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Corrections Corporation of America and Vevria Nelson. Case 26–CA–23180

November 12, 2009

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On March 27, 2009, Administrative Law Judge William N. Cates issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board¹ has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(1) by discharging Charging Party Vevria Nelson, on August 1, 2008, because of her protected concerted activity. We find that the Respondent would have discharged Nelson for legitimate reasons even in the absence of any protected activity. Therefore, we reverse the judge and dismiss the complaint.

I. FACTS

The Respondent operates correctional facilities throughout the United States, including a facility in Tutwiler, Mississippi, where it employs approximately 610 employees. In 2007, the Respondent secured a contract with the California Department of Corrections and Rehabilitation to house California inmates at the Tutwiler facility. This contract is the facility’s sole source of inmates and presents unique challenges to the Respondent.

¹ Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board’s powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), petition for cert. filed 78 U.S.L.W. 3130 (U.S. September 11, 2009) (No. 09-328); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), cert. granted ___ S.Ct. ___, 2009 WL 1468482 (U.S. Nov. 2, 2009); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), petition for cert. filed 78 U.S.L.W. 3098 (U.S. August 18, 2009) (No. 09-213). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petition for cert. filed, ___ U.S.L.W. ___ (U.S. September 29, 2009) (No. 09-377).

In response to litigation surrounding deficient health care services in California prisons, a federal court appointed a receiver to monitor the delivery of medical care to California inmates. The Respondent’s Tutwiler facility is subject to this receivership. In January 2007, Vevria Nelson transferred to the Tutwiler facility, where she worked as a licensed practical nurse (LPN) in the medical department.

Nelson’s tenure at Tutwiler was marked by controversy. During her first year, three employees filed reports with the Respondent alleging that Nelson acted unprofessionally. In March 2007, Mental Health Coordinator Mildred Ware asserted that Nelson yelled at her in a threatening manner in a confrontation that required intervention by security. In August and September 2007, nurse’s assistant LaTonya Rushing filed two reports alleging that Nelson shouted at her during one confrontation and threw away Rushing’s personal property during another. Then, in October 2007, nurse practitioner Tammy Taylor reported that Nelson’s “daily . . . uncivil conduct” created a “toxic work environment” in the medical department that brought about “low morale, stress and interfere[d] with teamwork, safety and productivity while increasing staff turnover.”

In February 2008, Nelson was involved in another confrontation with her coworkers. Nelson instigated this confrontation after she refused Dr. Jerry Tankersley’s request for pain medication for an inmate recovering from dental surgery. Registered Nurse (RN) Supervisor Albert Maples intervened after Nelson and Tankersley argued about the request. Maples reported that Nelson yelled at him and refused to calm down. Nelson, an African American, alleged that Maples discriminated against her by threatening to send her home while failing to make a similar threat to Tankersley, who is white. Gloria Johnson, Nelson’s immediate supervisor, investigated the matter and issued identical written counselings to Nelson, Maples, and Tankersley, stating that each exhibited unprofessional conduct contrary to company policy.

Meanwhile, in April 2008, an inmate died at the facility, triggering an investigation pursuant to the receivership. In a “fairly scathing” report, the receiver concluded that the medical department committed “several miscues and missteps” and failed to comply with the receivership’s rules and regulations. The receiver’s chief of staff warned that if the Respondent did not “immediately correct” these deficiencies, “he would remove the inmates from the . . . facility and pull them back to California.” Importantly, the receiver’s corrective action plan, received by the Respondent in late May 2008, emphasized that it was critical that the Respondent maintain and in-

crease its medical staff, particularly RNs. As such, Vice President of Facility Operations Jimmy Turner testified that the Respondent was under a “tremendous amount of pressure” regarding staffing and that a loss of the contract “would have been tremendously devastating” as the Respondent had spent \$52 million on renovations to secure the contract and a lack of inmates would have resulted in “the entire staff being laid off.”²

Around this same time, the Respondent learned that many of Nelson’s coworkers considered her to be the sole source of conflict in the medical department. In April 2008, the Respondent conducted a training seminar to identify and alleviate employee conflict after Warden Robert Adams, the facility’s senior warden, concluded that Nelson’s association with a small group of employees created division in the medical department. During one seminar session, Human Resources Director Cindy Koehn asked that participants anonymously write down the name of any individuals who were a source of conflict in the medical department. Thirteen of 16 participants named Nelson alone. Two participants named Nelson and other employees.

Even after the seminar, Nelson’s conduct continued to negatively impact the medical department. In May 2008, RN Supervisor Maples resigned because of the “high stress level” in the medical department and cited Nelson as contributing to that stress. That same month, RN Shakantayeri Scott filed an incident report asserting that Nelson yelled at and pushed her twice during a confrontation. LPN Kim Watson corroborated Scott’s account. In June 2008, a second RN, Deanna Hardin, resigned “because of Nelson’s behavior.” Hardin explained that the medical department environment was “anxious, hostile, and unprofessional” and described Nelson as “the biggest, baddest bulldog that just barked all the time in your face and would never go away.”

Finally, Nelson instigated yet another confrontation with an RN on July 29, 2008, 3 days before her discharge. RN Clinical Supervisor Dorothy Strong testified that she overheard nurses discussing a patient who had chest pains. Strong intervened and asked the nurses to identify the patient, however, the nurses did not respond. Strong repeated the question and a nurse replied that no patient was suffering from chest pains. At that point, Nelson approached the group, and referring to Strong, exclaimed, “that’s what I say about people being nosy. Just they don’t know what’s going on. And they just ask questions, questions, questions.” Strong testified that

Nelson’s outburst “really embarrassed me in front of my subordinates.” Strong added that, on other occasions, Nelson made disparaging remarks about RNs, including that they were dumb. Dr. Chester Layne³ witnessed the “stern exchange” and reported that Strong “became visibly upset” and cried following the confrontation.

Following the Strong confrontation, Adams discussed it, the May incident involving RN Scott, and the May and June RN resignations with Regional Director Jack Garner and Vice President Turner. Adams recommended discharging Nelson because her conduct was “detrimental to the facility” and put the Respondent in a position where it could lose its California contract. Turner related that Adams was at “his wit’s end” because of Nelson.

On August 1, Adams discharged Nelson. During the discharge meeting, Adams referred to already prepared talking points and told Nelson that she “made complaints” and was “never satisfied with our answers;” people had complained about her, including some of her coworkers; she blamed others for her problems, but was never personally at fault; the Respondent “was trying to secure the California contract;” and her “attitude” did not fit the environment the Respondent sought to maintain. Among other things, Adams’ talking points specified that “you [Nelson] never acknowledge that your own behavior has contributed to or created difficult situations for you and others who work with you” and that “the quality of the medical care the Facility is providing has been questioned by our California customer and we are facing a very challenging situation.” Following Nelson’s discharge, Supervisor Johnson prepared a favorable letter of recommendation for Nelson.

Prior to Nelson’s discharge, the Respondent did not discipline Nelson for any of her conduct, nor did it discuss this conduct with her. In a 2007 performance evaluation, Nelson received an overall rating of “Exceeds Expectations.”

In 2008, Nelson pursued various actions against the Respondent that the General Counsel alleged constituted protected concerted activity. She pursued three complaints involving alleged discrimination against her and alleged wage and bonus disparities between LPNs and RNs. The Respondent investigated the discrimination grievance, and, on May 14, 2008, Regional Director Garner issued the Respondent’s final denial of it. Nelson last discussed the alleged wage and bonus disparities with management on July 30, 2 days before her discharge.

² The judge did not acknowledge Turner’s additional testimony that the Respondent worked throughout the summer of 2008 to complete a remedial plan that addressed a host of additional deficiencies in the medical department.

³ The judge inadvertently misspelled Layne as “Layne.”

II. JUDGE'S DECISION

Applying *Wright Line*,⁴ the judge found that the General Counsel met his initial burden to prove that Nelson had engaged in protected activity and that this activity was a motivating factor in the Respondent's decision to discharge her. The judge then found that the Respondent failed to establish its rebuttal burden that it would have discharged Nelson even in the absence of her protected activity. The judge rejected the Respondent's contention that it lawfully discharged Nelson because her continued disruptive conduct jeopardized the California contract. The judge recognized that employees and supervisors complained about Nelson's conduct and that two RNs resigned, at least in part, because of Nelson. However, the judge found that the Respondent did not deem any of these incidents critical because, if it had, it would have immediately disciplined Nelson for them, discussed them with her, or raised them during Nelson's discharge meeting. The judge also cited Nelson's positive 2007 performance evaluation. Finally, the judge acknowledged Strong's testimony that she was "really embarrassed" about her exchange with Nelson, but found that the Respondent seized upon this incident as a pretext to discharge Nelson for her protected activity.

III. ANALYSIS

We find that the judge did not properly consider all relevant record evidence. Thus, assuming *arguendo* that the General Counsel met his initial burden, we find that the Respondent established that it could not tolerate employee conduct that threatened its California contract. Nelson's repeated pattern of abusive behavior directly threatened that contract, and the Respondent discharged her once it became clear that this was so. In sum, we are satisfied that the Respondent would have discharged Nelson because of this unprotected abusive behavior even in the absence of any protected activity on her part.

The judge did acknowledge substantial evidence that, from the onset of her employment, Nelson repeatedly engaged in behavior that created unnecessary conflict in the Respondent's medical department. Citing the numerous complaints lodged against Nelson by her coworkers, the judge concluded that "a number of staff did not have a favorable opinion of Nelson" and that Nelson "may not have been a model employee." To this end, the judge cited Adams' testimony that he received written and verbal complaints about Nelson's "bully-like tactics, aggressive tone with others, and acting as though she was running the place."

The judge, however, did not give proper weight to undisputed evidence that, starting 4 months before Nelson's discharge, the Respondent's California contract was in serious jeopardy. In response, the Respondent made many changes in an effort to save this contract. If it failed to implement these changes, the Respondent faced the loss of its only source of inmates, an outcome that would have left the Tutwiler facility in financial ruin and the jobs of 610 employees in peril. Also, around this same time, through the April training seminar, the Respondent learned that a number of Nelson's coworkers identified her as the sole source of conflict in the already struggling medical department. Given these circumstances, the Respondent's willingness to tolerate Nelson's behavior also changed.

The judge further failed to fully consider the impact Nelson's actions had on the Respondent's ability to employ RNs. The receiver stressed the importance of retaining and increasing the number of RNs in the medical department, yet Nelson's behavior caused various RNs to quit. In May, RN Supervisor Maples resigned, at least in part, because of Nelson's actions. RN Hardin resigned, in June, "because of" Nelson. And, in May, Nelson yelled at and pushed a third RN during a confrontation. At a time when the Respondent could not afford to lose a single RN, Nelson undermined the Respondent's ability to meet this essential receivership requirement.

Then, faced with increasing reports of Nelson's antagonistic behavior, the Respondent, in July, learned of a final confrontation instigated by Nelson with RN Clinical Supervisor Strong. Nelson interrupted Strong's justified questioning of her subordinates about a patient who was potentially suffering from chest pains. The judge acknowledged that Strong was "really embarrassed" by Nelson's conduct, but failed to consider that the conduct represented another occasion where Nelson instigated unnecessary conflict with an RN. Given Strong's strong reaction, it was not unreasonable for the Respondent to fear that it might lose yet another RN because of Nelson.

Additionally, the judge failed to consider that the Strong incident further jeopardized the Respondent's California contract by impacting its ability to administer proper medical care to an inmate. Nelson interfered with a superior's attempt to ascertain an inmate's medical status at a time when that inmate could have been suffering from a life-threatening condition. Any delay in treatment potentially could have been fatal. Considering that another inmate's death, only months earlier, led to threats that the California contract could be terminated, we find merit in the Respondent's assertion that it concluded that this incident was the final straw for Nelson. Accordingly, given the confrontation with Strong and the

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

circumstances discussed above, we find that the Respondent would have discharged Nelson, even in the absence of any protected activity, because Nelson's conduct constituted a legitimate threat to the Respondent's California contract.

In reaching a contrary conclusion, the judge focused on the Respondent's decision not to immediately discipline Nelson for most of her incidents of misconduct or discuss those incidents with her. The Board has considered this factor when examining a respondent's motivation for an adverse action.⁵ It is true that the Respondent did not discipline Nelson for, or discuss with her, any of the 2007 complaints about her behavior.⁶ However, the Respondent did issue Nelson a written counseling for her involvement in the February 2008 altercation with Maples and Tankersley, which, unlike the other complaints against Nelson, involved a confrontation that directly involved patient care.

Moreover, as soon as the status of its California contract was placed in doubt in April 2008, the Respondent understandably became more diligent in addressing misconduct that, in the past, it may have overlooked. It became apparent to the Respondent that Nelson's misconduct was a severe detriment to the facility because it directly interfered with the Respondent's ability to employ RNs and provide proper medical care for its inmates, objectives that were paramount in the Respondent's efforts to retain the California contract. When the Respondent learned of the Strong incident, which directly involved patient care, it was already dealing with two RN resignations caused by Nelson and news of her confrontation with RN Scott. Under pressure to "immediately correct" the deficiencies in its medical department, the Respondent quickly discharged Nelson.⁷

⁵ See, e.g., *Volair Contractors, Inc.*, 341 NLRB 673, 676 (2004) (absence of credited evidence that respondent ever spoke to discharged employee about alleged unsatisfactory performance undermined respondent's argument that unsatisfactory performance was motivation for employee's discharge).

⁶ Although the judge discredited Adams' testimony that he discussed these complaints with Nelson, and Nelson received a positive 2007 performance evaluation, Nelson admitted that she was nonetheless aware of the complaints lodged against her in 2007.

It is equally true that the Respondent did not act against Nelson, from February through May 2008, while Nelson engaged in alleged protected activity. Instead, it carefully considered her complaints and provided her with detailed responses pursuant to its grievance policy.

⁷ The judge also found that Supervisor Johnson's favorable letter of recommendation indicated that the Respondent discharged Nelson for reasons other than her job performance. However, the judge did not consider uncontradicted testimony from several witnesses that Johnson had a personal relationship with Nelson and that, because of this relationship, Johnson either enabled or overlooked Nelson's misconduct. This testimony places in doubt the impartiality and accuracy of John-

We also disagree with the judge that, during Nelson's discharge meeting, the Respondent failed to raise her misconduct. The Board has also considered this factor when examining the strength of a respondent's rebuttal defense.⁸ Although the Respondent did not mention any specific instances of misconduct, nonetheless Adams generally referred to these incidents by telling Nelson that her coworkers complained about her and that she blamed others for her problems while never accepting personal fault. Furthermore, Adams referenced the impact of Nelson's misconduct on the California contract when he cited the Respondent's efforts to "secure the California contract" as a reason for her discharge.⁹

In sum, it is undisputed that, only 2 months after Nelson arrived at the Tutwiler facility, employees began complaining that she mistreated them. While the Respondent may have tolerated this conduct in 2007, it could no longer do so in 2008, after learning that it could lose its California contract. Thereafter, the Respondent learned that Nelson's conduct threatened its ability to retain RNs and properly administer medical care to its inmates, two objectives critical in the Respondent's efforts to save its California contract. In response, the Respondent discharged Nelson. Accordingly, we find the discharge did not violate the Act.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. November 12, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Christopher J. Roy Esq. and *Rosalind Eddins, Esq.*, for the Government.¹

James M. L. Ferber, Esq., *Tracy Stott Pyles, Esq.*, and *Mark Floyd, Esq.*, for the Company.²

son's letter of recommendation. Thus, we find that Johnson's letter of recommendation is entitled to little weight.

⁸ See, e.g., *Yellow Ambulance Service*, 342 NLRB 804, 805 (2004) (respondent failed to meet its rebuttal burden where it asserted misconduct as its reason for discharging an employee, but failed to mention that misconduct during employee's discharge meeting).

⁹ Adams' talking points, prepared prior to Nelson's discharge, confirm that her misconduct, and its impact on the California contract, were critical factors in the discharge.

¹ I shall refer to counsel for General Counsel as counsel for the Government or Government.

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. This is a wrongful discharge case. I heard this case in trial in Clarksdale, Mississippi, on January 5 and 6, 2009. The case originates from a charge, filed by Vevria Nelson, an Individual, on September 12, 2008, against Corrections Corporation of America (Company). The prosecution of this case was formalized on November 6, 2008, when the Regional Director for Region 26 of the National Labor Relations Board (the Board), acting in the name of the Board's General Counsel, issued a complaint and notice of hearing (complaint) against the Company.

The complaint alleges Nelson concertedly complained to the Company about wages, hours, and working conditions of Company employees: by about February to April 2008, filing and processing a grievance regarding discrimination and harassment by Clinical Nurse Supervisor Albert Maples (Supervisor Maples); by about May 7, 2008, protesting the difference in pay between LPNs and RNs at the Company's Tutwiler, Mississippi facility and requesting LPNs receive a pay raise; and by about July 24 and 30, 2008, requesting a bonus for LPNs. It is alleged the Company, about August 1, 2008, discharged its employee Nelson because she engaged in the conduct just described and to discourage employees from engaging in these or other concerted activities. It is alleged the Company's actions violate Section 8(a)(1) of the National Labor Relations Act, as amended (the Act).

The Company, in a timely filed answer to the complaint, denied having violated the Act in any manner alleged in the complaint.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. I carefully observed the demeanor of the witnesses as they testified. I have studied the whole record, the posttrial briefs, and the authorities cited therein. Based on more detailed findings and analysis below, I conclude and find the Company violated the Act substantially as alleged in the complaint.

FINDINGS OF FACT

I. JURISDICTION AND SUPERVISOR/AGENCY STATUS

The Company is a Maryland corporation with headquarters in Nashville, Tennessee. The Company operates and manages prisons, jails, and other correctional facilities throughout the United States, including a correctional facility in Tutwiler, Mississippi, the only facility involved herein. During the 12 months ending September 8, 2008, a representative period, the Company purchased and received at its Tutwiler, Mississippi facility goods valued in excess of \$50,000 directly from points outside the State of Mississippi. The evidence establishes, the parties admit, and I find, the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is admitted Warden Robert Adams (Warden Adams), Managing Director Region IV Jack Garner (Director Garner) Human Resources Manager Victoria Holly (HR Manager Holly), Senior Human Resources Director Cindy Koehn (HR Director Koehn), Health Services Administrator Gloria Johnson (Health Administrator Johnson) Clinical Nurse Supervisor Albert Maples (Supervisor Maples), Regional Medical Director Beverly Overton (Medical Director Overton), and Vice President of Health Services John Tighe (VP Tighe) are supervisors and agents of the Company within the meaning of Section 2(11) and (13) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

1. Background

As noted earlier the Company manages prisons and jails throughout the United States with operations in 19 states and 65 separate facilities. Some of the facilities the Company manages are owned by governmental agencies, counties, or states while other of the facilities are owned by the Company. The Company has prison management contracts with federal agencies such as the Federal Bureau of Prisons, the United States Marshall Service, and the Immigration and Customs Enforcement Department as well as prison management contracts with state and county governments throughout the United States. The Company at its 65 facilities houses approximately 75,000 inmates on an average day-to-day basis.

John Ferguson is the Company's chief executive officer and Jimmy Turner is vice president of facility operations for Business Unit 2. Facility Vice President Turner is responsible for 22 facilities in Business Unit 2, one of which is the Tallahatchie Correctional Facility in Tutwiler, Mississippi.

The Tutwiler facility operates with a warden, three assistant wardens, and multiple department heads. Speciality areas at the Tutwiler facility include security, education, medical, programmatic, human resources, and a business office. The Company's contracts with the federal, state, and local governments call for a full complement of responsibilities including day-to-day security, supervision, and care. More specifically, the Company provides educational services, drug rehabilitation programs, medical and mental health services, and other rehabilitative programs. There are approximately 610 employees at the Tutwiler facility. The instant case focuses on the Health Services Department, and, as noted elsewhere, the administrator for that department is Gloria Johnson.

2. The Government's evidence

(a) Nelson's employment background

Nelson is, and since 1972 has been, a licensed practical nurse (LPN). Nelson worked for the Company at its Delta Correctional Facility in Greenwood, Mississippi, from 1997 until 2000 and from August 2006 until January 23, 2007. Nelson transferred to the Company's Tutwiler facility on January 24, 2007, and worked there until she was terminated on August 1, 2008.

Nelson transferred to the Tutwiler facility to assume the LPN/Infection Control position working Monday through Fri-

² I shall refer to counsel for the Company as counsel for the Company or Company.

day from 8 a.m. until 4 p.m. The position calls for monitoring infectious diseases among the inmate population such as, for example, hepatitis and/or tuberculosis. The LPN/Infection Control position is located in the Medical Department under the supervision of Health Administrator Johnson. Health Administrator Johnson in turn reports to Assistant Warden for Programs Lucy Cano and Regional Medical Director Beverly Overton.

(b) Nelson's February 26, 2008 grievance and related work discussions

On February 26, 2008, Nelson filed an employee grievance, with HR Manager Holly, against Supervisor Maples on the:

... grounds of discrimination based on my sex and race. I submit this grievance against Albert Maples, RN, CNS for defamation of character, and violation of CCA Policy and Procedure 3-17, Titled Harrassment/Sexual Harrassment by creating a hostile environment in my assigned work area by acts of discrimination, false accusations, failure to acknowledge my plea for help, and verbal threat.

Nelson's grievance contained several attachments addressing, among other matters, a February 22, 2008 incident between Nelson and Company Dentist Dr. Jerry Tankersley (Dr. Tankersley). Supervisor Maples, although not Nelson's regular supervisor, was her supervisor on February 22.

Along with her February 26, 2008 grievance, Nelson attached a 4-page memorandum dated February 25, 2008, in which she described allegations against Supervisor Maples and attached an Employee/Civilian-Incident Statement (Incident Statement or Incident Report) regarding the February 22, 2008 incident with Dr. Tankersley.

Nelson explained in the attachments that Dr. Tankersley came to the pharmacy and asked for two ibuprofen tablets for an inmate who was standing just outside the pharmacy door following dental surgery. Nelson indicated in the report she told Dr. Tankersley to get a different nurse who had the keys for the pharmacy. According to Nelson, Dr. Tankersley said as he walked away "Damn it I can't believe you're a nurse" and "you can't give him two pills." Nelson's incident report reflects Dr. Tankersley returned to the pharmacy with Nurse Hardin and she (Nelson) told him it was not right for him to talk like he did to her in front of an inmate. Nelson further claims in her report Dr. Tankersley told her, "Sugar, you don't want to go there." Nelson reports she told Dr. Tankersley she wasn't "sugar" rather she was Nurse Nelson. Dr. Tankersley and Nurse Hardin left the pharmacy as did the inmate.

According to Nelson's report, Dr. Tankersley returned to the pharmacy and told her "I don't believe you couldn't use your two damn hands to give that man two pills." Nelson asserts she told Dr. Tankersley she did not appreciate him cursing and yelling at her and she was not there for him to boss around. Nelson asserts she had asked Dr. Tankersley to leave the area when Supervisor Maples came into the pharmacy. Nelson "told" Supervisor Maples to "tell" Dr. Tankersley to leave. Nelson told Supervisor Maples that Dr. Tankersley did not have the right to curse or yell at her and Supervisor Maples agreed. Nelson said she was "upset at this time" and stated "loudly" for Dr. Tankersley to leave her alone. She reports Dr. Tankersley

asked if she was threatening him and she said she was not. Dr. Tankersley left the pharmacy. Nelson also asserts in her report that Supervisor Maples told her to calm down more than once and she told him to make sure Dr. Tankersley got his "little drunk self" out and to leave her alone. Nelson reports Supervisor Maples at that point told her, "Ms. Nelson if you don't calm down, I'm going to send you home." Nelson notes she told Supervisor Maples, "try it and see how far you get." Nelson accused Supervisor Maples of being a racist and explained in her written memorandum attached to her February 26, 2008 grievance:

On February 22, 2008 at approximately 1250 hours, Mr. Maples came to the pharmacy during an incident between Dr. Tankersley and me. When Mr. Maples arrived, I informed him Dr. Tankersley didn't have the right to curse or yell at me. Although Mr. Maples, white male, verbally agreed with me, he didn't ask Dr. Tankersley, white male, to calm down, nor did he threaten to send Dr. Tankersley home if he didn't calm down; however, Mr. Maples threatened to send me, black female, home if I didn't calm down.

Nelson testified that while she was in her office preparing her February 26, 2008 grievance against Supervisor Maples that LPNs Diketra Thomas, LaShunda Henderson, and Lashelle Melton came and told her they had heard what happened between she, Dr. Tankersley, and Supervisor Maples. Nelson told them she was preparing a grievance against Supervisor Maples and they discussed other incidents involving Supervisor Maples. Nelson told them they could write up their incidents and she would attach them to the grievance she was preparing. The three prepared separate Incident Statements which Nelson attached to the grievance.

In her Incident Statement dated February 25, 2008, Diketra Thomas felt Supervisor Maples' daily assignment sheets were not fair in that certain, unnamed, nurses got whatever assignments they desired while others did not. LPN LaShunda Henderson in her Incident Statement dated February 26, 2008, asserted Supervisor Maples required her to have a doctor's excuse for her surgery in January 2008 while not requiring white nurses to have excuses. LPN Lashelle Melton, in her Incident Statement contended she "picked" her work assignments for February 23 and 24, 2008, early on February 22, 2008, and that white nurses talked about her for doing so. Melton reported Supervisor Maples was called and took Melton's early assignment selections and gave them to a white male nurse.

Nelson made other accusations against Supervisor Maples in the grievance. Nelson asserted Supervisor Maples refused to help her administer 62 skin tests in January 2008 but the very next week helped a white nurse administer 12 such skin tests. Nelson further asserted Supervisor Maples, on or about February 18, 2008, closed the door to the medical department as he entered eventhough she was approximately 3 feet from the door.

Nelson ended the lengthy grievance against Supervisor Maples as follows:

I have tried every way I know to get alone (sic) with Mr. Maples. Mr. Maples makes it very hard for me to keep professional respect for him by his continuous false accusations, un-

concerned attitude, verbal threat, failure to respond to plea of help, and acts of discrimination.

According to Nelson the Company met with her and others on five occasions regarding the grievance against Supervisor Maples. The first meeting took place on March 5, 2008. Those in attendance with Nelson were Health Administrator Johnson, Clinical Nurse Supervisor Calvin Stewart, Assistant Warden Cano, and Supervisor Maples. Nelson testified Supervisor Maples gave her his response which she read and then declared the grievance to be "unresolved." Supervisor Maples, in his written response, denied defaming Nelson, creating a hostile work environment, or discriminating "against her [Nelson] for being female or black." Maples also denied making "false accusations" or failing to "acknowledge her plea for help." Supervisor Maples denied making any threats to Nelson but added he did inform Nelson regarding what he would do if she continued to speak with him with the tone of voice she was using during her encounter with Dr. Tankersley.

Supervisor Maples explained in his written response to Nelson's grievance how he learned of the encounter between Nelson and Dr. Tankersley on February 22, 2008. He wrote that RN Deanna Hardin told him he might wish to "referee" a "shouting match" in the pharmacy between Dr. Tankersley and Nelson. Supervisor Maples' wrote he observed Dr. Tankersley and Nelson in the pharmacy "standing face to face screaming at each other." Supervisor Maples tried to mediate and calm the situation down. Supervisor Maples' report reflects he tried to get Nelson to calm down but she continued to yell at him so he again asked Nelson to calm down or he would have to send her home. According to Maples' report, Nelson yelled at him "I wish you would try." Dr. Tankersley explained he simply asked Nelson for some ibuprofen tablets but Nelson told Dr. Tankersley she was busy, to get someone else. Dr. Tankersley denied cursing Nelson but did say he told Nelson she was "barking up the wrong tree."

Supervisor Maples acknowledged in his response to the grievance that he allowed the entrance door to the medical department to close when Nelson was nearby because central control had closed the crash gate on Nelson and he had no idea how long it would take Nelson to clear so she could get to the medical entrance door. Maples apologized but Nelson insisted he was not sorry. Supervisor Maples asserts in his response that in January 2008 when Nelson asked for assistance administering 62 skin tests for inmates he had rounds to complete and was understaffed. According to Maples, Nelson's only duties that day were to administer the skin tests.

The next meeting with management regarding Nelson's grievance took place on March 14, 2008, in Warden Adams' office. Warden Adams and HR Director Koehn met with Nelson. HR Director Koehn asked Nelson why she thought Supervisor Maples was prejudice and she responded because he refused to help her administer the 62 skin tests but later assisted a white nurse administer 12 such skin tests. Nelson testified HR Director Koehn asked if Maples should have helped her and she said he should have because she asked him for help and she did not ask unless she needed help. Nelson told Koehn "Mr. Maples he's trying to make it seem like I caused all the trouble"

adding "my co-workers and Mr. Maples try to make it seem like I'm a troublemaker." Nelson testified HR Director Koehn looked at her and told me they eventually get rid of trouble-makers.

Nelson testified the third meeting on her grievance took place in Warden Adams' office on March 26, 2008, with HR Director Koehn, Health Administrator Johnson, and Supervisor Maples. The grievance was not resolved and the next day, March 27, 2008, Nelson filed an addendum to her grievance. In the addendum, Nelson again asserts Supervisor Maples was prejudice. Nelson asserts Supervisor Maples said those he could not get along with were those in the grievance and all those named in the grievance were black.

Nelson testified she sent Warden Adams an e-mail on April 1, 2008, requesting to meet with him on April 4, 2008, regarding her grievance. In her e-mail to Warden Adams, Nelson explained "I don't feel my rights, nor, my co-workers rights, have been protected."

Nelson testified she met with Warden Adams in his office on April 4, 2008, but her grievance was not resolved to her satisfaction. After the meeting, Nelson e-mailed Warden Adams' immediate supervisor, Jack Garner, at his Nashville, Tennessee office. In her lengthy e-mail to Garner, Nelson questioned whether Warden Adams conducted a proper investigation of her grievance. Nelson complains in her e-mail that Warden Adams only took statements from employees who had positive comments about Supervisor Maples and negative comments about her. Nelson tells Garner in the e-mail that she can not "respect, trust or be loyal" to Supervisor Maples and she is stressed because of the way Supervisor Maples treated her. Nelson asserts Supervisor Maples treats white employees more favorable than black employees and she seeks to have Supervisor Maples receive counseling and take training on how to be a supervisor.

Nelson testified the last meeting on her grievance was on April 14, 2008. Warden Adams requested Nelson telephone Director Garner. Garner told Nelson he had her grievance and asked if she had any additional information to present. Nelson did not. According to Nelson, Garner wanted to know who the "we" referred to in her grievance and she told him the other LPNs whose Incident Statements were attached to her grievance. Garner promised he would provide her a written reply.

Director Garner's May 14, 2008 response to Nelson follows:

May 14, 2008

Vevria Nelson
1015 Lindsey, Apt. A
Greenwood, MS 38930

Dear Ms. Nelson:

This is in response to your grievance which was received in the Facility Support Center on April 8, 2008. First, thank you for your patience and for allowing us sufficient time to fully review and respond to your grievance. As I understand it, the gist of your pending grievance/appeal is that Warden Adams did not conduct "a sincere investigation" of your grievance.

Your February 26 grievance arose from a situation involving you, Dr. Tankersley, and Mr. Maples which occurred on Feb-

ruary 22, 2008. You alleged that Mr. Maples had not handled that situation properly and also alleged that Mr. Maples had discriminated against you based on your race and sex; defamed your character; ignored your requests for assistance; and had created a hostile work environment in violation of Policy 3-17.

The initial investigation of your grievance was conducted by HSA Gloria Johnson. As a result of her investigation you and the other two people involved in the February 22 incident all were given a written counseling. HSA Johnson apparently did not find any evidence of discrimination or unfair treatment on the part of Mr. Maples against you based on that incident or any other incident cited in your grievance.

Rather, HSA Johnson indicated that, “[t]he validity of each of the statements was questionable and in some instances the events seemed exaggerated.” Although when you signed your written counseling, you noted that “I reported the truth of how things happen,” neither in your first appeal dated March 5 nor in the April 4 letter in support of your current appeal do you assert that HSA Johnson’s investigation, findings and/or her decision to give you a written counseling was inappropriate or unfair.

Rather, in the March 5 appeal notice the basis of your appeal seems to be your impression that Mr. Maples’ reaction “showed disregard to CCA Policy and Procedures.” As set forth above, the basis of the current pending appeal is that Warden Adams did not properly investigate your grievance. Thus, it appears you have no objections to HSA Johnson’s original findings or to her decision to provide you with written counseling regarding the February 22 incident.

Contrary to your assertions, Warden Adams’ findings were based on information gathered from all identified witnesses. All witness statements, both verbal and written, were carefully considered. Although I will not reveal the identities of all the witnesses who participated in the investigation, to the extent you believe that some people who have relevant information were not interviewed, please identify those persons and if they have not previously submitted statements, they also will be interviewed.

Based on my review of the investigation, your grievance is denied. Both the investigation conducted by HSA Johnson and the Warden’s review of that decision were thorough and conducted promptly upon receipt of your grievance.

I understand that you do not agree with the outcome and that you do not feel that the grievance has been resolved to your satisfaction. However, the purpose of an investigation is to determine what the facts are in any given situation based on the weight of the credible evidence and then to take appropriate steps based on the findings of facts. Based on my review of the evidence and the investigations of your grievance and appeals conducted first by HSA Johnson and then by Warden Adams, the investigations have met that standard.

As per Policy 3-6, Employee Grievance Procedure, Section 3-6.5 Procedure C Step 2 and Step 3. The decision of the Managing Director or Corporate Officer will be binding.

Good luck in your career endeavors.

Sincerely,

/s/ Jack M. Garner
Jack M. Garner
Managing Director, Facility Operations
Division IV

Nelson testified she had no further communication with the Company regarding the grievance after Garner’s written response.

The written counseling Nelson (as well as Supervisor Maples and Dr. Tankersley) received from Health Administrator Johnson that Director Garner references in his response to Nelson’s grievance follows:

TO: Vivria Nelson, LPN
FROM: G. Johnson, H.S.A.
DATE: February 22, 2008
RE: Code of Conduct

After reading statements and listening to all individuals involved in the incident on the above date, it is difficult to determine what actually happened. The validity of each of the statements was questionable and in some instances the events seemed exaggerated. However, we as employees of CCA must remember the CCA Guiding Principles. It is not acceptable for staff to engage in a shouting match in this department regardless of the circumstances. We must always be stewards of professional behavior. Your behavior on the above date was not professional in nature and thus was a violation of Policy 3-3. In the future, it is important that you remember to think twice before speaking. If this opportunity ever presents itself again, remedy the problem and avoid confrontation by removing yourself from the hostile environment. You can never control the actions of others, but you must control of your own. We must at all times be sensitive to how others view our words as well as our actions. This is not a written reprimand, but documentation of an attempt to rectify actions that occurred on the above date between 3 medical staff members.

I have read and understand the above statement.

<u>/s/ Ms. Vevria Nelson</u>	<u>3/5/08</u>	I reported the truth of how things happen. /vn/
Name	Date	
<u>/s/ G. Johnson</u>	<u>3/5/08</u>	
Witness	Date	

(c) Nelson’s May 2008 Letter Concerning Pay of LPNs

Nelson testified that on May 5, 2008, she wrote VP Tighe concerning the difference in wages between RNs and LPNs and pointed out LPNs were concerned their wage scale did not reflect an appreciation for the work they performed. In the letter, it was requested LPNs be given a \$5 per hour wage increase with the years of experience remaining the same and the wage

increase be retroactive to the date of the previous pay scale change.

Nelson testified she spoke with various LPNs on May 5 and 6, 2008, including Diketra Thomas, LaShunda Henderson, Percynthia Thomas, Teri Williams, Rhonda Lawson, Carolyn Holmes, Cynthia Walker, Kim Watson, Regina Brown, Cary Gray, and Cantrell Williams. Nelson explained to the LPNs she had written a letter to VP Tighe about the difference in wages between RNs and LPNs and asked them to read her letter and if they agreed with it to sign the letter. Fifteen signatures appear on the letter which Nelson states she mailed that day. Nelson received a certified return receipt from the Company, which receipt was addressed to Nelson at her home address.

(d) Bonuses for LPNs

Nelson testified Health Administrator Johnson told her on July 24, 2008, she had good news that Nelson's December bonus would be \$4000 instead of \$2000. Nelson asked why and was told instead of the overall bonus being \$3500 it would be \$7000. Nelson asked how the Company was going to pay it because even with the \$4000 in December she would not be at \$7000. Johnson did not know how but added some employees were going to get some money that very day.

Nelson testified she observed a flyer at the nurses' station announcing a \$7000 retention bonus that only applied to RNs not LPNs. Nelson confronted Health Administrator Johnson about the bonus flyer pointing out it did not cover LPNs. Nelson asked Johnson where she got her information about bonuses and was told from Recruitment Specialist Nicole Carter. Nelson asked to speak with Carter. Nelson spoke with other LPNs about bonuses and asking if they wanted to go with her to speak with Carter. LPNs LaShunda Henderson, Percynthia Thomas, and Teri Williams agreed to go with Nelson. Nelson located Recruitment Specialist Carter and they met in Nelson's office. Nelson testified she asked Carter why the LPNs were not included in the retention bonus. Carter did not know and said they needed to speak with HR Director Koehn whom Carter got on a speaker telephone. Nelson asked Koehn why LPNs were not included in the retention bonuses and was told there was no need for LPNs. Nelson pointed out they had three vacant LPN positions. Koehn said she did not make the decision about the bonuses that it was made by Health Administrator Johnson, Medical Director Overton, and Warden Adams. The other three LPNs present asked no questions and the conversation ended.

Nelson testified that on July 30, 2008, when she arrived at work, LPN Brown asked about the bonuses. Nelson didn't know anything. Brown told Nelson she telephoned Company headquarters in Nashville, Tennessee, and someone there told her to speak with HR Manager Holly and she was on her way to do so. Nelson asked to join her. The two of them spoke with Holly in her office. Brown asked if their names were included with those getting bonuses. HR Manager Holly wanted to know what bonuses. Nelson explained "Well, some of the LPNs are getting some extra money. We want to know are we going to get it?" Recruitment Specialist Carter came into HR Manager Holly's office and said if they needed to know something about bonuses to ask her or HR Director Koehn. Nelson

told Carter they had been told to ask Holly. Carter wanted to know who told them but Brown could not recall. Nelson then told Recruitment Specialist Carter they were not talking to her anyway. Carter stated HR Manager Holly didn't know about the bonuses. Recruitment Specialist Carter suggested that if Nelson and Brown wanted to know about bonuses they needed to get HR Director Koehn on the telephone. The three of them went to the next office and got HR Director Koehn on the telephone. At that time, Diketra Thomas joined the other three on the speaker telephone. LPN Brown asked if she would get extra money because a coworker who had started the same day she had received extra money. HR Director Koehn did not know but would check into it. Nelson asked Koehn if she would get anything, however. Koehn did not know but said she would check into it. Nelson testified LPN Thomas told Koehn she had been specifically promised she would get a bonus but had not received it. HR Director Koehn replied she would in fact get it. Nelson asked HR Director Koehn to prepare a memorandum of their meeting but Koehn did not reply and the meeting ended.

(e) Nelson's termination

Nelson testified that on August 1, 2008, she was summoned to Warden Adams' office where she met with Adams and Assistant Warden Cano. Warden Adams asked permission to record their meeting. Nelson testified Adams told her he had a list of items to cover and asked she hold anything she might have to say until he finished. Nelson testified Adams told her she "made complaints" and was "never satisfied with our answers." According to Nelson, Adams also told her "people" had complained about her including some of her coworkers and he observed she always blamed others for her problems and was never at fault herself. Adams told Nelson the Company was trying to secure the California contract and reminded Nelson she had an important position at the facility. Nelson testified Warden Adams then told her they had decided to move forward and her attitude did not fit the environment they sought for the facility. Warden Adams gave Nelson two options, she could resign or be terminated and asked if she had any questions.

Nelson asked Warden Adams if people had complained why she had not been counseled. She said Warden Adams repeated she had two options, resign or be terminated. Nelson asked if her conduct was so serious why was her immediate supervisor, Health Administrator Johnson, not present and was again told she could resign or be terminated. Nelson told Adams she would not resign because she did not have a reason to do so. Adams told Nelson she was terminated, asked for her badge, and had Assistant Warden Cano escort her to the checkpoint to leave the prison.

Nelson testified she called her supervisor, Health Administrator Johnson, and asked her to come to the checkpoint. Nelson asked Johnson why she had been terminated. Johnson did not know. Johnson asked Assistant Warden Cano, why? Cano explained she did not know she had only been asked by Warden Adams to be present at the termination meeting. Nelson testified Health Administrator Johnson went back through the checkpoint into the prison and in the direction of Warden Ad-

ams' office. Johnson returned in approximately 10 minutes and told Nelson let's go home. Nelson and Johnson shared a ride to and from work.

Nelson testified Health Administrator Johnson told her during the ride home: "I told you that Cindy Koehn [HR Director Koehn] had something to do with it. I spoke with Warden Adams. He told me that Cindy Koehn said that you had called her being negative a few times and that you incited the nurses." Nelson told Johnson she was going to file a grievance to get her job back. According to Nelson, Health Administrator Johnson told her to send her termination grievance to Company Chief Executive Officer John Ferguson because they terminated her and she could go straight to Ferguson.

Nelson did not receive any paperwork at her August 1, 2008 termination interview with Warden Adams but did thereafter on August 8, 2008, receive a termination letter from him. The letter follows:

August 8, 2008

Vevria Nelson
1015 Lindsey Apt. A
Greenwood, MS 38930

Dear Ms. Nelson,

Effective July 31, 2008 your employment with CCA/Tallahatchie Correctional Facility is terminated due to a violation of Policy 3-3 "Code of Conduct."

Enclosed is a copy of a Grievance Policy for your use if you so choose.

Your final check can be picked up on August 8, 2008 when you turn in your CCA property, I.D., uniform, etc. If you have any further questions, please contact the Human Resource Dept.

Sincerely,

/s/Robert Adams
Robert Adams
Warden

Nelson filed with CEO Ferguson a "Grievance for Wrongful Termination" letter dated August 1, 2008, with receipt on August 6, 2008. In her letter, Nelson explained that Warden Adams said she made complaints which the Company looked into but that Nelson was never satisfied with the Company's decisions. Nelson wrote that Warden Adams said she always tried to blame others for her faults and the problems were never with her and she had a negative impact on the facility. Nelson asked CEO Ferguson that if there had been complaints against her why she had never been counseled. Nelson stated in her letter she had never received any disciplinary actions; had a very good evaluation; always spoke to staff members and never refused to help her coworkers. Nelson questioned whether Warden Adams was paying her back for filing a grievance against him. Nelson wrote that after much reflection the only thing she could conclude that Warden Adams might consider

negative on her part was her inquiring about bonuses paid to certain nurses.

Nelson testified she thereafter had two conversations with management about her termination grievance. The first took place on August 14, 2008, when VP Turner telephoned advising Nelson that CEO Ferguson had forwarded to him her grievance. Turner asked if Nelson had any additional information to provide. Nelson told Turner Warden Adams had said she was terminated for having a negative attitude but her termination letter listed the reason as violating the Company's Code of Conduct. Nelson asked if Turner could tell her what act she committed to violate the Code of Conduct. VP Turner said he was not at liberty to tell her. Nelson asked Turner if it was standard procedure for the immediate supervisor of an employee not to be present at the termination. Turner assured Nelson that was normal procedure. Nelson asked if Turner would be conducting an investigation and was told he would be. Nelson gave Turner names of persons she would like for him to interview.

Nelson testified she telephoned VP Turner on September 16, 2008, and he told her he had finished his investigation. Nelson asked what she had done to be terminated. Turner told her he would reply in writing. Nelson asked what his decision was and he told her he had not yet made a decision. Nelson told Turner she thought a decision had been made because her job position had been posted on the Company's website. Turner said he had nothing to do with job postings and their conversation ended.

On October 10, 2008, Nelson again inquired of VP Turner regarding the status of her August 4, 2008 termination grievance.

On October 30, 2008, VP Turner responded to Nelson in writing setting forth his findings regarding her termination grievance. First, VP Turner noted there was no credible evidence the decision to terminate her was in retaliation for her use of the grievance procedure or her inquiring about retention bonuses. Turner noted the last grievance she had filed was on February 26, 2008. VP Turner concluded that based on the length of time and intervening circumstances between her prior grievance and her termination there was no basis to conclude the termination decision was in retaliation for her having filed a grievance. VP Turner also concluded her inquiries regarding retention bonuses in no way brought about or contributed to her termination. Turner noted Nelson was not the only employee who complained and that some employees who complained were paid bonuses while others, like Nelson, were not.

Second, VP Turner concluded Warden Adams had advised Nelson of the reasons for her termination and noted she had cited reasons in her grievance. Turner questioned Nelson's contention she had never been disciplined, noting:

You also state in the letter that you have never before been disciplined. That statement is not supported by the record. In February you were disciplined for aggressive, confrontational, and intimidating conduct toward co-workers in the medical department. HSA Gloria Johnson issued disciplinary action and you did not grieve it against Ms. Johnson.

Third, VP Turner wrote Nelson that numerous times her co-workers reported conduct by Nelson like the behavior Health Administrator Johnson described. Turner concluded that Nelson demonstrated an unwillingness or inability to maintain a profession and respectful attitude toward others with whom she worked which was not compatible with the work environment the Company needed in order to meet the stringent requirements of the California customer the prison served. VP Turner noted his decision denying Nelson's grievance was final and binding.

(f) Nelson's evaluations, recommendations, and related matters

Nelson's "Performance Summary" for the years 2006 and 2007 reflect she "exceeds requirements" in all categories of her duties.

Nelson testified that on October 19, 2008, she requested and was provided a letter of reference by Health Administrator Johnson. The unsigned and undated letter, on Health Administrator Johnson's Company stationery reads:

To whom it may concern:

Vevria Nelson has worked under my supervision for the last couple of years. She is an excellent nurse with a wealth of knowledge in many areas of nursing. She was the model employee. She was self motivated, punctual, possessed excellent communication skills, and understood the importance of teamwork. She volunteered to assist whenever and wherever needed. She was goal oriented and paid attention to detail. It is with great pleasure that I submit this letter of recommendation. It is with sheer confidence that I say Ms. Nelson will be an asset to your team.

Regarding her work record, Nelson, during cross-examination, denied being aware of complaints registered against her by other employees. However, upon additional cross-examination, she acknowledged various incidents. First, she acknowledged that Health Administrator Johnson, in a February 22, 2008 written documentation, advised her that engaging in a "shouting match" with other staff was unacceptable behavior nonprofessional in nature and violated Company policy. Nelson acknowledged she was aware in March 2007 that Mental Health Coordinator Mildred Ware had filed an incident report against her alleging Nelson had engaged in "a loud and angry voice and tone" both in the hallway and in Ware's office. Nelson acknowledged she was aware in September 2007 that Certified Nursing Assistant LaTonya Rushing filed an incident report alleging Nelson removed Rushing's drinking water from a refrigerator and threw away. Nelson also acknowledged on cross-examination she was aware in October 2007 Percynthia Thomas filed an incident report alleging she (Nelson) had interfered with certain medications and placed patients at risk.

3. The Company's evidence

Vice President of Facility Operations Jimmy Turner provided information about the history of the facility which history is helpful to a full understanding of the medical department. The Tutwiler facility opened in early 2000 housing inmates from Wisconsin; however, after approximately 1½ years, Wisconsin

pulled its inmates back to Wisconsin resulting in the Company laying off its employees. Thereafter, the Company secured contracts to house inmates from the states of Alabama and Hawaii. These contracts lasted until mid-2007 when the Company secured a contract with the California Department of Corrections and Rehabilitation to house California inmates. California also has other contracts with the Company to house its inmates in other states as a result of California's prison overcrowding.

Vice President of Facility Operations Turner testified the Company invested in excess of \$50 million dollars improving, adding to, and equipping the facility herein to accommodate the newly contracted for California inmates. According to Turner, its contract with the California Department of Corrections and Rehabilitation brought unique challenges to the Company. Turner explained the California Department of Corrections and Rehabilitation is currently, and has for some time been, under Federal Court scrutiny. Federal Courts are overseeing two large federal civil rights law suits. One of the actions addresses overcrowding in California's prisons (not at issue herein) while the other addresses health services provided California inmates. A different federal judge oversees each of the two law suits. Pertinent herein is the decisions and requirements of the judge overseeing the health care issues. Turner testified the federal judge overseeing medical care concluded the California Department of Corrections and Rehabilitation "failed repeatedly to meet consent decrees that they had entered into" with the court. The federal judge then took the somewhat rare step of appointing a Receiver with staff to supervisor and monitor the court's orders regarding health services.

Turner testified the operation of the health services at the facility herein is under the supervision of the Receiver and staff of the federal court requiring the Company follow rules, regulations, and instructions of the Receiver on behalf of the court. The Receiver sends, on an ongoing basis, physicians and other medical professionals to check on the delivery of medical services for the inmates at the facility herein.

Vice President of Facility Operations Turner testified that a California inmate, Robert Washington, arrived at the facility herein in March 2008 and approximately 1 month later died while in custody. Turner explained that anytime an inmate dies in any facility housing California inmates the Receiver sends in a Medical Operations Performance Team (MOP Team) of doctors and nurses to do a complete investigation of the circumstances that led to the death of the inmate. A MOP Team investigated inmate Washington's death and, according to Turner, issued a "fairly scathing" report finding "several miscues and missteps by the medical staff" herein. The MOP Team also concluded "there were multiple things that could have been done differently and there were multiple things that were being done . . . that were not in compliance with the rules and regulations . . . in place . . . at [the] Receiver's office." A Remedial Plan was developed and the Receiver's Chief of Staff, John Hagar, told Turner and others that if the Company did not "immediately correct" the deficiencies "he would remove the inmates from the . . . facility and pull them back to California." Turner said if the inmates were returned to California, the Company would have paid \$52 million dollars on building expansions with no inmates to house which would have re-

sulted in the entire staff being laid off. Turner explained the impact on the Company “would have been tremendously devastating.”

Turner testified the review and the immediate corrective action resulted in a “tremendous amount of pressure” on management regarding staffing at the facility. Turner testified the Company increased its medical staff tremendously both with physicians as well as its nursing staff, particularly RNs. Turner explained it was critical the Company not only hire additional RNs but retain those already employed. Staffing levels and retention of nurses at the facility rested primarily with Warden Adams. Warden Adams perceived Nelson to be detrimental to the Company retaining nurses, particularly RNs.

Warden Adams testified that from the time he arrived at the facility in February 2007 until the day Nelson was terminated he received written, as well as verbal, statements from staff members complaining of her “bully-like tactics” as she interacted with them. Warden Adams said Nelson exhibited an aggressive tone with others, including supervision, and acted as though she was “running the facility.”

Warden Adams specifically recalled or was aware of a number of incidents related to Nelson for which staff members prepared Incident Reports. Incident Reports are written by employees or staff members relating to any type incident involving either prison inmates and employees or incidents between staff employees.

On March 15, 2007, Mental Health Coordinator Mildred Ware filed an Incident Report on Nelson in which she asserts Nelson was unprofessional and threatening when Nelson confronted Ware on that date about keys to a certain medical office. Ware testified that if an Officer Huddleston had not told Nelson to get away from Ware, Nelson would have made physical contact with her.

An Incident Report Adams recalled was filed by Nurse’s Assistant LaTonya Rushing, dated August 20, 2007, in which Rushing complained about Nelson shouting at her and talking to her in an inappropriate manner. Rushing filed a second Incident Report dated September 4, 2007, in which she complained Nelson removed her (Rushing’s) bottle of water from the refrigerator and threw it in the garbage. Rushing testified Nelson acknowledged putting her bottle of water in the garbage and that Nelson told her she needed the space for her (Nelson’s) bottle water. Rushing said Nelson replaced her bottle water the next day only “because I asked her about it.” Rushing, sometime thereafter, wrote Nelson a letter asking that they start over and be “loving co-workers” and added she would pray for Nelson and asked Nelson to pray for her.

Warden Adams was given a typed statement on October 13, 2007, from Nurse Practitioner Tammy Taylor which related, in part, to conduct of Nelson. In her letter, Taylor addressed “the ongoing problems occurring daily in the medical department because of the uncivil conduct” by Nelson and “the lack of leadership by HSA Gloria Johnson.” Taylor asserts in her letter the situation related to Nelson is complicated because of the close personal relationship “between Nelson, Johnson and Clinical Supervisor Calvin Stewart.” In her letter, Taylor claims Nelson is allowed to display authoritative behavior in the medical department on a daily basis because of her close

and personal relationship with Health Administrator Johnson. Taylor writes that staff members are reduced to tears and unable to perform their duties because of Nelson’s conduct. Taylor further writes that Nelson’s conduct creates a “toxic work environment” that brings about low morale, stress, and interferes with teamwork, safety, and productivity while increasing staff turnover. Taylor describes Nelson as a “saboteur and bully.”

Warden Adams testified he was provided on February 22, 2008, an Incident Statement (or Report) from former RN Supervisor Maples regarding an incident involving Nelson and staff dentist Dr. Tankersley on that date. Former Supervisor Maples testified RN Deanna Hardin came to his office and told him he needed to go and “referee” a shouting match between Nelson and Dr. Tankersley in the pharmacy. Maples proceeded to the pharmacy and told both to calm down. Maples testified that as he tried to calm Nelson down she continued to “yell” at him at which point he told her if she did not calm down he would send her home. As reflected in Maples’ Incident Report Nelson responded “I wish you would try.” Former RN Supervisor Maples testified nurses Hardin, Lisa Simmerman, Tim Wasilina, James Edwards, and Teri Williams complained quite frequently to him that Nelson constantly tried to stir up turmoil in the medical department and spoke to them in a degrading manner making Nelson appear as being a better person than they were.

Warden Adams also received Dr. Tankersley’s Incident Report on the shouting match between Tankersley and Nelson. Dr. Tankersley reported the matter as an unfortunate incident between two staff members and asked that everything return to normal noting he had eventually gotten the medication he sought and needed for the inmate on whom he had performed surgery.

Warden Adams testified an Incident Report by RN Shakan-tayeri Scott (Candace Scott) was submitted to him on May 21, 2008. In the Incident Report, RN Scott outlined an encounter she had with Nelson on that day following a facility staff meeting. Scott testified that as the staff was leaving the meeting she commented to LPN Cary Gray that he was “getting the evil eye.” Scott further testified at that point Nelson “starts ranting and raving,” “yelling and screaming to the top of [her] lungs” that she (Nelson) didn’t play like that. According to Scott, Nelson then faced her and pushed her twice but LPN Gray and LPN Kim Watson stepped between Nelson and Scott which allowed Scott to leave the area and Nelson returned to the medical unit. LPN Watson’s Incident Report of the encounter essentially corroborated Scott’s account. Warden Adams was also provided a copy of Watson’s Incident Report.

Warden Adams testified he was given, an Incident Report prepared by Victoria Holly on July 1, 2008, relating to an incident between she and Nelson that occurred on that date. In the Incident Report Holly wrote that Nelson initially refused to conduct two pre-employment reviews for two applicants claiming the reviews had not been prescheduled with her. Holly reported Nelson told her she was lying when she claimed the reviews had in fact been pre-scheduled with Nelson. Holly asked to speak with Nelson’s supervisor, Health Administrator Johnson, but Nelson hung up on her. Holly reported Nelson

later apologized for the mix-up when she reviewed a previous e-mail sent to her arranging for the reviews. Holly wrote "Nelson was very unprofessional in handling the situation"

Warden Adams testified he was given an Incident Report on July 29, 2008, written by RN Clinical Supervisor Dorothy Strong involving an exchange between Strong and Nelson on that date. Strong testified regarding the reported incident. Strong said she was looking after an inmate in an examination room when she overheard a discussion at the nurses' station of an inmate having chest pains. Strong said as charge nurse she needed to ascertain what the situation involved. Clinical Supervisor Strong asked who was having chest pains but no one responded. Strong then specifically asked Nurse Diketra Thomas who was experiencing chest pains and was told no one. According to Clinical Supervisor Strong, Nelson proceeded to the nurses' station where she stated, "that's what I say about people being nosy. Just they don't know what's going on. And they just ask questions, questions, questions." Strong said this "really embarrassed me in front of my subordinates because I was in charge." Clinical Supervisor Strong also testified Nelson would state in the presence of Strong and other staff that RNs were dumb "or the RNs make more money. Or . . . things like we were doing it before RNs got here."

Dr. Chester Layne, a staff dentist, testified he was present when a conversation started about an inmate having chest pains and he recommended the inmate be checked. Dr. Layne recalled a number of those present said the inmate had been checked several times and had a tendency to fake chest pains. Dr. Layne said it was at this point that Clinical Supervisor Strong came to the area and asked who was having chest pains. He said there was "a stern exchange" between Strong and Nelson and that Strong "became visibly upset" and later cried in the hallway.

Warden Adams said he spoke with Nelson on several occasions about the complaints against her and how she treated the nurses, and added he and Nelson's supervisor also met with her. Warden Adams explained that on one occasion when he talked with Nelson about her treatment of the nurses he told her that before he would lose all of his nurses he would "lose her." According to Warden Adams, Nelson responded the nursing staff didn't know Company policy and when she tried to explain what the policies were, the nurses got "angry" and "upset." Warden Adams told Nelson it was how she talked to the staff which he said the staff considered "belittling" or "putting then in a position where they feel disrespected or being bullied." Warden Adams advised Nelson he could not accept this attitude from her. Warden Adams testified Nelson continued to conduct herself in the same manner after their conversations. Adams testified he spoke with Health Administrator Johnson on "a few occasions" regarding Nelson's behavior. Health Administrator Johnson told Adams the nurses got offended when Nelson would correct them because they did not know Company policy. Warden Adams said he then asked an assistant warden to step in and spend more time in the medical department because "there may have been a closeness with Ms. Nelson and Ms. Johnson that made her a little blind to what was going on in her department."

Warden Adams testified he spoke with his "boss" about Nelson because her "attitude" "was starting to divide the medical staff." Adams said "three or four" coworkers "hung" with and supported Nelson which caused a separate group that was divisive within the medical department. Warden Adams' superior recommended a training class to bridge the whole department together. Warden Adams asked for training and HR Director Koehn came to the facility and taught "Conflict Dynamics Training."

HR Director Koehn testified she taught the Conflict Dynamics Training at the facility in April 2008 to employees on all shifts in the medical department. The training consisted of workbook type training to identify constructive and destructive working behaviors and to strive for the constructive behaviors. Koehn testified an individual in one of the classes asked what to do if the problem was not with anyone present but rather with one individual not present. HR Director Koehn told them the only way she could work to resolve the problem was to know who this individual was. The employee said she was afraid of retaliation from the employee's supervisor if she identified the employee. HR Director Koehn asked the employees if they would be willing to write the individual's name on slips of blank paper and she would take the names to Warden Adams for his review. The employees agreed and that procedure was followed in the other sessions of training. Koehn said that after all the sessions of Conflict Dynamics Training were concluded she took the slips of paper to Warden Adams and Nelson's name appeared on all slips except one. Thirteen slips reflected Nelson's name alone. One slip reflected both Nelson's and Health Administrator Johnson's names, one slip reflected Nelson, Johnson, and T. Taylor while one slip reflected Percynthia [Thomas] name alone.

Warden Adams testified he was concerned by Nelson's behavior and attitude in that he had two RNs quit back-to-back. Adams testified RN Supervisor Maples quit because Nelson, at a grievance meeting, accused him of being a racist. Nelson based her accusations that RN Supervisor Maples was a racist on the fact Maples told her, when she had an encounter with Dr. Tankersley, if she did not calm down he would send her home but did not say he would send Dr. Tankersley home. HR Director Koehn testified the work force at the Company is 95 to 97 percent African-American. Warden Adams testified he did not believe RN Supervisor Maples to be a racist. Adams said Maples offered to apologize to Nelson but Nelson "would not accept his apology," "kept her arms folded," shook her head, and "was adamant . . . she just wouldn't meet him halfway." Warden Adams testified RN Supervisor Maples found it real difficult to work with Nelson and found himself employment elsewhere. Adams said Maples told him he quit because of Nelson but Maples did not mention Nelson in his resignation letter. Adams testified Maples told him he did not mention Nelson in his resignation letter because he did not want to cross paths with Health Administrator Johnson in case he ever wanted to return to the Company to work. Warden Adams said he did not meet with Nelson to tell her RN Supervisor Maples resigned because of her.

Former RN Supervisor Maples testified he resigned his employment with the Company because of the "high stress level"

and part of the stress level resulted from his having to interact with Nelson.

Warden Adams testified the second RN he lost because of Nelson was Deanna Hardin. Adams testified Hardin told him and Director Garner that she was quitting because of Nelson, that she could not “supervise her” or “work around her any more,” and if the day came when Nelson no longer worked there she would be happy to return to work at the Company.

RN Hardin testified she was the first RN to be hired after the Company obtained the California contract. She said there were only three RNs at that time the other two being RN Supervisor Maples and Health Administrator Johnson. Hardin said because she was the first “higher professional” she caught it bad for a long time. Hardin said the atmosphere in the medical department was “anxious,” “hostile,” and unprofessional. RN Hardin described working with Nelson as “if you could just imagine the biggest, baddest bulldog that just barked all the time in your face and would never go away, that’s what it was like working with her.” Hardin said she told Warden Adams when she resigned it was because of Nelson’s behavior and Health Administrator Johnson’s enabling her. Hardin said she told Warden Adams if they ever got it figured out and got rid of those causing the problems to call her if they needed a good nurse and she would see about coming back.

Warden Adams testified he had to do something that they were losing RNs which were hard to find and that Nelson was “running everybody off.” Adams testified “Ms. Nelson wanted to be the boss. . . . She wants to tell the RNs what to do. And you don’t do that in no type of environment. That doesn’t happen, but she insisted on telling them what to do.”

Warden Adams said that after the incident involving RN Clinical Supervisor Dorothy Strong on July 29, 2008, he decided “enough was enough” and he had to do something with Nelson. Adams said she had been given more chances than anyone else in the facility because she had a supervisor who was her friend and would not hold her accountable.

As set forth above, the incident between RN Clinical Supervisor Strong and Nelson related to Strong’s attempts to ascertain which inmate was having chest pains and Nelson’s response thereto, particularly as it related to Strong.

Warden Adams said he spoke with Director Garner and Vice President of Facility Operations Turner after the Strong incident. Adams discussed the incidents related to Nelson that involved Maples, Hardin, Scott, and Strong and recommended they terminate Nelson. Adams said he made his recommendation “Because her [Nelson’s] conduct, her behavior was detrimental to the facility. She was killing us. She was . . . putting us in a position where we could lose our contract.” Vice President of Facility Operations Turner testified Warden Adams was at “his wit’s end” because he was unable to improve the health services clinic because of circumstances surrounding Nelson. Turner and Warden Adams testified Nelson was discharged for being disruptive and not because of her grievance filing or her complaints about working conditions.

Warden Adams testified that when he terminated Nelson he referred to talking points previously written for the exit interview.

B. Credibility Considerations, Analysis, Discussion, and Conclusions

Before turning to an analysis of the facts and application of legal guidelines, it is helpful to make certain observations applicable throughout this Decision. I have carefully reviewed the trial record and exhibits whether or not I have made reference to or discussed such herein. I have not attempted to resolve all differing versions of what took place in grievance meetings or like settings deeming it unnecessary to a resolution of the issues herein. In large part, the outcome of this matter would be the same regardless of which version of facts was accepted. On those incidents where it is essential to resolve or address credibility, I have done so after having carefully observed the witnesses as they testified. I have accepted portions of witnesses’ testimony but rejected other portions but have considered all testimony and done so in light of other witnesses’ testimony and exhibits. The Government and Company presented numerous disciplinary reports issued to employees during 2007 and 2008. I have carefully reviewed, but do not make reference to, the reports because I do not find the reports very helpful in deciding, one way or the other, the outcome of this matter.

Section 7 of the Act guarantees employees the right to engage in “concerted activities for the purpose of collective bargaining or other mutual aid or protection.” For an employee’s activity to be “concerted” the employee must be engaged with or on the authority of other employees and not solely on behalf of the employee him/herself. *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), and *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986). The Statute requires that the activities under consideration be “concerted” before they can be “protected.” As the Board observed in *Meyers I* “Indeed, Section 7 does not use the term ‘protected concerted activities’ but only concerted activity.” It goes without saying however the Act does not protect all concerted activity. In *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), enfd. sub. nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), the Board made it clear that under the proper circumstance a single employee could engage in concerted activity within the meaning of Section 7 of the Act. For example in *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984), the Supreme Court found an individual employee’s invocation of a right contained in a collective-bargaining agreement constituted concerted activity within the meaning of Section 7 of the Act. The question of whether an employee has engaged in concerted activity is a factual one based on the totality of record evidence. See e.g. *Ewing v. NLRB*, 861 F.2d 353 (2d Cir.1988). The Board has found an individual employee’s activities to be concerted when they grew out of prior group activity. *Every Women’s Place*, 282 NLRB 413 (1986). An employee’s activity will be concerted when he or she acts formally or informally on behalf of the group. *Oakes Machine Corp.*, 288 NLRB 456 (1988). Concerted activity has been found where an individual solicits other employees to engage in concerted or group action even where such solicitations are rejected. *El Gran Combo de Puerto Rico*, 284 NLRB 1115 (1987), enfd. 853 F.2d. 966 (1st Cir. 1988). The Board has long held, however, that for conversations between employees to be found protected concerted activity, they

must look toward group activity and that mere “gripping” is not protected. See: *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3rd Cir. 1964). Once the activity is found to be concerted an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee’s activity, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g., discharge) was motivated by the employee’s protected concerted activity.

During applicable periods herein, did Nelson engage in concerted activity protected by the Act? The evidence leaves no doubt she did. Nelson’s February 26, 2008 grievance against RN Supervisor Maples accused him of, among other things, discrimination based on race and sex. While Nelson was preparing the grievance against Maples, three of her coworkers came to her office where the four of them discussed incidents involving Supervisor Maples. Nelson informed her three coworkers, LPN Thomas, LPN Henderson, and LPN Melton, they could write up their incidents related to Supervisor Maples and attach them to the grievance she was preparing. The three did so. LPN Henderson complained that in January 2008 Maples required her to have a doctor’s excuse for an absence for surgery while not requiring white nurses to provide excuses. I note Nelson, Henderson, Melton, and Thomas are African-American and Supervisor Maples is Caucasian. LPN Melton complained Supervisor Maples took her early selected work assignments and gave them to a white male nurse. LPN Thomas complained Supervisor Maples did not fairly make daily work assignments. It is clear the four LPNs discussed working conditions and reduced certain of their concerns to writing which Nelson submitted to management in the form of a grievance. I find this constitutes basic protected concerted activity. I reject the Company’s contention the grievance only related to Nelson and thus could not be concerted activity. The attachments to the grievance clearly set forth the concerns of three other LPNs. I likewise find the nonparticipation of the other three LPNs at the various meetings on the grievance between February and May 2008 did not negate the concerted nature of the grievance. I need not, and do not, address the merits of the grievance, or any portion thereof, as it is not necessary to a finding that the actions of Nelson and the other three LPNs constituted concerted activity protected by the Act.

The letter Nelson drafted on May 5, 2008, to VP Tighe constituted concerted activity protected by the Act. The letter concerned wages for LPNs. Nelson solicited fellow LPNs to read and consider signing the letter. Fifteen LPNs signed the letter which Nelson then mailed to VP Tighe.

Nelson’s actions related to bonuses for LPNs also constituted basic concerted activity protected by the Act. After Nelson was apprised on July 24, 2008, that she was going to receive a larger bonus than otherwise expected, Nelson investigated and determined the larger bonuses only applied to RNs not LPNs. Nelson learned from Health Administrator Johnson that the information regarding bonuses came from Recruitment Specialist Carter. Nelson asked for, and was granted, permission to speak with Carter about the bonuses. However, before Nelson did so, she spoke with three other LPNs about bonuses and asked if they wanted to go with her to speak with Carter about bonuses. The three LPNs agreed and the four of them met with

Recruitment Specialist Carter to find out why the LPNs were not included in the retention bonuses.

On July 30, 2008, LPN Brown and Nelson met with HR Manager Holly to further pursue bonuses and if their names were included with those getting bonuses. When HR Manager Holly asked what bonuses, Nelson told her “some of the LPNs are getting some extra money. We want to know are we going to get it.” Recruitment Specialist Carter came into HR Manager Holly’s office at that time and told the two LPNs if they needed to know something about bonuses to ask her or HR Director Koehn. The two LPNs (Nelson and Brown) then spoke with Koehn on the speaker phone in Recruitment Specialist Carter’s presence. A third LPN, Diketra Thomas, joined Nelson, Brown, Carter, and Koehn during the telephone conference. Again the subject matter was bonuses for LPNs, a part of wages, and as such clearly constitutes concerted activity protected by the Act. It is clear Nelson’s inquires were not just for herself but for LPNs. Nelson made it clear her inquiry was for “we” LPNs. While Nelson may have made a reference in her grievance to CEO Ferguson to the fact she wanted to know whether she personally would receive a bonus does not detract from a finding her activity with respect to bonuses was concerted.

During this July 30, 2008, conference call, Nelson asked HR Director Koehn about the status of the letter she and certain LPNs had written VP Tighe. The letter addressed pay rates for LPNs. Koehn promised to look into the matter and get back with Nelson the following Monday.

I am fully persuaded the evidence establishes the Company was aware of Nelson’s protected concerted activity. In the grievance against RN Supervisor Maples, Nelson attached Employee Incident Statements from three additional LPNs concerning alleged issues of discrimination based on race and sex, which concerns Nelson also raised. Nelson in a March 27, 2008 addendum to Maples grievance asserts RN Supervisor Maples had said “I’m tired of trying to get along [sic] with these people!” Nelson indicated in the addendum, “Everyone in the grievance is black. Everyone Mr. Maples has violated is black.” From this alone it is clear Nelson was advancing the cause of others as well as herself and the Company was on notice in writing she was doing so.

The letter to VP Tighe was drafted and signed by Nelson along with 14 other LPNs; however, the return receipt signed by a Company representative, was specifically addressed to Nelson at her home. During a meeting on July 30, 2008, with HR Director Koehn regarding bonuses, Nelson asked about the status of the LPNs’ letter to VP Tighe about pay rates for LPNs. HR Director Koehn did not know the status but stated she would look into the matter and get back with Nelson. The Company was fully aware of Nelson’s efforts regarding the letter from its receipt by the Company and continuing thereafter.

The Company was aware of Nelson’s involvement, along with others, regarding bonuses because she was present with management representatives HR Manager Holly, HR Director Koehn, and Recruitment Specialist Carter when those concerns were raised.

Clearly Nelson engaged in concerted activity protected by the Act. However, what remains to be determined is whether the Company retaliated against her for exercising her right to engage in that protected activity.

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced its causation test in cases alleging violations of Section 8(a)(3) of the Act or violations of Section 8(a)(1) turning on employer motivation. To establish such a violation, the government must prove, by a preponderance of the evidence, that an individual's protected activity was a motivating factor in the employer's action. Once the government makes this showing, the burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even in the absence of the protected conduct. To sustain its burden, the government must show that the employee was engaged in protected activity, that the employer was aware of that activity, that the activity was a substantial or motivating reason for the employer's action, and there was a causal connection between the employer's animus and its challenged conduct or action. Recently, the Board has indicated that "Board cases typically do not include [the last element] as an independent element." *Wal-Mart Stores, Inc.*, 352 NLRB 815 fn. 5 (2008).

As noted above, I find Nelson engaged in concerted activity protected by the Act and that the Company knew about the concerted activity and Nelson's involvement therein. Therefore, it is now necessary to determine the Company's motivation in discharging Nelson. I conclude the Government has made a prima facie showing that Nelson's concerted protected activity was a motivating factor in the Company's decision to terminate her.

First, Warden Adams' written talking points for the termination meeting with Nelson indicates that each time she complained about an issue she was never satisfied with any response by the Company to her concerns. I note Nelson's concerns included allegations of race and sex discrimination as well as issues regarding rates of pay and employee bonuses. Warden Adams' talking points for Nelson's termination, standing alone, constitute unlawful motivation for her discharge. Second, Warden Adams told Nelson during the termination meeting, as credibly testified to by Nelson, that her attitude did not fit the environment the Company sought to establish and maintain. Nelson's attitude was one of pursuing employee issues, concerns, and complaints vigorously. The record demonstrates Nelson may have a number of shortcomings but a lack of persistence is not one of them. Nelson's attitude was a factor in her discharge. Third, on March 14, 2008, at a meeting on the grievance related to RN Supervisor Maples regarding whether he discriminated against Nelson and others based on sex and/or race, Nelson stated Maples and her coworkers tried to make it seem like she was a troublemaker. Nelson credibly testified HR Director Koehn, in Warden Adams' presence, stated they eventually got rid of troublemakers. Nelson is equated to a troublemaker and the Company, during a meeting on a grievance filed by Nelson, made it clear the Company would get rid of troublemakers demonstrating unlawful motivation for discharging her. Fourth, it is undisputed that Health Administrator

Johnson told Nelson immediately after Nelson's termination that she had just spoken with Warden Adams and Warden Adams told her that HR Director Koehn said Nelson "had called her being negative a few times and that you incited the nurses." Nelson had solicited other LPNs on July 24, 2008, to accompany her to speak about employee bonuses with Recruitment Specialist Carter and thereafter with HR Director Koehn. LPNs Nelson and Brown spoke again with HR Director Koehn on July 30, 2008, about the employee bonuses as well as the letter to VP Tighe that Nelson drafted and mailed and which 14 other LPNs signed. Nelson's inciting fellow LPNs and being negative concerned pay and working conditions and, in part, contributed to her discharge. Fifth, Nelson was terminated a mere 2 days after she discussed with HR Director Koehn employee bonuses and the status of an earlier letter regarding a wage increase for LPNs. I find the timing of Nelson's discharge to be suspect and further indicate the Company's unlawful motivation for her discharge. Sixth, Nelson's immediate supervisor, Health Administrator Johnson, wrote a letter of recommendation for Nelson describing her as "an excellent nurse" with a "wealth of knowledge" and a "self-motivated" "model employee." Such indicate she was terminated for other than her job performance or abilities.

Based on the above, I find the Government has met its burden of establishing the Company's action in terminating Nelson, was motivated, at least in part, by Company management's animus toward Nelson's grievance filing on her and other LPNs' behalf as well as Nelson's efforts, with other LPNs, regarding wage rates and employee bonuses all concerted activity protected by the Act. The burden shifts to the Company to demonstrate by a preponderance of the evidence it would have taken the same action even in the absence of the protected conduct. I conclude and find the Company has failed to meet its burden.

The Company's contention that it discharged Nelson because of her continued harassing, disruptive, and bullying behavior and causing the Company to lose RNs as well as putting the Company in a position where it could lose its contract with California does not withstand close scrutiny. For example, Warden Adams testified that from the time he arrived at the facility in February 2007 until Nelson's termination on August 1, 2008, he received written and verbal statements from staff members complaining about Nelson's "bully-like tactics," aggressive tone with others, and acting as though she was running the place. However, Warden Adams never issued or caused any written disciplinary warnings to be issued to Nelson about any such behavior. Warden Adams said he spoke with Nelson on several occasions about her conduct. I do not credit such testimony. I am persuaded if he had spoken with her on several occasions and considered it serious conduct he would not have signed Nelson's 2007 full year Performance Summary wherein Nelson was rated "Exceeds Requirements" in all categories specifically including that she was always eager to assist others as needed, was respectful to her coworkers, always tried to build positive relationships, had a true love for helping others and tried to do the right things with honorable intentions. Nelson's 2006 Performance Summary reflected an overall "Exceeds Requirements" evaluation for that year also.

Warden Adams identified, or was aware of, approximately 10 or more Incident Reports or Statements from staff employees and/or supervisors complaining about Nelson's conduct. The Company further contends Nelson's conduct came at the same time the Company was experiencing a crisis in the medical department which included the death of an inmate. The incident reports commencing in March 2007 and concluding with a report dated July 29, 2008, reflect allegations that Nelson acted unprofessional and threatening toward a mental health coordinator; shouted at a coworker in an inappropriate manner; threw away private property of a coworker; displayed an authoritative behavior toward coworkers creating a toxic work environment; creating low morale and stress and acting as a "saboteur and bully;" acting in a disrespectful manner toward a supervisor; engaging in a shouting match with a professional staff member; yelling and screaming at a coworker; handling a review schedule for applicants in an unprofessional manner; and embarrassing a clinical supervisor who was trying to ascertain which inmate was experiencing chest pains. While all of this shows that a number of the staff did not have a favorable opinion of Nelson, and she may not have been a model employee, but these were not I am persuaded factors that brought about her termination. I note Warden Adams did not speak with Nelson about any of these incidents. I am persuaded that if these incidents had been as critical as the Company contends some, if not all, of the incidents would have been raised with Nelson. None of these specific incidents were raised by Warden Adams as a basis for her termination when Adams met with Nelson on August 1, 2008, to terminate her.

Warden Adams contends he terminated Nelson because RNs were leaving their employment with the Company which was unacceptable to him. Warden Adams explained he had two RNs leave their employment back-to-back, namely RN Supervisor Maples and RN Hardin. Maples said he resigned his employment effective May 6, 2008, because of the "high stress level" in the medical department and a part of that stress came from having to interact with Nelson. RN Hardin resigned her employment effective June 19, 2008, telling Warden Adams she was doing so because of Nelson's behavior. Hardin described the Medical Department atmosphere as anxious, hostile, and unprofessional and described Nelson as "the biggest, baddest bulldog that just barked all the time in your face and would never go away." Warden Adams did not raise these two specific departures with Nelson even though both cited Nelson as their reasons, at least in part, for leaving their employment. I further note Warden Adams did not mention these specific resignations to Nelson at the time he terminated her as being the basis, in whole or in part, for her termination.

The Company did not consider any of the above incidents, including the departure of two RNs, to warrant immediate discipline for Nelson or for that matter raising the incidents with Nelson.

Warden Adams asserted the incident involving RN Clinical Supervisor Strong which occurred on July 29, 2008, caused him to conclude "enough was enough" and he had to do something with Nelson; therefore, he sought and obtained permission to terminate Nelson. With regard to the Strong incident, Strong said she was "really embarrassed" by Nelson's comments about

a conversation addressing whether an inmate was experiencing chest pains. I am persuaded the Company seized upon this incident after Nelson continued on July 30, 2008, to engage in concerted protected conduct as described earlier herein. I note Warden Adams could only place his decision to terminate Nelson as occurring sometime between July 29 and 31, 2008.

Accordingly, the Company has failed to rebut the Government's prima facie case. As noted above, the Company's contention Nelson was terminated because of her harassing, disruptive, and bullying behavior is nothing more than a pretext. Accordingly, it is appropriate to infer the Company's true motive was unlawful, that being because Nelson engaged in concerted protected activity. *Limestone Apparel Corp.*, 255 NLRB 722 (1981), *enfd.* 705 F.2d 799 (6th Cir. 1982).

CONCLUSIONS OF LAW

By on or about August 1, 2008, discharging Vevria Nelson because she engaged in concerted protected activity, the Company engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found the Company has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, to remedy the unlawful conduct toward Nelson, the Company must, within 14 days of the Board's Order, offer her reinstatement to her former job, or if her former job no longer exists to a substantially equivalent job without prejudice to her seniority or other rights and privileges previously enjoyed, and make her whole for any lost wages and benefits as a result of her August 1, 2008 discharge, with interest, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I also recommend the Company, within 14 days of the Board's Order, be ordered to remove from its files any reference to its August 1, 2008 discharge of Nelson and, within 3 days thereafter, notify Nelson in writing it has done so that her discharge will not be used against her in any manner. I also recommend the Company be ordered, within 14 days after service by the Region, to post an appropriate "Notice to Employees" in order that employees may be apprised of their rights under the Act and the Company's obligation to remedy its unfair labor practices.

On these findings and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The Company, Corrections Corporation of America, Tutwiler, Mississippi, its officers, agents, successors, and assigns, shall

1. Cease and desist from

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Discharging or otherwise discriminating against employees for engaging in concerted activity protected by the Act.

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

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

(a) Within 14 days from the date of the Board's Order, offer Vevria Nelson 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.

(b) Make Vevria Nelson whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the Remedy section of this decision.

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

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

(e) Within 14 days after service by the Region, post at its Tutwiler, Mississippi facility, copies of the notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Company's authorized representative, shall be posted by the Company 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 Company 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 Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expenses, a copy of the notice to all current employees and former employees employed by the Company at any time since August 1, 2008.

Dated at Washington, D.C., March 27, 2009.

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 discharge or otherwise discriminate against any of you for engaging in concerted activity protected by the Act.

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

WE WILL, within 14 days from the date of this Order, offer Vevria Nelson 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 Vevria Nelson whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

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

CORRECTIONS CORPORATION OF AMERICA

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