**White Oak Manor *and* Nichole Wright-Gore.** Case 11–CA–21786

January 30, 2009

## DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On August 12, 2008, Administrative Law Judge Lawrence W. Cullen issued the attached decision. He issued an erratum on August 19, 2008. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

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

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, White Oak Manor, Shelby, North Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraphs 2(a) and (b).

"(a) Within 14 days from the date of this Order rescind the unlawful discharge of Nichole Wright-Gore and offer her full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to her seniority or any other rights or privileges previously enjoyed.

" (b) Make Wright-Gore whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, with interest."

2. Insert the following as paragraph 2(c) and reletter the subsequent paragraphs accordingly.

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

*Ronald C. Morgan, Esq.,* for the General Counsel.
*Thomas H. Keim, Jr., Esq.,* for the Respondent.

## DECISION

### STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This case was heard before me in Shelby, North Carolina, on March 24 and 25, 2008.[1] The complaint is based on a charge filed by Nichole Wright-Gore (Wright), an individual, against White Oak Manor (White Oak or Respondent). The complaint alleges violations of Section 8(a)(1) of the National Labor Relations Act (the Act) and is joined by the answer filed by the Respon-

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

The judge discredited the testimony of Andy Nelson, the Respondent's administrator, in part because Assistant Director of Nursing Tammy Whisnant testified that Nelson and employee Nichole Wright-Gore met on October 31, 2007, and discussed the Respondent's alleged disparate enforcement of its dress code. Nelson claimed not to remember this discussion. In adopting the judge's credibility finding, we clarify that Whisnant was not present at the October 31 meeting, but that she attended a later meeting in which Nelson and Wright-Gore referred to the October 31 meeting and to their discussion at that meeting.

We correct the judge's statement that the Board in *Ogihara America Corp.*, 347 NLRB 110 (2006), held that "the use of photographs by employees to illustrate their positions concerning alleged poor work performed by a supervisor" was protected concerted activity. The Board in that case merely assumed arguendo that this activity was protected. Id. at 112 fn. 8.

[2] In agreeing with the judge that Wright-Gore's discharge violated Sec. 8(a)(1), we rely on his finding that she did not lose the Act's protection by photographing employee T.C. Brooks with her cell phone and showing it to other employees. As found by the judge, Wright-Gore engaged in protected concerted activity by seeking to initiate or induce group action among the Respondent's employees in an effort to compel the Respondent to fairly enforce its dress code. Wright-Gore's photographing, which led to her discharge, was part of the res gestae of these protected concerted activities. In this context, the "pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act." *Hacienda Hotel, Inc*., 348 NLRB 854 fn. 1 (2006), quoting *Stanford Hotel*, 344 NLRB 558, 558 (2005); see generally *Atlantic Steel Co.*, 245 NLRB 814 (1979). Here, there is no such showing. First, the Respondent failed to establish that it disseminated, prior to Wright-Gore's discharge, a rule prohibiting employees from taking photographs of other employees without their permission. Second, the Respondent did not enforce such a rule against other employees; employees freely took and posted photographs of each other with the Respondent's knowledge. Respondent's attempt to distinguish the photographs it permitted on the ground that they captured happy occasions is unpersuasive. Most importantly, the judge credited Wright-Gore's testimony that the Respondent's asserted basis for Wright-Gore's discharge, i.e., that she took a photograph of Brooks without his permission, did not occur.

[3] The judge inadvertently failed to include a separate expungement remedy in his recommended Order. We shall modify the judge's recommended Order to include such a provision.

Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[1] The record in this case was reopened on April 4, 2008, and closed by me on May 8, 2008.

dent wherein it denies the commission of any violations of the Act.

After due consideration of the testimony and evidence received at the hearing and the briefs filed by the parties, I make the following

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### I. THE BUSINESS OF RESPONDENT

The complaint alleges, Respondent admits, and I find that White Oak is now and has been at all times material, a North Carolina corporation with a facility located at Shelby, North Carolina, where it is engaged in the operation of a long-term care facility, that during the past 12 months, a representative period, Respondent derived an annual volume of revenue in excess of $100,000 in the operation of its facility at Shelby, North Carolina, and received goods and services valued in excess of $50,000 directly from points outside the State of North Carolina and that Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

### II. THE ALLEGED UNFAIR LABOR PRACTICES[2]

Respondent operates a long-term care facility in Shelby, North Carolina. This facility is one of several nursing homes owned and operated by Respondent through its headquarters in Spartanburg, South Carolina. The Shelby, North Carolina long-term care home is headed by its administrator, Andy Nelson, an admitted 2(11) supervisor, who in turn reports to the Respondent's headquarters in Spartanburg. Peggy Panther is the personnel director. Terry Fowler is the director of nursing. Tammy Whisnant is the assistant director of nursing. Veronica Walker is the staff development coordinator. Janice Horn is the housekeeping director. Tanesha Strong is the activities director. Kathy Gunter is the business office manager. Debbie Sanders is the Respondent's consultant. All of the above-listed individuals are 2(11) supervisors. Christie Ingle is the assistant business office manager. She is not a supervisor.

The complaint alleges that on November 15 and 16, 2007, Respondent, through its agent and supervisor, Andy Nelson, threatened its employees with discharge because they engaged in protected concerted activities and that Respondent also interrogated its employees concerning their protected concerted activities. The complaint further alleges that on November 16, 2007, Respondent discharged and thereafter failed and refused to reinstate employee Nichole Wright-Gore because of her engagement in concerted activities with other employees for the purpose of collective bargaining or other mutual aid or protection and in order to discourage employees from engaging in such concerted activities. The threats, interrogations, and discharge are alleged to have violated Section 8(a)(1) of the Act.

Wright testified that on October 23, 2007, she returned from a week's vacation wearing a baseball hat and approached her supervisor, Terry Fowler, and removed the hat and told Fowler that she had received a terrible haircut. Fowler commented that it did not look that bad and that it would grow out. Wright then put her hat back on and proceeded to perform her duties. Wright worked as a central supply clerk. She worked in a small office and did invoicing on her computer. She also spent about 50 percent of her time opening boxes and checking in supplies and other items that had been ordered and distributing them to the nurse's stations. Wright continued to wear the hat until October 30, when there was a fire drill and Personnel Director Peggy Panther observed her wearing the hat and tapped her on the hat and told Wright that the hat was not the required dress code. Wright said nothing, but declined to take off the hat and walked away. Panther acknowledged at the hearing that she had observed Wright wearing the hat prior to this incident but had not taken any action. A few minutes, thereafter, Assistant Director of nurses Tammy Whisnant told Wright to remove the hat. Wright told her that the dress code did not prohibit the wearing of hats. Whisnant again told her to remove the hat. Wright said no and walked away. She was then called into a meeting by Director of Nurses Terry Fowler with Panther and Whisnant present. Fowler gave Wright a copy of the dress code and asked Wright if she would remove the hat. Wright said she would not remove the hat because it was unfair to require her to remove her hat as other employees were permitted to wear hats. Fowler told her that if she walked out of her office without removing the hat she should clock out and leave by the back door. She refused to remove the hat and left about 3:30 p.m. After arriving home, she spoke to Administrator Nelson on the phone who told her to report to work the next morning. Panther testified that during the period from October 23 to 30 Wright had been observed wearing the hat by Nelson, Panther, Whisnant, and Fowler. In response to Wright's assertion on October 30, that there was nothing in the dress code that prohibited the wearing of hats in the workplace, Nelson distributed to employees by the end of that workday, a memo that said that only articles of clothing listed in the dress code could be worn. Hats were not listed in the dress code. The next day (October 31) was Halloween and Wright appeared in costume as a race car driver including a baseball hat. Most of the other employees wore costumes of varying kinds. When she arrived at work, she was met shortly thereafter by Nelson who told her it would be in her interest to remove the hat. She did so and did not again wear a hat at work during the rest of her employment by Respondent. Following the removal of her hat, Wright met with Nelson and Fowler concerning the issue. She was given a written warning for her refusal to remove the hat. Wright told them that it was unfair that she could not wear a hat while other employees were able to wear hats at the nursing home. She also told them that employee David Layell was wearing a hat at work that day. Nelson said he would look into this. As she was dissatisfied with being prohibited from wearing a hat at work and as she saw other employees who did not adhere to the dress code, particularly men wearing hats and showing tattoos, Wright sought to persuade female employees of this perceived inequity. She began talking to other women employees and telling them of the issuance of the written warning she had received because of wearing a hat on the premises, and the disparity of this discipline whereby, the dress code was not enforced against other employees wearing hats and showing tattoos. She discussed this with 10 or more female employees

[2] All dates in this case are in 2007 unless otherwise stated.

and 3 members of management. She engaged in one-on-one conversations and also spoke to groups of female employees in the smoking and break areas as well as on the general premises. Insofar as she was aware, the employees all expressed their sympathy with her cause and some of them expressed their own dissatisfaction with the way the dress code, with respect to shoes, hats, tattoos, fingernails, and jewelry, applied to them. On November 12, in furtherance of her campaign to have Respondent's management and particularly Nelson and the headquarters representatives enforce the dress code fairly, Wright began to use her cell phone camera to take pictures of other employees who were not complying with the dress code. The pictures showed them wearing hats and showing tattoos. She intended to use these photographs to demonstrate the inequity of the lack of uniform enforcement of the dress code. She took cell phone pictures of Harold Hopper, David Layell, Deborah Mitchell, and Shay Roberts. Mitchell and Roberts both wore head coverings and Wright testified they gave their approval to be photographed. A second picture was taken of Roberts to show a tattoo on his arm. Wright took pictures with her cell phone of Hopper and Layell wearing hats. Wright did not have permission from these employees to take the pictures. She did not have any of the pictures of these employees developed. Wright also telephoned Respondent's consultant, Debbie Sanders, at the headquarters, and told her of the problem of the uneven enforcement of the dress code and at Sander's request Wright mailed her a copy of the dress code and the October 30 memo distributed by Nelson.

The evidence presented at the hearing shows that what had initially started as an individual complaint by Wright, that she was being treated unfairly by being required to remove her hat, evolved into a campaign by Wright to have the dress code enforced in a fair and equitable manner. Wright was not alone in this campaign. According to Shay Roberts in his reports to Respondent which were received by Nelson, employee Angela Hawkins urged Roberts to permit Wright to take his pictures, one showing him wearing a hat and a second picture showing a tattoo on his arm. Nelson thus knew that Angela Hawkins solicited Roberts to pose for the picture. It is clear that the collaboration of Wright and Angela Hawkins in obtaining cell phone pictures of employees who were not in compliance with Respondent's dress code constituted a joint effort of these two employees in seeking to obtain a change in working conditions. Wright showed other employees the pictures she had obtained of employees Layell, Mitchell, Hopper, and Roberts who she contended were in violation of the dress code. Specifically, Wright showed employees Angela Hawkins, Susie Hawkins, Christie Ingle, Crystal Henson, and Kim McArthur these cell phone pictures. Wright testified, without rebuttal, that all employees to whom she showed the pictures agreed the dress code was not being fairly enforced. In addition to Wright's actions in showing the cell phone pictures to other employees, Wright showed the cell phone pictures to Manager Kathy Gunter and Coordinator Veronica Walker, both management employees. Gunter wrote in her account to Nelson dated November 16 that Wright had, on several occasions, shown the cell phone pictures to Gunter and had complained about the unfair enforcement of the dress code. On one occasion, Wright showed the cell phone pictures to Gunter and employee Ingle at the same time and asserted that the dress code was not being fairly enforced. On November 15, Gunter went to Nelson's office and informed him that Wright had shown her the cell phone pictures. On another occasion, Wright showed the cell phone pictures to Gunter in a group of employees in the smoking area concerning the enforcement of the dress code. Nelson acknowledged that he was informed of Wright's activities the day prior to his termination of Wright. The evidence supports a finding that Gunter told Nelson of the actions of Wright and the other employees in the smoking area on November 15. Wright testified that on two occasions she showed the cell phone pictures to Coordinator Veronica Walker. On one occasion they were alone, and on a second occasion they were at the smoking area in the presence of other employees. Wright testified she had shown the pictures to Walker and Gunter to show them that the Respondent was not enforcing the dress code fairly and to motivate them to go to Nelson to correct this inequity. I credit Wright's testimony in this regard, which was unrebutted. Walker was not called to testify.

Receptionist Crystal Henson testified that "a couple of days" prior to November 16 Angela Hawkins showed her a picture of employee Shay Roberts wearing a hat and that Hawkins said, "Look at what we got." Wright was not present during this incident. Henson testified that within "a couple of hours" of this incident she told Nelson who was her immediate supervisor. Nelson told Henson, "There was no need to say anything to anybody else," that he would "handle it." I credit Henson's testimony which was unrebutted. Kathy Gunter also testified that on November 15 she told Nelson that she and employee, Christie Ingle were shown the cell phone pictures by Wright, and that on the morning of November 16 Nelson directed Gunter that both she and Ingle give him a written statement of Wright's conduct. They did so. However, the statements of Gunter and Ingle differ concerning which employee's pictures were taken by Wright. Gunter testified that one of the cell phone pictures she saw was that of employee T.C. Brooks. Ingle testified she was not sure that she saw Brooks on the cell phone picture. Wright testified she did not take any pictures of Brooks. Gunter's testimony did not appear as sure as that of Wright. I credit the testimony of Wright in this regard as the more reliable. Brooks was not called by Respondent to rebut Wright's testimony.

On November 15, at about 2:30 p.m., Nelson called Wright to his office and, in the presence of Whisnant, asked Wright if she still had a problem with the hat. Wright responded that she did not have a problem with the hat but did with being treated unfairly. Nelson told her he thought that the prior discussion on October 31 would stay in his office. He asked her why she had not come back to him if she still had a problem. She told him she had not come back to him because she had no results from the prior meeting and noted that she had told him of the wearing of a hat by David Layell. Nelson acknowledged that he had said he would look into this. Nelson then told her that he had heard that she had been talking to employees and taking pictures of them without permission. Wright shook her head no and said she had permission. Nelson then called her a liar and she denied that she was a liar. Nelson then asked her why she

remained as an employee if she was unhappy there. She said that she had three children to take care of. Nelson then said, "So you're going to let a hat come in between the food on your kids' table." He then invited her to contact Respondent's headquarters and she declined to do so. He then told her she could give him her resignation then or she could think about it and talk about it later. The meeting was then concluded and she returned to work. I credit Wright's testimony which was unrebutted and find that this constituted unlawful interrogation and threats issued to Wright.

Nelson testified that on the afternoon of November 16, he approached employee T. C. Brooks and inquired of him whether he knew of his picture being taken on the premises and that Brooks said he was not aware of this. Nelson told Brooks to inform him or Brook's supervisor if he heard of anything. Prior to Nelson's inquiry, Brooks had not indicated any problem concerning the taking of pictures. However, on the same date at about 2 p.m., Brooks filed an employee problem solving form with Nelson in which Brooks asserted that he had reason to believe that someone in the facility had taken his picture without his knowledge and shown it to other employees. No evidence was offered by the Respondent as to what had prompted Brooks to file this complaint or where he obtained the information concerning the details of the complaint. Although Brooks is currently employed by Respondent, he was not called as a witness by Respondent. Nelson testified that following the receipt of the complaint from Brooks, he called Respondent's senior administrator, Amanda Pack in Charlotte, North Carolina, and they decided to discharge Wright. The termination report lists the reason for the termination as, "Stealing or misappropriating (misusing) property belonging to the facility, residents or other employees. Employee took a picture of another employee without his/her permission and in turn, showed it to other employees." Nelson conceded at the hearing that this referred to a single picture of a single employee and contended that his sole reason for discharging Wright was, "because she took a picture of a person named T. C. Brooks and showed it to other employees." However, Nelson conceded that he had never seen the picture of Brooks and Wright testified that she had never taken a picture of Brooks. Gunter testified it was Brooks, Ingle testified she was not certain that the picture shown to her was a picture of Brooks. About 3 p.m. on November 16, Nelson called Wright into a meeting with himself and Terry Fowler and terminated Wright. Angela Hawkins testified that on November 16 (the day Wright was discharged), Administrator Nelson called her to his office and said, "Nikki (Wright) no longer works here," and "do I need to take your keys?" She asked Nelson what he was talking about. He asked her if she knew anything about pictures. She told him she had taken pictures on Halloween. He asked if she knew anything about Nikki taking pictures with her cell phone. She said, "Yes" and told Nelson about the pictures that were taken of Shay Roberts. Nelson then said, "So you do know something," and she said, "No, I don't. I just know she took the pictures." Angela Hawkins testified she thought she was going to be discharged because Respondent takes the employees' keys when it discharges employees. The foregoing testimony of Angela Hawkins' was unrebutted.

On November 19, Wright prepared an Equal Employment Opportunity Commission (EEOC) questionnaire and filed it on November 20. In her statement accompanying the EEOC complaint Wright stated that she had taken pictures to prove that she had been discriminated against and spoke to others concerning the unfair enforcement of Respondent's dress code regulations. Wright filed the National Labor Relations Board charge in this case on November 28.

I find that the General Counsel has established that the Respondent violated Section 8(a)(1) of the Act, by threats of discharge issued to employees Wright and Angela Hawkins by Nelson and by his interrogation of these two employees because of their engagement in protected concerted activities. I further find, that the General Counsel has established a prima facie case of a violation of Section 8(a)(1) of the Act by the termination of Wright because of her engagement in protected concerted activities under the Act. With respect to the interrogation of Wright, I find the evidence as set out above, establishes that on November 15, Respondent, by Nelson, interrogated Wright concerning her engagement in protected concerted activities. With respect to the threats issued by Nelson to Wright on November 15, I find the Respondent, by Nelson, threatened Wright with discharge. I find that Respondent, by Nelson, also interrogated and threatened Angela Hawkins with discharge on November 16, because of her engagement in protected concerted activities following the discharge of Wright as set out above.

I find that the above cited testimony of Wright establishes that she was interrogated concerning her engagement in protected concerted activities when she was called into Nelson's office on November 15, and that Respondent, thereby, violated Section 8(a)(1) of the Act. I find that Nelson's inquiry concerning why she was continuing to work there since she was dissatisfied and the statement that she was coming between her children's' food for a hat, were unlawful threats of discharge because of her engagement in protected concerted activities and that Respondent thereby, violated Section 8(a)(1) of the Act. I further find that the above unrebutted testimony of Angela Hawkins establishes that she was unlawfully interrogated concerning the taking of the cell phone pictures. Nelson's inquiry of Angela Hawkins as to whether he needed to take her keys was an unlawful threat of discharge as this was the usual procedure followed when someone is terminated according to the unrebutted testimony of Angela Hawkins. The interrogation and threat of discharge were in violation of Section 8(a)(1) of the Act.

I find that Wright was engaged in concerted activities when she spoke with other employees concerning the disparate enforcement of the dress code and when she took pictures, with the assistance of employee Angela Hawkins, of employees who were wearing head coverings and who were showing tattoos. I credit the testimony of Wright that she was raising the issue of the unfair enforcement of the dress code with her fellow employees and with three of the managers with the goal of obtaining a united approach to Respondent's management and particularly to Nelson who was the highest ranking official at the nursing home. It may be that Wright's initial refusal to remove the hat and her dissatisfaction with the warning given to her for

her refusal to remove the hat was an individual gripe. However, I find that this evolved into a joint action wherein Wright was protesting the unfair enforcement of the dress code rather than an individual gripe. Wright told Nelson in the meeting of October 31 that her complaint was not about the wearing of the hat but rather was concerned with the unfair enforcement of the dress code. Moreover, in addition to Wright's discussion of the unfairness of the dress code, with other employees she enlisted Angela Hawkins to join together with her and assist in convincing employee Shay Roberts to permit Wright to take his pictures showing that he was wearing a hat and showing a tattoo on his arm. On November 12, Wright returned to work after a 2-½-day absence as a result of a medical problem. The incident involving Roberts on November 12, occurred after the issuance of a memorandum on October 30, by Nelson prohibiting the wearing of any items not listed in the dress code. The dress code did not permit the wearing of a hat or the showing of tattoos. I find that Wright was engaged in concerted activities for the purpose of mutual aid and protection, when she appealed to the female employees concerning the unfair enforcement of the dress code. It is clear that Wright was addressing the perceived unfair enforcement of the dress code and was seeking to obtain the support of the female employees to come together and make their positions known to Respondent's management and particularly Nelson, that these employees wanted the Respondent to remedy the unfair enforcement of the dress code. This constituted a joining together of the employees for their mutual aid and protection as the wearing of hats and other items outlined in the dress code would affect terms and conditions of employment. *Eastex Inc. v. NLRB*, 437 U.S. 556, 563–568 fn. 17 (1978). These concerted activities of the employees which Wright sought to promote among the Respondent's female employees were protected by Section 7 of the Act. *Brown & Root, Inc. v. NLRB*, 634 F.2d 816, 818 (5th Cir. 1981). The broad protection of Section 7, particularly applies to unorganized employees (as are involved in the instant case before me) as these employees do not have any designated bargaining representative to speak for them. *Washington Aluminum Co.*, 370 U.S. 9, 14 (1962). I find that Wright's engagement in concerted activities was on behalf of other female employees who she believed were being adversely affected in their terms and conditions of employment. Moreover, as noted above, Wright was joined in her concerted activities by employee Angela Hawkins who urged employee Shay Roberts to permit Wright to take his picture and who showed Roberts' picture to employee Henson. *Meyers Industries,* 268 NLRB 493, 497 (1984), remanded sub nom. *Prill v. NLRB*, 735 F.2d 941 (D.C. Cir. 1985), on remand *Meyers Industries,* 281 NLRB 882 (1986), enfd. sub. nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). In *Holling Press, Inc*., 343 NLRB 301, 302 (2004), the Board held that:

> In order for employee conduct to fall within the ambit of Section 7, it must be both concerted and engaged in for the purpose of 'mutual aid or protection.' These are related but separate elements that the General Counsel must establish in order to show a violation of Section 8(a)(1).

I find that the evidence supports a finding that, Wright was engaged in concerted activities when she attempted to obtain support among her fellow employees in order to attain fair enforcement of the dress code. I find that she was engaged in a joint discussion of the unfairness of the dress code, and that it was implicit, therein, that she was seeking a change in the enforcement of the dress code. Angela Hawkins joined together with Wright to seek change in their working conditions to deter the unfair enforcement of the dress code. The engagement of Wright and her fellow employees in the discussions of the dress code issue and in the taking of pictures of employees deemed in violation of the dress code was for the employees' mutual aid and protection. At the hearing several of the other employees, such as Wanda Goins, Nancy McKee, Susie Hawkins, and Crystal Henson, testified that they supported Wright's position that the unequal enforcement of the dress code was unfair. Goins testified that the warning given to Wright was "bullcrap." McKee testified that the issuance of the warning to Wright was unfair as other employees were allowed to show their tattoos. Susie Hawkins testified she agreed with Wright's position that Respondent was not fairly enforcing the dress code concerning the showing of tattoos, body piercing, long dangling earrings, and the wearing of hats. Employee Crystal Henson testified she was with a group of four to five employees who all agreed with Wright's position concerning the unfair enforcement of the dress code, although some disagreed after Wright left the group.

On November 12, Wright began taking pictures of her fellow employees with her cell phone in order to demonstrate that a number of employees were not complying with the dress code and were wearing items which were prohibited by the revised dress code of October 30, wherein employees were prohibited from wearing items that were not listed in the preexisting dress code. Wright took pictures of her fellow employees to use a modern technique available to her, by the use of the cell phone, to document the noncompliance with the dress code by certain employees. The use of the cell phone pictures were part of Wright's overall concerted protected activities as were Wright's verbal comments and discussions concerning the dress code, and were the use of the visual aid by the pictures to demonstrate the unequal enforcement of the dress code. In *Ogihara America Corp.*, 347 NLRB 110 (2006), the Board held that the use of photographs by employees to illustrate their positions concerning alleged poor work performed by a supervisor were protected concerted activities of the employees. By the solicitation of other employees in conversations about the unfair enforcement by Respondent of the dress code, Wright was mutually protesting with other employees regarding working conditions and, therefore, she was engaging in protected concerted activities. Roberts reported to Nelson both verbally on November 15, and twice in writing that the taking of the two pictures of Roberts on November 12, was a joint effort between Wright and Angela Hawkins. Nelson admitted that Roberts told him that Angela Hawkins encouraged him to let Wright take his picture. It is clear that Wright and Angela Hawkins were acting in concert to obtain cell phone pictures of Roberts showing him in violation of the dress code. Angela Hawkins testified she thought Wright was taking the pictures to show

Nelson that Respondent's enforcement of the dress code was unfair.

Nelson testified that during the afternoon of November 16 he went to T.C. Brooks and asked if he had posed for any pictures or heard anything about his pictures being taken in the facility. Brooks said he did not know anything about his picture being taken. Nelson then told Brooks that if he heard anything to tell his supervisor, Maintenance Director Scott, or himself. Nelson admitted that prior to his inquiring of Brooks, Brooks had no problem concerning a picture. Nelson testified he then received an employee solving form from Brooks showing it had been filled out at 2 p.m. on November 16, and showed the "complaint" had been previously discussed by Brooks with Nelson. In the section entitled "Nature of Complaint," Brooks wrote that he had "reason to believe that someone in the facility has taken my picture without my knowledge and showing to other staff in the facility. I feel like that is against my right, and would like some one to take action about this problems." The record in this case is devoid of any information as to where or how Brooks had allegedly obtained knowledge of his picture being taken or any details concerning it as Respondent failed to develop this through its witnesses and Respondent failed to call Brooks, a current employee, as a witness. Thus, Respondent has failed to explain why Nelson had approached Brooks about this matter in the first place and Respondent failed to demonstrate what the source of Brooks' knowledge of the details outlined in his written statement was. Moreover, it is significant that immediately after receiving the complaint from Brooks that Nelson called Senior Administrator Amanda Pack and a decision was made to terminate Wright, without giving Wright any opportunity to defend herself, and Nelson then prepared a termination report for Wright which lists the sole "reason for termination" as set out in the employee handbook as follows:[3]

> Page 41 #4 Stealing or misappropriating (misusing) property belonging to the facility, residents or other employees. Employee took a picture of another employee without his/her permission and in turn, showed it to other employees."

Nelson agreed at the hearing that the sole reason he discharged Wright was "because she took a picture of T. C. Brooks and showed it to other employees." Nelson admitted he never saw the purported picture of Brooks and Wright consistently denied that she ever took a picture of Brooks. As noted above, Gunter was the only person who identified the picture as one of Brooks. Ingle, who initially stated that Wright had shown her a picture of Brooks, conceded in her testimony that she was not certain that she had seen a picture of Brooks. I credit Wright's testimony that she did not take a picture of Brooks as the more reliable testimony. Nelson filled out the termination report on November 16, and called Wright to a meeting with himself and director of nursing Fowler about 3 p.m. which was an hour or less after Brooks had submitted the employee problem solving form. Nelson told Wright an allegation of her taking pictures of people without their permission was true and that he and the home office had decided to terminate her. Following this, Nelson proceeded to interrogate Angela Hawkins concerning her protected concerted activities and threatened her with termination because of her protected concerted activities.

The unrebutted testimony of the employees and the photographs introduced at the hearing show that the employees freely took photographs of other employees engaged in activities to celebrate various special days and to exhibit photographs of members of the employees' families without asking permission of management to do so. In fact, some of these photographs were placed on bulletin boards. It appears that the only restriction was that pictures of residents were not to be shown to others. Under these circumstances, I find that the showing of cell phone pictures was not so egregious as to cause Wright and/or Angela Hawkins to lose the protection of the Act.

Nelson's receptionist, Chrystal Henson, testified and Nelson did not deny that no later than November 15 Henson told Nelson that Angela Hawkins had shown her a cell phone picture of Roberts. Nelson's direction to Henson to let him handle the matter with respect to Angela Hawkins showing Henson pictures of Roberts and Nelson's testimony concerning this matter was designed to prevent the need to discipline Angela Hawkins. This would have shown evidence of disparate treatment by which Wright was disciplined but Angela Hawkins was not. Although Peggy Panther and Terry Fowler testified at the hearing that in the October 30 meeting, Wright did not assert the unfairness of the dress code and did not make any statement, this testimony was contradicted by the testimony of Whisnant. Whisnant testified that at this meeting Wright said it was unfair that she was required to remove her hat while other employees were allowed to wear their hats and that Wright told Fowler that there was nothing in the dress code prohibiting the wearing of a hat. Whisnant also testified that immediately after Wright was sent home on October 30, the dress code was revised to say that if, the wearing of hats or other items was not in the dress code then it was not to be included. I credit Whisnant's testimony over that of Nelson, Fowler, and Panther regarding the above as she is a current employee and she testified in convincing and unwavering terms notwithstanding her position as a management employee. I further note that Manager Kathy Gunter's initial testimony at the hearing was that she did not remember what Wright had said when she showed Gunter and Christie Ingle the cell phone pictures. However, when confronted with her prior testimony in a state unemployment hearing, Gunter testified that Wright was making a statement that other employees were wearing caps and she could not wear one and did not understand why. I credit this second version of Gunter's testimony.

The employee witnesses presented in the General Counsel's case were all current employees with the exception of Wright. I found the testimony of these witnesses was credible, straightforward, and mutually corroborative and consistent with the documentary evidence. I, likewise, find that the testimony of Wright was credible with the exception of her testimony that she had permission to take all of the cell phone pictures that she took. It is a common occurrence wherein some but not all the

[3] I find the evidence was not conclusive to establish whether a new rule entitled "Misuse of Company Property and Internet Postings" had been disseminated among the employees on or before the date of the termination of Wright.

testimony of a witness may be credited. I found much of the testimony of Nelson concerning the reasons for the discharge of Wright and Nelson's professed loss of memory as to what had occurred in his meeting with Wright was not credible. He claimed not to remember if Wright told him at the time when he gave her the warning on October 31 that it was not fair that other employees were allowed to wear hats while she was not permitted to do so. Nelson's testimony was contradicted by the testimony of Assistant Director of Nurses Whisnant who testified that at this meeting Nelson asked Wright if she still had an issue with the hat and that Wright told him that he was allowing other employees to wear hats. Whisnant further testified that Nelson acknowledged that Wright had told him about this problem before. Whisnant further testified that Nelson told Wright, "this is grounds for termination," and asked Wright that if she was so unhappy, why she was still working there and that Nelson further asked, if she was going to let a hat come between the food on her children's table. Furthermore, Nelson wrote on a problem solving form of Shay Roberts' that the investigation did not reveal that pictures of Roberts were shown to other employees. Nelson affirmed in his testimony that Roberts' picture was never shown to any employee as far as he knew.

Nelson testified that the sole reason that he discharged Wright was because she showed a picture of T. C. Brooks wearing a hat. The taking of cell phone pictures of employees and the showing of them to others was a protected concerted activity under the Act and Respondent's admission at the hearing that it discharged Wright solely because she took and showed the pictures of T. C. Brooks to other employees, establishes a violation of Section 8(a)(1) of the Act. Under these circumstances, General Counsel contends that a dual motive analysis under *Wright Line,* 251 NLRB, 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), is unnecessary. I find, the General Counsel's contention in this regard is correct. However, assuming arguendo that such an analysis is necessary, I will apply the *Wright Line* analysis. I find that the General Counsel has established a prima facie case. As discussed above, I have found that Wright was engaged in protected concerted activities in the taking of the cell phone pictures showing disparate enforcement of the dress code. It is undisputed that the Respondent had knowledge of Wright's protected concerted activities in support of her campaign to obtain fair enforcement of the dress code. I find it has been established that Respondent, through its administrator,Nelson, had animus against Wright because of her engagement in protected concerted activities and took action by discharging Wright. I find a nexus has been established between the protected activities and the adverse action of discharge underlying motive. The evidence in this case establishes disparate treatment not only in the enforcement of the dress code but it is also established by Respondent's withholding any disciplinary action against Angela Hawkins' who showed the picture of employee Roberts to employee Crystal Henson. I find that the Respondent has failed to rebut the prima facie case by the preponderance of the evidence. *Winston-Salem Journal*, 341 NLRB 124, 133 (2004), enf. denied 394 F.3d 207 (4th Cir. 2005). Under *Wright Line* if the General Counsel proves by a preponderance of the evidence that protected concerted activity was even a partial, motivating factor for the discharge, the burden of proof shifts to Respondent to prove by the preponderance of the evidence that Respondent would have discharged the employee in the absence of the unlawful motivation. *Guardian Industries Corp*., 319 NLRB 542, 549 (1995), applying *Healthcare & Retirement Corp.*, 306 NLRB 65, 66 (1992). See *Consolidated Bus Transit, Inc.*, 350 NLRB 1064, 1065 (2007), where the Board stated that under the *Wright Line* test, "the General Counsel must prove by a preponderance of the evidence that union animus was a substantial or motivating factor in the adverse employment action. The elements commonly required to support such a showing are union or protected activity by the employee, employer knowledge of that activity, and union animus on the part of the employer." If the General Counsel makes the required initial showings, the burden then shifts to the employer, to prove, as an affirmative defense, that it would have taken the same action even in the absence of the employee's union activity, citing *Manno Electric,* 321 NLRB 278, 280 fn. 12 (1996).

## CONCLUSIONS OF LAW

1. Respondent White Oak Manor is an employer within the meaning of Section 2(6) and (7) of the Act.

2. Respondent violated Section 8(a)(1) of the Act by the issuance of unlawful threats against employees Nichole Wright-Gore and Angela Hawkins.

3. Respondent violated Section 8(a)(1) of the Act by interrogating employees Nichole Wright-Gore and Angela Hawkins.

4. Respondent violated Section 8(a) (1) of the Act by discharging Nichole Wright-Gore because of her engagement in protected concerted activities under the Act.

5. The aforesaid violations of the Act, in conjunction with Respondent's status as an employer, affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

## REMEDY

Having found that the Respondent has engaged in the above violations of the Act, it shall be recommended that Respondent cease and desist therefrom and take certain affirmative actions designed to effectuate the policies and purposes of the Act and post the appropriate notice. It is recommended that Respondent rescind and expunge from its files the discharge issued to Nichole Wright-Gore and offer her immediate reinstatement to her former position or to a substantially equivalent one if her former position no longer exists. She shall be made whole for any loss of backpay and benefits sustained as a result of the Respondent's unfair labor practices. The backpay amount shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[4]

[4] 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.

ORDER

The Respondent, White Oak Manor, Shelby, North Carolina, ts officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with discharge because of their engagement in protected concerted activities for their mutual aid or protection.

(b) Interrogating its employees concerning their engagement in protected concerted activities for their mutual aid or protection.

(c) Discharging its employees because of their engagement in protected concerted activities for their mutual aid or protection.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the National Labor Relations Act.

2. Take the following affirmative actions to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order rescind the discharge of Nichole Wright-Gore and offer her full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent job without prejudice to her seniority or any other rights or privileges previously enjoyed, and expunge from its files the unlawful discharge and inform her in writing that this has been done.

(b) Make whole Wright for any loss of earnings and other benefits suffered as a result of the discrimination against her, with interest.

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

(d) Within 14 days after service by the Region, post copies of the attached notice marked "Appendix"[5] at its facility in Shelby, North Carolina. Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 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 October 2007.

(e) 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.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY THE ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten our employees with discharge because of their engagement in protected concerted activities.

WE WILL NOT interrogate our employees concerning their engagement in protected concerted activities.

WE WILL NOT discharge our employees because of their engagement in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights under Section 7 of the National Labor Relations Act.

WE WILL, within 14 days from the date of the Board's Order, rescind the unlawful discharge of Nichole Wright-Gore and offer her reinstatement to her former job, or, if that job no longer exists, to a substantially equivalent job, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make her whole for any loss of earnings and other benefits as a result of the discrimination against her, with interest.

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

WHITE OAK MANOR

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