North Carolina Prisoner Legal Services, Inc. ***and*** **Linda Weisel.** Case 11–CA–20238

September 29, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On December 16, 2004, Administrative Law Judge Pargen Robertson issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

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

The Board has considered the decision in light of the record and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] as modified and to adopt the recommended Order as modified and set forth in full below.[3]

I. INTRODUCTION

The Respondent is a nonprofit law firm in North Carolina. The complaint alleges, and the judge found, that the Respondent committed various unfair labor practices in retaliation for the employees' protected activities surrounding the Respondent's decision to deny an employee's request for maternity benefits under the Respondent's short-term disability policy.

The Board unanimously adopts, for the reasons stated by the judge, the judge's findings that the Respondent violated Section 8(a)(1) by: (1) threatening its employees with unspecified reprisals on August 13 and 22, 2003; (2) threatening to withhold a wage increase on August 13, 2003; and (3) threatening to eliminate short-term disability benefits on August 13, 2003.[4]

A majority of the Board[5] adopts, for the reasons stated below, the judge's findings that the Respondent violated Section 8(a)(1) by withholding a wage increase, eliminating short-term disability benefits between August 15 and December 2003,[6] threatening to eliminate reduced-hours work schedules,[7] eliminating reduced-hours work schedules, and constructively discharging employee Linda Weisel.[8]

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

[2] In his Conclusion of Law 2, the judge inadvertently concluded that the Respondent's termination of short-term disability benefits for its employees took place on October 1, 2003. The judge repeated this date in the remedy section of his decision. As the judge correctly found elsewhere in his decision, however, the Respondent's elimination of short-term disability benefits began August 15, 2003, and ended in December 2003. We modify Conclusion of Law 2 and amend the remedy accordingly.

[3] We shall modify the judge's recommended Order to conform to the violations found and to the Board's standard remedial language, and in accordance with *Indian Hills Care Center*, 321 NLRB 144 (1996), *Excel Container, Inc.*, 325 NLRB 17 (1997), and *Ferguson Electric Co.*, 335 NLRB 142 (2001); and we shall substitute a new notice to conform to the Order as modified.

We shall amend the judge's remedy in one additional respect. The judge's remedy provides for the calculation of backpay under the quarterly formula prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950). Some of the unfair labor practice violations found herein, however, did not involve cessation or denial of employment. Backpay necessary to remedy such violations is properly calculated in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971). See, e.g., *CAB Associates*, 340 NLRB 1391, 1393 (2003). We shall so provide.

[4] Chairman Battista agrees with his colleagues as to the first threat. He concurs in finding that threats (2) and (3), set forth above, violate Sec. 8(a)(1). These threats consist of one statement by the Respondent's agent that he will *recommend* an unlawful action to the Respondent's decisionmaker and a second statement that the Respondent *might* take unlawful action. As such, the Chairman finds that these threats constitute violations separate and apart from implementation of the actions that were threatened [in this case, withholding the wage increase and eliminating short-term disability benefits]. In the Chairman's view, this is distinguishable from situations where an employer *announces* the unlawful conduct it is implementing. In the latter case, the Chairman would find only a single violation: the unlawful action. See *Albertson's, Inc.*, 344 NLRB 1172, 1173 fn. 3 (2005) (Battista, dissenting in part).

[5] Chairman Battista and Member Walsh.

[6] To remedy this violation, the judge ordered the Respondent to restore its short-term disability benefits as they existed before August 15, 2003. The judge's remedy, however, is not tailored to expunge the effects of the violation, which consists essentially of depriving employees of short-term disability benefits during a period of approximately 4 months. We shall instead order the Respondent to make employees whole for any losses suffered as a result of the August 15 plan termination—i.e., to make whole any employees who would have been entitled to short-term disability benefits during the period between the unlawful termination of the Respondent's former plan and the lawful institution of the new plan. Whether there were any such employees is a matter we shall leave to compliance.

[7] In finding that this threat to eliminate reduced-hours work schedules violated Sec. 8(a)(1), Chairman Battista relies on the fact that Executive Director Michael Hamden's statement was a threat of future action rather than an announcement of a contemporaneous decision (see fn. 4, above). Indeed, the threat preceded the elimination of reduced-hours schedules by 4 months. Under these circumstances, Chairman Battista agrees that the threat and reduction are separate and independent violations.

[8] The judge also found that the Respondent violated Sec. 8(a)(1) by forcing employee Susan Pollitt to take personal leave in order to avoid a constructive discharge, and the Respondent excepts to that finding. Chairman Battista and Member Walsh find it unnecessary to pass on this finding. When the Respondent unlawfully eliminated reduced-hours work schedules, Pollitt, who had been working a reduced-hours schedule, continued working reduced hours and began using personal

II. FACTS

A. Background

The Respondent provides legal services to inmates in the North Carolina prison system. Executive Director Michael Hamden manages the Respondent's operations. He supervises the Respondent's attorneys and has exclusive hiring and firing authority over the Respondent's supervisors, attorneys, paralegals, and support staff. The Respondent is governed by a board of directors that has exclusive hiring and firing authority over Hamden.

The Respondent is primarily funded through a contract with the North Carolina Department of Corrections (the DOC). Under this contract, the DOC agrees to pay a set hourly rate for a specified number of hours that the Respondent's attorneys and paralegals spend providing legal services to inmates. At the time of the events underlying this case, the Respondent was operating under the first year of a 3-year contract with the DOC that was executed on May 16, 2003,[9] and was retroactive to October 1, 2002. The Respondent routinely grants wage increases when it enters into a new contract with the DOC. In order for a wage increase to occur, however, Hamden must first recommend the increase to the board of directors for its approval.

During the relevant time period, the Respondent employed approximately 16 attorneys. Four of these attorneys worked "reduced-hours schedules" of 30- to 32-billable hours a week: Kari Hamel, Kristin Parks, Susan Pollitt, and Linda Weisel. Attorneys working reduced-hours schedules were considered full-time employees and received benefits.

B. The Events Leading to the Employees' August 8 Petition

In early 2003, employee Hamel requested maternity leave and benefits under the Respondent's short-term disability policy. Although Hamden granted Hamel's request for maternity leave, he did not approve her request for short-term disability benefits. Hamel appealed the decision to the board of directors' grievance committee to no avail.

That spring, Hamel corresponded, through her attorney, with Barry Nakell, a member of the Respondent's board of directors. In her initial letter, Hamel alleged that the Respondent's refusal to apply its short-term disability policy to temporary disability arising from pregnancy was unlawful. In response, Nakell specifically inquired whether Hamel was taking the position that the Respondent's policy was unlawful on its face. In a letter dated June 10, Hamel answered that "[t]he question of a violation of Title VII arises only in how the policies are applied."

On July 22, having received no indication that the board of directors would reconsider its decision to deny her claim for short-term disability benefits, Hamel filed a charge with the Equal Employment Opportunity Commission (EEOC) on behalf of herself and similarly situated employees.[10] The charge alleged that the Respondent had illegally denied her claim for short-term disability benefits during her maternity leave.

Shortly thereafter, on August 8, the Respondent's employees submitted a petition to the Respondent's board of directors. This petition, authored by Attorney Elizabeth Hambourger and signed by 17 of the Respondent's employees, expressed the employees' hope that "short-term disability insurance will remain a benefit to NCPLS employees and that it will apply to temporary disability arising from pregnancy and childbirth as it does to any other short-term disability."

C. The Events Leading up to the August 15 Withholding of the Wage Increase and the Elimination of the Short-Term Disability Policy

The Respondent aggressively opposed the employees' petition. During a staff meeting on August 12, a number of the Respondent's supervisors expressed hostility toward the employees' decision to circulate the petition. Fiscal Officer Rick Lennon complained that it was wrong for the employees to have gone to the board of directors behind Hamden's back, and that he (Lennon) felt betrayed by the employees' action. At about the same time, Hamden, in a conversation with the executive director of Legal Aid of North Carolina, characterized the employees' petition as an act of "mutiny."

The day after the staff meeting, Hamden called Hambourger to his office and told her that he had not realized the extent of the factionalism in the office, that he had been "too indulgent" with the staff, and that "things were

leave to make up the difference between that schedule and a full-time schedule. The judge's make-whole remedy for his 8(a)(1) finding concerning Pollitt is to require the Respondent to reinstate her personal leave time. This remedy is cumulative, however. Having violated the Act by eliminating reduced-hours work schedules, the Respondent must make its employees whole for any losses resulting from that violation—including compensating Pollitt for the use of her personal leave. Cf. *Albar Industries*, 322 NLRB 298 (1996) (ordering respondent to reinstate vacation time it unlawfully required employees to use); *Ceridian Corp.*, 343 NLRB 571 (2004) (ordering respondent to restore personal days off to remedy respondent's refusal to grant employee-negotiators unpaid leave to attend collective-bargaining sessions), enfd. 435 F.3d 352 (D.C. Cir. 2006). Accordingly, Chairman Battista and Member Walsh do not pass on the judge's 8(a)(1) finding concerning Pollitt because it would not materially affect the remedy.

[9] All dates are in 2003, unless stated otherwise.

[10] Before filing this EEOC charge, Hamel informed coworkers Pollitt and Hambourger, and obtained their support for its filing.

going to change." Hamden said that the employees would be less likely to achieve their goals with the petition because they had gone to the Board. When Hambourger asked Hamden what he meant, Hamden explained, "[B]ecause of this letter I cannot ask the Board to give the staff raises," and "[B]ecause of the letter you are now less likely to get a parental leave policy in place." Hamden added that the board of directors would be "angry" about the petition and would "want to show the staff that they're not entitled to these things by withholding things." Hamden told Hambourger that she could not have known, "but senior attorneys should have known better" than to have petitioned the board of directors.

The Respondent had budgeted a 6-percent wage increase for employees that was slated for approval at its August 15 board meeting. A day or two before the board meeting, however, Hamden decided not to recommend the wage increase. Hamden discussed the matter with Lennon, and Lennon agreed with Hamden's decision. During the board meeting, Lennon advised the board of directors that management had decided not to recommend the wage increase because of "employee complaints and ongoing litigation." The minutes of the August 15 meeting reflect that the board of directors adopted Hamden and Lennon's recommendation and their stated reasons for it: "The current budget includes a 6% staff salary increase, but in light of staff benefit concerns and pending litigation, discussion of staff pay raises was deferred." The board of directors also repealed the Respondent's short-term disability policy at this meeting.

D. The Elimination of Reduced-Hours Work Schedules

On August 18, Hamden met with the Respondent's senior attorneys, including employees Hamel, Parks, Pollitt, and Weisel and told them that he would be announcing a proposal the following day that they would not support. On August 19, Hamden called a staff meeting, which Board Member Barry Nakell briefly attended. Nakell, who did not ordinarily attend such meetings, represented to the staff that Hamel's request for short-term disability benefits was still under consideration. Before leaving, he added that Hamden had the board's "full support."

After Nakell left the meeting, Hamden informed the staff that the board of directors had rescinded the Respondent's short-term disability policy. In addition, Hamden announced a proposal that, beginning September 1, all employees would be required (1) to work 40 hours per week (i.e., 40-*billable* hours per week) to qualify for benefits, and (2) to work 8 additional hours of overtime per week, for a total of 48 hours per week, until November 15, and possibly beyond that time. Hamden explained that under this proposal, the reduced-hours work schedule would be eliminated.

Hamden attributed the need for this change to a 48-hour workweek to a number of challenges, including a deficit in the number of hours owed under the DOC contract,[11] factionalism in the office, an impending office move, and the implementation of a new computer software program. Hamden gave the staff 1 week to provide their input on the proposal and said that he would announce his final decision on August 26.

Following the meeting, employees Pollitt and Weisel met with Nakell to express their concerns regarding Hamden's proposal. They also detailed their concerns in a letter to Hamden, explaining that they had been working reduced hours since 1992 and their family obligations had been structured around that schedule. The letter pointed out that Hamden's proposal would require a disproportionate increase in workload for reduced-hours employees, all of whom were women, and that a requirement of additional work should be proportional to employees' regular work hours, as it had always been in the past.

On August 23, employee Parks met with Hamden regarding his proposal. Hamden asked Parks if she knew that some members of the staff had gone to the board of directors "behind his back," adding that this was "not the way to get things done around here and I'm just not going to have that kind of thing anymore." Hamden told Parks that Pollitt and Weisel "continued to undermine" his authority and "stir up trouble," and that he could not "put up with it anymore."

On August 26, Hamden announced that he had decided not to implement the 48-hour proposal. Later that day, when Parks thanked Hamden for withdrawing the 48-hour requirement, Hamden stated, "Well, you know, I could still do 40 hours a week if that's what I choose to do." On another occasion, Hamden told Parks, "It's not because of the contract hours and it's not because of the money for the benefits, but it's because some people here think it's an entitlement to work part-time."

On October 1, Hamden told Pollitt that he was going to eliminate reduced-hours employment. Pollitt asked Hamden why he was taking this action, and Hamden stated that in addition to the deficit in hours owed to the DOC, it was because of the hostility he had received in response to his proposal in August. Hamden said that he couldn't take that kind of hostility, and that she and

[11] The Respondent was approximately 1200 hours behind on the hours owed under its contract with the DOC.

Weisel had "threatened gender litigation" in their letter and thought working reduced hours was an "entitlement." That day, Hamden sent an e-mail to all employees announcing the elimination of reduced-hours employment for all NCPLS employees.

Following Hamden's October 1 elimination of reduced-hours schedules, Hamel, Parks, and Weisel resigned from their employment with the Respondent. Pollitt continued to work for the Respondent, supplementing the hours she worked with accrued leave to fulfill the 40-hour requirement.

III. THE WITHHOLDING OF THE WAGE INCREASE AND THE ELIMINATION OF SHORT-TERM DISABILITY BENEFITS

The judge found that the Respondent's decisions to withhold the planned wage increase and to repeal its short-term disability policy were in retaliation for employees' protected activities, and therefore violated Section 8(a)(1) of the Act. We agree.

Under *Wright Line*,[12] the General Counsel bears the burden of proving by a preponderance of the evidence that the employees' protected conduct was a motivating factor in the adverse employment actions. If the General Counsel makes a showing of discriminatory motivation by proving protected activity, the employer's knowledge of that activity, and animus against protected conduct, then the burden of persuasion shifts to the employer to prove that it would have taken the same actions even in the absence of the protected conduct. See *Donaldson Bros. Ready Mix*, 341 NLRB 958, 961 (2004).

It is undisputed that the Respondent's employees engaged in extensive protected activities and that the Respondent was aware of those activities. Those protected activities included Hamel's filing of her July 22 charge with the EEOC on behalf of herself and similarly situated employees—after informing coworkers and obtaining their support—and the employees' August 8 petition to the Respondent's board of directors. The judge found that the Respondent harbored animus against those protected activities. We agree.

The record contains direct evidence that the employees' protected activity was a motivating factor in the Respondent's decision to withhold the planned wage increase. The minutes of the August 15 board of directors' meeting state that, "in light of staff benefit concerns and pending litigation, discussion of staff pay raises was deferred."[13] These minutes demonstrate that the board members withheld the wage increase at least in part because the employees had filed an EEOC charge and petitioned the board of directors, activity that was protected by Section 7.

In finding that the Respondent harbored unlawful animus in withholding the wage increase, we also rely on certain statements made by Fiscal Officer Rick Lennon. At a staff meeting held on August 12, Lennon expressed hostility toward employees' protected activity when he told them that it was wrong for them to have gone to the board of directors behind Hamden's back by circulating the petition and that he felt betrayed by those actions. Three days later, at the August 15 meeting, Lennon recommended to the board of directors that it defer discussion of any wage increase (i.e., that it not then authorize the granting of a wage increase). The board of directors acted consistent with that recommendation, and, as stated above, it expressly stated in its meeting minutes that it was acting because of staff benefit concerns and pending litigation.

We also rely on Lennon's admission that management decided to withdraw its plan to grant wage increases because of "employee complaints and ongoing litigation." That statement directly links the employees' protected conduct and the Respondent's decision not to go forward with the wage increase as planned.[14]

We also agree with the judge's finding that the Respondent's purported justifications for withholding the wage increase are pretextual. The Respondent claims in its brief that it based its decision on its pending office relocation, the deficit in the number of hours it owed to the DOC, the implementation of a new computer software program, and pending litigation. Even assuming that the Respondent had legitimate concerns over the costs associated with those issues, the evidence shows

[12] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[13] The credited testimony of Elizabeth Hambourger establishes that Rick Lennon told the board of directors that management was withholding the planned recommendation for staff pay increases, and not merely deferring the discussion. Whether characterized as a "deferral" or a "withholding," the Respondent did not grant a wage increase on August 15 because of protected activity, and hence its action was unlawful.

[14] Our colleague contends that we cannot rely on Lennon's statements to establish unlawful motivation because it was the board of directors, not Lennon, who ultimately made the decision to withhold the wage increase. Our colleague misses the point. The minutes of the board of directors' meeting show that, when the board of directors exercised its authority to deny the wage increase, its reasons were identical to the unlawful reasons expressed by Hamden and Lennon in their discussions leading up to the board of directors' August 15 meeting. Plainly, Lennon's recommendation informed the board of directors' decision, and Lennon's animus is therefore relevant.

Member Walsh would also rely on Hamden's unlawful threats that (i) he could not ask the board of directors for a wage increase; (ii) the board of directors would be "angry" and "want to withhold things" from the staff; and (iii) the "senior attorneys should have known better."

that the Respondent was not motivated by those concerns when it withdrew the planned wage increase.

First and foremost, as discussed above, the minutes of the August 15 board meeting state that the wage increase was not granted because of "staff benefit concerns and pending litigation." Significantly, the minutes do not mention the office relocation, the deficit in hours owed to the DOC, or the new computer software program as reasons for foregoing the wage increase. The Respondent's subsequent reliance on additional explanations for its decision supports an inference that these latter reasons were not in fact relied upon. See, e.g., *Hahner, Foreman, & Harness, Inc.,* 343 NLRB 1423, 1425 (2004); *Monroe Mfg.*, 323 NLRB 24, 27 (1997).

Moreover, it is clear from the record, as our dissenting colleague acknowledges, that whatever concerns the Respondent had, they did not deter the Respondent from placing the wage increase on the agenda of the August 15 board meeting. Indeed, with respect to the office relocation, the Respondent had received notice as early as February 11 that it would not be able to renew its lease. Yet when it came time to prepare for the August 15 board meeting—6 months after learning that it would have to relocate—the Respondent placed the wage increase on the agenda, as planned. Similarly, the Respondent was fully aware of the deficit in hours owed to the DOC, the pending implementation of a new software program, and the pending EEOC charge when it included the wage increase on the agenda for the August 15 board meeting. In fact, it was not until a day or two before the board meeting—and just after learning of the employees' petition—that Hamden and Lennon suddenly decided that the wage increase was no longer a good idea.

As shown, Hamden predicted that the board of directors would be "angry" and would want to "withhold things" from the staff because of their protected activities. In the circumstances, we agree with the judge that there is no evidence that anything happened shortly before the August 15 board meeting to cause the Respondent to reconsider the wage increase other than the employees' petition to the board of directors, which, as the judge found, was the employees' "most visible concerted activity."

Our finding that the Respondent's purported justifications for withholding the wage increase are pretextual defeats any attempt by the Respondent to show that it would have withheld the wage increase absent the employees' protected activities. *Golden State Foods Corp.*, 340 NLRB 382 (2003). This is because where "the evidence establishes that the reasons given for the Respondent's action are pretextual—that is, false or not in fact relied upon—the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need for us to perform the second part of the *Wright Line* analysis." Id. at 385.

Turning now to the Respondent's decision to repeal its short-term disability policy, we find, in agreement with the judge, that this decision too was an unlawful response to the employees' protected activities surrounding the August 8 petition. We infer from the fact, found above, that the board of directors withheld a planned wage increase on August 15 because of its employees' protected activities that its contemporaneous decision to repeal the disability policy was likewise unlawfully motivated. See, *e.g.*, *Leiser Construction, LLC,* 349 NLRB 413, 417 fn. 24 (2007); *Wild Oats Markets, Inc.*, 344 NLRB 717 fn. 4 (2005).

That inference of unlawful motivation is strongly supported, as the judge found, by the timing of the board of directors' decision, which occurred less than a week after the employees circulated their petition. *Davey Roofing, Inc*., 341 NLRB 222, 223 (2004) (the timing of an employer's action in relation to protected activity can provide reliable evidence of unlawful motivation); *La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1124 (2002), enfd. 71 Fed. Appx. 441 (5th Cir. 2003) (decision occurred "closely on the heels" of protected activity, illustrating the employer's "desire to cut any budding [protected] activity").[15]

Finally, we also agree with the judge's finding that the Respondent has not shown that it would have repealed its short-term disability policy in the absence of the employees' protected activities. The Respondent claims that the board of directors repealed the short-term disability policy because the legality of the policy had been called into question. However, the Respondent had been on notice of the alleged unlawfulness of the policy since at least early 2003, when Hamel first requested and was denied benefits under the policy. Moreover, after Hamden denied her request, Hamel appealed that decision to the board of directors' grievance committee. That spring, Hamel's attorney corresponded with Board Member Nakell directly, alleging that the policy was unlawful as applied. Despite all of this controversy surrounding the Respondent's short-term disability policy, the board of directors took no action. Then, within weeks of Hamel's July 22 EEOC charge, and just 7 days after the employees' August 8 petition, the board of directors repealed the

[15] Member Walsh would also rely on Hamden's threat that employees were "less likely to get a parental leave policy put in place" because of the petition, as well as on Hamden's characterization of the petition as an act of "mutiny" over his decision to deny Hamel maternity benefits under the Respondent's policy.

policy altogether at the August 15 meeting. In these circumstances, we find that the Respondent has not shown that it would have rescinded its short-term disability policy in the absence of the employees' protected activities.

IV. THE ELIMINATION OF REDUCED-HOURS WORK SCHEDULES

The judge found that Hamden unlawfully threatened to eliminate reduced-hours work schedules during the August 19 staff meeting, and again after employees protested Hamden's proposed 48-hour workweek. Specifically, Hamden told the senior attorneys on August 18 that he would announce a proposal that they would not like, and then proposed a mandatory 48-hour workweek the following day. After rescinding his initial proposal, Hamden told Kristin Parks that he could "still do a 40-hour workweek" and that he could eliminate reduced-hours work entirely, because, he told her, there were some employees that "think it is an entitlement" to work reduced hours. Given Hamden's demonstrated animus towards the employees' protected activities, we agree with the judge that those comments constitute threats to eliminate reduced-hours work schedules in retaliation for employees' protected activities. The fact that Hamden did not initially follow through on his threat does not, as the dissent suggests, render his proposal any less coercive. Indeed, Hamden chose to remind the staff that he could still eliminate reduced-hours schedules if he chose to do so.[16]

We also agree with the judge that the Respondent violated the Act when Hamden followed through on his threat to eliminate reduced-hours employment. As discussed above, the General Counsel has met his *Wright Line* burden of showing that the employees engaged in protected activities, that the Respondent was aware of those activities, and that the Respondent harbored animus toward those activities. In addition to the employees' filing of the petition, employees Pollit and Weisel also engaged in protected conduct by meeting with Board Member Nakell to discuss their concerns about Hamden's proposal and by expressing those concerns in a letter to Hamden.

We find animus in Hamden's statement to employees that his initial proposal was in response, in part, to "factionalism" in the office. As the judge found, Hamden's frequent references to factionalism in the office were a thinly veiled reference to the employees' protected activities. We also rely on Hamden's unlawful threats to Parks, after rescinding his proposal, that he could yet impose a 40-hour workweek, and that some employees viewed reduced-hours work as "an entitlement." Further, we find animus in Hamden's statements that Pollitt and Weisel's decision to go to the board of directors "behind his back" was "not the way to get things done around here," that he would not "have that kind of thing anymore," and that he would not put up with Pollitt and Weisel continuing to "undermine his authority."

We also agree with the judge's finding that the Respondent's asserted reason for eliminating reduced-hours schedules is pretextual. The Respondent claims that Hamden eliminated reduced-hours schedules because he was concerned about the deficit in hours owed under the DOC contract. Because only 4 of the Respondent's 16 attorneys would be required to work additional hours as a result of the elimination of reduced-hours schedules, however, it is not plausible that Hamden's action was tailored to make up the 1200 hours that the Respondent was behind under its contract with the DOC. Hamden admitted, moreover, that when he had required attorneys to bill additional hours in the past, the burden had been equitably distributed among the attorneys. Hamden does not explain his departure from this practice, but the obvious explanation is that Hamden's real motivation was to retaliate against those attorneys whom he felt were causing problems for him.

Finally, Hamden's October 1 statements to Pollitt that he was eliminating reduced-hours schedules because of the "hostility" he had received in response to his proposal in August, including the letter Pollitt and Weisel had written, and because certain employees thought reduced-hours employment was an "entitlement," belie the Respondent's claim that Hamden's goal was to address the deficit in hours owed to the DOC. Although we agree with the dissent that the Respondent legitimately could have eliminated reduced-hours schedules in order to address the deficit in hours owed to the DOC, it is not enough for the Respondent to advance a legitimate justification for its action—the Respondent must have actually relied on that reason.[17] We find that the Respondent did not do so.

[16] The dissent makes much of the fact that Hamden had the authority to make scheduling changes. Of course, if Hamden did not have this authority, his statements might not have been threatening.

[17] See, e.g., *Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345, 1352 (3d Cir. 1969) ("the policy and protection provided by the National Labor Relations Act does not allow the employer to substitute 'good' reasons for 'real' reasons when the purpose of the discharge is to retaliate for an employee's concerted activities"); see also *Hicks Oil & Hicksgas*, 293 NLRB 84, 85 (1989), enfd. 942 F.2d 1140 (7th Cir. 1991)

("Under *Wright Line,* an employer cannot carry its burden of persuasion by merely showing that it had a legitimate reason" for taking the action in question; rather, it "must show by a preponderance of the evidence that the action would have taken place even without the protected conduct.").

Once again, there is no need to perform the second part of the *Wright Line* analysis. Having found that the Respondent's asserted justification for the elimination of reduced-hours work schedules is pretextual, the Respondent cannot establish that it would have eliminated reduced-hours schedules absent the employees' protected activities. *Golden State Foods Corp.*, supra, 340 NLRB at 385.

V. THE CONSTRUCTIVE DISCHARGE OF LINDA WEISEL

The judge found that the Respondent constructively discharged Linda Weisel by eliminating reduced-hours employment. We agree.

The Board requires two elements to be shown to establish a constructive discharge. First, the burdens imposed on the employee must cause, and be intended to cause, a change in working conditions so difficult or unpleasant as to force the employee to resign. Second, the burdens must have been imposed because of the employee's protected activities. *Crystal Princeton Refining Co.*, 222 NLRB 1068, 1069 (1976). Both elements have been demonstrated here.

The Board has held that the intent element will be satisfied so long as the employer "reasonably should have foreseen" that its actions would cause an employee to quit. *American Licorice Co.*, 299 NLRB 145, 148 (1990). Here, Weisel's August 22 letter to Hamden clearly stated that she had been working reduced hours for over 10 years and that her family obligations had been structured around that schedule. In addition, Hamden admitted that he considered the possibility that some attorneys would resign as a result of eliminating the reduced-hours schedule. It was reasonably foreseeable, then, that the hardship caused to Weisel by the elimination of that schedule would cause her to resign.1[18] See *Yellow Ambulance Service*, 342 NLRB 804, 807 (2004) (requiring an employee to choose between work and family obligations is sufficiently burdensome to support a finding of constructive discharge). We find that Hamden's intent to target Weisel is also demonstrated by Hamden's statements that Weisel regarded the reduced-hours schedule as "an entitlement," and that he was not going to put up with Weisel undermining his position and causing trouble anymore.

Because we have already found that Hamden eliminated reduced-hours schedules in retaliation for employees' protected activities, including Weisel's protected activities, the second prong of *Crystal Princeton Refining Co.,* supra, has also been satisfied. Accordingly, we adopt the judge's finding that the Respondent constructively discharged Weisel.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, North Carolina Prisoner Legal Services, Inc., Raleigh, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening unspecified reprisals, the withholding of a wage increase, the elimination of short-term disability benefits, or the elimination of reduced-hours work schedules because of its employees' protected concerted activity.

(b) Withholding wage increases, eliminating short-term disability benefits, eliminating reduced-hours work schedules, or constructively discharging its employees because of their protected concerted activity.

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

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

(a) Institute the 6-percent wage increase unlawfully withheld on August 15, 2003, with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(b) Restore its reduced-hours work schedule practice unlawfully eliminated on January 1, 2004.

(c) Within 14 days from the date of this Order, offer Linda Weisel full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(d) Make Linda Weisel whole for any loss of earnings and other benefits suffered as a result of the discrimination against her. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, supra.

(e) Make its employees whole for any loss of earnings and other benefits suffered as a result of its unlawful withholding of a wage increase, elimination of short-term disability benefits, and elimination of reduced-hours

[18] The Respondent argues that Weisel's constructive discharge claim is foreclosed because the Respondent had three other employees, also mothers, who had previously worked 35 hours a week and did not resign because of the 40-hour requirement. However, because those employees were not attorneys, the same burdens were not imposed on them by the 40-hour requirement. For Weisel to bill 40 hours a week, she would have to work significantly more than 40 hours. Indeed, two of the employees who were similarly affected by the elimination of reduced-hours schedules, Attorneys Parks and Hamel, did resign. Although the remaining affected attorney, Pollitt, was able to comply with the 40-hour requirement, it was only by using accrued leave to supplement her hours worked.

work schedules. Backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, supra.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful constructive discharge of Linda Weisel, and within 3 days thereafter, notify her that this has been done and that her constructive discharge will not be used against her in any way.

(g) 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.

(h) Within 14 days after service by the Region, post at its Raleigh, North Carolina facility copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 11, 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 August 13, 2003.

(i) 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.

MEMBER SCHAUMBER, dissenting in part.

While I agree with my colleagues that the Respondent violated Section 8(a)(1) when its Executive Director Michael Hamden made various threats on August 13 and 22, 2003, I do not agree with their decision to affirm the judge's additional findings that the Respondent violated Section 8(a)(1) by: (1) withholding a wage increase; (2) eliminating short-term disability benefits between August 15 and December 2003; (3) threatening to eliminate reduced-hours work schedules; (4) eliminating reduced-hours work schedules; and (5) constructively discharging employee Linda Weisel.

I. WITHHOLDING WAGE INCREASE AND ELIMINATING BENEFITS

Unlike my colleagues, I would reverse the judge and dismiss the complaint allegations that the Respondent violated Section 8(a)(1) by withholding a wage increase and by eliminating short-term disability benefits between August 15 and December 2003. In my view, the General Counsel has failed to meet his initial *Wright Line*[1] burden of proof. In particular, there is insufficient evidence that, either individually or jointly, the members of the Respondent's board of directors, the body solely responsible for the decisions in issue, harbored animus toward the concerted activities of the Respondent's employees.

The Respondent is a nonprofit law firm with a facility in Raleigh, North Carolina, where it is engaged in the business of providing legal services to inmates for the North Carolina prison system. The Respondent's employees include management personnel headed by an executive director with exclusive hire and discharge authority over employees, supervisors, staff attorneys, paralegals, and support staff. A board of directors governs the Respondent and that board has exclusive hire and discharge authority over the executive director.

The board of directors is composed of members who are designated by law schools, civil liberties groups, and other legal organizations in North Carolina. The members are volunteers who are not compensated. Among other duties, the board of directors oversees the work of Respondent's executive director, Michael Hamden, and has the responsibility to set program policy, which includes governance of employee compensation, benefits, and the overall financial well being of the Respondent. In this latter capacity, the board of directors engages in rigorous independent review of Hamden's financial management of the program, including all recommendations he may offer regarding employee raises.

That the Respondent's employees engaged in concerted activity is not disputed. In the weeks preceding the August 15 board meeting, at which the decisions in issue were made, employee Kari Hamel, after consulting two colleagues and obtaining their support, filed a charge with the Equal Employment Opportunity Commission

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

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

(EEOC) on her own behalf and that of all similarly situated employees, alleging that the Respondent had discriminatorily denied her claim for short-term disability benefits related to maternity leave. Shortly thereafter, 17 employees, including Hamel, signed a petition to the board of directors stating their "hope" that "short-term disability insurance will remain a benefit for [the Respondent's] employees and that it will apply to temporary disability arising from pregnancy and childbirth as it does to any other short-term disability."

The judge found that, after learning about the petition, Hamden made several threats to the Respondent's employees. Specifically, the judge found that Hamden told employee Elizabeth Hambourger, who authored the petition, "that things were going to change and that he had been too indulgent with the staff." Hamden said that "as a result of the employees having gone to the Board it would probably mean that the employees would be less likely to achieve what they had set out to achieve with the petition." He also told Hambourger that because of the petition "he could not ask the Board to give the staff raises" and that employees were "less likely to get a parental leave policy put in place." According to the judge, Hamden explained his statements to Hambourger by saying: "[W]hen the Board gets the [petition] they will be angry; they will think that the letter indicates that the staff feels entitled to things and they will want to show the staff that they're not entitled to these things by withholding things."

At the August 15, 2003 board meeting, the budget proposed by the Respondent's financial officer, Rick Lennon, contained a 6-percent wage increase for staff. In the days preceding the meeting, Lennon independently concluded that the Respondent should not go forward with recommending this wage increase to the board of directors.[2] Thus, on August 15, Lennon told the board that he was not recommending the proposed raise. At this meeting, the board of directors decided to defer discussion of staff pay raises, and also decided to repeal the employees' short-term disability benefits.[3] The board directed Hamden to investigate the cost of short-term disability insurance and to canvas the staff for their opinions on short-term protection. There is no evidence that Hamden made any recommendations to the board concerning the proposed wage increase or the short-term disability benefits.

Relying on certain statements by Lennon and Hamden, particularly Lennon's "admission that management decided to withdraw its plan to grant wage increases because of employee complaints and ongoing litigation," my colleagues find that the General Counsel proved that the Respondent harbored animus toward its employees' concerted activities. Because the board of directors followed Lennon's recommendation, my colleagues conclude that it, too, harbored animus against those activities. Accordingly, they find that the decision made by the board of directors at the August 15 meeting violated Section 8(a)(1).

I disagree with my colleagues' reliance on this evidence to establish animus in decisions in which Lennon and Hamden were not ultimately involved. See *Alexian Bros. Medical Center*, 307 NLRB 389 (1992); see also *Wild Oats Markets*, 339 NLRB 81, 88 fn. 10 (2003) ("Because Abbas [had] no involvement in the decision to sell the store, his statements to the employees do not establish an unlawful motive"); *Detroit Newspaper Agency v. NLRB*, 435 F.3d 302, 310 (D.C. Cir. 2006) (alleged antiunion statements of supervisor did not support finding of animus where the supervisor "was not directly involved in the final decision to terminate [the employee], so any potential impact he had on that decision was necessarily circumscribed"). The board of directors alone made the decisions to not grant the wage increase and to eliminate the short-term disability benefits. There is no evidence suggesting that Lennon or Hamden was in any way involved in the decision to eliminate the short-term disability coverage. Further, despite the judge's assertions to the contrary, these men were not substantially involved in the board's decision to defer consideration of the proposed wage increase. The record indicates that the proposed budget presented to the board of directors on August 15 contained a 6-percent staff wage increase, and that, for various reasons, Lennon independently decided not to recommend that increase. Further, the board members testified that they exercise rigorous independent judgment when considering management's financial recommendations, especially with regard to raises. Indeed, on another occasion after the August 15 meeting, the board rejected Hamden's recommendation that it authorize staff raises. In my view, this establishes that the decisions in issue were made by the board of directors and not by Lennon or Hamden.

For the foregoing reasons, there is insufficient basis to impute to the Board of Directors Lennon's or Hamden's purported animus towards the employees' concerted ac-

[2] Hamden shared Lennon's opinion, though he also arrived at it independently.

[3] Notably, with respect to short-term disability benefits, the employee petition stated "we would like to suggest that future problems could be prevented if, rather than allowing this benefit to be administrated by the Executive Director, [the Respondent] purchased short-term disability insurance from a third party. Some employees may feel uncomfortable with the office management reviewing their medical certification."

tivities.[4] Further, there is no independent evidence establishing such animus held by the board members themselves.[5] Because I find the evidence relied on by the judge was insufficient to meet the General Counsel's initial burden of proof, it is unnecessary to pass on the validity of the Respondent's asserted defenses. *John J. Hudson, Inc.*, 275 NLRB 874, 875 (1985). Accordingly, I would reverse the judge and dismiss the allegations that the Respondent violated Section 8(a)(1) as discussed above.

II. REDUCED-HOURS WORK SCHEDULES AND CONSTRUCTIVE DISCHARGE

Similarly, I would reverse the judge and dismiss the complaint allegations that the Respondent violated Section 8(a)(1) by threatening to eliminate reduced-hours work schedules, eliminating reduced-hours work schedules, and constructively discharging employee Linda Weisel. In my view, Hamden's comments about work schedules did not constitute a threat. Further, I would find that the Respondent met its burden of establishing that it would have temporarily eliminated reduced-hours work schedules even in the absence of its employees' concerted activity. Thus, the elimination of those schedules was lawful, and did not unlawfully bring about Weisel's resignation.

1. Threats

On August 18, 2003, Hamden held a meeting with all of the Respondent's senior attorneys. He told them that in view of a deficit existing in the contract hours owed to the Department of Corrections (the DOC),[6] factionalism that had plagued the office, an impending move of the office, and a planned new computer system, he would announce the following day a proposal that "would not be supported by the senior attorneys." The following day, he announced his proposal for measures to make up the deficit in contract hours. The proposal was that, between September 1 and November 15, 2003, all employees would have to work 40-billable hours each week to qualify for benefits and, additionally, everybody would have to work 8 hours overtime each week. He told employees that he would like their input, and that he would announce his decision regarding the proposal during the August 26 staff meeting. At the meeting on August 26, after several employees voiced their opposition to the proposal, Hamden withdrew it. Instead, he established "workload goals" that everybody would have to meet. Later that day, after employee Kristin Parks thanked Hamden for withdrawing his proposal, Hamden told her, "I could still do 40 hours a week if that's what I choose to do." On some other unspecified date, Hamden told Parks that he could implement the schedule change because "some people here think it's an entitlement to work part-time."

The judge found that Hamden's comments of August 18, 19, and 26 "constitute[d] a threat to eliminate reduced hours work because of [the employees'] protected concerted activity." In my view, these comments could not reasonably be construed as threats. It is undisputed that, at the time Hamden first sought to implement the schedule change, the Respondent was approximately 1200 hours behind on its contractual obligation to the North Carolina Department of Corrections. Hamden specifically referenced this deficit when he notified the senior attorneys that there was an upcoming proposal that they would not support, and again when he made the proposal the following day. In these circumstances, these comments did not constitute a threat. This is further demonstrated by Hamden's withdrawal of the proposal after employees, many of whom engaged in the concerted activity involved here, voiced their opposition to the 48-hour week. Hamden's subsequent comments also did not constitute threats. Given that the hours deficit remained after Hamden rescinded his proposal, his comment that "I could still do a 40 hour work week if that's what I choose to do" was merely an assertion that he had the authority to make whatever scheduling changes were necessary to ensure that the Respondent fulfilled its contractual obligation to the Department of Corrections. No one disputes that he had that authority. Finally, Hamden's use of the word "entitlement" does not convert what is a generalized statement of disagreement over company policy into an unlawful threat of retaliation. In my view, there is nothing in these com-

[4] With respect to my colleagues' reliance on Lennon's purported animus, I note that, as the judge found, "the record . . . showed that only Hamden was alleged to have acted because of animus against protected concerted activity."

[5] In my view, the August 15 minutes do not reflect animus. The reference therein to "staff benefit concerns and pending litigation" is, in my view, insufficient evidence upon which to base a finding of animus. Even if this annotation refers to the employees' concerted activities, there is no indication that it was the employees' *actions* in bringing these concerns to the board's attention, as opposed to the substance and effects of those concerns, that led to the board's decision. Further, I disagree with my colleagues' assertion that the timing of the decision to eliminate short-term disability benefits demonstrates animus. As noted, in taking this action and in asking Hamden to investigate available alternatives, the board merely took the first necessary step in responding to the employees' request that it obtain short-term disability coverage from a third-party carrier.

[6] The Respondent is principally funded through a contract with the Department of Corrections. That contract anticipates that the Respondent's employees will work a certain number of billable hours during the term of the contract. At the time of this meeting, the Respondent was approximately 1200 hours behind in its annual contract commitment, with less than 2 months remaining in the first fiscal year of the new contract.

ments or in the context in which they were made that could lead others reasonably to believe that the revised work schedule was in any way related to the petition regarding maternity benefits. Accordingly, I would reverse the judge and dismiss this 8(a)(1) allegation.

2. Retaliation

On October 1, 2003, Hamden sent an e-mail to employees stating that, effective January 1, 2004, 40 hours would be required to qualify as a full-time employee. At the hearing, Hamden explained that this e-mail announced a temporary change. Indeed, on December 11, 2003, he sent another e-mail to employees specifically stating that the 40-hour minimum workweek was a temporary measure. Nevertheless, the judge found that Hamden made this change in retaliation for the Respondent's employees' concerted activities, and also found that the Respondent failed to demonstrate that it would have eliminated reduced-hours work schedules in the absence of that protected activity.

Even assuming that the General Counsel met his initial burden of proof here, in my view, the Respondent effectively demonstrated that it would have suspended reduced-hours schedules in the absence of its employees' concerted activities. In July 2003, the Respondent first calculated and became aware of the hours deficit. In the weeks preceding the August 8 petition, Hamden frequently lunched with colleagues Phil Griffin, Jimmy Carter, and Billy Sanders. During these lunches, Hamden repeatedly discussed his concerns about the hours deficit and possible remedies for it, including the elimination of reduced-hours schedules. Hamden made an effort in August to remedy the situation, but in the face of vocal opposition, he withdrew his proposal. By late September 2003, however, it had become apparent that voluntary efforts to meet the Respondent's program challenges had not produced significant progress.[7] Hamden therefore decided to require all employees to work 40 hours per week for a limited time.

Thus, Hamden's decision on October 1, 2003, to temporarily suspend reduced-hours work schedules was justified by compelling business needs. Hamden's plan was calculated to reduce the hours deficit. As originally conceived, Hamden's proposal would have affected every employee and reduced the deficit by approximately 190 hours each week for nearly 10 weeks. After that proposal was shot down by the employees, Hamden implemented a less aggressive, though nevertheless effective, schedule that would reduce the deficit over a longer period of time. Further, in my view, Hamden's decision to undertake efforts to reduce the hours deficit during the first year of the 3-year contract was prudent. If left unremedied, the deficit could continue to grow, leaving the Respondent in a situation where it would be impossible for it to meet its contractual obligations to the Department of Corrections. Even if the deficit could be remedied by a late surge in productivity, it is likely that the Department of Corrections would choose not to continue a relationship with a firm that was content to fall behind in its obligations and play "catch-up" for the remainder of the contract term.[8] In these circumstances, the Respondent's actions were not unlawful. See *Munford, Inc.*, 266 NLRB 1156, 1157 (1983) (where legitimate business needs necessitate changes to employee schedules, employer may protect its interests even though employees had previously been allowed to work lenient hours based on "personal and family obligations").[9] Accordingly, contrary to my colleagues, I would reverse the judge and dismiss this 8(a)(1) allegation.

3. Constructive Discharge

Linda Weisel worked for the Respondent as a staff attorney. She worked from 1986 until the end of January 2004. She was one of the Respondent's reduced-hours employees. After the Respondent suspended reduced-hours schedules in October 2003, Weisel provided notice of resignation on or about December 3, 2003. My colleagues find that Weisel was constructively discharged because the suspension of reduced-hours schedules resulted in burdens on her so difficult and unpleasant that she was forced to resign. As discussed above, they also determine that the suspension of reduced-hours schedules was discriminatorily motivated.

I disagree. Under *Crystal Princeton Refining Co.*, 222 NLRB 1068, 1069 (1976), two elements must be proved to establish a constructive discharge. First, the burdens imposed upon the employee must cause, and be intended to cause, a change in working conditions so difficult or unpleasant as to force her to resign. Second, it must be shown that those burdens were imposed because of the employee's protected concerted activities. There is no need to address the first element here because, as previ-

[7] At the end of September, the Respondent still had a deficit of approximately 1000-billable hours. By November 15, only 6 weeks later, the deficit was back up to nearly 1400 hours.

[8] For these reasons, I strongly disagree with my colleagues' finding that the Respondent's concern about its contract hours deficiency was a mere pretext, i.e., unworthy of belief.

[9] Moreover, given that Hamden had contemplated the suspension of reduced-hours schedules prior to the employees' drafting of the petition to the board of directors, the judge erred in finding that this action was discriminatorily motivated. See *Avecor, Inc.*, 296 NLRB 727, 744 (1989), enfd. in relevant part 931 F.2d 924 (D.C. Cir. 1991), cert. denied 502 U.S. 1048 (1992) (where workplace changes are planned prior to protected activity, there is no discriminatory intent).

ously discussed, I find that the suspension of reduced-hour work schedules was not imposed in retaliation for the employees' concerted activities. Accordingly, there can be no constructive discharge. Thus, I would also dismiss this 8(a)(1) allegation.[10]

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 threaten our employees with unspecified reprisals, the withholding of a wage increase, the elimination of short-term disability benefits, or the elimination of reduced-hours work schedules because of your protected concerted activity.

WE WILL NOT withhold wage increases, eliminate short-term disability benefits, eliminate reduced-hours work schedules, or constructively discharge our employees because of your protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL institute the 6-percent wage increase we unlawfully withheld on August 15, 2003, with interest.

WE WILL restore the reduced-hours work schedule practice we unlawfully eliminated on January 1, 2004.

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

WE WILL make Linda Weisel whole for any loss of earnings and other benefits resulting from her constructive discharge, less any net interim earnings, plus interest.

WE WILL make our employees whole, with interest, for any loss of earnings and other benefits suffered as a result of our unlawful withholding of a wage increase, elimination of short-term disability benefits, and elimination of reduced-hours work schedules.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful constructive discharge of Linda Weisel, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the constructive discharge will not be used against her in any way.

NORTH CAROLINA PRISONER LEGAL SERVICES, INC.

Ronald P. Morgan, Esq. and *Shannon Renee Mecues, Esq.,* for the General Counsel.

William P. Barrett, Esq. and *Terrence D. Friedman, Esq.,* for the Respondent.

DECISION

STATEMENT OF THE CASE

PARGEN ROBERTSON, Administrative Law Judge. A hearing was held in Chapel Hill, North Carolina, on June 22, 23, and 24 and August 2–5, 2004. I have considered the entire record and briefs filed by Respondent and the General Counsel in reaching this decision.

I. JURISDICTION

At material times, Respondent has been a nonprofit North Carolina corporation with a facility located in Raleigh, North Carolina, where it is engaged in the business of providing legal services for inmates of the North Carolina prison system. During the past 12 months, a representative period, Respondent in the course of its business operations had a gross volume of business in excess of $250,000 and it purchased and received at its Raleigh facility goods and materials valued in excess of $50,000 directly from points outside North Carolina. In view of its admissions and the full record, I find that Respondent has been an employer at all material times engaged in commerce within the meaning of the National Labor Relations Act (the Act).

II. PRELIMINARY MATTERS

Respondent is a law firm. Its clientele is limited to prisoners in the North Carolina Department of Corrections (DOC) system. Respondent's employees include management personnel headed by an executive director with exclusive hire and discharge authority over employees, supervisors, staff attorneys, paralegals, and support staff. A board of directors governs Respondent and that board has exclusive hire and discharge authority over Respondent's executive director.

Respondent does not bill the prisoners it represents. Instead, almost all it's funding is provided under a contract with the

[10] For the same reason, I would dismiss the finding that the Respondent violated Sec. 8(a)(1) by forcing employee Susan Pollitt to take personal leave in order to avoid a constructive discharge.

DOC.[1] Under that contract, Respondent's work product is measured in billable hours. The record showed that attorneys actually work in excess of hours that qualify as billable hours. Until the events material to this litigation, each week some attorneys routinely worked 40 billable hours and others worked fewer than 40 billable hours.[2] The attorneys that routinely worked 40-billable hours received full fringe benefits. The reduced hours[3] attorneys[4] that regularly worked 30 or more billable hours each week also received benefits.

Evidence supporting the complaint allegations includes the following:

A. Early 2003

Respondent Attorney Kari Hamel asked Executive Director Michael Hamden for maternity benefits including benefits under Respondent's short-term disability practice. Respondent routinely granted maternity leave and it did so for Hamil, but Respondent did not agree to Hamil's request for short-term disability benefits. Subsequently, Hamel's attorney wrote Respondent's board of directors that it was unlawful for it to deny its employees short-term disability benefits. Hamel and other employees discussed her claim for short-term disability benefits at and away from Respondent's office.

B. July 22, 2003

Kari Hamel filed an EEOC charge against Respondent on behalf of herself and others similarly situated, alleging that Respondent had illegally denied her claim for short-term disability benefits during maternity leave.

C. August 8, 2003

Seventeen employees signed a petition to the board of directors on and before August 8 that included among others, the following paragraph:

> We understand the Board will be discussing the NCPLS short-term disability plan and how it applies to female employees after childbirth. As employees of this organization, we want to let the Board know how important our benefits are to us. We hope short-term disability insurance will remain a benefit for NCPLS employees and that it will apply to temporary disability arising from pregnancy and childbirth as it does to any other short-term disability.

That petition was distributed to others including some supervisors, on August 8, 2003.

D. August 12, 2003

Susan Pollitt and Kristin Parks[5] testified about an August 12, 2003 staff meeting. During that meeting supervisors and employees engaged in a sometime heated discussion regarding the employees' petition supporting Kari Hamel's request for short-term disability benefits. Supervisor Brenda Richardson[6] held up a copy of the employees' petition during the August 12 staff meeting and asked what is this. Richardson said, we need to talk about this and Phil Griffin slapped his hand on a table and said, "This is beneath contempt." Brenda Richardson questioned Kari Hamil about why she couldn't arrange her leave to cover her disability after birth of her child and Richardson quizzed Kristin Parks about whether she felt she had been discriminated against.

E. August 13, 2003

Elizabeth Hambourger[7] testified that Michael Hamden asked her to come into his office on August 13. Hamden said that he felt it was his fault about the events in the August 12 staff meeting and that he had not realized the extent of the factionalism in the office. Hamden said that things were going to change and that he had been too indulgent with the staff. He said it would have been better for us to come to him about short-term disability than to have gone to the Board. Hamden said that as a result of the employees having gone to the Board it would probably mean that the employees would be less likely to achieve what they had set out to achieve with the petition. Hambourger asked what he meant by that and Hamden answered that because of this letter he could not ask the Board to give the staff raises. He said that because of this letter we were now "less likely to get a parental leave policy put in place." Hambourger asked why was that and Hamden answered that "when the Board gets the letter they will be angry; they will think that the letter indicates that the staff feels entitled to things and they will want to show the staff that they're not entitled to these things by withholding things." Hamden told Hambourger that she should not have known how the Board would react but "senior attorneys should have known better."[8] He said that he assumed that it was not Hambourger's idea to write the letter.

Michael Hamden did not deny that he called Hambourger in on August 13. However, he testified that he called her in order

[1] DOC was directed to provide legal services to prisoners by a case referred to as the "*Bounds*" decision. Respondent cited that case as *Smith v. Bounds,* 430 U.S. 817 (1977).

[2] Five attorneys worked reduced hours. One, Eleanor Kinnaird, was a part-time employee. The other four, Pollitt, Weisel, Parks, and Hamil, were considered full-time employees on reduced-hours schedules. Susan Pollitt and Linda Weisel worked reduced hours from 1992. Kristin Parks started working reduced hours when she returned from maternity leave in January 2002. Kari Hamel worked reduced hours from after the birth of her first child in the summer of 2003.

[3] For example, Susan Pollitt testified that her routine work schedule in 2003 and for some 10 years before 2003 was to bill 32 hours a week. In order to make up 32 billed hours she would customarily work between 37 and 40 hours. She received reduced pay and benefits including vacation, contribution to 401(k), and life insurance while on that reduced hours schedule. During that time, Pollitt was eligible for full health benefits coverage.

[4] There were also other nonattorney employees that worked reduced hours.

[5] Kristin Parks as well as Kari Hamel took maternity leave in 2003.

[6] Richardson testified that she supervised the work of three support staff employees. Support staff employees answer the phones, open mail, copy documents; maintain the file room, close files, and other of those sorts of duties. Richardson evaluates and makes recommendations on support staff to higher supervision. She has worked for Respondent for about 6 years. [See GC Exh. 2.]

[7] Hambourger was the field attorney that drafted the employees' petition to the Board.

[8] Susan Pollitt and Linda Weisel were Respondent's most senior field attorneys.

to express his appreciation for her leadership in taking heat over the petition. Hamden also testified:

> I—you know I might have discussed with her that the—my idea that this was not a good strategy. The Board has always been very supportive of our Program and all of our staff. They have always done the very best they could for us in terms of salaries and benefits. And I don't think it is a productive exercise to attack or implicitly attack the Board when your objective is for enhanced benefits. I think a better approach would be to recognize the history of the Board and to commend them for that and to ask them for additional benefits. I think we discussed that.

Hamden denied telling Hambourger that he would not ask for staff pay increases because of the petition. He admitted that he may have told her the Board would not be receptive to an attack. Michael Hamden denied that he told Hambourger that he would retaliate against the employees because of the petition.

F. August 15, 2003

Michael Hamden, Brenda Richardson, Rick Lennon, and Jimmy Carter were present on behalf of management for the August 15 board of directors' meeting. Elizabeth Hambourger was also there. Rick Lennon told the Board they had been planning to grant wage increases but because of employee complaints and ongoing litigation, they were not going to recommend raises.

Michael Hamden testified that before the August 15 board meeting, he asked Rick Lennon his opinion of whether they should go forward with their recommendation to the board for a staff salary increase. Hamden believed that meeting with Lennon was on the day before August 15. He had independently concluded that they should not go forward with the recommendation for a salary increase and Lennon said that he had concluded they should not recommend a pay raise to the Board. Hamden said that the employees' petition was not a consideration in determining not to recommend a pay increase. When asked the basis for the recommendation to not go forward with the pay increase, Hamden testified:

> Well, there were a number of factors, significant ones included the fact that our employees, two of our—one of our employees had asserted a claim of entitlement to paid leave, which we had not budgeted or planned on. We had a second employee in virtually the same circumstance. There was pending an EEOC complaint. We didn't know what would be involved in the defense of that. We were 1200 hours behind on our contract. We had some uncertainties to deal with respect to the file management software. And we did not have an idea of what the cost of relocating the office would be. So all of these things were factors. There was a great deal of uncertainty.[9]

Michael Hamden admitted Respondent has generally increased salaries once they had a contract with DOC.

Hamden testified that on August 15, the board repealed the employees' extended (short-term) illness policy. He did not recall making a recommendation in that regard. The board directed Hamden to investigate the cost of short-term disability insurance and to canvas the staff for their opinions on short-term protection. Hamden did recommend a short-term policy during the November 2003 board meeting. That recommendation was approved. A short-term insurance policy was purchased and became effective in December 2003.

Brenda Richardson called Hambourger into Richardson's office on the afternoon of August 15. Richardson told Hambourger that she apologized for her conduct in the August 12 staff meeting and that she knew that what had happened was not Hambourger's fault because it was not her idea to write the letter. She said that the only reason Hambourger had written the letter was because she was a good friend of Kari. Hambourger agreed that she was motivated by her friendship with Kari Hamel and wanted to support the lawsuit but also because she supported what was contained in the letter. Richardson cautioned Hambourger that just because others in the office were nice to her[10] did not mean they are her friends and that she felt they had convinced Hambourger to write the letter for their own purposes. Hambourger replied that was insulting but she accepted Richardson's apology.

G. August 18, 2003

There was a meeting between Michael Hamden and all senior attorneys at 1:30 p.m. on August 18, 2003. Present at that meeting were Richard Giroux, Linda Weisel, Phillip Griffin, Susan Pollitt, Latisha Eckels, Ken Butler, Kristin Parks, Kari Hamel, and Michael Hamden. Hamden spoke and said that in view of a deficit existing in the contract hours owed to the Department of Corrections,[11] factionalism that had plagued the office, an impending move of the office and a planned new computer system; he would announce a proposal the following day which would not be supported by the senior attorneys.

H. August 19, 2003

Board of directors member Barry Nakell visited the office during the August 19 staff meeting. He told the staff that the matter of Kari Hamel's request[12] had been hotly debated among the directors but had not been resolved as of that time. Nakell told the staff that the Board fully supported Director Michael Hamden. Nakell left before the staff meeting concluded.

When the meeting continued Michael Hamden told the staff that on August 15 the board rescinded Respondent's extended illness policy.[13] Hamden stated that Respondent had out-

[9] The claim for entitlement to paid leave and the EEOC complaint involved Kari Hamel's request for short-term disability benefits.

[10] At that time, Hambourger generally associated with Kari Hamel, Kristin Parks, Susie Pollitt, Linda Weisel, and Tracy Wilkinson.

[11] Respondent is principally funded through a contract with DOC. That contract anticipated Respondent's employees would work a certain amount of hours during the term of the contract. Not all worktime was counted. Instead, hours that qualified as work under the DOC contract were called "billable hours."

[12] Nakell was referring to Hamel's request for short-time disability benefits during her maternity leave.

[13] The term "extended illness policy" refers to Respondent's short-term disability benefits.

standing problems including a contract hours deficit, factionalism in the office,[14] a pending office move and a planned new computer system. He then announced a proposal that starting September 1, 2003, all employees[15] would have to work 40-billable hours each week to qualify for benefits and, additionally, everybody would have to work 8 hours overtime for a total of 48 hours per week. That practice would continue from September 1 until November 15, 2003. The staff would then break from that practice for the holidays but if they had not achieved some goals, the 48-hour-per-week practice would resume on January 16, 2004. Michael Hamden said that was his proposal and he was giving the staff 1 week for its input. Hamden said he would announce his decision during the August 26 staff meeting. In response to questions, Hamden explained that under his proposal there would no longer be reduced hour with benefits employment.[16]

Hamden admitted that he met with the staff on August 19.

I. August 22, 2003

Michael Hamden and Rick Lennon meet with the staff on August 22 and explained employee benefits. Linda Weisel and Susan Pollitt presented Hamden with a response to his August 19 proposal.[17]

J. August 23, 2003

Michael Hamden met with Kristin Parks on August 23.[18] He asked Parks if she knew that some members of the staff had gone to the board behind his back. Hamden said that was not the way to get things done around here. He told Parks, "I'm not going to have that kind of thing anymore." Parks told Hamden that she wanted to talk about the 48-hour a week issue and how badly it would impact on people with families. Hamden mentioned Susan Pollitt and Linda Weisel as causing the problems for him and that they continued to undermine his authority and stir up trouble. Hamden said that he just couldn't put up with it anymore. Parks asked why did Hamden always take things out on Susie and Linda when it was Phil Griffin that was causing problems in the office. Hamden replied that Phil did not matter because no one looks up to him and no one follows him so it doesn't matter what Phil does. The difference is that people respect Linda and Susie and follow them.

Hamden admitted that he met with Kristin Parks. He denied that he told her "that Linda's and Susie's visit to Barry or their meeting with Barry was 'not the way things are done around here and that (he wasn't) going to accept it.'"[19] Hamden testified that he did not recall discussing with Parks, Linda, and Susie's meeting with Barry. He did not recall any discussion about undermining his authority. Hamden did not recall telling Parks that he could still require employees to work 40 hours a week but he admitted that he never had any question but that he could require employees to work 40 hours a week. He denied telling Parks that any change in schedules would be because employees think that a reduced hours schedule is an entitlement. Hamden admitted that maybe a month later he made a comment that he was not concerned with making up the contract hours and that he was confident Respondent would make up the contract hours deficit. Michael Hamden then testified:

> What concerns me is the unending contention, in the office, the unending factionalism, that's a concern. How are we going to deal with that.

K. August 26, 2003

On August 26, Hamden told the staff that no one had fully supported his August 22 proposal and he had decided not to require 48 hours work each week. Hamden said that there would be workload goals that everybody would have to meet. Each attorney would have to get his or her files down to 120 and the attorneys would communicate with their clients in accord with an office memorandum. Additionally, there would be a complete restructuring of the office.

Kristin Parks testified that she went to Hamden's office on August 26 and thanked him for discarding the 48-hour week. Hamden said, "Well, you know, I could still do 40 hours a week if that's what I choose to do." Parks replied that he should understand that she could not work 40 hours a week. Kristin Parks testified that she had several conversations with Michael Hamden regarding reduced hours workweeks. During one of those conversations, Hamden said, "[I]t's not because of the contract hours and it's not because of the money for the benefits, but it's because some people here think it's an entitlement to work part-time."

L. October 1, 2003

Kari Hamel went into Hamden office on October 1, 2003. She told him she appreciated the work schedule. Michael Hamden replied that people in the office believed the work schedule was an entitlement and people were not grateful.

Also on October 1, 2003, Michael Hamden came to Susan Pollitt's office. Hamden said that he was going to change the rule so there would no longer be reduced hours employment. Everybody would have to bill 40 hours a week in order to be full time. Pollitt asked why he was taking that action. Hamden

[14] Michael Hamden testified that factionalism had been a problem since at least the day he was hired as executive director and that it has probably been a problem since 1990.

[15] Hamden referred to full-time employees. That term included reduced-hours employees that worked a minimum of 30-billable hours each week as well as attorneys that worked 40-billable hours each week. Employees that normally worked less than 30-billable hours per week were not entitled to benefits and were sometimes referred to as part-time employees.

[16] Susan Pollitt testified that Hamden's August 19 proposal would eliminate reduced hours for five women attorneys. Before August 19, five attorneys routinely worked fewer than 40-billable hours each week. Those five were Eleanor Kinnaird, Linda Weisel, Kari Hamel, Kristin Parks, and Susan Pollitt. Eleanor Kinnaird routinely worked 10- to 20-billable hours a week and was considered a part-time employee. Linda Weisel, Kristin Parks, and Kari Hamel routinely worked 30-billable hours and Susan Pollitt routinely worked 32-billable hours, each week.

[17] GC Exh. 10.

[18] Kristin Parks phoned Michael Hamden on August 22, 2003, and asked to meet with him after learning he had proposed that all employees work 48-hour weeks. She and Hamden met on August 23.

[19] Susan Pollitt, Linda Weisel, and others had met with Board Member Barry Nakell to discuss the short-term disability policy issue.

replied there was the matter of deficit in the *Bounds*[20] hours owed under the Department of Corrections contract[21] but it wasn't just that. He said that his action was also due to the hostility that he had received in August in response to his proposal. Hamden said that he could not lead an organization unless everyone was on the same footing. He couldn't take that kind of hostility that he had in August and Hamden said that, "Linda Weisel and (Pollitt) had threatened gender litigation in (their) letter."[22] Hamden said that Weisel and Pollitt had claimed working reduced hours was an entitlement and he was going to require 40 hours a week. Pollitt testified that Hamden said nothing in that conversation to the effect that requiring 40 hours per week was a temporary measure.

Later on October 1, 2003, Hamden e-mailed employees that effective January 1, 2004, 40 hours would be required to qualify as a full-time employee (GC Exh. 17).[23] Kristin Hamel went to Michael Hamden on October 1 and asked if she relinquished her benefits and worked less than 40 hours a week would she still have a job. Michael Hamden told her he would consider her request and get back to her. Hamden did not get back to Hamel on that question and Hamel decided she would quit her job because she was unable to work 40-billable hours a week.

In regard to the October 1 e-mail, Hamden did not dispute that he sent employees General Counsel's Exhibit 17. What he did dispute was the permanent nature of that message. He testified that General Counsel's Exhibit 17 announced a temporary change.[24] Hamden also testified that he met with Kari Hamel, Kristin Parks, and Susan Pollitt individually before he sent General Counsel's Exhibit 17 and told each of them of the upcoming change. He testified that he had also planned to meet with Linda Weisel but she was out of the office. Hamden recalled that of his conversations with Hamel, Parks, and Pollitt, only in the conversation with Pollitt did the question come up of whether the change was temporary. He testified that he told Pollitt the change was temporary.

Several employees including Kristin Parks,[25] Eleanor Kinnaird,[26] Linda Weisel,[27] and Kari Hamel[28] resigned after Respondent's October 1, 2003 announcement that effective January 1, 2004, all employees were required to bill a minimum of 40 hours.[29]

M. November 14, 2003

The Board approved the purchase of a short-term disability policy carried by an insurance company.[30] That policy which was effective on December 1, 2003, specifically included short-term benefits during maternity. The Board also approved payment of short-term disability benefits for Kari Hamel and Kristin Parks resulting from each one's 2003 maternity leave.

N. December 2003

Linda Weisel gave notice of her resignation in December 2003. Michael Hamden recalled that around December 3 or 5, 2003, Weisel told him she was resigning.

III. THE UNFAIR LABOR PRACTICES

The General Counsel alleged that Respondent threatened employees and retaliated against employees because of their protected concerted activities. In consideration of those allegations I shall initially consider whether the employees engaged in concerted activity, which falls within the scope of the Act's protection. Secondly, I shall consider whether the evidence supports a finding that Respondent demonstrated animus toward those concerted activities and whether there was a nexus between the concerted activity and Respondent's alleged unlawful acts.

A. The Record Regarding Protected Concerted Activities

As shown above the complaint included allegations among others, that Respondent retaliated because of various protected concerted activities by its employees. The alleged protected concerted activities include an EEOC change[31] filed by one employee and discussed among several employees; employees' discussions about, preparations of, and distribution of, a petition to Respondent's board of directors supporting a request for short-term disability benefits during maternity leave; and concerted opposition to an announced proposal to require 48-hour workweeks.

In early 2003, employee Kari Hamel requested benefits for maternity leave. In addition to leave, Hamel asked for short-term disability benefits. Hamel discussed her claim for short-term benefits with other employees and she filed an EEOC claim on July 22, 2003, against Respondent for denying her those benefits. Subsequently, in early August 2003 several employees discussed, prepared, signed and distributed a petition to Respondent's board of directors supporting Hamel's claim for short-term benefits.

Before giving birth on March 6, 2003, Hamel spoke to Michael Hamden, James Carter, Gary Presnell, Barry Nakell, and

[20] "*Bounds*" is sometime used in referring to a lawsuit that resulted in the creation of North Carolina Prisoners Legal Service. "*Bounds*" is also used in referring to Respondent's funding contract with DOC. Respondent has been party to several contracts with DOC. The current contract is for 3 years and expires on September 30, 2005.

[21] In the event of Respondent's failure by the termination date of the contract, to provide billed hours as required by the bounds contract, DOC had the contractual authority to seek return of unaccounted funds.

[22] See GC Exh. 10.

[23] Before that time reduced hours employment in excess of 30-billable hours per week was considered full time even though reduced hours employees received only a portion of some fringe benefits.

[24] Hamden subsequently e-mailed the employees on December 11, 2003, stating, among other things, that the 40-hour minimum workweek was a temporary measure. He admitted that Linda Weisel had told him of her plan to resign a couple days into December like on December 3 or 5, 2003.

[25] Parks resigned in November 2003.

[26] Kinnaird resigned in December 2003.

[27] Weisel resigned in December but continued to work until late January 2004.

[28] Hamel resigned on December 31, 2003.

[29] Hamden testified that the 40-minimum hours requirement affected members of the support staff as well as Rick Lennon and Brenda Richardson, in addition to the four reduced hours attorneys.

[30] The earlier short-term benefits were self-funded.

[31] The EEOC charge alleged that Respondent discriminated against its employee and other employees by denying short-term disability benefits to employees on maternity leave.

Rick Lennon regarding her eligibility for benefits. Hamden was Respondent's executive director. Carter was the assistant executive director and Lennon was the financial officer. Both Presnell and Nakell were members of the board of directors. Presnell was president of the Board and Nakell was a member of the board's disciplinary committee.

The parties stipulated that Hamel claimed short-term disability coverage for maternity and that she filed an EEOC charge.[32] From February 2003 Hamel discussed her claim with other employees. Those other employees included Kristin Parks, Elizabeth Hambourger, Susan Pollitt, and Linda Weisel. Kristin Parks was also pregnant at the time of those discussions. Hamel testified that she phoned Susan Pollitt and Elizabeth Hambourger and asked for their approval for her filing EEOC charges. Pollitt and Hambourger told Hamel she had their approval and support in filing with EEOC.

Elizabeth Hambourger learned of the dispute between Kari Hamel and management in mid-March 2003. She discussed the matter with others including Susan Pollitt, Linda Weisel, Kristin Parks, Tracy Wilkinson, and Eleanor Kinnaird. After Hamel filed her EEOC charge, Kristin Parks discussed the EEOC charge with other employees. In August 2003, Hambourger took some writing from Ellie Kinnaird and completed a petition[33] to the board of directors. She received input from Pollitt, Billy Sanders, Ellie Kinnaird, and others. Hambourger and Susan Pollitt then solicited other employees to sign that petition. She also spoke to Respondent's assistant director, Jimmy Carter, about the petition.

Kristin Parks, who as shown above, was also pregnant in 2003, testified that she talked with Michael Hamden around February 27, 2003. Parks told Hamden she had talked with Kari Hamel the day before and Kari had said that she was having ongoing discussions with Hamden and Jimmy Carter about short-term disability benefits for pregnancy. Parks told Hamden that she was confused about the situation and had called a friend that is an employment defense attorney. The friend told her that if a small office chooses to have short-term disability it could not exclude pregnancy. Hamden asked Parks if she had shown the attorney Respondent's policy and procedural manual and Parks replied that she had told the attorney about the policy. Hamden told Parks that he would not be threatened by her or by anyone else. During her pregnancy leave and after she returned to work in June, Parks talked to other attorneys including Kari Hamel about whether employees should receive short-term disability benefits for pregnancy. She also spoke with Supervisors Ken Butler and Jimmy Carter about short-term disability benefits during maternity leave. After Parks returned to work she talked with Karen Hamel about Hamel's EEOC charge. She learned that her name had been signed to the petition for short-term disability during pregnancy leave. Parks testified that she agreed with the position expressed in that petition.

Susan Pollitt testified that she learned that Hamel was seeking short-term disability benefits in conjunction with Hamel's maternity leave, in early 2003. Pollitt discussed Hamel's request for extended illness[34] coverage with other employees and in July 2003, with Supervisor Jimmy Carter. She told Carter that Respondent needed to stop fighting Kari Hamel's claim for benefits under the extended illness policy. Pollitt also discussed Hamel's extended illness request with employees Linda Weisel, Kristin Parks, Kari Hamel, Elizabeth Hambourger, Richard Giroux, Latish Eckels, Eleanor Kinnaird, Katie McDonald, and others. Those discussions occurred in February, March, June, and July 2003, and on a frequency of at least two discussions each week. Pollitt, Elizabeth Hambourger, and Kristin Parks discussed Hamel's plan to file the EEOC complaint with Hamel before July 22.

Some of the attorneys decided to write Respondent's board of directors before the directors' August 15, 2003 meeting. That letter was signed by several employees and dated August 8, 2003. Employees Elizabeth Hambourger, Patricia Sanders, Elizabeth Raghunanan Nana, Kimbra Bratton, Tasha Swiney, Billy Sanders, Richard Giroux, Elizabeth Coleman Gray, Leslie Templeton, Bruce Creasey, Eleanor Kinnaird, Katie McDonald, Tracy Wilkinson, Susan Pollitt, Linda Weisel,[35] Kristin Parks,[36] and Laura Smith signed that letter. Employees were solicited to sign the petition by at least two employees. Susan Pollitt asked Richard Giroux to sign the letter. Most of the signatures were obtained by solicitation of Elizabeth Hambourger. The letter was mailed to members of the board of directors and copies were left in the in-office mail for several employees including management employees and supervisors.

Moreover, Linda Weisel, Susan Pollitt, and others met with Board Member Barry Nakell and discussed their efforts to include short-term disability benefits for people out on maternity leave.

Then, two attorneys, Linda Weisel and Susan Pollitt, joined in writing Michael Hamden on August 22 in opposition to Hamden's proposal to require 48-hour workweeks. That letter included the following:

> On August 19, 2003, you proposed a plan including the following components: effective September 1, 2003, through November 15, 2003, the definition of full time employment will be changed from 30 hours/week to 40 hours/week. All full time employees will be required to work 48 hours a week. Any employee working less than 48 hours a week will no longer be entitled to benefits. These terms of employment may be recommenced on January 15, 2003 [sic], unless certain goals you have identified are met.
>
> The stated reasons for this action include that we are 1200 hours behind in our DOC contract, and that attorney caseloads are too large.
>
> We think the proposed plan is not called for by the current circumstances and is unfair, particularly to employees who are paid to work between 30–32 hours/week. The proposed plan will require a disproportionate increase in

[32] Hamel testified that she filed the EEOC charge on behalf of herself, and any persons in the past, present, or future.

[33] GC Exh. 5.

[34] The terms extended leave and short-term disability leave are oftentimes used interchangeably.

[35] Susan Pollitt signed the petition on behalf of Linda Weisel.

[36] Susan Pollitt signed the petition on behalf of Kristin Parks.

hours for this group of employees—all of whom are female—compared to employees now working 40 hours. Thus your proposed plan places a disproportionate burden on female members of the legal staff. Any plan for mandatory additional work should be proportional to the employees' regular work hours, as it has always been in the past.

Between us we have worked at NCPLS for 30 years. We have successfully handled major impact litigation as well as individual cases on behalf of North Carolina prisoners throughout our careers here. We have always been, and continue to be, willing to work longer work weeks when required to serve our clients or the organization.

The proposed plan is to take effect 8 days after your announced it. Your proposed plan forces a particular group of employees, all women, to choose between working 16 or 18 additional hours a week or lose their benefits, which include health benefits for the employees and their children. For those who have access to alternative health insurance, we have learned that 8 days is not a sufficient amount of time to switch health insurance. This proposed plan also places a disproportionate burden on the working spouses and children of employees who work 30–32 hours/week. We have both worked 30–32 hours/week since 1992, and our family obligations have been structured on this work schedule. We strongly believe that employees who work reduced schedules for reduced pay provide a significant contribution to the program and our clients. This type of employment status is important for employee retention and helps to make this a family-friendly workplace. Bar Associations across the country endorse flexible employment options and NCPLS should continue its tradition of being a family friendly workplace.

The justification for the proposed plan does not support this draconian action. Staff have been told we will have until 2005, to make up any contract hours. There are many causes for the current workload situation including: absorbing the caseloads of departing attorneys and attorneys on leave due to childbirth; increased individual caseloads (intake) because those attorneys are not replaced; and increased prison population without an increase in NCPLS attorney staff. In the near future, the workloads should be reduced by the upcoming hiring of two attorneys and the return of the attorneys from leave. [GC Exh. 10.]

B. Conclusions

1. Credibility

I credit the record showing that field attorneys engaged in protected concerted activities by, among other things: the filing of and discussions regarding Kari Hamel's EEOC charge; the employees' petition, along with discussions, writing, and distribution of and about the petition; a joint letter to Michael Hamden from Linda Weisel and Susan Pollitt in opposition to Michael Hamden's 48-hour week proposal; and Weisel and Pollitt and others meeting with Board Member Barry Nakell regarding the employees' efforts to include short-term disability benefits with other maternity leave benefits. As shown herein there was no direct evidence disputing that the employees engaged in the above referenced protected concerted activities. Additionally, the evidence established without dispute that the employees engaged in additional concerted activity regarding (1) the possible inclusion of short-term benefits for employees on maternity leave and (2) in opposition or agreement to various proposals and acts by Michael Hamden and the board of directors which are shown herein constituted unfair labor practice threats and acts.

2. Findings

The most visible concerted activity by the employees was the August petition to Respondent's board of directors. That petition was signed by employees Elizabeth Hambourger, Patricia Sanders, Elizabeth Raghunanan Nana, Kimbra Bratton, Tasha Swiney, Billy Sanders, Richard Giroux, Elizabeth Coleman Gray, Leslie Templeton, Bruce Creasey, Eleanor Kinnaird, Katie McDonald, Tracy Wilkinson, Susan Pollitt,[37] and Laura Smith. The petition was mailed to members of the board of directors and copies were left in the in-office mail for several employees including management employees and supervisors.

In addition to the petition, there were numerous employee discussions with other employees regarding the petition and there were meetings involving employees and sometimes, others as well, in which the petition was discussed. Additionally, the evidence shows that several employees engaged in concerted activity included discussions among employees in support of Kari Hamel's claim to Respondent for short-term disability benefits and several employees' discussions about Hamel's EEOC charge.[38]

Additionally at least two of the attorneys met with Board Member Barry Nakell to discuss short-term disability for employees on maternity leave.

Then, on August 22, two employees, Weisel and Pollitt, wrote Michael Hamden in opposition to his proposed 48-hour workweeks.

I find that the full record including especially that noted above proved that employees engaged in concerted activities, which fall within the scope of the Act's protection.

C. Did Respondent take Action or Actions that were Directed Against its Employees' Protected Concerted Activities?

1. Was Respondent motivated by its employees' concerted activities?

I shall consider what the record shows, if anything, that may tend to connect Respondent's acts with its employees' concerted activities [*Wright Line,* 251 NLRB 1083 (1980)]. I shall consider whether Respondent was motivated by animus regard-

[37] As shown herein, Pollitt also signed for employees Linda Weisel and Kristin Parks.

[38] There would be a question of whether Hamel's EEOC charge constituted protected concerted activity especially where, as here, the evidence showed that Hamel consulted other employees before filing the EEOC charge. However, in view of the total evidence it is apparent that the question of did employees engage in protected concerted activity need not rely on the question of whether the EEOC charge would alone constitute protected concerted activity.

ing employees' protected concerted activities and whether there was evidence showing a nexus between Respondent's allegedly unlawful activity and any animus.

As shown above Elizabeth Hambourger testified that Michael Hamden called her into his office on August 13, 2003. Hamden said that he had not realized the extent of the factionalism in the office and that things were going to change. He said that he had been too indulgent with the staff. Hamden also told Hambourger that as a result of the employees going to the Board, employees would probably be less likely to achieve what they set out to achieve through the petition and that employees were less likely to get a parental leave policy in place; that he could not now ask the Board to give staff pay raises; that the Board will be angry when it receives the employees' petition; that Respondent will show the staff that they are not entitled to current benefits; and that Respondent will withhold things from the employees. Hamden told Hambourger that senior attorneys should have known better than go to the board of directors.

Hambourger testified that Rick Lennon told the board of directors on August 15 that management was withholding a planned recommendation for staff pay increases because of employee complaints and ongoing litigation. Hambourger also testified about an August 18 meeting Hamden held with senior attorneys. Hamden spoke and said that in view of a deficit existing in the contract hours owed to the Department of Corrections, factionalism that had plagued the office, an impending move of the office and a planned new computer system; he would announce a proposal the following day which would not be supported by the senior attorneys.

At a staff meeting on August 19, according to Elizabeth Hambourger, Board Member Barry Nakell said the matter of Kari Hamel's complaint had not been resolved and that the Board fully supported Michael Hamden. Michael Hamden told the staff that the board at its August 15 meeting had rescinded the short-term disability practice. Hamden pointed to four items of concern including a contract hours deficit, factionalism in the office, a pending office move, and a new computer system. Hamden announced a proposal that starting September 1, 2003, all employees would have to work 40-billable hours to qualify for benefits and, additionally, everybody would have to work eight hours overtime each week for a total of 48 hours. That practice would continue from September 1 until November 15, 2003. The staff would then break from that practice for the holidays but if they had not achieved some goals, the 48-hour-per-week practice would resume on January 16, 2004. Michael Hamden said that was his proposal and he was giving the staff one week for its input. Hamden explained that under his proposal there would no longer be reduced hours with benefits employment.

Kristin Parks talked with Hamden on August 23. Michael Hamden asked Parks if she knew that some members of the staff had gone to the Board behind his back.[39] Hamden said that was not the way to get things done around here. He told Parks, "I'm not going to have that kind of thing anymore." Hamden said that Susan Pollitt and Linda Weisel were causing the problems for him and that they continued to undermine his authority and stir up trouble. Hamden said that he just couldn't put up with it anymore. Parks asked why did Hamden always take things out on Susie and Linda when it was Phil Griffin that was causing problems in the office. Hamden replied that Phil did not matter because no one looks up to him and no one follows him so it doesn't matter what Phil does. The difference is that people respect Linda and Susie and follow them.

At an August 26 staff meeting, Hamden said that no one had fully supported his August 19 proposal and he had decided not to require 48 hours work each week. Hamden announced that there would be workload goals that everybody would have to meet. That afternoon Kristin Parks went to Hamden's office and thanked him for discarding the 48-hour week. Hamden said, "Well, you know, I could still do 40 hours a week if that's what I choose to do." Parks replied that he should understand that she could not work 40 hours a week. Parks testified that she had several conversations with Michael Hamden regarding reduced hours workweeks. During one of those conversations Hamden said, "[I]t's not because of the contract hours and it's not because of the money for the benefits, but it's because some people here think it's an entitlement to work part-time."

Kari Hamel went into Hamden office on October 1, 2003. She told him she appreciated the work schedule. Michael Hamden replied that people in the office believed the work schedule was an entitlement and people were not grateful. Hamden went to Susan Pollitt's office that same day. Hamden said that he was going to change the rule so there would no longer be reduced hours employment. Everybody would have to bill 40 hours a week in order to be full time. Pollitt asked why he was taking that action. Hamden replied there was the matter of deficit in the *Bounds* hours owed under the Department of Corrections contract but it wasn't just that. His action was also due to the hostility that he had received in August in response to his proposal. Hamden said that he could not lead an organization unless everyone was on the same footing. He couldn't take that kind of hostility that he had in August and Hamden said that, "Linda Weisel and (Pollitt) had threatened gender litigation in (their) letter."[40]—Hamden said that Weisel and Pollitt had claimed working reduced hours was an entitlement and he was going to require 40 hours a week. Pollitt testified that Hamden said nothing in that conversation to the effect that requiring 40 hours per week was a temporary measure.

Later on October 1, 2003, Hamden e-mailed employees that effective January 1, 2004, 40 hours would be required to qualify as full time.

2. Findings

Credibility

It was not disputed but that Respondent withheld consideration of a staff pay increase from August 15, 2003; or that Respondent rescinded its short-term disability benefits practice on August 15; or that Respondent threatened on August 19 to require all employees to work 48-hour weeks; or that Respondent

[39] As shown herein, Linda Weisel, Susan Pollitt, and others met with Board Member Barry Nakell.

[40] See GC Exh. 10 and my finding herein that that document evidenced protected concerted activity by Linda Weisel and Susan Pollitt.

announced on October 1 that it would eliminate reduced hours work and require a minimum of 40-billable hours each week beginning on January 1, 2004. Evidence was in dispute as to Respondent's motive for taking those actions. Witnesses for Respondent including especially Executive Director Michael Hamden testified to the effect that none of the adverse actions taken after August 8, was motivated by animus against the employees' protected concerted activities.

Michael Hamden[41] testified that he harbored no ill will against employees for their protected concerted activities and that he was not angry because of those acts by the employees. That testimony was in dispute with substantial testimony during the General Counsel's case in chief including especially testimony by Kristin Parks, Kari Hamel, Elizabeth Hambourger, and Susan Pollitt. Moreover, there was a direct conflict between Hamden's testimony and testimony brought out during rebuttal testimony. For example, George Hausen, the executive director of Legal Aid of North Carolina, testified that he was with Michael Hamden in August 2003 at a conference at the McKimmon Center in Raleigh. After Hamden finished a phone conversation, Hamden appeared a little agitated and urgent and he told Hausen that he was having some problems back at the office. Hamden told Hausen that he seemed to have a mutiny on his hands in that there was a petition being passed to overturn a decision he had made about employee Kari Hamel. On cross examination, Hausen recalled Hamden saying that he had made a decision about an employee who was out on maternity leave and short term disability and that the other employees were trying to overturn his position with a petition.

Additionally, there was other evidence that directly disputed testimony by Hamden. Kristin Parks testified in rebuttal to testimony by Hamden, that Michael Hamden did not contact her prior to issuing his October 1 e-mail, to tell her that he intended to make a 40-billable hour rule. In fact, according to Parks, she talked to Hamden on the morning of October 1 before he sent the email announcing that rule and she asked him to tell her first if he ever decided to go to the 40-hour plan so that she could suggest an alternative plan. Hamden agreed that he would do as Parks had requested. Nevertheless, according to Parks, Hamden did not notify her before publishing his October 1 e-mail.

Kari Hamel testified in rebuttal to testimony by Hamden that Hamden did not tell her he was changing to a 40 hours week, before he issued his October 1 e-mail. She also testified that before October 11 Hamden never said that the 40-hour week would be a temporary measure.

I have considered demeanor of the witnesses and the full record and I find that Michael Hamden was not a credible witness. Some of the witnesses impressed me with their credibility including especially Susan Pollitt, Kristin Parks, Kari Hamel, and Elizabeth Hambourger.

[41] Hamden was the only competent witness for Respondent regarding motivation in view of the complaint allegations and the record, which showed that only Hamden was alleged to have acted because of animus against protected concerted activity.

3. Conclusions

After distribution of the employees' petition to the board of directors on August 8, 2003, Respondent made a number of changes to its employees working conditions. Michael Hamden frequently introduced those changes after threats to employees. For example, on August 13, Hamden told Elizabeth Hambourger that he had not realized the extent of factionalism in the office and that things were going to change. He threatened that because employees had petitioned the Board the employees were less likely to get pregnancy leave benefits; or receive a pay raise; or to continue to receive current benefits and that the Board will withhold things from the employees. On August 19, Hamden told the staff that the board had rescinded short-term disability benefits and he threatened to force all employees to work 48 hours each week.

On August 22 Susan Pollitt and Linda Weisel wrote an opposition to Hamden's 48-hour plan. After that, Hamden threatened Kristin Parks to the effect that Pollitt and Weisel had gone to the Board behind his back,[42] that Pollitt and Weisel were stirring up trouble and that he was not going to have that anymore. On October 1, Hamden announced the elimination of reduced hours work.

In view of the above and the full record, I find that Respondent was motivated by its employees' protected concerted activities. I base my findings on credited evidence showing that Hamden threatened employees because of the employees' protected concerted activities and that Hamden made changes in working conditions which he had included in threats because of the employees' protected concerted activities. Hamden's threats and subsequent acts were not subtle. With the exception of his references to "factionalism" in the office, all his threats were unequivocally directed against employees' protected concerted activities. Those protected activities were mentioned by Hamden as the employees letter to the board; employees going to the board behind his back; employees Weisel and Pollitt were stirring up trouble and undermining his authority; no employees had supported his 48-hour plan; and employees thought reduced hours was an entitlement. The letter to the board was the employees' August 8 petition to the board and that action by the signers of that petition constituted protected concerted activity.

The employees going to the board behind Hamden's back referred to employees Weisel and Pollitt's visit to Board Member Nakell to discuss Respondent's short-term disability benefits and their hope those benefits would be available to employees on maternity leave. As shown above that was also found to be protected concerted activity. Employees Weisel and Pollitt were stirring up trouble and undermining Hamden in his opinion by, as he expressed to Kristin Parks on August 23, influencing younger employees. At that time Weisel and Pollitt had engaged in extensive protected concerted activity including among other things, participating in the August 8 petition to the Board and their August 22 letter to Hamden. That letter from Weisel and Pollitt to Hamden opposed his 48-hour plan. Then,

[42] As shown herein Pollitt, Weisel, and others had met with Board Member Barry Nakell and discussed extending short-term disability benefits in cases of maternity leave.

on October 1, Hamden told Susan Pollitt that he was making changes due in part; to hostility he had received in August in response to his 48-hour proposal. Hamden also told Pollitt that she and Weisel had threatened gender litigation in their August 22 letter.

As to employees feeling entitled to reduced hours. There were only four full-time employees on reduced hours. Those four were Linda Weisel, Susan Pollitt, Kristin Parks, and Kari Hamil. All four had participated in extensive protected concerted activities extending from Hamil's request for short-term disability benefits, her EEOC charge, the petition supporting Hamil's claim and employees Weisel and Pollitt's visit to Board Member Nakell and Weisel and Pollitt's August 22 letter to Michael Hamden. Therefore, all those threats and subsequent action directly involved protected concerted activity.

As to Hamden's frequent mention of *factionalism* in the office as a cause of his displeasure and action, the record shows that factionalism did arise immediately before Hamden's first alleged illegal threats on August 13. That was the factionalism that appeared in the August 12 staff meeting. The underlying cause of that factionalism was the employees' petition to the Board. As shown above, an angry exchange occurred during that staff meeting between some of the attorneys and others including Supervisors Brenda Richardson and Phil Griffin, over the petition supporting Kari Hamel's claim for short-term disability benefits. It was only from that time that Hamden actually moved to correct what he viewed as office factionalism even though, by his own testimony, factionalism was shown to have existed from around 1990. I am convinced that Hamden's reference to factionalism was a thinly veiled reference to the employees' protected concerted activity.

Respondent argued in its brief, among other things, that some nexus must be shown to connect motive of the active decisionmaker and that the actual decisionmaker was the board of directors. However, the record evidence did not support Respondent contention that the board of directors was the sole decisionmaker. The record clearly established that the executive director handled day to day running of Respondent without input from the board of directors.[43] Moreover, the record proved that the board routinely considered only those matters placed on meeting agendum by the executive director.[44] For example, the record showed that the decision to eliminate a wage increase from the board's August 15 agenda was made by Michael Hamden in consultation with Rick Lennon. Neither Hamden nor Lennon was on the board. Nevertheless, the board accepted the recommendation to forego consideration of a staff pay increase.

Respondent also argued that the General Counsel was attempting to substitute its business reasoning in place of Respondent's. However, that is not the question in my view. The issue herein is whether Respondent was motivated to take the allegedly unfair labor practice action because of its employees protected activities. As shown above, I find that Respondent was motivated by its employees' protected activities. In consideration of the issue of whether Respondent would have taken those alleged unlawful actions in the absence of protected activity, I have considered among other things, Respondent's alleged business justification for taking those actions. I made that consideration not from a standpoint of substituting someone else's business judgment for that of Respondent, but from the standpoint of determining among other things, whether Respondent was truthful in its contention that it was motivated by business considerations or instead, whether Respondent used an alleged business motivation as a pretext to cover up illegal motivation.

In that regard, Respondent argued that Respondent was simply exercising its business judgment regarding its *Bounds* hours deficit. It argued that its actions after August 8, 2003, were justified by business concerns and that argument was arguably supported by a concern that the DOC could audit Respondent's billable hours at any time. Moreover, Respondent argued DOC would have knowledge of the deficit in billable hours at any time during the existence of the contract because of reports regularly made to DOC by Respondent.

Nevertheless, there was no evidence showing that DOC had authority to take any action because of billable hours deficits before the end of the contact in 2005. Regardless of any knowledge gained from reports from Respondent or from audits it conducted on Respondent's records, DOC could not have penalized Respondent during the term of the contract. Moreover, as shown above the record shows that Respondent's billable hours deficit was a pretextual reason for its decision to increase attorney's workloads. Among other things, the billable hours deficit was not a new matter and no event occurred proximate to August 15 or thereafter, to justify severe remedial action other than the employees' protected concerted activity. Also, the hours deficit posed no imminent problem for Respondent. The record proved that DOC could not take any detrimental action against Respondent because of a billable hours deficit before the end of the contract in 2005. Moreover, the record shows that Respondent's actions to allegedly correct its billable hours deficit was discriminatorily applied. The reduced hours attorneys would have been required to work an additional 16- to 18-billable hours each week under Hamden's original proposal of 48-hour weeks as opposed to an additional 8-billable

[43] In fact the record illustrated that the normal practice was that the executive director and not the board of directors made decisions. For example, it was Michael Hamden and not the board that denied Kari Hamel's claim for short-term disability benefits. It was Hamden that announced a proposal to go to a 48-hour workweek. It was Hamden that decided to eliminate reduced hours employment. And it was Hamden that decided to go to a 40-billable hour workweek. Therefore, I find that Hamden was Respondent's decision maker except in those instances where it was shown through credited evidence that the relevant decision was made by the board.

[44] Respondent pointed to testimony of Board of Directors President Gary Presnell and Board Members James Crouch, Fred Williams, and Barry Nakell to show that the board did fully consider the pay increase question during the August 15 meeting. I find that testimony conflicts with Respondent's actual record of that meeting. The minutes (GC Exh. 5) show, "The current budget includes a 6% staff salary increase, but in light of staff benefit concerns and pending litigation, discussion of staff pay raises was deferred." In light of the minutes, I do not credit the testimony of Presnell, Crouch, Williams, and Nakell to the extent their testimony tends to show that the pay raise issue was not deferred but was in fact, discussed at the meeting.

hours each week for all other full-time attorneys. Under Hamden's October 1 plan, the reduced hours attorneys were required to work an additional 8- to 10-billable hours each week as opposed to the full-time attorneys who would not work any additional billable hours.

Respondent also argued that because there were already some attorneys working well in excess of 40 hours in 2003, Hamden wanted the allocation of work to be more equitable. As shown above, I do not credit the testimony of Michael Hamden. In addition to what I have shown in my credibility resolutions, I find it incredible that Hamden would suddenly decide to equitably even out the workload. Before August and September 2003, two attorneys had worked reduced hours schedules for over 10 years. Two more, Hamel and Parks, had worked reduced hours for shorter periods but no one including Michael Hamden, testified of concern with equitable division of the work before employees engaged in protected concerted activities in August and September 2003.

Respondent also argued that upon learning of a billable hours deficit DOC could have awarded the contract to a competing law firm. However, there was no record evidence showing the DOC would have been so influenced. Respondent also argued that an unprecedented surge in billable hours in the latter part of the contract might cause DOC to question the validity of such a sudden increase in billable hours. Again, there was no record evidence supporting that assertion.

Respondent argued that the General Counsel contended that it could have hired additional attorneys to help reduce its billable hours deficit. I find that neither the General Counsel nor Respondent's arguments regarding the possible hiring of additional attorneys is material to the issues herein. If, as Respondent argued, it had a business problem that necessitated reducing a billable hours deficit, it could have taken whatever steps it deemed appropriate to satisfy that objective provided it did not engage in unlawful activity. The entire record has convinced me that Respondent engaged in unlawful activity and Respondent failed to prove it would have taken the same action in the absence of its employees' protected activities. Whether Respondent could have corrected its allegedly business problems by lawful means including possibly, hiring additional attorneys, is neither material in considering the General Counsel's case nor in considering Respondent's defense.

As shown herein, the evidence was conclusive that Respondent was motivated because of its employees' protected activities and that Respondent would not have taken the alleged unlawful action in the absence of the employees' protected activities.

I shall also consider the record in light of the specific unfair labor practice allegations. The complaint included the following allegations:

> Respondent threatened its employees with unspecified reprisals:
>
> Respondent threatened its employees that it would withhold a wage increase and Respondent actually withheld a wage increase:
>
> Respondent announced the termination of its extended illness benefit and Respondent actually terminated its extended illness benefit:
>
> Respondent threatened its employees with a change in required work schedules and Respondent actually changed work schedules for reduced hours employees:
>
> Respondent constructively discharged Linda Weisel:
>
> Respondent constructively required Susan Pollitt to use personal leave in an attempt to constructively discharge her:

As to the specific allegations the credited evidence showed as follows:

D. Respondent Threatened its employees with Unspecified Reprisals?

On August 12, Hamden threatened Elizabeth Hambourger that things were going to change and he had been too indulgent with the staff. Then, on August 22, Hamden threatened Kristin Parks that he was not going to have that kind of thing anymore in reference to employees going to the board behind his back. He then said that Susan Pollitt and Linda Weisel continued to cause problems for him, undermine his authority and stir up trouble.

1. Findings

Credibility

As shown above I do not credit the testimony of Michael Hamden to the extent it conflicted with credited evidence. I do credit the testimony of Elizabeth Hambourger and Kristin Parks.

2. Conclusions

The credited testimony of Hambourger proved that Michael Hamden threatened her that things were going to change because of what he observed in the August 12 meeting. Hamden asked Kristin Parks if she knew that employees had gone behind his back[45] and he threatened Parks that he was not going to have that kind of thing anymore and that Susan Pollitt and Linda Weisel continued to undermine his authority and stir up trouble.

Hambourger was involved in defending the employees' petition during the August 12 meeting. In view of the fact that the petition involved concerted activity, Hambourger's defense of that action also constituted protected concerted activity. Pollitt and Weisel's activity that Hamden complained about also involved in the employees petition to Respondent's board. That too constituted protected concerted activity.

Therefore, I find Hamden's threats of unspecified reprisals against employees because of their protected concerted activities constitutes unfair labor practices in violation of Section 8(a)(1) of the Act.

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[45] As shown herein, several people including Susan Pollitt and Linda Weisel, met with Board Member Barry Nakell regarding the employees' efforts to extend short-term disability benefits to employees on maternity leave.

E. Respondent Threatened its Employees that it Would Withhold a Wage Increase and Respondent Actually Withheld a Wage Increase?

As shown above, Elizabeth Hambourger testified that she was asked to come to Michael Hamden's office on August 13, 2003, and, among other things, Hamden threatened her that because of the employees' petition to the board he could not ask the board to give the staff a pay raise.

The current contract between Respondent and the DOC was signed on May 16, 2004.[46] Routinely, before August 8, 2003, employees received merit pay increases at the time of a new contract with DOC.[47] The undisputed record showed the practice was for the executive director to recommend and the board of directors to approve staff pay increases. Before August 8, 2003, Rick Lennon and Michael Hamden planned to recommend a pay increase during the August 15 board meeting. A day of so before August 15, Michael Hamden decided in consultation with Richard Lennon, to not recommend a staff pay increase to the board of directors during the August 15 meeting. Richard Lennon[48] told the board Respondent would not recommend staff pay increases during its August 15 meeting. The minutes of that meetings show:

> Financial Matters
>
> Budget Report
>
> Rick Lennon gave a projected budget report . . . . The current budget includes a 6% staff salary increase, but in light of staff benefit concerns and pending litigation, discussion of staff pay raises was deferred. [GC Exh. 6.][49]

1. Findings

Credibility

Michael Hamden denied telling Elizabeth Hambourger that he could not ask the board to give staff raises because of the employees' petition to the board.[50] As shown throughout my credibility findings, I do not credit the testimony of Michael Hamden to the extent it conflicts with credited evidence. Hamden's overall testimony to the effect that he praised Hambourger for her role in the employees' petition and that he did not blame employees for contacting the Board, was rebutted by credited testimony. Testimony of George Hausen showed that Hamden was agitated after learning of the employees' petition and that he termed the employees' action in that regard a mutiny. Moreover, Respondent's minutes of the August 15 board meeting show that Hamden directed deferral of the pay raise issue because of "staff benefit concerns" and "pending litigation." That evidence and my observation of her demeanor, supports the testimony of Elizabeth Hambourger and tends to contradict the testimony of Hamden. In view of my observation of demeanor and the credited testimony of Hambourger and events shown in Respondents August 15 minutes regarding this issue, I do not credit the relevant testimony by Michael Hamden.

2. Conclusions

During a conversation with Elizabeth Hambourger in his office on August 13, Michael Hamden told Hambourger, among other things, that as a result of the employees petition to the Board he could not ask the Board to give the staff raises. I find that comment constitutes a threat to deny staff pay increases because of the employees' protected concerted activity.

I shall apply the standards set forth in *Wright Line*, 251 NLRB 1083 (1980), in regard to the allegation that Respondent recommended against granting a staff pay increase. I shall first consider whether the General Counsel proved that Respondent was motivated to withhold a pay increase because of its animus regarding the employees' protected concerted activities.

I have found herein that Respondent was motivated to retaliate against various employees by refusing to consider a staff pay increase. As shown throughout this record Respondent was not subtle in its acts. It's adverse actions were most often directed against the very activities that employees sought through protected concerted activities or against activities that directly affected those employees that Respondent viewed as most obviously involved in protected activity. Here, unlike many of the matters considered below, Respondent took action against its entire staff. Nevertheless, the record did show that action was taken in retaliation to the employees' petition to the board. The petition was distributed on August 8, 2003. Michael Hamden testified that it was not until a day or so before the board's August 15, 2003 meeting that he in agreement with Rick Lennon, decided to recommend against consideration of the pay increase. There was no showing that anything happened shortly before August 14, which justified Hamden rethinking whether to recommend a pay increase on August 15 other than the employees' petition. Therefore, I am convinced from the credited record that Respondent was motivated to withhold consideration of a 6-percent pay increase because of the employees' protected concerted activities.

In further adherence to the *Wright Line* standard, I shall consider whether Respondent proved that it would have recommend against consideration of a 6-percent pay increase in the absence of the employees' protected concerted activities. As shown above I find that Respondent's defense to that action was a pretext. Michael Hamden and Rick Lennon claimed that they decided against recommending a pay increase on August 15 because of (1) a deficit in the *Bounds* hours; (2) factionalism in the office; (3) a planned office move; and (4) a planned improved computer program. As shown above, as to (1), the

[46] See GC Exh. 48. The contract was retroactive to October 1, 2002.

[47] Respondent granted pay increases to its staff on May 1, 2001, May 1, 2002 (GC Exh. 42), and on May 1, 2004 (GC Exhs. 51, 52). Negotiations between DOC and Respondent were ongoing on May 1, 2003, and raises were not considered at that time. Instead, as shown herein, Respondent first considered staff pay increases after Respondent and DOC agreed to a contract in May 2003. The first Board meeting after signing of the contract occurred on August 15, 2003.

[48] As shown herein, Lennon had met with Michael Hamden one or two days before August 15 where Hamden decided with Lennon's agreement, to not recommend the staff pay raise.

[49] Elizabeth Hambourger testified that Rick Lennon told the board of directors on August 15, 2003, that management was withholding a planned recommendation for staff pay increases because of employee complaints and ongoing litigation.

[50] Hambourger testified that Hamden referred to the petition as "this letter."

Bounds deficit was known well before Michael Hamden decided to not recommend a pay increase and the hours deficit posed no imminent problem for Respondent.[51] As to (2), Hamden admitted that factionalism had existed in the office since 1990. Nothing was shown to have occurred proximate to August 13 or 14, which would have caused imminent alarm over factionalism except for the employees' petition to the Board and the factionalism over that petition during the August 12 staff meeting. The petition and the factionalism demonstrated in that staff meeting stemmed from employees' protected concerted activities. As to (3) and (4), the evidence proved that Respondent including Michael Hamden, was fully aware of those problems from before the time when the last budget was planned and there was no showing of anything proximate to August 15, which would cause Respondent to lawfully change its budgetary plan. Therefore, I find that the evidence failed to show that Respondent would have canceled a staff pay increase in the absence of its employees' protected activities.

I find that Respondent was motivated to recommend against consideration of a 6-percent pay increase on August 15, 2003, because of its employees' protected concerted activities and the record failed to show that Respondent would have recommended against consideration of that pay increase in the absence of the employees' protected concerted activities. By that act Respondent engaged in activity in violation of Section 8(a)(1) of the Act.

F. Respondent Threatened and Implemented Termination of its Extended Illness Benefits

Among other things Michael Hamden talked about short-term disability benefits after calling Elizabeth Hambourger into his office on August 13. He said it would have been better for the employees to come to him about short-term disability than to have gone to the board. Hamden said that as a result of the employees having gone to the board it would probably mean that the employees would be less likely to achieve what they had set out to achieve with the petition.

As shown above, the Kari Hamil complaint concerned Respondent's refusal to provide her with short-term (or extended illness) benefits during her maternity leave. On July 22, 2003, Hamel filed an EEOC complaint alleging Respondent had illegally denied her benefits under its extended illness policy. On August 8, employees distributed copies of a petition to the Board signed by employees supporting Hamel's claim for extended illness benefits.

The board of directors met on August 15, 2003. The minutes of that meeting show:

> Executive Session
>
> The board met in Executive Session. The Board directed Michael to advise staff of the repeal of the Extended Illness benefit. Michael was instructed to obtain input from staff regarding desired benefits in light of budgetary constraints for the Board's consideration. [GC Exh. 6.]

Michael Hamden told the employees that the board had rescinded the extended illness policy at its August 15 meeting.

1. Findings

Credibility

As shown throughout this decision, I do not credit the testimony of Michael Hamden to the extent it conflicts with credited evidence. The evidence proved that Respondent acted to repeal the short-term disability benefits immediately upon receiving the employees' petition. Hamden's testimony that Respondent did not retaliate against its employees is not credited and I find the evidence shows that Respondent's repeal of the short-term disability benefit was motivated by the employees' protected concerted activity.

2. Conclusions

During his conversation with Elizabeth Hambourger in his office on August 13, Michael Hamden told Hambourger, among other things, it would have been better for the employees to have come to him about short-term disability benefits than to have gone to the board. I find that comment constitutes a threat to deny improved short-term disability benefits because of the employees' protected concerted activity.

I shall apply the standards set forth in *Wright Line*, 251 NLRB 1083 (1980), in determining whether Respondent unlawfully eliminated its short-term disability benefits. In that regard I shall first consider whether the General Counsel proved that Respondent was motivated to eliminate short-term disability benefits because of its animus regarding the employees' protected concerted activities.

I have found herein that Respondent was motivated to retaliate against various employees by eliminating its short-term or extended illness benefits. As shown throughout this record, Respondent failed to exercise subtlety in its actions. It's adverse actions were most often directed against the very activities that employees sought through protected concerted activities or against activities that directly affected those employees that Respondent viewed as most obviously involved in protected activity. Here, the entire thrust of the protected concerted activities was to extend Respondent's short-term disability policy and that was the precise policy that Respondent eliminated. On August 15, Respondent's board of directors voted to entirely rescind the employees' short-term disability benefits.

The evidence showed that Michael Hamden expressed hostility especially in regard to the protected activities and employee leadership in those activities. By eliminating its short-term disability policy Respondent illustrated what it could do in the event of a "mutiny." The record shows that Respondent announced only that the board at its August 15 meeting had rescinded the policy. In view of the full record including especially Respondent's threat that the employees should have approached Michael Hamden rather than the board about short-term disability benefits; the timing of Respondent's action; and its previous showing of animus, I find that the record proved that Respondent rescinded its short-term disability policy because of its employees' protected activities.

[51] As shown herein, Respondent would not suffer any penalty for a shortage of *Bounds* hours, if ever, before the expiration of the contract in the fall of 2005.

I shall consider whether Respondent proved that it would have rescinded the short-term disability benefits in the absence of the employees' protected concerted activities. Respondent argued that the short-term disability policy was eliminated because their attorney had advised that the policy may be in violation of appropriate sex discrimination laws and because that is what the employees requested in their petition to the board. Actually, the issue in the petition was not whether Respondent's policy was illegal but whether Respondent's practice of not applying that policy to cases of maternity leave was illegal. That was the thrust of both the attorney's advice to the board and the request contained in the employees' petition. The petition did include a request for coverage under an independent insurance policy but there was no request that the policy be rescinded pending conversation to a private insurance policy. I find the record failed to prove that Respondent would have rescinded its short-term disability policy in the absence of its employees' protected activities.

G. Respondent Threatened its Employees with a Change and Actually Changed its Required Work Schedules for Reduced Hours Employees

Elizabeth Hambourger was identified as the draftsperson of the employees' petition during the August 12 staff meeting. Afterward Michael Hamden told Hambourger that senior attorneys should have known better than submit the petition. He referred to those senior attorneys that were on the staff at a time when Hamden was a staff attorney. The record showed the senior attorneys that had been on the staff since the time when Hamden was a staff attorney, were limited to Linda Weisel and Susan Pollitt.

During the August 19 staff meeting, according to Hambourger, Michael Hamden told the staff, among other things, that because of a contract hours deficit, factionalism in the office, the pending office move and the new computer system, he was proposing that beginning on September 1, 2003, all employees would have to work 40-billable hours to qualify for benefits and, additionally, everybody would have to work 8 hours overtime each week for a total of 48 hours. That practice would continue from September 1 until November 15, 2003. The staff would then break from that practice for the holidays but if they had not achieved some goals, the 48-hour per week practice would resume on January 16, 2004. Michael Hamden said he was giving the staff one week for its input. Hamden explained that under his proposal there would no longer be reduced hour with benefits employment.

Kristin Parks[52] met with Michael Hamden on August 23. Hamden asked Parks if she knew that some members of the staff had gone to the Board behind his back. Hamden said that was not the way to get things done around here. He told Parks, "I'm not going to have that kind of thing anymore." Parks told Hamden that she wanted to talk about the 48-hour a week issue and how badly it would impact on people with families. Hamden said that Susan Pollitt and Linda Weisel were causing the problems for him and that they continued to undermine his authority and stir up trouble. Hamden said that he just couldn't put up with it anymore. Parks asked why did Hamden always took things out on Susie and Linda when it was Phil Griffin that was causing problems in the office. Hamden replied that Phil did not matter because no one looks up to him and no one follows him so it doesn't matter what Phil does. The difference is that people respect Linda and Susie and follow them.

At the August 26 staff meeting, Hamden said that no one had fully supported his August 23 proposal and he had decided not to require 48 hours work each week. Hamden announced that there would be workload goals that everybody would have to meet. That afternoon Kristin Parks went to Hamden's office and thanked him for discarding the 48-hour week. Hamden said, "Well, you know, I could still do 40 hours a week if that's what I choose to do." Parks replied that he should understand that she could not work 40 hours a week. Parks testified that she had several conversations with Michael Hamden regarding reduced hours workweeks. During one of those conversations Hamden said, "[I]t's not because of the contract hours and it's not because of the money for the benefits, but it's because some people here think it's an entitlement to work part-time."

On October 1, Michael Hamden told Kari Hamel that people in the office believed the work schedule was an entitlement and people were not grateful. Hamden also talked with Susan Pollitt that same day. He said that he was going to change the rule so there would no longer be reduced hours employment. Everybody would have to bill 40 hours a week in order to be full time. Pollitt asked why he was taking that action. Hamden replied there was the matter of deficit in the *Bounds* hours owed under the Department of Corrections contract but it wasn't just that. His action was also due to the hostility that he had received in August in response to his proposal. Hamden said that he could not lead an organization unless everyone was on the same footing. He couldn't take that kind of hostility that he had in August and Hamden said that, "Linda Weisel and (Pollitt) had threatened gender litigation in (their) letter." Hamden said that Weisel and Pollitt had claimed working reduced hours was an entitlement and he was going to require 40 hours a week. Later that day, October 1, 2003, Hamden emailed the employees that effective January 1, 2004, 40 hours would be required to qualify as full time. The October 1 e-mail included the following:

> So everyone will have enough notice (three months) to make the necessary arrangements, I want to let your know that beginning on January 1st, full-time employment with NCPLS will require a 40-hour work week. This change will affect Support staff, intake staff, and all people who are presently considered full-time employees who are working fewer than 40 hours per week. Of course, salaries and other compensation will be adjusted upward to reflect the increase time-commitment.

1. Findings

Credibility

As shown herein, I do not credit Hamden and I do credit Hambourger, Parks and Hamel.

[52] At that time Parks was off on maternity leave.

2. Conclusions

On August 18, 2003, Michael Hamden threatened the staff with a proposal to be announced the following day, that senior attorneys would not like. On August 19, Hamden proposed that all attorneys would have to work 40 hours plus 8 hours overtime each week to receive benefits. After employees protested against the proposed 48 hours week [including Linda Weisel and Susan Pollitt's join letter (GC Exh. 10)], Hamden announced that he had decided not to impose 48-hour workweeks. However, on August 26, 2003, Hamden threatened employee Kristin Parks that he could still do a 40-hour work week. At one time Hamden told Parks that he could eliminate reduced hours work because there are some employees that "think it is an entitlement to work (reduced hours)." I find those comments constitute a threat to eliminate reduced hours work because of their protected concerted activity.

In regard to the allegation that Respondent unlawfully eliminated its reduced hours practice, I shall first consider whether the General Counsel proved that Respondent was motivated to require 40-billable hours each week because of its animus regarding the employees' protected concerted activities [*Wright Line*, 251 NLRB 1083 (1980)]. As shown above, I have found herein that Respondent was motivated to retaliate against various employees by changing their working conditions. Those changes included the elimination of the reduced hours schedule because of the employees' protected activities.

The evidence showed that Michael Hamden expressed hostility specifically in regard to the protected activities and employee leadership in those activities. Moreover, a reduced hours employee, Attorney Kari Hamel, initiated the concerted activity, which led to Hamden and Respondent's hostility. Kristin Parks, another reduced hours attorney was in the same position as Hamel as regards short-term disability benefits during maternity leave. By eliminating reduced hours Respondent struck directly at those two employees as well as at the two remaining reduced hours employees. Those two, Linda Weisel and Susan Pollitt, were credited by Hamden with being the leaders in the August 2003 efforts to undermine his authority. By eliminating reduced hours Michael Hamden moved directly against the four attorneys[53] that would most directly benefit if the employees' protected concerted activities had been successful.

In further consideration of the *Wright Line* standard, I shall consider whether Respondent proved that it would have eliminated the reduced hours week schedule in the absence of the employees' protected concerted activities. As shown above, I find that Respondent's defense to that action was a pretext. Respondent claimed that it eliminated reduced hours schedules because of (1) a deficit in the *Bounds* hours; (2) factionalism in the office; (3) a planned office move; and (4) a planned improved computer program. As shown herein, as to (1) the *Bounds* deficit was known well before Michael Hamden decided to eliminate reduced hours and the deficit posed no imminent problem for Respondent. As to (2), Hamden admitted that factionalism in the office had existed since 1990. However, it was immediately after the August 12 staff meeting that Hamden, in consultation with Rick Lennon, decided to start actions including delaying a pay increase, that were in retaliation of the employees' petition and associated activity. Before that time there was no showing that Respondent was concerned with factionalism and there was not showing of any other event proximate to October 1 which caused Respondent to show increased concern with factionalism. As to (3) and (4), the evidence proved that Respondent including Michael Hamden, was fully aware of those problems from before the time when the last budget was planned and there was no showing of anything proximate to October 1, which would cause Respondent to change its budgetary plan. Therefore, I find that the evidence failed to show that Respondent would have eliminated the reduced hours schedule in the absence of its employees' protected activities.

Respondent also argued that even if believed, statements by Hamden allegedly made to Kristin Parks and Susan Pollitt to the effect that some attorneys believed reduced hours was an entitlement or that some were not grateful for reduced hours schedules, shows that it was not the employees' petition that motivated action by Hamden. However, as shown above, it was those same reduced hours attorneys that Hamden associated most directly with the petition and other protected concerted activity. As shown above, Hamden stated that it was the senior attorneys and that it was Pollitt and Weisel that were causing trouble. Pollitt and Weisel were shown to be the "senior attorneys," that had been on the staff from the time when Michael Hamden was also a staff attorney. The two remaining reduced hours attorneys were Kari Hamel and Kristin Parks and those two were the only attorneys directly involved the 2003 maternity leave issue. Both Hamel and Parks gave birth in 2003 and Hamel was the attorney that specifically requested short-term benefits during her maternity leave. It was against that background that Hamden started talking about attorneys or employees believing that reduced hours was an entitlement. I find a strong connection between the two and I am convinced that Hamden's reference to "entitlement" would not have come up but for the protected concerted activities. I find that Respondent engaged in unfair labor practices by threatening to and actually eliminating the reduced hours practice and Respondent failed to prove it would have eliminated reduced hours in the absence of the employees' protected concerted activity.

H. Respondent Constructively Discharged Linda Weisel

Linda Weisel worked as for Respondent as a staff attorney. She worked from 1986 until the end of January 2004. Weisel was one of Respondent's reduced hours employees. From 1992 she regularly worked 30-billable hours a week. On that reduced hours schedule her pay and benefits with the exception of health insurance, were proportionally reduced. She was considered a full-time employee and, as such, received full health insurance benefits.

Weisel learned of the dispute between Kari Hamel and Respondent over short-term disability leave in late March or early April 2003. Around that time she talked to Jimmy Carter about that dispute. Weisel told Carter that she thought law on the subject supported Hamel's position. From that time until her

[53] Attorney Eleanor Kinnaird also worked reduced hours. However, Kinnaird regularly worked less than 30 hours each week and was not entitled to receive benefits. She was considered a part-time employee.

employment ended Weisel supported Kari Hamel's claim for short-term benefits. Among other things, she talked with other employees about Hamil's claim and she gave her proxy to Susan Pollitt to sign the employees' petition supporting Hamil (GC Exh. 5) while she was absent on vacation. She along with Susan Pollitt wrote Michael Hamden on August 22, 2003, in opposition to Hamden's 48-hour a week proposal.

1. Findings

Credibility

As shown herein, I do not credit the testimony of Michael Hamden to the extent it conflicts with credited evidence. I credit the undisputed evidence showing that Linda Weisel was extensively involved in the employees' protected concerted activities in the summer and fall of 2003 and that Michael Hamden identified Weisel and Susan Pollitt as the two senior attorneys that were undermining his position and causing trouble. I also credit the evidence some of which was admitted by Michael Hamden that Billy Sanders, Phil Griffin, and Kristin Parks cautioned him in the summer and fall of 2003 that reduced hours employees would quit if Hamden forced them to work 40-billable hours weeks.

2. Conclusions

The Board has applied a two-part test in cases involving constructive discharge allegations:

> There are two elements which must be proved to establish a "constructive discharge." First, the burdens imposed upon the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee's (protected concerted) activities. [*Crystal Princeton Refining Co.,* 222 NLRB 1068, 1069 (1976).]

In this instance, in order to fully consider "the burdens imposed upon the employee must cause," one need not rest on projections as to what may happen following Respondent's allegedly unlawful action. Here, the changes occurred well before the hearing in this matter. As shown above Respondent announced elimination of reduced hours with benefits on October 1, 2003. At that time there was one part-time employee working less than 30 hours a week. That was Eleanor Kinnaird. There were four reduced hours with benefits attorneys. Those four were Linda Weisel, Susan Pollitt, Kristin Parks, and Kari Hamel. None of those five attorneys continued working under the terms announced on October 1. Four, Eleanor Kinnaird, Linda Weisel, Kristin Parks, and Kari Hamel, resigned and all four testified they resigned because of Respondent's elimination of reduced hours schedules. One of those four, Eleanor Kinnaird resigned out of protest over Respondent's action.[54] The remaining three resigned because of the burdens imposed by elimination of reduced hours schedules. The sole remaining reduced hours attorney was Susan Pollitt. Pollitt was also unable to work 40-billable hours a week and she continued to work a reduced hours schedule. As shown below, Pollitt was able to continue her employment with Respondent by use of her personal leave time to make up the difference each week after January 1, 2004, in the number of hours she was able to work and 40-billable hours.

As shown above Respondent took actions against its employees because its employees signed the August 8 petition supporting Hamil. All those adverse actions affected Linda Weisel. Those actions included Respondent withholding a wage increase for all employees from August 15 and Respondent eliminating its short-term benefits practice. The most dramatic change in working conditions in regard to its affect on Weisel appeared to be Respondent's elimination of reduced hours work.

Weisel along with Pollitt also engaged in protected concerted activity by writing Hamden that they opposed his proposal to require 48-hour workweeks. As shown herein Respondent took detrimental action against Weisel after her specific protected concerted activity on August 8 and 22, 2003.

The record showed that Respondent was aware that its October 1 announcement of the elimination of reduced hours employment was likely to result in the resignation of reduced hours employees. As shown herein, from August 19 the employees including Kristin Parks, repeatedly told Hamden they would not be able to continue working if required to work 40-billable hours each week. Billy Sanders, who was called by Respondent, admittedly told Hamden during the week before October 1 that elimination of reduced hours may cause all four reduced hours attorneys to resign. Another of Respondent's witnesses, Team Leader Phil Griffin testified that elimination of reduced hours would cause Eleanor Kinnaird to quit.[55] Michael Hamden was vague but he appeared to testify that only Kristin Parks told him that she would resign if forced to work a 40 hours a week schedule. He testified that he did not believe Linda Weisel would resign. As to Billy Sanders, Hamden admitted that he did have discussions with Sanders and that he (Hamden) "certainly considered the possibility that we might lose some members of the staff."

Respondent argued there is no evidence showing that Michael Hamden intended his change to a minimum 40-billable hours per week schedule to cause Linda Weisel to resign. As shown above I do not credit Michael Hamden's testimony. I specifically discredit his testimony that he did not intend for any of the reduced hours attorneys including Weisel, Hamel and Parks, to resign. As shown herein the credited record showed that Hamden believed Weisel and Pollitt to be troublemakers that undermined his authority. He believed Weisel and Pollitt had led the concerted action in petitioning the board of directors. Moreover, management officials including Billy Sanders told Hamden he believed the 40-minimum hours requirement might cause reduced hours attorneys to resign. I find that Hamden specifically intended to force reduced hours attor-

[54] Kinnaird did not receive benefits because she regularly worked less than 30 hours each week. Therefore, she was not directly affected by elimination of reduced hours with benefits.

[55] Although Kinnaird was not a full-time employee because she routinely worked less than 30-billable hours each week, the testimony shows that supervision anticipated that elimination of the reduced hours practice would cause her to resign.

neys to resign. *American Licorice Co*., 299 NLRB 145, 148 (1990).

Respondent also argued the evidence failed to show that Respondent should have reasonably foreseen that reduced hours attorneys would resign. However, the record illustrated that Michael Hamden was repeatedly told that reduced hours attorneys would resign if he eliminated the reduced hours privilege. As shown above Billy Sanders told Hamden the reduced hours attorneys may resign. Kristin Parks, Susan Pollitt, and Linda Weisel told Hamden on several occasions that they could not work 40-billable hours each week.

Respondent argued that neither Weisel nor Susan Pollitt had home responsibilities great enough to justify a constructive discharge determination. However, as was the case in determining whether certain action was justified business judgments by Respondent, I shall not substitute my judgment for the judgments of the alleged discriminatees in determining the extent of their family obligations. The record clearly established that both Weisel and Pollitt are the primary caregivers of their respective child or children and the record established each has substantial responsibilities which justified the desire to only work reduced hours. Moreover, even though Michael Hamden was aware that all the reduced hours attorneys as well as some of the other reduced hours employees, desired to work reduced hours at reduced salaries, he was content to accept their respective judgment behind those desires without inquiring further as to the merits of their needs. I find that both Weisel and Pollitt showed through credited and uncontested testimony that their reduced hours work were personal necessities. Moreover, Hamden was fully aware that loss of reduced hours privileges might cause some or all the reduced hour attorneys to resign. I find that Hamden reasonably foresaw that his action would result in resignation by reduced hours attorneys.

The evidence showed that Michael Hamden expressed hostility especially in regard to the protected activities and leadership in those activities by Weisel and Pollitt. Moreover, another reduced hours employee, attorney Kari Hamel, initiated the activity which led to Hamden's hostility. Kristin Parks, the sole remaining reduced hours attorney was in the same position as Hamel as regards her right to short-term disability benefits during maternity leave.

All the above factors and the full record proved that Respondent was motivated to require Weisel to work a full 40-billable hour week because of its employees' protected concerted activities.

I shall also apply the standards set forth in *Wright Line*, 251 NLRB 1083 (1980). Of course, the initial *Wright Line* consideration is similar to the question considered above under *Crystal Princeton*. In that regard, as shown above, I find that Respondent was motivated to change the working conditions of its employees including especially Linda Weisel because of its animus regarding the employees' protected concerted activities.

The evidence included unrebutted testimony from Linda Weisel showing that she is the primary caregiver[56] for her child and demands resulting from her time with her family and her time involved in family duties,[57] proved that Respondent's elimination of reduced hours work resulted in a change in Weisel's "working conditions so difficult or unpleasant as to force (her) to resign." Moreover, the credited testimony of Weisel proved that she told Michael Hamden "[M]y family obligations will not allow me to (work 40 hours a week)."

In further consideration of the *Wright Line* standard, I shall also consider whether Respondent proved that it would have eliminated the reduced hours week schedule for Linda Weisel in the absence of the employees' protected concerted activities. As shown above, I find that Respondent's defense to that action was a pretext. Respondent claimed that it eliminated reduced hours schedules because of (1) a deficit in the *Bounds* hours; (2) factionalism in the office; (3) a planned office move; and (4) a planned improved computer program. As shown above, as to (1), the *Bounds* deficit was known well before Michael Hamden decided to eliminate reduced hours and the deficit posed no imminent problem for Respondent. As to (2), Hamden admitted that factionalism in the office had existed since 1990. There was nothing to show that action was required to eliminate factionalism on October 1, 2003, other than factionalism caused by the employees' protected concerted activity. As to (3) and (4), the evidence proved that Respondent including Michael Hamden, was fully aware of those problems from before the time when the last budget was planned and there was no showing of anything proximate to October 1, which would cause Respondent to change its budgetary plan. Therefore, I find that the evidence failed to show that Respondent would have eliminated the reduced hours schedule in the absence of its employees' protected activities.

Despite Respondent's claim that reduced hours was a privilege and not a right as well as its argument that Weisel did not have child care responsibilities sufficiently grave in magnitude to justify a constructive discharge finding, the record showed that shortly after Respondent expressed its animus toward it's employees' protected activities, it eliminated a longstanding working condition because of its animus against it's employees' protected activities. Regardless of whether reduced hours was a privilege or a right, Respondent could not lawfully eliminate that privilege or right because of its animus against protected concerted activities. Moreover, there is no authority for the argument that discriminatees must illustrate a certain level of need to justify a constructive discharge allegation. The General Counsel did illustrate that Weisel had serious child care responsibilities and that she met those responsibilities through among other things, use of time she would not have had but for her reduced hours schedule. Moreover, the General Counsel proved that Weisel took her responsibilities seriously and that Respondent was fully aware that Weisel took her family responsibilities seriously.

In summary, I find that the General Counsel proved that Respondent's changed working conditions for its reduced hours

[56] Weisel's husband is an attorney that works approximately 60 hours a week.

[57] Weisel's son is now 12 years old. Linda Weisel testified to the effect that she has always been responsible for picking up her son after school and escorting him to school, sports practices, music lessons, camps, medical appointments, religious studies and school events. She assists her son in his work on school assignments including homework.

attorneys as found herein, including especially its elimination of reduced hours work, because of the employees protected concerted activities. Those changes resulted in burdens on the employees so difficult and unpleasant that they did cause reduced hours attorneys to either resign or use personal leave time to avoid resigning. The record evidence proved that Respondent intended to cause its reduced hours attorneys to resign. *Crystal Princeton Refining Co*., 222 NLRB 1068, 1069 (1976). Respondent imposed those changes in working conditions because of Weisel's and other employees' protected concerted activities. *Crystal Princeton Refining Co*., supra; *Wright Line*, supra. I find that Respondent constructively discharged Linda Weisel in violation of Section 8(a)(1) of the Act. *American Licorice Co.,* 299 NLRB 145 (1990); *Bennett Packing Co. of Kentucky,* 285 NLRB 602 (1987). The evidence did not prove that Respondent would have constructively discharged Weisel in the absence of the protected concerted activity.

I. Respondent Constructively Required Susan Pollitt to use Personal Leave in an Attempt to Constructively Discharge Her

Susan Pollitt, like Linda Weisel, worked for Respondent as a staff attorney on a reduced hours schedule. Pollitt started working for Respondent as an attorney in June 1989. From 1992 until 2004 she worked reduced hours of 32-billable hours per week. Like Weisel and the other reduced hours attorneys, Pollitt received reduced pay and benefits with the exception of health insurance, in proportion 32 hours versus full pay and benefits at 40-billable hours a week. She and all the reduced hours attorneys were entitled to full health insurance benefits.

As shown above, Pollitt was extensively involved in the protected concerted activities in support of Kari Hamel's claim for short-term benefits during maternity leave. Respondent was aware of Pollitt's activities and Michael Hamden told Kristin Parks and Pollitt, that Pollitt, as well as Linda Weisel, undermined his leadership role and posed a danger to him. Pollitt, like Weisel, also engaged concerted activity by jointly writing Hamden on August 22 in opposition to his 48-hour week proposal.

Susan Pollitt did not resign after Respondent announced elimination of reduced hours schedules. Instead Pollitt has used and she continues to use, a built up reserve of accrued leave to continue working reduced hours each week. Thereby Pollitt has been able to meet her family obligations to the same extent as before elimination of reduced hours work.

1. Findings

Credibility

As shown herein, I do not credit the testimony of Michael Hamden to the extent it conflicts with credited evidence. I credit the undisputed evidence showing that Susan Pollitt was one of the employees that was extensively involved in the employees' protected concerted activities in the summer and fall of 2003 and that Michael Hamden identified Pollitt as well as Linda Weisel, as the senior attorneys that were undermining his position and causing trouble.

2. Conclusions

As shown above, the Board has applied a two-part test in cases involving constructive discharge allegations:

> There are two elements which must be proved to establish a "constructive discharge." First, the burdens imposed upon the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee's (protected concerted) activities. [*Crystal Princeton Refining Co.,* 222 NLRB at 1069.]

In this instance as in the case with Linda Weisel, in order to fully consider "the burdens imposed upon the employee must cause," one need not rest on projections as to what may happen following Respondent's allegedly unlawful action. Here, the unlawful changes occurred well before the hearing in this matter. As shown above, Respondent started its unfair labor practices on August 15 and it subsequently announced elimination of reduced hours on October 1, 2003. Since then all the attorneys that worked less than 40-billable hours a week including part-time employee Eleanor Kinnaird, and full-time but reduced hours Attorneys Weisel, Parks, and Hamel, have resigned. The sole remaining reduced hours attorney is Susan Pollitt. Pollitt was also unable to work 40-billable hours a week and she continued to work a reduced hours schedule. As shown below, Pollitt was able to continue her employment with Respondent by use of her personal leave time to make up the difference each week after January 1, 2004, in the number of hours she was able to work and 40-billable hours.

As shown above, Respondent took actions against its employees because its employees engaged in protected concerted activity including signing the August 8 petition supporting Kari Hamil. All those adverse actions affected Susan Pollitt. Those actions included Respondent withholding a wage increase and eliminating its short-term benefits practice for all employees from August 15. Pollitt and Weisel engaged in another protected concerted activity on August 22 when they wrote Hamden that they opposed his 48-hour week proposal. Subsequently, Respondent engaged in further unfair labor practices by, among other things, eliminating reduced hours workweeks. That elimination of reduced hours appears to be the most dramatic change in working conditions in regard to its affect on Pollitt.

The record showed that Respondent was aware that its October 1 announcement of the elimination of reduced hours employment was likely to result in the resignation of reduced hours employees. As shown herein, from August 19 the employees including Kristin Parks, repeatedly told Hamden they would not be able to continue working if required to work 40-billable hours each week. Billy Sanders, who was called by Respondent, admittedly told Hamden during the week before October 1 that elimination of reduced hours may cause all four reduced hours attorneys to resign. Another of Respondent's witnesses, Team Leader Phil Griffin, testified that elimination

of reduced hours would cause Eleanor Kinnaird to quit.[58] Michael Hamden appeared to testify that only Kristin Parks told him that she would resign if forced to work a 40 hours a week schedule. He testified that he did not believe Linda Weisel would resign. As to Billy Sanders, Hamden admitted that he did have discussions with Sanders and that he (Hamden) "certainly considered the possibility that we might lose some members of the staff."

The evidence showed that Michael Hamden expressed hostility specifically in regard to the protected activities, and leadership in those activities, by Weisel and Pollitt. Moreover, another reduced hours employee, attorney Kari Hamel, initiated the protected concerted activity, which led to Hamden's animus. Kristin Parks, the sole remaining reduced hours attorney was in the same position as Hamel as regards her right to short-term disability benefits during maternity leave.

All the above factors and the full record proved that Respondent was motivated to require Pollitt to work a full 40-billable hour week because of its employees' protected concerted activities [*Wright Line*, 251 NLRB 1083 (1980)]. The record proved that Respondent intended by its unlawful action to cause Pollitt to resign and especially by eliminating reduced hours work. Respondent engaged in those unfair labor practices because of its employees' protected concerted activities. *Crystal Princeton Refining Co*., supra.

I shall also consider under *Wright Line* whether Respondent proved that it would have intentionally forced Pollitt to use personal leave to avoid constructive discharge in the absence of the employees' protected concerted activities. As shown above, I find that Respondent's defense to that action was a pretext. Respondent claimed that it eliminated reduced hours schedules because of (1) a deficit in the *Bounds* hours; (2) factionalism in the office; (3) a planned office move; and (4) a planned improved computer program. As shown above, as to (1), the *Bounds* deficit was known well before Michael Hamden decided to eliminate reduced hours and the deficit posed no imminent problem for Respondent. As to (2), Hamden admitted that factionalism in the office had existed since 1990. Therefore, there was nothing to show that action was required to eliminate factionalism on October 1, 2003. As to (3) and (4) the evidence proved that Respondent including Michael Hamden, was fully aware of those problems from before the time when the last budget was planned and there was no showing of anything proximate to October 1, which would cause Respondent to change its budgetary plan. Therefore, I find that the evidence failed to show that Respondent would have eliminated the reduced hours schedule in the absence of its employees' protected activities.

Susan Pollitt credibly testified that she is the primary caregiver[59] for her children. Under the circumstances in her case, I find that Respondent's elimination of reduced hours work resulted in a change in Pollitt's "working conditions so difficult or unpleasant as to force (her) to resign." Of course, Pollitt had not resigned at the time of the hearing. However, she continued to work only by use of her personal leave to make up the difference between what she was able to work and what she would have worked to fulfill Respondent's requirement that all full-time employees work 40-billable hours each week.

Despite Respondent's claim that reduced hours was a privilege and not a right as well as its argument that Pollitt did not have child care responsibilities sufficiently grave in magnitude to justify a constructive discharge finding, the credited evidence proved that Respondent eliminated reduced hours because of its animus against its employees' protected concerted activities. Regardless of whether reduced hours was a privilege or a right, Respondent could not lawfully eliminate that privilege or right because of its animus against protected concerted activities. The General Counsel proved that Pollitt had serious child-care responsibilities and that she met those responsibilities through among other things, use of time she would not have had but for her reduced hours schedule. In Pollitt's case she was forced to use accumulated personal leave time in order to continue working a reduced hours schedule. The General Counsel proved that Pollitt took her responsibilities seriously and that Respondent was fully aware that Weisel took her family responsibilities seriously.

As to the second element in the *Crystal Princeton* standard, both employees and supervision repeatedly told Michael Hamden that elimination of reduced hours would probably result in reduced hours attorneys' resignations. Moreover, as shown above, credited evidence proved that Michael Hamden was motivated by animus against the employees' protected concerted activities and it was shown that Hamden knew of Pollitt's involvement in those activities and that Hamden blamed Pollitt and Weisel with leading other employees in those activities.

The General Counsel proved that Respondent's unlawfully changed working conditions, including especially its elimination of reduced hours work, because of the employees' protected concerted activities. Those changes resulted in burdens on the employees so difficult and unpleasant that they did cause reduced hours attorneys to either resign or use personal leave time to avoid resigning. The record evidence proved that Respondent intended to cause its reduced hours attorneys to resign. *Crystal Princeton Refining Co*., 222 NLRB at 1069. Respondent imposed those changes in working conditions because of Pollitt's and other employees' protected concerted activities. *Crystal Princeton Refining Co*., supra; *Wright Line*, supra. I find that Respondent intended to constructively discharged Susan Pollitt and by its actions in that regard including especially its unlawful elimination of reduced hours privileges, forced Pollitt to use her personal leave to avoid resigning, in violation of Section 8(a)(1) of the Act. *American Licorice Co.,* supra; *Bennett Packing Co. of Kentucky,* supra.

Respondent also argued the evidence failed to show that Respondent should have reasonably foreseen that reduced hours attorneys would resign. However, the record illustrated that Michael Hamden was repeatedly told that reduced hours attorneys would resign if he eliminated the reduced hours privilege.

[58] Although Kinnaird was not a full-time employee because she routinely worked less than 30-billable hours each week, the testimony shows that supervision anticipated that elimination of the reduced hours practice would cause her to resign.

[59] Weisel's husband is an attorney that works approximately 60 hours a week.

As shown above, Billy Sanders told Hamden the reduced hours attorneys may resign. Kristin Parks, Susan Pollitt, and Linda Weisel told Hamden on several occasions that they could not work 40-billable hours each week. Respondent argued that neither Weisel nor Pollitt had home responsibilities great enough to justify a constructive discharge determination. However, as was the case in determining whether certain action was justified business judgments by Respondent, I shall not substitute my judgment for the judgments of the alleged discriminatees in determining the extent of their family obligations. The record clearly established that both Weisel and Pollitt are the primary caregivers of their families and the record established each has substantial responsibilities, which justified their desire to only work reduced hours. Moreover, even though Michael Hamden was aware that all the reduced hours attorneys as well as some of the other reduced hours employees, desired to work reduced hours at reduced salaries, he was content to accept their respective judgment without inquiring further as to the merits of their needs. I find that both Weisel and Pollitt showed through credited and uncontested testimony that reduced hours work were personal necessities. Moreover, Hamden was fully aware that loss of reduced hours privileges might cause some or all the reduced hour attorneys to resign.

CONCLUSIONS OF LAW

1. By threatening its employees with unspecified reprisals; by threatening its employees that it would withhold a wage increase; by announcing the termination of its extended illness benefit; and by threatening its employees with the elimination of reduced hours work schedules; the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) of the Act.

2. By withholding a 6-percent wage increase for its employees on August 15, 2003; by terminating its extended illness (i.e., short-term) benefit for its employees on October 1, 2003; by eliminating the practice of employees' working reduced hours each week on January 1, 2004; by its constructive discharge of Linda Weisel and by forcing Susan Pollitt to use personal leave to avoid constructive discharge; because of employees' protected concerted activity, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) of the Act.

REMEDY

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

The Respondent having unlawfully withheld a 6-percent staff pay increase on August 15, 2003; having terminated its extended illness benefits on October 1, 2003; having eliminated the practice of employees' working reduced hours on January 1, 2004; having constructively discharged Linda Weisel; and having constructively required Susan Pollitt to use personal leave time, it must immediately reinstate its extended illness benefits as those benefits existed before October 1; it must immediately reinstate its reduced hours practice as that practice existed before October 1; and it must offer Weisel and Pollitt immediate reinstatement to their former reduced hours jobs. Additionally Respondent must immediately make whole members of its staff that were employed at any time on and after August 15, 2003, for earnings lost because of Respondent's unlawful denial of the 6-percent staff pay increase; Respondent must make whole all employees injured by its elimination of its extended illness policy on October 1, 2003; Respondent must make whole all employees injured by its elimination of its reduced hours practice on January 1, 2004; and Respondent must make whole Linda Weisel and Susan Pollitt for all loss of earnings and other benefits. As to Pollitt, that make whole remedy shall include making her whole for loss of personal leave in order to avoid constructive discharge. Backpay shall be 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).

[Recommended Order omitted from publication.]