

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

JACKSON HOSPITAL CORPORATION
d/b/a KENTUCKY RIVER MEDICAL CENTER

and

Cases 9—CA—42249
9—CA—43128
9—CA—43165
9—CA—43397

UNITED STEEL, PAPER & FORESTRY,
RUBBER, MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL & SERVICE WORKERS
INTERNATIONAL UNION, AFL—CIO—CLC

David L. Ness, Esq., for the General Counsel.
Don T. Carmody, Esq., and *Bryan Carmody, Esq.*,
of Painted Post, New York, for the Respondent.
Randy Pidcock, of Frankfort, Kentucky, for the
Charging Party.

DECISION

Statement of the Case

PAUL BUXBAUM, Administrative Law Judge. This case was tried in Jackson, Kentucky, over a period of 7 days commencing on November 27, 2007, and concluding on April 9, 2008. The original charge was filed on August 11, 2005, with an amendment filed September 23. Additional charges were filed on September 21 and October 10, 2006, and January 19, 2007. The Regional Director issued a consolidated complaint on March 29, 2007. The parties entered into an informal settlement agreement on August 22, 2007. On October 16, 2007, the Regional Director issued an order vacating and setting aside that settlement agreement.¹ This included an amended consolidated complaint and order rescheduling the matter for hearing.²

The amended complaint alleges that Jackson Hospital Corporation d/b/a Kentucky River Medical Center (the Hospital) unlawfully disciplined certain of its employees during each of 3 successive years commencing in 2005. It contends that James Fields was suspended on

¹ It is undisputed that the Respondent failed to comply with the terms of the parties' settlement agreement. See Respondent's answer to amended consolidated complaint, par. 7 ("Respondent has not complied with the informal settlement agreement . . . having informed the Regional Director that the Respondent was withdrawing from the settlement agreement.").

² During the trial, counsel for the General Counsel moved to further amend the complaint in two respects, changing the date of alleged discriminatee James Fields' discharge from September 9, 2005, to August 31, 2005, and withdrawing the allegation that June Abadilla, M.D., was an agent of the Respondent within the meaning of the Act. (Tr. 252, 476.) Both amendments were unopposed, and I authorized them.

August 9 and discharged August 31 of that year. It next alleges that Shirley White and Louise Gross were suspended on September 19 and discharged October 2, 2006. Finally, it alleges that Frances Lynn Combs was suspended on January 18, 2007.³ Each of these disciplinary actions are asserted to have been discriminatorily motivated by the employees' protected union activities in violation of Section 8(a)(1) and (3) of the Act. The Hospital has filed an answer to the amended consolidated complaint denying the material allegations made against it.

For the reasons set forth in detail in this decision, I find that the Hospital disciplined Gross and Combs in an unlawfully discriminatory manner. I further conclude that the General Counsel has failed to prove that the discipline imposed on Fields and White was similarly unlawful.

On the entire record,⁴ including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Hospital, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, a corporation, operates a full service hospital at its facility in Jackson, Kentucky, where it annually derives gross revenues in excess of \$250,000 and purchases and receives at its Jackson, Kentucky facility goods and services valued in excess of \$50,000 directly from points outside the Commonwealth of Kentucky. The Respondent admits⁵ and I find that it 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. I also find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Introduction

Community Health Systems, Inc., a corporation based in Tennessee, operates acute care hospitals in non-urban markets, primarily in the southeastern and southwestern regions of the United States. Its subsidiary, Jackson Hospital Corporation, maintains such a hospital in

³ It is undisputed that the Hospital has not offered employment to Combs since her so-called suspension more than a year ago. As a result, her suspension is the functional equivalent of a termination of her employment.

⁴ The transcript of the trial is generally accurate. During the final phase of the proceedings, with the participation of counsel, I clarified and corrected various errors in the transcription up to that point. I also noted that the indices delineating the portions of the transcript relating to the examination of each witness are inaccurate and should not be relied on. (See Tr. 1015—1023.) As to the final section of the transcript, three errors require correction: at p. 1355, l. 12, "munch housing syndrome" should be "Munchausen syndrome," at p. 1439, l. 12, "relative" should be "relevant," and at p. 1729, l. 22, "wrist" should be "risk." All other errors are not significant or material. Finally, as agreed during the course of the trial, counsel for the Hospital has submitted redacted copies of R. Exhs. 9, 12, 16, 17, 29, and 32. I have substituted these for the previously admitted versions in order to protect patients' privacy. I have also directed that the unredacted versions be retained under seal.

⁵ See the Hospital's answer to amended consolidated complaint, par. 2. (GC Exh. 1(z).)

Jackson, Kentucky, under the name of the Kentucky River Medical Center. This is a 55-bed acute care facility and full service hospital with both inpatient and outpatient components. It employs approximately 275 to 300 persons.

5 The United Steelworkers of America (the Union) began an organizing campaign among certain employees of the Hospital, culminating in a Board-conducted election. Based on the results of that election, on June 8, 1998, the Board certified the Union as the collective-bargaining representative of various categories of employees including registered nurses and medical lab technicians. One year later, during the course of contract negotiations, a unit member filed a decertification petition. This resulted in another election, after which the Board again certified the Union as collective-bargaining representative of those employees on August 2, 2000.⁶ At the same time, unit employees engaged in a strike against the Hospital from July 8 until August 15, 2000.

15 The course of the parties' labor relations included the filing of a number of unfair labor practice charges against the Hospital during the period from June 16, 2000 through May 9, 2001. The General Counsel issued a consolidated complaint and a trial was held on various dates in 2001 before Administrative Law Judge David L. Evans. On February 20, 2002, Judge Evans issued a decision finding that the Hospital had engaged in a variety of unlawful activities, including a refusal to bargain with the Union, imposition of unilateral changes in terms and conditions of employment for bargaining unit members, threatening employees with discharge or other forms of discrimination due to their support for the Union, and issuing warnings and suspensions to employees because of their involvement in protected activities. Most significantly, Judge Evans found that the Hospital discriminatorily discharged eight bargaining unit members in August and September 2000, due to their involvement with the Union.⁷ As a result, he imposed a variety of remedial measures including the reinstatement of the discharged employees. In addition, "[b]ecause of the Respondent's egregious misconduct, demonstrating a general disregard for the employees' fundamental rights," Judge Evans recommended that the Board issue a broad cease-and-desist order enjoining the Hospital from infringing the rights of its employees in any manner. *Kentucky River Medical Center*, 340 NLRB 536, 607 (2003), enf. No. 04-1019 (unpublished) (D.C. Cir. 2005).

35 On September 30, 2003, the Board adopted Judge Evans' decision with minor modifications. In evaluating the propriety of the judge's findings of unlawful discrimination against union members, the Board observed that the record "contains abundant evidence of threats, including multiple threats of discharge, supporting the judge's finding of antiunion animus." Above at 536. In addition to the order reinstating the eight discharged employees, the Board adopted the broad cease-and-desist remedy. By an unpublished opinion, the D.C. Circuit enforced the Board's order on June 3, 2005.⁸

40 ⁶ The Regional Director's certification of the Union was approved by the Board and enforced by the Circuit Court in *Jackson Hospital Corp.*, 333 NLRB No. 29 (2001) (not reported in Board volumes), enf. 33 Fed. Appx. 735 (6th Cir. 2002).

⁷ Judge Evans also recommended dismissal of a number of the complaint allegations, including several allegedly discriminatory disciplinary actions.

45 ⁸ The case has continued to spawn litigation. In *Kentucky River Medical Center*, 353 NLRB No. 33 (2008), the Board adopted Administrative Law Judge Margaret G. Brakebusch's determinations as to the backpay owed to four of the unlawfully discharged employees. Administrative Law Judge Michael A. Rosas has recommended a determination as to the backpay owed to yet another of these discharged employees in *Kentucky River Medical Center*, 2008 WL 544882 (February 26, 2008).

In the ensuing years, the parties' relationship has remained contentious. In this case, the General Counsel asserts that the Hospital has continued to engage in unlawful conduct. In addition, on January 25, 2007, the Board filed a petition with the D.C. Circuit seeking an adjudication of civil contempt against the Hospital for multiple alleged violations of the Board's remedial order entered in the prior proceeding. (GC Exh. 6.) The Hospital has filed a response denying the material allegations of that petition. (GC Exh. 7.) As of the conclusion of the trial in the present case, that matter is unresolved. As a result, I draw no conclusions regarding the General Counsel's allegations of contumacious conduct by the Hospital's management.

It is undisputed that the Hospital and the Union have never succeeded in reaching agreement as to a contract. They have attended collective-bargaining sessions at which Don Carmody, the Hospital's labor law attorney, has been the Employer's lead negotiator. The Union has been represented at the sessions by its negotiating committee led by Randall Pidcock, its district organizing coordinator. Among the bargaining unit members who have attended collective-bargaining sessions as members of the Union's committee were Shirley White, Louise Gross, and Frances Lynn Combs.

In the present case, the General Counsel contends that the Hospital committed three distinct sets of unlawful disciplinary actions. Each set of alleged violations involves different circumstances and personnel and they are separated in time. As a result, for purposes of clarity I will address the allegations individually by year of occurrence. For each such set of events, I will describe my factual conclusions and legal analysis in consecutive fashion. Naturally, my discussion will begin with the earliest set of allegations.

B. The Suspension and Discharge of James Fields in 2005

The Facts

In his amended complaint, the General Counsel's first allegation of unlawful discrimination by the Hospital is the contention that it suspended James Fields on August 9, 2005 and terminated him on August 31, due to his union activities.⁹ Fields was hired by the Hospital in October 2000 for a position as a medical laboratory technician.¹⁰ He continued to serve in that position until the adverse actions taken against him in August 2005. His job duties consisted of drawing blood from patients and running laboratory tests on samples of blood and urine to aid in the diagnosis and treatment of those patients.

Fields testified that he joined the Union in 2001 and manifested his decision by signing a union card given to him by another laboratory employee. He further reported that he decided to escalate his involvement in the Union in February or March 2005. He testified that he had a meeting with Randy Pidcock, the Union's district organizing coordinator. He described their conversation as follows:

⁹ All dates in this portion of the decision are in 2005 unless otherwise indicated.

¹⁰ Fields reported that he became a so-called phlebotomy supervisor in 2004. Although the Hospital did not allege that he possessed supervisory status under the Act in its pleadings, counsel did tentatively raise this issue once Fields provided this testimony. Subsequently, counsel withdrew any defense based on Fields' purported supervisory status. See tr. 1024. Counsel's action in this regard is entirely consistent with the testimony of the Hospital's director of human resources who stated that she was "unaware" of any supervisory authority on the part of Fields. (Tr. 941.)

5 FIELDS: I told him then, you know, I . . . wanted to get involved in any way I could, and . . . Randy mentioned maybe the Negotiating Committee or . . . one of the other committees of the Union.

5 COUNSEL: And what did you say?

FIELDS: I said I'd like to be a part of the Negotiating Committee.

10 (Tr. 214.)

15 While his testimony on direct examination indicated that Fields approached Pidcock to volunteer his services, it was significantly undercut on further inspection. Counsel for the Hospital confronted Fields with an affidavit he provided shortly after his suspension. In that document, Fields stated that, "Pidcock asked me if I would join the Union's Negotiating Committee. I accepted the invitation." (Tr. 293.) Counsel pressed the point by asking Fields if it was "a case of Mr. Pidcock asking you to join the committee, or is it a case of you saying you wanted to join the committee?" (Tr. 293-294.) Fields replied that he didn't "really recall." (Tr. 294.)

20 Fields continued his account by indicating that a couple of days after his discussion with Pidcock, he approached his supervisor, Diane Blankenship. The circumstances of their conversation were a bit unusual as Fields was not on duty at that time.¹¹ Instead, he traveled to the office after visiting a nearby clinic for a medical appointment. Upon meeting Blankenship at the lab, Fields testified that he told her that he "was going to be on the Negotiating Committee." (Tr. 217.) He reported that her only response was to say, "well." (Tr. 217.)

30 Approximately a month after his initial asserted conversation with Blankenship about his committee membership, Fields claimed to have had a second discussion of the matter with her. During a telephone conversation, he advised her that a negotiating session was planned for the following day. He noted that he was scheduled to work and informed her, "that I'd work that night, you know, because I was supposed to get time off for negotiations. And I told her that I was already on the schedule, that I'd work that night and—but in the future, that nights before negotiations that I'd need off." (Tr. 218.) Fields testified that he was later informed by Pidcock that the bargaining session had been cancelled.

40 In his testimony, Fields was clear that he never actually attended any bargaining sessions or performed any other duties on behalf of the Union's negotiating committee. He also agreed that the only evidence that the Hospital was aware of his membership on the committee consisted of his two conversations with Blankenship.¹² By contrast, Blankenship testified

¹¹ This would make sense as Blankenship's shift ended at 4:30 p.m. Fields' work hours were from 10 p.m. until 6:30 a.m. As a result, absent something unusual, it would be impossible for them to have a face-to-face conversation at the lab.

¹² Fields did make a passing reference to telling Sharon Noble of his membership on the committee. He indicated that she was "a Blood Bank supervisor." (Tr. 296.) I discussed the significance of this matter with both counsel. As there was no agreement regarding Noble's possession of supervisory status, I observed that, if counsel for the General Counsel were to rely on Fields' reported discussion with Noble, it was his burden to prove such status or other type of agency or managerial relationship with the Hospital. See, *NLRB v. Kentucky River*

unequivocally that she was entirely unaware of Fields' union activities and that they never had any discussion of his involvement. In particular, she specifically denied any conversation regarding a need to accommodate Fields' work schedule so that he could attend collective-bargaining sessions.

5 It is now necessary to examine the events that immediately preceded the suspension and discharge of Fields. On the night of August 1—2, Fields was at work in the laboratory. He testified that he was experiencing “severe abdominal pain” and nausea. (Tr. 222.) He interpreted this as a recurrence of pancreatitis, a condition for which he had been diagnosed in 2001.¹³ At approximately 2 or 3 a.m. on August 2, he decided to test his blood for signs of this
10 illness. He testified that he drew his own blood and proceeded to perform the steps necessary to analyze the sample. In particular, he reported that he performed an analysis of his levels of two important blood enzymes, amylase and lipase.¹⁴ The printed report of the results shows that his amylase was 425, a level well above the normal range of 27 to 131. (GC Exh. 35.)

15 After obtaining the results of his self-administered blood tests, Fields reported that he discarded the tube containing his blood sample. When asked why he did so, he testified that, “we were always told that any blood that didn't have a label on it, to make sure we disposed of it.” (Tr. 225.) When further asked why he could not have labeled his tube, he responded that the printer only provided labels for a “registered patient.”¹⁵ (Tr. 225.)

20 Fields continued to work for the remainder of his shift. He also reported for work on the night of August 2—3. He testified that he was still suffering from abdominal pain and nausea. He decided to perform another analysis of his blood. Once again, he drew his own sample and

25 *Community Care, Inc.*, 532 U.S. 706, 711 (2001). (This is the same river in Kentucky, but a different employer.) No such proof was offered. As a result, any knowledge allegedly acquired by Noble cannot be imputed to the Hospital.

30 ¹³ In an effort to support Fields' testimony, the General Counsel introduced his medical records from an admission to the Hospital during the preceding month of June. (GC Exh. 34.) Counsel argued that these records showed that he had been treated for pancreatitis on that occasion, “just two months earlier.” (Tr. 262.) Actually, those records show that he was diagnosed with a “[n]onspecific systemic viral illness.” (GC Exh. 34, p. 2.) While the records do note a past history of pancreatitis, they also report that, on this occasion, his “amylase and lipase were within normal limits and this effectively rules out any issues of pancreatitis.” (GC
35 Exh. 34, p. 7.)

40 ¹⁴ A well-known medical reference manual, in pertinent part, notes that, “laboratory tests cannot confirm a diagnosis of acute pancreatitis but can support the clinical impression. Serum amylase and lipase concentrations increase on the first day of acute pancreatitis and return to normal in 3 to 7 days.” *The Merck Manual*, Merck & Co., Inc., p. 271, 17th ed. 1999. The quotation is from the edition in effect during the events at issue. The current edition contains essentially identical language.

45 ¹⁵ This would seem to raise the issue of the propriety of a laboratory employee using the facility to obtain test results outside the regular course of medical diagnosis and treatment. Indeed, the Hospital's disciplinary manual lists “examples of unacceptable behavior,” including, “[u]se of hospital or facility material, time or equipment for the manufacture or production of any article for unauthorized purposes or for personal use.” (GC Exh. 8, p. 20.) Nevertheless, testimony from witnesses for both sides established that the Hospital condoned the practice of lab employees obtaining analysis of personal samples. As a result, counsel for the Hospital stipulated that the employer does not rely on any violation of the quoted policy as supporting its
50 discipline of Fields. (Tr. 1024.)

ran tests of his amylase and lipase levels. The results were printed from the machine at 10:42 p.m. on August 2 and show his amylase at 646. (GC Exh. 36.) Fields reported that he again discarded the tube containing his blood sample. He resumed working until sometime between 4 to 5 a.m. on August 3. At that time, he spoke to his family doctor, Edward Burnette, M.D. Their conversation took place in a hallway at the Hospital. Fields testified that he informed Dr. Burnette that his amylase was high and was instructed to “come on over to the [Emergency Room] and that he’d probably just go ahead and direct admit me.” (Tr. 235.)

At approximately 5:15 a.m., Fields went to the emergency room.¹⁶ Burnette instructed him to speak with a medical student on duty at that time. He showed the student the two laboratory reports from his self-administered blood tests. The student told him to keep the reports until he was admitted. He was admitted as an in-patient at approximately 6:15 a.m. One hour later, Lab Assistant Amanda Turner came into his room with orders to draw a blood sample from Fields. Fields told her that he had already performed the tests on his own blood and gave her his lab reports. She accepted these in lieu of taking a sample of his blood.

Turner confirmed Fields’ account, adding that she had never before experienced such a situation. When she returned to the lab with Fields’ self-administered test results, the lab technicians refused to accept them. She testified that they explained that, “We had to have his actual blood work, you know, that we drew on him to make sure that it was his.” (Tr. 1477.) Another lab assistant, Kim Johnson, was present in the lab on this occasion. She also reported that the lab technicians refused to accept Fields’ results because, “they just said they didn’t feel comfortable releasing something that they didn’t see one of us draw.” (Tr. 1463.) As a result, Johnson agreed to go to Fields’ room to draw a blood sample. She did so with some trepidation, asking Turner to accompany her since she thought “he might have hard feelings thinking I didn’t trust him or something.” (Tr. 1465.) Turner agreed to go with Johnson, observing that she did so because she “didn’t want him to get mad.” (Tr. 1478.)

Fields testified that within an hour after he provided his own test results to Turner, Johnson came to his room and drew a blood sample from him. He reported that he was told that, “Dr. Burnette wanted it redrawn.” (Tr. 367.) The medical records reflect that the laboratory tests on the blood sample drawn by Johnson were performed at 8:40 a.m. on August 3. The amylase level was recorded at 75, well within the normal range of 27 to 131. (R. Exh. 3, p. 20.)

At 12:03 a.m. on August 4, the laboratory performed another set of tests on a new sample of Fields’ blood. The results for the blood enzymes were entirely normal, with the amylase being recorded at 48. (GC Exh. 33, p. 2.) Fields received a visit from Dr. Burnette later that morning. He testified that he told his physician that, “I really wanted to be discharged, because, you know, I was feeling better and that I really didn’t want to miss any work. And he said he’d discharge me.” (Tr. 242.) He indicated that Burnette told him that his amylase “was back down to normal” and he did not see any problem with Fields’ being discharged. (Tr. 244.) Burnette asked him if he desired any pain medications and Fields declined, noting that he already had some from a prior prescription. Burnette referred him to a specialist located in Lexington. Fields testified that Burnette never discussed the test result numbers from his self-administered blood tests.

Fields was discharged from the Hospital in the late morning of August 4. He returned to his job at the laboratory at 10 p.m. that day.

¹⁶ This would have been during the latter part of his work shift which ran from 10 p.m. to 6:30 a.m.

Dr. Burnette, Fields' treating physician, testified in detail regarding the circumstances of Fields' admission and course of treatment. He noted that Fields had approached him and told him that "he had drawn his own blood and had run some tests and that he had pancreas—flare up of his pancreas. The labs were abnormal and we admitted him to the hospital." (Tr. 1344.)
 5 Those lab results showed Fields' amylase at 646, well above 150, the upper limit of the normal range. Given his patient's prior history of pancreatitis and this test result, Burnette decided that hospitalization was appropriate.

10 Approximately 3 hours later, Burnette ordered additional lab testing to check Fields' condition and the amylase results were normal at 75.¹⁷ Another follow up test showed the amylase level to be 48. This constituted an unusual pattern of results that Burnette considered to be a "discrepancy." (Tr. 1351.) Specifically, the nature of the discrepancy was that it typically was a slow process to bring down an abnormally high amylase level, taking a "good three days." (Tr. 1361.) Burnette testified that this caused him to reevaluate the entire episode. In so doing,
 15 he noted that, "The thing that impressed me was that he, he didn't appear to be acutely ill as I would expect." (Tr. 1351.) This was striking to Burnette because pancreatitis is a "very painful thing and it just didn't strike me that he was in acute distress." (Tr. 1378.) In addition, Fields had a normal white blood count and an absence of fever.

20 Burnette articulated his thought process as follows:

[H]ow can that be, could [amylase] go down that quick and it couldn't, it just couldn't do it that quickly . . . I thought well how can this be and the fact that he drew—it just, it just was
 25 a red flag to me that this man draws his own blood, which to me was unusual. I mean I've never heard of somebody doing that. Draw your own blood. Run your own test and then bring it to the doctor and say, here I am. I'm sick. Put me in. And, [he] just didn't seem to me to be acutely ill like someone with
 30 pancreatitis. They're usually pretty sick and they're hurting pretty bad. So I repeated the labs and they weren't[,] they were normal.

(Tr. 1352.)

35 Having proceeded this far in his thought process, Burnette decided to ask the laboratory to retest Fields' self-drawn blood sample. As Lab Director Blankenship confirmed, this was the "usual process when we have lab values that are inconsistent." (Tr. 1195.) Indeed, she noted that the lab retains serum samples for 48 hours for precisely this eventuality. Despite this usual
 40 practice, Burnette was advised that the sample was unavailable for further testing. Upon learning this, his concerns were amplified. As he put it,

I thought perhaps this man is manipulating. He's got an
 45 ulterior motive for being in the Hospital. If you draw your own blood, you run your own test and now you can't find the blood sample that you had, that's unusual. That's just—that's a lot of coincidences on one admission.

50 ¹⁷ Burnette testified that he ordered the repeat testing because "it just seemed so strange" that Fields had drawn his own blood and performed his own analysis. (Tr. 1381.)

(Tr. 1354.)

5 Confronted with this dilemma involving potential conflict among his professional obligations toward his patient, his employer, and the protection of the integrity of the laboratory for the benefit of all patients, Burnette took steps to meet his responsibilities. Regarding his patient, he testified that he decided to give Fields “the benefit of the doubt,” by discharging him with a diagnosis of recurrent pancreatitis and a prescription for pain medications. (Tr. 1357.) As to his other perceived obligations, he reported his concerns to Denise Asher, the acting supervisor of the laboratory during an absence by Blankenship.

10 Fields’ medical records document Burnette’s struggle to understand what he had observed. Burnette’s discharge summary notes,

15 He [Fields] had his lab work done by himself on the morning of admission, which revealed an amylase of over 600. Three hours later, we had techs to draw blood on the patient and his amylase is 75. This morning, his amylase is normal at 48 and his lipase is 34. From a medical point of view, I cannot explain this drop and will address this with the patient.

20 (GC Exh. 33, p. 2.)

25 Upon being informed by Asher of Burnette’s concerns, Blankenship commenced an investigation. She spoke with Burnette and then scheduled a meeting with Fields. That meeting was held on August 9. The Hospital’s human resources director, Naomi Mitchell, was present, along with Blankenship and Fields. Fields reported that he confirmed to Blankenship that he had twice taken his own blood samples and performed tests for amylase. He indicated that she asked him if the blood samples could have been mixed up with anyone else’s and he told her that he “knew that the blood was mine.” (Tr. 246.)

30 Blankenship reported that she confronted Fields with the inability to locate his blood samples for retesting. She testified that, “she asked him if he had any idea why they couldn’t find it, and he said no, he didn’t have any idea.” (Tr. 1217.) Her account was corroborated by Mitchell who testified that Fields told Blankenship that he could not explain the discrepancy cited by Dr. Burnette. When asked about the location of the blood sample, he stated that he “didn’t know where it was” and “didn’t know what happened to it.” (Tr. 1580, 1585.) When recalled as a rebuttal witness, Fields disputed these accounts, contending that he told Blankenship that “I threw it away because it wasn’t labeled.” (Tr. 1745.)

40 At the conclusion of this meeting, Fields was informed that he was being placed on an investigatory suspension. This was documented in a letter sent to him on August 10. (GC Exh. 15.) During the course of the investigation, Blankenship reported her recommendation to the Hospital’s chief executive officer, O. David Bevins. That recommendation was for termination of Fields’ employment because, as she described it, she was convinced that Fields’ test results had been “adulterated,” and she was unwilling to take responsibility for the continued employment of a laboratory technician who would adulterate test results. (Tr. 1231.) Bevins testified that he decided to approve the termination decision based on Blankenship’s recommendation and Dr. Burnette’s assertion that “there’s no way these reports could have differed in such a short period of time.” (Tr. 1659.)

50 On August 31, Fields was sent a letter terminating his employment due to his “behavior

in connection with your preparation of lab tests regarding yourself, and your subsequent [presentation] in the Hospital's Emergency Room." (GC Exh. 16.) Fields has not been employed by the Hospital at any time since.

Legal Analysis of Fields' Suspension and Discharge

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The General Counsel alleges that the disciplinary actions taken against Fields were fatally tainted by discriminatory motivation arising from his protected union activities. In assessing such a claim, I must apply the analytical framework devised by the Board in *Wright Line*.¹⁸ A comprehensive exposition of that test was provided by the Board in *American Gardens Management Co.*, 338 NLRB 644, 645 (2002):

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Wright Line is premised on the legal principle that an employer's unlawful motivation must be established as a precondition to finding an 8(a)(3) violation. In *Wright Line*, the Board set forth the causation test it would henceforth employ in all cases alleging violations of Section 8(a)(3). The Board stated that it would, first, require the General Counsel to make an initial showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. If the General Counsel makes that showing, the burden would then shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The ultimate burden remains, however, with the General Counsel.

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To establish his initial burden under *Wright Line*, the General Counsel must establish four elements by a preponderance of the evidence. First, the General Counsel must show the existence of activity protected by the Act. Second, the General Counsel must prove that the respondent was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminate suffered an adverse employment action. Fourth, the General Counsel must establish a motivational link, or nexus, between the employee's protected activity and the adverse employment action.

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If, after considering all of the relevant evidence, the General Counsel has sustained his burden of proving each of these four elements by a preponderance of the evidence, such proof warrants at least an inference that the employee's protected conduct was a motivating factor in the adverse employment action and creates a rebuttable presumption that a violation of the Act has occurred. Under *Wright Line* the burden then shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. (Internal quotation marks, citations, footnotes, and language not relevant to this case have been omitted.)

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See also the Board's discussion of this quoted language and Chairman Schaumber's additional commentary in *Frye Electric, Inc.*, 352 NLRB No. 53, fn. 2 (2008).

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¹⁸ 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983).

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In applying this test, the first steps are the determinations as to whether Fields participated in protected union activities and whether the Hospital knew of his involvement in such activities. Because these matters are intimately intertwined in this case, I will evaluate them together.

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Fields testified that he joined the Union in 2001. More significantly, he reported that he became a member of the Union's negotiating committee in "February or March of '05." (Tr. 213.) The impact of this testimony was substantially undercut by Fields' imprecision in explaining how he became a member of the committee. In one version, he solicited an invitation to such membership, while in another he contended that he was recruited by Pidcock. When asked to reconcile these accounts, he was unable to say more than that he did not "really recall" how his membership on the committee came about. (Tr. 294.) As to other committee members, Gross supported Fields' account that he joined the committee in 2005, but was unable to recall whether he attended any meetings. White merely recalled that Fields "was going to be on the negotiating committee." (Tr. 591.) Neither witness provided any indication that his participation ever came to the attention of management.

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It is entirely undisputed that Fields never attended any actual bargaining sessions. As a result, management never had occasion to observe his presence as a member of the Union's negotiating team. Nor was there any evidence that Fields engaged in other committee activities that would bring his membership to management's attention.

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It is fundamental that an employer cannot be found to have engaged in unlawful discrimination based on an employee's protected activities unless that employer has been shown to have knowledge of those activities. The Hospital vigorously asserts that it lacked any such knowledge regarding Fields. In its leading case on the subject, the Board has held that the trier of fact must make a wide ranging inquiry on the issue of knowledge, taking into account both direct evidence and "circumstantial evidence from which a reasonable inference of knowledge may be drawn." *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995), enf. 97 F.3d 1448 (4th Cir. 1996). I will now examine both forms of evidence on this question.

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It is noteworthy that the direct evidence of the Hospital's knowledge of Fields' membership on the committee consisted entirely of his own assertion that he twice discussed the matter with his supervisor, Blankenship. On the other hand, she flatly denied the existence of either conversation. Faced with this stark conflict, I must necessarily turn to an examination of the surrounding circumstances. As the Board has observed, "[w]here demeanor is not determinative, an administrative law judge properly may base credibility determinations on the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences which may be drawn from the record as a whole." *Daikichi Sushi*, 335 NLRB 622, 623 (2001), enf. 56 Fed. Appx. 516 (D.C. Cir. 2003) (Internal quotation marks and citation omitted.)

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In examining the record as a whole, I am struck by the utter lack of corroboration in circumstances that cry out for such supporting evidence. It will be recalled that Fields explained that a key reason for his discussions of the matter with Blankenship involved the need to accommodate his work schedule to the parties' bargaining plans. He reported that he took pains to explain to Blankenship that, "I was supposed to get time off for negotiations." (Tr. 218.) This certainly raises an expectation that the Union would inform management of any changes to the composition of its negotiating committee so as to facilitate this scheduling process. No evidence of any such communication from the Union was provided. In particular, it was noteworthy that Pidcock, although present throughout virtually the entire trial, was not called as

a witness to shed light on this key aspect of Fields' case.

I conclude that the failure to elicit testimony from Pidcock regarding Fields' membership on the negotiating committee and, what, if any, steps he took to notify the Hospital that Fields had joined the committee requires the drawing of an adverse inference. In reaching this
5 conclusion, I have followed the Board's instructions that,

Normally, it is within an administrative law judge's discretion to draw an adverse inference based on a party's failure to call a witness who may reasonably be assumed to be favorably
10 disposed to the party and who could reasonably be expected to corroborate its version of events, particularly when that witness is the party's agent and thus within its authority or control. It is usually fair to assume that the party failed to call such a witness because it believed that the witness would have testified adversely to the party.
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Roosevelt Memorial Medical Center, 348 NLRB No. 64, slip op. at 7 (2006). See also *Martin Luther King, Sr., Nursing Center*, 231 NLRB 15, fn. 1 (1977) (failure to produce testimony from supervisory employees justified adverse inference against employer), and *NLRB v. Iron Workers*, 124 F.3d 1094, 1101 (9th Cir. 1997) (Board's "well established" use of adverse
20 inference was properly applied where union officials failed to testify in support of the union's position).

The significance of the failure to produce documentary evidence of Fields' membership on the committee and any notification by the Union to management regarding his membership was highlighted by testimony from Combs. When discussing her own participation on the same committee, she was asked whether there had been any communication to the Hospital, "that you had joined the bargaining committee." (Tr. 101.) She answered affirmatively, adding that, "Mr. Pidcock said that he would be sending a letter to the facility making them aware that I was
30 now serving on the bargaining committee."¹⁹ (Tr. 101.) She also testified that she had seen a "flyer information sheet" that listed her as a member of the committee. (Tr. 102.)

In evaluating the inherent probabilities regarding Fields' alleged participation on the negotiating committee and his employer's awareness of his role on that committee, I place great
35 weight on the absence of the sort of evidence alluded to by Combs when relating her own experience on the committee. It makes sense that the Union would announce the addition of a new member on such an important committee. Such an announcement would alert fellow unit members regarding the identity of their new representative in collective-bargaining negotiations. Similarly, a communication from the Union to the Hospital's management would appear to be a
40 logical manner of providing formal notification of Fields' status. In particular, it would enable management to accommodate his work schedule to the needs of the bargaining process. Thus, the failure to provide any evidence whatsoever that the Union took these common sense measures constitutes compelling circumstantial evidence indicating that Fields' account of his membership on the committee and discussion of such membership with his supervisor are not
45 reliable.

¹⁹ I note that Combs' testimony on this point is consistent with her claims in a lawsuit that she has filed against the Hospital. In that complaint, filed in Kentucky's Circuit Court, she
50 stated, "Randy Pidcock, the Union's top negotiator, sent a letter to [Kentucky River Medical Center] indicating that Combs was on the Bargaining Committee." (R. Exh. 2, p. 2.)

Before reaching a final determination on the issues of the nature of Fields' protected activities and the employer's knowledge of those activities, I have also carefully considered the employer's stated reasons for deciding to suspend and discharge Fields. In *Montgomery Ward*, supra, the Board specifically approved the practice of examining the employer's explanations of the rationale for its disciplinary decisions to determine what light they may shed on the issue of knowledge of protected activities. Thus, the Board noted that it has inferred the element of knowledge where the stated reasons for discipline are "baseless, unreasonable, or contrived." 316 NLRB at 1253. Beyond this, an inference of knowledge may be appropriate where the employer's asserted reasons for discipline, while not "patently contrived," are nevertheless weak justifications for the adverse actions. 316 NLRB at 1253. See also, *State Plaza, Inc.*, 347 NLRB No. 70, slip op. at 3 (2006) (pretextual reasons for discipline of employee used to establish the element of knowledge).

While in the cited cases the employers' unpersuasive explanations contradicted a claim of lack of knowledge of union activities, in this case the strength of the Hospital's rationale for dismissing Fields supports its contention that it was unaware of his alleged involvement on the negotiating committee. In reaching this conclusion, I accord significant weight to the testimony of Dr. Burnette. It will be recalled that Burnette made the initial request to management to conduct an investigation of Field's behavior. He took this action based on his observation that Field's self-administered blood test showed his amylase to be 646 while a test conducted on a sample of Fields' blood drawn just hours later showed an amylase level of only 75. Additional testing showed the level to be 48. Burnette's uncontroverted expert opinion was that this pattern of test results was medically anomalous because it would require a period of at least 3 days for a pancreatitis patient's amylase level to decline to such a degree.²⁰ Beyond this, Burnette reported that he assessed other pertinent signs and symptoms that further aroused his suspicions. In particular, he testified that Fields' clinical presentation was inconsistent with what one would expect in a patient who was acutely ill with pancreatitis. He noted that this condition is extremely painful, yet Fields did not appear to be in acute distress when he approached Burnette for treatment. In addition, Fields' clinical picture contained other inconsistencies with a diagnosis of acute pancreatitis. Specifically, he had a normal white blood count and an absence of fever. Finally, Burnette testified that his concerns were amplified when he contacted the laboratory to request retesting of Fields' self-drawn blood sample and was told that it was unavailable. It was this combination of factors that led to his decision to request an investigation of Fields' behavior.

Burnette's demeanor and presentation as a witness provided powerful support to his testimony that Fields' behavior in seeking admission to the Hospital was both extraordinary and suspicious. Through his tone of voice and body movements, he conveyed a sense of genuine

²⁰ Counsel for the General Counsel contends that Burnette's conclusions were "contradicted" by Dr. June Abadilla. (GC Br. at p. 10.) This is inaccurate. Her testimony on this issue was largely confined to her assessment of the medical records regarding Fields' lipase levels. Regarding the amylase results, she observed that, "Amylase stays longer in the blood when you have pancreatitis . . . it takes longer to come down to normal." (Tr. 495.) She also took great pains to emphasize that blood tests should not be considered in isolation from other findings, including the results of the clinical examination. As she succinctly explained, "You're not going to treat a lab result, you're going to treat a patient." (Tr. 493.) She stressed that it was vital to observe the patient's "clinical condition." (Tr. 493.) This is a mirror image of Dr. Burnette's thought processes. In sum, her testimony was essentially consistent with, and corroborative of, Burnette's account.

surprise and shock that a laboratory employee would draw his own blood and present his physician with self-administered test results in an effort to support a case for hospitalization.²¹ In addition, I found his evident struggle to balance his conflicting duties to his patient and the Hospital to be credible. The fact that, despite grave doubts, he continued to provide treatment for Fields' asserted condition, underscores his attempt to fulfill his professional obligations toward all of the parties, including his patient. It is entirely consistent with his prompt notification of the laboratory regarding his fears about the integrity of the lab results. In other words, viewed in relation to each other, Burnette's actions toward his patient and his employer were logical and appropriate. They do not suggest any animus against Fields personally or as a union supporter.²²

Assessing the Hospital's conduct with respect to Fields, I have looked beyond the propriety of Burnette's initial referral of Fields' unusual conduct to management for investigation. In particular, I have focused on the manner in which the ensuing investigation was conducted and on the reasonableness of the conclusions that management derived from that investigation, including their evaluation of statements made by Fields during that process.

In examining the quality of the Hospital's investigation, I have been mindful that the Board considers the failure to conduct a thorough and fair inquiry into an employee's alleged misconduct to be potentially powerful evidence of unlawful motivation. For example, in *Midnight Rose Hotel & Casino, Inc.*, 343 NLRB 1003 (2004), affd. 198 Fed. Appx. 752 (10th Cir. 2006), the employer's lack of investigation and failure to give the employee an opportunity to explain her conduct were deemed significant indicators of discriminatory motivation. Conversely, in *Boardwalk Regency Corp.*, 344 NLRB No. 122 (2005), rev. denied 196 Fed. Appx. 59 (3d Cir. 2006), the Board adopted my reasoning that the employer's careful and complete investigation of alleged misconduct supported a conclusion that the ensuing adverse action was lawful.

In this case, the investigation was conducted by Blankenship with assistance from Naomi Mitchell, the Hospital's human resources director. Blankenship testified that she began her inquiry by discussing the matter with Burnette. She testified that she learned that Burnette "was certain that [the test results] had been falsified in some way." (Tr. 1186.) She then examined the medical records and interviewed laboratory employees in an effort to learn why Fields' self-administered tests had not been checked by rerunning the tests on another portion

²¹ I had the same impression when a number of other witnesses testified regarding the highly unusual nature of a person drawing his own blood. The witnesses, all of whom were experienced hospital employees, appeared surprised and perhaps a bit disgusted by this behavior. This came across not merely in their words, but in their tone, facial expressions, and body language.

²² I recognize that Judge Evans found that, in 2000, Dr. Burnette had threatened that employees who participated in the strike against the Hospital should be fired. *Jackson Hospital Corp.*, 340 NLRB 536, 550 (2003). In making this finding, the judge noted that Burnette had not been called to testify. As a result, he did not have the opportunity to evaluate Burnette's reliability as a witness. While I do not doubt that Burnette may harbor some animus against the Union, I found no evidence that his actions with regard to Fields were in any way motivated by such views. As I have indicated, those actions represented an effort to delicately balance his obligations as both a member of the Hospital's professional staff and a treating physician for this particular patient. This is an example of an instance when there is a failure to prove a nexus between any antiunion animus and the adverse action taken against a unit member. Instead, the evidence demonstrated that the crucial link in the motivational chain was Burnette's concern for the integrity of the laboratory.

of the original blood sample. She testified that this was the usual procedure employed when lab values were inconsistent, noting that, “We keep samples for at least 48 hours for that purpose, for retesting, serum samples.” (Tr. 1196.) In speaking to the employees, she learned that the original samples were missing. She also confirmed that Fields had declined to permit Turner to draw a new sample, giving her his own test results instead.²³

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On August 9, Blankenship and Mitchell met with Fields. There was a complete discussion of the incident at issue. Fields was asked if there was any chance that his blood could have been mixed up with someone else’s sample. He testified that he responded by telling Blankenship that, “I knew that the blood was mine.” (Tr. 246.) The content of one key aspect of their further discussion was disputed during the testimony at trial. The meeting participants all agree that Blankenship asked Fields about the inability to locate his blood sample. Fields reported that he told her that he had thrown it away because of the lab’s policy against retaining unlabeled blood samples. Blankenship and Mitchell both stated that Fields made no mention of discarding the sample, instead claiming that “he didn’t know where it was” and “didn’t know what happened to it.” (Tr. 1580, 1585.)

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In resolving this conflict, I have again looked to the inherent logic of the situation. Fields supports his claimed explanation that he threw away his sample by noting that it was not labeled and that policy prohibited retention of such unidentified blood. It is readily understandable that the laboratory procedures would prohibit storage of unidentified blood samples. The difficulty with this rationale is Fields’ further contention that he was unable to label his sample because the printer would only print labels for admitted patients. I credit Blankenship’s testimony that samples were given handwritten labels for a variety of reasons including cases where blood was drawn on an emergency basis or at a patient’s residence by a home health aide, as well as, instances when a lab employee’s own blood was being tested. That testimony was corroborated by lab employees, Johnson and Turner. Equally importantly, it is supported by common sense and everyday experience in the age of computers.²⁴ It defies belief to expect that a hospital’s laboratory would lack a procedure to label samples during periods when its computer and printer might be inoperative.

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After speaking with Burnette, examining the medical records, interviewing laboratory employees, and giving Fields an opportunity to present his side of the story, Blankenship concluded that she would recommend termination of Fields’ employment. She testified persuasively and in detail regarding her thought process. She readily agreed that it was common practice for laboratory employees to have tests performed on their blood. Nevertheless, she was struck by the fact that Fields had also drawn his own sample, noting that the drawing of blood was a “two-handed procedure” and that it would be both “unusual” and “very difficult” for someone to do it alone. (Tr. 1196—1197.) This conduct was inexplicable since the ordinary practice was for the employee to ask a coworker to perform this service for them. As she put it, during her long experience in medical laboratories, “I’ve never heard of anyone drawing blood from themselves.” (Tr. 1242.)

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²³ Fields’ attempt to avoid having another blood sample taken undercuts counsel for the General Counsel’s argument that “Fields had nothing to hide by presenting the tests that he ran because he assumed that he would be re-tested when he was admitted as a patient.” (GC Br., at p. 8.) To the contrary, Fields actively tried to avoid such re-testing.

²⁴ In fact, Fields himself confirmed that the lab’s printer broke down “[a]ll the time,” and that they would then “just get a roll of blank . . . labels and write their name, birth date.” (Tr. 1747, 1748.)

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The next troublesome aspect of Fields' conduct cited by Blankenship was the fact that he only obtained test results for lipase and amylase. She noted that the usual way to perform blood tests was to produce a complete set of results. As she put it, "you only have to hit one key and you'll get the whole panel." (Tr. 1211.) She concluded that the reason that Fields took care to isolate the amylase and lipase results was as follows:

5 If you are going to adulterate or falsify, if you wanted to make
your amylase appear higher than it should, you don't want to
10 make the rest of your lab work very inconsistent with what it
would normally be, because then that would be an obvious—
obvious falsification.

(Tr. 1211.) Blankenship also considered whether a laboratory technician would be able to produce false readings for amylase. In that regard, she noted that there were "many ways" to do so, and that the simplest way would be to use a "pinprick of saliva [that] would make the amylase read 'very high.'"²⁵

Of course, the central aspect of Blankenship's reasoning process was her consideration of the trajectory of the test results. Once again, she provided clear and cogent insight into her reasoning:

20 [J]ust in looking directly at the numbers, they don't make any
sense. If you have an insult to an—an organ system, the
pancreas, or whatever, there—there's a response, an acute
25 pancreatitis[.] [T]he amylase usually will elevate as long as the
insult's present, the infection's present, or the blockage is present,
the amylase will rise or—and continue to stay elevated as long as
that process is ongoing. And once it resolves, the amylase slowly
is cleared from the system over a period of 24, 48, even 72 hours,
30 depending on how—how high it was initially. It does not make
sense for amylase to be significantly elevated several times above
normal at three o'clock in the morning, and then five hours later be
completely normal. That just does not make any sense clinically,
and that was Dr. Burnette's stance.

35 (Tr. 1230.)

Based on these considerations, Blankenship testified that she was "satisfied" that Fields' self-obtained test results had been "adulterated."²⁶ (Tr. 1231, 1232.) Because she felt that she

40 ²⁵ Interestingly, Fields confirmed that one could use "spit" to create a falsely elevated amylase reading. (Tr. 384.) He also noted that this would throw off other lab values as well. All of this tends to confirm the validity of Blankenship's analysis. In fairness, I also note that Fields testified that he did not use saliva to alter his test results.

45 ²⁶ At trial, Fields offered his own explanation of how his amylase level had dropped so precipitously. He explained that this came about because he had been administered intravenous fluids in the period between his self-administered test and the ones obtained through the normal procedures. Both Drs. Burnette and Abadilla rejected this explanation. As Abadilla put it, "If you ask me whether giving fluids alone will, you know, bring down the level . . . I don't think this alone will do it." (Tr. 498.) This compounds the difficulty that I experienced in
50 attempting to credit Fields' account of these events and underscores his unreliability.

could not tolerate the responsibility of retaining a laboratory employee who was willing to adulterate test results, she recommended that Chief Executive Officer Bevins discharge Fields. Bevins testified both that he was unaware of any union activity by Fields and that he concurred with Blankenship's reasoning and recommendation. As a result, Fields was terminated as of August 31.

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In sum, I find that the Hospital conducted a full, fair, and appropriate investigation and that the results of that inquiry supported the decision to terminate Fields' employment because his retention would pose a danger to the integrity of the laboratory's procedures.²⁷ The reasonableness of management's conduct constitutes meaningful circumstantial evidence supporting its assertion that it lacked knowledge of Fields' union activities and, as a result, did not take action against Fields because of those activities.

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Based on the totality of the evidence, I conclude that Burnette, Blankenship, and Bevins' accounts of the events involved in Fields' discharge are credible and that Fields' contrary assertions are not supported by the record when considered as a whole.²⁸ It follows that the General Counsel has failed to meet his burden of demonstrating that Fields engaged in protected activities which came to the attention of management and formed a material part of the motivation leading to his suspension and discharge.²⁹ For these reasons, I recommend that the allegations concerning Fields be dismissed.

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²⁷ To be clear, I am not saying that there is conclusive proof that Fields adulterated his tests in order to gain admission to the Hospital. That is not the level of certainty required under the Act. As the Board has recently noted, "In order to meet its burden under *Wright Line*, the Respondent must show that it had a reasonable belief that [the employee engaged in serious misconduct], and that it acted on that belief when it discharged him." *J.J. Cassone Bakery, Inc.*, 350 NLRB No. 6, slip op. at 2 (2007). (Citations and footnote omitted.) I conclude that the Hospital possessed such a reasonable belief and acted on that conclusion.

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²⁸ Counsel for the General Counsel urges me to discount the reliability of Blankenship's testimony because Judge Evans had "discredited" her testimony in his prior decision. (GC Br., at p. 11.) This is not entirely accurate. Judge Evans did reject several portions of Blankenship's testimony while expressly finding other aspects to be credible. Compare *Jackson Hospital Corp.*, supra at 584, 588 with 566. The Board often explains this phenomenon by citing Judge Learned Hand's recognition that, "nothing is more common in all kinds of judicial decisions than to believe some and not all of a witness' testimony." See, for example, *Parts Depot, Inc.*, 348 NLRB No. 9, fn. 7 (2006), enf. 260 Fed. Appx. 607 (4th Cir. 2008) (internal quotation marks omitted.), citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951). In any event, being mindful of what went on in the past, I have carefully evaluated all of the testimony in this case with an eye on the long history of mutual (and mutually destructive) antipathy between some persons in management and some on the labor side of the issues. Because Blankenship's testimony about the Fields discharge was logical, consistent, and persuasive, I have credited it.

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²⁹ It also follows from my discussion of the reasonableness of the Hospital's decision making in this situation that, assuming for sake of argument that the General Counsel had met his burden of establishing protected activity, knowledge, and animus, the Hospital still demonstrated that it would have discharged Fields in any event. I accept the credibility of the Hospital's assertion that it could not and would not have retained an employee that it reasonably believed had altered laboratory test results.

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C. The Suspension and Discharge of Shirley White and Louise Gross in 2006

The Facts

5 Registered Nurses Shirley White and Louise Gross were both hired by the Hospital on the same day in August 1993. For approximately 10 years, they served together as the entire complement of nurses for the intensive care unit (ICU) on one of the day-shift schedules. At the time of the events in question, they were two of the most senior members of the Hospital's nursing staff.

10 In conjunction with their long tenure at the Hospital, White and Gross also had long and prominent service for the Union. During the strike in 2000, both of them served as pickets and were observed in this role by CEO Bevins. Shortly after the strike ended, White joined the Union's bargaining committee and continued to attend negotiating sessions on behalf of the Union throughout her remaining tenure at the Hospital. For instance, she reported that she attended approximately 20 such meetings with management during 2005 and 2006. Similarly, Gross joined the committee in late 2002 or early 2003 and attended five or six sessions during the period immediately prior to her discharge.

20 In the years before their discharge from employment, both White and Gross had compiled a strong record of performance. White's personnel file reveals that, while she received a verbal warning in 2002 for excessive absences, she had no other disciplinary history.³⁰ Gross' file is completely devoid of disciplinary problems. Insight into the quality of their work may be gained from their yearly performance evaluations. White's 2006 evaluation was summarized by a written notation indicating that she, "[p]rovides exceptional nursing care to all patients." (GC Exh. 27, p. 5.) Earlier evaluations were to the same effect. For example, in 2004, it was reported that she was a "[v]ery good clinician, caring and compassionate about patient care." (GC Exh. 29, p. 5.)

30 I have already noted that Gross maintained an unblemished disciplinary record. In addition, her yearly evaluations were also reflective of a very high level of performance. Her 2006 evaluation summarized this by observing that she "[p]rovides exceptional care to patients." (GC Exh. 21, p. 5.) The 2005 evaluation was similar and, in 2004, it was noted that Gross was a "[v]ery good clinician, often performs as house supervisor. Compassionate about her patient care." (GC Exh. 23, p. 5.) The reference to Gross' supervisory responsibilities relates to her assignment during a period in 2004-2005 to serve on an occasional basis as supervisor of the entire hospital staff.

40 The fact that these nurses were held in high esteem was also illustrated by the testimony of several witnesses. Debbie Linkous, the Hospital's chief nursing officer, testified that they were both good nurses.³¹ CEO Bevins confirmed that, in the words of counsel for the General

³⁰ White testified that her absenteeism during this period arose due to her pregnancy and childbirth and the death of her father.

45 ³¹ Her exact words illustrate the pressures that affect witnesses in hotly contested litigation. Under cross-examination, she was asked to give her opinion about White and Gross. She responded, "They were good. I—you know, they were okay, I would think." (Tr. 1112.) Such are the travails of life on the witness stand. Of course, I credit her initial response as being the accurate reflection of her opinion, free from the urge to testify in a manner that pleased her employer.

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Counsel, he had been told that they were both “good and conscientious nurses.” (Tr. 1723.) After the two women were discharged, Dr. Abadilla was moved to write letters on their behalf. She testified that she had been the physician who had worked with them “more closely than any other doctor in—in that hospital.” (Tr. 463.) She wrote that they were “very competent, caring and conscientious nurses” and that she knew them to be “exceptional ICU nurses in whom I
5 have the highest confidence.”³² (GC Exh. 19.)

With this background showing that White and Gross were veteran members of the Hospital’s professional staff with excellent records of performance and were also active and vocal members of the Union, I will now turn to an examination of the events that culminated in
10 their discharge from employment. This discussion will focus on their behavior in administering the wrong blood transfusion to a patient. As a result, it is first necessary to gain a detailed understanding of the Hospital’s policies and procedures regarding the administration of such transfusions in order to assess the propriety of management’s decisions to terminate their
15 employment.

For purposes of providing background about blood transfusions, the Hospital produced the testimony of William Bowles, M.D., a Board-certified surgeon who serves as the Hospital’s medical advisor. He explained that there is a high degree of potential peril in administering
20 blood and, as a consequence, “a very high standard [is] placed on blood transfusions.” (Tr. 1154.) This is required since there is a one-third possibility of incompatibility between any donor and recipient. In the event of an incompatibility, there is a 10 percent possibility of the recipient’s death. The problem is compounded because, unlike the case with medications, all blood looks alike. In consequence, blood administration procedures are “far more stringent” than medication administration procedures. (Tr. 1559.) In particular, they involve “a lot of
25 double checks.” (Tr. 1554.)

This expert medical testimony was confirmed by Blankenship who approached the issue from the laboratory perspective. It will be recalled that she was the supervisor of the Hospital’s lab and she is currently responsible for laboratory procedures in all 130 of the parent company’s
30 hospitals. As she described it, “Blood bank is such a problem prone and significantly dangerous process that we have redundancies built into the system, checks, rechecks, and double checks.”³³ (Tr. 1281.)

Consistent with the level of risk, the Hospital maintained detailed written procedures
35 governing the entire transfusion process. The policy document in effect at the time of these events was entitled, “Blood and Blood Component Transfusion Therapy.” (R. Exh. 25.) It had been revised as of March 2004 and provided 13 specific steps required when a registered nurse administered a blood transfusion. Steps designed to prevent patient identification problems

40 ³² I have considered Abadilla’s letters solely as to the past job performances of White and Gross. I have not given them weight on the question of their behavior on the day at issue since it became clear on cross-examination that Abadilla’s understanding of the events of that day was based on limited information. When presented with further information on the witness
45 stand, she retreated from any effort to defend their conduct in the incident under discussion.

³³ There were many occasions throughout the trial when hospital staff members provided confirmation about the nature of the transfusion process. Somewhat ironically, the other alleged
50 discriminatees in this case, Fields and Combs, gave such testimony. Thus, Fields noted, “I’m so scared of blood bank, you know, of killing someone, that I always usually triple checked everything just to be safe.” (Tr. 403.) Combs also underscored the need for “double-checking” during her extensive testimony about blood procedures. (Tr. 165.)

included requirements that the nurse carry a copy of the signed physician's order when proceeding to the lab to pick up the blood. Once at the lab, the nurse was directed to engage in a checking procedure with the lab staff that included the following items:

5 Patient name
 Medical record number
 Unit number
 ABO and RH of the unit and the patient
 Antibody Screen
 Cross-match results
 10 Expiration date of the cross-match and the unit

(R. Exh. 25, p. 1.)

15 The policy required a second set of identification procedures once the nurse returned to the unit with the blood. This specified that,

20 Two RN's must recheck the label on the blood bag, the blood or blood component transfusion record, and the patient's ID band to verify: patient's name, medical record number, donor and recipient ABO and RH types, unit number, and expiration dates. This must be done at the patient's bedside.

25 (R. Exh. 25, p. 2.) Only after completion of these checks and double-checks was the blood to be transfused to the patient.

30 Compliance with this transfusion policy was documented through use of a three-part form that requires signatures by both laboratory employees and nursing staff at each step of the process. The form contains the following paragraph that is to be signed by two nurses prior to administration of any transfusion:

Pre-transfusion Verification:

35 We certify that prior to blood administration we have examined the blood component label, information on this form and all patient ID bands. The intended recipient of this blood product is the same person named on this form and the blood component.

40 (R. Exh. 10.) (Boldface in the original.)

45 The Hospital presented evidence that it provided training to all of its nurses regarding these procedures. In particular, Nurse Peggy Allen, the operating room manager, testified that she conducted such mandatory training for all nurses at a so-called "health fair" held by the Hospital in December 2005. During this event, she went over the policy and the verification form with all of the nursing staff. She reported that she read the policy to the nurses, "word for word." (Tr. 1548.)

The focus must turn now to the events of September 14, 2006.³⁴ On that day, White

50 ³⁴ All dates in this portion of the decision are in 2006 unless otherwise indicated.

and Gross filled their customary positions as the nursing staff in the intensive care unit. The unit can accommodate up to four patients. As is indicated by the name of the unit, all of the patients are gravely ill. On this day, there were two admitted patients and a third arrived during the shift. White and Gross testified that the workday was hectic. In addition, this was the first day of operation for a new system of telemetry monitors. These monitors reported on the status of patients outside the unit. Although these patients were not under the direct care of White and Gross, they were responsible for the oversight of this diagnostic equipment. While White contended that the busy work atmosphere and the presence of the new equipment “contributed” to the mistakes made that day, Gross forthrightly denied this, testifying that her error “did not occur because I was busy.” (Tr. 694, 862.)

I have considered the impact of the working conditions on that day as a factor in the transfusion error that occurred. I conclude that Gross is correct in declining to place substantial weight on this explanation. At the outset, these nurses were highly experienced and competent in dealing with the challenges involved in providing intensive care to patients suffering the most serious health impairments. While the working environment was hectic, Gross reported that, “the workload in ICU was always, it was always heavy.” (Tr. 827.) In fact, the unit was not at its full capacity of patients on this day. Finally, the presence of the new monitors may have been a complication to the work environment, but this did not represent a dramatic departure from past experience. As long ago as 2002, Judge Evans observed that “[t]he vital signs of patients throughout the Hospital who are ‘on telemetry’ are transmitted for reading to a central location that is located in the intensive care unit.” 340 NLRB 536, 598. Nothing in the working conditions on the day in question would explain or excuse the transfusion error.

The chain of events began at 9 a.m., when White received an order from Dr. Abadilla directing her to provide a blood transfusion for one of her patients. The patient was a gentleman who had multiple previous admissions and was well known to White. His name was Oakley T.³⁵ White testified that she proceeded to transcribe the order and make a computer entry to notify the laboratory. Between 12 and 1 p.m., the lab notified White that the blood was ready. Taking a copy of the transfusion order, White proceeded to the lab where she met Cheri Vires, a lab employee. White showed Vires the transfusion order and was told to “put it up on the shelf, where they keep the orders.” (Tr. 636.) Vires proceeded to go into the refrigerator where the blood is stored. She returned with a package of blood.

Vires did not testify in this trial. Nevertheless, the overwhelming weight of the circumstantial evidence demonstrates that she made the grave error of selecting the wrong package of blood from the storage unit. Instead of picking the blood that was ready for Oakley T, she chose blood that was awaiting transfusion into a female patient on the medical/surgical

³⁵ The parties stipulated that the names of the two patients involved in the transfusion error would be partially redacted in order to protect their privacy. They will be referred to as Oakley T and Oakey B. White and Gross contend that their names were confusingly similar. Clearly, the first names are very close to each other, although the patients were of opposite genders. As to the surnames, they are both of English origin and end with the same two letters. Nevertheless, I do not find them to be confusingly close to each other. Certainly, anyone hearing the names being spoken would have no difficulty differentiating between them. As a result, I do not conclude that, considering the complete names of the patients, any similarities were a determinative explanation for the confusion of their identities by the nurses. I have placed various unredacted exhibits under seal in the event that any reviewing authority wishes to form an independent conclusion regarding the similarities and differences in these patients’ full names. See the sealed copies of R. Exhs. 9, 12, 16, 17, 29, and 32.

unit of the Hospital, Oakey B. Just as a dislodged boulder may precipitate an avalanche, this unfortunate mistake began a chain of events that could have culminated in tragedy.

White testified that when Vires returned with the blood the two women performed the required cross-checks to verify that it was the correct package. In particular, she testified that they checked the patient's name and medical record number and the unit number of the blood. In prior testimony in another proceeding just 3 months after these events, White provided greater detail about her interaction with Vires. She testified that Vires "read off the patient's name, and I read off on the blood. She had the blood slip, she had the blood—she had the blood slip, I had the blood." (R. Exh. 9, p. 50.) At 12:45 p.m., Vires signed the transfusion verification form, certifying, "I have inspected the blood for abnormal color and appearance, verified patient information and physicians [sic] order to transfuse and release component to nursing personnel." (R. Exh. 10.)

Although White contended that the two employees had performed the required verifications, the fact remains that she returned to the intensive care unit with the wrong patient's blood. Once back at the unit, White encountered Gross at the nurses' station. As Gross explained, "[S]he asked me to check off the blood with her." (Tr. 832.) Gross took the actual bag of blood, while White retained the paperwork. White read off the patient's name, medical record number, unit number of the blood bag, and type of blood. Gross testified that, "everything matched on the bag of blood." (Tr. 834.) White confirmed that, "We checked the—we was at the nurses' station. We checked the name, MR [medical record] number, Unit Number, blood type, the date it expired on the blood." (Tr. 637.)

Gross' testimony about what happened next underscores the bizarre nature of this entire chain of events. She reported that White tendered the transfusion verification form and instructed her to "[s]ign your name here." (Tr. 834.) This seems an unusually explicit way to accomplish the verification given that both nurses had performed the same procedure and completed the same certification form many times together over the past years. Beyond this, Gross continued her account, testifying that she responded to this direction by asking White, "This is for Oakley T, right?" (Tr. 834.) She then indicated that White took another look at the bag of blood and said, "Yes, it is." (Tr. 834.) All of this suggests to me that Gross was making only a superficial check, choosing instead to place her trust in her colleague's performance of her primary responsibility in verifying that the blood belonged to her patient.

I have carefully analyzed the extensive and frankly somewhat mysterious testimony about these events in an effort to understand what actually happened. Ultimately, I conclude that the best explanation of Gross' conduct was provided by Gross during her testimony given slightly less than 3 months after the events. In that hearing, she explained, "It was busy, and we checked it off at the nurses' station . . . I glanced at it, and it looked like it was for Oakley T, the writing on it." (R. Exh. 12, p. 34.) She repeated this description under cross-examination, again explaining, "I glanced at the name." (R. Exh. 12, p. 44.)

By contrast, I cannot begin to explain White's numerous errors and omissions. She never conceded that she had performed her responsibilities in a negligent or careless fashion, nor did she provide any alternative explanation for her inability to discern the obvious error despite repeated attempts at verification. The best she could offer as a justification for her behavior was encapsulated during the following colloquy that took place during the prior administrative proceeding:

COUNSEL FOR THE HOSPITAL: [D]o you believe it is justified to not follow the verification procedure simply because it's busy

in the ICU?

WHITE: I think you take priority. You do what you have to do.

5 (R. Exh. 9, p. 64.) This betrays a cavalier attitude toward the Employer's carefully designed system of safeguards intended to prevent the sort of potentially tragic mistake made by White in this case.

10 Returning to the account of the events, at this juncture both White and Gross signed the transfusion verification form at the nurses' station. White took the blood into the patient's room. Gross did not accompany her.³⁶ Once inside the patient's room, White had a final opportunity to avert a potential catastrophe. Regrettably for all concerned, she testified that she did not examine the patient's ID band to verify that the information it contained matched that on the unit of blood. She testified that she chose not to perform this step because she knew the patient "personally." (Tr. 639.) She did address him, telling him, "Oakley, I'm giving you a unit of blood." (Tr. 640.) He responded, "Yeah, I know." (Tr. 640.) Of course, the difficulty with White's choice of procedure at this last stage of the matter is that a final verification was not merely for the purpose of determining the identity of the patient. Instead, a final bedside verification served the function of confirming that this particular blood was actually intended for administration to that specific patient.

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In her testimony at the earlier hearing, Gross was particularly forthright and clear about the value of a bedside confirmation procedure. With the benefit of hindsight, she testified as follows:

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HEARING OFFICER: If you had checked the blood at the bedside and compared the wristband with the ID number—

GROSS: Then it would have showed me that it was wrong.

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(R. Exh. 12, pp. 38, 40.) Of course, the primary responsibility for performing this final bedside check in this case rested with White because Oakley T was her patient.

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Tellingly, the remaining alleged discriminatee in this case, Nurse Combs, was also questioned about the importance of the final bedside verification in blood transfusion procedures. Her compelling testimony clearly underscores everything that went awry in this case. Combs explained that when she is charged with administering a blood transfusion,

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I personally lay [the blood bag] on the bedside table. I match my form to my blood Then I take that blood form and the

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³⁶ It is true that the Hospital's policy mandates that the verification be performed at bedside, not at the nurses' station. There was conflicting testimony about the actual practice in this regard. Management nurses reported that the policy was enforced. Line nurses testified that it was ignored and that management knew about and participated in the practice of doing the verification at the nurses' station. On this record, I do not find that the Hospital has shown that the location of the verification violated the condoned practice. Even if I were to find otherwise, a violation of the rule in this regard would not have resulted in serious discipline. For instance, Unit Manager Kathy Thacker testified that when she was a line nurse she was observed performing a verification at the nurses' station. Her supervisor merely told her not to do so in the future. There was no sanction imposed.

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5 bag itself has already been matched to my form and I match my name and MR number either with the form or the bag to the patient's ID bracelet. I will tell you that for me every day when I go to work and especially here in Jackson where we have an awful lot of family members with the [same] last names and I'm not from here, I would take and look at every ID bracelet I had and make sure I had a face with a patient . . . It was a verification that had to be done but I already knew who this person was, I'm just double-checking that I still know who that patient is.

10 (Tr. 164-165.) Alas, White chose to forego this simple step and administered the transfusion of blood intended for Oakey B to Oakley T.

15 Inevitably, a nurse from Oakey B's unit eventually reported to the laboratory to pick up the blood intended for her transfusion. As a result, the error was uncovered. White was informed of the error. She halted the transfusion and returned the blood to the laboratory. By the greatest of good fortune, it turned out that Oakley T and Oakey B shared the same blood type and characteristics. Because of this stroke of luck, Dr. Abadilla was able to report that Oakley T suffered no ill effects from the erroneous transfusion.

20 Shortly after these events came to light, White had a conversation with her supervisor, Alice Robinson. She asked Robinson if she thought the nurses would be fired in response to the incident. Although White observed that "we'll probably get fired over this," Robinson reassured her that this would not happen and that they would "work through this." (Tr. 645, 646.) She instructed White to prepare a variance report, a form used to document unusual occurrences and errors. White did as instructed.

25 At approximately 4 p.m., White and Gross were present at the nurses' station. Blankenship arrived and asked White, "Did you go to the bedside and check the blood?" (Tr. 647.) White reported that she had not done so, adding that it was "standard practice to check it at the nurses' station. We knew the patient." (Tr. 648.) Gross also informed Blankenship that they had not checked the patient's ID band. Shortly after Blankenship's visit, White and Gross met with Janelle Cude, the Hospital's risk manager. Cude instructed them to keep the incident, "hush/hush." (Tr. 649.)

35 Over the next 3 days, both nurses continued to perform their usual duties at the Hospital. Indeed, they participated in providing additional blood transfusions to Oakley T. As one would now expect, they performed the verification procedure at his bedside, noting that Robinson had instructed them that "[i]n the future, just go to the bedside to check the armband." (Tr. 879.)

40 On September 18, CEO Bevins returned from a vacation. Blankenship and Linkous met with him to advise him about the transfusion incident. He testified that Blankenship informed him that, "upon the three [pre-transfusion verification] checks, the laboratory, both Shirley [White] and Cheri Vires had signed that it was appropriate but it was not." (Tr. 1675.) He noted that he was also informed that White and Gross had readily admitted the failure to check the armband and that the patient had not suffered any apparent harm.

45 On the following day, Bevins had a meeting regarding the transfusion incident with the Hospital's attorney and chief negotiator with the Union, Don Carmody. Noting that a bargaining session was scheduled with the Union for later that day, the two men decided to "forego the negotiating session to spend time to deal with this personnel matter." (Tr. 1682.) Carmody then contacted Pidcock and advised him that White and Gross were being suspended and that the

bargaining session was cancelled.

At approximately 2 p.m. on September 19, Pidcock telephoned Gross to tell her of her suspension. This was her first notice of the adverse personnel action. Over 90 minutes later, she received a call from Mitchell, the Hospital's human resources director, confirming that she had been suspended indefinitely. White received a similar call from Mitchell.

On September 25, Bevins wrote letters to White and Gross confirming their suspensions. He followed this with a second set of letters on October 2. In those communications, he informed White and Gross that they were being terminated, "due to unsatisfactory performance of your assigned duties on September 14th, relative to the blood transfusion of which you are aware, including your failure to follow prevailing Kentucky River Medical Center policy, and your falsification of the 'Pre-Transfusion Verification.'" (GC Exhs. 18 and 25.) Neither nurse has been offered employment by the Hospital since that date.

Legal Analysis of White's Suspension and Discharge

Determination of the legality of White's suspension and discharge turns on an appraisal of the motivation of the Employer's managers. As a result, it requires application of the same *Wright Line* analytical framework discussed earlier in connection with Fields. Unlike the situation involved in Fields' case, there is no dispute regarding the first steps of the process. The Hospital readily concedes that White was an active union supporter who served an important role as a negotiator for the Union during the collective-bargaining process. Furthermore, Bevins testified that at the time he decided to fire White he was well aware of her participation on the bargaining committee.

Because there is no question that White participated in protected activities and that her employer was aware of her role in those activities when it decided to suspend and terminate her employment, the inquiry next focuses on whether the Employer's decisions were motivated to a substantial degree by unlawful antiunion animus. If I find that such animus existed, I must finally determine whether it was a decisive factor in the disciplinary decision. In considering these questions, I cannot limit my analysis to direct evidence of unlawful intent. Instead, I note that, "motive may be inferred from the total circumstances proved. Under certain circumstances the Board will infer animus in the absence of direct evidence. That finding may be inferred from the record as a whole." *Fluor Daniel, Inc.*, 304 NLRB 970, 970 (1991), enf. 976 F.2d 744 (11th Cir. 1992). Thus, it is important to undertake an examination that considers the entire context, including reasonable inferences to be drawn from circumstantial evidence.

While the factfinder must be careful to make a broad and penetrating inquiry into the employer's reasoning process, it must also be understood that there are important limitations on the scope of this undertaking that stem from the limited nature of the regulatory policies underlying the Act. In this connection, it is essential to avoid unnecessary intrusion on the freedom of economic action that forms a bedrock feature of our system of liberties. For this reason, in a case involving the motivation behind an employer's choice of which employees to select for a layoff, the Board observed:

We emphasize that it is not our objective to determine whether the Respondent's choice . . . was the correct decision or that the Respondent used the best decision-making process. The Respondent may make its layoff decision on any basis it chooses, good, bad, or indifferent—as long as it is not an unlawful basis The wisdom of the Respondent's decision is immaterial. We are

concerned only with discerning the sincerity of the Respondent's contention that the decision was not motivated by union animus.

Children's Services International, Inc., 347 NLRB No. 7, slip op. at 4 (2006).

5 With these parameters in mind, I have assessed the Employer's state of mind. For the following reasons, I conclude that unlawful animus against the Union did play a substantial role in the Employer's motivation. Nevertheless, I also find that, regardless of the impact of such animus, the Employer would have terminated White due to the grave and extensive nature of her negligence in performing her duties in connection with the transfusion that she administered to the patient under her care.

10 Turning first to the question of unlawful animus, I have examined the Employer's conduct before the events at issue, the precise manner in which management chose to effectuate the decision to discipline White, and the evidence regarding the Employer's subsequent behavior toward another union member who engaged in the same form of protected activity. Based on the totality of the picture presented by that evidence, I conclude that the General Counsel has met his burden of demonstrating that antipathy towards White's role as an active member of the Union's negotiating team formed a substantial factor in the decision to fire her.

20 My consideration of the Employer's attitudes toward union activists must necessarily begin with the events described in Judge Evans' decision. It will be recalled that the Board adopted Judge Evans' conclusion that the Hospital, under the direction of CEO Bevins, engaged in "egregious misconduct, demonstrating a general disregard for the employees' fundamental rights." *Kentucky River Medical Center*, supra, at 607. Of particular importance, Judge Evans found that management had terminated the employment of eight bargaining unit members due to their active involvement with the Union.

30 I have given careful consideration to the weight to be assigned to this evidence of prior misconduct. In his opening statement at the trial, counsel for the General Counsel argued that, "the most important thing to keep in mind at the outset is that Respondent is a recidivist violator of the Act." (Tr. 31-32.) As someone who cut his teeth in our profession in the realm of criminal law, this assertion struck me as highly disturbing.³⁷ It had the same effect on counsel for the Hospital, who summarized his objection by rather eloquently observing in his brief that it would be necessary for me "to analyze the case based upon the evidence presented to Your Honor personally, as opposed to that which lies in the cobwebs of a case decided five years ago." (R. Br., p. 23.)

40 On balance, I conclude that, while counsel for the General Counsel clearly engaged in some lawyerly hyperbole, he is correct in urging that the Hospital's prior behavior is probative on the issues before me. By the same token, while counsel for the Hospital is on target in warning me against deciding this case by the simple expedient of imputing malice based on the findings in the earlier case, he also properly acknowledged that prior unfair labor practice findings, "may be admissible on the question of an employer's animus, but only in the 'appropriate circumstances.'" (R. Br., p. 21.) (Footnote and citation omitted.) This is an accurate statement

45 ³⁷ Of course, it must be recalled that the general prohibition against the admission of a defendant's criminal history in a criminal trial is not based on a lack of relevance. Rather, such evidence is excluded precisely because its obvious probative value may be outweighed by its potentially prejudicial impact. In evaluating this type of evidence in this case, I have been mindful that it cannot be used as a substitute for careful analysis of the totality of circumstances.

of the Board's standards. See, for example, *Overnite Transportation Co.*, 336 NLRB 387, fn. 2 (2001) (evidence of prior violations may be used "for other purposes, such as showing an unlawful motive for an employee's discharge").

5 I find that there are appropriate circumstances in this case to impute prior unlawful animus as manifested toward the eight discharged union supporters to the managers who decided to terminate White. Two powerful factors lead to this conclusion, the fact that the events in White's case are of precisely the same sort of misconduct as that exposed in Judge Evans' decision and the fact that the Hospital's chief executive at all relevant times was the same person, Bevins. This linkage in identity and conduct is too potent to ignore.

10 I have also considered counsel for the Hospital's counter argument that this evidence is "overly stale." (R. Br., p. 21.) Bevins discharged the eight activists in August and September 2000. He suspended White and Gross in September 2006 and discharged them in October of that year. This is a significant span of years, raising the question of whether the passage of time has so eroded the probative value of this evidence as to render it useless in shedding light on the employer's motives.

20 By somewhat odd but perhaps fortunate coincidence, the Board has recently had occasion to instruct me on the principles involved in resolving this question. In *Electrical Workers, Local 98 (TRI-M Group, LLC)*, 350 NLRB No. 83 (2007), I was required to evaluate the impact of a respondent's prior history of unfair labor practices in deciding whether the respondent had a proclivity to violate the act so as to justify the grant of the General Counsel's request for enhanced remedies. The most recent instance of prior misconduct had occurred 4½ years before the events at issue. Based on my review of prior Board decisions, I opined that the passage of such a period of time insulated the respondent from a finding of proclivity based solely on prior misconduct.³⁸ I had concluded that passage of a 4-year period appeared to have vitiated the impact of such prior misconduct in previous cases. In its decision adopting my recommendation in *TRI-M Group*, the Board took pains to reject my attempt to divine a bright-line rule on this question, noting that, "Rather, we will assess the totality of circumstances in each case, including the applicable dates of misconduct and prior Board and court orders." *Id.* at slip op. 1, fn. 2.

35 In applying the Board's totality test to the facts of this case, I conclude that the prior misconduct retains significant probative value in judging the employer's motivation. I note that the unlawful activity in the prior case was widespread and egregious. It did not represent an isolated instance of technical law violations by an unsophisticated employer. Instead, it consisted of an extensive pattern of rather depraved behavior, including multiple decisions to deprive persons of their means of livelihood simply to advance an unlawful agenda. The severity of the misconduct provides a clue as to the likelihood that the underlying attitudes may persist and continue to influence the employer's behavior. This, coupled with the presence of 40 the same chief executive, leads me to conclude that the employer's past manifestations of unlawful animus in considering termination decisions provides valuable insight into the thought processes under examination in this case. See, for example, *St. George Warehouse, Inc.*, 349 NLRB No. 84, slip op. at 9 (2007) (animus found where prior misconduct 3 years earlier involved 45 same manager and same type of retaliation against employees).

In addition to a history of possessing a mindset that would be willing to make disciplinary decisions that are motivated to a substantial degree by unlawful considerations, I find that the

50 ³⁸ I did, however, find that other factors justified the request for the enhanced measures.

5 employer manifested this sort of intent in the strikingly peculiar way that it chose to effectuate its decision to initiate the disciplinary process regarding these two nurses. Under the Hospital's disciplinary procedures, the final authority was held by Chief Executive Officer Bevins. On the date of the improper transfusion, he was on vacation. He returned to work on September 18 and was immediately informed of the event by the supervisors of the nursing and laboratory
5 staffs. Bevins testified that he spoke by telephone with the Hospital's labor counsel, Carmody, that afternoon.

10 On the following day, September 19, Carmody was scheduled to be in Jackson for purposes of attending a collective-bargaining session with the Union. Prior to the time for this session, Bevins and Carmody conferred. Bevins testified that they decided "to forego the negotiating session to spend time to deal with this personnel matter." (Tr. 1682.) Carmody proceeded to meet with the Union's organizing director, Pidcock. Bevins was asked to describe the content of this meeting as follows:

15 COUNSEL [DON CARMODY]: And do you know how was it, how was it that Shirley [White] and Louise [Gross] were informed of the decision to suspend them?

20 BEVINS: You informed Mr. Pidcock at your meeting with him that they would be suspended.

COUNSEL: And did the Hospital itself inform them directly also at some point?

25 BEVINS: We informed them on the 19th by phone. Naomi Mitchell did that and we followed with a letter on September 25th.

30 (Tr. 1682.) Gross confirmed this chronology of events. She reported that at 2 p.m. she received a telephone call from Pidcock advising her of the suspension decision. Approximately 90 minutes later, she received a call from Mitchell telling her the same thing.

35 I find this procedure to be entirely and strikingly extraordinary for several reasons. First, no explanation was offered as to why the disciplinary situation regarding White and Gross necessitated the cancellation of the scheduled collective-bargaining session. It is clear that management felt no particular urgency in resolving the problem presented by the transfusion incident. The incident was discovered on September 14. No action to suspend the nurses was taken until September 19. In the interim, they performed their customary duties, even to the extent of providing additional blood transfusions to Oakley T. There was simply no emergency need to cancel the bargaining session in order to deal with the transfusion issue.

40 I conclude that the decision to cancel the scheduled bargaining session was motivated by animus. It was a crude attempt to drive a wedge between bargaining unit members by suggesting that misconduct by the two bargaining committee members had stymied the ongoing and lengthy effort to obtain a contract for the unit employees. The asserted need to cancel the
45 session to address the transfusion issue served as a convenient pretext to delay the negotiations for a collective-bargaining agreement and place the blame on the Union's committee members.

50 Beyond this, it is equally bizarre for the Hospital's leadership to choose to inform the affected employees of their suspensions by the means of citing this personnel action to their union representative as an excuse for the cancellation of a bargaining session. The fact that

management used this method of communication instead of the obvious and forthright means of contacting the employees directly further demonstrates a high level of hostility and animus. It thrust Pidcock into the role of messenger of the bad news and conveyed a callous lack of respect for two longtime professional employees who had compiled a good record of performance.

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In sum, the manner in which Bevins and Carmody handled the suspension decision betrayed a deliberate attempt to undermine the Union by converting the disciplinary process into a wedge to divide the bargaining unit and humiliate the two nurses. In discussing the degree of unlawful motivation by the Hospital's management, Judge Evans characterized it as an "extreme level" of hostility toward employees who engaged in protected activities. *Kentucky River Medical Center*, supra, at 557. I reach the same conclusion regarding the events just described.

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Finally, I have considered the events involved in the remaining portion of this case as part of the totality of circumstances that shed light on the issue of unlawful animus. I have concluded that the use of the disciplinary process against White and Gross was, in part, designed to frustrate the bargaining process with the Union. To that extent, it reflects animus particularly directed against members of the bargaining committee. It is, therefore, significant that the Hospital's management engaged in similar misconduct directed toward another long term member of that committee, Combs. I will discuss in detail the nature of that misconduct in the section of this decision devoted to analysis of Combs' so-called indefinite investigative suspension. Suffice it to say at this point that the evidence revealed that management appears to have set a trap for Combs, using her misunderstanding of the rules of labor law as a convenient vehicle to remove her from employment, and, hence, from the bargaining committee as well. In so doing, it demonstrated a particularly cynical disregard for her by twisting the concept of an investigatory suspension into a sub rosa termination of her employment. The retention of Combs in this state of perpetual employment purgatory persists to the present time.

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I recognize that Combs was initially suspended in January 2007, approximately three months after White and Gross were discharged. Nevertheless, it is appropriate to consider her treatment as probative of unlawful animus as to White and Gross because it reflects a similar malicious use of the disciplinary process to target members of the bargaining committee. See *K.W. Electric, Inc.*, 342 NLRB 1231, fn. 5 (2004) (subsequent statements found relevant on the issue of animus where they revealed "a strong and generalized antiunion sentiment"). Considering the course of conduct of the Hospital's management from the initial certification of the Union as representative of the bargaining unit through the present day, I find that the General Counsel has met his burden of proving that management remains willing to engage in, using Judge Evans' choice of words, "egregious misconduct, demonstrating a general disregard for the employees' fundamental rights." *Kentucky River Medical Center*, supra, at 607. More specifically, I conclude that the decisions to suspend and terminate White and Gross were motivated to a substantial degree by unlawful animus directed toward them due to their active participation on the Union's bargaining committee.

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Because I have determined that the General Counsel has presented a prima facie case of unlawful antiunion discrimination, the burden under *Wright Line* now shifts to the Hospital to show that it would have discharged White regardless of her protected activities. Upon careful reflection, I conclude that it has met this burden.

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Initially, it must be recognized that this is not a case where an employer has fabricated or contrived an allegation of employee misbehavior to rid itself of a union activist. There can be no doubt whatsoever that White engaged in serious misconduct of a type that could have

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5 resulted in tragedy. To my mind, the record clearly establishes that the Employer suspended and discharged White for two reasons, animus against her involvement on the bargaining committee and grave concern regarding her grossly negligent care for her patient, Oakley T. As a consequence, this is a classic example of a mixed motive situation calling for careful application of the *Wright Line* analysis. In particular, I am mindful of the Board's admonition that:

10 Under *Wright Line*, an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity. Nor is a judge's personal belief that the employer's legitimate reason was sufficient to warrant the action taken . . . a substitute for evidence that the employer would have relied on this reason alone.

15 *Ingramo Enterprise, Inc.*, 351 NLRB No. 99, slip op. at fn. 10 (2007). (Internal quotation marks and citations omitted.)

20 In addressing this question, I begin with consideration of the employer's existing disciplinary standards and policies. While the employer has a progressive system of discipline, credible and consistent testimony from managers established that, in appropriate circumstances, an employee may be discharged for a first offense. As Human Resources Director Mitchell described, the "severity" of the offense would be the determinative factor. (Tr. 927.) This testimony also tracks the language of the Kentucky River Medical Center employee handbook which states:

25 If your performance, work habits, overall attitude, conduct, or demeanor become unsatisfactory in the judgment of the hospital, based on violations of any of the hospital's policies, rules or regulations, you will be subject to disciplinary action, up to and including dismissal.

30 (GC Exh. 8, p. 21.) Among the specific examples of "unacceptable behavior" cited in the Handbook is, "[d]isregarding safety or security regulation." (GC Exh. 8, p. 21.)

35 The question then becomes whether White's disregard of the safety provisions of the Hospital's transfusion policy convinced her supervisors that her performance, work habits, and conduct were deficient to such a degree as to require her termination from employment. In assessing this question, it is not enough to simply say that White made a transfusion error. Rather, it is necessary to track her conduct through each step of the transfusion administration process for Oakley T. Of course, it is apparent that the initial error was made by Vires, who returned from the blood storage unit with the wrong bag of blood. Under the policy, however, this error should have been immediately ascertained and corrected by Vires and White.

45 Current Laboratory Director Karla White described the procedures then in effect in revealing detail. She testified that both the lab technician and the nurse were required to sign the laboratory's logbook, indicating that,

50 the unit number has been checked, double checked, by both tech and the nurse. The patient identifiers have been checked, the name, the medical record number and I think even on their form it has the date of birth . . . and then both the nurse and

the tech are to sign it, to sign the log book as well as requisition before it leaves.

....

5 They both go through it and they sign that requisition as well as this log book. So it's like—it takes a while to sign out a unit of blood.

10 (Tr. 1640, 1642.) Although White testified that she followed this procedure, it remains a fact that the error should certainly have been revealed if she had done so with any reasonable degree of care.³⁹ It will be recalled that while the patients' first names were similar, their surnames were readily distinguishable, they were of opposite genders, bore different medical identification numbers, had different birthdates, and were on different wards of the facility. It can only be
15 concluded that, to the extent that Vires and White made any effort to verify the blood, that effort was grossly negligent.

20 Having failed to properly verify that she had received the correct blood, White now compounded her error by the manner in which she conducted the second required verification procedure with Gross. Once again, White testified that she and Gross, "checked the name, M[edical] R[ecord] number, Unit Number, blood type—uh, the date it expired on the blood." (Tr. 637.) Had any reasonable degree of care been exercised during this process, the obvious mistake would have been identified and readily corrected. This did not happen.

25 Finally, White proceeded to Oakley T's bedside. Hospital policy required that she verify the accuracy of the transfusion by checking the patient's wrist identification band.⁴⁰ The evidence clearly established that this band contained the patient's name and medical record number. For a third time, it is obvious that a comparison of the wristband with the bag of blood would have shown that a potentially tragic error was about to occur. In this instance, White did not claim that she conducted such a comparison. Rather, she conceded that she failed to do
30 so. Her reason for failing to do so, that she knew the patient personally, demonstrates a complete incomprehension of, or indifference to, the reasons for the required verifications.

35 The uncontroverted evidence demonstrates that in the space of approximately an hour, White performed two transfusion verification checks in a grossly deficient and negligent manner and failed to perform a third such verification at all. As a result, her patient received an incorrect blood transfusion, an error that put him at risk of his life.

40 All of this is reflected in the explanation presented in the testimony of the official who made the decision to discharge White. Bevins explained that White was discharged because,

Following our investigation of the facts we found that the blood [that] was received from the laboratory was the wrong blood, it'd

45 ³⁹ In what is perhaps an indication of White's haste, she did not actually sign the log book. Instead, she wrote her initials. Of the 17 entries on the relevant page of the log book, White's was the only one that was initialed instead of signed. Furthermore, her initials are placed on the entry showing that the blood was for Oakey B. (R. Exh. 29.)

50 ⁴⁰ Counsel for the General Counsel concedes that there was a great deal of testimony establishing that the nurse who administered a transfusion was required to, "actually check[] the ID band at the bedside." (GC Br., at p. 20, including the transcript citations listed therein.)

been checked by Shirley [White] as being the appropriate blood for that particular patient. In the ICU it was checked by both Shirley and Louise [Gross] and then signed as being the right blood, which it was not, and at the bedside it was signed as being the appropriate, the right unit for that patient and it was not.

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(Tr. 1671.) Thus, Bevin's analysis reflects his recognition that White had failed to properly conduct the three separate verification procedures required by the Hospital's transfusion policy. This rationale for White's discharge is entirely accurate and well within the Hospital's disciplinary policies. I conclude that this was the predominant, actual reason for Bevin's decision to suspend and terminate White.⁴¹

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Finally, I have also evaluated the General Counsel's argument that the Hospital has failed to show that White's discharge was consistent with other disciplinary actions. Bevins testified that he was unaware of any other instances of administration of the wrong blood transfusion to a patient. No records of any such prior error were produced despite the General Counsel's diligent and commendable efforts to develop a complete documentary record. That documentary record does contain a regrettably large number of events involving errors in the administration of medications. Apart from the Hospital's claim that blood transfusion errors are distinguishable from, and more serious than, medication errors, I find that none of the employee misconduct shown in those medication errors approaches the level of negligence and inattention demonstrated by White in her care of Oakley T.⁴² As counsel for the Hospital aptly asserts, "[T]he evidence strongly suggests that Ms. White had not performed **any** of the required verifications or, alternatively, performed the verifications with such reckless lack of care that she effectively did not perform the verifications at all." (R. Br., at p. 51.) (Boldface in the original.) In all of the remotely comparable cases, either the employees did not demonstrate the repeated negligence and deliberate omission revealed in White's case, or the potential consequences of the error were considerably less severe, or both.

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The Board has placed carefully calibrated limits on the use of comparative discipline as insight into an employer's motivation. In *Elko General Hospital*, 347 NLRB No. 123, slip op. at 3 (2006), it held:

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We recognize that the Respondent has not shown a practice of disciplining similar misconduct. However, the circumstances confronting the Respondent . . . were unprecedented. To say that an employer must show a prior instance of similar misconduct

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⁴¹ I recognize that the General Counsel argues that Bevins' reliance on an additional reason is suspicious. Bevins did claim that he also considered White's signatures on the verification forms to be a falsification of hospital records. In his testimony, he always added this justification as an afterthought, usually based on leading questions from his counsel. I agree with counsel for the General Counsel's contention that this, standing alone, was not a significant reason for the decision to discharge White. In fact, Bevins readily agreed that White and Gross had not engaged in any intentional misconduct and did not possess any ulterior motives. I infer that this asserted justification was a lawyerly afterthought, not a significant factor in the actual decision. While its use at the trial is a ground for legitimate concern, the overwhelming evidence supporting Bevins' actual decision-making process satisfies me that it was primarily and fundamentally legitimate.

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⁴² I will describe these medication errors when discussing the propriety of Gross' termination later in this decision.

would preclude an employer from disciplining an unprecedented wrong, irrespective of how egregious that wrong might be. We reject that approach.

(Footnote omitted.)

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White engaged in a pattern of grossly negligent behavior that could have caused the gravest consequences for her patient and her employer. Bevins provided a detailed and credible explanation that it was his consideration of this pattern of events that caused him to discharge her. While the record also revealed that he bore animus against her for her protected activities, I conclude that the Hospital has met its burden of establishing that he would have suspended and discharged White for her unprecedented and severe degree of poor performance of her duties, regardless of her role in the Union's affairs.⁴³ As a result, I recommend that this allegation against the Hospital be dismissed.

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Legal Analysis of Gross' Suspension and Discharge

Because there is no doubt that Gross was involved in the transfusion error that led to White's lawful termination, it is necessary to apply the dual motive analysis of *Wright Line* in order to assess her situation. As with White, it is undisputed that Gross was active on the Union's bargaining committee. Bevins readily conceded that he was well aware of Gross' role on that committee when he decided to suspend and terminate her employment.

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As to the issue of animus, once again, White and Gross are similarly situated. Having already concluded that the General Counsel has shown the existence of a significant degree of unlawful animus as a motivating component in the employer's decision-making process, I find that this element of the General Counsel's case is also met. In making this finding, I rely on the analysis described in detail in the preceding section of this decision, including the Employer's history of the same type of discriminatory decision making, the unusual and disturbing manner in which the discipline was effectuated and communicated, and the subsequent unlawful targeting of a remaining member of the negotiating committee.

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Since the General Counsel has proven a prima facie case of discrimination, the burden shifts to the Hospital to demonstrate that it would have discharged Gross regardless of her participation on the negotiating committee. At first blush, it would seem that my answer to this question as to White would extend to Gross as well. Upon individualized analysis, I conclude that this would conflate conduct that consisted of a pattern of gross negligence and willful disregard of the transfusion verification requirements with a simple and isolated error. The vast degree of differentiation in culpability underscores the discriminatory nature of the identically severe discipline meted out to Gross. As counsel for the Hospital acknowledges, "In the case of blood, the Hospital clearly treats errors as serious, and routinely imposes discipline. Still, even with blood, there are degrees of error." (R. Br., at p. 48.) I find that there was a vast degree of difference between White's pattern of culpable negligence and Gross' simple verification error. The Hospital's failure to differentiate between the two employees requires careful assessment in

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⁴³ As the Board has explained, "[I]n mixed-motive cases like this one, to sustain its defense under *Wright Line*, an employer must show that it would have taken the same adverse action regardless of the employee's protected activities. It does not have to prove that the adverse action was based solely on legitimate grounds, to the exclusion of any unlawful motivation." *North American Dismantling Corp.*, 341 NLRB 665, 666 (2004). Such is the case regarding White's termination.

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the context of established unlawful antiunion animus. I will now explain my reasoning in detail.

At the outset, it will be recalled that Oakley T was White's patient. Gross' only role in these events was to participate in the second stage verification of the transfusion information. There is no question that she performed this role in a deficient manner.⁴⁴ She forthrightly testified that she merely "glanced" at the information. (R. Exh. 12, p. 34.) Implicitly placing her faith in White and believing that the blood was for Oakley T, she signed the transfusion verification form. This was misconduct, but the question remains whether the Employer sincerely believed that the degree of the misconduct was such that it required termination of her employment. This is particularly true because Gross had lengthy tenure with the Hospital and an impressive record of past performance.⁴⁵

In concluding that the Employer has failed to establish that it possessed such a sincere belief that Gross' misconduct required her discharge, I have applied the analytical tests traditionally employed by the Board. These were summarized in *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003), rev. dismissed 2004 WL 210675 (D.C. Cir. 2004):

Proof of discriminatory motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole. . . . To support an inference of unlawful motivation, the Board looks to such factors as inconsistencies between the proffered reason for the discipline and other actions of the employer, disparate treatment of certain employees compared to other employees with similar work records or offenses, deviation from past practice, and proximity in time of discipline to the union activity.

(Citations omitted.) Many of these factors and related concepts support a conclusion that Gross was terminated for her protected activity rather than for her simple verification error.

At the outset of the inquiry, I note that the Hospital is committed to a system of progressive discipline. The corporate disciplinary policy provides that "[t]he hospital will follow a progressive approach to employee discipline."⁴⁶ (GC Exh. 9, p. 1.) It further provides that, "[i]n

⁴⁴ The Hospital also contends that Gross' misconduct included intentional falsification of the verification form. As with White, I reject this attempt to add to the justifications advanced for her termination. Gross erred in the performance of her verification procedure. She had no intent to falsify any records. While the Hospital introduced personnel records showing that it fires employees who intentionally falsify records, I agree with counsel for the General Counsel's observation that, "these incidents are not comparable because they involved either falsification of an employee's time cards or medical excuses for absences, or an obviously intentional falsification of a patient's medical records." (GC Br., at p. 42.) For an example of a truly intentional falsification of records, see the Hospital's discharge of X-ray Technician Norman who reused old X-rays to hide the poor quality of the studies she had just taken. (GC Exh. 73.) The contention that Gross engaged in the same sort of fraud is a flagrant exaggeration of the seriousness of her misconduct.

⁴⁵ This is another distinguishing factor between the cases of White and Gross. White had a prior disciplinary history for admitted excessive absenteeism. Gross had an unblemished disciplinary history and had been trusted with supervisory responsibilities in the recent past. If there were ever an employee whom one would expect to be given some sort of first-offender treatment, it was Gross.

⁴⁶ It goes on to explain that "occasionally" misconduct may be so severe as to require

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general,” the progressive approach moves from verbal warning to written warning. (GC Exh. 9, p. 1.) If these steps do not obtain the required result, further infractions may be addressed through disciplinary suspensions and ultimately discharge. Significantly, the policy explains that a verbal warning is the appropriate response to “initial performance problems.” (GC Exh. 9, p. 1.) Beyond this, the employee handbook advises that application of the progressive disciplinary methodology will involve consideration of both “the circumstances of the situation and an employee’s overall work record.” (GC Exh. 8, p. 20.)

Certain things about the application of this policy to Gross stand out immediately. The imposition of the ultimate sanction on a 13-year veteran with no prior infractions of any type certainly suggests a failure to consider Gross’ overall work record as a mitigating factor. No management witness provided any reasonable explanation for the failure to assess this factor. Furthermore, no witness explained whether a conscious decision had been made that Gross’ “initial performance problem” merited treatment beyond that ordinarily specified in the policy. Certainly, no witness justified the decision to move from the level of a verbal warning all the way to a sanction of termination as the appropriate response for Gross’ first work infraction in well over a decade of service. The Hospital’s unexplained deviations from its corporate disciplinary policies in the treatment of a veteran employee with a fine record constitute potent circumstantial evidence of a primary unlawful motivation. See *Tubular Corp. of America*, 337 NLRB 99, 99 (2001) (discrimination inferred where employer’s behavior was “inconsistent with its progressive discipline system”).

In *Tubular Corp.*, infra., the Board also noted the importance of a comparison between the discipline under analysis and the employer’s past practices. I have already observed that there was no evidence of any prior transfusion errors at the Hospital. However, there were ample records regarding past medication errors that were similar in nature and extent to the error made by Gross in this case. Examination of those records underscores that Gross was given “atypically strict treatment.” *Publix Supermarkets, Inc.*, 347 NLRB No. 124, slip op. at 6 (2006). I will now provide a brief description of each of these incidents and the nature of management’s responses. These will be presented in chronological order, commencing with the more remote and ending with those very close in time to Gross’ discipline.

On March 31, 2002, Nurse Phyllis Gibbs was given a verbal reprimand for the offense of substandard work due to the administration of an injection to a patient “without proper identification.” (GC Exh. 65.) In another incident that clearly seems of equivalent severity to Gross’ mistake, on May 26, 2004, a Nurse Neac was given a counseling session with her department manager for failing to check a patient’s armband before administering a dose of Heparin. (GC Exh. 37.)

In May 2005, Nurse Pat Lutes removed medications from the storage drawer for room 375 and administered them to the patient in room 385. The record does not reveal the management’s response. However, using the scoring system contained on the record, it would appear that the expected response was a counseling session with the department manager. (GC Exh. 42, p. 2.) In any event, it is certain that the Hospital does not contend that the offender was discharged from employment.⁴⁷ Later that year, on December 12, Nurse Angie

immediate termination. I have found that White’s repeated failures and omissions toward her patient represent an example of this situation.

⁴⁷ Indeed, it is reasonable to draw an adverse inference on this point since it would be a simple matter for the Hospital to have explained what happened to Nurse Lutes as a result of her negligent administration of three medications to the wrong patient.

Willett administered Lasix to the wrong patient. Once again, the documents of record do not show the precise nature of the Hospital's response but the computation on the form indicates that the response should be a counseling session. (GC Exh. 41, p. 2.) And, once again, the Hospital does not contend that Nurse Willett was fired for her mistake.

5 It will be recalled that Nurse Gross committed her error on September 14, 2006. That year was a dismal year so far as the staff's performance in the area of medication administration. On April 6, Nurse Christy Brewer gave Coumadin to the wrong patient. The record explains that she "was in a hurry to pass meds & apparently pulled the wrong MAR for the wrong pt." (GC Exh. 38, p. 3.) Was she fired? On the contrary, the record blandly suggests
10 that it was necessary to "[d]iscuss with the nurse the importance of matching the pt's ID band with the name on the MAR." (GC Exh. 38, p. 3.) Linkous testified about this incident and confirmed that Brewer was simply given a counseling session.⁴⁸

15 Another startling example of the disparate treatment of Gross occurred on May 22, 2006. Nurse Sonya Combs administered the wrong antibiotic to a patient. The records show the required follow up to have been a "talk with nurse about checking the meds better." (R. Exh. 16, p. 4.) Linkous was also asked about this episode. Indeed, counsel for the Hospital asked her, "[W]ould this kind of mistake and error, should it have led to a suspension or a termination of the nurse on account of what happened?" Linkous responded in the negative, explaining that "there
20 was no negative outcome." (Tr. 1091.) Once again, this explains nothing since Oakley T also failed to suffer any negative outcome. In fact, Oakley T happened to have been given a bag of blood that was entirely compatible with his profile. In that sense, he was not really given anything erroneous at all. By contrast, Nurse Combs' patient received a drug different from the one that the physician had prescribed.

25 In the month prior to the transfusion incident, Nurse Kathy Brandenburg gave a patient 10 extra doses of medication because a pharmacy employee wrote down the wrong amount and the nurse "didn't do chart check right." (GC Exh. 48, p. 6.) While Gross was fired, Brandenburg was counseled to "look at charts better during chart checks." (GC Exh. 48, p. 6.)
30 Just a few weeks later, Nurse Judy Chadwell wrongly administered insulin to a patient because, in the words of the form, she "failed to check the medication label for accuracy." (GC Exh. 40.) There is no indication of the nature of Nurse Chadwell's punishment. Once again, it would have been a simple matter for the Hospital to provide records or testimony indicating that she was terminated from employment for her negligence.

35 Finally, we come to an event on September 11, less than a week before Gross' transfusion mistake. Nurse Kassandra Combs administered an adult dose of Heparin to a child. The Hospital's recommended response to this error was that "nurses need to check and recheck orders against MARS." (R. Exh. 17, p. 4.) Linkous was again asked whether this
40 incident had justified suspension or termination. She replied that it did not since it was the correct medication, merely "a different dose or a—a bigger dose." (Tr. 1097.) Different indeed, as the record establishes that it was exactly double the prescribed dose. (R. Exh. 17, p. 1.) Once again, the reasoning defies any concept of logic. Oakley T received exactly what his physician ordered (albeit only through the greatest of good fortune). Nurse Combs' pediatric
45 patient received double the dose ordered by the doctor. Neither patient suffered any apparent

50 ⁴⁸ In an effort to justify the obvious disparity between the treatment of Brewer and Gross, Linkous noted that Brewer's patient was not harmed. The difficulty with this explanation is that, fortunately, Oakley T was not harmed either. The fact remains that both patients were placed in danger of potential harm, yet one nurse was fired and the other was given verbal counseling.

harm, yet one nurse was counseled and one was fired.

The Hospital's disciplinary policy promises its employees that "[e]ach facility will administer disciplinary practices in a fair and consistent manner." (GC Exh. 9, p. 1.) Comparison of the treatment of Gross with that afforded to her colleagues on the nursing staff shows this promise to be a hollow mockery. Her grotesquely unfair and inconsistent treatment is compelling evidence of unlawful discrimination against a veteran employee with a perfect prior record.⁴⁹

As just described, there is abundant evidence showing that the Hospital failed to follow its established disciplinary policies or provide a convincing explanation of its decision to deviate from them in the case of Gross. Even more clearly, the evidence demands a conclusion that the Hospital treated Gross in a vastly more strict fashion than many other nurses who engaged in similar degrees of misconduct. The last of the factors cited by the Board in *Embassy Vacation Resorts*, supra, is the proximity of the discipline to the union activity. Even here, there is reason to draw an inference against the Employer. While it is certainly true that the Hospital did not pick the day on which White and Gross made their transfusion error, the decision to sweep Gross out with the same broom as White came conveniently timed to enable management to use it as a justification for the cancellation of a collective-bargaining session.

Analysis of the circumstantial evidence on the question of the sincerity of the Employer's claimed motive for Gross' discharge convinces me that she is entitled to relief under the Act. Based on the totality of the evidence, I find that, but for her participation on the negotiating committee, Gross would have received a verbal counseling for her isolated error in verification of Oakley T's transfusion. The decision to suspend and terminate her employment after well over a decade of unblemished service was a direct product of an unlawful desire to punish her protected activities and thwart the Union.⁵⁰ I will recommend that unfair labor practices be found as to Gross' suspension and termination.

⁴⁹ I recognize that the Hospital points to the discharge of lab employee Vires as proof of consistent disciplinary treatment. There are several problems with this argument. First, the Hospital asserts that Vires was not a member of the bargaining unit because she was a statutory supervisor. It presented no evidence regarding the disciplinary standards for supervisory personnel. Certainly, it is possible that an employer would hold such personnel to a higher standard of conduct. Absent evidence on the issue, I cannot evaluate the propriety of her discharge. In addition, I have no evidence regarding her length of service and past disciplinary history. Finally, and most importantly, her level of misconduct toward Oakley T was much higher than that of Gross. It will be recalled that Vires set the whole chain of events in motion by negligently removing the wrong blood bag from the storage facility. She then proceeded to compound her error through her complete failure to identify her mistake during the detailed verification check that White claimed the two women performed. In my view, her culpability is roughly equal to that of White and clearly greater than that of Gross.

⁵⁰ Regarding the decision to suspend Gross, I note that the record does not show that any of the similarly situated nurses were subject to investigatory suspension for their various medication errors. In addition, the suspension was fatally tainted by its use as a weapon against the Union and by the hostile manner in which management conveyed it to Gross through Pidcock.

D. The Suspension of Frances Lynn Combs in 2007

The Facts

5 The remaining allegation in this case concerns the propriety of the investigatory suspension imposed on Frances Lynn Combs⁵¹ on January 18, 2007, and maintained in effect as of the current time.⁵² Combs is a 37 year veteran of the nursing profession. The Hospital hired her in January 2003 to serve as a nurse in the medical/surgical unit. At the time of these events, Unit Manager Kathy Thacker was Combs' direct supervisor. In turn, Thacker reported to
10 Chief Nursing Officer Linkous.

 A few months after Combs was hired, she was offered a new position. Linkous testified that the Hospital was planning to open a swing bed unit. She learned that Combs had significant prior experience with this sort of unit. As a result, it was intended that Combs would
15 be appointed to the position of swing bed unit coordinator. Combs testified that she did some preliminary work regarding the new unit.

 In early April 2006, Combs joined the Union's bargaining committee and attended two collective-bargaining sessions on the Union's behalf. Union Organizing Coordinator Pidcock testified that a third session was scheduled for later that month. This was cancelled by Carmody who informed Pidcock that, "we wouldn't be going forward that day because I had reason to believe that you had a member of a management person on your side of the table."⁵³ (Tr. 1510.) Subsequently, Combs sent a letter to Linkous indicating that she was unaware that she was being considered as part of management. She specifically declined any such position
20 in management. In her letter, she expressed evident surprise about the characterization of her status, noting that she had not "received compensatory pay for any management role." (R. Exh. 15.) In the months following the resolution of this so-called management issue, Combs continued to attend bargaining sessions on behalf of the Union.

 Toward the end of 2006, the Hospital decided to make changes in its policies governing the method for administration of medications to patients. On December 12, 2006, the new policy was distributed to the nursing staff and the nurses were required to sign it. Combs testified that she felt that the new policy "would be difficult to implement." (Tr. 119.) She took her concerns to Donald Rentfro, the recently appointed replacement for Bevins as chief executive officer of the Hospital. She presented Rentfro with a document that set forth her concerns about the medication policy. He promised to refer it to Linkous. He testified that he
30 did make this referral later that day. Thacker reported that based on Combs' concerns a change was made to the policy regarding the labeling of syringes.

 On the next day, Linkous and Thacker met with three nurses, including Combs. They discussed the new policy and Combs signed the form containing it. She testified that, based on these discussions, she believed that the policy "was going to be revised" in order to make it

⁵¹ Combs goes by the name of "Lynn."

45 ⁵² All dates in this portion of the decision are in 2007 unless otherwise indicated.

⁵³ The Hospital's last-minute cancellation of a bargaining session due to an allegation concerning the situation of a member of the Union's negotiating committee foreshadows the employer's conduct in canceling a subsequent session due to the newly-announced suspensions of White and Gross. This is a troubling pattern of last-minute disruption of
50 scheduled negotiations using the status of union committee members as a purported excuse.

“easy to implement it.” (Tr. 120, 122.) She conceded, however, that when she signed the form there was no mention of revisions on it.

On January 10, Combs administered medications to a patient in a manner that was inconsistent with the new policy. Immediately thereafter, Thacker spoke to her about this. Combs agreed that she had not complied with the policy, observing that, “We don’t need to be fools. We need to use common sense.” (Tr. 63.) Combs told Thacker that she would take the matter up with Linkous. Five minutes later, she and a colleague, Nurse Debra Adams, proceeded to Linkous’ office to raise the issue. In her testimony, Combs admitted that she was concerned that Thacker was going to discipline her for violating the policy and wished to seek a resolution from Linkous. She indicated that Linkous told her that “maybe the policy might need to be made a little more user friendly.” (Tr. 67.) Combs responded by observing that if she or anyone else were to be disciplined, “the policy should at least make sense.” (Tr. 67.) Linkous noted that she had not heard from Thacker regarding the incident, but she would review the policy and “get back with her as soon as I could.” (Tr. 1045.)

Approximately a week later, Linkous spoke to Thacker about the incident. Thacker confirmed that she had observed Combs violate the new medication policy. Linkous testified that they concluded it would be appropriate to issue a verbal warning to Combs for this violation. Thacker confirmed that this was the decision reached by the two supervisors regarding the response to Combs’ misconduct. Because Combs was ill, it was necessary to wait approximately a week in order to effectuate this decision.

January 18 was selected as the date on which Linkous and Thacker would issue the verbal warning to Combs. Linkous, Thacker, and Human Resources Director Mitchell convened in Linkous’ office for this purpose. Prior to the meeting with Combs, they engaged in a very peculiar and highly probative discussion. This came to light during counsel for the General Counsel’s cross-examination of Linkous as follows:

COUNSEL: Now, before—before you called Ms. Combs into this meeting, did you tell Ms. Mitchell and Ms. Thacker that if Ms. Combs refused to meet with you all, that you would have to place her on an indefinite suspension?

LINKOUS: I probably—yeah, I probably did. I’m not sure, but, well, I think I did.

COUNSEL: I’m sorry, you said I really think I did?

LINKOUS: Yes, I think I did, yes.

(Tr. 1129—1130.) Any lingering doubt about this conversation was dispelled by Mitchell who was asked the following:

COUNSEL: [B]efore Lynn Combs actually came into the room, did Debbie Linkous tell you that if Lynn Combs refused to go ahead with the meeting you all would probably have to suspend her?

MITCHELL: That’s what she said she would probably do.

COUNSEL: And that’s before Lynn Combs came into the room –

MITCHELL: Yes.

(Tr. 1604—1605.)

5 This testimony left me incredulous. I pursued the matter with Mitchell by asking,

JUDGE: Does this happen often that an employee refuses to proceed with a meeting?

10 MITCHELL: No, no.⁵⁴

JUDGE: So why would they have been thinking that that might happen with Ms. Combs?

15 MITCHELL: I don't know, sir. I can't answer that.

(Tr. 1605—1606.) During the legal analysis portion of this discussion, I will address in detail my interpretation of the import of this strange and revealing preliminary conversation among the supervisors who had gathered for the purpose of disciplining Combs.

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At 5 p.m., Linkous instructed Combs to come to her office. Combs testified that Linkous explained that she “had made a decision regarding the January 10th incident and that she wanted to talk to me about it.” (Tr. 69.) Combs invited Nurse Adams to attend the meeting with her. They proceeded to Linkous’ office. Linkous, Thacker, and Human Resources Director Mitchell were waiting for her arrival.⁵⁵

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With the exception of Adams, all of the participants in the meeting testified regarding its content. While there were shades of difference among the accounts, the broad outlines are not in dispute. I will observe, however, that the account of the management witnesses was a bit too perfect. By this I mean that it was couched in precisely the sort of legalistic conclusions that would advance the Hospital’s case. To the extent that these nuances matter, I credit Combs’ more unvarnished version.

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In any event, it is clear that the first thing that happened was that Linkous informed Adams that she was not permitted to attend the meeting. Combs testified that, once Adams departed, she asked Linkous,

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if I wasn't allowed to have Ms. Adams there—uh, because I'm a union member would it—you know, would it be possible to have a union representative there and that I could call Randy Pidcock to come in.

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(Tr. 72—73.) When Linkous rejected this suggestion, Combs explained that,

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⁵⁴ In fact, Bevins testified that the last time an employee refused to attend a disciplinary meeting was in 1998.

⁵⁵ Combs acknowledged that the presence of Mitchell struck her as significant. Thus, in her court complaint, it is alleged that, “[b]ecause Naomi Mitchell was present in the meeting, this signaled to Combs that a write-up or some type of employment action was about to occur.” (R. Exh. 2, p. 5.)

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it was my understanding, having been part of the union[,] that representation for anything to do with a disciplinary discussion I had a right to representation for that and that I did not understand why she was telling me no.

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(Tr. 73.)

10 Mitchell testified that, upon hearing this, Linkous asked Combs, “[A]re you refusing to go ahead with the meeting and Lynn said yes.” (Tr. 1589.) Combs then observed that, while she had a lot to learn about labor relations, she really believed that she had a right to union representation at the meeting. Whereupon, Linkous explained to Combs that she was being placed on investigatory suspension.

15 At this juncture, Combs asked if she would receive compensation for the time spent on suspension if it turned out that she had been correct in her belief regarding her right to representation. Mitchell said this would be the normal practice in situations where it was determined that the employee had done nothing wrong.

20 As the abortive meeting drew to a close, Combs spoke to Linkous as follows, “I have no personal issues with you. You all have treated me fairly. I just believe this is a matter of employee rights.” (Tr. 74.) With that, she asked if Linkous wanted her to turn her patients over to another nurse and clock out. Linkous responded in the affirmative. Combs did as instructed and departed the Hospital.

25 On the next day, Combs telephoned Pidcock to inform him of her suspension. He promised to take appropriate action. That action consisted of a letter addressed to Rentfro. In it, Pidcock noted that Combs had been suspended “when she was called in to a disciplinary meeting and insisted on Union representation.” (R. Exh. 24.) Pidcock requested an opportunity to meet with Combs and Rentfro to discuss the matter “at your earliest convenience . . . preferably late today or early next week.” (R. Exh. 24.)

30 Rentfro testified that, while he could not locate his copy, he responded to Pidcock by letter on the same day, advising Pidcock that he would have a meeting and asking for an opportunity to have counsel present during it. In fact, Rentfro’s recollection was in error. Once the Union produced its copy of the response, it became apparent that it was actually dated 35 January 22. In it, Rentfro noted that the Hospital would “communicate with Ms. Combs further as our investigation proceeds.” (R. Exh. 26, p. 1.) He also agreed to meet with Pidcock, but only “after I have had an opportunity to gather the facts underlying Ms. Combs’ suspension, and consult with counsel.” (R. Exh. 26, p. 1.) He promised that he would notify Pidcock once he 40 was ready to proceed with such a meeting. He ended by indicating that he would defer making a final decision on the matter “until after you have been afforded an opportunity to meet as you have requested, unless you advise me to the contrary.” (R. Exh. 26, p. 1.)

45 Subsequently, the parties planned to have this meeting in conjunction with a previously scheduled bargaining session. That session and a succeeding one were both postponed due to illness in a union committee member’s family. After the cancellation of the second of these scheduled meetings, there has never been another bargaining session nor any meeting to discuss Combs’ suspension.

50 Also on January 22, Linkous addressed a letter to Combs confirming that she had been placed on “unpaid investigatory suspension” on January 18, “after you expressly refused to

meet with me without being accompanied by Debra Adams, or, if not Debra Adams, then Randall Pidcock.” (R. Exh. 26, p. 2.) The letter ended with the promise that, “We will communicate further with you as the investigation progresses.” (R. Exh. 26, p. 2.) Although it has been well over a year since that promise, Combs testified that she has never received a further communication from the Hospital and has never been offered a resumption of her employment. In his testimony, Rentfro confirmed that Combs has remained on investigatory suspension and has been in that status since January 18, 2007.

Legal Analysis of Combs’ Investigatory Suspension

As the record was developed regarding the circumstances of Combs’ suspension, I began to realize that the Hospital’s action could be viewed in two ways. By one interpretation, Combs was suspended because she made a demand for representation by her union. From the other point of view, she was suspended because, once her demand was denied, she engaged in an act of insubordination by insisting on a postponement of the meeting so that she could investigate her entitlement to representation.

Under the first interpretation, it is necessary to determine whether the Hospital’s imposition of Combs’ suspension was lawful because her conduct was of a character that took it outside the protections of the Act. Under the second view, the analysis would focus on the Employer’s motivation and it would become necessary to determine whether Combs was suspended for insubordination or in retaliation for her union activities. Different analytical models are employed in assessing these two types of issues. Quite recently, in *Register Guard*, 351 NLRB No. 70, slip op. at 11 (2007), the Board explained, “*Wright Line* is appropriately used in cases turning on employer motivation. A *Wright Line* analysis is not appropriate where the conduct for which the employer claims to have disciplined the employee was union or other protected activity.” [Citations and internal quotation marks omitted.]

Because I found that neither of these ways of looking at this situation is obviously unreasonable, I asked counsel to address the choice of methodology in their post trial briefs. Perhaps not surprisingly, counsel for the General Counsel urged me to employ the test for cases involving a single motive, while counsel for the Employer urged assessment using a dual motive approach. I continue to find that both ways of looking at this situation are productive. As a result, I will assess the conduct of the parties using both analytical tests.⁵⁶

Turning first to the method urged by the General Counsel, the Board employs a four-part test set forth in its leading case of *Atlantic Steel Co.*, 235 NLRB 814, 816 (1979). Thus, the Board has explained,

When an employee is discharged for conduct that is part of the *res gestae* of protected concerted activities, the pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act. . . . In making this determination, the Board examines the following factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee’s outburst; and (4) whether the outburst was, in any way, provoked by an employer’s unfair labor practice.

⁵⁶ The Board employed a similar methodology involving assessment under both the *Atlantic Steel* and *Wright Line* tests in *Waste Management of Arizona*, 345 NLRB 1339, 1340—1341 (2005).

Stanford Hotel, 344 NLRB 558, 558 (2005). (Citations, including one to *Atlantic Steel*, omitted.)

As to the first factor, Combs made her initial demand for representation and subsequent demand for a postponement of the meeting while at Linkous' office. This was a private venue and there is no evidence whatsoever that Combs' statements were overheard by any other employee, a patient of the Hospital, or any member of the public. As a result, this factor favors a finding that Combs' behavior was protected.

The second factor concerns the subject matter involved in Combs' statements. There is no dispute that Combs invoked a supposed right to the presence of a union representative at the meeting. In response to my question, Human Resources Director Mitchell confirmed that the Hospital's policy on this matter, "is going to track labor law." (Tr. 1596.) It is, however, noteworthy that the Hospital's longtime chief executive officer until shortly before these events, Bevins, testified that this policy was not reduced to writing and had not been posted or sent to the employees.

Combs informed Linkous, Thacker, and Mitchell that, while she was not an expert in labor law, she believed that she had a right to union representation in disciplinary meetings. Of course, Combs was referring to a right articulated by the Board and subsequently affirmed by the Supreme Court in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). In *Weingarten*, the Court approved the Board's conclusion that the Act "guarantees an employee's right to the presence of a union representative at an investigatory interview in which the risk of discipline reasonably inheres." 420 U.S. at 262. Without doubt, it was this right that Combs was invoking.

Unfortunately, Combs was unaware that the Board had subsequently placed a limitation on the *Weingarten* right, holding that:

[A]s long as the employer has reached a final, binding decision to impose certain discipline on the employee prior to the interview, based on facts and evidence obtained prior to the interview, no Section 7 right to union representation exists under *Weingarten* when the employer meets with the employee simply to inform him of, or impose, that previously determined discipline.

Baton Rouge Water Works Co., 246 NLRB 995, 997 (1979). See also *Barnet of Indiana*, 284 NLRB 1024, 1025 (1989) ("this protection does not extend to situations where an employer merely informs an employee of a decision previously arrived at by the employer").

The evidence establishes that the meeting convened by Linkous was of the type described in *Baton Rouge Water Works*. I credit the testimony of the supervisors that they had previously conferred and decided to issue a verbal warning to Combs. Prior to the meeting, they had also prepared the required employee verbal documentation form showing that Combs was being warned for substandard work due to her "not following the medication administration policy." (R. Exh. 23.) Combs testified that her "understanding" was that the meeting "was called to give a result of the discussions that we had had prior on what to do around this medication policy." (Tr. 107.) Furthermore, I have already noted that Combs' court complaint is even more forthright on this point, stating that Mitchell's presence in Linkous' office "signaled . . . that a write-up or some type of employment action was about to occur." (R. Exh. 2, p. 5.) The Employer had already conducted its investigation and it is clear that the meeting under examination was for the limited purpose described in *Baton Rouge Water Works*.

While Combs was asserting entitlement to a right that she did not possess, there was nothing unreasonable about her behavior in this regard. The Hospital's policy had not been published and the Board's decision to place this limitation on *Weingarten* certainly does not render a contrary viewpoint unreasonable. Indeed, in *Baton Rouge Water Works*, then Chairman Fanning issued a strikingly vehement dissent deploring the majority's holding as "totally unrealistic," an abdication of the Board's responsibilities, and a "pity." 246 NLRB at 999. The point is that it is obvious that reasonable persons may disagree about whether a right to representation should be afforded in the situation that Combs encountered.⁵⁷ Nothing in the nature of the subject matter raised by Combs can serve to deprive her of the protection of the Act.

The third factor cited in *Atlantic Steel* is the nature of the employee's conduct. I find that Combs was not unconditionally refusing to participate in the meeting. It is apparent that she was seeking a postponement of the meeting for the purposes of enabling the supervisors to confirm or modify their position that she was not entitled to representation and to afford her an opportunity to consult Pidcock for advice on the same question. This is underscored by Mitchell's testimony that Combs was not agitated or upset and that her demeanor throughout the incident was "just normal." (Tr. 1606.) Combs' mistaken assertion of a right to representation, coupled with her calm insistence on a postponement of the meeting in order to effectuate that right, was not the sort of conduct that would deprive her of the protection of the Act. In this regard, I also note that Combs' conduct did not involve any violation of her professional nursing responsibilities and she, herself, raised the need for her to give the nurse who would be assigned to cover her duties a full report on her patients before leaving the Hospital.

The final factor is whether the employee's conduct was "provoked by an employer's unfair labor practice." *Atlantic Steel Co.*, supra, at 816. As I will discuss in connection with the dual motive analysis, I have grave concerns about the employer's motives and intentions regarding this disciplinary meeting. Nevertheless, I do not find that Combs' behavior was provoked by some prior unfair labor practice. It may well be that the decision to issue a verbal warning to Combs was designed, to some degree, to provoke Combs into some misstep. However, that is something apart from what is meant by the language of *Atlantic Steel* and is best discussed in connection with the *Wright Line* analysis. In consequence, I conclude that this factor favors the Employer's position.

Three of the four *Atlantic Steel* factors support a determination that Combs' conduct did not remove her from the protection of the Act. Of course, my ultimate conclusion that Combs is entitled to the Act's protection is not derived from an arithmetical computation, but rather a comprehensive appraisal of the context combined with a full consideration of the policies underlying the Act. Very recently, the Board undertook the same analysis in another health care case. In that case, an off-duty employee was suspended for refusing to comply with an order to leave the premises. The Board noted that the incident occurred in a recreation room and did not affect any work. The subject matter was a dispute over the employee's assertion of a right to be on the premises while off-duty. The employee's conduct, "involved no profanity and no

⁵⁷ In any event, the Board and the Supreme Court have long eschewed any attempt to impose a requirement of reasonableness. As the Court observed almost 50 years ago, "It has long been settled that the reasonableness of workers' decisions to engage in concerted activity is irrelevant." *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 16 (1962). See also *QSI, Inc.*, 346 NLRB 1117, 1117 (2006), where the Board "reaffirm[ed]" its position that the reasonableness of an employee's means of protest is irrelevant.

threatening conduct.” *Bloomfield Health Care Center*, 352 NLRB No. 39, slip op. at 3 (2008). In these circumstances,⁵⁸ the Board held that the employee’s protest “was not sufficiently egregious to remove it from the protection of the Act.” *Id.*, slip op. at 3. I conclude that, under a single-motive analysis, the Hospital’s indefinite investigatory suspension of Combs for engaging in union activity was a violation of the Act.⁵⁹

5

I will now conduct the dual-motive analysis using the standards mandated by *Wright Line* as described earlier in this decision. Like *White* and *Gross*, there is no dispute that Combs was an active member of the Union’s negotiating committee and had been attending bargaining sessions in that capacity. In addition, Linkous readily admitted that she was aware of Combs’ role on the committee at the time that she suspended her.⁶⁰ As a result, the focus of the inquiry turns to the issue of unlawful animus against Combs arising from her participation on the Union’s committee.

10

To begin, it is important to delineate what is not at issue. In this connection, I asked the following:

15

JUDGE: [L]et me raise with both counsels something here. My understanding thus far, Mr. Carmody, is that the Hospital’s stated reason for the suspension of Ms. Combs was not some misconduct regarding a medication policy or administration of medications, but rather a refusal to attend a disciplinary meeting?

20

MR. BRYAN CARMODY: That’s true Your Honor.

25

....

JUDGE: Mr. Ness, what’s your view of this?

30

....

MR. NESS: Right, we’re not alleging that as a violation. We’re not trying prove that the verbal warning . . . was a violation rather just the suspension.

35

(Tr. 1399—1402.) Consistently with the nature of this discussion, the General Counsel does not contend that the Hospital engaged in any impropriety by deciding to issue a warning to Combs regarding her violation of the medication policy. By the same token, the Hospital does not assert that Combs’ violation of that policy formed any portion of its rationale for imposition of her investigatory suspension.

40

With the confines of the issue understood, I will address the presence of unlawful

⁵⁸ The Board also found that the employer had provoked the misconduct by engaging in the unfair labor practice of excluding only off-duty union supporters from the premises. In my view, this does not meaningfully distinguish the case from the facts established here.

45

⁵⁹ In connection with my dual-motive analysis, I will discuss the related issue of the significance of the Employer’s decision to keep Combs on a so-called investigative suspension for well over a year and until the present time. This egregious misconduct sheds retrospective light on the propriety of the Hospital’s conduct throughout this case.

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⁶⁰ Indeed, Linkous testified that she knew that Combs was “strong in the Union.” (Tr. 1041.)

animus. For reasons previously discussed in detail, I have concluded that the Hospital's history of prior discriminatory discharges for union activities constituted probative evidence of animus against White and Gross. The events here took place approximately 3 months later. That span of time does not attenuate the importance of this evidence of past mindset and the misconduct it produced to any material degree. To the contrary, my determination that the adverse actions
5 taken against White and Gross were, in part, motivated by the same sort of animus demonstrates the tenacious nature of the set of attitudes uncovered in the prior case. Beyond that, my determination that such attitudes were the dispositive factor in the unlawful decision to fire Gross is powerful evidence of identical animus against Combs arising out of the similar nature of both nurses' participation on the negotiating committee.

10 Beyond this history, I find manifestations of animus from the conduct of management in the moments immediately preceding the fateful meeting, in Mitchell's conduct during the meeting, and from the behavior of the management of the Hospital throughout the lengthy period after the meeting.

15 It will be recalled that the three managers, Linkous, Thacker, and Mitchell, had gathered in Linkous' office preparatory to giving Combs her verbal warning. Both Linkous and Mitchell confirmed that they discussed the possibility that Combs would refuse to participate in the meeting. Linkous stated that, in that eventuality, she would suspend Combs' employment. As
20 counsel for the General Counsel observes, "This is certainly odd because Linkous was not aware of any previous occasions when Combs had allegedly refused to attend a meeting with management." (GC Br. at pp. 31—32.) Indeed, Bevins reported that such behavior was so rare that the last time any employee had done so was almost a decade earlier. This raises the question of whether the supervisors were attempting to provoke Combs into making a misstep that would justify her suspension.⁶¹ During the trial, I expressed surprise and puzzlement about
25 this conversation. Despite this, neither Linkous, Mitchell, nor counsel for the Hospital have offered any explanation of the reason for this conversation and I cannot discern any reason other than an unlawfully motivated one.

30 Just as I infer animus from the occurrence of a conversation that I very much doubt would have taken place absent unlawful motivation, I find additional evidence of animus regarding a conversation that one would reasonably have expected to occur during the meeting, but did not. I refer here to Mitchell's strange and disturbing silence in the face of Combs' request for representation. Mitchell has worked for the Hospital's human resources department
35 since 1988 and has served as the director of human resources since 1998. It is evident that she participated in the meeting with Combs as the authoritative representative of that department. Indeed, Combs indicated that Mitchell's presence conveyed a strong message to her about the purpose of the meeting.

40 At the meeting, Combs asked if it would be "possible to have a union representative." (Tr. 72—73.) Linkous responded by denying the request. They discussed the matter further, with Combs indicating that she thought she had right to representation "for anything to do with a disciplinary discussion." (Tr. 73.) I simply cannot understand why the authoritative
45 spokesperson for the Employer's personnel system did not intervene and explain the Hospital's policy regarding representation at meetings that did not involve an investigatory aspect. Mitchell readily conceded that she was aware of the policy. Yet, she chose not to make any effort to

50 ⁶¹ It is clear that Linkous was aware that Combs had a somewhat volatile nature when displeased by actions taken by her supervisors. In 2005, Combs made an impulsive decision to quit during a dispute. Linkous calmed her down and persuaded her to return to work.

avert the unfortunate outcome that followed on Combs' mistaken assertion of a right to representation.

At the trial, I asked Mitchell why she was silent in the face of Combs' obvious misunderstanding of the situation. The best she could offer was to respond that, "I wasn't the one doing the meeting." (Tr. 1597.) Of course, this merely begs the question of her presence at the meeting. I pressed for more explanation and Mitchell replied, "[Combs] said she knew her rights what she could and couldn't do. She didn't know everything but she said she knew her rights. So I didn't say anything if she—you know." (Tr. 1602.)

Ironically, Mitchell's attempt to be self-effacing about her limited status at the meeting was thoroughly undermined by the conversation that followed Linkous' suspension of Combs. At that point, Combs asked if she would receive backpay in the event it was determined that she had not been mistaken about her rights. Linkous referred this inquiry to Mitchell. When asked why she did so, she testified that, "I'm not HR [Human Resources], so I couldn't truthfully answer that question, so I directed her to Ms. Mitchell, the HR person." (Tr. 1135.) Absent an intention to provoke Combs into a misstep, I cannot conceive of a reason why the managers did not similarly turn to Mitchell for an authoritative expression of the Hospital's rules regarding union representation in an effort to avert all that has now followed.⁶²

I recognize that the Hospital takes the viewpoint that it was not incumbent on Mitchell to explain an employee's *Weingarten* rights to her. I have no quarrel with this proposition. The point, however, is that Mitchell failed to explain the Hospital's *Baton Rouge Water Works* rights to Combs. That is entirely another matter and Mitchell's silence in circumstances where one would have expected her to act authoritatively suggests a peculiar lack of interest in averting an ongoing disciplinary problem.

The Hospital's past set of attitudes and actions, coupled with the strange behavior of the managers immediately preceding and during the meeting all point to an unlawful motivation as the best explanation for what occurred. Beyond this, management's behavior in the period of well over a year since the imposition of the investigatory suspension is even more striking. Chief Executive Officer Rentfro testified that Combs was placed on investigatory suspension on January 18, 2007, and remained in that status as of the date of his testimony, April 8, 2008.⁶³ Similarly, Combs testified that, since her suspension on January 18, she has heard nothing further from her employer.

I have already noted in connection with the discharges of White and Gross that the Board looks to circumstantial evidence of animus that may include, "inconsistencies between the proffered reason for the discipline and other actions of the employer, disparate treatment . . . [and] deviation from past practice." *Embassy Vacation Resorts*, supra, at 847. It is, therefore, important to examine the evidence regarding the Hospital's theory and practice in the use of the

⁶² Mitchell has not always been so shy. As long ago as 1997 when she was merely an administrative assistant in the human resources department, she participated in what was a difficult and emotional disciplinary meeting. Given how distraught that employee became upon learning that she was being discharged for misconduct, Mitchell took the initiative. As a documentary account notes, "Naomi Mitchell explained the procedure of filing a grievance report and went to get the proper papers for [the employee]." (R. Exh. 28, p. 3.) One may only regret that Mitchell failed to show a similar type of initiative in this situation.

⁶³ In his post trial brief, counsel for the Hospital confirms that, "to this day, Ms. Combs remains on investigatory suspension." (R. Br., at p. 14.)

investigatory suspension.

The Hospital's written disciplinary policies clearly differentiate between a disciplinary suspension and an investigatory suspension. A disciplinary suspension is a punishment consisting of an unpaid leave of absence for a term not to exceed 10 days. By contrast, an
 5 investigatory suspension is described as "an interim action waiting the outcome of an investigation or review by management or court action, etc." (GC Exh. 9, p. 2.) Rentfro confirmed that Combs' suspension by Linkous was "to allow time to further investigate the situation and get appropriate counsel as to the next steps." (Tr. 1499.)

10 Rentfro's explanation is clearly plausible and I certainly comprehend his desire to confer with counsel before making any final decision as to how to resolve Combs' situation. However, this explanation does not begin to account for the length of Combs' investigatory suspension. There was certainly nothing complex about the events under analysis by management. Since
 15 all of the alleged misconduct by Combs took place in the direct presence of three managers, there was hardly a need for detective work. Furthermore, all of the evidence from management established that the Hospital had a longstanding policy regarding the issue of representation and, in fact, the managers had already discussed and decided what to do before Combs appeared at Linkous' office. I conclude that the only possible remaining matter that could have taken any amount of time at all was the desire to get an opinion from legal counsel.

20 Rentfro testified that the length of Combs' investigatory suspension was "[v]ery atypical." (Tr. 1504.) He conceded that a typical length for a relatively uncomplicated case would be between 3 to 10 days. Mitchell reported that such an investigative suspension should take, "maybe a couple weeks, maybe not even that, that long; a week or two weeks." (Tr. 1595.) She
 25 confirmed that this was consistent with good management and personnel practices. She endorsed the logic that an innocent employee should be returned to productive work as soon as possible and an employee guilty of serious misconduct should be gotten off the rolls with the same speed. All of this underscores the bizarre contrast between the intended length of investigatory suspensions under the Hospital's policies and the interminable length of Combs' suspension.

30 A review of the record also reveals the startling disparity between Combs' protracted suspension and the treatment of other employees who found themselves under such interim measures. In particular, it is worthwhile to examine the timing for other employees involved in
 35 this case. Fields was suspended on August 9 and discharged by letter dated August 31. This is an entirely rational use of the investigatory suspension. The misconduct alleged against Fields required careful investigation to determine the facts, consultation with medical experts to assess the complex meaning of the events, and referrals to the highest levels of management and to legal counsel before the selection of a final sanction. Given the complexities involved, Fields' 3-
 40 week investigatory suspension appears entirely appropriate.

Nurse White was suspended on September 18. She was terminated by letter dated October 2. Once again, the matter involved a clear need for thorough investigation, legal
 45 consultation, and decision making at the highest levels. All things being equal, White's suspension for a little more than 2 weeks was reasonable in length.⁶⁴

50 ⁶⁴ I have already explained that, in the case of Gross, all things were not equal since the Hospital never suspended other nurses for errors similar to the one she made. Thus, while the length of Gross' suspension may have been reasonable for an investigatory suspension, the imposition of any suspension at all was based on unlawful considerations.

The fact that complex disciplinary problems like those represented by the situations of the other employees involved in this case could be brought to final resolution in a matter of weeks stands in stunning contrast to the decision to maintain Combs on what has become a permanent deprivation of her means of employment, rather than an interim measure to allow reasoned and deliberate decision making. It reeks of animus directed against her for her participation in protected union activities.

In his post trial brief, counsel for the Hospital makes only a perfunctory effort to explain that which cannot be innocently explained. By footnote, he blandly observes:

Ms. Combs has remained on investigatory suspension because the Hospital agreed to postpone further action until a meeting could take place with the Union and, despite the Hospital's efforts, the Union failed to convene a meeting.⁶⁵

(R. Br., at fn. 14.)

Examination of this claim uncovers additional evidence of animus against both Combs and the Union. Counsel bases this claim on the fact that Pidcock wrote to Rentfro to request a meeting to discuss Combs' behavior. As to scheduling, he suggested, "preferably late today or early next week." (R. Exh. 24.) Several days later, Rentfro responded to Pidcock, advising that he would prefer that the meeting occur after the investigation and an opportunity to confer with counsel. He promised to notify Pidcock once he was ready for the meeting. Although he had not been faced with any request by the Union on this subject, he also volunteered that he would "defer" making any final decision regarding Combs "until after you have been afforded an opportunity to meet as you have requested, unless you advise me to the contrary." (R. Exh. 26.) While two meetings were scheduled, they never took place.

The Hospital hides behind this history as an excuse for the maintenance of Combs' interminable investigatory suspension. In so doing, it is attempting to drive another wedge between the bargaining unit members and their representative. This obvious attempt to shift blame for the decision to maintain Combs in limbo in a manner clearly contrary to past policy and practice demonstrates similar animus to that displayed in the decision to announce to Pidcock that White and Gross were being suspended and that this required the last-minute cancellation of a bargaining session.

I recognize that the Hospital's purported justification is an attempt to copy a strategy that it employed with some success in Judge Evans' case. In that case, the Board affirmed the judge's conclusion that Pidcock's failure to submit a proposal that he had promised to prepare served to excuse a refusal to meet with the Union for a period of over 3 months. As a result, a

⁶⁵ This version of events is misleading. To say that the Hospital "agreed to postpone further action until a meeting could take place" suggests that the Union negotiated this outcome. Actually, the Union never demanded that management postpone any action. Furthermore, the Hospital's unilateral commitment was only to delay action until the Union had been "afforded an opportunity to meet." (R. Exh. 26, p. 1.) It is clear that the Union had been offered such an opportunity and it twice chose to postpone the scheduled meetings. There was nothing in the parties' correspondence that precluded the Hospital from making its disciplinary decision regarding Combs. The only thing that stood in the way was animus directed against her and the Union.

charge alleging a violation of Section 8(a)(5) was dismissed. In no way are the situations comparable. Pidcock never requested a delay in reaching a decision as to Combs' discipline. Indeed, he made it clear that he wanted any meeting to be held immediately so as to avoid such delay for his union member who was suspended without pay. He certainly never requested or demanded that the Hospital defer action on its disciplinary process in order to await a meeting with the Union.

Beyond this, the alleged bargaining violation in the prior case was part of the maneuvering between two institutional antagonists and it certainly made sense to hold the Union to its promise to provide a proposal. Here, the conflict is between the Hospital and one of its employees. As clearly explained by the Hospital's written policy and history of past practice, management's duty was to conduct its investigation, make a decision, and inform the affected employee of the outcome. This promise was rendered all the more specific in Linkous' formal letter advising Combs of her investigative suspension. She ended the letter by making a firm commitment to "communicate further with you as the investigation progresses." (R. Exh. 26, p. 2.) No action or inaction by the Union could alter the obligation owed by management to comply with its own rules and its direct promise to Combs. The attempt to place blame for the unfair treatment of Combs since she was placed on investigatory suspension on her union representative is both baseless and indicative of the type of animus displayed by management throughout this course of events.

Upon examination of all the circumstances involved in Combs' endless investigative suspension, I conclude that it was primarily motivated by animus against her due to her protected activities and also by animus against the Union itself. Apart from the unpersuasive smokescreen about Pidcock's failure to reschedule a meeting, the Hospital has never explained why it refused to reach a decision regarding Combs' status. Nor has it suggested any reason why it did not terminate the investigatory suspension and offer Combs a second opportunity to receive the verbal warning once she had conferred with Pidcock and presumably learned that she had no right to his representation at such a meeting.

Finally, at the last step of the *Wright Line* process, I must decide whether the employer would have maintained Combs on permanent investigatory suspension regardless of its animus against her protected union activities. To simply pose the question serves to answer it. There is no Hospital policy or practice that authorizes the use of the investigatory suspension as a punishment for any infraction, including insubordination. Based on the totality of the evidence, it is clear that the Hospital did not actually base its decision to treat Combs in this fashion on any theory of punishment for insubordination arising from her conduct. The Board's treatment of such a problem was outlined in *La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1124 (2002), *affd.* 71 Fed. Appx. 441 (5th Cir. 2003):

Having found that the General Counsel has met his initial burden of persuasion, we now examine the Respondent's argument that it would have taken the same action in the absence of that protected activity. In doing so, we must distinguish between a "pretextual" and a "dual motive" case. If the Respondent's evidence shows that the proffered lawful reason for the discharge did not exist, or was not, in fact relied upon, then the Respondent's reason is pretextual. If no legitimate business justification for the discharge exists, there is no dual motive, only pretext.

See also *Rood Trucking Co.*, 342 NLRB 895, 898 (2004) ("finding of pretext defeats any attempt by the Respondent to show that it would have discharged the discriminatees absent their union

activities”). Here, the Hospital’s conduct compels me to conclude that its managers did not rely on any insubordination by Combs in deciding to place her on investigatory suspension and maintain her in that status for over a year.

I conclude that the Hospital placed and maintained Combs on investigative suspension solely because of her involvement in protected union activities, including her active participation on the bargaining committee and her invocation of a supposed right to union representation at a disciplinary meeting. In consequence, the Hospital violated Section 8(a)(3) and (1) of the Act in its discriminatory treatment of Combs.

Conclusions of Law

1. By discriminatorily suspending and discharging its employee, Louise Gross, the Hospital has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

2. By discriminatorily suspending its employee, Frances Lynn Combs, the Hospital has engaged in an unfair labor practice affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

3. The Hospital did not violate the Act in any other manner alleged in the amended consolidated complaint.

Remedy

Having found that the Hospital 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. I will also recommend that the Hospital be required to post a notice in the usual manner.⁶⁶

As to affirmative relief, the Hospital, having discriminatorily suspended and discharged two of its employees, it must offer them reinstatement and make them 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). It must also be ordered to expunge from its records any references to the unlawful disciplinary actions taken against them and notify them that those actions will not be used against them in any way.

⁶⁶ Neither the General Counsel nor the Union has requested a broad cease-and-desist order or other extraordinary measures such as a requirement that a member of management read the notice to unit members. In the present posture of this case, I will not recommend such measures absent a request for them. I note, however, that the General Counsel’s petition seeking an adjudication of contempt against the Hospital remains pending before the Circuit Court. Once it has been resolved, it may become appropriate to reconsider the need for additional forms of relief. See, *Five Star Mfg., Inc.*, 348 NLRB No. 94 (2006) (totality of circumstances must be assessed to determine severity of a respondent’s attitude of opposition to the purposes of the Act in order to gauge the need for a broad cease-and-desist order) and *Homer D. Bronson Co.*, 349 NLRB No. 50, slip op. at 5 (2007), enf. 2008 WL 1699205 (2d Cir. 2008) (reading of notice required to dissipate effects of serious and widespread unfair labor practices).

Both sides in this case have made unusual requests regarding the remedy portion of the litigation. Neither request merits relief. Turning first to the Hospital's request, it urges that I add a gloss to the Board's jurisprudence by heightening the standard required to order reinstatement of health care personnel who have been victims of unlawful discrimination. Of course, one must
 5 begin examination of this question by noting that "reinstatement and backpay are the usual remedies when an employee has been unlawfully discharged." *Precoat Metals*, 341 NLRB 1137, 1138 (2004). While the Board recognizes certain very limited exceptions to this remedial policy, it has not adopted any exception based on the nature of an employer's type of business enterprise. Rather, such rare exceptions relate to the conduct of the employee whose
 10 reinstatement is under consideration.⁶⁷ See, for example, *Precoat Metals*, *infra.*, involving an employee who lied to the Board agent and perjured himself at trial, and *Anheuser-Busch, Inc.*, 342 NLRB 560 (2004), involving an employer's use of video surveillance that captured various forms of employee misconduct, such as smoking marijuana at work.

15 Counsel urges me to deny reinstatement to Nurse Gross because "she admittedly failed to follow blood transfusion policies, resulting in the transfusion of the wrong blood to a patient."⁶⁸ (R. Br., at p. 68.) He urges this departure from the Board's normal remedial approach because of the unique considerations affecting an employer in the healthcare field.⁶⁹

20 The primary difficulty with this argument is that it is an attempt to gain through the back door that which was properly denied at the front gate. By this I mean that *Wright Line* has already required me to determine whether the Hospital truly and sincerely believed that Gross' misconduct posed such a danger to its patients that she had to be fired.⁷⁰ As a circuit court explained long ago, the "crucial factor" in the assessment of an employer's liability for acts of
 25 discrimination, "is not whether the business reason cited by [the employer was] good or bad, but whether [it was] honestly invoked and [was], in fact, the cause of the [employer's decision]." *NLRB v. Savoy Laundry, Inc.*, 327 F. 2d 370, 371 (2d Cir. 1964), cited with approval by the Board in *Framan Mechanical, Inc.*, 343 NLRB 408, 411-412.⁷¹ Having carefully considered

30 ⁶⁷ The Board has rejected an argument for imposition of a lesser remedy based on a contention that the employer did not engage in pervasive or flagrant misconduct. In declining this invitation to change its policy, the majority observed that the respondent had discharged multiple employees and that, "[e]ach discharge represents one of the most serious forms of
 35 employer misconduct, and each one warrants the normal remedial response." *First Transit, Inc.*, 350 NLRB No. 68, slip op. at 5 (2007).

⁶⁸ Counsel makes no argument for denial of reinstatement to Combs on this basis since her conduct had nothing to do with patient care.

40 ⁶⁹ Actually, there is nothing particularly unique about the fact that employees' misconduct in healthcare institutions may lead to serious injury and death. The same is true for many types of employers such as automobile manufacturers or construction contractors. Any exception to reinstatement based on the dangerousness of an occupation would threaten to swallow the rule.

45 ⁷⁰ For the same reason, the Board has rejected an employer's attempt to argue that it should not have to provide backpay for an unlawful termination since the employee had been discharged for good cause. As the Board put it, "This argument is another attempt by the Respondent to assert its rebuttal defense under *Wright Line*, which we reject." *Joseph Chevrolet, Inc.*, 343 NLRB 7, fn. 9 (2004), enf. 162 Fed. Appx. 541 (6th Cir. 2006).

50 ⁷¹ Indeed, the Board's *Wright Line* test was crafted to meet the Act's injunction that, "[n]o order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged . . . if such individual was suspended or discharged for cause." Sec. 10(c).

this question, I concluded that the Hospital did not believe that Gross' failure to properly perform the transfusion verification required her discharge. Instead, I found that Gross' active role on the Union's negotiating committee constituted the dispositive motive for her termination.

5 Interestingly, Judge Evans addressed the same point quite eloquently and forcefully in the prior case involving this hospital. He found that the employer had discharged Operating Room Technician Eileene Jewell because of her participation in protected union activities. The Hospital had contended that Jewell was discharged because she failed to properly clean and sterilize surgical instruments, a form of substandard work that could endanger the lives of patients. Judge Evans agreed that this misconduct may have endangered patients. He went on to explain that:

15 There are, however, innumerable opportunities in the daily workings of a hospital for life threatening endangerments of patients by simple failures by employees to do their routine jobs according to the standards of their employers. Common logic, as well as the existence of the Respondent's published progressive disciplinary system, indicates that the Respondent would not necessarily discharge an employee for nonintentional mistakes about which that employee had not received warnings, even if the life of a patient is endangered by those mistakes.
20 This is especially true for long-service employees such as Jewell who had worked for the Respondent almost from its opening in 1987.

25 *Kentucky River Medical Center*, supra, at 582. (Footnotes, including one observing that Jewell had no prior history of disciplinary violations, omitted.) The Board adopted Judge Evans' order reinstating Jewell to her position with the Hospital.

30 Turning to Gross, another long-service employee with an unblemished disciplinary history, I examined the totality of the evidence, including comparable instances of discipline for similar misconduct, and concluded that the employer would not have terminated Gross for her mistake absent her union activity. As a result, reinstatement does not in any way infringe the right of the Hospital to make personnel decisions that protect the lives and welfare of its patients.⁷² I shall order the customary remedy of reinstatement for Nurse Gross.

35 The General Counsel also asks me to depart from the Board's established remedial policies. He argues that I should order that interest on the monetary award be compounded quarterly. He acknowledges that such an award would run counter to the Board's "current practice." (GC Br. at p. 46.) I have seen this argument before. For example, roughly a year ago, the General Counsel made the same argument to me in *Frye Electric, Inc.*, 352 NLRB No. 53 (2008). Although I did not grant the request at that time, I gave it serious consideration at, id., slip op. at 14-15.

45 ⁷² Reductio ad absurdum is also a useful analytical tool to employ regarding counsel's argument. If one accepted his premises in cases of antiunion discrimination, there could be no reason not to apply them as well to cases involving discrimination based on race, religion, gender, or ethnicity. If evidence showed that a health care employer had fired a nurse because of her race, it would hardly be argued that reinstatement should be denied because it would "interfere[] with the Hospital's exercise of its core healthcare judgment." (R. Br., at pp. 68-69.)
50 It is no less repugnant to make such an argument regarding any other form of unlawful discrimination.

In the meanwhile, the Board has spoken on this issue. Although I have not compiled an exhaustive list of the cases in which it has so spoken, I will cite three instances from the period immediately preceding the filing of the General Counsel's brief in this case: *National Fabco Mfg.*, 352 NLRB No. 37, slip op. at fn. 4 (March 17, 2008) ("Having duly considered the matter, we are not prepared at this time to deviate from our current practice of assessing simple interest."); *ABS Heating & Cooling*, 352 NLRB No. 50 (April 7, 2008) (same); and *Mays Electric Co.*, 352 NLRB No. 49 (April 10, 2008) (same). The key word here is "duly." Webster defines this term as, "in a proper manner."⁷³ Thus, the Board has signaled that it has considered the issue and made its decision regarding it.⁷⁴

As I noted in *Frye Electric*, *supra*, there is nothing wrong with General Counsel seeking modification of existing Board policies.⁷⁵ As a young lawyer, however, I was taught that it was bad form to lead a judge into error. Here, the General Counsel spends more than 10 pages on his argument regarding the need for compound interest. Nowhere in those pages does he advise me that the Board has recently and repeatedly given due consideration to this argument and rejected it.⁷⁶ Even the sturdiest boilerplate must be returned to the blacksmith's forge for revision when circumstances dictate. Such circumstances have now arisen regarding the General Counsel's attempt to induce administrative law judges to order compound interest in the face of the Board's recent and repeated refusals to do so.⁷⁷

As to both of the requests that I depart from established precedent, I will follow the Board's admonition that:

[I]t remains the [judge's] duty to apply established Board precedent which the Supreme Court has not reversed. Only by such a recognition of the legal authority of Board precedent, will a uniform and orderly administration of a national act, such as the National Labor Relations Act, be achieved.

Pathmark Stores, Inc., 342 NLRB 378, fn. 1 (2004). (Citations omitted.)

⁷³ *Webster's II New Riverside University Dictionary*, Riverside Publishing Co., 1994, at p. 409. See also, www.Merriam-Webster.com ("duly" defined as "in a due manner" and "properly").

⁷⁴ The fact that the Board has stated that it has considered the merits of the request for compound interest distinguishes this situation from others where the Board declines to address a proposed change in its remedial policies. See, for example, *Ishikawa Gasket America, Inc.*, 337 NLRB 175, 176 (2001), *affd.* 354 F.3d 534 (6th Cir. 2004) (Board declines to alter policy regarding reimbursement for taxes because the issue "should be resolved after a full briefing by the affected parties").

⁷⁵ The degree of acceptable persistence is a matter for the Board to decide.

⁷⁶ Nor does the General Counsel inform me that the Board reversed a judge's recommendation to calculate interest on a daily compounded basis in *Rogers Corp.*, 344 NLRB No. 60, slip op. at 1 (2005).

⁷⁷ My criticism of the General Counsel on this topic is not meant to refer to trial counsel in this case. His request for compound interest is presumably made pursuant General Counsel's Memorandum GC 07-07 (May 2, 2007), entitled "Seeking Compound Interest on Board Monetary Remedies." That memorandum requires inclusion of model language regarding compounding of interest in briefs filed by the individual regions. It is this model language that I respectfully suggest requires modification.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷⁸

ORDER

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The Respondent, Jackson Hospital Corporation d/b/a Kentucky River Medical Center, Jackson, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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(a) Suspending, discharging, or otherwise discriminating against Louise Gross, Frances Lynn Combs, or any of its other employees because of their participation in activities on behalf of, or support for, the United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, AFL—CIO—CLC, or any other union.

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

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

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(a) Within 14 days from the date of the Board's Order, offer Louise Gross and Frances Lynn Combs 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.

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(b) Make Louise Gross and Frances Lynn Combs 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.

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

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(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

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(e) Within 14 days after service by the Region, post at its facility in Jackson, Kentucky, copies of the attached notice marked "Appendix."⁷⁹ Copies of the notice, on forms provided by

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⁷⁸ 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.

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⁷⁹ 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

Continued

the Regional Director for Region 9, 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 employees and former employees employed by the Respondent at any time since September 19, 2006.

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(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.

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IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. July 29, 2008

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Paul Buxbaum
Administrative Law Judge

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Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities

WE WILL NOT suspend, discharge, or otherwise discriminate against Louise Gross, Frances Lynn Combs, or any of our other employees for supporting, or engaging in activities on behalf of, United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, AFL-CIO-CLC, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed by Federal labor law.

WE WILL, within 14 days from the date of this Order, offer Louise Gross and Frances Lynn Combs 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 Louise Gross and Frances Lynn Combs whole for any loss of earnings and other benefits resulting from their suspensions and discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful suspension and discharge of Louise Gross and the unlawful suspension of Frances Lynn Combs, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the suspensions and discharge will not be used against them in any way.

JACKSON HOSPITAL CORPORATON d/b/a
KENTUCKY RIVER MEDICAL CENTER

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under

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Jackson, Kentucky

the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

550 Main Street, Federal Office Building, Room 3003
Cincinnati, Ohio 45202-3271
Hours: 8:30 a.m. to 5 p.m.
513-684-3686.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 513-684-3750.