JD–57–09
Syracuse, NY

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

IROQUOIS NURSING HOME, INC.

and

1199 SEIU, UNITED HEALTHCARE WORKERS EAST

Cases 3–CA–26766
3–CA–26767
3–CA–26794
3–CA–26805
3–CA-26874

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Ross P. Andrews, Esq. (*Satter & Andrews, LPP*), of Syracuse, New York, for the Charging Party Union.

DECISION

STATEMENT OF THE CASE

EARL E. SHAMWELL JR., Administrative Law Judge. These consolidated cases were heard before me on May 13–14 and June 17–19, 2009, in Syracuse, New York, pursuant to an original charge filed by 1199 SEIU, United Healthcare Workers East (the Union) in Cases 3–CA–26766 on July 15, 2008, against Iroquois Nursing Home, Inc. (the Respondent); the Union filed an amendment to this charge on November 17, 2008. On July 15, 2008, the Union also filed an original charge against the Respondent in Case 3–CA–26767, and amended charges in the case on September 23, 2008. On July 31, 2008, the Union filed a charge against the Respondent in Case 3–CA–26794; on August 11, 2008, the Union filed a charge against the Respondent in Case 3–CA–26805; and on October 8, 2008, the Union filed a charge against the Respondent in Case 3–CA–26874.

On November 28, 2008, the Regional Director for Region 3 (the Region) of the National Labor Relations Board (the Board) issued a complaint consolidating these cases and scheduled them for hearing. On December 12, 2009, the Respondent filed its answer for the consolidated complaint essentially denying the commission of any unfair labor practices.

The consolidated complaint alleges that the Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) on several occasions after the Union's successful organizing campaign and election as the bargaining representative of certain of the Respondent's employees.

At the hearing, the parties were represented by counsel and were afforded full opportunity to be heard, examine and cross-examine witnesses, and introduce evidence.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the posthearing briefs of the General Counsel, the Respondent, and the Union, I make the following findings of fact, conclusions of law, and recommended Order.

I. Jurisdiction

The Respondent, a corporation with an office and place of business in Syracuse, New York, has been engaged in the operation of a long-term health care facility. During the past 12 months, the Respondent, in conducting its business operations, derived gross revenues in excess of $100,000 and during this period purchased and received goods valued in excess of $5000 directly from points outside the State of New York. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. The Labor Organization

The Respondent admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practice Allegations

The consolidated complaint (the complaint) essentially alleges that on or about July 28 the Respondent violated Section 8(a)(1) of the Act by denying the request of one of its employees to be represented by the Union during an investigatory interview that the employee believed would result in disciplinary action. The complaint further alleges that between June 27 and October 7, 2008, on separate occasions, the Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily denying an employee weekend work hours and opportunities to work on the first shift; issuing a major offense as opposed to a general offense discipline to an employee; disciplining employees; and suspending and discharging an employee.

A. The Respondent's Business

The Respondent, Iroquois Nursing Home, engages in the health care business and operates a 160-bed skilled residential nursing facility located in Jamesville, New York.[2] Approximately 90–100 certified nurse aides (CNAs)—the category of workers principally involved in this litigation—30 licensed practical nurses (LPNs), and 12 registered nurses (RNs) comprise the Respondent's primary work force.

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[1] On July 23, 2009, the General Counsel filed a motion styled, motion to reopen record to receive previously unavailable evidence and supporting memorandum of law. This motion essentially requested that the record formally closed on June 13, 2009, be reopened to receive evidence of the State of New York Unemployment Insurance Appeal Board, Decision of the Board for (alleged discriminatee) Esperanza Cruz, dated July 1, 2009. The General Counsel, noting that this decision was not available at the time of the hearing, avers that this decision represents an administrative review of the initial decision regarding Cruz, which was received in the instant matter (see R. Exh. 29) and constitutes previously unavailable evidence. The Respondent filed no response, and I will treat the motion as unopposed by the Respondent. Pursuant to NLRB Rules and Regulations, Sec. 102.35(a)(8), I will grant the motion and give this evidence whatever weight it merits. *D. H. Martin Petroleum Co.*, 280 NLRB 547 fn. 1 (1986), and *Garrison Valley Center*, 277 NLRB 1422 fn. 1 (1985).

[2] Unless otherwise indicated, all dates and times material to this litigation refer to 2008.

The Respondent began operations in 1992, and annually serves the medical and rehabilitative care needs of about 500-600 mostly elderly and infirm residents[3] 24 hours daily and 7 days weekly. The workday is divided into three shifts, that is, the (first) day shift, 7 a.m. to 3 p.m.; the (second) evening shift, 3 to 11 p.m.; and the (third) night shift, 11 p.m. to 7 a.m.

The Respondent's nursing facility is located in a four-floor building with the specialty dementia care unit on the first floor; a sub-acute rehabilitation unit occupying the second floor; a long-term care unit is on the third floor; and an end-of-life palliative care unit on the fourth floor. Each unit is divided into two 20-bed subdivisions, designated a B and C side, on each floor.

The Respondent participates in both the Medicare and Medicaid programs and is obliged to comply with applicable Federal rules and regulations as well as New York State regulations issued by the State's Department of Health covering standards of care residents must be accorded. In order to ensure that the Respondent is in compliance with applicable rules and regulations, the New York authorities conduct periodic surveys and onsite audits of the facility. Notably, the nursing home industry is strictly regulated in New York, and the Department of Health demands strict compliance with regulatory standards and guidelines.[4] Where a nursing home is determined through a State audit to be in noncompliance with any given rule or regulation, a deficiency notice is issued. To the extent an employee's conduct is cause for the issuance of any such deficiency, the Respondent has historically issued disciplines to the employee involved.

In order to maintain State-mandated quality care for the facility's residents, and effectively manage its CNA work force in particular, the Respondent has at least since 2006 maintained a progressive disciplinary action policy contained in its employee handbook which is provided to each employee on hire.

The policy, as contained in the employee handbook, specifies the successive levels of progressive discipline applicable to employee misconduct in each of the following categories:

SEVERE OFFENSES:
1st offense – immediate discharge

MAJOR OFFENSES:
1st offense – written warning
2nd offense – unpaid suspension with final written warning
(Suspension not less than three (3) days)
3rd offense – dismissal

GENERAL OFFENSES:
1st offense – verbal warning

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[3] Residents of the Iroquois facility have medical/clinical diagnoses that include dementia and incontinence, are recovering from hospital stays, and/or are receiving end-of-life care.

[4] See R. Exh. 5, an excerpted copy of the State of New York Department of Health's manual entitled "Medicare/Medicaid Requirements for Long Term Care Facilities, which contains detailed guidelines for the operation of facilities like Iroquois Nursing Home. According to the credible testimony of the Respondent's administrator, Sonya Moshier, the entire document consists of about 90-100 pages and is known in the business as the State Operations Manual and functions as a veritable "Bible" for nursing homes in New York.

2nd offense – written warning
3rd offense –second written warning
4th offense – unpaid suspension with final written warning
(Suspension up to three (3) days at the discretion of the department head)
5th offense - dismissal[5]

In addition to the handbook, the Respondent provides to each employee a single sheet document entitled "Employee Handbook Quick Reference," which sets out a summary of key work rules and progressive discipline. The Respondent's disciplinary policy is predicated on the difficult nature of the work entailed with providing care to a very vulnerable population, the extensive rules associated with this endeavor, and the need to hold its employees accountable, especially CNAs who are charged with providing the direct hands-on daily care to residents and comprise the largest share of the Respondent's work force. Notably, CNA work is relatively low-skilled and low-paying, but entails fairly onerous physical, psychological, and scheduling demands to provide quality care for residents along with the expectations under the State regulatory scheme as well as those of the resident's family.

In order to meet the expectations of the regulations and the family and to insure that the residents receive quality care, the Respondent's medical staff prepare individual care plans for each resident, and all care providers are expected to follow and implement the plans at all times.[6] However, due to the nature of the work, the nursing home industry has a high turnover rate among the care provider cadre, particularly among the CNAs.[7] Nonetheless, the Respondent, by law and charter, is required to maintain rigorously the standards of care applicable to each and every resident. Accordingly, the Respondent's management cannot and does not tolerate care standards deemed lax nor does it overlook poor performance from its employees in the deliverance of care to its residents. In point of fact during the period covering around February 7, 2001, through October 7, 2008, the Respondent disciplined individual (nursing, management, and dietary) employees for various infractions on about 105 different occasions; the infractions generally ranged from the individual employees' failure to follow instructions as outlined in the resident's care plan, time and attendance issues, insubordination, negligence and neglect of duty, and inability to get along with residents and coworkers among other miscellaneous misconduct as stated in the disciplines.[8]

Around the middle to late December 2007, the Union began its organizing efforts at the Respondent's facility.[9] During the campaign period, the Respondent held management meetings designed to inform managers and supervisors of the applicable law and procedures

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[5] See R. Exh. 3, p.p. 17 and 18. The policy provides a listing of examples of employee misconduct that could fall within each of the three categories of infractions. The entire handbook consists of 32 pages plus an addendum.

[6] See R. Exh. 4.

[7] See R. Exh. 9.

[8] See GC Exh. 14 and R. Exh. 32, copies of Iroquois Nursing Home, Inc. – Employee Progressive Discipline Records for employees determined to be in violation of the facility's rules and regulations. It would appear that the Respondent followed this above-stated progressive disciplinary scheme in meting out the various disciplines imposed on the respective employees, which disciplines included punishment as minimal as verbal warnings to more draconian measures such as suspensions and terminations.

[9] This was not the Union's first attempt to organize Iroquois employees, the first effort having taken place in the 1990s, although the organizing efforts at the time were undertaken by a different local of the SEIU.

associated with the Union's campaign—the do's and don'ts as it were—to discuss issues associated with the campaign and to devise strategies to combat the Union. The Respondent also held meetings to which employees were invited to set out management's position regarding the Union's efforts.

An election was conducted on March 7, 2008, and the Union received a majority of the votes. On May 1, 2008, the Union was certified as the exclusive bargaining representative by the Board in an appropriate unit, including the CNAs and other categories of facility employees.[10]

Beginning around mid-May 2008, the Respondent and the Union undertook their first collective bargaining. On May 13, 2008, the Union notified the Respondent of the members of its initial negotiating team; however, throughout bargaining, the Union's team members changed. Bargaining continued throughout the summer and fall of 2008 and by December 2008, the parties reached agreement and are operating under a collective agreement effective December 2008 to December 2011.[11]

B. The Alleged Denial of "Weingarten rights" to Carol Rommevaux on or about July 28, 2008

The complaint alleges that on July 28, 2008, the Respondent conducted an investigatory interview of CNA Carol Rommevaux who had reasonable cause to believe the interview would result in disciplinary action against her in spite of her request for representation by the Union at the interview.[12]

Rommevaux testified at the hearing at the behest of the General Counsel. Rommevaux stated that she was an active union supporter, assisting with the organizing campaign in 2008, serving as a union election day observer, and ultimately serving on the Union's bargaining committee after the Union was voted in.[13]

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[10] The unit of employees deemed appropriate consists of the following:

> All full-time and regular part-time certified nurse aides, activity leaders, unit secretaries, service aides, food service workers, cooks, maintenance and grounds employees, housekeeping employees, laundry employees, clerks and receptionists, but excluding all licensed practical nurses, technical employees, administrative secretary, managerial employees, and professional employees and supervisors as defined in the Act, and other employees." [GC Exh. 2.]

[11] See Jt. Exh. 1, a copy of the parties' tentative agreement which later was ratified by the Union and the Respondent.

[12] Rommevaux voluntarily terminated her employment at Iroquois by letter dated August 11, 2008, directed to Carol Dempsey, the director of human resources. Dempsey acknowledged receipt of this letter also on August 11, 2008. See R. Exh. 34.

[13] On May 13, 2008, the Union sent the Respondent's counsel a list of Iroquois employees on its bargaining team, which included Rommevaux. Rommevaux also identified GC Exh. 31, a copy of the Union's August 2008 newsletter distributed to its members employed by Iroquois in which she is quoted as a member of the Union's bargaining team. Rommevaux said that she observed a copy of the newsletter in the employees' locker (breakroom).

Rommevaux acknowledged that on July 28, 2008, she was issued a written major discipline by the Respondent, essentially for failing in her responsibility as the then-assigned breakfast coordinator to serve timely six residents their breakfast meals.[14]

Rommevaux explained the circumstances leading to the issuance of this discipline.

Rommevaux testified that on the date in question she worked her normal day shift duties but was also designated the breakfast coordinator[15] whose main function is to see that residents receive their breakfasts in the dining room. Rommevaux stated that she found herself in an understaffed situation; that is, there were only two CNAs—herself and Maria Cole—to serve 40 residents their meals. She noted that there were two other employees—licensed practical nurses (LPNs)—on duty, but they rendered no breakfast assistance to her at the time.

Rommevaux went on to say that she commenced the breakfast service along with Cole and when she determined that service was properly underway, she decided to attend to her assigned residents who had not been seen to that morning. Accordingly, she asked Cole to relieve her of the coordinator function while she saw to her residents, leaving the dining hall to do so. Rommevaux stated that at the time there was a LPN working on her side of the unit but this person was unfamiliar with the 20 residents under her (Rommevaux's) care. All in all, according to Rommevaux, the situation was chaotic; her residents required care but she simply could not adequately attend to everyone, including those in the dining room.

However, after attending to her residents, Rommevaux said that she returned to the dining room to find a nurse manager, Carol Scheussler (an admitted supervisor), on the clearly chaotic scene around 9:30 a.m.; Scheussler asked her what was going on. Rommevaux testified that she explained, telling Scheussler that basically there was simply too much work for the available staff. It was during her explication of the staff situation (to which Scheussler merely shrugged her shoulders) that, according to Rommevaux, Scheussler noticed that there were trays containing food on the dining tables, but no residents were being served. Rommevaux said that she told Scheussler that she had asked Cole to take over for her, but instead of placing the unserved trays on the food cart for delivery to residents who had not been served, Cole had evidently left the trays on the dining room table in violation of the rules. The result was that the six residents did not get their breakfast.

Rommevaux stated that around 2:15 p.m., just before quitting time and when the other CNAs were doing their end of shift rounds, Scheussler told her that Michelle Robertson, the director of nursing, wanted to see her in her office. On the way to Robertson's office, Rommevaux said she queried Scheussler about the reason for the meeting and Scheussler said that Robertson simply wanted to see her. According to Rommevaux, she asked if she should bring her gaite belt (a patient lifting aid) and her identification badge; Scheussler said that she did not. Rommevaux stated that she was unconvinced of this and asked Scheussler again why she was being called in for the meeting; Scheussler again said she did not know. Rommevaux stated she asked Scheussler if she were being fired; Scheussler again said no.

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[14] See GC Exh. 25. Rommevaux signed the disciplinary form indicating that form indicates that she also had received a general discipline on October 18, 2006, for an undisclosed violation.

[15] According to Rommevaux, as the breakfast coordinator, a first shift CNA is assigned to the dining room from 7:30 or 8:30 until 9:30 a.m. before she begins her regular resident care duties. According to Rommevaux, breakfast coordinator duties entail a long setup and cleanup process for the residents.

Rommevaux testified that in spite of Scheussler's denials, she believed she was in some sort of trouble because of the events of the morning; and she believed a discipline was coming. Accordingly, out of this concern, Rommevaux said that she told Scheussler she wanted another CNA, preferably Maria Cole (whom she knew, the other staff at the time she did not know) to accompany her to the meeting. Rommevaux said that she believed she had the right to have someone of her choosing to attend the impending meeting and this was her only chance to get help.

In spite of her repeated requests, Rommevaux stated that Scheussler just "blew her off," telling her you don't need anyone—"it's just going to see Michelle [Robertson]," and never allowed her to speak with anyone before the meeting in Robertson's office.

Rommevaux testified that when she arrived at Robertson's office she was greeted by Robertson and Carol Dempsey whom she knew as the head of human resources. According to Rommevaux, once seated, Robertson told her that she was being disciplined and there was a written discipline already prepared. Rommevaux said that she told Robertson she wanted an opportunity to explain her side of the breakfast situation; however, Robertson told her that she had left the dining room and as breakfast coordinator she could not leave it unattended; her explanation did not matter. According to Rommevaux, Robertson then called two LPNs to the meeting—John Meyers and Kathy Witten—both of whom could have witnessed the morning's activities. According to Rommevaux, Meyers told Robertson that he had come to the dining room, observed the unserved trays, and was shocked that residents possibly were not being served.

Rommevaux stated that she told Robertson that Meyers, then in charge of the medicine cart, had been in the dining room the entire time and did nothing to assist her or the residents; he could have stopped delivering the medicines to lend her a hand.

According to Rommevaux, Robertson was unconvinced, saying it (nothing she said) did not matter, that she had failed in her responsibilities, and failed to do her job; Dempsey agreed with this assessment and the written discipline ensued.

Rommevaux testified that she persisted in trying to explain to Robertson and challenged the discipline, saying that no one person—herself—could be blamed for the problem with the trays under the circumstances because resident care is a team effort. But with Robertson, Scheussler, Dempsey, and the two LPNs aligned against her, Rommevaux said that she was resigned to the discipline and, in tears, simply signed off on the document, taking full responsibility for the failure of the residents to get their morning meals.

Rommevaux testified that she was pretty upset over the matter but did not file a grievance or unfair labor practice charge over the discipline—she believed that she had already lost; hence, there was no point to a further contest.

The Respondent called Michelle Robertson[16] on the Rommevaux related allegations. Robertson testified that Nurse Manager Cindy Scheussler conducted an investigation of Rommevaux on July 28 regarding her failure to see that six residents received their breakfast on that date. After the investigation was completed by Scheussler, according to Robertson, she

[16] Robertson was also called by the General Counsel as a 6(11) witness in his case-in-chief. Robertson is an admitted supervisor.

convened a disciplinary meeting on July 28 with Rommevaux, Scheussler, and Carol Dempsey.[17]

Robertson acknowledged that Rommevaux had requested representation before the meeting and that Dempsey had denied her request. Robertson noted that at the meeting Rommevaux expressed her disbelief that six residents had not been served breakfast that morning and because of her resistance, Scheussler, who had conducted the investigation, called Charge Nurse Meyers to the meeting to confirm that, indeed, six residents had not received breakfast and that Rommevaux as breakfast coordinator was responsible. Robertson denied that the meeting covered Rommevaux's overall work performance, but centered only on her failure to serve the residents. Robertson stated that the discipline issued to Rommevaux (GC Exh. 25) was for failing to serve timely the six residents.

C. The Respondent's Discipline of Ashley Rudolph on July 10, 2008

Ashley Rudolph testified that she was employed by Iroquois as a CNA from about February 8, 2008, until September 16, 2008.[18] Rudolph stated that she was familiar with and by way of background supported the Union and even allowed herself to be depicted in a union campaign pamphlet stating, "We're Voting Yes for 1199 SEIU" and announcing the election to be held on March 17.[19] Rudolph stated that after the election, she served on the bargaining committee.

Rudolph testified that on July 10 she was called off the third floor unit near the end of the first shift by her nurse manager, Cindy Scheussler, for a meeting to be held in the office of Michelle Robertson, director of nursing. Rudolph said that she asked Scheussler for permission to have fellow CNA, Esperanza Cruz, accompany her to the meeting but Cruz was told to leave and not permitted to attend.

Rudolph said that at the meeting she was told that she was being disciplined because she left early on July 9 without completing her duties that day.[20]

Rudolph related the circumstances leading to this discipline. Rudolph stated that on July 9 she was working the first shift (7 a.m. to 3 p.m.) on the first floor; her charge nurse (supervisor) was Tammy Majewski. However, Rudolph said she was not rescheduled to work past 11:30 a.m. because she had been cleared by the Respondent to attend her first bargaining committee session.[21] Pursuant to her scheduled early departure, Rudolph stated that she

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[17] Neither Scheussler nor Dempsey testified at the hearing; however, both are admitted supervisors.

[18] Rudolph initially testified that she was employed by the Respondent from May 2005 to September 2008. She later recalled that she returned to work from maternity leave in February 2008, when she was given a new hire date by Iroquois. Rudolph said that she worked for about a year and a half in total for Iroquois. Rudolph was deemed by the Respondent to have resigned voluntarily on September 16, 2008, because of three consecutive no-call/no-show incidents on September 12, 15, and 16. See R. Exh. 33.

[19] See R. Exh. 12. Along with Rudolph's picture in the pamphlet, she is quoted as saying, "I am voting YES for equal rights."

[20] See GC Exh. 16, a copy of the discipline which essentially states that this was Rudolph's first major offense—neglect of job duties and failure to follow instructions and violation of a resident's rights—that did not warrant discharge.

[21] Rudolph noted that other CNAs were allowed to leave for the July 9 11:30 bargaining

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informed Majewski around 11:30 a.m. that she was leaving, but that she had not completed her assignments; that there was a resident to be attended to, namely, Genie, who customarily arose at around 11–11:30 a.m. each day. Rudolph volunteered that Genie, if roused before 11 a.m., often yells and screams and is sometimes combative.

At the hearing, Rudolph admitted that on July 9 she had not started any care for Genie and did not know if she had had her briefs changed; she was incontinent. However, Rudolph said she did leave her breakfast tray as she customarily does for the resident. Rudolph also freely admitted that the general rules to be followed by first-shift care providers such as herself are to serve breakfast by about 8 a.m. and to pick up the trays by 9 a.m. for those residents served in their rooms. Moreover, breakfast trays are not to be left for any extended time with the resident. Rudolph also acknowledged that residents, including Genie, should generally be checked for incontinence and washed up early in the shift irrespective of whether the resident was up and out of bed. However, due to the issues associated with providing care to Genie and the constraints on her time on July 9, Rudolph said she did not have time to attend to her by the time she was scheduled to leave.[22] Rudolph testified, however, that she had cleared her early departure with Majewski who said that three other aides were coming in and would pick up where Rudolph left off. According to Rudolph, Majewski gave her permission to attend the bargaining session.

Returning to the meeting with Robertson and Dempsey on July 10, Rudolph stated that neither manager asked her about her side of the matter—not completing the resident's care. However, Rudolph said that she told them that she fully intended to finish her assignments before leaving, but simply did not have time. Rudolph noted that the managers did not mention any other issues associated with her work performance; specifically, there was no mention of any issues associated with any residents' bowel movements.

Rudolph testified that she told Robertson that she did not believe the discipline was warranted because she had received permission to leave; Genie was a customarily late riser; and in point of fact, as management well knew, there were three aides coming in to pick up her shift. Rudolph stated that she in fact told them that she believed she was being disciplined solely because she was on the bargaining committee.

Rudolph volunteered that during this time management was acting "funny," meaning to her that the Company was changing since the Union was voted in. For instance, according to Rudolph, she had been caring for Genie in her established and routine way for weeks with no issues from management. But when she was to attend bargaining, all of a sudden Genie's care became a problem. Rudolph observed that after she received her discipline, another CNA got Genie up at the exact same time as she had.

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session, namely, Demmetrics Brown, Espi Cruz, and Carol, whose last name she did not know. This was in all likelihood Rommevaux.

[22] Rudolph testified that Genie was one of her regular residents for whom she had been caring for about 2 months prior to July 9, and, hence, she was very familiar with the idiosyncrasies of her care needs. Rudolph was persistent in testifying that Genie simply did not and would not get up at 7 or 8, or even 9 or 10 in the morning; 11 or 11:30 a.m. was her routine time to get up and at which time she received her regular care.

Rudolph stated that once she observed that management was reacting to the Union, she decided that she would dot all her “i’s” and cross all her “t’s" so as to not give management any reason to act “funny” towards her when she was going to bargaining sessions.[23]

Rudolph also cited a conversation she had with Esther Field, a nurse manager, prior to the July 10 discipline but after the election. Rudolph noted that Field had given her CNA training. According to Rudolph, Field tried to persuade her not to be on the bargaining committee, telling her that she did not have to do this, not to feel pressured, that it was her choice.

The General Counsel also called Tamara “Tammy” Majewski regarding the Rudolph allegations.

Majewski testified that she was employed as a LPN at Iroquois from around May 2002 until about October 2008, and one of her assignments during the period included serving as a charge nurse whose duties include passing medication to residents, supervising staff (CNAs), dealing with physicians, and assisting the residents.

Majewski stated that during the summer of 2008, the Respondent and the Union were engaged in collective bargaining and several sessions were scheduled. Majewski recalled receiving instructions from management to release certain CNAs on the bargaining team to attend bargaining sessions, generally at around 11:30 a.m., at which time the second-shift aides would relieve them.

Majewski testified that she knew CNA Ashley Rudolph and that she was scheduled to leave for a bargaining session at 11:30 the morning of July 9, 2008. According to Majewski, Rudolph came to her before leaving and informed her that all of her assignments had not been completed, that there were a couple of beds to be made, and one resident had not been provided her morning care. Majewski stated she asked Rudolph for the name of the resident and was told it was Genie. Majewski was familiar with Genie and knew that she did not rise before 11:30 a.m.; in that light Majewski said that she approved Rudolph’s early departure.

Majewski recalled on that day after Rudolph left, she later (around noon) had a conversation with Esther Field, the first floor nurse manager, in which Field asked her if she knew that Rudolph had left the unit, but had not completed her assignments—several beds unmade—and had in fact left a resident uncared for in bed. Majewski said that she told Field that she was aware that Rudolph had left and that there was one resident in bed but the resident (Genie) in question did not get up until right before lunch; she knew that Genie was still abed. Majewski stated that she also told Field that Rudolph had obtained her permission to leave and that she (Majewski) assumed the staff coming in would finish up for Rudolph. Majewski noted that Field seemed upset at the time, especially because the resident had been left in bed so long.

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[23] Rudolph specifically denied stating to a coworker, Lenora Williams, on July 9 anything that would suggest she did not intend to finish her care duties before attending the bargaining sessions. Rudolph was shown a statement purporting to reflect her conversation with Williams. The statement was signed not by Williams but by Esther Field on July 10, 2008. (See GC Exh. 18.) Rudolph insisted that she had no such conversation with Williams with whom she was not friendly, but more importantly because she was sensitive to management’s attitude toward the Union and did not want to give them anything to use against her.

Majewski volunteered that Field also told her that another CNA (Williams) told Field that Rudolph had said that she had no intention of completing her assignment before leaving. Majewski said that she responded, telling Field that she should have been told about Rudolph's remarks.[24]

Shown by the General Counsel a copy of a statement purporting to be from Lenora Williams regarding comments allegedly made by Rudolph, Majewski confessed that this statement did not conform to what Field had told her and what Williams had said.[25]

The General Counsel also called CNA Demmetrics Brown as his witness regarding the Rudolph matter. Brown testified that she knew fellow CNA Rudolph and on July 9 worked with her on the same (unit) floor of the facility.

Brown stated that both Rudolph and she were scheduled to attend a bargaining session that day. According to Brown, before leaving, she and Rudolph told the charge nurse, Majewski, that they were leaving for the session. Brown recalled that Rudolph told Majewski that she had not finished her duties, but she had to attend the bargaining session. According to Brown, Majewski okayed Rudolph's leaving and indicated that other workers were coming on the unit to cover or pick up where Rudolph left off. Brown said that both she and Rudolph were released to attend the bargaining session on July 9 and that, in fact, attendance at the bargaining committee session was part of her shift assignment for the day, an assignment that Majewski as charge nurse made so that management would know to cover the unit.

The Respondent called Michelle Robertson and Esther Field[26] to testify about Rudolph's discipline.

Robertson testified that she knew Rudolph as a CNA employed by Iroquois and believed she was a union supporter who also served on the Union's bargaining team which met with company bargainers including herself on July 9. Robertson acknowledged that employees on the bargaining committee were released from their work assignments that day at 11:30 a.m.

Robertson also acknowledged Rudolph's discipline for neglect of duties on the day she was permitted to attend the bargaining sessions, stating that the discipline was issued based on an investigation of the matter by the then-acting nurse manager, Esther Field. According to Robertson, she did not ask Rudolph any questions in the disciplinary meeting on July 10, nor did she ask her to provide a statement setting out her version of the incident.

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[24] Majewski also stated that on July 10 early in the shift, Rudolph asked if any of four residents on a paper were on the bowel (movement) watch list. After viewing the list of names, Majewski said that they were not on the list. According to Majewski, Rudolph informed her that she had not had time to put them in the care tracker the day before and then tossed the paper in the trash. Majewski stated she retrieved the paper from the trash and took it to Field, to show that Rudolph had not completed another aspect of her assignments on July 10 as well. The retrieved paper with resident names and a copy of Majewski's statement dated July 10 about her conversation with Rudolph was contained in GC Exh. 17.

[25] See GC Exh. 19, a statement purportedly submitted and signed by Lenora Williams on July 10, 2008. Regarding Rudolph's completion of her assignment on July 9, Williams says "she gave me a look and say [sic] right and watch as if she is won't." Williams did not testify at the hearing.

[26] Robertson was also called by the General Counsel as an adverse witness. Notably, both Robertson and Field are admitted supervisors.

Robertson recalled that Field determined that Rudolph did not, as required, report to her supervisor, then Majewski, that she was leaving the unit. However, Robertson admitted that in spite of Field's determination that Rudolph left the unit without informing management, she (and management) actually knew that Rudolph was scheduled to participate as she recalled in the first scheduled bargaining session and that someone was to be assigned to relieve Rudolph.[27]

Esther Field testified that she was employed at Iroquois beginning in 1992, the year the facility began operations, but left its employ at various times over the years. Field resumed her employment with the Company in June 2001 and resigned in November 2008. Field stated that in January 2008, she filled in as an acting nurse manager and remained in that capacity until she left in November 2008.

Field said that she knew Ashley Rudolph and had, in fact, in her role with the Respondent's staff development program, taught a CNA in-service training course and trained Rudolph.

Field recalled that in July 2008, while making her usual rounds of the unit just before lunch that day (around 11:45 a.m.), she observed a resident sitting in bed in her nightgown with the room reeking of urine while her breakfast tray was still in front of her. Field stated that the resident had not been groomed and this clearly violated the standards of care for residents, especially the check and change standard for incontinent residents. Field said she was very perturbed over this discovery. Field said that two CNAs came to the resident's room—Lenora Williams and Lucinda Turner—and observing her obvious upset asked what was wrong. Field said that she told them that the resident had not been attended to and it was noon. According to Fields, the CNAs said they would take care of the resident and she then saw to her other duties.

Field said that she later checked on the resident and at that time Williams pulled her aside to tell her that the resident was Rudolph's responsibility and that she (Williams) had told Rudolph that she should get her care duties done before she departed. According to Field, Williams said that Rudolph did not intend to care for the resident in question, and, in fact, Williams said that Rudolph intentionally neglected to care for the resident. Based on this conversation, Field said that she asked Williams to prepare a statement memorializing the matter.

Field related that on the next day she spoke to the charge nurse for Rudolph's unit, Tammy Majewski, and asked whether she knew that the resident had not been rendered care.

According to Field, Majewski said that she did not realize that care had not been provided and that Rudolph did not tell her that she had not cared for the resident. Field stated that she had the impression that Majewski had not given Rudolph permission to leave and that Majewski did not realize Rudolph had left and no care had been rendered.

According to Field, Majewski also told her that Rudolph had approached her and inquired whether any of her assigned residents were on the BM (bowel movement) list (which is maintained for residents who might need a laxative to avoid constipation issues). Field stated

[27] Robertson identified an investigation statement form prepared by a CNA, Lakeya Brown, who relieved Rudolph at around 12:05 p.m. on July 10, and provided care for the resident, Genie.

that Majewski said she told Rudolph that she believed her residents were not on the list, whereupon Rudolph produced a paper with certain residents' names thereon. According to Field, Majewski asked Rudolph if she were going to enter the information in the care tracker (kiosk) and Rudolph said she was not and threw the paper in the trash can; Majewski retrieved the paper and later submitted it to Field with the statement.

Field stated that she later interviewed Williams and obtained a statement from her and one from CNA Lakeya Brown. These statements were turned in to Robertson. Field acknowledged that William's written statement did not include the word "intentionally," but Williams had answered "yes" to her verbal query as to whether Rudolph intentionally did not care for Genie.[28]

Regarding Rudolph's absence from the unit on July 9, Field testified that she "believed" she knew Rudolph was leaving (early) that day, but did not really know whether Rudolph or any other employee was on the bargaining committee. Field went on to say that she did learn later that the reason Rudolph left early (at 11:30 a.m.) was to attend a bargaining session; that she had permission to do so; and that she did attend the bargaining session on July 9.

Field denied having any conversation with Rudolph about her participation on the bargaining committee, and specifically denied telling her she should not feel pressured to do something that she did not want to with regard to participating on the bargaining committee.

Field acknowledged that she did not obtain a witness statement from Rudolph although she (Field) realized that while she had observed the resident uncared for after 11:30 a.m., she did not really know the circumstances surrounding the incident, or the resident's care.

D. The Respondent's Issuance of a Major Discipline Rather than a General Discipline to CNA Demmetrics Brown on June 30, 2008; and its Issuance to Brown of a Written Discipline on July 29, 2005

Demmetrics "Meechie" Brown testified that she was employed as a CNA at Iroquois from around August 2005 through February 24, 2009, when she resigned; at the time of her departure, she worked the first shift (7 a.m.–3 p.m.) and was assigned the third floor unit for a time but as of June 2008, worked on the first floor.

Brown stated that she was familiar with the Union and in fact served on the bargaining committee; she attended bargaining sessions during her time with the Company but could not recall the exact dates of the first session she attended.

Brown acknowledged that she was issued a formal discipline[29] by the Respondent through the director of nursing, Robertson, on June 30, 2008, and that the disciplined stemmed from a finding of a deficiency in the provision of care to a resident pursuant to the an audit by the State Department of Health on April 1–2, 2008; this misconduct was deemed her first major

[28] Field also acknowledged that her own signed statement (GC Exh. 18), purporting to be a report given by Williams, did not include the word "intentional."

[29] See R. Exh. 35, a copy of the discipline dated June 27, but signed by Brown and Robertson on June 30, 2008. The discipline describing what Brown did or in this case failed to do stated that "4/1-4/2/2008-Dem[m[etrics failed to provide residents with a warm, palatable breakfast as observed by the DOH [Department of Health] during survey-2007." The discipline, in essence, related to Brown's failure to follow the resident's care plan or the care tracker.

offense. However, Brown testified that she did not understand why she was being written up, and in fact viewed it with suspicion, coming as it did on the last day of the State audit; and all of the deficiencies (of which she was aware) were received on the last day. Brown, however, was aware that the discipline related to her not serving a resident a warm breakfast.

Brown stated that on the day she met with Robertson and, as it happened, Nurse Manager Esther Field, and Human Resources Director Carol Dempsey, the matter was discussed. While signing off on the discipline, she commented on the form that she believed she was the victim of favoritism because she (as opposed to the whole unit) was solely disciplined when in her view the deficiency related to staffing, which was in her estimate a management issue that should not have fallen on her shoulders alone.

Brown acknowledged that management (Robertson) did explain why they were meeting with her in June for the April incident, stating that the State deficiency reports often take up to 90 days after the fact to be received. Brown also stated that she came to understand that there were other deficiencies determined for days other than the last day.

Turning to her discipline July 29, 2008, Brown testified that at around 2:50 p.m. on July 28, a fellow CNA, Christian Bradley, asked her to accompany her as her representative to a disciplinary meeting. Brown volunteered that at the time her shift was 10 minutes from ending; she had finished her rounds and was sitting in the dining room assisting residents with their activities when Bradley sought her assistance. Brown noted that other CNAs were present, namely, Espi Cruz, Ashley Rudolph, and Tia Latham who worked the second shift (3-11 p.m.) and was about to enter duty.

Brown, acting on Bradley's request, said that she asked Rudolph to cover for her as they worked the same side of the unit and to let Cruz know that she was leaving the unit to assist Bradley at the meeting.

According to Brown, when she and Bradley appeared at the meeting they were greeted by Robertson, Scheussler, and Carol Dempsey who asked (aloud) why Brown was there. Bradley told Dempsey that she wanted Brown to represent her in the disciplinary meeting. Brown testified that Dempsey told Bradley that she did not need Brown to represent her, that "we" will represent you. According to Brown, Bradley persisted in her request to have her assistance and stated that she had the right to have her request honored. Brown said that in spite of her repeated requests, Bradley was denied, with Dempsey ultimately telling her that if Bradley refused to meet with them only if Brown were there, that refusal would constitute another discipline. According to Brown, Bradley hesitated but then relented, and the meeting went forward without Brown's participation.

Brown stated that she then returned to the unit from which she was absent for about 5 minutes.

Brown testified that the next day she was called to Robertson's office and told by Robertson, in the presence of Dempsey and Field, that she was being disciplined for leaving the unit without informing the charge nurse.[30] Brown recalled that she laughed over this charge

[30] See GC Exh. 24, a copy of Brown's discipline dated July 29 and signed by Field and Robertson; Brown refused to sign, stating in the employee comments part that, inter alia, she believed management was harassing her to get her to quit or they would seek to terminate her by continued disciplines.

because it was clear to her that the discipline stemmed from her attempt to represent Bradley the day before. Brown noted that at that point Robertson started yelling at her, "Don't lie, you were here [at the meeting]." Brown stated that she responded, stating why should she lie about being off the unit; she indeed was at Robertson's office trying to represent Bradley. Brown said that she explained to Robertson that she had left the unit for around 5 minutes and indeed had not told the charge nurse, but had told the other aides with whom she worked; moreover, she had never been disciplined before for such conduct.

Brown acknowledged that the general Iroquois policy is that the CNAs should report to a nurse manager or charge nurse when leaving the unit but the actual practice during the time she worked at Iroquois was simply to let your coworkers know you are leaving the unit for a break or to use the restroom; according to Brown, the CNAs basically coordinate their breaks among themselves so that the unit would always be covered.

Brown stated that until the Bradley incident, she had never informed the charge nurse or nurse manager about leaving the unit for breaks. Brown insisted that the charge nurses were aware of the practice of the CNAs.[31] Brown noted that it was only after the Bradley incident that Iroquois began enforcing the policy requiring CNAs to inform the charge nurse or nurse manager when they needed to leave the unit for any reason and even held an in-service training on the subject.

The Respondent called Robertson and Field regarding Brown's disciplines.

Robertson testified that in April 2008, the State had conducted a survey of Iroquois' compliance with State rules and regulations governing the operation of nursing care facilities and discovered some deficiencies in the care provided to residents. Based on these deficiencies, a number of members of the care staff received disciplines emanating from the determined deficiencies.[32] Brown was one such caregiver who was disciplined in June 2008 by her as a result of the State findings that were not provided Iroquois until around that later date. Robertson stated that Brown[33] was disciplined for failing to provide a resident a warm palatable breakfast during the State survey. Robertson noted that Brown freely admitted that she had not served a warm breakfast to a resident, but excused her conduct by saying the resident preferred her breakfast cold. Robertson also noted that around the time of the survey Brown herself acknowledged to her that Brown had done "something bad," that is, when the State official asked her if she was going to heat the resident's oatmeal, she told the official the resident likes her cereal cold.

Robertson emphasized that Iroquois simply did not serve residents cold oatmeal, that this was not consonant with the standards of care for residents and was not in compliance with the resident's care plan. According to Robertson, she viewed Brown's conduct to fall in the category of a major as opposed to general offenses because in her view employee misconduct

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[31] Brown stated that the every day practice of the CNAs during her time was to merely inform coworkers of their leaving the unit. According to Brown, the charge nurses had to know because CNAs were entitled to lunches and the need to take breaks. Notably, Carol Rommevaux, who testified at the hearing, stated that CNAs also need to leave the unit to get supplies practically every day, to talk to the scheduler, or to get residents out of bed. Rommevaux stated that she knew of no particular rules governing this issue. (Tr. 538.)

[32] See GC Exh. 22.

[33] Robertson stated that Brown was a CNA and she knew that Brown was a member of the bargaining committee. (Tr. 103–104.)

that relates to resident care redounds to a major violation. Robertson volunteered that in her view serving a cold breakfast in all likelihood would mean the resident would not eat her breakfast and therefore miss a meal, which can bring on a health issue such as dehydration.

Robertson was at pains to describe from her perspective any employee misconduct relating to resident care that would or could be considered "general" and after much thought (on the witness stand) offered as a possible general violation, a CNA's forgetting to put on a resident's hearing aid. Robertson testified that she follows a fairly hard and fast rule regarding resident care and neglect of duty issues; any infractions falling within those areas will generally be deemed by her to be "major" in nature.[34] She noted that while Brown did object to the discipline over the State deficiency—alleging favoritism and urging a discipline for the entire unit—she did not deny serving a cold breakfast.

Regarding Brown's discipline of July 29,[35] Robertson acknowledged that it was issued by her because Brown left the unit to represent an employee, Christian Bradley, who was scheduled to attend a disciplinary meeting in her Robertson's office. Robertson also acknowledged that Brown was not allowed to attend the meeting by the human resources director.

According to Robertson, she was informed by the nurse manager that Brown did not return to the unit after being told she could not attend the meeting which took place around 2:20 p.m.; according to Robertson, Brown punched out at 3 p.m.

Esther Field testified that she recalled an incident involving Brown,[36] whom she called "Meechie." Field stated that Iroquois rules require that an employee inform the charge nurse before leaving the unit, and (on first shift) no one is ever permitted to leave the unit after 2:30 p.m. Field went on to explain that in the last half hour of the shift the CNAs are doing rounds and making sure the residents are cared for in anticipation of the arrival of the next shift employees. During this period of transition, CNAs are instructed not to leave the unit and only if necessary; they must inform the charge nurse.

E. The Respondent's Denial of Weekend Work Hours to Employee Khadijah Osbourne on June 27, 2008; its Denial to Osbourne of First-Shift Work Opportunities on July 17, 2008

Khadijah Osbourne testified at the behest of the General Counsel regarding the complaint allegations stated above.

Osbourne stated that she was currently employed by Iroquois as a per diem licensed practical nurse (LPN) and had been so employed for the last 6 years; but she has worked for the facility a total of 10 years, the first 4 years of her tenure were made through an agency that

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[34] Robertson pointed to the employee handbook (R. Exh. 3) and noted that the exemplified disciplines associated with general infractions related to employee conduct such as absenteeism or other personnel related matters. However, on cross-examination by the General Counsel, she agreed that the deficiencies determined by the State in 2007 (GC Exh. 3(a) and (d)) and the resulting disciplines issued to the employees in question were deemed general in spite of their being related to follow a care plan and resident care. However, she also noted that these disciplines were issued by her predecessor director of nursing, Gail Travers.

[35] See GC Exh. 24.

[36] Field did not elaborate on the details of the "incident" involving Brown.

provides nurses by contract.[37] Osbourne also noted that per diems at Iroquois were required as of March 2008 to work a minimum of three shifts per week, including every other weekend.

Osbourne explained that during her tenure with the Respondent, she was allowed to work certain schedules that allowed her to accommodate her parental responsibilities for a disabled child. Osbourne stated that her child care needs were known by the Respondent's managers as she has explained to them her circumstances in this regard over the years.[38] Because of her child care issues, according to Osbourne, the Respondent allowed her to work certain schedules at the nursing home. For instance, during the summer Osbourne said that she worked the first (day) shift and weekends; during the fall she worked the evening (third) shift and weekends. Osbourne noted that as a per diem she did not work full time, but this status worked out well for her and, in her view, for the nursing home as well.

Osbourne stated that she was aware of the Union's initial organizing efforts which started around December 2007. Osbourne said that she became involved and was a supporter of the union cause and toward that end helped organize her fellow workers, encouraging them to join the Union. Osbourne recalled attending two employer meetings presided over by the Respondent's administrator, Sonya Moshier.[39] At one of the meetings around late February 2008, according to Osbourne, Moshier told the assembled employees that the Union was there only to take our money, we would lose our benefits, and the quality of care for the residents would suffer. Osbourne stated that she spoke up and countered Moshier by saying that even if we had a union or did not have one, we could still lose our benefits, and further that the workers had a right to join the Union without prejudice and that she herself supported the Union and her coworkers. Osbourne said that she told Moshier at this meeting that she had attended all of the union meetings and the Union never said anything negative about the quality of care or doing anything negative with respect to resident care in the facility.

Turning to the summer of 2008, Osbourne testified that she was scheduled to work on June 28 and 29, 7 a.m. to 7 p.m. on both days (Saturday and Sunday); however, she did not work those days. She explained what happened. According to Osbourne, on June 27, while she was working the day shift, the company scheduler, Jackie Jones, called to inform her that her assignment on those shifts was to be canceled and that Robertson would be speaking to her about the matter. Osbourne stated that later that day she spoke with Robertson, who was accompanied by Esther Field, in a third floor office where Robertson told her that she was being canceled because of an ongoing investigation of an incident involving Osbourne that had occurred on June 22, the previous weekend. Osbourne stated that she asked Robertson about the nature of the investigation and whether she needed Osbourne's input (written or otherwise) to assist in the investigation. Osbourne said that Robertson did not advise her as to the nature of the investigation or her specific involvement in any incident and that her input was not needed. Robertson also advised her that she was going on vacation in this conversation.

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[37] It is undisputed that the Respondent not only employs its own full-time and part-time nurses but also agency contract and per diem nurses to cover the three shifts of its operations. It is also undisputed that the Respondent as a matter of economic policy tries to fill the shifts with its own employees, then per diem, and then agency nurses who are more costly to employ.

[38] Osbourne testified that she specifically told Robertson and other supervisors over the 10 years she has worked for Iroquois of her child care issues and the needs of her disabled child; Osbourne added that other coworkers also knew of her circumstances.

[39] Osbourne said that in addition to Moshier, Carol Dempsey of human resources represented management. The employees in attendance included about four CNAs and/or LPNs. Osbourne stated that the meetings occurred before the election.

Osbourne testified that she called Field on June 30, the following Monday, and asked why she was being investigated, but Field would not meet with her (or supply an explanation). Osbourne said that she then called Carol Dempsey on Friday (July 1) and requested a meeting with her and Field; Dempsey agreed to her request to meet that very day.

Osbourne said she met with Dempsey and Field in the conference room. According to Osbourne, neither woman would provide a reason or explanation for the investigation and also would not tell her why her input was not being sought for the investigation. Osbourne stated she asked if she were suspended and was told that she was not. However, according to Osbourne, Field told her that she was being taken off weekends for her (Osbourne's) safety, with no elaboration of the circumstances or events that might have affected her safety. Osbourne stated that her repeated requests for a reason for being removed from the weekend work was met with no response and the meeting ended with both managers simply saying that they could not discuss the matter.

Osbourne testified that Robertson returned from vacation on or about July 11, and she again met with her and Field. According to Osbourne, Robertson informed her that the investigation had been completed and then proceeded to discuss the matter. According to Osbourne, Robertson asked her if she felt she was better than the other LPNs because she had more education.[40]

According to Osbourne, Robertson also advised that she had spoken to various LPNs and other CNAs as well as agency nurses who said that she was verbally abusive and aggressive with them; and that, specifically, a CNA had complained that Osbourne had pestered her, asking for favors and to sign something. Robertson then proceeded to tell her that "we have a job to do," management could not be there 24 hours to monitor Osbourne's behavior even though we have a union. Osbourne said finally that Robertson declared that she could no longer work weekends. Osbourne said that the meeting was significant because this was the first time the Union was brought up and Robertson was the one who raised the subject. She also said that Robertson did not explain what "favors" were involved in the complaints[41] against her. Osbourne testified that she has not worked weekends since June 22; however, she has not requested that tour because she was told weekends were not available to her.

Osbourne also recalled another encounter with Robertson in July when she was called into her office; Field also happened to be present at the time. According to Osbourne, Robertson informed her that she was told that Osbourne had gone to a floor, on which she was not assigned, to visit and was socializing with other employees, but this was not permitted. Osbourne said that she told Robertson that she had indeed visited another floor, but not to visit for social purposes, rather to do her job. Robertson then reiterated that she could go to another floor to perform her job but she was not permitted to communicate with employees for social purposes.

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[40] Osbourne had completed her studies for registered nurse and had been so certified by sometime in January 2009.

[41] Osbourne noted in passing on this issue that she had no prior disciplines/writeups prior to July 11, specifically none involving staff or resident care. Osbourne also stated that she was never given any written discipline or other documentation regarding the investigation. She was merely told by Robertson her behavior was inappropriate—all communications were verbal—and told she could no longer work weekends.

Osbourne stated that Robertson also at this meeting told her that she had hired additional LPNs to work the day or first shift and that Osbourne would have to pick up the evening and night shifts, if any were available; that the first shift would no longer be available to her because of the new hires. Osbourne said that she responded, saying only that she would do what she could because of her child care situation, and then returned to the unit.

Osbourne related her usual procedure in obtaining shift work. According to Osbourne, she generally called the scheduler—staffing coordinator Jackie Jones—who informed her as to what shifts were available. Usually before July 17, 2008, she could work any day of the week pursuant to this procedure. After July 17, specifically on July 18, 2008, she called Jones and inquired about first shift availability on July 21, 22, 23, 24, and 25. According to Osbourne, Jones told her no day shifts were available on those days but that evenings were. Osbourne then put in her bid for the evening shifts for July 21, 22, and 23.

Osbourne noted that she did, however, work July 24 on the day shift. She explained that on the evening of July 23 she overheard Scheussler, the third floor nurse manager, in conversation with someone (presumably a LPN) calling in to inform her that the employee was not coming in on July 24. Accordingly, Osbourne said she requested the day shift for July 24 right there and then, and was given the assignment by Scheussler.

Osbourne stated that on July 28 (Monday) she inquired of Jones about any available first-shift assignments for July 29, 30, and 31. Jones said that she would have to check with Field before scheduling her for those dates. According to Osbourne, Jones later informed her that only evenings were available on July 28, 29, and 31; no day shifts were available.

Barbara Sawyer[42] was also called by the General Counsel to testify about the Osbourne allegations and other matters relevant to this case.

Sawyer testified that she used to work for Iroquois from about December 2007 until May 2008, serving as the director of clinical services; Sawyer said she reported to the administrator of the facility, Sonya Moshier.

Sawyer recalled attending a meeting in the beginning of January 2008 that included the nurse managers, the director of social work, human resources, the director of nursing (Robertson), and the MDS coordinator and was presided over by Moshier. According to Sawyer, the purpose of the meeting was to determine if any manager had heard or seen any employees discussing the Union or anything related to the Union. Sawyer recalled that Robertson spoke up and said she had heard some disgruntled employees talking and that there may be some union talk going on.

According to Sawyer, at the time most of what management knew about the Union was hearsay and wanted more information. Sawyer noted that the managers mentioned a few names associated with the union talk; Osbourne's and employee Pauline Lanos' names were mentioned.

Sawyer stated this meeting ended, but since there was much speculation, she and the other managers were instructed to keep their eyes and ears open to determine if an (election) petition was to be filed, at which time Moshier said Iroquois would have to contact an attorney.

[42] At the time of the hearing, Sawyer was employed at a local psychiatric hospital and appeared at the hearing pursuant to the General Counsel's subpoena.

Sawyer stated that after this meeting she went to Moshier's office to seek more information as she was only recently hired a few weeks previously. According to Sawyer, Moshier advised that there had been a prior unsuccessful organizing effort by the Union, but not to worry about it as Moshier believed there was an insufficient number of employees interested in the Union.

However, Sawyer said a few weeks later (towards the end of January) a petition was indeed filed by the Union and Moshier convened a meeting of the managers to inform them that Iroquois would be contacting an attorney. Moshier also admonished the managers to again keep their eyes open, watch for staff activity, and listen to their conversations, especially about the issues making for dissatisfaction. At this meeting, Sawyer recalled that some names kept coming up; for instance, Osbourne, Pauline Lanos, and Tammy Majewski. Regarding Osbourne, Sawyer stated that it was believed that she had relatives in the Union and she was referred to not only as a union organizer but an instigator. Sawyer said this meeting again ended on the note that all managers should be keeping their ears open and to inform Moshier about what was going on among the staff. Sawyer said that Moshier also instructed the managers now to be vigilant in disciplining staff for lateness.

Sawyer also recalled a time during the union campaign that Moshier by email asked managers to work weekends on a 2-hour block of time basis on Saturdays and Sundays to monitor for union activity, especially as the shifts changed. Sawyer stated that she indeed worked two weekends and saw Moshier onsite also; Sawyer noted that she (and other managers) did not normally work weekends.

Sawyer related that on her first Saturday assignment while preparing to leave, she met with Moshier in her office and informed her that she had not really heard anything out of the ordinary. However, Sawyer said that she told Moshier that she was somewhat taken aback by the union activity because she had left a union job to work at a nonunion job (Iroquois), because having worked with unions previously and really not being "thrilled" with unions, and for personal reasons, she did not like working in a unionized facility. According to Sawyer, Moshier assured her, saying that she did not think the Union would be successful because she did not believe enough employees supported the Union.

Sawyer stated that other managers signed up to work weekends, including the accountant and admissions office, along with Robertson and other nurse managers, all with the assignment to watch for staff doing union business during working hours.

According to Sawyer, at a regularly scheduled 9 a.m. meeting of managers convened to discuss resident issues, but sometime after the filing of the petition, Moshier told the assembled group to be diligent in disciplining the staff for lateness or anything they saw going on because management did not want to have a precedent set or to set the precedent. Sawyer recalled that Gloria Fish, a nurse manager, was told to back up a little and not to be so overly enthusiastic about disciplining people.

Sawyer said that after a time, but before the election, she was told by Dempsey of human resources and Susan Parker, the director of social work, that she was being investigated for supporting the Union or helping it in its organization efforts. Sawyer said she was very surprised to the point of shocked disbelief. However, Dempsey persisted, telling her that she had obtained statements from staff who said that she had made comments supportive of the Union. Sawyer stated that she asked to see the statements to identify her accusers, but Dempsey refused.

Sawyer said that she then told Dempsey that she did not support the Union, had personal reasons[43] not to want them at Iroquois, and in fact just wanted to stay out of the matter. Unmoved by her response, Sawyer said that Dempsey told her the investigation was, nonetheless, continuing. Sawyer stated that she never received a specific discipline from Iroquois for this; however, around May 13, 2008, she was told that she could resign or be terminated because of her union activity.[44]

Sawyer related that on the Monday following the election she spoke to Moshier, explaining why she did not stay for the election results the previous Friday. According to Sawyer, Moshier told her that Iroquois was going to fight to overturn the election in the meantime but they (management) needed to weed out staff. Sawyer testified that the "weed out" would include disciplining the union supporters on the nursing staff. On that score, Sawyer noted that Moshier lamented having hired CNAs from the outside, that is outside of their internal CNA training operation; her stated mistake was in having already certified CNAs from other nursing homes, most of which were unionized.

The Respondent's witnesses regarding the Osbourne allegations were Michelle Robertson, Esther Field, and Sonya Moshier.

Robertson[45] testified that she knew that Osbourne, one of Iroquois' per diem LPNs, was a union supporter who made her support well known. Robertson admitted that she knew of Osbourne's preference to work weekends, because of her child care issues, but that she has worked all of the different shifts available at Iroquois.[46] Robertson also admitted that she told Osbourne that she would no longer be allowed to work weekends, having spoken to her about the subject in July 2008; Robertson, however, denied having removed Osbourne from the weekend schedule on June 28 and 29, 2008. But when shown (by the General Counsel) an email dated October 9, 2008, that solicits her response to a question posed by the Respondent's counsel as to whether she told the scheduler to remove Osbourne's name from the schedule for the weekend of June 28 and 29, Robertson acknowledged that her answer was "yes."[47] However, later in the case while testifying for the Respondent in its defense case,

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[43] Sawyer explained that at one time she worked at a facility as a manager whose workers were represented by the Union (Local 1199); that her son, a CNA, also worked at the facility and was a member of the Union. Sawyer said her son was involved in an on-the-job incident and the Union did not stand behind him in her view.

[44] Sawyer revealed on cross-examination that after her termination and after reading a newspaper article about Iroquois and feeling bad for the employees, she contacted Board investigators and told them she possessed helpful information about what was happening there. Sawyer said that she was not upset over being asked to leave Iroquois; rather, she was actually somewhat relieved. However, in spite of her experience there, she believed the staff took good care of the residents and she even tried to get her own mother-in-law placed there.

[45] Robertson was also called by the General Counsel in his case-in-chief as an adverse witness under Rule 6(11)(c) of the Federal Rules of Evidence on the first day of trial—May 13. She was later called as a witness for the Respondent.

[46] Robertson stated that she considered Osbourne a good nurse and had offered her full-time positions on two occasions; the most recent was a full-time charge nurse position on the second shift (3–11 p.m.). However, according to Robertson, Osbourne has declined her offers, indicating that she was preparing at the time for her registered nurse board examinations, along with ongoing (for years) child care issues. (Tr. 118.)

[47] The email in question is contained in GC Exh. 27 and, in pertinent part, purports to be a

Continued

Robertson testified that she met with Osbourne on July 11 and informed her then that she had been taken off of weekend assignments, but not before.

In this later testimony, Robertson recalled that she (and Field) had briefly spoken to Osbourne on the third floor before taking her vacation—she could not recall the exact date—but, in spite of answering "yes" to the question posed in the October 9 email, she insisted that she did not remove Osbourne from weekend duty on June 28 and 29. According to Robertson, her response in the email was a mistake and she did not know how this happened.

By way of background, Robertson acknowledged that as the director of nursing she prefers to fill the various shifts with the regular Iroquois staff, full-time and part-time employees; then next in line are the per diems followed by seasonal nurses; and last, by the agency nurses who cost more to the Respondent. Robertson noted, however, that once an agency or contract nurse is selected for a shift, the Respondent has to honor the contract in spite of her staff preferences and the fact that they are more costly to employ.

Robertson directed herself to the staffing timesheets for June 28 and 29 (R. Exhs. 38 and 39, respectively) covering the three shifts both days and agreed that Osbourne's name was not entered and, in fact, no per diem nurses worked those days on any shift.

Robertson also agreed, however, that on June 28, one contract (agency) nurse, Cheryl Lentz, worked two shifts as did Carol Sinton-Adams and Robert Heath; other agency nurses, Vincent Marshall and Marshette Williams, worked a single shift.[48]

Robertson stated that on June 29, the Respondent again employed Lentz, Williams, and Sinton-Adams but also agency nurses Lisa Solomon and Wanda Barksdale, along with a seasonal LPN, Elijah Dut.

Robertson explained how Osbourne came to be removed by her from weekend duties, as she insisted, on July 11, 2008. According to Robertson, near the end of June while drafting a plan of correction for deficiencies determined by the State, one of her nurse supervisors informed that Osbourne's behavior and conduct during the weekend was becoming problematic with two LPNS; Osbourne reportedly was not professional and in fact was very rude to one of the LPNs while a resident was being transferred to the hospital.

According to Robertson, she telephoned the two LPNs as part of her investigation; one would not cooperate with her and the other said she did not have time to meet during the week, but could speak to her then. However, Robertson stated that she could not complete the investigation by the end of the workday, June 27, the last day before her scheduled vacation. So she (in the company of Field) spoke to Osbourne on the third floor on June 27, informing her of the pending investigation which centered on complaints about her rendering of care the

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message from the Respondent's counsel to a Patricia Petock, an investigating agent for the Board, regarding the Iroquois investigation. The email contains a section entitled, "Follow up questions for Michele [Robertson] with Michele's responses." The question posed in par. 2 asks, "Did you tell the scheduler to remove Osbourne's name from the schedule for the weekend of June 28–29?" Robertson's response is yes. The Respondent's counsel stipulated and agreed that the email was sent to Petock and that he was provided the information by the Respondent on October 9, 2008. (Tr. 123–124.)

[48] Robertson indicated that "NC" on the schedules denoted the independent staffing agency, Nurse Corps, that supplies nurses under contract to Iroquois.

previous weekend of June 22. Robertson said that this was a heads-up to Osbourne whom she told at the time she could not elaborate on the matter because of her vacation. Robertson stated that she had not made any decision regarding the complaints against Osbourne at that time.

Robertson further testified that she returned from vacation on July 9, but had to attend an all day collective-bargaining session and was unable to deal with the investigation of Osbourne. However, in a separate matter, Sonya Moshier, the Iroquois administrator, and her boss advised her that Osbourne was involved in a sexual harassment matter involving LPN Joyce Marshall and the aforementioned seasonal LPN, Elijah Dut; that human resources (Dempsey) was aware of the matter. Moshier also indicated that Marshall was to be terminated and Osbourne was to be taken off of weekends. Robertson said that Moshier also asked her to call Dut and with Dempsey's assistance, explain to him about her decision because Dut was supposedly very fearful of working with Osbourne on the weekends.

Robertson said that she told Osbourne of the decision by Moshier on July 11. Robertson said her own investigation of Osbourne's alleged "unprofessionalism" while acting as a weekend charge nurse involved LPN Cheryl Lentz and a nurse supervisor, Susan Greer, and had nothing to do with the Dut/Marshall matter.[49]

Robertson stated that in her view the two matters—the sexual harassment and Osbourne's unprofessionalism—were separate and that she believed that the latter issue could be addressed with just counseling as opposed to a discipline. Accordingly, Robertson (and Field) issued Osbourne a counseling on July 11, 2008, based on the complaints turned up in her investigation.[50]

Robertson noted that while Osbourne was removed from weekend assignments, she was allowed to work Monday through Friday on any available shifts by calling in on Monday morning pursuant to the usual procedure for per diems.[51]

Robertson directed herself next to the Respondent's hiring activities in the summer of 2008, stating it was then that she began an effort to fill a number of full-time and part-time employee slots with regular employees as opposed to using agency nurses and per diems who in her view basically are used as fill-ins for regular employees taking vacation or other emergency or personal days.

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[49] Robertson identified an unsigned statement purporting to be from Leatz on June 22 and a signed statement from RN Supervisor Susan Greer dated June 25, 2008, that comprised part of her investigation.

According to Robertson, Leatz refused to sign the statement out of fear of retaliation from other coworkers as well as Osbourne. Greer did not testify at the hearing although she is an admitted supervisor.

[50] See R. Exh. 36, Robertson's counseling document.

[51] Robertson volunteered that she did not view Osbourne's removal from weekends as a discipline in the strict sense of the word and under the Respondent's disciplinary scheme. However, she was of the view that the sexual harassment matter did warrant a formal discipline for Osbourne, but the decision was made by Moshier. Robertson, however, conceded that she knew Osbourne worked quite a few weekends which were preferable for her because of her family needs. (Tr. 1096–1097.)

Robertson noted that the Respondent offers good per diems full-time employment as slots become available and, in fact, she offered Osbourne as an accommodation a full-time position as an evening charge nurse on September 2, 2008. Robertson further noted that, in spite of the professionalism issue, Osbourne was considered a good nurse who had just completed nursing school and who worked many evening hours although she preferred weekends. Robertson stated she believed that such a position would be helpful not only to Osbourne but also the Respondent in terms of eliminating having to schedule different nurses in all of the time.

In any case, Robertson testified that from January through December 2008, she hired a total of 36 LPNs—5 in July 2008, 4 in August, and 2 in September.[52] According to Robertson, the addition of these LPNs resulted in few open shifts for per diems and prompted her to speak with Osbourne about the matter. Robertson stated that in August 2008, she told Osbourne of the new hires and that they would be training primarily on the day shift, which would in fact reduce the availability of work for her; but there were available slots on the 3–11 p.m. and 11 p.m.–7 a.m. shifts. Robertson stated that Osbourne was offered a full-time charge nurse position for these shifts on September 2, 2008, but she declined.[53]

Field recalled that on a Friday before Robertson left for her vacation Robertson requested that she accompany her to give Osbourne a "heads-up" about an investigation in which she was involved. Field stated that she and Robertson met with Osbourne and informed her of the pending investigation of her conduct, but did not elaborate further. However, according to Field, Osbourne was advised that no decisions had been made because the investigation would not be completed until Robertson returned. Field stated that at the time management was preoccupied with a number of deficiencies determined by the State and was conducting a lot of in-service training to correct the deficiencies; this issue took precedence over the investigation of Osbourne, so nothing more was communicated to her at that time.

Field stated that she was involved in an investigation of the Elijah Dut matter and recalled that he had sought out Robertson who was on vacation to report a problem that seemed to be causing him much upset. Accordingly, she and Dempsey met with him and at the time he complained of rumors floating around the facility regarding his supposed involvement with another LPN. According to Field, Dut (whom she trained as a CNA) said that Osbourne had called a couple of his friends, James Deng and John Guarak, and told them that he was being accused of intent to rape the LPN. According to Field, Dut was a Sudanese national as were his friends (also employed by the Respondent). She noted that Dut's upset seemed to stem from his experience in the Sudan where he said an accusation of rape would be met with possibly bad treatment by the whole village or town.

Field said that she and Dempsey investigated the matter and informed Moshier, the administrator. Ultimately, Field Stated that she, Dempsey, and Moshier met with Osbourne to discuss the matter. According to Field, Osbourne said that she was handling "things" and she did not let her supervisor know of her involvement. Field volunteered that Osbourne did not seem to realize the "trauma" she was causing Dut.

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[52] See R. Exh. 40, a listing of the LPNs hired by the Respondent in 2008.

[53] See R. Exh. 41, a note signed by her and first-shift Supervisor Sue Greer memorializing a meeting with and her offer to Osbourne of a full-time evening charge nurse position on September 2, 2008. The note further states that, "We [management] have accommodated Khadijah's schedule over the last year for [sic] by having her arrive when she could work which included day and evening shifts."

Field stated that the decision to remove Osbourne from weekends, she believed, was made by Moshier or possibly Robertson but not until Robertson returned from her vacation; Field believed that she was present when Osbourne was so informed.

Field was shown (on cross-examination) a number of employee statements taken by management pursuant to the investigation of the Dut matter. According to Field, she had reviewed some of the statements, but could not recall having reviewed them all.[54]

Field agreed that the statements set out the time line for her investigation that commenced on July 1, 2008, with Dut's statement and concluded about July 9.

Moshier testified about the matter involving Osbourne[55] specifically the allegations of sexual harassment of Iroquois employees

Moshier stated that in July 2008 while Robertson was vacationing, she was informed by Field and Dempsey that weekend CNA Dut was embarrassed and upset over rumored allegations that he was sexually harassing a LPN; Moshier noted that Dut was originally from the Sudan as were a number of Iroquois employees. Moshier volunteered that she understood that in Dut's homeland, allegations that included sexual harassment—in this instance rape—brought serious consequences up to torture of the perpetrator.

According to Moshier, Dut claimed the rape rumor had spread throughout the facility and because of the seriousness of the charge, she initiated an investigation. Notably, the rumors, as she understood them, centered on the harassment of a LPN who supposedly was concerned about her safety stemming from Dut's supposed intent to rape her, and the LPN had conveyed her fears to "everyone."

Moshier noted that Iroquois maintains a zero tolerance harassment (sexual or otherwise) policy and expects all such claims to be reported immediately to a supervisor, preferably one's immediate supervisor. Moshier insisted that any employee is required to report sexual harassment to her supervisor.

As to Osbourne's involvement in this matter, Moshier stated that Dut and other employees said that Osbourne had knowledge of the allegations and during her off-duty times she was calling others—Dut's friends and coworkers—accusing Dut of sexually harassing the LPN in question, Joyce Marshall.

As Moshier understood the allegations, Osbourne was reportedly asking Dut's friends to tell him to cease his improper behavior because Marshall was married and his behavior was

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[54] The statements are contained in R. Exh. 31. The employees who provided statements were: Dut, James Deng, Nurse Supervisor Tammy Balamut, Joyce Marshall, Khadijah Osbourne, Manop Wuor, Daniel Matoup, and Beverly Long. Field, on July 9, 2008, provided a statement regarding her interview of Joyce Marshall who interestingly showed her cell phone which contained a multimedia message containing a heart sent by Dut whose name appeared as the sender.

[55] Moshier admitted that she knew that Osbourne was a union supporter and very active in the organizing campaign. (Tr. 31.) Notably, Moshier testified that she was also aware upon her being hired in 2000 that the SEIU had conducted two prior organizing campaigns in 1994 and 1997. (Tr. 697.)

inappropriate. According to Moshier, Osbourne also contacted Dut personally and asked him to cease his behavior. Moshier believed that Osbourne was wrongfully conducting her own investigation of a matter that was management's responsibility.

Moshier testified that she, along with Field and Dempsey on July 8, met with Osbourne to get her side. At the meeting, Moshier stated that she queried Osbourne as to whether she was aware of the allegations or had made phone calls, among other things. According to Moshier, Osbourne acknowledged that she never reported the matter to anyone in supervision and that she had called her friend, CNA John Guarak. Osbourne also admitted that she had contacted Dut at his residence and inquired of him whether he planned to assault or rape Marshall.

Moshier stated that she considered Osbourne's behavior as simply intolerable, that she should have reported the matter immediately to management to give it the opportunity to investigate "without subjecting Dut to all of this unnecessary fear"; that management would have handled the whole affair differently, especially in terms of taking appropriate action much sooner. According to Moshier, Osbourne agreed that she should have reported the matter to management.

Moshier stated that she concluded in the end that LPN Marshall, who supervised CNAs, had engaged in misconduct by making inappropriate assertions about Dut, and management could not tolerate this behavior. Moshier determined that Marshall was to be terminated, but she quit before she could be fired. Moshier also stated that she found no misconduct on Dut's part.

However, according to Moshier, Dut was afraid of Osbourne and afraid to work with her; and he was extremely embarrassed and concerned about his reputation.[56] Moshier stated further that Dut was a seasonal CNA who worked only weekends while attending (nursing) school during the week. At the time of her testimony, Moshier said that she believed that he was in the Sudan.

Regarding Osbourne, Moshier said that while she considered issuing Osbourne a formal discipline (and in her view, could have), a position supported by Dempsey, she decided that the better course was to take Osbourne off weekends and thereby separating her and Dut; Osbourne could continue to pick her shifts with this exception, as she had been doing.[57] Moshier noted that Robertson was on vacation on July 8, so she elected to await her return before formally notifying Osbourne of the decision to take her off weekends.

Moshier testified that she was aware of a prior investigation of Osbourne by Robertson that involved complaints against her by some nurses; however, Moshier said that was a separate matter in which she (Moshier) had no involvement. Moshier was also aware that Robertson was unable to complete her investigation before her vacation and was to complete it upon her return. Moshier stated that she informed Robertson to take Osbourne off the weekend schedule based on the investigation of the Dut matter around July 10.[58] Moshier denied that Osbourne was officially taken off weekends as of June 27.

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[56] Notably, Dut did not testify at the hearing and the Respondent did not explain his absence, evidently choosing not to call him.

[57] Moshier identified a copy of a written summary of the meeting and what transpired there.

[58] Moshier was shown R. Exh. 31 and stated that her decision to remove Osbourne from weekends was in part based on the employee statements contained in the exhibit. Moshier

Continued

Moshier admitted that Osbourne has not been offered weekends since July 10, and realized further that Dut does not work for Iroquois when school is in session, most likely starting in September of any given school year. According to Moshier, Dut will pick up shifts during breaks in his matriculation; e.g., Christmas and spring break. Moshier conceded that Osbourne was not returned to weekends when the school term commenced in September 2008, nor at any time since.[59]

Moshier stated that she was familiar with a former management employee, Barbara Sawyer; and she was present in the hearing room to hear Sawyer's testimony in its entirety.

Moshier noted that starting in January 2008, Sawyer and all management staff attended in-service education meetings held by Iroquois' retained labor relations counsel, and all were instructed to conduct themselves lawfully and to respect the rights of employees during the campaign; and that all disciplines of employees had to be based on a thorough investigation consistent with established Iroquois policy. Moshier denied giving her staff managers and supervisors any instructions contrary to counsel's advice at any time after he made his presentations. Moshier noted that Sawyer was a very short-term employee with whom she would not have had any private conversations, least of all any that were inconsistent with the directives she gave all managers about their conduct during the campaign.

Moshier agreed that managers were asked to sign up for weekend duty during the campaign but only because there were so many complaints coming in from the family members as well as staff about union activities, including rallies blocking the parking lot, harassment of the visiting families, supporters impeding entry and egress, and nonemployees entering the facility with food, resulting in the interruption to resident care through solicitations on the unit.

Moshier stated that there is an absolute prohibition against nonemployee solicitations, especially in the resident care units. However, on the weekends, supervision is minimal so at the time, in this context, Moshier said that she requested some managers to come in voluntarily for an hour or two, especially around the changes in the shifts, to make sure unauthorized persons did not enter the facility. Moshier denied that managers were asked to come in on weekends to spy on Osbourne, or any other staff.[60]

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agreed that the Dut matter did not become an issue until July 1. Notably, Osbourne worked no weekends from June 28 through July 6, and none thereafter. (See GC Exh. 26.)

[59] Moshier stated that she actually did not know what school Dut attended; he is simply one of many seasonal workers employed by the Respondent. Moshier did not know if the "school" he attended was a 2- or 4-year post high school institution or that it may be a high school program. Moshier also did not know at the time of the hearing whether he still worked at the facility; according to Moshier, her general understanding was that Dut was not available weekends during the school year; he only worked weekends when not attending classes. (Tr. 937.)

[60] Robertson and Field both testified as to Moshier's request that managers work weekend duties during the campaign. Robertson essentially corroborated Moshier's testimony about the complaints from family and staff regarding the Union's organizing activities during the weekends, and the possible violation of the facility's solicitation rules during worktime on the units. (Tr. 1075–1077.) Field also testified briefly about the weekend call, stating that some managers were asked to come in on the weekends because people—nonemployees—were coming into the facility late at night or on off hours. According to Field, Moshier wanted to make sure management was there to monitor the facility. (Tr. 1148.)

Continued

Moshier testified that Sawyer was offered the option of either resigning voluntarily or being terminated around May 13, 2008, because after being on board for only about 3 to 4 months, Sawyer had created an unacceptably hostile work environment by yelling at both the clinical staff and the front line nursing staff. Moshier claimed that Sawyer's behavior even caused certain clinical staff to quit because of her negative and hostile approach, which included strident disapproval of staff efforts, but no offers of explanations or other actions that could correct the problems. Moshier found her behavior unacceptable (actually rising to the level of misconduct) but certainly not befitting a manager at the coordinator level. Moshier also noted that Sawyer was often unprepared for the quality assurance meetings and sometimes canceled them outright or provided nothing of substance when they were held. According to Moshier, Sawyer was very angry with her, and in her view Sawyer simply did not accept professional responsibility for her behavior. Accordingly, she was involuntarily discharged verbally by her; after which she wrote a summary memorializing the allegations against Sawyer.[61]

Robertson testified that she knew Sawyer as the Respondent's clinical coordinator who was employed from about December 2007 through about May 2008. Robertson stated that at no time during the campaign did Moshier depart from the rules and regulations governing the union election, but simply stressed that management was to conduct business as usual, caring for the residents. Robertson denied that any employees were targeted for disciplinary action because of their stance on the Union. Robertson said that she in fact attended all of the management meetings during the campaign.

Robertson stated that Sawyer left Iroquois because she did not get along with her coworkers, which placed Robertson in the middle of the complaints from various staff who complained that Sawyer argued with them and addressed them condescendingly. Robertson

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Nurse Manager Gloria Fish, a RN employed by Iroquois since 2003, recalled that during the union campaign there were problems with people (possibly nonemployees) coming in and out of the building and disrupting family members, which caused management to ask managers to come in on the weekends to ensure that business was not disrupted and security at the facility could be maintained. (Tr. 1214.) I would note that evidently none of the complained of activities were documented by Iroquois management as none were produced at the hearing. I note also that according to Moshier, the maintenance staff also performs a security function at the facility but no one from that department testified at the hearing regarding this issue.

[61] Moshier identified a document she described as a "summary" of the circumstances and reasons leading to Sawyer's discharge. The summary is contained in R. Exh. 21 and is dated May 13, 2008, the date of its preparation according to Moshier. Notably, the summary appears on plain white paper as opposed to the Respondent's "official" business-type records introduced at the trial. Moshier, on my examination, stated that there is no other office personnel "action" paperwork for Sawyer, and she fired her verbally (Tr. 784) and then wrote up the summary. Moshier then stated that "officially" Sawyer resigned and her resignation letter is in her personnel file. Moshier then explained that Sawyer was involuntarily terminated in the sense that Sawyer did not want to leave but Moshier delivered an "illustration [her word]" that she could resign or be fired and Sawyer opted for resignation effective May 13. According to Moshier, Sawyer simply wrote out a "quick little note" saying that she was resigning, and left. Moshier admitted that she did not include the resign or be fired option in her summary because she simply accepted Sawyer's handwritten note and felt no need to fill out the ordinary termination document used by Iroquois. I note that Sawyer was not confronted with this document when she testified, and Sawyer's "quick little note" was not produced at the hearing.

cited complaints of harassment and "talking down" by two MDS coordinators (Donna Sweeney and Kathleen Brasno) who were disciplined by Sawyer—in their view, unfairly. According to Robertson, Sawyer was unduly critical of staff work and caused arguments with them.[62]

Field, in likewise, testified that Moshier at no time directed management staff to step up discipline or monitor employees during the union campaign, and especially not at the manager meetings. Field also stated that she knew Sawyer and that Sawyer attended the management meetings.

Osbourne was recalled by the General Counsel on rebuttal to provide her side of the events surrounding the Dut matter.

Osbourne stated that she was called in to meet with Moshier, Field, and Dempsey on July 8 to discuss the incident involving Dut and Marshall. According to Osbourne, she was informed by the managers (presumably Moshier) that Dut was concerned about Marshall's accusations that he had done something to her, and that management was aware of the situation. Then, according to Osbourne, the managers proceeded to ask of her involvement in the matter.

Osbourne stated that she told them that near the end of her shift and the beginning of Marshall's (the second shift) on June 22, Marshall pulled her aside at the nurses station in an attempt furtively to show her an image on her cell phone.[63] Osbourne said the image was that of an animated heart blinking on and off with Dut's name written on it. Marshall said that Dut had texted the current image to her, but that Dut had texted her previously because he liked her. Osbourne stated that she asked Marshall how Dut had gotten her cell phone number and Marshall said that she probably had left it on some occasion with her (Osbourne) and perhaps he obtained it that way.[64] Marshall then proceeded to tell her that Dut had been following her to her car and trying to engage in conversation.

Osbourne noted that she asked Marshall if she had spoken to Dut about his behavior, to which Marshall replied that she was afraid to do this. Osbourne said that she also asked Marshall if she had reported the matter to management, and Marshall said she had, to evening Nurse Supervisor Tammy Balamut, and that the administration was aware of the situation and they were watching Dut; Marshall also said a few others (employees) also knew.

Osbourne stated that she advised Marshall to talk to Dut who may not be aware that his behavior was inappropriate, and the conversation ended on that note as other employees happened by.

After relating to Moshier and the others her involvement in the matter, Moshier asked her to provide a written statement, which she did.[65] Osbourne noted that there was no mention by Moshier of taking her off weekends at this July 8 meeting.

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[62] Robertson did not provide at the hearing copies of any complaints about Sawyer from these named employees or any other employees.

[63] According to Osbourne, cell phones are not allowed to be used on the units and Marshall was trying to conceal the phone from the monitors and managers.

[64] Osbourne said that she reminded Marshall that she had previously given her (Osbourne) the number, and wondered why she had left it for her. According to Osbourne, Marshall did not answer.

[65] Osbourne identified a copy of the statement contained in R. Exh. 31.

Osbourne testified, however, that it was not until November 2008 in a tape-recorded (with Osbourne's permission) meeting with Robertson, Greer, and Sherlock that she was told that she was taken off weekends because of the Dut matter. Osbourne stated that the meeting had been called because management wanted to discuss resident issues on the fourth unit, but also her obligation as a per diem to work three shift (days) a week. Osbourne said that she told them that it was difficult (because of her child care issues) to get three shifts in during the week since Moshier had removed her from weekends. According to Osbourne, it was then for the first time Robertson said that she was taken off weekends because of the Dut matter.

Osbourne insisted that Robertson had told her in June (the 27th) that she was being taken off weekends then because of the numerous complaints from the LPNs, CNAs, and agency nurses that she was verbally abusive and aggressive towards staff and that an investigation had to be completed by her. Before November, Osbourne insisted that Robertson had never connected the Dut matter to her removal from weekend duty.

Osbourne was shown a copy of Moshier's summary (R. Exh. 30) of their July 8 meeting on the Dut matter and declared that she had never even seen a copy before the hearing, let alone given a chance to read it. She disputed some of its contents. For instance, Osbourne stated that Marshall never said to her that Dut wanted to rape her. Rather Marshall told her that she was afraid to discuss the matter—his interest in her—with Dut personally, but had spoken to Balamut, her supervisor, about him. Osbourne also denied that she had contacted John Guarak and James Deng, her coworkers, at home and discussed the matter with them. Osbourne also emphatically denied telling Moshier that she had asked them to find out from Dut if he had plans to assault Marshall. Osbourne also denied being reminded by Moshier of the Respondent's zero tolerance harassment policy or that her own conduct as a LPN charge nurse was inappropriate; Osbourne insisted these comments were never made to her in the July 8 meeting. Osbourne also denied that Moshier told her it was inappropriate for her to have contacted other coworkers to discuss these accusations. However, Osbourne admitted that in the meeting she told Moshier that she had spoken to Daniel Matoup on June 22 as they were leaving work and asked him to tell Dut his behavior was inappropriate as Marshall was married and much older than Dut—and, moreover, they were all friends. Osbourne said that Daniel Matoup was the only one (other than Marshall) to whom she spoke about the matter.

On balance, Osbourne said that where Moshier's summary states that she "confirmed" this information to be accurate is simply not true.[66] Osbourne testified that in her view, Moshier's July 8 summary is false and a fabrication.

Regarding Dut, Osbourne testified that she has known him for some time as they both attended Onondoga Community College (OCC) and were participants in the registered nurse program there; Osbourne completed her qualifications in January 2009. Osbourne stated that coworkers Daniel Matoup and John Guarak were also students at OCC and she knew them, as well as James Deng.

[66] Osbourne admitted that she did not report the Marshall matter to management because Marshall said that she had reported it to Balamut and that management presumably was aware of the issue. (Tr. 1257.) Osbourne candidly admitted that the Iroquois sexual harassment policy requires that sexual harassment be reported to management. Osbourne said that she understood this to mean that the aggrieved party should report the matter.

Osbourne volunteered that she had seen Dut about 3 weeks before the hearing at a local buffet eatery and they exchanged their usual greetings. She stated that Dut also asked about the nursing masters program at OCC. Osbourne said since they each were in the program and had each other's telephone numbers, she asked him to call her to discuss the program. Osbourne noted in passing that before the hearing she had never heard that Dut was afraid of her, nor had she heard this from anyone else; this was very surprising to her. Osbourne, however, noted that at the time of her testimony she did not know Dut's whereabouts and was not sure whether he was in the country.

F. The Respondent's Suspension of CNA Esperanza (Espi) Cruz on October 2, 2008, and its Discharge of Her on October 7, 2008

Cruz testified that she was employed as a CNA with Iroquois from about December 15, 1992, until October 7, 2008, when her employment ended by her discharge on that date. Cruz testified that during her time with Iroquois, her primary duties included assisting residents with their activities of daily living such as comfort care, eating, toileting, transfer, mobility bathing, and skin care.

Cruz was familiar with the Union and its 2008 organizing campaign and as well as its successful election in March 2008. Cruz said that she participated in the campaign, attended union meetings, wore union shirts and buttons, and talked to her coworkers about the Union; after the election, served as an employee representative on the bargaining committee and attended most bargaining sessions.[67]

Cruz testified about the circumstances leading to her discharge on October 7, 2008.

Cruz stated that she worked her normal day shift on October 1 but was originally assigned that day to the second floor unit as a floater; however, when she arrived on the second floor she was reassigned to the fourth floor. Once there, Cruz said that she reported to the charge nurse and was given her assignment sheets for the residents to whom she was to provide care.

Cruz said that she then went to the care tracker kiosk, checked her list to identify the residents and their required care, and then proceeded to provide care in the B wing. Cruz stated one of her residents that day was J. E. (also known as Jessie) and she provided her morning care which included oral hygiene (swabbing and cleaning her mouth), pericare (changing her disposable briefs and washing her up as she was an incontinent resident), and dressing her so that she could be placed in her wheelchair. Cruz noted that Jessie required a vanderlift—a lifting device used to assist residents with mobility deficits and transfer issues—to get her from her bed to the wheelchair.

Cruz insisted that she changed Jessie's briefs and gave her a good pericare before lunch, which was scheduled for around 12:30 p.m. that day. Cruz said that after lunch she

[67] Notably, Cruz has been a supporter of union representation at Iroquois for over a decade, since about July 11, 1997. In that regard see R. Exh. 11, a copy of a union flier containing a picture of Cruz and quoting her as follows, "As nursing home workers we deserve far more respect, dignity, and better wages and benefits. This is only going to happen by joining the union and demanding it." See also R. Exh. 12, a copy of a union flier which contains the headline "We're Voting Yes for 1199 SEIU," depicts Cruz prominently along with other supporters, and announces the March 7, 2008 election date.

worked on the unit with another CNA, Cheryl Sanders. According to Cruz, a common practice at Iroquois is for CNAs to work as a team for their afternoon rounds. On that point, Cruz stated that she provided afternoon care for Jessie and, using the vanderlift, she and Sanders got her back to her bed.[68]

Cruz said that her shift ended and when she left work at around 3 p.m. that day there was nothing amiss with her residents, including Jessie. However, when she arrived home, Cruz stated that there was a message from Nurse Manager Sue Greer. Cruz said that she returned the call and was told by Greer to report to Gloria Fish, the fourth floor nurse manager, first thing the next day.

Cruz stated that on October 2, she reported to Fish who informed her of an injury to Jessie, that her mouth was bleeding, and asked her to provide a written statement to which she complied.[69] Cruz stated that after writing out her statement she was asked by Fish to wait a while, while Fish met with a night shift nurse supervisor, Patty Ray.[70] According to Cruz, Fish told her after a time to report back to her first floor assignment.

Cruz said that she met later on October 2 with management, this time with Moshier, Sherlock, and Fish, and at this time was told that Jessie had been discovered with a missing tooth and bleeding from her mouth. According to Cruz, Moshier asked her whether she knew anything about the injury and Cruz said that she knew nothing about any injury to Jessie; that when she departed that day there was nothing unusual about the resident's condition. Cruz said that she was asked to prepare another written statement and did so.[71] Cruz emphatically stated that she did not tell the managers that she never looked at the care tracker and denies telling them she did not change Jessie's briefs. Cruz said this second meeting ended with her suspension, pending investigation of the matter.

Cruz turned to the events of October 7, stating that she was called in to meet once more with management (Moshier, Sherlock, and Fish) and on this occasion she was accompanied by a representative—Bonita Thompson—from the Union. Cruz stated that at this meeting she was told by Moshier that she was terminated; but she was not provided the paperwork for her termination although the union representative was shown the termination notice.

Cruz insisted on the witness stand that she had never seen the termination paperwork, but was simply told that she was terminated because she had not changed Jessie's briefs and

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[68] Cruz stated that afternoon care includes again changing the incontinent resident if she is wet and giving her a good wash-up in the process.

[69] Cruz identified a copy of her first October 2 statement regarding the injury to the resident in question. (See GC Exh. 8.) Cruz' statement is fairly brief and essentially states that she provided mouth care in the morning, and in the afternoon (around 2:30 p.m.) she and CNA Cheryl Sanders put the resident in the vanderlift to transfer her to her bed. Cruz stated that she did not notice anything unusual in the resident's appearance and did not notice any trauma signs while transferring her.

[70] Cruz said that Ray was in attendance at the meeting and sat with her as she prepared her written statement.

[71] See also GC Exh. 8. In the second statement in essence, Cruz briefly stated that she saw nothing unusual when she cared for Jessie and that her teeth were intact, that she would have reported anything out of the ordinary to the charge nurse.

for not checking the care tracker; that the investigation of the injury had proven to be inconclusive.[72]

On cross-examination, Cruz stated that she first changed Jessie's briefs in the morning and in the afternoon, and she (always) checked the care tracker; Cruz went on to say that checking the care tracker is important, saying "you are supposed to do this and [she] checked it as often as [she] could to make sure that whatever care you provide is the right thing to do." (Tr. 337.)

Cruz noted that one (CNAs) checks the care tracker because the resident's care plan changes a lot of times, the resident's conditions or needs change and CNAs not only check the care tracker frequently for changes, but will record their observation of a change in the resident's condition. Cruz stated that it was important to monitor and document care and since the care tracker was introduced about 2 years earlier, she knows how to use (and used) the system.

Cruz testified that at the October 7 meeting Moshier informed her that she was being terminated because the current infractions—not checking the care tracker and not changing the resident's briefs—constituted her third major offense. Cruz said that she was shown a copy of her termination paperwork which indicated that she had previous disciplines.[73]

With regard to the statement which, inter alia, said that she goes by word of mouth from other CNAs in order to determine the care each resident requires and that she did not change briefs for Jessie because she did not have time, Cruz stated that she actually changed the resident three times in the early morning when she started, at around mid-morning, and afternoon but entered only the first change in the computer at about 12:27 p.m. Cruz admitted that all care should be entered into the care tracker as you render it, as soon as you can, but this is not always possible. Cruz noted that while she did not personally make an entry in the

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[72] It is important to note that on this examination by the General Counsel, and subsequently by counsel for the Charging Party, Cruz, as I observed her, was becoming visibly nervous and upset; her English usage slipped rather badly; she seemed somewhat confused in the process. For example, she initially said she was terminated because of Jessie's injury. (Tr. 320.) Then, under examination by the counsel for the Charging Party, she testified that she was told the injury investigation proved to be inconclusive, but she had not changed the resident and did not check the care tracker for residents before providing care and was being terminated for that. (Tr. 323–324.) Based on my observation and her consistent testimony, I was moved to ask her whether at the October 7 meeting she was terminated because of the injury. Cruz responded as follows: "Yeah, but they told me before that whatever you know, that the whatever they accusing me of you know, like changing [sic] the you know inconclusive. They conclude that it is not inconclusive what they charging me of." (Tr. 325.) Cruz later said, "No, they told me before that when they found out is that the Incident that happened with [Jessie's] injury is inconclusive. (Tr. 326.) Cruz appeared very upset over recounting this latter matter.

[73] See GC Exh. 13, a copy of Cruz' progressive discipline record dated October 7, 2008. Notably, on cross-examination, Cruz identified the document, saying that she had read it before but could not recall where. Cruz then said (at Tr. 355–356) that she had never seen it before. At this juncture, I concluded that Cruz' English comprehension presented a communications problem and was moved to ask Cruz about her English proficiency. Later in her testimony, Cruz stated that she refused to sign the termination form and at the time refused to even look at it. Cruz stated that her union representative, Bonita Thompson, handled the matter. (Thompson, signing for Cruz, noted that grievant refused to sign.)

care tracker to document her afternoon change of Jessie's briefs, Sanders, her coworker, did make the entry.[74] Cruz further noted that Jessie was Sanders' regular resident.

On this point, Cruz noted that she could not recall Sanders ever speaking about Jessie's specific care routine and needs but, as is customary among CNAs, she and Sanders did talk about her during the course of providing care to her on October 1.

Cruz stated initially that she could not recall telling Moshier and the other managers on October 7 that she went by (only) what Cheryl Sanders told her regarding Jessie's care and then, upon reflection, emphatically "no," she did not tell Moshier "she went by Cheryl." Cruz stated she just checks the care tracker. (Tr. 384.)[75]

Cruz stated that the statements attributed to her in the termination and discharge form were not true. Consequently, she denied making any such statements to Moshier and the other managers on October 7, 2008.[76]

The Respondent's witnesses to the Cruz matter were Fish (an admitted supervisor), Sherlock, and Moshier.

Fish testified that she has been employed by Iroquois since around October 2003, first as a LPN and, after completing her RN training 3-1/2 years ago, a nurse manager currently working days on the fourth floor unit. Fish testified that she was familiar with the matter involving Jessie's injury and became involved in the investigation of the matter.

Fish testified that at around 3:45-3:50 p.m. on October 1, Theresa Boehm, a fourth floor LPN, reported that at around 3:45 p.m. Jessie's visiting family members discovered blood on her lip and bruising. Fish said that she went to check on the resident and saw dried blood on her lip and, upon opening her mouth to explore the source, observed what appeared to be a missing tooth; that is, coagulated blood in an empty tooth socket.

At the time Fish, making a clinical assessment,[77] stated that she believed that the injury happened some time prior to discovery by the family. Fish said that she ordered the LPN to

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[74] Cruz stated that when she reported for work on October 1 and was told to report to the fourth floor, she provided Jessie morning oral care at around 8:15 a.m.; at 8:30–9 a.m., she gave Jessie a wash-up and brief change; and between 10:13 and 11 a.m., she again changed her briefs but this care was not entered into the care tracker until about 12:30 p.m. Cruz said that she did not have time to make the entries any earlier.

[75] At this point, Cruz was on cross-examination by the Respondent's counsel. Again, I must note that Cruz seemed to experience much difficulty in answering questions posed by the Respondent's counsel. She did not seem to understand them. Accordingly, I was moved to ask her about her care practice, and she stated to me that she checks the care tracker but also converses with her coworkers on occasion about the care of a resident. It should be noted that with respect to Jessie, Cruz was "floated" to her floor on October 1; Jessie was not one of her regulars.

[76] Cruz' emphatic denials were made to me based on my questions regarding the contents of the discharge form. I also asked Cruz about the other disciplines recorded on the October 7 disciplinary form. Cruz stated that she did not agree with the March 12, 2008 discipline but could not recall the stated disciplines for February 10 and July 26, 2005, and March 6, 2007. However, I would note on those occasions and with respect to the charged infractions, that Cruz signed the forms.

clean the resident's mouth and immediately reported the matter to Moshier because the director of nursing, ordinarily the first level to whom she reported, was out of the building.

According to Fish, she commenced her investigation the next morning by establishing a time line for Jessie's care on October 1 and taking statements from all CNAs and LPNs on duty that day up to the time of the discovery of the injury; Fish said that she essentially determined to investigate the 24-hour period before discovery.

Based on her investigation, Fish stated that she concluded that:

1. the injury did not occur between 11 p.m. and 7 a.m. September 30–October 1;

2. that two CNAs, Cheryl Sanders and Kelly LeDuke, provided morning care but nothing unusual was noted;

3. that Jessie ate her breakfast at 8:30, with nothing noticed by Boehm;

4. Cruz provided oral care between 10:13–11 a.m., and the tooth was not missing;

5. Jessie had her lunch between 12:30 and 1:30 p.m.; both care providers noted she ate a portion of lunch—the tooth was not missing.

6. Cruz and Sanders provided care for Jessie and put her to bed for an afternoon nap at around 2:30 p.m.

7. CNA Peter Keirn got Jessie out of her bed to receive her visiting family around 3:45 p.m.; Keirn noticed what he thought was dried cranberry juice on the resident's lip; Keirn wiped the "juice" off around 3:45, Jessie's family noticed the injury—missing tooth—in the dining room.[78]

Fish testified that taking all of the above into consideration, she concluded that the injury most likely occurred sometime between lunch and 3:45 p.m. on October 1, and informed Moshier by email of her conclusion. Accordingly, Fish stated that based on that conclusion she decided to re-interview Cruz and Sanders, whom she knew provided afternoon care to Jessie during that period.

Fish stated that the second interview took place on October 2, in separate meetings with Cruz and Sanders; Moshier, Sherlock from human resources, and Fish were also present for each meeting. According to Fish, Moshier led the inquiry and asked pertinent questions of Cruz (and Sanders) regarding the care she provided Jessie that day. According to Fish, during the interrogation, Cruz said that she did not change the resident's brief between breakfast and lunch because she did not have time.

According to Fish, Moshier asked her why both she and Sanders transferred Jessie when her care plan calls for a single assist with the vanderlift. Fish stated that Cruz then

[77] Fish noted that the blood on Jessie's lip was dried and there was no fresh flowing blood from the wound and, while her lip was swollen, Jessie did not seem to be in immediate pain.

[78] Fish identified GC Exh. 5, a copy of the time line she created for and pursuant to her investigation, including the names of the personnel thought to have been involved in Jessie's care. The text above recites her time line analysis.

responded that she did not look at the care tracker. Fish stated the meeting ended with Cruz and Sanders being suspended pending the completion of the investigation.[79] Fish stated that on October 2, she wrote two memoranda to memorialize the meeting of October 1.[80]

Fish noted that, in the end, the investigation of the injury was determined to be inconclusive as to how it happened or who was at fault. However, because Cruz had admitted to not following the care plan and did not change the resident's briefs, management believed that some formal discipline was warranted for her as well as Sanders. Fish further noted that no other employees were disciplined and that, in particular, the only employee other than Cruz and Sanders possibly involved in Jessie's care, Peter Keirn, was ruled out by her because she could not provide a time frame for the coagulated blood in Jessie's wound site. Accordingly, she determined that the injury occurred prior to his coming on his shift.[81]

Sherlock testified that she has worked at Iroquois in various management positions since December 1993; on September 5, 2008, Sherlock said she was promoted to vice president of human relations and development, a position she currently held.

Sherlock stated that she was familiar with the injury to the resident known as J. E. (Jessie) because Moshier asked her to sit in on the October 2 interviews of two CNAs, Cruz and Sanders.

According to Sherlock, Cruz stated in the interview she that she did not read the care tracker prior to rendering care to the injured resident, and that she did not perform morning care for Jessie because she did not have time.

Sherlock identified two memoranda[82] that she prepared from her handwritten notes—since discarded—shortly after the interview session with Cruz (and Sanders). Sherlock explained why there were two memoranda.

According to Sherlock, part of her reason for being at the October 2 meetings with the CNAs was to record what transpired there, essentially what was said. Sherlock said that when she completed the first memo, she discovered that she needed to make some changes. For instance, Sherlock claimed to have omitted Fish's asking Cruz about morning care. Sherlock stated that she also tried to make the memo nicer looking editorially. In fact, Fish admitted that she revised the first drafts several times to make them more accurate and did not intend to save

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[79] Fish stated that a similar meeting was held afterwards with Sanders and "pretty much" she was asked identical questions. Sanders admitted to assisting Cruz with the resident but noticed nothing wrong with her physical person. According to Fish, Sanders also noted that she did not look at the care tracker. At the hearing at the behest of the Respondent, Sanders testified and essentially did not dispute Fish about her meeting with management.

[80] Fish identified the two documents as GC Exhs. 11(e) and (f)).

[81] It is noteworthy that evening shift (3–11 p.m.) CNA Keirn, who, according to Fish provided pericare to Jessie, transferred her to her wheelchair and transported her to the dining room to visit with her family between 3:30 and 3:45 p.m. Aside from noting the "dried cranberry juice" on Jessie's lip according to his statement (GC Exh. 8), Keirn did not notice the missing tooth and blood in her mouth; however, the family, it seems, noticed this almost immediately and reported the matter. It is also noteworthy that Fish, a RN, could not say how long it takes for blood to coagulate. Osbourne, a RN since January 2009, however, stated that it takes about 10 minutes for blood normally to coagulate.

[82] See GC Exhs. 11(a) and (b), copies of the memoranda prepared by Sherlock.

the earlier drafts; it just happened to be left in the file (and was produced per the Board investigation). Fish related that she intended to retain only the second memo as part of the official file.

Sherlock insisted that Cruz stated very clearly to the three managers that she did not follow the care plan generally and, as she interpreted Cruz' statement, Cruz did not look at the care tracker for any of the residents under her care, not just with respect to Jessie. Sherlock stated that she understood Cruz to be saying that she also does not follow the care plan prior to rendering care to the residents, but instead gets the resident's care instructions from other CNAs. Sherlock noted that the questions about the care plan came about because it was clear to management that Cruz had been floated to a floor whose residents and their particular care needs were unknown to her. So the line of questions from management (Moshier) related to how Cruz came to know what particular care was required for these residents. According to Sherlock, Cruz said she did not follow the care plan prior to rendering care.

Cheryl Sanders testified and recalled being disciplined in October 2008 stemming from an incident involving a resident (J. E. or Jessie) who had suffered an injury to her mouth.

Sanders stated that she met with Moshier, Sherlock, and Fish, and one other person whose name she could not recall.

According to Sanders, she was asked by the managers how the resident in question was transferred or lifted and she told them that she performed a two-assist lift.

Sanders was shown a copy of her discipline record (R. Exh. 25) and agreed with the finding that she did not look at the care tracker to determine the resident's current plan of care before rendering care, and that this was her second major offense. Sanders stated that she had lost time from work and was suspended as a result of her admissions, but only for the time the investigation was pending.

Sanders stated that while she ultimately agreed with the discipline she was kind of surprised to have received it and at first she believed they were disciplining her to justify disciplining Cruz and, moreover, for injury to a resident. Sanders stated that neither she nor Cruz caused any injury to the resident.

Sanders said, however, when she returned to work on October 3 after the investigation and spoke to management (she did not identify anyone by name), she came to understand with more clarity that her offense lay in not consulting the care plan as required, but was not connected to Cruz.

Moshier testified that she knew Cruz as a CNA who had worked for Iroquois about 16 years; Moshier also stated that she knew Cruz was a union supporter and served on the Union's bargaining committee team.

Regarding Cruz' termination, Moshier testified that she terminated her on October 7, 2008, because during the investigation of an injury to a resident, Cruz admitted to her and two other managers that she did not look at the care plan before rendering care and she did not change the (injured) resident's briefs. According to Moshier, while she based her decision to terminate Cruz on both reasons, the primary or guiding reason was Cruz' admission that she does not look at the care tracker before providing care to a resident; the changing of briefs (for incontinent residents) is part of the care plan set out in the care tracker.

However, when shown a copy of the care tracker for the injured resident (Jessie), Moshier admitted that it did reflect that Cruz at 12:28 p.m. documented in the care tracker that she had changed the resident's briefs.[83]

Moshier went on to say that at the October 2 investigatory meeting, while wavering in her answer on many issues, Cruz ultimately made an admission that she did not change the resident's briefs.[84] Moshier also volunteered that during the interview Cruz had said that she had changed Jessie's briefs and initially said to her, "of course I [she] look (sic) at the care chart." (Tr. 53.) However, according to Moshier, Cruz also stated that she did not look at the care chart (plan).

Moshier was shown a copy of a document entitled "Iroquois Nursing Home, Bargaining Update" (GC Exh. 7) and admitted that she had distributed this information sheet to all staff on or about October 9, 2008. According to Moshier, the document was issued by her to refute what was considered false information being disseminated by the Union regarding Cruz' discharge. Moshier acknowledged that her document states that "Espy [Cruz] had a history of misconduct going back long before the Union showed up [and] [h]er termination had nothing to do with the Union but instead was based on care issues and previous disciplines in accordance with Iroquois policy. The Union's claim that she was terminated for failing to change a resident is incorrect, along with everything else their flyer said." However, according to Moshier, she was attempting to clarify and correct a union flier which had said that Cruz was fired solely for not changing a resident's briefs.

Moshier testified that she had directed Fish to investigate the resident's injury and relied on her time line and those employees she chose to interview. Moshier acceded that for purposes of determining when the injury occurred, management concluded that it happened sometime in the afternoon of the day shift on October 1, but an actual time could not be stated. Moshier acknowledged that evening shift CNA Keirn also provided care to Jessie around 3:30 p.m. on October 1. Moshier noted that Keirn was ruled out and not suspended because of the time line worked up by Fish. Accordingly, Moshier stated that the investigation settled on both Cruz and Sanders,[85] even though the statement by LPN Boehm indicated that she had noticed fresh blood on the resident's lip at 3:50 p.m. and Fish herself noted the swollen lip at 3:56 p.m., all which occurred during Keirn's shift.

Moshier noted that at the time Iroquois followed a progressive disciplinary policy and that policy required a finding of failing to follow the care plan to be considered a major—not

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[83] See GC Exh. 6, a copy of the care tracker document showing the entries made by Cruz for October 1, 2008, regarding the care she provided Jessie. Moshier indicated that the care tracker document contains categories to deal with the residents' activities of daily living (ADLs) such as eating, toilet use, personal hygiene, bath, etc. The category "bladder activity" covers the changing of Jessie's briefs because of her incontinence issues.

[84] Moshier also allowed that Cruz also said that she had changed Jessie's briefs in the meeting.

[85] Moshier stated that while she knew Cruz supported the Union, she also believed that Sanders was also a union supporter. (Tr. 59–60.) Notably, GC Exh. 15, a letter to the Respondent's counsel dated May 13, 2008, includes a list of the Union's bargaining committee members, of which Cruz is one such. There is no documentation or other evidence of Sanders' involvement with the Union one way or the other.

general—offense and Cruz' record indicated that she had two prior major disciplines,[86] and the October 7, 2008 violation became her third which required termination.

Moshier noted that the Iroquois policy allows for expungement of prior disciplines if the employee is discipline-free for 2 years. According to Moshier, in examining an employee's disciplinary record, management goes back 2 years to determine if any expungement applies. She noted that an employee has to be completely discipline-free for 2 years, so one could have disciplines in her record over 2 years old that would not be considered expunged because the employee never had the 2 years with no discipline.[87]

IV. Legal Principles and Standards Applicable to the Unfair Labor Practice Charges

A. Section 8(a)(1)/Weingarten Rights

Employer interference, restraint, or coercion of employees who exercise their statutory right to form, join, or assist labor organizations are unlawful under Section 8(a)(1) of the Act.[88] The test under Section 8(a)(1) does not turn on the employer's motive or whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which it may be reasonably said tends to interfere with the free exercise of employee rights under the Act. *Gissel Packing Co.*, 395 U.S. 575 (1969); *United Rentals, Inc.*, 350 NLRB 76 (2007); *Almet, Inc.*, 305 NLRB 626 (1991); *American Freightways Co.*, 124 NLRB 146, 147 (1959).

In *NLRB v. J. Weingarten, Inc.*[89] and its companion decision, *Ladies Garment Workers v. Quality Mfg. Co.*,[90] the Supreme Court, agreeing with the Board, held that an employee's insistence on having a representative of his union at the employer's investigatory interview which the employee reasonably believes might result in a disciplinary action against him constitutes protected concerted activity. Accordingly, the disciplinary action proposed against the employee for refusal to cooperate in such an investigatory interview without union representation is violative of Section 8(a)(1).

Notably, the Supreme Court in these decisions enumerated what have over the years have become known as an employee's *Weingarten* rights, which includes the following "contours and limits."

> (1) the right to union representation inheres in Section 7's [of the Act] guarantee of the right of employees to act in concert for mutual aid and protection";
>
> (2) the right arises only in situations where the employee requests representation;

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[86] See R. Exh. 26, a copy of a major discipline issued against Cruz on March 12, 2008, for which she was suspended for 3 days. The incident involved Cruz' failure to report that she had been struck by the maintenance man. Cruz signed off on this matter without comment. See, also, R. Exh. 28, a copy of a discipline dated 07/26/05 stating that Cruz failed to follow the care plan for a resident who was injured because of Cruz' failure; this was Cruz' first major offense.

[87] Moshier provided this testimony through a very leading question posed by the Respondent's counsel; her actual response was "correct." (Tr. 822.)

[88] Sec. 29 U.S.C. §158(a)(1).

[89] 420 U.S. 251 (1975).

[90] 420 U.S. 276 (1975).

(3) the employee's right to request representation as a condition to participation in the interview is limited to situations where the employee reasonably believes the investigation will result in disciplinary action;

(4) exercise of the right may not interfere with legitimate employer prerogatives;

(5) the employer may carry on its inquiry without interviewing the employee, thus leaving to the employee the choice between having an interview and foregoing any benefits that might be derived from one;

(6) the employer has no duty to bargain with any union representative who may be permitted to attend the investigatory interview.[91]

The Supreme Court in *Weingarten* instructed that for purposes of determining under what circumstances a reasonable basis exists for believing that the investigatory interview will result in disciplinary action, the inquiry must be based on objective standards and on a reasonable evaluation of all of the circumstances, rather than on the subjective reason of the employee.

Notably, *Weingarten* does not require union representation at an interview called merely to inform an employee that a disciplinary action already has been decided on. *Baton Rouge Water Works Co.*, 246 NLRB 995 (1979). However, the Board has held that an employee's *Weingarten* rights and protection can become applicable at the disciplinary interview if the employer engages in investigatory conduct beyond merely informing the employee of a previously made disciplinary action. *Baton Rouge Water Works*, above at 997.

In short, if the employer goes beyond its stated purpose (to inform the employee of the discipline already acted on) by undertaking further action to support its decision to discipline the employee, the panoply of *Weingarten* rights may be invoked.[92]

The importance of honoring an employee's *Weingarten* request cannot be understated as the Board has held that an employee's request for the assistance of a representative from a newly elected but not yet certified union also must be honored by an employer. *ITT Lighting Fixture,* 261 NLRB 229 (1982).

B. Section 8(a)(3)

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 the following causation test in all cases alleging violations of Section 8(a)(3)[93] or violations of Section 8(a)(1)[94] turning on employer motivation.

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[91] These limits and contours are taken from the analysis and distillation of *Weingarten* outlined in the Developing Labor Law, Volume 5, Chapter 6.

[92] *Titanium Metal Corp.*, 340 NLRB 766 (2003); enfd. in part and derived in part 392 F.3d 439 (D.C. Cir. 2004). The Court enforced the Board's order insofar as it found that the employer wrongfully questioned a certain employee in the absence of union representation.

[93] Sec. 8(a)(3) of the Act makes it an unfair labor practice for an employer to discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

[94] As noted previously herein, Sec. 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Sec. 7 of the Act."

First, the General Counsel must make a prima facie showing sufficient to support the interference that protected conduct was a motivating factor in the employer decision. This showing must be by a preponderance of the evidence. Then, upon such showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The Board's *Wright Line* test was approved by the United States Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983).

Under the *Wright Line* framework, the General Counsel must establish four elements by the preponderance evidentiary standard. Accordingly, the General Counsel must first show the existence of activity protected by the Act, generally an exercise of an employee's Section 7 rights.[95] Second, the General Counsel must show that the employer was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the General Counsel must establish a line or nexus between the employee's protected activity and the adverse employment action. If the General Counsel establishes these elements, he is said to have made out a prima facie case of unlawful discrimination, or a presumption that the adverse employment action violated the Act.[96]

The Respondent, in order to rebut this presumption, is required to show that the same action—the adverse action—would have taken place even in the absence of protected activity on the employee's part. *Mano Electric, Inc.*, 321 NLRB 278 (1996); *Farmer Bros. Co.*, 303 NLRB 638 (1991).

While the *Wright Line* test entails the burden shifting to the employer, its defense need only be established by a preponderance of evidence. The employer's defense does not fail simply because not all of the evidence supports, or even because some evidence tends to negate it. *Merrilat Industries*, 307 NLRB 1301, 1303 (1992).

It is worth noting that proving discriminatory motive and animus is often elusive. Accordingly, the Board has held that an animus or hostility toward an employee's protected and concerted activity or union activity may be inferred from all the circumstances even without direct evidence. Therefore, inferences of animus and discriminatory motive may derive from evidence of suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct, departures from past practices, tolerance of behavior for which the employee was fired, and disparate treatment of the discharged employees. *Adco Electric*, 307 NLRB 1113. 1123 (1992); enfg. 6 F.3d 1110 (5th Cir. 1993); *Electronic Data Systems Corp.*, 305 NLRB 219 (1991); *Bryant & Cooper Steakhouse*, 304 NLRB 750 (1991); *Visador Co.*, 303 NLRB 1039, 1044 (1991); and *In-Terminal Services Corp.*, 309 NLRB 23 (1992).

The judge may also consider prior unfair labor practices in resolving this issue, as well as violations that have occurred before and after an election.[97]

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[95] The protected activity includes not only union activities but also invocation and assertion of rights guaranteed employees under Sec. 7 of the Act. *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984); *Interboro Contractors*, 157 NLRB 1295 (1966).

[96] *Yellow Transportation, Inc.*, 343 NLRB 43 (2004); *Tracker Marine*, 337 NLRB 644 (2002).

[97] On this point, see Robert *Orr/Sysco Food Services*, 343 NLRB No. 1183 (2004), holding that union animus was evident through the Respondent's many violations of Sec. 8(a)(1), (3), and (4) found to have occurred before and after the second election campaign. See, also, *Atlantic Veal & Lamb, Inc.*, 342 NLRB 418 (2004), where the Board noted that the knowledge

Continued

V. Discussion and Conclusions Regarding the Unfair labor Practice Charges

With the foregoing legal principles and standards of proof in mind, I believe it would be helpful to make several preliminary observations about this case, my concerns and approach to its resolution before proceeding to a discussion of the complaint allegations, the positions and contentions of the parties, and my ultimate conclusions disposing of the matters at hand.

First, and probably foremost, I have given especially careful consideration of and serious regard to the purposes, objectives, and nature of the Respondent's business, which essentially is one that serves the relevant community by providing specialty care to a very vulnerable and, in many respects, helpless resident population that includes the terminally ill, the aged and infirm, the rehabilitating injured, and the demented; providing this service is by any standard seriously important to society in general and the specific community in which the Respondent operates.

Because of the vulnerability and attendant care needs of these residents, the Respondent's operations are highly and scrupulously regulated and monitored by both the State and Federal authorities. It follows then the persons hired to provide resident care are required diligently and rigorously to follow and comply with not only the State-mandated but also the Respondent's own rules, regulations, and procedures governing general standards of care and the specific individualized care plans for the residents.

In this regard, I have taken especial note and due regard for and of the Respondent's position regarding the standards and quality of care it attempts to follow and implement so that, first, the residents receive appropriate care and, second, that the requirements of the law are met. Accordingly, I have fully embraced the concerns and positions as advanced by the Respondent in this case regarding the duties and obligations of its CNAs, who provide the bulk of the care for all residents at its facility, to provide quality care, to achieve the general mandated standards of care, and to consult, follow, and comply with the individualized care plans of the residents to whom they are assigned. I have specifically taken to heart the Respondent's position that it "cannot afford to have lax standards for its employees or overlook [their] poor performance of misconduct"[98] with its overarching need to provide quality care for the residents at its facility.

I have further noted and given due regard to the fact that long before the Union began its instant organizing campaign in around December 2007, the Respondent maintained a written and published employee disciplinary policy to deal with various degrees of employee misconduct; that the disciplinary policy, last revised in about December 2006, was in place at all material times of this matter. My review of the evidence[99] regarding the disciplines imposed by the Respondent on employees—primarily CNAs—reveals that the actions taken included various punishments for varying degrees of employee misconduct, up to and including suspensions and discharge. It should be noted that the Respondent's progressive disciplinary scheme in and of itself is not the subject of any unfair labor practice charges and in my view is

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element of the General Counsel's initial burden also may be satisfied by evidence of the surrounding circumstances, including contemporaneous 8(a)(1) violations.

[98] R. Br. at p. 6.

[99] See GC Exh. 14 and R. Exh. 32, which include 15 disciplined employees and 90 disciplined employees, respectively, covering calendar years 2001 through 2008.

presumed valid. The issue here is whether it was, under the extant factual situations, unlawfully applied.

This brings us to the other side of the coin; that is, the countervailing concern on my part for the federally guaranteed rights of the Respondent's employees under the Act. For, irrespective of the Respondent's obligations to New York and the Federal regulations, it also is obliged to honor the statutory rights of its employees, the aforementioned CNAs in particular. The essential issue in my view for resolution of this case may be posited in terms of whether the Respondent used its charter and mandate of providing quality care to its residents in combination with its progressive disciplinary to deny the employees named in the complaint their rights under the Act. In the main, the answer to this question will govern my disposition of the charges herein.

Regarding the substantive issues and turning to the named employees alleged to have been unlawfully dealt with or disciplined as the case may be, it is abundantly clear to me, based on the undisputed (or not seriously disputed) aspects of this record, that for purposes of *Wright Line*, each employee was known by the Respondent to be a union supporter, an activist, a member of the Union's bargaining committee, or otherwise involved with the Union's organizing effort during its latest successful campaign (and at other previous times) at the Respondent's facility.

It also is well established on the record in my view that each employee suffered an adverse employment action and, moreover, the disciplines imposed were clearly connected (in time or circumstance) to each employee's exercise of her Section 7 rights.

While I will discuss the cases of the individual alleged discriminatees more at length, it is my view preliminarily that as a general matter the General Counsel has met his initial burden under *Wright Line*. As will be apparent, the Respondent stakes its main defense on the assertion, essentially, that irrespective of the employees' union activities, it properly, and hence lawfully, disciplined each, something it was obliged to do given its primary concern of providing quality care to its residents.

With these preliminary observations in mind, I turn to my discussion and conclusions regarding the complaint allegations and certain ancillary matters.

A. The Alleged Denial of "Weingarten Rights" to Rommevaux

The General Counsel contends that Rommevaux, a known active union supporter, who served as an observer for the Union on election day and also a member of the Union's bargaining committee, credibly testified about the circumstances surrounding her ultimate discipline on July 28, and her strong but reasonable belief that she, as the breakfast coordinator that day, was going to be disciplined for leaving breakfast trays out on the table, unserved to the residents, which acts and omissions served in part as the basis for her repeated requests for a representative to accompany her to the meeting with Robertson and other managers, who incidentally did not testify at the hearing.

The General Counsel argues that it is undisputed that Rommevaux requested union representation, and that Managers Scheussler and Dempsey denied her request. The General Counsel concedes that had the Respondent stuck to its sole purported reason for the meeting—informing Rommevaux of her discipline that it had reached a decision to discipline her based on its pre-meeting investigation of the events and circumstance surrounding its decision, there

would be no violation of the Act, even when Robertson explained to Rommevaux the reason for her discipline and allowed her to explain her side.

However, the General Counsel contends the Act was violated under *Weingarten*, when the Respondent called Scheussler and LPN Meyers to the meeting to corroborate what had happened regarding the six unserved trays, a point disputed by Rommevaux.

Consequently, the General Counsel argues that by calling in the other employees to the meeting, thereby delving further into Rommevaux's attempt at justifying or explaining why the trays were not served, the Respondent continued the investigation to seek additional facts and as a result triggered her *Weingarten* rights. By denying her request for representation under such circumstances, the General Counsel asserts the Respondent violated Section 8(a)(1) of the Act.

Noting that the actual discipline imposed on Rommevaux is not charged as an unfair labor practice, the Respondent asserts that earlier in the day of the meeting Rommevaux did not ask for representation when confronted by Scheussler about the breakfast trays matter. Moreover, Rommevaux herself testified at the hearing that it was proper for her to be held accountable for the untimely service of breakfast to the residents. The Respondent contends that the investigation had been in fact completed by the time of the meeting by Scheussler and the sole purpose of the meeting was to issue an appropriate discipline to Rommevaux; the discipline was in fact already written. However, when Rommevaux questioned the finding that six residents had gotten their breakfasts late, Robertson properly then asked LPN Meyers to the meeting to confirm that Rommevaux's residents indeed had not timely received their breakfast, which even Rommevaux admitted could have serious consequences to the resident's health.

I would find and conclude, in agreement with the General Counsel, that the Respondent violated Section 8(a)(1) of the Act by denying Rommevaux her *Weingarten* rights. In my view, Rommevaux testified very credibly and in point of fact her version of the events is not seriously disputed by Robertson, the Respondent's sole witness to the matter. It is clear to me that when Robertson called Meyers in essentially to corroborate Scheussler's findings, the investigation took on a continuing nature or lacked the finality of result that would abnegate *Weingarten's* applicability to the situation. In such a circumstance, if Rommevaux had been permitted a representative to accompany and presumably assist her, she, too, would have had a better opportunity to explain or justify her actions that day, and perhaps avoid the proposed discipline. This appears to me to be the essence of the protection of *Weingarten*, that is employees should be able to assist one and the other for their mutual aid and protection when a discipline is imminent or threatened but not determined as fact by the employer. Here, I would find and conclude that the Respondent violated Section 8(a)(1) of the Act by denying Rommevaux's repeated requests for representation at the July 28 disciplinary meeting.

B. The Ashley Rudolph July 10, 2008 Discipline

The General Counsel contends that the Respondent, first, knew absolutely that Rudolph had previously engaged in activities supportive of the Union, but more importantly at the time of her discipline she was a member of the Union's bargaining committee. The General Counsel also notes that the Respondent through one of its managers (Majewski) knew to a certainty that Rudolph was scheduled to leave early on July 9, 2008, to attend her first contract bargaining session and her early departure had been approved. Yet, in spite of her prior authorization and approval, Rudolph was disciplined by the Respondent for not completing her resident care assignment and, worse, in partial reliance on a statement from an unfriendly coworker, for intentionally not completing her assignment.

On balance, the General Counsel asserts that the Respondent's motive was unlawful and clearly evident of hostility to her exercise of protected activity.

The General Counsel argues that the Respondent's stated reasons for Rudolph's discipline are pretextual given the Respondent's failure to conduct a full and fair investigation which most notably did not even include an interview of Rudolph prior to the issuance of the discipline. The General Counsel also submits that the timing of the discipline—within a day of Rudolph's participation in the bargaining session—supplies additional proof of the Respondent's unlawful motivation in writing her up and undermines any claim by the Respondent that she would have been so disciplined despite her union activities.

The Respondent acknowledges that Rudolph was issued a major offense discipline, but that it was justified because Rudolph had left her assigned resident in a urine soaked bed, unwashed with her breakfast tray food uneaten—in front of her—at 11:30 a.m. The Respondent essentially argues that this dereliction was compounded by her demonstrating a deliberate intent not to complete her morning care assignments and not telling her charge nurse (Majewski) about the condition of the resident before leaving for the bargaining session. The Respondent also contends that Rudolph's discipline was in part also predicated on her failure to document several residents' bowel movement, putting these residents' health at risk.

In terms of witness credibility, I found Rudolph to be truthful and forthcoming about the events and circumstances surrounding her discipline. For example, Rudolph admitted that she had not begun the resident's—Genie—care by the time she was scheduled to leave for bargaining but, as she explained at the hearing, the resident was a late riser and often did not like to be attended to before 11:30 a.m. Moreover, Rudolph credibly testified that she told the charge nurse, Majewski, that she had not attended to Genie. Majewski confirmed that Rudolph had so informed her and, as both Rudolph and Majewski testified, it was understood that the resident would be cared for by the CNAs coming on duty after Rudolph.

The record clearly shows that Rudolph's participation in the bargaining session for July 9 was known and approved by the Respondent's management and that she would be leaving at around 11:30 a.m. as opposed to her normal 3 p.m.; any claim that Rudolph intentionally failed to complete her assignment under such circumstances borders on the absurd.

Regarding the Respondent's claim that Rudolph intentionally did not complete her assignment, the putative proof of this comes from an unsigned statement from a coworker (Lenora Williams) who did not testify at the hearing, and whose statements (GC Exhs. 18 and 19) do not on their face even indicate that Rudolph intentionally was not going to attend to the resident for whom she was cited for not providing care.

In this regard, I share the General Counsel's jaundiced view of the Respondent's (through Nurse Manager Field) investigation which included taking unsigned statements from coworkers,[100] yet taking none from Rudolph. As noted by the General Counsel, the Board has historically required that investigations of employee misconduct be full and fair (*Firestone Textile Co.*, 203 NLRB 89 (1973)).

[100] Field also took a signed statement from CNA Lakeya Brown on July 10, 2008. Brown's statement in essence indicated that she provided care for Genie at 12:05 p.m. Notably, Brown's statement did not state what date she provided care. (See GC Exh. 20.)

In my view, a full and fair investigation would at a minimum be prompt, thorough, and impartial. While Field undertook her investigation of Rudolph rather promptly, she certainly was not thorough and hardly impartial. As noted, she did not interview Rudolph and evidently she did not consult with the other managers about Rudolph's approved early departure and the reasons therefor; nor, prior to the issuance of discipline, did she consult with Rudolph's charge nurse, Majewski, who could have disabused her of any notion that Rudolph deliberately left the resident unattended, that the resident had certain preferences and would be seen to by other caregivers coming on duty. Field also admitted that she was very upset over Genie's care, or lack thereof, and in my view went off half-cocked with a view to pinning the blame on Rudolph. Emblematic of this was her going to a coworker, Williams,[101] who (according to Field) made some rather oblique reference to Rudolph's giving her a look and saying, "yeah right watch." Field took this to mean that Rudolph deliberately and intentionally neglected the resident in question. As I view Field's investigation, it was hardly thorough and certainly not impartial, and on balance not full and fair.

Then there is the discipline itself. I note that the misconduct with which Rudolph is charged deals only with her having failed to complete her assignment prior to leaving at 11:30, essentially with respect to morning care of one resident. Nowhere in the discipline record is there any mention of Rudolph's deliberate intention not to render care. Also, there is no mention of Rudolph's failure to document resident bowel movements. Surely, these care-related failures, if true, would have been a part of Rudolph's discipline. Accordingly, I view these proffered reasons with great suspicion. In my view, the essence of pretext is manufacturing reasons to justify an action taken.

In agreement with the General Counsel, I would find and conclude that the Respondent unlawfully disciplined Rudolph, that its proffered reasons for her discipline were mere pretexts and cover-ups for its unlawful treatment of an employee it knew was engaging in protected conduct, that is bargaining for a contract, in order to discourage her from engaging in same.

C. The Respondent's Disciplines of Demmetrics Brown on June 30 and July 29, 2008

Again noting that it is verily undisputed that at all material times Brown was engaged in union activities and was a known member of the Union's bargaining committee, the General Counsel contends that with respect to Brown's June 30 discipline the Respondent disparately and unlawfully dealt with her when it issued her a major offense discipline, as opposed to a general one, for a deficiency discovered during the 2008 State audit. The General Counsel submits that in 2007, before the union campaign, the Respondent gave employees lower levels of discipline for infractions that on their face were more severe than serving residents a cold cereal, the underlying charge against Brown. The General Counsel cites several examples from the disciplinary record in evidence, wherein certain CNAs in 2007 were given general offense treatment for failing to float residents' heels off surfaces. Yet in 2008, the years of the union organizing effort, the CNAs were given major offense disciplines for failing to elevate residents' heels while in bed.

[101] Rudolph evidently did not get along with Williams and vice versa. It is not clear whether Field knew this. But considering the fact that Williams would not sign her two "statements" given to Field, and she did not testify at the hearing, I am inclined to infer she would not have testified along the lines the Respondent advocates.

The General Counsel concedes that the Respondent routinely disciplined employees for deficiencies stemming from the State audits and inspections, but after the Union's successful election the Respondent gave a number of CNAs a higher level of discipline—a major as opposed to a general—in contra-distinction to 2007 when they were not represented by any labor organization. The General Counsel submits that Brown was treated disparately regarding the June 30 discipline for which she received a major offense treatment because of her union activities and support.

Regarding Brown's July 29 discipline, the General Counsel submits that the Respondent departed from past practice when it disciplined Brown for leaving the unit on July 28 without telling the charge nurse.

The General Counsel further submits that irrespective of its past practice, in point of fact, the Respondent disciplined Brown solely for engaging in protected activity, serving (or attempting to) as a representative of a coworker in the July 28 meeting with management.

The General Counsel concedes that the Respondent's official, but unwritten policy, in effect at the time required CNAs to report to the charge nurse when leaving the unit; however, the policy was not followed in daily and routine practice by the CNAs and with management's full knowledge. The General Counsel notes that Brown credibly testified that as a matter of general practice during her tenure she and other CNAs, in the case of an urgent matter taking them off the unit, simply told another unit CNA that they were leaving. The General Counsel asserts that is exactly what Brown did and, moreover, the Respondent was fully aware of where Brown was, why she was there, and what she was attempting to do—assist a coworker called to a management meeting.

The General Counsel contends that Brown's engaging in protected activity was the single most motivating factor in the July 29 discipline and in such case the Respondent violated the Act.

The Respondent contends that, based on the findings and observations of the State health survey team in April 2008, Brown was disciplined on June 27 by Robertson for providing cold oatmeal to a resident contrary to the resident's care plan; and, most notably, Brown admitted (with an explanation) that she had indeed served the cereal cold. The Respondent submits that while the incident occurred in April 2008 and the discipline was not issued until June, this was due to the State health agency's process, not because of any protected activity on Brown's part. The Respondent further notes that Brown admitted at the hearing that this reason for the discipline and its delayed issuance was explained to her by management.

Regarding Brown's second discipline, the Respondent first points out that while Brown testified that she left the unit at about 2:50 p.m. (10 minutes before her shift ended), Robertson testified that Brown left at 2:20 p.m. on July 28, and furthermore the two differ on whether Brown returned to the unit before leaving. The Respondent contends that Robertson's version of the events is the more credible.

Be that as it may, the Respondent submits that it is undisputed that Brown did not report to her charge nurse before leaving the unit, and it was near the time for a shift change during which staff are not supposed to take breaks or leave the unit. The Respondent also submits that the extant policy at the time required CNAs to report to a nurse manager or charge nurse if they needed to leave the unit either for breaks or at meal times. The Respondent asserts that Brown clearly knew the rule and policy and irrespective of her claim that CNAs did not always

comply with the reporting policy, she admitted that she (and they) were responsible for informing the charge nurse when leaving the unit.

The Respondent asserts that all of its witnesses attested to the CNA reporting policy unless the charge nurse is truly unavailable, and in such cases the CNA informs her coworker of her intention to leave the unit; and the coworker is expected to inform the charge nurse or nurse manager. The Respondent notes that Majewski, a charge nurse called by the General Counsel, testified that it is not acceptable for one CNA to tell another CNA of her intent to leave the unit instead of one of the (charge or manager) nurses.

The Respondent contends that Brown was disciplined for legitimate nondiscriminatory reasons and long-established policy, irrespective of her involvement with or support of the Union or her having engaged in protected activities, and that the charges should be dismissed as to her.

As I have noted earlier, there is no serious dispute—and the Respondent evidently concedes—that the General Counsel met his initial burden under *Wright Line* regarding Brown's discipline. There is no doubt that the Respondent knew (and has admitted through its management witnesses) of Brown's union involvement and support when it issued the respective disciplines to her on June 30 and July 29. It is also well established on this record that Brown had commenced her participation on the bargaining committee by June 30 and on July 28, when she had attempted to represent a coworker who had requested her assistance in meeting with management, both of which are activities that constitute protected activity. Accordingly, the timing of both disciplines supplies both a sufficient nexus between Brown's engaging in protected activities and the disciplines imposed, as well as a discriminatory motive in so disciplining her. The issue is whether the Respondent has met its burden through its defense—that is, that Brown violated Iroquois' rules and policies and that it would have imposed the disciplines on her irrespective of her union activities and other protected activities.

Regarding the June 30 discipline, it is significant to me that, first, the discipline emanated from the annual State audit of the Respondent's operations and Brown's misconduct involved resident care. I have previously stated that the Respondent is highly regulated and strictly monitored by the authorities, and deficiencies in the providing of care are seriously dealt with by those authorities, and derivatively the Respondent. So it would appear that imposing a major offense discipline on Brown for a resident care-related deficiency discovered by the State is not inappropriate, unreasonable, or unwarranted in my view. Second, I think it also significant that Brown admitted that she served the cereal cold and was queried about it by a State representative. While Brown offered her explanation for serving the cereal unheated (plausible, given her care experience with the resident), this evidently did not hold much water with the State and the deficiency was issued. Third, while I would agree with the General Counsel that similar (in some respects) but not identical infractions by other employees were punished less severely before the Union, I note that a number of employees received major offense disciplines for neglect of job duties—like Brown—stemming from the 2008 State audit. Fourth, I note that Robertson, who issued the Brown discipline, was not employed as the Respondent's director of nursing in 2007, having come on board in 2008. Robertson, in this instance, credibly testified that the 2007 audit disciplines were made by her predecessor and that she viewed neglect of care offenses and infractions as "major," and not susceptible to designation as general offense. In this regard, I am loathe to second-guess the Respondent and find a violation under the circumstances of Brown's June 30 discipline. In my mind, such a finding would unduly interfere with the Respondent's management's ability to meet its obligations to the State and to the residents. I would recommend dismissal of this charge.

Turning to Brown's July 29 discipline, I would find and conclude that the Respondent violated the Act in issuing this discipline.

First, I found Brown to be generally credible and sincere in her relating of the circumstances surrounding the disciplines and, moreover, she was candid in her responses on cross-examination and exhibited no hostility or grudge against the Respondent. Accordingly, I believe her testimony regarding the CNAs' practice of telling coworkers (where charge nurses were not available) when they leave the unit and that in all likelihood, the Respondent's managers were aware of the practice because the exigencies of providing care probably did not allow for strict compliance with the unwritten reporting policy.[102] However, I do not rely on this in my findings of a violation because in point of fact the CNAs—Brown included—knew of the official policy regarding reporting.

Instead, I rely on Brown's credible testimony regarding her encounter with Robertson on July 28, when she attempted to accompany her coworker to the meeting and was denied entry by Robertson. I also rely on her testimony regarding the disciplinary meeting with Robertson the next day in which Robertson told her not to lie about her presence at the meeting room and therefore being off the unit the day before. In this regard, Robertson, the director of nursing, knew where she was, why she was there, and in effect by refusing her admittance to the meeting directed her to return to the unit which I believe Brown did. Given these circumstances, I would find and conclude that while Brown technically did not adhere to the official reporting requirement, the Respondent's discipline of her for this failure was not the motivating factor in issuing the discipline. Rather, I would find and conclude that the Respondent's primary motive in disciplining her was for attempting to act as a representative for a coworker.

Moreover, I believe that the Respondent's defense is pretextual; that is, the discipline was basically manufactured to get back at her. It is significant to me that it appears from the record that Brown was the only CNA over a number of years who ever received a discipline of this type. Yet other nursing staff witnesses, for instance Rommevaux and Osbourne, testified that CNAs and nurses often have to leave the unit for various reasons and routinely tell other CNAs of their leaving when a nurse manager or charge nurse was not available. Surely over time, one would think, some other CNA must have violated the reporting policy if it was enforced uniformly and consistently as claimed by the Respondent. That Brown was the only one, at least brought to my attention at the hearing, buttresses my view that she was discriminatorily disciplined on July 29 in violation of the Act.

D. Khadijah Osbourne

The General Counsel asserts that the Respondent denied Osbourne weekend work hours as of June 27 and continuing to the present because of her union activities and support. He points specifically to an incident of June 22 when Osbourne asked another employee to complete a union survey and give it to CNA (and alleged discriminatee) Cruz. About 5 days later, he notes that the matter evidently having been reported to management, Robertson

[102] I indulge in this bit of admitted speculation based on Administrator Moshier's extensive testimony about the difficulties of providing care to the Iroquois resident community, her staffing issues including high turnover, and no-show employees. Certainly, with these issues probably occurring daily and in fast breaking fashion, the CNAs who have to leave for the bathroom, and perhaps obtain needed supplies, worked out their own system to advise each other of such needs to leave the unit because the charge nurse or nurse manager was equally involved in resident care issues or other administrative exigent matters and was not readily available.

removed Osbourne from weekend shifts explaining that she was under investigation for an incident—unexplained—occurring on June 22, the very day Osbourne asked an employee to complete the union survey.

The General Counsel further notes that, contrary to its position at the hearing, the Respondent has admitted that since June 27—not some time in July—it has denied Osbourne weekend work hours and that Robertson even confessed at the hearing that one of the reasons she removed Osbourne from the weekend shifts was because of the union survey matter which was the subject of a complaint by one of Osbourne's coworkers, Cheryl Lentz. The General Counsel submits that the Respondent's claim (through Moshier and Robertson) that Osbourne was removed around July 10 from weekends because of her involvement in the Dut/Marshall matter is a mere subterfuge and pretext for its unlawful action against union activist Osbourne. He notes that the Dut/Marshall matter arose around July 1, days after Osbourne's removal effective the weekend of June 27, so this could not be a legitimate reason to remove her from weekend assignments. The General Counsel submits that basically Moshier sought to punish and retaliate against Osbourne for her support of the Union.

Regarding the Respondent's denial of first-shift work opportunities to Osbourne, the General Counsel asserts that this was simply another part of the Respondent's pattern of unlawful discrimination against Osbourne because of her support of the Union. The General Counsel argues that in the aftermath of Robertson's denial of weekend hours to Osbourne, around July 17, she also informed Osbourne that there would be little opportunity for her to work first shifts because she had hired other LPNs to work that shift; after this Osbourne's first-shift opportunities were greatly reduced.

The General Counsel suggests that this move by the Respondent was purely and simply retaliatory because Robertson (and other management) was well aware that Osbourne preferred first-shift work during the summer months because of her family situation. He also notes that in spite of the Respondent's claim that there were no, or greatly reduced, first-shift work opportunities for Osbourne, the records clearly shows that Iroquois utilized agency nurses—at additional cost—on July 28 and 29, even as Osbourne specifically asked scheduler Jones whether there were first-shift opportunities on those days.

The General Counsel contends that in both instances the Respondent for unlawful reasons adversely affected Osbourne's employment in violation of the Act.[103]

The Respondent asserts that on June 22, 2008, one of Osbourne's colleagues, Cheryl Lentz, made a written complaint against her. Lentz' complaint essentially accused Osbourne of behaving inappropriately and unprofessionally and noted also that Osbourne's side of the unit was in poor condition, with unmade beds and dirty linen in evidence. Lentz also reported that she overheard two CNAs complain that Osbourne had harassed them over some paper. The Respondent notes that RN Supervisor Greer also documented her own observation of Osbourne's improper behavior, particularly on weekends which adversely affected both the work environment and relations between regular and agency nursing staff. These concerns and complaints were communicated to Robertson who just before her vacation undertook an investigation which was not completed before she left.

[103] The Charging Party focused on the two cases it believes were not resolved by the Union's settlement agreement with the Respondent, to be discussed later herein. The Osbourne case was one of the two. The Charging Party concurs with the General Counsel largely for the same reasons argued by him.

The Respondent asserts that in the meantime the Dut/Marshall matter arose and Moshier, in Robertson's absence, undertook (along with Field) her own investigation. In the end, rather than issuing Osbourne a formal disciplinary action, Moshier recommended to Robertson that Osbourne be removed from weekends because Dut worked only on weekends and under the circumstances brought out in the investigation, this was the better course.

The Respondent submits that the credible testimony of its witnesses clearly demonstrates that Iroquois took Osbourne off of weekend duty for legitimate and nondiscriminatory reasons and not because of her union activities and support.

As with the preceding discussion of the alleged discriminatees, there is no serious dispute about Osbourne's known union support, involvement, and activism. Also in my view, the credible evidence—both testimonial and documentary—clearly supports an inference that Osbourne may have been the subject of special interest to the Respondent during the union organizing campaign.

Along those lines, the testimony of Sawyer looms large. The Respondent asserts her lack of credibility and strong bias against its management for essentially terminating her because of her poor performance. However, I found Sawyer to be eminently credible and straightforward in her presentation. Sawyer candidly even stated that she was not particularly fond of the Union because it had failed in her view to represent adequately her son in a dispute with his employer. I note also that when the Respondent had the opportunity to cross-examine her, it did not ask her any questions about her relationship with other employees or managers and specifically her on-the-job conduct's effect on the decision of coworkers to leave the Respondent's employ, as claimed by Moshier. Instead, the Respondent chose to bring into question through Moshier her credibility after Sawyer had testified. I note that in spite of Sawyers purported poor performance, Moshier did not produce what I would call a credible termination document for Sawyer; rather she produced a memo she authored to explain Sawyer's departure from Iroquois. I found this document to be irregular on its face as a proper official business record and its contents did not stack up to Moshier's testimony about Sawyer's performance. In all candor, the document seemed to me to be fabricated and therefore of dubious reliability. Accordingly, I would find and conclude that the General Counsel has convincingly met his burden under *Wright Line* to establish a violation of Section 8(a)(3) and (1) of the Act regarding the Osbourne allegations.

The issue then becomes did the Respondent establish by the preponderance standard that it took the job actions against Osbourne irrespective of her union activity and for legitimate business reasons.

In agreement with the General Counsel (and Charging Party), I would find and conclude that the Respondent did not. I would find and conclude that the Respondent violated the Act both in denying Osbourne weekend work as well as day shift work opportunities because of her union activities. My reasons are as follows.

First, in agreement with the General Counsel and Charging Party, Robertson altered her story and testimony regarding Osbourne's being denied weekend hours. Significantly, the Respondent in its answer admitted that Osbourne was removed from weekends on June 27. This clearly, in my view, must have been based on the email query during the Board investigation in which Robertson responded in the affirmative that Osbourne was taken off of weekends as of that date. Notably, the report relied on by Robertson related to her circulating a union survey among the workers.

It bears reminding that Sawyer credibly testified that weekends were especially to be monitored during the election campaign. It seems that even after the election there were or may have been some residual concerns about employee union activities of the type engaged in by Osbourne on weekends, which in turn serves as a motive to take her off weekends.

Be that as it may, Robertson's credibility suffered mightily when she changed her testimony at the hearing, in my view to give false credence to Moshier's investigation of the Dut/Marshall matter and Osbourne's involvement therein.

Turning to the Dut/Marshall matter, the Respondent's claim that this was the real justification for denying Osbourne weekends, with all respect, in my eyes borders on the ludicrous. Notably, most of the parties to the affair—Marshall, Matoup, Guarak, or Deng—were not called to testify and no reason was given for their nonappearance. The Respondent did not even call Manager Balamut whose statement was included as part of the Respondent's investigation.

Osbourne, however, did testify, and her version of the underlying events and her involvement therein were borne out by the Respondent's investigation. In point of fact, Osbourne, as any reasonable person dealing with the entire affair would conclude, had done nothing wrong with respect to Dut or anyone else associated with his supposed sexual harassment of Marshall. In agreement with the Charging Party, the Respondent, in my view, simply inflated her involvement and imposed on her a duty—to inform management—that was simply not her responsibility. Notably, it is clear that the supposed victim of the harassment, Marshall, had already reported the matter to Manager Balamut, and one is left to wonder what more would Osbourne report about Marshall's claim of harassment.

Also, the Respondent's supposed main reason for taking Osbourne off weekends—Dut's fear of her—in addition to being unsubstantiated on the record (he did not testify) frankly does not pass the smell test. Notably, Osbourne not only testified at the hearing, but attended every session as the Charging Party's designated representative. Accordingly, I had the opportunity to observe her. Osbourne presented as a petite, very composed, and dignified person who all admit was a good and competent charge nurse interested in self-improvement and professional advancement. It strains credulity that the Respondent would advance that Dut, a grown man, would be struck with such fear that he could not work with the small-framed Osbourne.

I have considered the Respondent's claim that it removed Osbourne from weekends because of her supposed involvement in the Dut/Marshall matter and because Dut could not work with her and would find, as Osbourne herself intimated on the witness stand, that this whole matter was a fabrication and as such was a pretext for unlawful action against her.

Turning to the alleged denial of first-shift opportunities to Osbourne, while under ordinary circumstances I would be loathe to question an employer regarding its staffing decisions, not only because per diem workers like Osbourne in the Respondent's nursing hierarchy fall below full-time and part-time nurses in terms of shift prerogatives, but also because the Board admonishes judges not to second-guess the legitimate business decisions of employers. However, Osbourne's case presents a different situation.

In view of my findings regarding the unlawful denial of weekend hours to Osbourne, I would in likewise find and conclude that the Respondent also unlawfully denied her first-shift opportunities. In this regard, I am most persuaded by the Respondent's use of the more expensive agency nurses on the day shift Osbourne specifically requested. However, the

lengths to which the Respondent went to concoct a justification to take Osbourne off of weekends in my view irredeemably tainted its defense to the first-shift denial allegation. The Respondent's defense in my view was wholly pretextual.

I would find that the Respondent violated the Act in both instances regarding its treatment of Osbourne.

E. The Suspension and Discharge of Esperanza "Espi" Cruz

Noting that Cruz was a longtime known union sympathizer and activist, the General Counsel asserts that the Respondent suspended and terminated Cruz because of her union activities, which included support of her sister workers during the Respondent's investigatory interviews and participation on the union bargaining committee.

The General Counsel submits that direct evidence of the Respondent's animus against Cruz' activities is evident from its discipline of her on March 9, a mere 2 days after the Union's successful election, for failing to report (accurately) an incident in which she was almost knocked to the floor by another employee, which Moshier decried as a "union tactic."

The General Counsel also contends that the Respondent's unlawful motivation is clearly suggested by the Respondent's clear targeting of a bargaining committee member like Cruz, but also Brown, Rudolph, and Rommevaux, during the time the Union and it were bargaining for a contract. He notes that Cruz was quoted in an August 2008 union newsletter of which the Respondent was aware about a month before she was suspended and later terminated.

The General Counsel submits that the Respondent's proffered reasons for terminating Cruz are a mere pretext, essentially, the Respondent's attempt to concoct so-called admissions—not following or consulting a resident's care tracker or treatment program and not changing the resident's briefs—when in fact the Respondent knew that Cruz told Moshier that she "of course" looked at the care tracker before and while providing care to the injured resident. The General Counsel suggests that the Respondent in its zeal to frame Cruz even expanded (shifted) its claim to include Cruz' failure to consult the care tracker for all residents, not just the one injured. Moreover, the General Counsel contends that in point of fact Cruz documented her care of the injured resident—including the changing of her briefs—which fact was known or should have been known by the Respondent through its investigation which proved that Cruz made an entry on the care tracker at 12:27 p.m. the day of the resident's injury. The General Counsel submits that contrary to the Respondent, this was the resident's morning care as opposed to afternoon care and besides, it was a well-established practice at Iroquois for CNAs to make their care tracker entries when they could. He also notes that the Respondent, in a bargaining update issued to its employees, stated that Cruz was not terminated for failing to change a resident.

Regarding the suspension of Cruz, the General Counsel argues that Cruz was treated disparately in that CNA Peter Keirn was responsible for the resident's care immediately after Cruz' tour ended and the injury was actually discovered on his tour. Yet, he was absolved (capriciously) of all responsibility for the injury as a result of the Respondent's "investigation," leaving Cruz and another CNA holding the bag for an incident that on an objective basis took place after they had left for the day. All in all, the General Counsel submits that the Respondent violated the Act when it suspended and terminated Cruz.[104]

[104] The General Counsel notes in passing that even if, arguendo, Cruz admitted to not

Continued

The Respondent essentially contends that based on its credible investigation of the injured resident and the equally credible testimony of the investigators, Moshier, Sherlock, and Fish, it did not violate the Act in deciding both to suspend and ultimately discharge Cruz.

The Respondent first notes that injuries to residents must be investigated and reported to the State, and employees involved must be suspended pending completion of the investigation. This was done in the case of Cruz and sister CNA Sanders, the individuals determined by it to be involved most prominently in the resident's care before discovery of her injury. The Respondent contends that both employees were interviewed and asked the same or similar questions about the care each rendered.

The Respondent asserts that the testimony of Moshier, Fish, and Sherlock, coupled with their contemporaneous documented findings and conclusions, should be given great weight. The Respondent contends that on this score management determined from its interview of Cruz (and Sanders as well) when questioned about her use of a two-person assist instead of the care plan directed one-person assist, she admitted that she did not look at the care tracker regarding the care she provided to the injured resident. The Respondent asserts there is no dispute that CNAs are required absolutely to check the care plan before rendering care. The Respondent also contends that under its consistently administered disciplinary scheme, a failure to follow the care plan constitutes neglect of job duties and failure to follow job instructions—a major offense. With respect to Cruz, by dint of her admission, she committed a major offense, her third which under the disciplinary policy mandated discharge on October 7, 2008. The Respondent notes that Sanders who made admissions similar to Cruz was also issued a major offense discipline, but that this was only her second which did not warrant discharge.

The Respondent also submits that Cruz was not credible and notes her having gone "back and forth" on several points during her testimony. The Respondent argues that in contra-distinction, Moshier, Sherlock, and Fish testified in a highly credible fashion, their testimony being forthright, consistent, detailed and coherent, accurate and truthful. All in all, the Respondent contends that Cruz was suspended and terminated in accordance with its longstanding policy and practice and, therefore, for legitimate and nondiscriminatory reasons having nothing to do with her union activities or support.

With Cruz, it appears we come full circle in this case. I recall at the hearing the Respondent, mainly through Moshier—at some length describing the nature of the health services business and its experience and operations therein in particular. Moshier related the complexities and difficulties of operating a nursing and rehabilitative care facility in a highly regulated and competitive business environment. Moshier also specifically related the problems associated with nurse staffing and retaining qualified nursing staff, the CNAs in particular who work at relatively low pay and often under very difficult, trying, and arduous working conditions. Nonetheless, CNAs have to comply with very stringent regulations and work rules to deliver quality care for the residents. I have previously incorporated those matters in my findings of fact herein.

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looking at the care plan or changing the resident's briefs, this type of behavior, based on the Respondent's discipline of employees who may be said to have committed a similar information—failure to follow the care plan—Cruz should not have received a major offense as opposed to a general in which case she would not have been terminated. The General Counsel suggests that Cruz was treated disparately in this regard.

This brings me to Cruz. At the time of her termination in October 2008, Cruz had been working in the same CNA job for about 16 years, presumably following and complying with the Respondent's policies and procedures without fail, with the exception of three occasions. In this regard, Cruz' disciplinary record discloses that at the time she was terminated on October 7, 2008, she had been issued a total of four disciplines, two of which occurred on February 18 and July 26, 2005; one of which took place on March 6, 2007; and finally her last before discharge on March 12, 2008, several days after the Union won the election.[105]

Of these four prior disciplines, only two involved allegations that Cruz did not follow the care plan of a resident. In July 2005, Cruz did not ensure that a resident's wheelchair was properly secured as required by her care plan, resulting in a fall and the need for an X-ray of the resident's hip.[106] On March 6, 2007, Cruz allegedly did not see that a resident's heels were raised off her mattress as required by her care plan, resulting in the issuance of a deficiency by the State.

Thus, over a 16-year career working a demanding and often tedious job as a CNA, Cruz, accumulated actually only two disciplines that could be construed to relate to resident care and ostensibly a failure to follow the prescribed care plan. It clearly then follows that over her career, Cruz most certainly complied with and followed to the letter the care plans associated with the care she provided residents. In my view, to an equal certainty, over the years, the Respondent knew that she was in compliance with its rules, regulations, and procedures and regarded her at the least as a good if not exceptional nurse.

It is equally clear on this record that the Respondent knew that Cruz was a union supporter of longstanding and, actually, was an activist for the Union's cause during the campaign; and that ultimately she served on the bargaining committee. Notably, the Respondent does not contest Cruz' union activities and support or its knowledge thereof. For purposes of *Wright Line*, I would find and conclude that the General Counsel has more than sufficiently met his burden to show Cruz' union or other protected activity as well as the Respondent's knowledge thereof. It is also clear that the General Counsel has demonstrated that Cruz suffered an adverse action, that is, her suspension on October 2 and termination on October 7, 2008, at the hands of the Respondent. The question is whether the General Counsel has sufficiently established the nexus requirement detailed by *Wright Line*.

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[105] The July 26, 2005 discipline was Cruz' first major offense and involved not following a resident's care plan; the February 18, 2005 discipline involved Cruz' inability to get along with residents and was deemed a general offense. See R. Exh. 28. Cruz' March 6, 2007 discipline involved a failure to follow the resident's care plan and was deemed a general offense. See R. Exh. 27.

Regarding Cruz' March 12, 2008 discipline, Cruz indicated in an investigation report on March 10, that on March 9 she was almost hit by a maintenance man's cart and only luckily avoided being knocked to the floor. Cruz stated that she reported the incident to the local police who never responded to the facility as far as she knew. In the ensuing investigation by the Respondent, additional statements were taken, including one from the maintenance man, Supervisor Susan Greer, and another employee, Tonya Miller. In the end, Cruz was issued a major offense over her alleged failure to report the matter to the Respondent in a satisfactory manner. Cruz was suspended for 3 days. See R. Exh. 26. This discipline was issued by then-Director of Nursing Robertson and became Cruz' second major offense.

[106] The discipline report is difficult to read; this is my reading and interpretation of what happened to the resident.

I would answer that question in the affirmative. This brings me to the Respondent's investigation, mainly through Fish, of the injury to the resident on October 1 during the pendency of which Cruz and a sister CNA, Sanders, were suspended.

As noted previously herein, the Board has indicated that an investigation by an employer of employee misconduct may supply the *Wright Line* evidentiary requirement of unlawful motive. Notably, based on my research, the Board has not enunciated specific standards or criteria—aside from the full and fair rubric—for either a sufficient or insufficient investigation of employee misconduct that may establish or negate the worthiness of any employer's investigation of employee job-related transgressions; evidently the Board test of sufficiency/insufficiency redounds to a case-by-case factual analysis. However, in my view, as I have previously stated, any legitimate investigation of employee misconduct occurring in the context of the exercise of an employee's protected rights should at a minimum be promptly undertaken, thorough, and impartial. It is with this "standard" in mind that I have once more examined the Respondent's investigation of the resident's injury; and, based thereon, I would find the Respondent lacking. My reasons are as follows.

First, let it be said that the Respondent did commence its investigation promptly. However, on the criteria of thoroughness and impartiality, in my view the investigation was woefully inadequate. On this score, the Respondent, mainly through Fish, determined that the injury to the resident had to have occurred during the time Cruz, Sanders, and Keirn provided care to the resident. Fish later determined that based on the coagulated blood at the resident's wound site, the injury had to have occurred only during the time Cruz and Sanders provided care. Fish accordingly ruled out Keirn's care as a possible cause of the injury.

However, on cross-examination, Fish could not explain what was the normal rate of coagulation in humans.[107]. Accordingly, Fish's use of coagulation as a time-line component of her investigation efforts is seriously in question.

Then there are Keirn's statements[108] about the incident; Keirn incidentally did not testify at the hearing. Keirn stated that he began his care duties to the resident at about 3:30 p.m. on October 1, 2008, and noticed that the resident had what appeared to him to be dried cranberry juice on her chin and down the side of her mouth; Keirn merely wiped the stain off and evidently did not examine her mouth. Keirn went on to state he noticed nothing unusual about the resident's condition, although about 15 minutes later he related that visiting family members noticed a tooth missing and blood in her mouth.

Fish clearly accepted at face value Keirn's version of the incident-free care he may have provided as well as his statement that he observed no signs of either pain, anxiety, or injury to the resident. On the other hand, Cruz' statement in which she specifically mentions providing the resident mouth care and seeing no injury, let alone "cranberry juice," and otherwise seeing nothing unusual in the resident's condition, was not accepted by Fish. In likewise, Sanders,

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[107] Osbourne by contrast, when asked, readily provided an answer to this query, saying that it was 10 minutes.

[108] Keirn provided to Fish a statement about the incident on October 1 and 2, 2008; his statements are contained in GC Exh. 8. Notably, Keirn, who only saw what he viewed as dried cranberry juice on the resident's mouth, stated that the visiting family (and a nurse) noticed blood in the resident's mouth, a missing tooth, and a cut on her tongue, all after he had performed pericare and other grooming on the resident a mere 15 minutes prior to the discovery of the injury.

who worked with Cruz in providing care to the resident, said in her statement she also did not notice anything physically amiss with her. Yet, these two were suspended pending completion of the investigation, while the caregiver who actually saw possible evidence of injury and reported nothing of the sort to management was completely exculpated by Fish. In my view, Fish's ruling out Keirn as a possible suspect in the resident's injury under the circumstances casts serious doubt on the Respondent's intent to investigate thoroughly and impartially the incident over which Cruz was suspended.[109]

I also have serious reservations about the impartiality of the investigation, specifically with Fish, the person charged with conducting it. It may be remembered that Sawyer testified, and credibly in my view, about the Respondent's tactic of or strategy to impose discipline on union supporters basically, with a view toward getting rid of them. Sawyer also testified that Fish was especially in favor of this plan and had to be admonished not to go overboard in furtherance of this scheme. Accordingly, I would find and conclude that Fish, the main investigator for the Respondent regarding the injured resident, may have possessed hostility to union adherents like Cruz and, therefore, her investigation was not imbued with sufficient impartiality.

All in all, I would find and conclude that the Respondent's investigation of the injured resident was unfair and discriminatorily targeted Cruz because of her union activities. Accordingly, in my view, the General Counsel has met his initial burden to connect Cruz' suspension pending investigation on October 2 with her known engagement in union or other protected activities.[110]

Turning to Cruz' ultimate discharge on October 7, it is notable that the investigation of the injured resident, all parties agree, was deemed inconclusive; that is, the source or cause of the injury could not be determined. However, according to the Respondent, in the course of the investigation, Cruz admitted to Moshier, Sherlock, and Fish that she not only did not perform incontinence care to the injured resident after breakfast on October 1, 2008, but also did not review the resident's care plan/care tracker prior to performing resident care. Because this infraction was deemed "major" and constituted Cruz' third major offense under the progressive disciplinary scheme, she was properly terminated.

To be sure, if Cruz had made such admissions, there would be no question that a discipline of the major type would be warranted; and since there is no allegation that the Respondent's disciplinary scheme was unlawful facially or in practice over the years, Cruz' termination would also be warranted and justified in spite of her union activities.

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[109] It occurred to me during the hearing that Fish never thought to explore Keirn's statement regarding his observation of cranberry juice on the resident's chin and around her mouth. Did the Respondent serve the cranberry juice at all; was this a menu item? Would the resident be served cranberry juice at 3 p.m.? The answers here could theoretically have influenced a proper investigation.

[110] I note that Sanders was also suspended at the same time as Cruz because of the injury. In my view, Sanders was probably included in the suspension simply to give cover to Cruz' suspension. I note that Sanders, who testified for the Respondent, believed initially that she was being suspended because of the Respondent's antipathy to Cruz. Sanders later "confessed" to certain charges relating to resident care failures on her part but she was not discharged; the suspension days were her only punishment.

However, I do not believe that Cruz made any such admissions. My reasons are as follows.

First, considering the nature of the CNA job with all of its attendant complexities and difficulties, Cruz' record was exemplary in my view. I cannot conceive of a person working this job for over 16 years, providing care to what clearly are fragile and helpless people, admitting—confessing as it were—that she did not provide appropriate care, here changing briefs, to a resident, a demented person also suffering from incontinence and mobility issues, and not checking with the care plan prior to rendering care to this resident or others. This seems especially incredible because on the date in question Cruz "floated" to a floor in which she did not work and was unfamiliar with her resident charges.

I viewed Cruz (and her record supports this) as a very conscientious nurse who would not render care to a stranger resident without checking her care plan. Also, I cannot conclude that Cruz was so lazy or uncommitted that she would rely on a coworker's word about a resident's care needs. This would not be consonant with Cruz' career record with the Respondent.

I note in this regard Cruz did have two incidents in her tenure relating to a purported failure to follow a resident's care plan. However, she was warned about these, and significant to me she owned up to the charge by signing off on the discipline form. Notably, she refused to sign the October 7 discipline, believing—as she testified—the allegations were untrue.

I note also that the care tracker record for October 1 indicates that Cruz did provide total care to the resident in question, including changing her briefs that morning. The only discrepancy was that Cruz made her entry at 12:27 p.m., technically the afternoon. However, Cruz testified that she made the entry when she had time—she had other residents to attend to—and that lunch did not start for the residents until 12:30 p.m. The Respondent surely must have had this document during the investigation between October 1 and 7, and the care record clearly runs counter to any assertion that Cruz admitted that she did not provide care and did not check the care tracker. This record almost singly undermines any contention that Cruz admitted to not changing the resident's briefs and, more particularly, that she did not consult the care tracker before rendering care.

The Respondent's treatment of Cruz regrettably appears to conform to its treatment of some of the other alleged discriminatees, all of whom except Osbourne no longer work for the Respondent. Basically, it seems that with respect to several of the union supporters and alleged discriminatees, the Respondent frames a charge, convenes a meeting whereat the employee has no representative but is clearly outnumbered by managers, who then write up self-serving reports indicating that the employee "confesses" to the charge or makes "admissions" to that end, and some adverse action or discipline ensues. I believe this approach was taken with respect to Cruz and in my view further supports the unlawfulness of her termination.[111]

I note in passing that while the Respondent's witnesses—Moshier, Sherlock, and Fish—testified that Cruz made her admissions "freely," I frankly did not believe them. On the other hand, I listened to Cruz, witnessed her demeanor on the stand, and specifically asked her if she had made the statements attributed to her. She looked me in the eye and denied making any

[111] I note that this "stacked deck" approach was also employed if not perfectly with respect to Rommevaux, Rudolph, and Osbourne.

such admissions. As I have noted, Cruz exhibited some difficulty with English, but was able in my view to explain her case honestly, forthrightly, and sincerely. I note also that perhaps in the interview with management, her difficulties with English expression possibly could have caused some confusion. However, in my mind, Cruz' expressive difficulties should not have led the Respondent to conclude that she made the admissions attributed to her. In short, in my view, Cruz' so-called admissions were concocted by the Respondent, and as such were pretextual.

Based on the foregoing and the entire credible evidence of record, I would also find and conclude that the Respondent's termination of Cruz on October 7 was unlawful.

VI. An Ancillary Matter: The Union and the Respondent's Settlement Agreement

On or about December 11, 2008, the Respondent and the Union entered into an agreement entitled "Iroquois Tentative Contract Settlement Agreement 12/11/08."[112] This agreement in the main constitutes the parties' negotiated collective-bargaining agreement which was subsequently ratified and became effective sometime after December 11.

This agreement also contains the following provision in a footnote:

> The parties also agree that all pending unfair labor practice charges will be withdrawn, except the charges involving Kadijah Osbourne and Esperanza Cruz. The parties agree to settle the charges involving Tammy Parker and Jurina Williams by reducing the disputed written warnings to verbal warnings; to reduce the major offense issued to Demmetrics Brown on June 30, 2008 to a general offense; and to remove the discipline issued to Demmetrics Brown on July 29, 2008. The parties agree to take all actions necessary to obtain a dismissal by the National Labor Relations Board of the charges that are being withdrawn and/or settled.

At the hearing, the Respondent requested by oral motion that the charges relating to Demmetrics Brown, Ashley Rudolph, and Carol Rommevaux be dismissed in accordance with the terms of the purported settlement between Iroquois and the Union. The Union did not oppose the motion and in its brief stated that the Respondent and it reached a non-Board settlement with regard to most of the then-pending unfair labor practice charges, with the exception of those involving Osbourne and Cruz, implicitly agreeing with the Respondent that the Brown, Rudolph, and Rommevaux charges should be dismissed.[113] The Respondent renewed its motion in its trial brief. The General Counsel, however, opposed the motion, consistent with his nonapproval of the settlement in the first instance, and in his brief continued in his opposition.

While my rulings on the complaint have made the Respondent's motion somewhat moot, or in practical effect it has been denied by me, I find it necessary to deal with the issue as an ancillary matter.

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[112] See Jt. Exh. 1.

[113] Consistent with its stance, the Union's brief, while acknowledging that the evidence relevant to the Brown, Rudolph, and Rommevaux charges is also relevant to establishing the Respondent's animus against it, addressed principally the Osbourne and Cruz complaint allegations. CP Br. at p. 2.

As noted by the General Counsel, the leading case dealing with the acceptance of settlement agreements is *Independent Stave Co.*, 287 NLRB 740, 743 (1987). Under *Independent Stave*, the Board considers the following factors:

> (1) whether the charging party[ies], the respondent[s], and any of the individual discriminatee[s] have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes.

Applying these standards, clearly the General Counsel disapproves of the settlement, as stated earlier. In his brief, he notes that the parties' settlement agreement by its terms provides no remedy for Rommevaux's request for union representation at her disciplinary meeting; also there is no remedy for Rudolph's discipline contained in the agreement. He further asserts there is no language relating to protections against further misconduct. Moreover, none of the discriminatees supposedly the subject of the agreement agreed to be bound by it.

The General Counsel notes further that litigation was not avoided in this case, the motion was made at a late stage (at the hearing) of the litigation, and the parties by going to trial assumed the risk of litigation. Finally, the General Counsel submits that the remaining allegations, those relating to Osbourne and Cruz, remained unsettled since the agreement did not cover them. The General Counsel requests that the parties' non-Board settlement be rejected and the Respondent's motion be denied.

I am in agreement with the General Counsel, largely for the reasons and authority cited by him,[114] that the parties' non-Board agreement does not satisfy the *Independent Stave* standards governing the acceptance by a judge of a settlement agreement.[115] In this regard, I am particularly persuaded to reject the agreement because neither of the supposedly covered alleged discriminatees here—Brown, Rudolph, or Rommevaux—signed on to the agreement, and neither the Union nor the Respondent made any inquiry of them regarding the proposed settlement when each testified at the hearing. I inferred from this omission that the three did not approve of any settlement of the unfair labor practices relating to them.

Accordingly, the Respondent's motion to approve of the parties' settlement agreement as it relates to the charges in the instant case is denied.[116]

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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[114] See *Flint Iceland Arenas*, 325 NLRB 318 (1998).

[115] I note that there is no evident fraud, coercion, or duress by any of the parties herein in reaching the settlement, and there is no evidence that the Respondent has engaged in a history of violations of the Act or breached previous settlement agreements involving unfair labor practices.

[116] My ruling has no bearing or effect on the purported settlement of any matters involving individuals not covered by the allegations of the complaint in this case.

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

3. The Respondent violated Section 8(a)(1) of the Act, by refusing to allow Carol Rommevaux to have union representation at the July 28, 2009 investigatory interview.

4. On or about July 10, 2008, the Respondent violated Section 8(a)(1) and (3) of the Act by disciplining employee Ashley Rudolph.

5. On July 29, 2008, the Respondent violated Section 8(a)(1) and (3) of the Act by disciplining employee Demmetrics Brown.

6. On or about June 27 and July 17, 2008, the Respondent violated Section 8(a)(1) and (3) of the Act by denying employee Khadijah Osbourne weekend work hours and opportunities to work on the first shift.

7. On or about October 2 and 7, 2008, the Respondent violated Section 8(a)(1) and (3) of the Act by suspending and discharging employee Esperanza Cruz.

8. The unfair labor practices found above affect commerce within the meaning of Section 2(6) and (7) of the Act.

9. The Respondent has not violated the Act in any other manner.

Remedy

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

Specifically, the Respondent's having discriminatorily suspended and discharged employee Esperanza Cruz, denied weekend work hours and opportunities to work on the first shift to employee Khadijah Osbourne, disciplined employees Demmetrics Brown and Ashley Rudolph, and denied employee Carol Rommevaux's requests for the presence of a union representative and continuing to question her during meetings in which she reasonably feared that discipline may result, it must offer immediate reinstatement to Cruz of her former job or, if the former job no longer exists, to a substantially equivalent position without prejudice to her seniority or other rights previously enjoyed and make her whole for any loss of earnings and other benefits suffered by her as a result of her discriminatory suspension and discharge; and make Osbourne whole for any loss of earnings and other benefits suffered as a result of her discriminatory removal from weekend and denial of first-shift work opportunities; and remove from its files any references to the suspension and termination issued to Cruz and the disciplines issued to Rommevaux, Brown, and Rudolph, and notify them in writing that this has been done and that the unlawful actions will not be used against them in any way. Backpay shall be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

I also recommend that within 14 days after service by the Region, the Respondent be ordered by Region 3 to post at its facility copies of an appropriate "Notice to Employees," a copy of which is attached hereto as "Appendix," for a period of 60 consecutive days in order that employees may be apprised of their rights under the Act and the Respondent's obligation to remedy its unfair labor practices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[117]

ORDER

The Respondent, Iroquois Nursing Home, Inc., Syracuse, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Suspending, terminating, or otherwise disciplining employees because they engaged in activities on behalf of the 1199 SEIU, United Healthcare Workers East (Union).

(b) Denying weekend work hours or opportunities to work on the first shift because employees support the Union.

(c) Denying requests for the presence of a union representative and continuing to question employees during meetings in which they reasonably fear that discipline may result.

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

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

(a) Make employee Esperanza Cruz whole for any loss of earnings and other benefits suffered as a result of her discriminatory suspension and discharge, with interest.

(b) Offer Esperanza Cruz 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.

(c) Make employee Khadijah Osbourne whole for any loss of earnings and other benefits suffered as a result of her discriminatory removal from weekend and denial of first-shift work opportunites, with interest.

(d) Offer Khadijah Osbourne opportunities to work weekend and first shifts, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(e) Remove from its files any references to the suspension and termination issued to Esperanza Cruz, and the disciplines issued to Carol Rommevaux, Demmetrics Brown, and Ashley Rudolph, and notify them in writing that this has been done and that the unlawful actions will not be used against them in any way.

(f) Within 14 days after service by the Region, post at its facility in Syracuse, New York, copies of the attached notice marked “Appendix.”[118] Copies of the notice, on forms

[117] 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.

provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 27, 2008.

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

Dated, Washington, D.C. November 25, 2009

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Earl E. Shamwell Jr.
Administrative Law Judge

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

JD–57–09
Syracuse, NY

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 on your behalf with your employer
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT do anything which interferes with, restrains, or coerce you with respect to these rights. More specifically,

WE WILL NOT discriminate against you by suspending, terminating, or otherwise disciplining you because you engaged in activities on behalf of the 1199 SEIU, United Healthcare Workers East (Union).

WE WILL NOT deny you weekend work hours or opportunities to work on the first shift because you support the Union.

WE WILL NOT deny your requests for the presence of a union representative and continue to question you during meetings in which you reasonably fear that discipline may result.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the Act, as set forth at the top of this notice.

WE WILL make employee Esperanza Cruz whole for any loss of earnings and other benefits suffered as a result of her discriminatory suspension and discharge, with interest.

WE WILL make employee Khadijah Osbourne whole for any loss of earnings and other benefits suffered as a result of her discriminatory removal from weekend and denial of first-shift work opportunities, with interest.

WE WILL, within 14 days of this Order, offer Esperanza Cruz 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, within 14 days of this Order, offer Khadijah Osbourne opportunities to work weekend and first shifts, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days of this Order, remove from our files any references to the suspension and termination issued to Esperanza Cruz, and the disciplines issued to Carol Rommevaux, Demmetrics Brown, and Ashley Rudolph, and WE WILL, within 3 days, notify them in writing that this has been done and that the unlawful actions will not be used against them in any way.

IROQUOIS NURSING HOME, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

111 West Huron Street, Federal Building, Room 901
Buffalo, New York 14202-2387
Hours: 8:30 a.m. to 5 p.m.
716-551-4931.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 716-551-4946.

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

IROQUOIS NURSING HOME, INC.

and

1199 SEIU, UNITED HEALTHCARE WORKERS EAST

Cases 3–CA–26766
3–CA–26767
3–CA–26794
3–CA–26805
3–CA-26874

TABLE OF CONTENTS