

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

ALTA BATES SUMMIT MEDICAL CENTER

and

**Case 32-CA-24459
32-CA-24469
32-CA-24470**

NATIONAL UNION OF HEALTHCARE WORKERS

**CHARGING PARTY'S ANSWERING
BRIEF TO RESPONDENT'S EXCEPTIONS**

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I. PRELIMINARY STATEMENT

On June 16, 2010, Administrative Law Judge Burton Litvack, hereinafter “the Judge” or “ALJ”, issued his decision in the above-captioned case. In this decision or “ALJD”, the Judge correctly concluded that Respondent violated Sections 8(a)(1) of the Act when it engaged in surveillance of its employees’ union activities on March 20 and March 23, 2009;¹ and violated Section 8(a)(1) and (3) of the Act by redefining and discriminatorily enforcing its existing solicitation/distribution policies at its Summit Hospital campus cafeteria on March 20 and its Alta Bates Hospital campus cafeteria on March 23; and Section 8(a)(1) and (3) of the Act by issuing a disciplinary warning to Griffith on February 23, by suspending Griffith on March 24, and by discharging her on April 6.

On July 28, 2010, Respondent filed its “Exceptions to the Decision and Recommended Order of the Administrative Law Judge” and brief in support thereof. Pursuant to the Board’s Rules and Regulations, Series 8, as amended, Section 102.46, attorneys for the Charging Party

¹ All dates hereafter refer to 2009 unless otherwise indicated.

hereby file the following Answering Brief to said Exceptions and urges herein that the Board affirm the Judge's decision in its entirety.

II. THE JUDGE'S FINDINGS

A. THE JUDGE MADE APPROPRIATE FINDINGS OF FACT

In support of his correct conclusions that Respondent violated Sections 8(a)(1) of the Act when it engaged in surveillance of its employees' union activities on March 20 and March 23; violated Section 8(a)(1) and (3) of the Act by discriminatorily enforcing its existing solicitation/distribution policies at its Summit Hospital campus cafeteria on March 20 and its Alta Bates Hospital campus cafeteria on March 23; and violated Section 8(a)(1) and (3) of the Act by issuing a disciplinary warning to Griffith on February 23, by suspending Griffith on March 24, and by discharging her on April 6, the Judge made the following factual and credibility findings:

1. Background Facts

The Parties

Respondent is a California non-profit corporation, and, since 1992, it has owned and operated four hospital facilities in northern California, including its Summit Hospital facility, herein called the Summit Hospital campus, located in Oakland, and its Alta Bates Hospital facility, herein called the Alta Bates Hospital campus, located in Berkeley, at which it provides acute-care, emergency, medical, and surgical services. (ALJD 3:6-10; GC 1(g), 1(i)).² The

² Throughout this Brief, references to the Administrative Law Judge's Decision, the underlying transcript, and exhibits will be abbreviated as follows:

Administrative Law Judge's Decision	ALJD (followed by page number)
Underlying transcript	Tr. (followed by page number)
General Counsel's Exhibits	GC (followed by page number)
Respondent's Exhibits	R (followed by page number)

hospital was been unionized prior to Respondent acquiring it in the early-1990s. (ALJD 3:10-15).

Respondent's various employees are represented for purposes of collective-bargaining by labor organizations, with its service employees, including the environmental services employees, represented by the Service Employees International Union, United Healthcare Workers—West, (herein "SEIU-UHW"), since, at least, 1978. The most recent collective-bargaining agreement between SEIU-UHW and Respondent was effective from February 14, 2006 through June 30, 2008. (ALJD 3:11-18; GC 3; Tr. 44).

On approximately January 26, the Service Employees International Union ("SEIU") placed its affiliate SEIU-UHW into trusteeship. (ALJD 3:18-20; Tr. 49, 58, 503). Subsequently, the former leadership of that group of SEIU-UHW formed the National Union of Healthcare Workers ("NUHW" or "Charging Party") to represent healthcare employees and bargain with employers, including Respondent. (ALJD 3:20-23; T. 59). By January 29, several of Respondent's service employees commenced circulating a petition, designed to decertify SEIU-UHW and to certify the NUHW as their collective-bargaining representative. (ALJD 3:23-26; Tr. 54, 60, 62-64, 95-96, 219). After approximately 70 percent of said employees had executed the petition, several of them went to the office of Respondent's chief operating officer, presented the petition to his secretary, and verbally demanded that Respondent recognize the NUHW as their bargaining representative. (ALJD 3:26-30; Tr. 54-55, 63-71). In February, the NUHW filed a decertification petition with the Board, which remains pending. (ALJD 3:30-31; Tr. 54-55, 58-60).

Bruce Hatten is an Employee and Labor Relations Specialist for Alta Bates Summit Medical Center. (Tr. 497). Tito Aquino is a Housekeeping Supervisor; the housekeeping

department is also known as Environmental Services. (Tr. 591). Brett Rogers is the Director of Environmental Services. (Tr. 510). Carla Biddle was employed by Crothall Healthcare Inc. and was assigned from March 9 until her resignation July 10, 2009, to work as an Environmental Supervisor at Respondent; Biddle worked at the Summit Campus on March 24. (Tr. 646, 647). Annie Block is employed by Allied Barton Security Services and works at the Alta Bates campus as a Site Manager where she supervises seven officers. (Tr. 696, 697, 698). Ronnie Parks is also employed by Allied Barton Security Services, and at all relevant times was a Utility Officer. Francis Kidd is Respondent's Director of Support Services, a position that administratively controls housekeeping, food service and patient transportation; prior to May 2006, Mr. Kidd was Food Service Director for all campuses.³ Richard Hinshaw is Respondent's Director of Employee and Labor Relations in the Human Resource Department. (Tr. 806).

Beverly Griffith, the discriminatee, worked as an Environmental Services Aide in the Environmental Services department at the Summit campus in Oakland. (Tr. 42). Griffith was employed by Respondent and its predecessors for a total of 31 years. (ALJD 8:14-18; Tr. 43). She was an SEIU-UHW member throughout her employment with Respondent. In 1979 Griffith became a Shop Steward and in October of 2008, she was appointed Chief Shop Steward by all the stewards in the hospital. (Tr. 45, 48). As a steward and more recently as Chief Shop Steward, Griffith was active in representing her fellow union members by filing grievances, attending *Weingarten* meetings, and sending letters to management for release of bargaining team members. Griffith also participated at the bargaining table as a member of the union's bargaining team. (Tr. 45, 47, 48, G.C. 3 p.70). After SEIU-UHW was put into trusteeship, Griffith became a supporter of NUHW though she remained a member of SEIU-UHW and

³ G.C. 2 stipulates as to the legal status within the meaning of Section 2(11) of the Act of Bruce Hatten, Tito Aquino, Carla Biddle; and within Section 2(13) of the Act for Ronnie Parks, Thomas George, and Maher Said.

continued in her role as chief steward throughout the time period relating to this complaint. Griffith's employment was terminated on April 7, 2009. (Tr. 43, G.C. 10).

Respondent's Cafeterias

Respondent maintains large, full service cafeterias at its Summit Hospital campus and at its Alta Bates Hospital campus. (ALJD 4:30-32). The former facility's cafeteria accommodates between 150 and 300 people, and the latter facility's cafeteria seats approximately 200 individuals. (ALJD 4:32-34; Tr. 77, 307, 402-403, 739). The cafeterias at both facilities are open to and utilized by the public, visitors to patients, employees and staff doctors, visiting physicians, outpatients, and patients' family members. Because of dietary restrictions, patients are normally prohibited from eating in the cafeterias; however, they do occasionally sit at the tables with their families. Employees utilize the cafeterias for their lunches and during their break periods, and only between five percent and ten percent of the customers of the cafeterias are non-employees. (ALJD 4:40-5:4; Tr.732-33).

Respondent's first exception excepts to the finding of fact: "The finding that employees have used the cafeteria for distributing literature, selling various items, solicitations, and for collecting union dues. (Decision, 5:6-7)." ⁴ However, the record is replete with testimony, without contradiction, that employees have historically utilized the cafeterias for distributing literature, selling various items, solicitations, and for collecting union dues. (ALJD 5:6-7; Tr. 101-102, 108-109, 308-309, 362-363, 486, 490, 734, 780, 812-81). For example, Griffith testified to holding union meetings three or four times a year in the cafeterias, that included the

⁴ Respondent's exceptions 1 and 2 are based entirely on factual contentions that were discredited by the Judge and mischaracterizations of the record. These exceptions are simply not supported by the facts as found by the Judge. Respondent has failed to show by a clear preponderance of all the relevant evidence that the Judge's factual and credibility findings are incorrect.

distribution of literature. (Tr. 101-102). She also testified to seeing another labor organization, the California Nurses Association (“CNA”) using the cafeteria to conduct business. (Tr. 108).

Respondent’s second exception excepts to: “The finding that without restriction and with the tacit consent of the Medical Center’s managers, employees have sold church and school raffle tickets, dinner tickets, and food items such as peanuts and egg rolls in the cafeteria by approaching other employees or by walking table to table, and that without impediment, employees have regularly solicited their coworkers for religious, charitable or union related purposed (sic) and distributed literature to them directly in hand. (Decision, 5:6-14).”

However, Medical Center employees testified that their use of the cafeteria was without restriction and with the tacit consent of managers, and that employees have regularly solicited their co-workers for religious, charitable, or union-related purposes and distributed literature to them indirectly by leaving leaflets on tables or directly by hand. (ALJD 5:12-14; Tr. 93, 94, 97, 778). For example, Griffith testified to asking managers and administrators, including an administrator to Respondent’s CEO, to buy dinners and raffle tickets she was selling in support of her church. (Tr. 93). Ms. Griffith identified another employee, Joyce Burke who sold lumpians [lumpias] and peanuts. (Tr. 94). With regard to union-related purposes and distributing literature, Griffith, Lawana Williams, a member of the SEIU-UHW bargaining committee and a shop steward, and DeAnn Horne, also a member of the SEIU-UHW bargaining committee and a steward, each testified that, prior to the trusteeship, SEIU-UHW stewards and union representatives advertised and used Respondent’s cafeterias to meet with bargaining unit

employees/members and to conduct general membership meetings without interference by Respondent.⁵

There is no dispute that Respondent maintains no written rule or policy regarding the conduct of meetings inside the cafeterias at its facilities; nor is there any such written policy prohibiting outside organizations from conducting meetings in the cafeterias. (ALJD 5:23-25; Tr. 28, 269-271, 545). Griffith testified that the SEIU-UHW stewards would move tables together and place literature on them for members to take and read. Williams testified that SEIU-UHW agents have utilized the cafeteria for meetings-- “we’ve had meetings . . . where we vote on contract issues. We’ve had steward meetings there. Just general membership meetings,” normally on a monthly basis. (ALJD 5:33- 40; Tr. 359). Horne, too, testified that the SEIU-UHW stewards would use the cafeteria at the Alta Bates Hospital campus for meetings with employee/members. (ALJD 6:1-2; Tr. 285). Also, according to Griffith and Horne, the California Nurses Association would use the cafeterias for meetings with Respondent’s nurses, and Griffith testified that she has seen Respondent’s student nurses sitting at table and, without eating, meeting with their instructors. (ALJD6: 4-7; Tr. 108, 285).

Respondent’s Unwritten “Policy” on Conducting Meetings in its Cafeterias

The first allegation of misconduct found within the Respondent’s Notice of Termination to Griffith is that she violated Respondent’s policy and practice that outside organizations are not allowed to advertise and conduct meetings in its cafeterias. (GC 11). While conceding the lack of any written rules or policy regarding the conducting of meetings in its cafeterias, Respondent’s three witnesses on this issue offered differing opinions on its unwritten policy.

⁵ Respondent’s third exception, under the heading of “Findings of Fact”, is, “The finding of a negative inference based on the Medical Center’s failure to call Erica McDuffie (“McDuffie”) as a witness and to explain her absence. (Decision, fn. 23,11:40-41; 30:38-39.)” This is not a factual finding but rather a legal conclusion properly arrived at by the facts. This exception is addressed *infra* in Section B.

Bruce Hatten asserted that Respondent maintained a “practice” of not permitting any group to “take over” a dining area so as to be “disruptive” of the intended purpose of the facility, The ALJ credited Griffith and employees Williams and Horne that, prior to the SEIU-UHW trusteeship, they had been unaware of any restrictions, placed by Respondent, upon the holding of meetings in the latter’s cafeterias. The ALJ credited the three employees in finding that the labor organization’s stewards utilized Respondent’s cafeterias for general membership meetings without interference from Respondent; that the stewards would move tables together and place literature on them for distribution; that employees would sit at these tables during their lunch and break periods, eating meals or snacks and speaking to the stewards; that, on occasion, the stewards would walk to other tables at which employees were sitting in order to distribute literature and union-related issues. (ALJD 35: 28-38).

Francis Kidd and Richard Hinshaw, who testified on behalf of Respondent on the issue of meetings in the cafeteria, were each internally inconsistent, contradicted each other, and were found not credible. Kidd testified that, if two tables were pushed together, it would be permissible for eight to ten employees to sit and meet with a union representative and discuss union business, Hinshaw contradicted him and said such activity would not be permissible. Later, however, Hinshaw reversed himself and conceded such activity would be tolerated. (ALJD 35: fn. 95).

Respondent’s Written Policy on Solicitation

Respondent maintains written policies regulating solicitations and distribution of literature, which are set forth in the human resources department policy and procedures manual.⁶

⁶ The guidelines for Respondent’s security services also state that employees may solicit and distribute literature in hospital parking lots, lounges, restrooms, and restaurants and that security guards are not to “forbid” employees

(GC 15). Employees are not permitted to solicit or distribute literature during scheduled working time, which includes the scheduled working time of both the employee doing the soliciting or distributing and the employee to whom the activity is directed but which does not include the time prior to or following a work shift and meal and break periods. Further, soliciting and distributing literature are prohibited in all patient care areas and in all other areas where employees normally work. As defined, work areas do not include the hospital cafeterias and street lobbies, employee lounges and break rooms, public and private sidewalks, driveways, and parking areas. An employee “must not” be identified with Respondent while engaged in soliciting or distributing literature, meaning that he or she must be out of uniform and not wearing his or her identification badge while doing so. (ALJD 4:5-18; Fn. 4; GC 15, GC 16).

Respondent’s Written Policy on Disruptive Conduct and Misconduct

Respondent’s employee handbook also sets forth written policies regarding disruptive conduct and misconduct. Disruptive conduct is defined as “. . . conduct that has the potential for adversely impacting both the quality of patient care and the ability of other employees to work effectively.” Misconduct is defined as behaviors “. . . so serious in nature and so contradictory to the goals of and expectations of [Respondent] that they require immediate action” and sets forth several types of employee misconduct, including insubordination or willful refusal to carry out a reasonable order, inappropriate behavior while on duty, or “the use of foul or abusive language on company property or while performing duties at any location.” With regard to either disruptive conduct or misconduct, Respondent’s progressive disciplinary policy, which begins with a documented verbal warning and includes possible termination, applies. ALJD 3:33-4:3; GC 15).

from soliciting on their own time, to engage in surveillance of such activities or to “spy” on union meetings or union activities. (GC 16; tr. 501).

February 17 Water Spilling Incident

On February 17, SEIU-UHW representatives, Hernandez and McDuffy, encountered Griffith at a table in the Alta Bates Hospital campus cafeteria; they began arguing about the pending election petition before the Board and the state of the negotiations for a new collective-bargaining agreement between SEIU-UHW and Respondent. (Tr. 110-111). Griffith, having no desire to continue their heated conversation, arose and inadvertently knocked over a small cup of water, with the contents spilling over the tabletop and down to the floor. (*Id.*) No water spilled on Hernandez. (Tr. 222, 794, 797). McDuffy accused Griffith of spilling the water deliberately and threatened to report the matter to the police. (Tr. 112). Then, the two SEIU-UHW representatives left the dining area and exited the cafeteria; shortly thereafter, Griffith observed them speaking to a security guard for Respondent and accusing Griffith of deliberately knocking over the cup of water on them; Griffith approached and said it had been an accident; the guard said he would have to file a report of the incident and did so; and, in his report, the guard quoted Hernandez as accusing Griffith of knocking over the cup of water, with the contents spilling on him. (ALJD 32:11-23; Tr. 112).

Hatten received a telephone call from McDuffy wherein McDuffy accused Griffith of having been “rude” to Hernandez and her, and of having deliberately spilled water on Hernandez. Hatten then requested and received the security guard’s incident report. Hatten failed to interview Hernandez; Hatten believed McDuffy and perceived the incident as an employee deliberately spilling a cup of water on a guest. On February 20, along with Tito Aquino, Hatten went looking for Griffith but was unable to locate her on her work floor; and that, notwithstanding his professed desire to speak to the alleged discriminatee and ascertain her version of events, at approximately 3:25pm, near the EVS office, Griffith walked past Hatten and

Aquino on her way to clock out for the day and, in abject disregard of his usual practice of obtaining each party's version of a disputed incident, Hatten made no effort to speak to her. Finally, the ALJ found that, on February 23, Hatten met with Griffith for a *Weingarten* interview; that, during the course of their meeting, he gave Griffith a written warning notice, accusing her of “. . . intentionally knock[ing] over a glass of water that spilled onto a guest. . . . This behavior is unacceptable and will not be tolerated;” that Griffith became upset and accused Hatten of disciplining her without obtaining her version of the incident; that Hatten responded “it sounds like [you]” and that Hatten never protested he had, in fact, spoken to Griffith three days earlier. (ALJ 32:27-43).

March 20 Membership Meeting

The ALJ found that the SEIU-UHW bargaining unit employees' membership meeting held at the Summit Hospital campus cafeteria on March 20 was to “update” the bargaining unit employees on the status of the SEIU trusteeship and the ongoing bargaining, and to solicit support for the NUHW and the decertification campaign. The meeting was publicized by posting and distributing flyers, as was the custom.

The ALJ further found that Griffith, who was off duty that day, and Deborah Kirtman, a chief steward, met inside the cafeteria at approximately 6:00 a.m. and placed stacks of documents and a sign-up sheet on top of a table; that, moments later, some bargaining unit employees approached the table and the two stewards engaged them in conversation; and that, after the employees walked away, Hatten and a security officer, Ronnie Parks, approached the stewards' table. Hatten asked what was going on and “snatched” some papers from Griffith. When Griffith attempted to retrieve the documents, Hatten rebuffed her and said he would not return the documents; that Griffith then threatened to call the police and Hatten returned all but

one of the documents. When Hatten read the document, he remarked that it concerned the ongoing bargaining between Respondent and SEIU-UHW. Hatten next turned toward Kirtman and reached for the documents in the stacks in front of her, including the sign-in sheet; Kirtman placed her hands over the documents in order to protect them and asked Hatten to calm himself. Hatten then told the two stewards that they were not allowed to conduct a meeting for “outside unions,” pass out flyers, or solicit funds, and they were “trespassing.” Kirtman replied that she and Griffith continued to meet SEIU-UHW members and had a right to utilize the cafeteria in order to inform members; Hatten turned and walked away.

The ALJ further found that Respondent hired Allied Barton Security Services to provide two security officers, who wore clothing different than worn by Respondent’s own security, to engage in surveillance of the membership meeting. Bruce Hatten informed the two security officers, that Respondent’s employees were attempting to form a new union but were not allowed to hold a meeting in support, solicit funds, or distribute union literature in the cafeteria and instructed them to “closely” observe and to take notes and photographs of such “violations.” Security officer Parks and the other security officer moved close to Griffith and Kirtman, sitting at a table a few feet from where they sat and remained there for the entire day, carefully listening for and observing potential “violations.” Some employees did not approach Griffith and others expressed their reluctance to speak to her because of the presence of the two security officers.

March 23 Meeting and Respondent’s Eviction of Griffith

The ALJ found that a second membership meeting took place at the Alta Bates Hospital campus cafeteria on March 23. Like the previously conducted membership meeting at the Summit Hospital campus three days earlier, the SEIU-UHW dissident stewards, including Griffith, publicized the meeting with flyers announcing a union membership meeting; that the

purposes of said meeting were similar to the reasons underlying the March 20 meeting; and that Bruce Hatten, on behalf of Respondent, again intended to thwart the stewards, utilizing security guards to maintain surveillance, including taking photographs, of the stewards' activities in the facility's cafeteria and to report any "violations," including holding union-related meetings, soliciting funds, or distributing union literature, to him. (ALJD 36:27-35).

The ALJ further found that the Alta Bates Hospital campus cafeteria was sparsely filled when Beverly Griffith, who was again off duty for the day, and DeAnn Horne arrived at approximately 7:00am; that they immediately walked to a table in the right corner of the dining area, placed stacks of the same documents, which the stewards had distributed on March 20, on the table, and sat; that Bruce Hatten, security officers Ronnie Parks and Mahir Said, and Joan Davis, an HR specialist for Respondent were sitting at a table when Griffith and Horne entered the dining area; that Hatten left the room and Parks and Said arose and moved to a table no more than six feet behind the two women.

The ALJ further found that Griffith noticed some bargaining unit dietary workers sitting and eating at another table; that she arose, walked to the employees' table, initially spoke to them while standing, and then sat in a chair; that she spoke to the employees about their various union-related matters including the pending decertification petition; that, after five or six minutes, Griffith returned to her table; that security officer Parks overheard Griffith soliciting money for the NUHW and immediately telephoned for Hatten to return to the cafeteria; and that, having been gone for half an hour; that Hatten entered the cafeteria and Parks reported observing Griffith walk over to another table and overhearing her soliciting funds for the new union. (ALJD 36:45-37:2).

The ALJ found that Hatten, accompanied by Parks, walked over to Griffith's table; that

Hatten addressed Griffith, Horne, and Hill, demanding that they “cease and disperse,” leave the cafeteria “now,” and no longer engage in their union activities, including distributing literature and soliciting funds; that, upon hearing Hatten’s order, the three stewards arose and Griffith, who understood that an employee, who failed to adhere to a manager’s direct order, would be subject to discipline, told Horne it was time to leave as they were being kicked out of the cafeteria and Griffith asked to use her cell phone in order to arrange for a ride; that Hatten repeated his order for the stewards to leave; that Griffith and Horne began stuffing the stacks of flyers into a bag and, before she finished, Hatten warned, “and if you don’t leave before security comes, you will be suspended and you could be terminated;” that Griffith and Horne finished packing the documents and began walking out of the cafeteria; that, before they left, two hospital security guards entered and escorted Griffith out the front entrance of the building. Importantly, the ALJ found that, at no point during this incident, did Hatten ever inform Griffith that she was suspended. (ALJ 37:2-14).

Roxie Osborne’s Union Activities on March 23

The ALJ found that at approximately 10:00am, after Griffith’s ejection from the Alta Bates Hospital campus cafeteria, employee Roxie Osborne arrived, having volunteered to help during the membership meeting. Observing no ongoing union activity, Osborne approached a co-worker, who nodded toward the two security officers, Parks and Said, who were seated at a nearby table. The co-worker informed Osborne that Parks and Said earlier had stopped the meeting and “hustled” Griffith out of the cafeteria. Osborne, who was carrying union flyers, noticed several other bargaining unit employees sitting and eating at another table and walked over to the table and began speaking to the employees about union issues. Parks left his table and moved closer to where Osborne was speaking to her co-workers; Parks identified the flyers

as “union related” and began photographing Osborne’s activities. The employees, to whom Osborne was talking, observed Parks and became “restless” and, eventually, having reached the end of their break periods, the employees arose and left the dining area. Osborne walked over to another table and began giving her co-workers “updates” on union issues; and that, having telephoned Hatten’s office, Parks was instructed to stop Osborne’s activities.

The ALJ further found that, at this point, Parks approached Osborne and told her “you can’t hand out flyers, you can’t solicit funds, and you can’t hold a meeting . . . in relation to these materials;” that Osborne replied the flyer was an Alta Bates document and she was sharing it with co-workers; that Parks walked away and, spotting another co-worker, Osborne approached and began speaking to that employee; that Parks approached within a few feet of them and then returned to his seat; and that Osborne then left the cafeteria. (ALJD 37:16-37).

Alleged Profanity by Griffith on March 24

The ALJ found that on March 24, dressed in her usual work clothes, Beverly Griffith arrived at the Summit Hospital campus at 6:55am in order to start working her normal 7:00am to 3:30pm shift. After learning from her supervisor, Tito Aquino that she was suspended, Griffith announced to her colleagues in the break room that she had just been suspended but did not know the reason. Aquino, who had walked into the room behind her, demanded that she leave immediately. Asserting she had become upset at the reality of being suspended, while she “gathered” and repacked her materials, Griffith admittedly exclaimed “. . . this is bullshit’ or something.” Asked whether, besides the word “bullshit,” she uttered any other profanity that morning, Griffith said, no.” (Tr. 183-184).

Respondent’s fourth exception is to the Judge’s “failure to discredit Griffith’s testimony regarding her use of profanity given the ALJ’s finding that Griffith’s pretrial affidavit, her

submissions regarding her March 26th *Weingarten* interview, and her hearing testimony all differed from each other. (Decision, fn. 72, 24:47-51.)”

The Judge credited Griffith’s testimony, corroborated by Dorrough and Williams, over that of Biddle and Aquino. (ALJD 30:27-34; 30:40-43; 31:7-9; 31:22-33. During cross-examination, Griffith conceded there was nothing in her pretrial affidavit about her saying this is “bullshit” after hearing of her suspension but maintained, “I said it” inside the lounge. Further, Griffith conceded that, during her March 26 *Weingarten* interview prior to her discharge, she admitted she might have said “f” something. However, she added, “after thinking about what [Hatten] said . . . I said, no, I did not say that.”

Finally, Respondent’s exception centers on the credibility of Griffith. Here the Judge found that:

...while I was troubled by Beverly Griffith’s timorous testimony explaining her admittedly equivocal response to Hatten, during her March 27 *Weingarten* interview, as to her use of profanity, I, nevertheless, viewed her demeanor, while testifying, as that of a veracious witness, one who clearly paid attention to and understood my admonition to tell the truth, and I shall credit and rely upon her version of events. ALJD 30:23-27.

The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that such credibility resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). The Judge was specific in his credibility determinations and the relevant evidence he relied upon in his credibility resolutions.

B. THE JUDGE CORRECTLY CONCLUDED THAT RESPONDENT VIOLATED THE ACT

1. The Judge Correctly Applied the *Wright Line* Standard

The Judge determined that the *Wright Line*⁷ standard, as opposed to *Burnup & Sims*⁷, was appropriate for analyzing each of the contested disciplinary actions in the instant case.⁸ (ALJD 33, fn. 93, 41:40, 43:18). There were no exceptions with that determination.

Respondent, however, citing *White Electric Construction Company, Inc.* 345 NLRB 1095, 1096 (2005),⁹ argues that the ALJD misapplies the *Wright Line* test by ignoring a “basic tenet of *Wright Line* -- that an employer who holds a mistaken but good-faith belief that the employee engaged in misconduct has a complete defense to its actions.” Respondent misreads and takes out of context *White Electric* for such a sweeping proposition.

In *White Electric*, the employer terminated an employee for unsatisfactory work performance and low productivity. The judge found no violation under *Wright Line* because of a lack of evidence that the employer knew of any concerted activity, but instead employed *Burnup & Sims* for discipline in connection with misconduct in the course of protected activity. The Board found that because the employee was not involved in any actual protected concerted activity, the judge erred in finding a violation under *Burnup & Sims*. “*Burnup & Sims* applies when an employer terminates or disciplines employees for allegedly engaging in misconduct *in the course of protected activity*. In that setting [referring to *Burnup & Sims*], *good*

⁷ *Burnup & Sims, Inc.* 379 U.S. 21 (1964)

⁸ *Wright Line*, 251 NLRB 1083, 1089 (1980), *enf'd*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 445 U.S. 989 (1982), *approved in NLRB v. Transp. Mgmt. Co.*, 462 U.S. 393, 400-03 (1983).

⁹ Respondent’s contention that it is a “basic tenet” of *Wright Line* that an employer who holds a mistaken but good-faith belief that the employee engaged in misconduct has a complete defense to its actions is wholly unsupported. *White Electric’s* admonition is self-evident, an employer does not violate the Act by terminating employees based on actions that do not arise out of any protected activity. To the contrary, *Wright Line*, by its very definition, concerns employer actions based at least in part on an employee’s protected activity.

faith belief that the employees engaged in misconduct, is not a defense if the General Counsel proves that the employees did not, in fact, engage in the misconduct.” The Board found that where the *Burnup & Sims* rationale does not apply (when employees are not engaged in a protected activity) an employer does not violate the Act by terminating employees based on a mistaken belief that they engaged in misconduct.

Respondent’s interpretation of *White Electric* is erroneous. It is axiomatic that an employer does not violate the Act by terminating employees based on actions that do not arise out of any protected activity protected by the Act. *White Electric* offers no “basic tenet” to *Wright Line* that an employer’s good-faith belief that the employee engaged in misconduct is a complete defense to its actions involving or arising from protected activity.

The analysis in *White Electric* is legally and factually inapposite to the instant case. In *White Electric*, the judge rejected a *Wright Line* analysis as inappropriate because there was no evidence that the Respondent was motivated by any concerted activity. *White Elec. Constr. Co.*, 345 NLRB at 1095. Here, however, the Judge employed *Wright Line* analysis finding by a preponderance of evidence that Griffith engaged in protected union activity and that this protected activity played a role in her receiving discipline and termination. See *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 445 U.S. 989 (1982), *approved in NLRB v. Transp. Mgmt. Co.*, 462 U.S. 393, 400-03 (1983). Respondent’s abstruse authority for a “mistaken but good faith belief” as an absolute defense fails under these circumstances.

2. The Judge Correctly Applied the Wright Line Standard to Respondent's Disciplinary Actions Against Griffith For the February 17 Water Spilling Incident

The testimony adduced at trial and credited by the Judge clearly established that Griffith was a longstanding union activist and that Respondent had knowledge of Griffith's support for the new union, NUHW. The testimony credited by the Judge established that Respondent was motivated by animus towards the new union, and disciplined and terminated Griffith because of her activities. Accordingly, the Judge correctly found a *prima facie* case that Respondent terminated Griffith because of her union activities. *Wright Line*, 251 NLRB at 1089.

Accordingly, under *Wright Line*, with a *prima facie* showing sufficient to support an inference that the employee's protected conduct motivated Respondent's adverse action, the burden of persuasion then shifts to the employer to show that it would have taken the same adverse action even in absence of such activity. *Detroit Newspapers*, 342 NLRB 1268, 1269-70 (2004); *Senior Citizens Coordinating Council*, 330 NLRB 1100, 1105 (2000).

Respondent argues that the record evidence "proves that the Medical Center had a reasonable basis for disciplining Griffith for her actions on February 17th." To establish a reasonable basis, Respondent relies upon an incident report written by a security guard at the urging of SEIU's Erica McDuffie, Hatten's testimony of a phone call with Erica McDuffie regarding the incident, and Medical Center policies regarding disruptive conduct. Respondent's record evidence is unpersuasive.

Respondent argues that the Medical Center had reasonable basis for disciplining Griffith for the water spilling incident based on the security guard's incident report. (R. 16). That report was generated at the request of rival union representative Erica McDuffie, who accused Griffith of intentionally spilling water on her colleague. The incident report is hardly dispositive of what

occurred; indeed it is clear that Griffith disagreed with the allegation that she intentionally spilled water, calling the spill an accident. A contested security report, without any follow-up investigation, provides no reasonable basis to discipline Griffith.

Next, Respondent argues that Hatten’s testimony regarding a telephone conversation he had with rival union representative Erica McDuffie also provides reasonable basis for Respondent’s discipline of Griffith. Respondent argues the conversation is not hearsay, contending it falls within certain hearsay exceptions including the excited utterance exception, though the call allegedly took place several days after the incident. The hearsay argument is, however, moot given the ALJD credibility determination regarding Hatten. Hatten impressed the Judge as being “particularly disingenuous, deceitful, and not worthy of belief” as to any aspect of his testimony. (ALJD 31:7-9). Hatten’s recounting of a telephone conversation cannot be given any credit – “Bluntly put, Hatten, who was the instigator behind each of the alleged unfair labor practices, was a duplicitous witness, one whose primary intent, I believe, was to buttress Respondent’s defense rather than to testify truthfully...” (ALJD 31:9-11).

Lastly, the Respondent argues that it relied upon its policies against disruptive conduct to discipline Griffith. However, this reasoning as a basis for Griffith’s discipline is a ruse. Reliance on policies and employee handbooks does not provide any evidence of mistaken belief of disruptive conduct on the part of Griffith. The policies are, after all, only useful *after* a genuine reasonable determination is made of what actually occurred. Then those finding are applied to the policies to reach an outcome of discipline or not. That did not happen here. Respondent’s policies do not offer an after-the-fact justification for its discipline of Griffith.

3. The ALJD Correctly Drew an Adverse Inference Against Respondent for Failing to Call Erica McDuffie as a Witness

Respondent failed to serve Erica McDuffie with a subpoena, failed to call McDuffie as a

corroborative witness, and failed to explain her absence. The Judge allowed the parties a full and final opportunity to claim that other witnesses should testify. No such claim was made by either party. Tr. 814: 22, 23. Accordingly, the ALJD drew an adverse inference when McDuffie was not called to testify. (ALJD 11 fn. 23).

Respondent claims this inference is improper as McDuffie was not an employee of the Medical Center and, therefore was equally available to both parties. Moreover, Respondent argues that had McDuffie testified, her testimony would have been duplicative, as Hatten had already recounted McDuffie's statements. (*Id.*)¹⁰

An adverse inference is properly drawn regarding any matter about which a witness is likely to have knowledge, if a party fails to call that witness to support its position and if the witness may reasonably be assumed to be favorably disposed to the party. *Grimway Farms*, 314 NLRB 73, fn. 2 (1994). The Judge's findings indicate that McDuffie may reasonably be assumed to be favorably disposed to the Respondent as the Judge found the Respondent was favorably disposed to McDuffie's union, SEIU. "Next, I believe that, having become aware of its bargaining unit employees' antipathy towards the SEIU-UHW by virtue of their decertification petition and of the NUHW's nascent organizing efforts amongst said employees, Respondent favored the SEIU-UHW and embarked upon a campaign designed to quell its employees' suspected growing support for the NUHW." ALJD 33:39-43. Therefore, the adverse inference drawn by the judge regarding the Respondent's failure to call McDuffie is proper. See *International Automated Machines*, 285 NLRB 1122, 1123 (1987), *enfd.* mem. 861 F.2d 720 (6th Cir. 1988) ("Where, as here, a party fails to elicit evidence from a witness whose testimony reasonably would be assumed to favor that party, an adverse inference can be drawn that had the

¹⁰ This assertion totally ignores the ALJ's credibility determination of Hatten as disingenuous, deceitful, and not worthy of belief as to any aspect of his testimony.

witness been questioned about the matter, the testimony would have been unfavorable to the party's cause.”).

Respondent next asserts that the ALJ should have provided the Medical Center with notice of his intent to draw an adverse inference so that the Medical Center could have explained why it did not call McDuffie as a witness. Respondent acknowledges that a judge typically need not provide notice of his intent to draw an adverse inference. However, Respondent states that notice was required in this instance because the adverse inference pertained to a non-party witness. Respondent provides no authority for this notice requirement but compares a footnote found within *Douglas Aircraft Co.*, 308 NLRB 1217, 1217 n.1 (1992):

The Respondent has excepted to the judge's drawing an adverse inference from the Respondent's failure to call certain witnesses, with no prior notice to the Respondent. The Respondent moves, in the alternative, that this case be remanded to the judge so that witnesses whose absence the judge has deemed to be critical can be called. The Respondent argues that considerations of fairness demand prior notice, analogizing this situation to judicial notice where such prior notice to the parties is required. We find that unlike judicial notice, prior notification that an adverse inference may be drawn from the failure to call witnesses is not required. The adverse inference rule is well known and the parties should be aware of the circumstances under which it may be used. See *International Automated Machines*, 285 NLRB 1122, 1123 (1987) ("familiar rule . . . that when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge"). We find no merit to the exception and, because we find that the Respondent was not unfairly prejudiced by the lack of prior notification, we deny the Respondent's motion to remand.

Like the Respondent in *Douglas Aircraft*, Respondent's exception is without merit as there is no unfair prejudice from lack of prior notification given the adverse interest rule is well known and Respondent should have been aware of it.

4. The ALJD Correctly Found That Respondent Failed To Show It Would Have Disciplined Griffith In the Absence of Union Activity

The ALJD found that the General Counsel established Respondent was unlawfully motivated in disciplining Griffith. ALJD 34:17. Thus, under *Wright Line*, the burden of persuasion shifted to Respondent to establish that it would have disciplined Griffith notwithstanding the existence of unlawful motivation. The Judge found that Respondent failed to establish that it would have disciplined Griffith on February 23 even absent the existence of unlawful animus, and that it issued the written warning notice to Griffith that day in violation of Section 8(a)(1) and (3) of the Act. ALJD 34:40-43.

Respondent contends that the ALJD's conclusion is based on "mischaracterizations of the evidence." In particular, Respondent complains that despite the ALJ's finding, it undertook a satisfactory investigation of the water spilling incident prior to issuing discipline.¹¹ To support that contention, Respondent notes that the ALJD credits Aquino's testimony that Hatten "spent some time searching" for Griffith."¹² ALJD 34:38-40. Respondent fails to mention the rest of the ALJD's sentence on that topic: that Hatten shortly thereafter "had an opportunity to speak to Griffith near the EVS office but made no effort to do so." *Id.*

Respondent next contends, with regard to a meaningful investigation, that the ALJ failed to consider the fact that Hatten had reviewed the security report that contained "Griffith's account of events." It is preposterous to consider the incident report, generated at the urging of a union rival, and drafted by Respondent's security guard, as an accurate or *bona fide* account by Griffith of what actually occurred. Moreover, Griffith was not provided an opportunity to view

¹¹ The Board has held that "[t]he failure to conduct a meaningful investigation and to give the employee who is the subject of the investigation an opportunity to explain the circumstances are clear indicia of discriminatory intent." *New Orleans Cold Storage & Warehouse Co.*, 326 NLRB 1471, 1477 (1998); *K&M Electronics*, 283 NLRB 279, 291 (1987).

¹² Respondent mischaracterizes Aquino's testimony; at the time Aquino did not know why Hatten was looking for Griffith. Tr. 594:20-21.

the security incident report prior to Respondent's discipline of her.¹³ That there was a security report based on the water spilling incident is no substitute whatsoever for a genuine investigation by Hatten, which did not happen. Respondent simply did not seem to care whether or not the spill was intentional or not. In fact, it was not.

Finally, the Respondent relies on past examples of strict discipline of workers as somehow justifying its discipline of Griffith. ALJD considered those actions and weighed them with Hospital disciplinary actions offered by the General Counsel showing a far more lenient attitude towards employees. Moreover, the ALJ rightfully believed that Hatten did not actually review the cases of discipline prior to deciding to discharge Griffith. ALJD 28:38-40, 29:19-21; Tr. 752, 753, 782. In other words, despite whatever established policies were in place, they are not probative as they were not part of the consideration in deciding to discharge Griffith, but were reviewed only after the fact. As such, no credence is afforded to Respondent in justifying the discipline and termination of Griffith based on its history of disciplining employees.

5. The ALJD Correctly Found That Respondent Discriminatorily Enforced Its Solicitation and Distribution Rules In Its Cafeterias When it Evicted Beverly Griffith, DeAnn Horne and Kenny Hill.

Respondent sets forth several arguments that it did not violate the Act by discriminatorily enforcing its solicitation and distribution policy. Respondent argues that it may lawfully limit solicitation and distribution activities, including the "staging" of meetings in Respondent's cafeterias; that the ALJD improperly found disparate treatment between NUHW and SEIU-UHW; that the ALJD failed to consider the distinction between vending and sales in adjacent spaces outside the dining area; that the ALJD failed to give weight to evidence that Griffith was

¹³ Hatten testified that he showed Griffith the three-page incident report, but did not give Griffith a copy or even let her handle the document. (Tr. 772-773). When Aquino was asked whether Hatten was able to speak to Griffith, Aquino replied, "No, sir." Tr. 597.

permitted to engage in non-disruptive union-activity in the cafeteria; and finally that the ALJD erroneously held that the posting of security guards in the cafeteria violated the act. Each argument is without merit.

As stated above, Respondent maintains written policies regulating solicitations and distribution of literature, which are set forth in the Human Resources Policy & Procedures Manual. (GC 15 p. 104; Tr. 498). Employees are not permitted to solicit or distribute literature during scheduled working time, which includes the scheduled working time of both the employee doing the soliciting or distributing and the employee to whom the activity is directed, but which does not include the time prior to or following a work shift and meal and break periods. Further, soliciting and distributing literature are prohibited in all patient care areas and in all other areas where employees normally work. As defined, work areas *do not* include the hospital cafeterias and street lobbies, employee lounges and break rooms, public and private sidewalks, driveways, and parking areas. The solicitation/distribution policy states that an employee “must not” be identified with Respondent while engaged in soliciting or distributing literature, meaning that he or she must be out of uniform and not wearing his or her identification badge while doing so. (ALJD 4:5-10, 39:12-17).

The record evidence is that, prior to March 20, Respondent’s employees had utilized the cafeterias for solicitations, including collecting union dues, and for distributing union-related literature without restriction by Respondent. The ALJ credited Griffith and other Hospital employees/union stewards’ testimony that, prior to the SEIU-UHW trusteeship, they had been unaware of any restrictions, placed by Respondent, upon the holding of meetings in the cafeterias. As labor organization stewards, they utilized Respondent’s cafeterias for day-long general membership meetings without interference from Respondent. Such meeting involved

moving tables together, setting literature out for distribution, and employees sitting at these tables during their lunch and break periods, eating meals or snacks and meeting with their stewards. ALJD fn. 95.

The ALJ found that Respondent violated Section 8(a)(1) and (3) of the Act by discriminatorily enforcing its existing solicitation/distribution policies at its Summit Hospital campus cafeteria on March 20 and at its Alta Bates Hospital campus cafeteria on March 23. ALJD 30: 17-19. Specifically the ALJ states:

I believe that when, on March 20 in the Summit Hospital campus cafeteria, acting on behalf of Respondent, Bruce Hatten approached Griffith and Kirtman and warned the two employees they could not conduct a meeting for an “outside union,” distribute literature, or solicit funds and when, on March 23 at the Alta Bates Hospital campus cafeteria, Hatten demanded that Griffith and Horne cease and desist from their union activities, including distributing literature and soliciting funds, and Ronnie Parks admonished Roxie Osborne that she was not allowed to solicit funds or distribute literature on behalf of a union, Respondent, in fact, redefined its solicitation/distribution rules to make said restrictions applicable to its cafeterias, which are non-patient-care areas. ALJD 39: 20-28.

The ALJD held that Respondent redefined its solicitation/distribution policies on March 20 and March 23 specifically in order to hinder employees’ actions in support of the NUHW. Importantly, the ALJ notes that Respondent placed no similar restrictions upon SEIU-UHW agents, who utilized its cafeterias to meet with bargaining unit employees in order to discuss union business, distribute literature and counter NUHW.

Respondent argues that the Medical Center’s actions were consistent with general principles limiting solicitation in hospital settings, which the ALJ has ignored. To that end, Hatten testified that Respondent maintained a “practice” of not permitting any group to “take over” a dining area so as to be “disruptive” of the intended purpose of the facility. Respondent’s Francis Kidd and Richard Hinshaw also testified on the issue of meetings in the cafeteria.

Respondent's contention that its actions concerning the solicitation and distribution in question were consistent with Hospital policy and general principles is wholly without merit.

The ALJ acknowledges that the Board's rules and presumptions concerning employee solicitation and distributions of literature in hospitals are different than those that the Board generally applies to other types of employers.¹⁴ The ALJD also acknowledges Respondent's published solicitation/distribution policies comport with the Board's rules. However, the ALJD properly found that the March 20 and March 23 redefinitions by Respondent of said rules to prohibit meeting were designed to impede the SEIU-UHW bargaining unit employees from engaging in support of the NUHW.

In support of his finding that Respondent redefined its rules in connection with employees engaging in support of NUHW, the ALJ noted Hatten's acknowledgment that Respondent had no written rules or policies regarding the holding of meetings in its cafeterias. Moreover, the ALJ found the testimony of Respondent's Kidd and Hinshaw were each internally inconsistent, contradicted each other, and were not credible. "Thus, I note that, while Kidd testified that, if two tables were pushed together, it would be permissible for eight to ten employees to sit and meet with a union representative and discuss union business, Hinshaw contradicted him and said such would not be permissible. Later, however, the latter reversed himself and conceded such would be tolerated." ALJD 35: fn. 95.

In sum, Respondent is correct that an outside group or even a group of its own employees may not "take over" a hospital's cafeteria or hold a large scale rally or assembly or engage in other actions disruptive to the normal operations of the said cafeteria. But the ALJD found no such activity occurred on either March 20 or March 23. Moreover, the ALJD found that

¹⁴ ALJD considers *St. Johns Hospital & School of Nursing*, 322 NLRB 1150 (1976); *Beth Israel Hospital v. NLRB*, 437 US 483 (1978); *Brockton Hospital*, 333 NLRB 1367 (2001), among other cases. ALJD 40.

Respondent has historically permitted its employees to hold union meetings in its cafeterias without restrictions. Therefore the ALJD correctly found that Respondent had redefined its solicitation rules, and given that Respondent made no effort to stop SEIU agents Hernandez and McDuffy from meeting with employees or distributing literature to them inside its cafeterias, Respondent had therefore, selectively and discriminatorily enforced such redefined solicitation and distribution rules.

As a fallback position, Respondent then asserts that the ALJD failed to consider the distinction between vending and sales adjacent spaces outside the dining area. Respondent seeks to characterize the activities of NUHW supporters as not entitled to recognized protections under the Act because the purpose of coming to the cafeteria was to hold a “meeting.” This argument is disingenuous. As detailed above, the activities of March 20 and 23rd differed in no significant way than previous union meetings, except that now there was a dispute between NUHW and SEIU-UHW. Respondent’s actions were not based on fear of an assembly, just as Respondent’s actions were not based on apprehension of disruption to patient care or to the operation of its cafeterias. Respondent’s motivation on March 20 and 23 was to squelch the SEIU-UHW bargaining unit employees’ increasing support for the NUHW.

The remaining arguments advanced by Respondent are trivial and may be quickly dismissed. Respondent asserts that the non-union-related sales adjacent to the cafeteria differ from the solicitation and distribution by NUHW supporters in the cafeteria and that the ALJD erroneously found solicitation even though these non-union activities are permitted by the hospital. Respondent does not cite the connection of this assertion with any of the findings by the ALJ. The ALJ does not rely on the activities of non-union-related sales adjacent to the cafeteria in finding Respondent violated the Act. Rather, the ALJ finds, *inter alia*, Respondent

has permitted its employees to hold union meetings in its cafeterias without restrictions. Yet, on March 20 and 23, Respondent brought in outside security guards, and Hatten instructed them that a forbidden meeting would be “. . . a group of people discussing the union business” This prohibition was clearly content driven and had nothing to do with where the discussion took place.

Likewise, Respondent asserts that the ALJD, in finding a violation of solicitation protections, failed to give weight to evidence that the Medical Center permitted Griffith to engage in non-disruptive union activity in the cafeteria. As evidence for this bizarre exception, Respondent seeks credit for allowing Griffith and Kirtman to remain in the cafeteria on March 20 after Hatten made them remove stacks of flyers, so prohibiting their distribution. As further evidence, Respondent maintains that it did not interfere with Griffith and Kirtman’s activities, despite acknowledging posting specially-hired guards within feet of them all day long. This is not a very convincing defense, nor in any way a demonstration of Medical Center’s abidance with the Act’s solicitation and distribution protections.

Next, Respondent argues that the ALJD erroneously held that Respondent’s posting of guards violated the Act. The guidelines for Respondent’s security services state that employees may solicit and distribute literature in hospital parking lots, lounges, restrooms, and restaurants and that security guards are not to “forbid” employees from soliciting on their own time, to engage in surveillance of such activities or to “spy” on union meetings or union activities. (GC 16). Yet the record is clear, and the ALJ found, that Respondent engaged in surveillance of its employees’ union activities in its Summit Hospital campus cafeteria on March 20 and in its Alta Bates Hospital cafeteria on March 23.

The Board holds that a supervisor's observation of employees engaged in open Section 7 activity on company property does not constitute unlawful surveillance. However, an employer does violate Section 8(a)(1) of the Act when it monitors its employees, who are engaged in Section 7 activity, by observing them in a way that is "out of the ordinary" and thereby coercive. *Partylite Worldwide, Inc.*, 344 NLRB 1342 at 1342, n. 5 (2005);

Respondent informed the two guards, whom it hired from Allied Barton Security for the purpose of engaging in surveillance of its employees' activities, that its employees were attempting to form a new union and directed the guards to be vigilant for any employees meeting on this subject, soliciting funds on behalf of the new union, or distributing flyers and to immediately report such "violations." According to one of the security guards (Parks), Hatten was clear the reason for the employees' planned union activity that day was that ". . . they were in the process of trying to form a new union." Parks added that, if a prohibited meeting occurred, Hatten gave the guards a camera in order "to take pictures of the violation," and they had notebooks in order "to take notes." The ALJ further found that on March 20, the security officers moved close to the two women, sitting at a table a few feet from where Griffith and Kirtman sat and remained there throughout the day, carefully listening for and observing potential "violations;" and that some employees did not approach Griffith and others expressed their reluctance to speak to her because of the presence of the two security officers. ALJD 36: 18- 25. As the ALJ noted, indicia of coercive surveillance include the duration of the observation, here it was all day, the employer's distance from the employees while observing them, within a few feet, and whether the surveillance is an isolated act, and whether the employer engaged in other coercive behavior during its observation. *Wilshire Plaza Hotel*, 353 NLRB No. 29 at slip. op. 19 (2008).

In the face of these factual findings, Respondent argues that given the Medical Center had received notice that there was to be a meeting in the cafeteria, it was “privileged to engage in anticipatory surveillance.” Respondent does not explain or reconcile this “privilege to engage in anticipatory surveillance” with its own guidelines that security guards are not to “forbid” employees from soliciting on their own time, to engage in surveillance of such activities or to “spy” on union meetings or union activities. Nor does Respondent explain how it reasonably believed the meetings of March 20 and 23 were going to be unlawful as compared to the all previous union meetings held in the cafeteria over the years, none of which elicited the hiring of special plain-clothed security to closely monitor its employees.

6. The ALJD Correctly Held That Respondent Violated the Act by Disciplining Griffith for her Actions on March 23.

Here again, Respondent contends that the ALJ erroneously applied the *Wright Line* test by not considering the Hospital’s alleged mistaken but good-faith belief that Griffith engaged in misconduct. Again, Respondent misreads and takes out of context *White Electric* for the sweeping proposition that an employer’s good-faith belief that the employee engaged in misconduct is a complete defense to its actions. *White Electric* offers no “basic tenet” to *Wright Line* that an employer’s good-faith belief that the employee engaged in misconduct is a complete defense to its actions involving or arising from protected activity.

Instead, the Medical Center was held to the proper *Wright Line* standard: with a *prima facie* showing sufficient to support an inference that the Griffith’s protected conduct motivated Respondent’s adverse action, the burden shifted to Respondent to establish that it would have taken the foregoing disciplinary actions against Griffith notwithstanding the existence of unlawful animus. *NLRB v. Transportation Corp.*, 462 U.S. 399–403 (1983).

Respondent first contends that on March 23 its security guards reported to Hatten

“misconduct” on the part of Griffith. According to Hatten, he found the conduct described by the guards objectionable: Griffith spoke loudly enough that other people could hear her and that she spoke to people at another table. Tr. 559:17- 560:4. Incredibly, despite the prior testimony of security guard Parks regarding Hatten’s instructions to monitor union behavior, Hatten denied concern about the discussion content -- NUHW. Tr. 560:5-16. The ALJD rightly found, “...notwithstanding that Parks only mentioned she had moved to another table and was soliciting money from employees there and that the cafeteria was sparsely populated that morning, Hatten’s dubious descriptions of Griffith’s asserted misconduct on March 23 were tortuous and recrementitious, variously accusing her of “taking over part of the cafeteria,” conducting a meeting, “calling attention to herself,” being disruptive, and, generally “disturbing the environment” for the patrons of the cafeteria.” ALJD 40:40-41:3.

7. The ALJD Correctly Characterized the Evidence in Finding Griffith was Never Suspended on March 23rd.

The ALJ concluded that Griffith was never told she was suspended, rather she was told by Hatten that she *could* be suspended. This conclusion is based on the clear testimony of Griffith, corroborated by DeAnn Horne.

Respondent, as an initial matter, takes issue with the ALJ’s purported reliance upon the fact that “contrary to normal procedure, Hatten failed to demand Griffith relinquish her security badge. (ALJD 44:25-27). Respondent states that this finding disregards the fact that Griffith was not wearing her badge on the morning of March 23. That Griffith was not wearing her badge on the morning of the March 23rd, consistent with the Hospital’s policy, is irrelevant to Hatten’s lack of action. As Griffith testified, Respondent’s employees take home their badge. (Tr. 250:25- 251:10). As such, though the record is silent, Griffith could have had her badge with her on the morning of March 23, available to turn over to Hatten had he really intended to

suspend her.

Next, Respondent complains of the ALJ failed to credit certain testimony by Respondent's agents. The Judge's credibility determinations in this case were based on his observations of the witnesses' demeanor and as such are entitled to great deference. The Judge's credibility rulings are fully supported by the record and Respondent has certainly not met its burden under *Standard Dry Wall Products, Inc., supra*, to overrule those findings.

Respondent also takes exception to the ALJD footnote 89, which reads in part,

"I harbor doubts regarding these documents. Thus, while Ronnie Parks' written report of the March 23 incident does portray Hatten as informing Griffith she was suspended, I note that, notwithstanding its import, Parks' failed to mention Hatten's act in his description of the incident. Rather, the sentence containing Hatten's suspension of Griffith is the last sentence and is introduced by "Bruce also" regarding Parks'."

The ALJ's reasoning is fully explained. While Respondent may not agree with the ALJ's doubt, the ALJ provides a reasonable basis for his skepticism.

Lastly, Respondent claims the ALJD ignores the Medical Center's record of disciplining other employees for insubordination. That is not accurate; see ALJD 29:21-34. In addition to considering Respondent's exhibits regarding disciplining employees for insubordination, the ALJD, in footnote 88, takes note of other examples provided by the General Counsel of Respondent discipline short of termination for similar conduct by employees.

Given the ALJD's findings of fact, the ALJ correctly determined that Griffith was not suspended on the morning of March 23.

8. The ALJD Correctly Held That Respondent Violated the Act by Terminating Griffith for her Actions on April 6.

Here again, Respondent contends that the ALJ erroneously applied the *Wright Line* test with regard to the events of March 24. Respondent contends the Medical Center had a

reasonable belief that Griffith was suspended and therefore lawfully removed her, that she engaged in profanity, and that Respondent had a lawful motivation because Griffith had a “disciplinary history.”

For the same reasons stated above, Respondent’s misapplication of *Wright Line* argument fails. With the General Counsel having established a *prima facie* case, the burden shifted to Respondent to establish that it would have discharged Griffith notwithstanding the overwhelming record evidence of its unlawful animus against Griffith.

Respondent contends that its termination of Griffith was justified due to her use of profanity in the EVS break room on March 24. Respondent argues that it had reasonable belief based upon the respective accounts of Aquino and Carla Biddle. However, neither witness impressed the ALJ as testifying candidly on this point.

”... their respective versions of Griffith’s attributed words are not corroborative and utterly contradictory on salient points such as where each supposedly stood while listening and, in particular, Griffith’s asserted profanity-laced attack upon Aquino. In addition, the latter related three inconsistent versions of Griffith’s comments inside the break room. In short, I do not believe their accounts and, therefore, can not conclude that Griffith uttered the word “fucking” or any variant thereof while venting inside the break room immediately after being informed of her suspension.” ALJD 45:2-8.

The ALJD concludes: “In short, I do not credit the guileful Hatten that he relied upon these documents [Aquino and Biddle’s reports] in deciding to discharge Griffith.” ALJD 45 fn. 101.

Respondent’s argument that it was “lawfully motivated” by Griffith’s disciplinary history is erroneous. Respondent cites *Consolidated Biscuit* in which the ALJ found that employer’s failure to follow its progressive discipline policy was insufficient in itself to establish that a discharge was pretextual or unlawful. *Consolidated Biscuit Co.*, 346 NLRB 1175, 1181. Here,

there is no lack of evidence demonstrating Respondent's unlawful discharge. General Counsel does not argue, and the ALJD does not rely upon, Respondent's failure to follow its progressive discipline policy was necessary to establish that Griffith's discharge was unlawful. Respondent's reliance on *Consolidated Biscuit* is entirely misplaced. The ALJ correctly applied the standards set forth in *Wright Line* to the instant case. Respondent finds no safe harbor in arguing "lawful motivations" given the mountain of evidence to the contrary.

9. The ALJD Properly Considered All Relevant Evidence in Arriving at Credibility Resolutions

The Respondent has excepted to some of the Judge's credibility findings, in particular discrediting Aquino's testimony regarding profanity. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products, Inc., supra*. A careful examination of the record shows no basis for reversing the findings.

The ALJ carefully explained his reasons for finding that the testimony of Aquino, with regard to his statements concerning alleged profanity, were less credible than his other testimony: "... any credence, which I might give to [Aquino]... must be palliated by Aquino's three divergent accounts of Griffith's asserted profanity on March 24..." ALJD 30:40-43. Moreover, the ALJD credited the testimony of current bargaining unit employees Lawana Williams and Bertha Dorrrough, each of whom was present in the employees' lounge. ALJD 30:28-34. Indeed, the ALJD found that Williams and Dorrrough each "impressed me as adhering to my admonition and attempting to convey her recollection of events as accurately as possible, and, in this regard, I note that, at a time when job security is a paramount concern, each testified adversely to Respondent's interests with a management representative, Bruce Hatten, observing her testimony." *Id.* Importantly their testimony was significantly divergent from that of Aquino

and corroborated Griffith's testimony regarding profanity. As such, the ALJ's decision to not credit Aquino on his three divergent accounts of March 24 is supported by the evidence.

Next, Respondent asserts that written statements by Aquino and Biddle should be credited. The ALJ explained his reasons for finding that the statements by Aquino and Biddle, which corroborate the testimony of each, should be given no credence. Aquino's purported statement was his second draft, and Respondent failed to offer the original to corroborate revisions made by Aquino. Further, Hatten failed to corroborate Aquino as to the reason for revising his statement. ALJD 26:40-41. Biddle's written version of Griffith's comments (drafted at the behest of Hatten) and her testimonial version are utterly contradictory. Given their dubious nature, the ALJ suspected that each was a fabrication, drafted subsequent to Griffith's discharge as justification for Respondent's action. As such, the ALJD's decision to not credit these statements are supported by the evidence and the ALJ's credibility determinations, and therefore entitled to deference.

Lastly, Respondent claims that the ALJD failed to credit the Medical Center's evidence that it has a longstanding practice of enforcing its policies. Respondent offered exhibits as evidence of a "consistent history of disciplining employees for similar conduct and disruptive activity" but claims that the ALJD ignores each such instance. The ALJD acknowledged the exhibits in detail. ALJD 29:21-34. Rather than ignoring the offered exhibits on the "flimsiest grounds", as Respondent asserts, the ALJD also takes into account examples of Respondent's discipline offered as exhibits by the General Counsel. See ALJD fn. 88. These disciplines, with far more lenient punishment meted out, demonstrate the Medical Center did not have a consistent history of disciplining employees. As such, the ALJD correctly credited the Medical Center's evidence proportionate and within the context of other Respondent disciplines offered

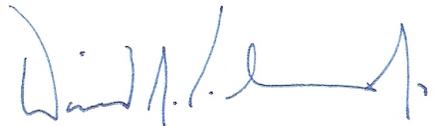
by the General Counsel.

III. CONCLUSION

Counsel for the Charging Party submits that the foregoing, and the record as a whole, establishes that the ALJ's findings that Respondent violated Sections 8(a)(1) of the Act when it engaged in surveillance of its employees' union activities on March 20 and March 23, 2009; and violated Section 8(a)(1) and (3) of the Act by redefining and discriminatorily enforcing its existing solicitation/distribution policies at its Summit Hospital campus cafeteria on March 20 and its Alta Bates Hospital campus cafeteria on March 23; and Section 8(a)(1) and (3) of the Act by issuing a disciplinary warning to Griffith on February 23, by suspending Griffith on March 24, and by discharging her on April 6 is supported by a preponderance of the evidence and current legal authority. The record establishes, and the ALJ has found, that the General Counsel has presented an overwhelming case. Accordingly, Respondent's Exceptions should be denied in their entirety and the decision of the Administrative Law Judge should be affirmed.

DATED AT Oakland, California this 8th day of September 2010.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "David J. Tubman, Jr.", with a stylized flourish at the end.

David J. Tubman, Jr.
Attorneys for Charging Party
National Union of Healthcare Workers
456 8th Street,
Oakland, CA 94607

CERTIFICATE OF SERVICE

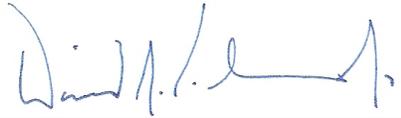
Attorneys for Charging Party hereby certify that they caused a true and correct copy of the foregoing to be served upon:

Via electronic mail and U.S. Mail, postage prepaid:

Mr. Christopher T. Scanlon
Jones Day
555 California Street, 26th Floor
San Francisco, CA 94104

Ms. Amy Berbower
Counsel for the General Counsel
1301 Clay Street, Suite 300N
Oakland, CA 94612

In the manner referenced above, on this 8th Day of September 2010.



David J. Tubman, Jr.