their working conditions during patient care time.

B. The Chronology of Events During September–November 1996

Meredith Scannell filed a report of an alleged unsafe condition with Respondent on September 9 (G.C. Exh. 9). She complained that she had to take responsibility for 16 patients with the help of 2 certified nursing assistants (CNA). Scannell claimed that this was unsafe and that a licensed practical nurse (LPN) should also have been helping her.

On September 12, Barry Adams wrote a two-page memorandum to Terri Poster complaining that the East-2 unit was understaffed (G.C. Exh. 15). On the next day Adams met with Poster for the first time. They discussed three incidents brought to Respondent's attention by Adams in August. Two involved patients who fell. Adams contended that these falls were due at least in part to inadequate staffing. The last incident involved a patient to whom Adams gave two Tylenol with codeine. After administering the medicine Adams discovered that the patient had received one tablet 2 hours earlier. Adams contends that understaffing caused this error because the 3 p.m. tablet was not recorded on the medication administration record. Poster

[1] All dates are in 1996 unless otherwise indicated.

[2] The transcript of this proceeding contains a number of errors and misspellings. I accept the parties' stipulation to amend and correct the transcript which was filed on July 7, and contains seven pages of corrections.

[3] It appears from R. Exh. 3 that Waters was normally, or always, designated as charge nurse when she was on duty, prior to November 15.

[4] Poster testified that if there was a sick call on a shift, the charge nurse would be expected to try to find a substitute. There is no indication as to how the charge nurse selected the substitute or whether they had any guidance from management as to who to call. Poster also testified that the charge nurse had the authority to call somebody in. It is not clear what the charge nurse did if the person called as a substitute was either unwilling or unable to come to work

[5] Adams had filed a complaint regarding the adequacy of the staffing of another unit in the nursing home on July 22.

[6] Waters alleged that after her shift change she was no longer designated as the charge nurse on the evening shift. R. Exh. 3 indicates that she continued to be designated as charge nurse, although possibly not as frequently as before. It is unclear as to whether Scannell was designated as charge nurse after the change in shift assignments and, if so, whether these designations were less frequent.

blamed Adams for the mistake (Tr. 117). She believes that if he followed the proper procedure he would have been aware of the 3 p.m. tablet before he administered the medication at 5 p.m.[7]

On September 17, Marie Waters filed a hazard report complaining that inadequate staffing had created unsafe conditions for the patients on the East-2 unit that evening (G.C. Exh. 3). The following day, September 18, Barry Adams met with Joanne Parsons, Respondent's human resources director. They discussed the MDS form, which is filled out for Medicare patients on the 14th day after admission, and quarterly thereafter. Parsons recalled that Adams stated he would not fill out the forms and that she told him that completing such forms was part of his job (Tr. 246). Adams denies this and stated that he objected to filling out the forms after patients had been discharged. He also complained that completing the forms for discharged patients required a nurse to leave an already understaffed floor to obtain the patient's medical records and that no overtime was granted by Respondent to complete the forms (Tr. 301, also see G.C. Exh. 20). I conclude that Adams refused to complete the MDS forms only under the existing conditions.

On September 23, seven employees presented a petition, prepared by Adams, to Lois Hunter, the supervisor for the East-2 unit. The complained that they were informed that they would no longer be paid for time spent on the floor if they skipped their dinner break.[8] The petition also alleged that staffing levels sometimes made taking a dinner break unsafe for patients and nurses. The petition was signed by the nurses in the following order: Marie Waters, Barry Adams, Vida Carrington, Lois Flanagan, Meredith Scannell, Ann Schifone, and Tom Quinlivan (G.C. Exh. 4). Adams met with Poster, Parsons, and Lois Hunter on September 24. Again, he raised the issue of adequate staffing on East-2. Poster disagreed with Adams' contention that staffing was inadequate (G.C. Exh. 17).

On October 1, or immediately prior to that date, a "staffing grid" was posted at the nurse's station in East-2. I infer that this grid was prepared by Lois Hunter at Poster's direction. A "staffing grid" prescribes the number of nurses on the floor for each shift depending on the number of patients on the floor. The grid that was to become effective October 1, provided for a staff of one RN without any assistance if the number of patients was nine or less on the evening and night shifts (R. Exh. 9). On October 2, Marie Waters, Barry Adams, Meredith Scannell, Ann Schifone, and Janice Nowicki addressed a petition to Joan Coyne, Respondent's administrator, Terri Poster and Lois Hunter.[9]

The petition read as follows:

> This letter is to express our sentiments regarding the new "staffing grid" for East 2 which states that for a patient census of nine patients or less, only one registered nurse will be on the floor with no additional help, licensed or unlicensed. We know that such a situation would place patients at Youville Hospital at great risk should any unexpected event occur. Additionally, we believe such a staffing policy shows a lack of concern for the well being of the patients . . . as well as the families of our patients. Additionally, we believe such a policy violates our educations, our common sense and negates our licensure in the state of Massachusetts . . . .

G.C. Exh. 5.

At about 3 p.m. on October 2, Terri Poster conducted a staff meeting for a group of nurses assigned to East-2. Adams, Scannell and Waters attended this meeting (R. Exh. 10, Tr. 26, 155). Staffing issues were discussed. Poster announced that the staffing pattern on the evening and night shifts for nine patients or less was one RN and one CNA. The posted staffing grid was at some time modified to reflect this.[10]

Poster also announced that nurses would be paid for dinner breaks that are missed due to their workload. Then there was a general gripe session.[11] Some nurses complained that management was more concerned with its budget than patient care. There was a discussion at the meeting about the completion of MDS forms. Poster felt that Adams was very antagonistic towards her regarding these issues (Tr. 171, R. Exh. 11).[12] Adams refused to complete MDS forms for discharged patients who had not been under his care and either asked or demanded overtime if he was going to be expected to complete the forms (Tr. 301–302, G.C. Exhs. 18 & 20).

After the October 2 meeting Poster began supervising the night, evening and weekend shifts more closely (Tr. 157).

[7] The patient suffered no ill effects from receiving the additional medication.

[8] Waters' timesheets (R. Exh. 3) indicate that she was paid for dinner breaks that she missed through the end of her employment with Respondent.

[9] On September 29, Hunter went on extended sick leave and never returned to work.

[10] Poster testified that the original grid was a mistake insofar as it provided for only one RN when there were nine or less patients. She testified further that she was informed of this error by Lois [I assume this to be Lois Hunter]. Poster also testified that when Lois brought the error to her attention, "I said that it was a mistake and we'd immediately correct it, we would never leave a staff person alone with patients" (Tr. 151). She also testified that she received the employee petition (G.C. Exh. 5) no earlier than October 2, and probably on October 3 or 4.

I infer, however, that the East-2 nurses were not informed that the grid would be corrected until the staff meeting of October 2 and after the petition had been submitted to management. Had the staffing grid been corrected before the meeting there would have no reason for the nurses to submit the petition or for a discussion of the staffing grid at the meeting. Moreover, if Poster was informed of the mistake by Hunter, she did not immediately correct the grid. The record indicates that Hunter went on sick leave on September 29 and the original uncorrected staffing grid was still posted on October 2.

[11] My findings as to what transpired at this meeting are based almost entirely on R. Exh. 10, Poster's minutes. I deem them to be more reliable than her testimony.

[12] Terri Poster testified that Adams and Waters stated that they would not fill out MDS forms (Tr. 162). She must have meant Scannell rather than Waters because Waters was not expected to complete MDS forms since she had not had an orientation program as to how to fill them out (Tr. 222). Poster also testified that some nurses complained that they were completing the forms and other nurses were not. Poster's meeting notes provide no corroboration for this testimony and I do not find it credible. The notes indicate that "The 3-11 shift feels that they have no time to do MDSs." The only notation about any nurses complaining that others were not doing their job properly is an item (#11) stating that "other staff thought the CNAs work has to be checked. There are issues with blood pressures and catheters." Further, Karen Wells, one of the nurses who was completing the MDS forms according to Poster, was called as a witness by Respondent. She wasn't asked any questions about the MDS forms. If there was tension between those nurses who were completing the MDS forms and those that were not, Respondent could have established this fact through Wells.

Sometime between October 2 and 16, Poster learned of a discussion in which Meredith Scannell discouraged nurse Karen Wells from working overtime. Poster was also told erroneously that Adams, who was present during this conversation, also tried to discourage Wells from working overtime.

The discussion in question began when Wells, who normally worked the day shift, walked into the kitchen on unit East-2. She overheard Scannell telling nurse Beth Carvalho that if the day shift continued to work overtime, Respondent would not hire additional nurses. Thus Scannell believed that if the day shift nurses continued to work significant overtime, Respondent would avoid resolving what she deemed to be its staffing shortage. Wells became angry at Scannell and raised her voice. She told Scannell she needed the overtime pay. Scannell apparently reiterated the arguments she made to Carvalho, but did not threaten Wells or raise her voice.[13] Adams was in the kitchen during the discussion but did not participate in it. The kitchen door was closed and there is no evidence that any patients heard the discussion.

Wells told nurse Jennifer Vecchia about the conversation and it was related to Poster second or third hand. Poster never asked Scannell for her side of the story until presenting her with a "development plan" on October 22. The plan was predicated in part on Scannell's conversation with Wells (G.C. Exh. 11).

During this time period Poster also became aware of an incident in which a nursing home security guard came up to the East 2 unit and yelled at Scannell in front of a newly admitted patient. Scannell had sent a patient to the nursing home kitchen to request a glass of juice. The guard came to East 2 to tell Scannell that nursing home policy required a head nurse present for a patient to gain access to the kitchen. Adams spoke to the guard to protect Scannell from his wrath and possibly to defuse the situation.[14]

Without talking to Scannell, Adams or the security guard, Poster included in Scannell's development plan an allegation that Scannell yelled at the security guard. Both Scannell and Adams deny this (Tr. 65, 296, G.C. Exh. 12). Poster also blamed Adams for the episode (Tr. 167). The development plan presented to Adams on October 16, recited that "[h]e has had problems resolving problems that occur on the evening shift."

C. The Events Immediately Preceding the Termination of Barry Adams

On October 16, Poster and Parsons met with Adams and presented him with a development plan signed by Poster (G.C. Exh 19). They also informed him that his shift was being changed to a rotating shift which would include day shift assignments. Adams expressed concern about conflicts with classes he was taking during the day. Poster stated she would honor his school schedule. Adams said he would agree to the shift change only if Poster and Parsons could support the accusations made in the development plan.

Parsons and Poster told Adams that the development plan was not punitive, but was a way to help him improve his skills (R. Exh. 19, p. 2). However, at the bottom of the plan the last sentence states that "Failure to meet the goals stated will result in Corrective Action up to and including termination." I find that the development plan was punitive. Adams' development plan relates two shortcomings:

> Barry has been having difficulty managing his time, completing his assignments, including MDS documentation while on the evening shift. He has had problems that occur on the evening shift, and requires extra intervention from the nursing administration quite frequently.
>
> Staff have reported on two occasions that Barry has discouraged them from accepting overtime on the evening shift, telling them that if they work, administration will not recognize the staffing issue. This puts patients at risk and is disrespectful of staff and patients and not professional behavior.

When presented with the development plan, Adams became very angry.[15] He denied that he had ever discouraged any nurses from working overtime, recounted the extent of his involvement with the security guard, and denied that either he or Scannell had yelled at the guard. Poster replied by stating that if she was wrong she would apologize and amend the development plan. Adams asked for a face-to-face meeting with the nurses who told Poster that he had asked them not to work overtime.

On the afternoon of October 17, Adams, Parsons, and Poster met with Karen Wells and Jennifer Vecchia. Wells said she had an argument with Meredith Scannell about overtime in Adams' presence. Adams, she said, said nothing to discourage her from working overtime. In fact Parson's notes (R. Exh. 20) relate that Wells said that Adams told her to do what she wanted.

Poster engaged Wells and Vecchia in a discussion of other issues. At some point in this discussion, Adams placed copies of a magazine article concerning a negligence suit against a nurse in front of Wells and Vecchia. The two nurses did not look at the article and continued their discussion with Poster (R. Exh. 20, p. 2). Poster indicated to the three nurses that matters regarding working conditions should not be discussed while they were on duty. She said that if such matters needed to be discussed she would provide an area or a forum for such discussions to occur (Tr. 175).[16]

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[13] I credit Scannell's testimony at Tr. 66 in this regard. Wells' testimony that Scannell raised her voice at her is extremely equivocal (Tr. 140–141).

[14] Adams replied something to effect of "Big deal", when the guard informed the nurses that he had an engineering degree. I regard this comment as completely innocuous.

[15] Poster testified that she became physically afraid of Adams (Tr. 227, R. Exh. 11.) Parsons noted that "[a]fter the meeting, Terri told me she was physically afraid of Barry. I told her that I did not feel he was a physical threat to me, but that I was shocked at the way he attacked her." (R. Exh. 19, p. 2). Having observed Mr. Adams at trial, I doubt that Poster could have entertained a reasonable belief that Adams would attack her—particularly in Parsons' presence. He is not a large man and does not present a physically intimidating presence. I do not think this would be so even in the rather small confines of Parsons' office where the October 16 meeting took place.

[16] Respondent in fn. 12 on p. 36 of its brief draws a distinction between the language used by Poster in her letter terminating Adams and that used in her testimony. The termination letter recounts that Poster told Adams that "discussions not related to patient care issues should not take place during work hours." At hearing Poster testified that she told the nurses that she needed to ask them to attend to patient care issues when they were working. She told them if there were matters that needed to be discussed that took away from patient care Respondent would provide an area or forum for that to occur (Tr. 175). I see no material difference between the two. By suggesting that she would

After Wells and Vecchia left the meeting, Adams demanded a change to the development plan. Poster said she would change it. Adams also announced he was not going to work the rotating shift because Respondent's reasons for making this change were untrue (R. Exh. 20). After the meeting ended, Poster went to see Nursing Home Administrator, Sister Joan Coyne and asked for permission to terminate Adams. Coyne granted the request and Poster prepared a letter of termination (G.C. Exh. 22).

D. Further Events Prior to the Presentation of a Development Plan to Scannell and Changes in the Shift Assignments for Scannell and Waters

On October 17, the day Adams met with Parsons and Poster for the second consecutive day, Meredith Scannell filed another hazard report with management. She alleged the staffing on the evening of October 16 was inadequate. Although she had no quarrel with the total number of staff for the 25 patients in the unit, she took issue the mix of skills of the personnel on duty. The staff on the 16th included two registered nurses, Scannell and Jennifer Vecchia, who stayed on after the day shift, and two CNAs. Scannell contended that three of the four should have been registered nurses or LPNs.

On October 22, Scannell was summoned to a meeting with Parsons and Poster in which she was presented with a development plan (G.C. Exh. 11). The development plan alleged that Scannell was having difficulty managing her time on the evening shift and inferred that she was not completing MDS forms. It also cited her discouraging other nurses from accepting overtime and alleged that she had yelled at the security guard. The plan also cited Scannell's use of 5 sick days between June 3 and September 12 as a deficiency. Scannell's form also stated that failure to meet the stated goals would result in corrective action up to and including termination.

Scannell took issue with the allegations in the plan on the development plan form and in a written memorandum to Poster and Parsons (G.C. Exh. 12). She claimed both in the memorandum and at the October 22 meeting that she had filled out MDS forms, although she could not recall the names of any patients for whom she had done so.

Sometime prior to November 1, Respondent's management received complaints from a patient's family concerning Waters. The family said Waters had described the patient as "whiny" and made the patient use a bedpan instead of allowing her to walk to the bathroom. Patients on East-2 have an absolute right to walk to the bathroom if they so desire, regardless of a nurse's judgment as to whether it is safe to do so.

On October 29, Waters required a patient to ingest a liquid called "Golightly" which cleans out the lower bowels prior to certain diagnostic procedures. Waters did not know that the procedure, scheduled for the next day, had been canceled. Another staff member failed to note this cancellation in the doctor's orders notebook. However, the cancellation was recorded in the nursing notes and Respondent alleges that Waters should have known of the cancellation even though it was not recorded in the doctor's order book.

provide a time and a place for discussions between the nurses regarding working conditions, Poster was clearly conveying a policy that such discussions should not occur while the nurses were on duty. I would also note that Parsons' recollection of what Poster said more closely resembles a prohibition of discussing working conditions while on duty (Tr. 263).

Waters, Scannell, and Vida Carrington sent another petition to poster and patient care coordinator Cheryl Robinson on October 30, 1996. The petition complained that Youville had never adequately responded to the concerns raised in September 23 memo regarding inadequate staffing to allow nurses to take their breaks.

On November 1, Terri Poster and Joanne Parsons met with Waters and notified her that she was being changed to a rotating shift effective November 15, which would include day-shift and night-shift assignments. They apparently informed Waters that the change was being made due to her "time management problem" (G.C. Exh. 7). Waters immediately wrote a memo to Poster and Parsons asking them for specific examples and asking them to clarify the reasons for the schedule change. Poster responded to the memo on November 4, citing her view that rotation allows the opportunity to work with and benefit from other proportional experiences. She also said the change would provide her with an opportunity to evaluate the workload of all shifts. Poster did not give any examples of Waters' time management problem or any specific instances of misconduct. Waters immediately began looking for another job as she believed night assignments would conflict with her obligations as a single parent. In the 5 weeks between her change to the rotating shift and her resignation on December 19, Waters worked only 2 day shifts.[17]

Shortly thereafter, Scannell was also placed on a rotating shift. Respondent took care not to schedule day assignments which conflicted with her school attendance. The change had some adverse impact on Scannell's compensation in that she lost the shift differential she had been receiving when she worked days. She also alleges that the shift change adversely affected her ability to get sufficient sleep. At some unspecified time prior to May 1997, Scannell left Youville to work elsewhere.

E. Analysis

1. Waters, Scannell, and Adams were not supervisors within the meaning of the Act

Respondent raises an affirmative defense that Waters, Scannell, and Adams were supervisors within the meaning of the Act, and therefore unprotected. Each of the Charging Parties rotated as charge nurse on the evening shift for unit East-2. The position of charge nurse can in some circumstances be supervisory. The distinction between a charge nurse who is a supervisor and one who is not is whether the individual posses any of the attributes of a supervisor listed in Section 2(11) of the Act.

In the instant case, there is no evidence that the evening charge nurses on unit East-2 met most of the Section 2(11) criteria. They did not have the authority to hire, transfer, suspend, lay off, recall, promote, reward, discipline, or discharge employees, or to adjust their grievances. The question is whether the charging parties exercised independent judgment in assigning employees to patients and in directing other employees, or whether the exercise of such authority was merely routine or of a clerical nature, *Providence Hospital,* 320 NLRB 717, 731–733 (1996), enfd. *Providence Alaska Medical Center v. NLRB,* 121 F.3d 548 (9th Cir., Aug. 18. 1997), *Washington Nursing Home,* 321 NLRB 366 (1996).

[17] Registered nurses received an additional $1.25 per hour on the evening shift compared with the day shift. A nurse designated as the charge nurse received an additional $1 per hour.

The party seeking to establish supervisory status bears the burden of persuasion on this issue, *Bennett Industries,* 313 NLRB 1363 (1994). I conclude that Youville has not established that Waters, Scannell, and/or Adams exercised the kind of independent judgment that would make any of them a supervisor. In addition to the facts noted at page 2 here, I rely on the fact that the charge nurse did not determine the staffing of the East-2 unit, nor which nurses would work on a particular evening. Although, the fact that the position rotated is not dispositive, it does indicate, as Adams testified, that the charge nurse was the "first among equals."

Terri Poster's view of the charge nurse position at Youville Health Care is also relevant to determining whether they were supervisors. She testified that Youville designated a charge nurse "in the absence of the supervisor or the patient care director (Tr. 109)." Further she stated that she would not call a charge nurse a supervisor (Tr. 111). I conclude that Respondent has failed to establish that the charge nurses' duties, with regard to assigning staff to patients, otherwise directing employees and calling in substitutes, was anything more than routine and clerical.

2. Respondent violated Section 8(a)(1) in changing Adams, Scannell, and Waters to a rotating shift, presenting Scannell and Adams with developments plans and in terminating Adams

In order to prove a violation of Section 8(a)(1), the General Counsel must show that protected conduct has been a substantial factor in the employer's adverse personnel decision. Then the burden of persuasion shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity. *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (lst Cir. 1981).

To establish discriminatory motivation the General Counsel must show protected activity, employer knowledge of that activity, animus or hostility toward that activity and an adverse personnel action. Inferences of knowledge, animus and discriminatory motivation may be drawn from circumstantial evidence rather than direct evidence.[18]

3. Waters, Scannell, and Adams engaged in concerted protected activity—Respondent was aware of this activity

Although each of the three alleged discriminatees had previously complained to management about staffing, they first did so in a concerted manner on September 23, when they submitted a petition to Lois Hunter, Respondent's first-line supervisor on unit East-2. In that petition, which was signed by four other employees, they complained about inadequate coverage of the East-2 unit on the evening and night shifts and the fact they would not be paid for the time worked if they missed their allotted dinner break.

The following day Adams met with Hunter, Terry Poster, the director of nurses, and Joanne Parsons, the director of human resources. Adams raised the issue of whether staffing on East-2 was adequate. Poster disagreed with him (G.C. Exh. 17). Adams' discussion at the meeting was a logical outgrowth of his discussions with Waters and Scannell and is itself concerted protected activity, *Every Woman's Place,* 282 NLRB 413 (1987).

[18] *Flowers Baking Co.,* 240 NLRB 870, 871 (1979); *Washington Nursing Home, Inc.,* 321 NLRB 366, 375 (1966); *W. F. Bolin Co. v. NLRB,* 70 F.3d 863 (6th Cir. 1995).

On October 2, Waters, Scannell, and Adams engaged in further concerted protected activity in submitting a petition to Poster and Hospital Administrator Coyne, protesting the new staffing grid. It is undisputed that Poster became aware of the petition. At 3 p.m., the same day Poster conducted a staff meeting attended by Adams, Scannell, and Waters. At this meeting Poster addressed the staffing grid and meal break issues. It is clear from her notes of the meeting (R. Exh. 10), that a number of nurses expressed their unhappiness with the staffing of the evening and night shifts. The notes reflect that "The 3–11 shift feels they have no time to do MDSs." Adams and Scannell were the nurses who complained most about not having sufficient time to do these reports. I deem their complaints at the meeting to be concerted protected activity.

Finally, Scannell's discussion with Carvalho and Wells suggesting that they not volunteer for so much overtime was concerted protected activity. Scannell's efforts to enlist their cooperation in pressuring Respondent to hire additional nurses were protected by Section 7.

4. Animus toward Adams' protected activities and a prima facie case of discriminatory motivation is inferred

a. The development plan

At some unspecified time between October 2 and 16, Poster went to Human Resources Director Parsons to discuss presenting Barry Adams with a development plan (Tr. 161–162). Poster's explanation of the origins of the development plan are as follows:

> We were having discussions about problem solving, one of them was within the staff meeting. What was becoming apparent was Barry Adams had a fair amount of antagonism towards me, and I was having difficulty working with that, and I sought out Joanne to how to best work that out so that we would be able to move forward and not continue to struggle.

(Tr. 161.)

The grounds for Adams' development plan (G.C. Exh. 19) were:

1. The erroneous allegation that he discouraged other nurses from accepting overtime.

2. Assertions unsupported in this record that Adams:

(a) Failed to complete MDS forms despite having adequate time to do so.

(b) "Required extra intervention from the nursing administration quite frequently."

3. An assertion that Adams "has had problems resolving problems that occur on the evening shift."

The discussion in the East-2 kitchen between Scannell and Wells regarding overtime constituted protected concerted activity. Assuming that Respondent had an honest belief that Adams engaged in this discussion, it cannot rely on it in disciplining him because it was protected.

The final assertion in the development plan, that Adams has had "problems resolving problems" on the evening shift, appears to be based entirely on Adams' failure to prevent or manage the confrontation between a security guard and Scannell on or about October 15. Poster did not discuss the incident with any of the participants. She simply blamed Scannell and Adams and predicated their development plans in part on the incident.

While Scannell was mistaken in sending a patient to the nursing home kitchen, it was the security guard who initiated the confrontation by coming to the East-2 unit to yell at Scannell. There is nothing in this record that indicates that Adams did anything with regard to this incident other than to try to protect Scannell from the security guard's wrath. Respondent has offered no suggestions as to how Adams should have handled the situation differently. The eagerness with which Poster laid blame for this event on Adams is another factor that causes me to infer deep-seated animus toward his protected activities.

From the timing of the development plan, the admission that it was based on Respondent's belief that Adams participated in Scannell's protected discussion with Wells, Respondent's failure to adequately investigate Adams' alleged misconduct, and the prextual nature of Respondent's reasons for the plan, I conclude that Respondent was motivated by a desire to retaliate against Adams for expressing his differences with management on behalf of himself and others, *Washington Nursing Home,* 321 NLRB 366 at 375 (1966), *Shattuck Denn Mining Corp. v. NLRB,* 362 F.2d 466 (9th Cir. 1962). For the same reasons I infer that Respondent bore considerable animus toward Adams as a result of his concerted activities regarding the staffing on the evening shift in unit East-2 and the alleged lack of adequate time to complete MDS forms during the shift.

b. Adams' meeting with Poster and Parsons at which he received the development plan and was informed that he was being changed to a rotating shift

Adams became very angry at his October 16 meeting with Poster and Parsons. He vehemently expressed his anger at Poster. Two of the four grounds cited for giving him a development plan and changing his shift were erroneous. The other two were assertions that Respondent has not supported by reliable evidence either to Adams or at trial. Poster offered to amend the development plan. The appropriate response to Respondent's lack of support for its assertions would have been to rescind the development plan and the shift change. Respondent provoked Adams' angry outbursts and cannot take advantage of them by arguing that they provide a nondiscriminatory basis for his subsequent discharge, *Teksid Aluminum Foundry,* 311 NLRB 711, 719–720 (1993); *NLRB v. Steinerfilm, Inc.,* 669 F. 2d 845, 851–852 (1st Cir. 1982).

c. The October 17 meeting

On October 17, Parsons and Poster granted Adams' request for a meeting with Karen Wells and Jennifer Vecchia regarding accusations that he had discouraged them from working overtime. At the meeting neither nurse supported the accusations and Wells refuted them. Poster then started talking to Wells and Vecchia about other subjects. Adams slid copies of a magazine article in front of Wells and Vecchia. The two nurses did not interrupt their conversation with Poster. At the end of the meeting Adams said he would not workdays. I conclude he was perfectly justified in doing so because the shift change had been largely based on accusations that were inaccurate. Adams' conduct at the October 17 meeting was marginally disruptive, if at all. In fact it had no bearing on the purpose of the meeting which was to give Adams an opportunity to confront his alleged accusers. Almost immediately, Poster went to Hospital Administer Coyne and requested authorization to terminate Adams. The request was granted.

I conclude from the above that the General Counsel has established a prima facie case that Adams' development plan, shift change, and termination were motivated by Respondent's desire to silence him and retaliate against him for concerted protected activities. Further, I conclude that Respondent has failed to show that it would have taken any of these actions in the absence of his protected activities.[19]

F. Animus and Discriminatory Motivation are inferred in Respondent's Presentation of a Development Plan to Scannell and its Changing of her Shift

I infer from the record that Respondent identified Scannell, and to a lesser extent Waters, with Adams. The animus toward Adams was transferred to these other two evening shift nurses. Moreover, I infer animus toward Scannell's protected activities from the fact that while Poster talked to Wells about the kitchen confrontation, she did not bother talking to Scannell before administering the development plan and changing her shift. Likewise, I infer animus from Poster's failure to ask Scannell for her side of the confrontation with the security guard.

For essentially the same reasons as in the case of Adams, I conclude that the General Counsel had established a prima facie case of discrimination with regards to Scannell.[20] As in Adams' case, one of the transgressions relied on in the development plan, the conversation with Wells, was protected. Furthermore, Respondent has not met its burden of proving that it would disciplined Scannell and changed her shift in the absence of her protected activities.[21] The development plan relies on four deficiencies; (1) the security guard incident, (2) the "argument" with Wells, (3) unsupported assertions that Scannell

[19] Respondent mentions an alleged incident in which Adams called the Healthcare Center Administrator, who had left for the day, when he could not find toilet paper and soap, as justification for the development plan. R. Br. at 38, R. Exh. 19, p. 2. Assuming the incident occurred, there is no indication as to when it occurred. Moreover, there is no mention of the incident in the development plan itself, only in Parson's memo written to justify the plan after Adams' angry reaction to receiving it. This alleged incident presents no basis for concluding that Respondent had a legitimate nondiscriminatory reason for giving Adams the development plan.

[20] Scannell filed another hazard report regarding inadequate staffing on East-2 on October 17. This constitutes concerted protected activity as a logical outgrowth of her earlier activities with Adams and others. Her development plan may have been prepared by Poster on October 16, but was not presented to Scannell until October 22. Scannell's shift change may have occurred after she and Waters presented Respondent with another petition regarding the dinner breaks.

[21] The fact that other nurses who signed the same petitions as Adams, Scannell, and Waters were not punished, does not materially advance Respondent's claim that its personnel actions were nondiscriminatory, *George A. Tomasso Construction Co.,* 316 NLRB 738, 742 (1995); *Master Security Services,* 270 NLRB 543, 552 (1984); *Nachman Corp. v. NLRB,* 337 F.2d 421, 423–424 (7th Cir. 1964). None of the other nurses was nearly as vocal as Adams. Scannell was also more active than other nurses as well as being closely identified with Adams. I infer that Waters, who was only other full-time RN assigned exclusively to the evening shift, was regarded by Respondent as a member of Adams' group of malcontents. I infer that Poster regarded the protected activities of Adams, Scannell, and Waters to be more threatening or offensive than the protected activities of other nurses.

Moreover, the fact that nurses such as Janet Nowicki and Vida Carrington were not placed on a rotating shift belies Poster's testimony that the Scannell's and Waters' shifts were changed so they could improve their skills by working with a greater number of nurses. (Also see G.C. Exh. 7, p. 3.) If this was the motivation behind the shift change, it would appear that Nowicki and Carrington would also have benefited from the opportunity to work with the day shift.

failed to complete MDS forms while having sufficient time to do so, and (4) assertions of excessive absenteeism.

With regard to the discussion with Wells, I have credited Scannell's assertion that she did not raise her voice to Wells. Assuming that Respondent had a good-faith belief that she did, this belief is not a defense to this unfair labor practice charge because the General Counsel established, that in the course of otherwise protected activity, the misconduct did not occur, *Rubin Bros. Footwear,* 99 NLRB 610 (1952); *NLRB v. Burnup & Sims, Inc.,* 379 U.S. 21 (1964).

The development plan cites 5 sick days used by Scannell between June 3 and September 12. There is no evidence that Respondent was concerned with Scannell's "absenteeism" until she began engaging in protected concerted activities with Adams. I conclude that Respondent's reliance on Scannell's absences was pretextual.

G. Waters' Shift Change was Discriminatorily Motivated

The only adverse action taken against Waters was changing her to a rotating shift. This change made continued employment at Youville much less desirable for Waters since she was a single parent who wanted to be at home at night with her children and because she attended school during the days.[22] Respondent contends this change was made at least in part so that the evening shift nurses could benefit from the experience of working with a larger number of nurses. Respondent has not established why it would expect Waters to learn anything from the day-shift nurses, including Poster.

The day she was informed of her shift change, Waters informed Respondent in writing that the change would cause her personal and financial hardship because she was both a student and a single parent. She asked for more specific examples of her shortcomings that warranted her new schedule. When Poster responded to Waters (G.C. Exh. 7, p. 3) she did not explain the change on the basis on any instances of misconduct by Waters. She also made no effort to elaborate on the benefits of the change. Respondent now contends that Waters' shift change was made due to the errors she made in administering "Golightly" and her treatment of the "whiny" patient. Given Poster's failure to mention these as reasons in her November 4 memo, I find them to be pretextual.

Given the animus toward Adams, Scannell, and Waters, the close proximity in time of Waters' shift change to the October 30 petition and other concerted activities, and the pretextual nature of Respondent's reasons for the shift change, I believed that the General Counsel has established a prima facie case of animus and discriminatory motivation with regard to Waters.

H. Respondent has not Rebutted the General Counsel's Prima Facie Case of Discrimination

The General Counsel has established protected concerted activity on the part of Adams, Scannell, and Waters, employer knowledge of this activity and employer animus toward that activity. This evidence is sufficient for me to conclude that the General Counsel has a established a prima facie case of discrimination. Respondent has failed to establish that it would have administered any of the adverse actions here in the absence of the protected concerted activity.

Youville alleges that Adams and Scannell failed or refused to complete MDS forms when they had an adequate opportunity to do so, at times when others were completing the forms. Youville has offered no persuasive evidence to support this allegation. To establish such a defense, I would expect testimony or documentary evidence that establishes, for example, that MDS forms were completed by other nurses during their shifts who had no more free time than Adams and Scannell.

Poster testified at transcript 162 that Karen Wells and Jennifer Vecchia were completing MDS forms. To establish a nondiscriminatory basis for Adams' and Scannell's development plans, Respondent could have, for example, established how many MDS forms were being completed by Wells and Vecchia during their shifts and that these two nurses had no more time to complete the forms than Adams and Scannell. No such evidence was proffered even though Wells was called to testify for other purposes.[23]

I. The General Counsel has Failed to Establish that Respondent's Limitation on Solicitation and Distribution of Material Violates Section 8(a)(1) as Alleged in Paragraphs 12 and 13 of the Complaint

As to paragraphs 12 and 13 of the complaint, I agree with Respondent that there is no indication that its written policy limiting solicitation or distribution of material (G.C. Exh. 23) has any relevance to discussions or materials regarding working conditions. It appears to concern charitable solicitations only. As noted in Respondent's brief, it was not cited by Terri Poster in her discussions with employees, nor is there any indication that the charging parties were aware of the policy.

J. Respondent Violated the Act when Terri Poster Indicated to Barry Adams and Other Nurses on October 17 that they were not Permitted to Discuss Their Working Conditions While on Duty

On the other hand, Poster's discussion with Adams, Wells, and Vecchia on October 17, clearly conveyed the message that employees were not to discuss working conditions during work hours. Instead they were to come to management which would provide a time and a place for such discussions. Such a limitation on employees' Section 7 rights is unduly broad and violates section 8(a)(1), as alleged in paragraph 13(a) of the complaint.[24] While a healthcare institution can prohibit such discussions in patients' rooms, operating rooms, other patient care areas, and possibly other areas in which patients may overhear such discussions, it cannot deny employees the right to discuss such issues during the workday at times when it does not impact on patient care or otherwise affect patients and their families. *Aroostook County Regional Ophthalmology Center,* 317 NLRB 218 (1996); *Aroostook County Regional Ophthalmology Center v. NLRB,* 81 F.3d. 209, 213 (D.C. Cir. 1996).

[22] Poster testified that she told Scannell and Waters that Respondent would try as best it could to accommodate their school schedules (Tr. 165–166). There is no indication that she gave Waters any assurances about working the night shift, to which she might also be assigned (G.C. Exh. 7, p. 3).

[23] The record does not indicate if there is anyway to determine who completes an MDS form. Respondent failed to establish to my satisfaction that Scannell was not completing the forms or was not completing an adequate number of the forms compared to other nurses.

[24] I conform the pleadings to the evidence to delete the reference in par. 13(a) of the complaint to Youville's solicitation and distribution of materials policy.

REMEDY

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

The Respondent having discriminatorily discharged Barry Adams, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Respondent must also make Meredith Scannell and Marie Waters whole for any loss of earnings or other benefits that resulted from their discriminatory shift changes.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[25]

ORDER

The Respondent, Youville Health Care Center, Inc., Cambridge, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Disciplining, discharging, or otherwise discriminating against any employee for engaging in concerted protected activities.

(b) Prohibiting employees from discussing working conditions during working hours when such discussions do not adversely affect patient care.

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

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

(a) Within 14 days from the date of this Order, offer Barry Adams full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position on the evening shift, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Barry Adams, Meredith Scannell, and Marie Waters 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 decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Barry Adams, the unlawful development plans given to Barry Adams and Meredith Scannell and the shift changes given to Barry Adams, Meredith Scannell, and Marie Waters and notify the employees in writing that this has been done and that these personnel actions 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 Cambridge, Massachusetts facility copies of the attached notice marked "Appendix."[26] Copies of the notice, on forms provided by the Regional Director for Region I, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 24, 1996.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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

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