

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

**BANNER HEALTH SYSTEM d/b/a  
BANNER ESTRELLA MEDICAL CENTER**

**and**

**Case 28-CA-023438**

**JAMES NAVARRO, an Individual**

**ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT  
OF CROSS-EXCEPTIONS**

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Counsel for the Acting General Counsel (General Counsel) files the following Brief in Support of Cross Exceptions to the Decision of Administrative Jay R. Pollack, [JD(SF)-43-11] (ALJD), issued on October 31, 2011, in the above captioned case.<sup>1</sup> As set forth in the General Counsel's Cross-Exceptions, filed under separate cover, the General Counsel excepts to the ALJ's failure to: (a) find that Respondent unlawfully issued James A. Navarro (Navarro) a coaching discipline; (b) find that Respondent unlawfully issued Navarro an unfavorable performance evaluation and a revised performance evaluation; (c) find that Respondent promulgated an overly-broad and discriminatory rule prohibiting employees from discussing their concerted activities with others; (d) admit General Counsel's Exhibit 11 into evidence; and (e) order a notice posting at Respondent's other facilities wherever Respondent uses the confidentiality agreement. In all other respects the ALJ's findings are appropriate, proper, and fully supported by the credible record evidence, including the finding that Respondent violated Section 8(a)(1) of the Act by including in its confidentiality agreement a

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<sup>1</sup> Banner Health System d/b/a Banner Estrella Medical center will be referred to as "Respondent" or "Banner." References to the official transcript will be designated as (Tr.), with appropriate page citations. References to the General Counsel and the Respondent's Exhibits will be referred to as (GCX) and (RX) respectively with the appropriate exhibit number. All dates are in 2011, unless otherwise stated.

prohibition against sharing employee information, such as salaries and discipline, with third parties.

## **I. INTRODUCTION**

This case involves sterile processing technician James Navarro (Navarro) and Respondent's retaliation against him for questioning the appropriateness of the procedures Respondent ordered him and his coworkers to use to clean and sterilize surgical instruments; a process that had never been previously used. On February 18, a steam pipe malfunctioned at Respondent's facility, preventing employees from performing their job duties, which entailed the cleaning and sterilization of surgical instruments used in the labor and deliver rooms. After Respondent became aware of the broken steam pipe, Navarro was told to use hot water from the Bunn coffee machine in the employee break room to clean the surgical instruments, and the Sterrad machine to sterilize them. Neither procedure was established protocol; Respondent's employees had never before used hot water from a coffee machine to clean surgical instruments, or the Sterrad machine to sterilize them. Reasonably, Navarro questioned the appropriateness these directives with fellow employees and with management.

On February 19 and 20, deeply concerned over Respondent's unexpected and unprecedented instructions, without any established protocol or procedure in place, Navarro discussed his concerns with several of his coworkers. Navarro's concerns identified issues that fall squarely within the ambit of Section 7 activity, including the lack of documentation or established protocol in using the methods directed by Respondent, and the potential liability or loss of employment faced by employees using these methods that were not established protocol. Instead of honoring employee Section 7 rights to discuss workplace

concerns, Respondent issued Navarro a coaching discipline and unfavorable performance appraisals.

On February 21, the very same day Navarro notified Respondent about his discussions with employees, he was issued a coaching discipline for insubordination. Three days later, Navarro was given an unfavorable performance evaluation which contained negative comments concerning his work performance, which had never been previously discussed with Navarro. Four days later, on February 28, Navarro was issued a revised performance evaluation, which still contained negative comments about his work performance.

Despite the fact that Navarro had engaged in protected concerted activity, and Respondent's discipline for insubordination was directly linked to Navarro's concerted complaints, the ALJ failed to find that Respondent used the discipline and performance evaluations as a vehicle to retaliate against Navarro, and to thwart the Act's protections. The ALJ also dismissed the allegation that Respondent's directive to employees that they cannot talk about matters discussed during investigative interviews, while the investigation is ongoing, violates Section 8(a)(1). It is respectfully submitted that the ALJ erred by failing to find that Respondent violated the Act as alleged.

## **II. STATEMENT OF FACTS**

### **A. Respondent's Business Operations**

Respondent operates a hospital facility located in Phoenix, Arizona, providing inpatient and outpatient medical care services. (ALJD 2) Navarro has worked for Respondent as a sterile processing technician (tech) for about three years. Navarro works in the Central Processing Sterile Department (CPSD), which operates 24 hours a day, seven days a week, employing 13 techs over three work shifts. (ALJD 2, 21; Tr. 13-14, 115)

Techs are responsible for the proper care and handling of all surgical instruments. This includes cleaning, assembling, preparing, and sterilizing the instruments. (ALJD 2) They are required to use equipment according to manufacturer recommendations and hospital policy, and perform their duties according to established procedures, regulatory guidelines, accreditation requirements, and applicable professional standards. (ALJD 2; GCX 6)

The cleaning and sterilizing of surgical instruments requires hot water and steam, as well as the use of specialized machines for certain surgical instruments. (Tr. 66-69) The type of instruments to be cleaned and sterilized dictates which machines are used in the process. (Tr. 66-69)

**B. Steam Shutdown on February 19**

Navarro was working on Saturday, February 19, and at around 9:00 a.m. learned there was a lack of hot water and steam pressure. (ALJD 2; Tr. 115-118) Because steam pressure and hot water are necessary for sterilizing surgical instruments, the lack of steam and hot water impacted not only the machines in the CPSD Department, but also the job duties of all the techs. Therefore, Navarro sought assistance. He spoke to an employee in the facilities department and learned that the steam pipe was broken, and there would be no hot water, steam pressure, or heat. (ALJD 2; Tr. 117)

Navarro contacted Respondent's House Supervisor Cecilia Dicob (Dicob), who serves as Respondent's troubleshooter for a myriad of issues and departments, in order to advise her about the broken steam pipe. (ALJD 2; Tr. 118) After his conversation with Dicob, Navarro called Ken Fellenz (Fellenz), CPSD Senior Manager, telling him that the machines were down because of the broken the steam pipe, and, therefore, employees could not sterilize the surgical instruments. (ALJD 2; Tr. 118) Navarro further told Fellenz that there were six

Operating Room surgeries scheduled, but that the Surgery Department had clean instruments for the surgeries scheduled that day. (ALJD 2; Tr. 19-20)

After obtaining the status report from Navarro, Fellenz ordered him to use the Sterrad machine to sterilize the labor and delivery instruments, instead of the Autoclave, which was inoperable due to the lack of steam pressure and hot water. (Tr. 20, 118) The Autoclave is a steam sterilizer used to sterilize labor and delivery surgical instruments. (ALJD 2; Tr. 21, 71) The Sterrad machine is a low temperature hydrogen peroxide sterilizer which could be used in emergency situations. (Tr. 21) Hospital protocol called for the use of the Autoclave to sterilize the labor and delivery surgical instruments, and there had never previously been an emergency at the hospital where employees were asked to use the Sterrad in lieu of the Autoclave. (ALJD 2; Tr. 21, 70-71) Navarro told Fellenz that he was unaware that the Sterrad machine could be used to sterilize the labor and delivery instruments, as it was not the established procedure. (ALJD 2; Tr. 21, 294) Fellenz admitted that the broken steam pipe was a concern for all the techs as it affected the performance of their work duties; specifically how they cleaned and sterilized surgical instruments. (Tr. 197)

After speaking with Fellenz, Navarro was concerned about using the Sterrad to sterilize the surgical instruments, a method that was not the established protocol; he returned to the department and began researching whether the Sterrad could be used to sterilize the labor and delivery instruments. Navarro was unable to find any documentation supporting the use of the Sterrad. (ALJD 2; Tr. 120) Respondent did not have an established procedure to clean surgical instruments in the emergency situations, such as the one at hand, and a written procedure was not established until a week after the incident. On February 23, Respondent's Director of Perioperative Services, Joan McKisson, sent an email to employees announcing

that Fellenz had established a guideline for cleaning and sterilizing surgical instruments during a steam/hot water shutdown. (GCX 15) This guideline was again sent to employees by email on March 28. (GCX 8)

### **C. Navarro's Protected Concerted Activities**

Navarro engaged in protected concerted activities by raising and discussing his concerns regarding Respondent's directive to use hot water from the coffee machine to clean surgical instruments, and the Sterrad instead of the Autoclave to sterilize them. Navarro's protected conduct occurred during conversations with various coworkers including Ruth Hernandez (Hernandez), Curtis Wilks (Wilks), Mary Hedges (Hedges), and Muriel Kremb (Kremb). (ALJD 5)

#### **1. February 19 conversation with Kremb**

As he was researching whether the Sterrad could be used as Fellenz instructed, and because he was unable to find any documentation supporting such a use, Navarro spoke with his immediate supervisor, Lead/Coordinator Muriel Kremb.<sup>2</sup> (ALJD 3; Tr. 120) Kremb, who had spoken to Fellenz about the situation earlier that day, told Navarro to use hot water from the coffee machine in the break room to clean the labor and delivery surgical instruments.<sup>3</sup> (ALJD 3; Tr. 120-121) Navarro expressed his concerns about the procedures Respondent was advocating, as it was not the established protocol and someone could get sick. (Tr. 55-56) Because Navarro's shift was ending at the time he received the cleaning instructions from

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<sup>2</sup> Kremb, who reports directly to Fellenz, acts as a direct conduit between Respondent and employees, and relays instructions from Fellenz to employees. (Tr. 49-52) Kremb earns \$18 per hour while Navarro earns \$14.04 per hour. (Tr. 52; GCX 3) Fellenz agreed that the techs should use hot water from the coffee machine to clean the surgical instruments. (Tr. 23)

<sup>3</sup> The surgical instruments first need to be cleaned using hot water before they can be sterilized using the Autoclave or the Sterrad. (Tr. 158-59)

Kremb, Navarro did not have time that day to clean the surgical instruments using hot water from the coffee machine, and to sterilize them in the Sterrad. (ALJD 3; Tr. 121-123, 157)

## **2. February 19 Conversation with Hernandez**

On February 19, at about 2:30, just before Navarro's shift ended, Ruth Hernandez arrived to work the Second Shift. Navarro expressed his concerns to her about using the procedures suggested by Respondent to clean and sterilize the surgical instruments. (ALJD 3: Tr. 120-121) Hernandez testified that Navarro was concerned about using hot water from the coffee machine to clean surgical instruments, that it was not established protocol, and if someone got sick from the instruments that he could lose his job. (Tr. 87, 120-123, 157) Navarro testified that Hernandez was also concerned about using hot water from the coffee machine, and stated that she would not want "these instruments used on her using this process."<sup>4</sup> (Tr. 121:12-16, 86)

## **3. February 20 Conversation with Curtis Wilks**

On Sunday, February 20, when Navarro reported for work in the morning, he found that all the instruments had already been cleaned. (Tr. 161) Tech Curtis Wilks, who was nearing the end of his shift, discussed with Navarro his concerns about using hot water from the coffee machine to clean the surgical instruments. (ALJD 3; Tr. 124) Wilks had never seen or heard of this method, felt uncomfortable using it, and did not know of any documentation to support the procedure. (Tr. 124) Navarro told Wilks that he was afraid if they did not use the method as directed "that we could be fired." (Tr. 124-125)

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<sup>4</sup> Hernandez denied making this statement. (Tr. 86) Hernandez claimed that she had used hot water from a coffee machine during her employment at another facility to clean instruments, but admitted that Respondent had no documentation to support using this method to clean and sterilize labor & delivery surgical instruments. (Tr. 86) Navarro denied that Hernandez ever mentioned previously using water from a coffee machine to clean instruments. (Tr. 121) The ALJ did not make any credibility findings regarding this divergent testimony.

Before Navarro's shift ended, he sterilized the labor and delivery surgical instruments using the Sterrad, as instructed by Fellenz, and completed documentation to verify that the sterilization had been completed. (Tr. 130; GCX 7) In Navarro's continued search for documentation regarding the cleaning and sterilization of labor and delivery instruments, he looked at both the manufacturer's recommendations and AAMI (Association for the Advancement of Medical Instrumentation) Standards. Both are guidelines used to determine the proper procedure for cleaning and sterilizing surgical instruments. (Tr. 125; GCX 9, 10) However, neither provided support of the methods suggested by Fellenz and Kremb.

#### **4. February 20 Conversation with Cecilia Dicob and Mary Hedges**

On February 20, Navarro spoke to House Supervisor Cecilia Dicob (Dicob) on two different occasions, and also spoke to registered nurse Mary Hedges (Hedges). Navarro first spoke to Dicob while she was in his department; he told her that he was not trying to be insubordinate, but felt uncomfortable using the methods directed by Fellenz and Kremb because it was not established procedure and had never previously been used at the hospital. (ALJD 3; Tr. 117-18, 129) Dicob, who knew little about the technical aspects of Navarro's job, advised him that she was trying to find a solution to the steam pipe issue. (Tr. 39-41, 129) Navarro told Dicob that the broken steam pipe affected the techs' ability to sterilize instruments, using the Sterrad was not standard protocol, and he was concerned there was no documentation to support such a procedure. (Tr. 39-40)

After speaking with Dicob, Navarro spoke to Hedges who worked in the Respondent's Labor and Delivery department and had been a nurse for about 17 years. (Tr. 130) Navarro called Hedges and spoke to her about the process Respondent was instructing techs to use, how it was different from the normal procedure, and asked her if she had ever seen or heard

anything about using the Sterrad to sterilize labor and delivery instruments, or using hot water from the coffee machine to clean them. Hedges shared Navarro's concerns. (ALJD 3-21-22; Tr. 130)

### **5. Navarro's Meeting with O'Dell on February 21**

On the morning of February 21, at around 9:00 a.m., Navarro met with Human Resources Consultant JoAnn Odell (Odell) in her office. During this meeting Odell took notes, which she reduced to a report on an "Interview of Complainant Form." (GCX 12) As a standard practice, Odell types notes during her meetings with employees on this form. (Tr. 242)

Odell testified that Navarro came to her with concerns about the steam pipe shutdown. (Tr. 235) Navarro explained to Odell there was no hot water available, and that he was instructed by Fellenz and Kremb to clean and sterilize surgical instruments using hot water from the coffee machine and the Sterrad, a method he was uncomfortable using. (ALJD 3; Tr. 235-36) Navarro further explained there was no documentation to support using these methods, told Odell that he had spoken to Hernandez and Hedges about his concerns, said that he was concerned about his job, and that he would be unable to raise questions regarding procedures used in the department.<sup>5</sup> (Tr. 236-39, 269; GCX 12) Odell told Navarro not to discuss the matter with his coworkers while Odell was investigating the matter. (GCX 12; Tr. 196) Odell's report confirms this conversation, and shows that Respondent knew Navarro had spoken to Hernandez and other employees his concerns. (GCX 12; Tr. 269) Odell's report also shows that Respondent knew Navarro had also discussed his concerns with Dicob

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<sup>5</sup> Odell initially testified that Navarro told her that he had spoken to Hernandez about the "process" he was instructed to use regarding the cleaning and sterilization of instruments (Tr. 236-37), which comports with her contemporaneous notes. (GCX 12) Odell then testified she was "not sure" whether Navarro told her that he spoke to Hernandez about the broken steam pipe, and then testified that she did not believe Navarro told her that he discussed with Hernandez his concerns about the "procedures" he was uncomfortable with. (Tr. 236-37)

and Kremb. (GCX 12; Tr. 239, 269) Odell admitted that she knew the issues raised by Navarro concerned not only him, but also affected the other employees in the department. (Tr. 269-270)

**D. Respondent's Retaliatory Response**

**1. February 20 Discussions with Fellenz**

On February 20, before speaking to Dicob, Navarro had a conversation with Fellenz. At around 11:15 a.m., Navarro had just clocked out for lunch, when Fellenz called him on the Vocero (a hand-held radio). (Tr. 39, 128) Fellenz directed Navarro to return to the department because there was an emergency situation due to the broken steam pipe. (Tr. 128) Navarro did so and Fellenz, who was at home, called Navarro on the department phone. Fellenz questioned Navarro as to why he had not cleaned and sterilized the surgical instruments as directed, using hot water from the coffee machine and the Sterrad. (Tr. 127-29) Navarro told Fellenz that he was uncomfortable doing either process as there was no documentation to support the procedure, and that it was not established protocol. (Tr. 295, 299, 310-311) Fellenz asked Navarro if he was refusing to do as instructed; Navarro replied that he was not refusing, but was uncomfortable in doing so. (ALJD 3; Tr. 128-129) Before Navarro left work on February 20, he sterilized the labor and delivery surgical instruments using the Sterrad, as instructed, and completed documentation to verify that the sterilization had been completed. (Tr. 130, 156; GCX 7)

**2. Fellenz' February 21 Meeting with McKisson**

Fellenz met with McKisson at around 9:00 a.m. on February 21, armed with notes he created that same morning, to discuss Navarro. (ALJD 3; Tr. 290, 305; RX 5) Fellenz testified he created the notes to document what happened over the weekend regarding the

broken steam pipe and Navarro. (Tr. 291) Although Fellenz testified that the notes were accurate, and some sections were taken directly from text messages sent to his cell phone, he admitted the notes contained various inaccuracies<sup>6</sup> (Tr. 293)

Fellenz testified that he told McKisson he wanted to put Navarro on a corrective action for failing to sterilize the surgical instruments as instructed. (ALJD 3; Tr. 33:3-13, 305) Fellenz and McKisson decided to meet with Odell in her office concerning Navarro. (Tr. 305)

### **3. Odell's February 21 Meeting with Fellenz and McKisson**

Around 1:00 p.m., after discussing whether to issue Navarro a disciplinary warning for insubordination, Fellenz and McKisson met with Respondent's Human Resource Consultant Joann Odell (Odell). (Tr. 305-307) The three discussed why Fellenz wanted to issue Navarro a disciplinary warning. (Tr. 244) Odell asked McKisson and Fellenz whether there was a procedure in place at the hospital that supported using hot water from the coffee machine and the Sterrad to clean and sterilize surgical instruments; both McKisson and Fellenz admitted that no such procedure existed.<sup>7</sup> (Tr. 244)

After listening to McKisson and Fellenz, Odell advised them that she was concerned it would send the wrong message if Respondent issued a corrective action to an employee for asking questions. (ALJD 3; Tr. 306:18, 310) Although Fellenz strongly believed Navarro should be issued a warning for insubordination, based upon the discussion with Odell, the

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<sup>6</sup> Specifically, Fellenz testified that Navarro instructed Hernandez not to come to work because of the broken steam pipe; however there were no such entry in his notes. (Tr. 295, 319) Odell testified that Navarro did not instruct Hernandez to forego coming into work, but rather advised her to come to work despite the broken steam pipe. (Tr. 237) Also, Fellenz testified he had told Navarro that documentation supporting the cleaning and sterilization methods he advocated could be found online; however this entry was also absent from his notes. (Tr. 320) Additionally, Fellenz testified that he had received text messages from Kremb on February 19, and that he quoted the text messages directly from his phone. (Tr. 296) However, Kremb testified that she did not send anyone a text message on February 19, but that all of her communications were verbal. (Tr. 64)

<sup>7</sup> That morning Navarro had told Odell that he was uncomfortable with the process and there was no documentation to support it. (Tr. 244:21-23)

decision was made to issue Navarro a coaching instead.<sup>8</sup> (ALJD 3; Tr. 307) Fellenz then prepared the counseling note for Navarro. (Tr. 307)

#### **4. Navarro's February 21 Coaching Discipline**

On February 21, at around 2:00 p.m., Kremb told Navarro that McKisson wanted to speak with him; however, Kremb did not tell Navarro the purpose of the meeting. (Tr. 131) When Navarro arrived at McKisson's office, both McKisson and Fellenz were waiting. McKisson asked Navarro what had happened over the weekend, and Navarro told them about the broken steam pipe and that he had discussed with Wilks, Hedges, and Hernandez, his concerns about using hot water from the coffee machine to clean the surgical instruments and the Sterrad to sterilize them. (Tr. 131-132) Navarro further told them that he had followed instructions regarding cleaning and sterilizing the surgical instruments, because he feared that if he did not do so he could have been fired for insubordination. (ALJD 3; Tr. 132) McKisson told Navarro that Fellenz accused him of refusing to follow his directions. Navarro said this was untrue. He insisted that he had followed Respondent's instructions, although he did not want to do so because of his concerns about not having an established protocol, patient safety, and possibly losing his job for following the non-established procedures. (ALJD 3; Tr. 132) Navarro told the pair that he had reviewed the AAMI Standards and the manufacturer's recommendations, and could not find any support for the procedure Respondent wanted him to use. (Tr. 132)

Fellenz then accused Navarro directly of not following instructions, and Navarro handed McKisson documentation demonstrating that he had, in fact, sterilized the instruments in the Sterrad on February 20, as instructed. (ALJD 3; Tr. 133, 155; GCX 7) Despite

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<sup>8</sup> Odell was not the only person who evaluated the incidents regarding the steam pipe/hot water shutdown. The Arizona Department of Health investigated the incident and found "there were staff education issues regarding knowledge of processes and consistency of procedures." (GCX 16 -rejected exhibit)

receiving documents proving that Navarro sterilized the surgical instruments using the Sterrad, McKisson nevertheless told Navarro that he was going to receive a coaching. (ALJD 3; Tr. 134) McKisson also told him that, in the future, if a manager tells him something, the manager is taking the responsibility; Navarro replied that it was his signature, not Fellenz', on the paperwork and if a patient got sick Navarro would be held responsible. (Tr. 134) Navarro asked if the coaching would be on his permanent record, and McKisson told him it would, in fact, be in his employee file. (Tr. 134) Navarro was not provided a copy of this coaching discipline until June 2. (Tr. 134; GCX 2) The coaching document, titled "Performance Recognition and Corrective Action Log," and signed by Fellenz, states "James refused to do as instructed by manager and lead tech which directly affected patient care." (ALJD 3; GCX 2 Tab A)

Fourteen weeks later, on June 2, Respondent sent Navarro a letter containing a "Memorandum" (GCX 2, Tab C) which reads, in pertinent part, as follows:

On February 21, 2011, you received a "coaching" note, the record of which is attached. That note and the notes related to the incident that it references it [sp] have been removed from your file and will not be part of your employment record. In addition, neither that note, nor the conduct referenced in that document or the related notes, will be used by Banner in making any future decisions with respect to discipline; in other words, it will not be treated as the first step of progressive discipline under Banner's policies or practices.

Furthermore, to make sure that there is no misunderstanding or miscommunication about Banner's policies regarding employees speaking to one another about the terms and conditions of their employment, please be advised that Banner's policy is not now and has never been to prohibit employees from speaking with each other, at appropriate times and places, regarding the terms and conditions of their employment. If you ever feel that any management representative of Banner has instructed you otherwise or disciplined you for exercising that right, please immediately contact either Dina Steinberg in the Banner Estrella Human Resources Department or, if you prefer, Sandra Herr in the Banner Corporate Human Resources Department.

## 5. Navarro's February 24 Annual Performance Evaluation

On February 24, Fellenz called Navarro into his office and asked him to review his yearly performance evaluation.<sup>9</sup> (ALJD 4; Tr. 135; GCX 3) The review consists of two sections: "Essential Functions" and "Behaviors." Both have the following grading system, from lowest to highest: (1) Does Not Meet Expectations; (2) Not Fully Meeting Expectations; (3) Fully Meets Expectations; (4) Exceeds Expectations; and (5) Extraordinary Performance. The grade in each section determines the employee's yearly overall rating. On the "Essential Functions" section, Navarro's grade was "Fully Meets Expectations." However, on the "Behaviors" section, Navarro's rating was "Not Fully Meeting Expectations,"<sup>10</sup> making Navarro's yearly overall rating "Not Fully Meeting Expectations." The "Behaviors" section consists of five categories: Patient Centered, Collaboration, Ownership, Continuous Improvement, and Outcome Focused. In each category, Fellenz wrote a critical review of Navarro's performance. (GCX 2, 3)

During the meeting, Navarro reviewed each section, line by line, pointing out comments he objected to, and asked Fellenz to provide a basis for his comments in the evaluation. (ALJD 4; Tr. 135-36) However, Fellenz failed to provide any justifications for his assessments. (Tr. 330) Navarro asked Fellenz who he could speak with about having the evaluation revised; Fellenz advised him that there was "no one he could talk to and that it was just what it was." (Tr. 136:11) Although he advised Fellenz that he disagreed with the evaluation, Navarro signed the document. (Tr. 27, 136)

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<sup>9</sup> Fellenz testified that he had prepared the evaluation in January. (Tr. 275) However, Navarro had just received a previous yearly evaluation at the end of September 2010, where his overall rating was Fully Meets Expectations. (GCX 4)

<sup>10</sup> In his 2009 and 2010 yearly evaluations, Navarro's rating was "Fully Meets Expectations" in the Behavior section. (GCX 4, 5)

Navarro sought to speak with Odell about the evaluation, but she was unavailable until March 1. (Tr. 136) Navarro also visited the office of Human Resources representative Dina Steinberg; however she too was not available until March 1. (Tr. 136) Navarro had just been evaluated a few months earlier, on September 28, 2010, and before that in September 2009. (GCX 4, 5) Neither the September 2010, nor the September 2009, evaluations reflect the negative comments contained in the February 24 appraisal.

Fellenz based the comments in the appraisal on his observations of Navarro's work performance, as well as complaints made by Hernandez and other employees. (Tr. 286, 314-315) Fellenz testified that complaints started in June 2010, and would come in both verbal and written form. (Tr. 327-328) However, Fellenz was unable to locate any purported written reports from other employees regarding Navarro's work performance. (Tr. 328)

Fellenz testified that employee Alemu Demissew, Hernandez, Wilks, and former employee Milka Paulic, complained every shift following a weekend that Navarro worked. (Tr. 283, 316) According to Fellenz, Louis Garcia, Teresa Jones, and Respondent's Senior Manager Jeremy Staley also complained about Navarro's work performance, and former employee Zoraima Gutierrez would complain daily about Navarro. (Tr. 278-279, 280) Hernandez, who had met and spoken with Respondent's counsel prior to the hearing, testified that she complained about Navarro to Fellenz every weekend she worked with him starting in June 2010. (Tr. 110; RX 1) However, Hernandez admitted that, about a month prior to the hearing, while "playing around" she sprayed air from an air hose into Navarro's ear. Navarro reported this incident to Respondent, and Hernandez was mad at him for doing so, believing that he had purposely blown the incident "up into something that shouldn't have been blown up to;" Hernandez was "really upset" at Navarro. (Tr. 110-12:19)

Respondent's witness Garcia testified that, although he did not like to complain, starting in June 2010 through mid-February 2011, he complained seven or eight times about Navarro. (Tr. 216) However, he later testified that he complained twice or more a week. (Tr. 223-224) Garcia also testified that he "could not keep count" of the times he complained about Navarro disappearing from work. (Tr. 217:16) Inexplicably, he later testified that he never reported Navarro to Fellenz for disappearing from work, then changed his testimony again and claimed that he had complained three times a week in February. (Tr. 227-228) Garcia was not at work when the steam pipe broke but testified that he would be concerned if surgical instruments were being cleaned using hot water from a coffee machine. (Tr. 229)

Fellenz testified that, although he had no specific recollection of the dates, he spoke to Navarro about his work performance issues five times from September 28, 2010 through February 21, 2011. (Tr. 322-323) However, Fellenz never documented these purported discussions. (Tr. 322-323)

Navarro denied engaging in the conduct to which Fellenz, Hernandez, and Garcia testified. (Tr. 330) Also, Navarro denied that Fellenz ever advised him of complaints from other employees regarding his work performance or spoke to him concerning his work performance. (Tr. 330-331) Navarro had never previously received an appraisal of "Not Meets Expectations," nor had he ever received negative comments, such as those contained in the February 28 evaluation, in any of his previous appraisals. (Tr. 140, 149) Moreover, the evidence shows that, in the past, Navarro's coworkers had routinely complimented Navarro's work and viewed him as a "team player." (GCX 11)

**6. Navarro's February 28 Revised Annual Performance Evaluation**

On February 28, Fellenz met with Navarro and gave him a revised performance appraisal. (ALJD 4) Earlier, Fellenz had spoken with Odell, and as a result of this meeting it was decided that Respondent should revise Navarro's appraisal. (ALJD 4; Tr. 253, 276-277)

When Navarro arrived at Fellenz' office only two pages of his evaluation (pages 2 and 3) were sitting on the table. (Tr. 137) Fellenz informed Navarro that he had revised Navarro's evaluation regarding the "Behaviors" section, revising four out of the five categories. This revision changed Navarro's previous rating to "Fully Meets Expectations" for the "Behaviors" section, and gave Navarro an overall yearly rating of "Fully Meets Expectations. (Tr. 137-138; GCX 2) However, the category entitled "Collaboration" was unchanged; Navarro told Fellenz he disagreed with the assessment.<sup>11</sup> (Tr. 138-139) As with the February 24 appraisal, Navarro testified that Fellenz did not provide any basis for the negative comments in the evaluation. (Tr. 139)

**E. Respondent's Overbroad and Discriminatory Rules**

During the hearing the General Counsel amended the complaint to include two additional allegations. One involved Respondent's "Confidentiality Agreement" and the other concerned statements Respondent makes to employees during investigations, as set forth in its "Interview of Complainant Form." (GCX 12, 13, 14, 17) The ALJ found that Respondent's Confidentiality Agreement violated Section 8(a)(1) of the Act, but found that Respondent had a legitimate business justification for asking employees refrain from discussing with their

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<sup>11</sup> Regarding the "Collaboration" category, Fellenz wrote, "James [Navarro] does not always promote teamwork. There are times when others do not feel that he can be approached and they sometimes feel tuned out. This is definitely an area that needs improvement."

coworkers any matters discussed during investigative interviews, while the investigation is ongoing. (ALJD 6)

### **1. Interview of Complainant Form**

Odell testified that as part of her duties as a human resources consultant, she conducts investigations, and that the bullets listed on the Interview of Complainant form under the section “Introduction for all interviews” are used by her as talking points when she speaks to employees in the course of her investigations. (GCX 12) During these investigations, as set forth in the talking points, Odell tells employees that the interview is confidential and asks them to not discuss the matter with their coworkers while the investigation is ongoing. (GCX 12)

While Odell testified that she does not give the instructions every time she meets with an employee during an investigation, she admitted giving these instructions to Navarro, as well as to an employee just two weeks prior to the hearing in this matter. (Tr. 194, 196) Respondent presented no evidence that these instructions are, in any way, explained further to employees or are somehow limited to only certain types of investigations. Instead, Odell gave a broad definition of “investigation,” as being “something that I would need to speak to at least more than one person.” (Tr. 258) At trial, the only evidence Respondent provided supporting business justification for Odell’s confidentiality instructions was her testimony that she wants to keep opinions or facts as pure as possible. (Tr. 259)

### **III. ARGUMENT**

#### **A. The ALJ Erred in Excluding from Evidence General Counsel Exhibit 11.**

At hearing, the General Counsel attempted to introduce into evidence General Counsel's Exhibit 11, three "Colleague Feedback Forms" completed by Navarro's coworkers, which were produced by Respondent pursuant to subpoena. (GCX 11; Tr. 171) Two forms are dated September 21, 2009, and one form is undated. In each form Navarro's coworkers compliment his work abilities and indicate they value Navarro as a colleague. (GCX 11) At trial, General Counsel attempted to introduce these documents into evidence to counter Respondent's claim that Navarro received a lower evaluation because some of his colleagues had complained about his work and to support the General Counsel's theory that these purported complaints became an issue only after Navarro engaged in concerted activities. (Tr. 171-74) The ALJ sustained Respondent's relevance objection, refusing to admit the documents into evidence. (Tr. 171-74)

The standard for relevance with respect to trial evidence "is a liberal one. 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *EEOC v. Manville Sales Corp.*, 27 F.3d 1089, 1093-1094 (5th Cir. 1994) (trial court erred by excluding stray age-related remarks made by District Manager in age discrimination case) citing Fed. R. Evid. 401. Here, the General Counsel claims that Navarro received less favorable performance evaluations because he engaged in concerted activity. (Complaint ¶ 4) Respondent asserts these evaluations were based upon complaints made by Navarro's coworkers about his work performance. (Tr. 278-79) Because the General Counsel attempted to introduce GCX 11 to rebut Respondent's defense, the laudatory

comments made by Navarro's colleagues praising his performance and teamwork certainly have a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. For it is the same work performance and teamwork that other colleagues purportedly complained about and formed the basis for Navarro's disputed performance appraisals.

Significantly, the performance appraisals in question are dated 2009 through 2011, the same period of time covered by two of the three Colleague Feedback Forms. (GCX 3 p. 1; GCX 2 tab B p. 1; GXC 11) While Respondent's counsel, and its Human Resources Consultant Joann Odell, claimed that the year "2009" on both performance appraisals was a typographical error, neither counsel nor Odell prepared the evaluations.<sup>12</sup> (Tr. 250-52, 273) These forms were prepared by Fellenz. (Tr. 275, 277, 312-13) Tellingly, Fellenz was never asked, nor did he testify, about any supposed typographical error regarding the relevant dates on the appraisals he prepared. By refusing to admit GCX 11, the ALJ precluded the General Counsel from introducing rebuttal evidence to specifically refute Respondent's purported reason for lowering Navarro's appraisal. As such, the ALJ erred. *Nelson v. University of Hawaii*, 38 F.3d 95, 104-105 (Hawaii 2001) (in suit alleging employment discrimination and various torts related to the nonrenewal of college professor's contract, trial court abused its discretion in excluding plaintiff's proffered rebuttal evidence to show defendant's reason for nonrenewal of her contract was pretext); *Brown v. City of Lake Providence*, 2010 WL 1812579 (W.D. La. 2010) (regarding claim of employment harassment and retaliation, plaintiff's work history is highly probative, relevant, and admissible into evidence); *EEOC v.*

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<sup>12</sup> The statements made by Respondent's counsel are not evidence of a purported typographical error. *Clifford v. Crop Production Services, Inc.*, 627 F.3d 268, 273 n. 6 (7th Cir. 2010) (statements of lawyers are not evidence.) *Stebbins v. Clark*, 5 Fed.Appx. 196, 203 (4th Cir. 2001) (argument of counsel is not considered evidence).

*Manville Sales Corp.*, supra. Therefore, the General Counsel asks that the Board reverse the ALJ, admit General Counsel Exhibit 11 into evidence, and consider the evidence accordingly.

**B. The ALJ Erred By Failing To Find That Navarro’s Coaching Discipline and Unfavorable Evaluations Violated Section 8(a)(1), and Further Erred by Failing to Apply a *Wright Line* Analysis to these Allegations.**

**1. The ALJ Decision**

The ALJ found that Respondent issued Navarro a coaching discipline “not because of any protected concerted activity, but solely because Fellenz believed Navarro had engaged in insubordination.” (ALJD 5:31-34) Regarding the unfavorable performance evaluations, the ALJ dismissed the complaint allegations finding that the “performance review . . . was not motivated by any protected concerted activity . . . [but Fellenz] was influenced by complaints made by Navarro’s coworkers.” (ALJD 5) The ALJ credited Fellenz’ testimony that the initial performance review was completed prior to Navarro’s concerted activity, but failed to analyze altogether the General Counsel’s allegation regarding the revised performance appraisal. Moreover, the ALJ failed to analyze the facts presented pursuant to the burden shifting strictures of *Wright Line*, 251 NLRB 1083 (1980). The record evidence shows that Respondent angrily retaliated against Navarro because he dared to raise concerns about using hot water from the coffee maker to clean the labor and delivery surgical instruments, and the Sterrad to sterilize them, methods unsupported by any protocol, or written professional standards. As such, the ALJ erred in refusing to find the violations as alleged.

**2. The Legal Standard**

Section 7 of the Act provides workers “the right to act together to better their working conditions.” *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962). An employer may

not retaliate against an employee for exercising this right to engage in protected concerted activity. *Id.* at 17; *Triangle Electric Co.*, 335 NLRB 1037, 1038 (2001).

To establish that an employer has retaliated against an employee for exercising his right to engage in concerted activity, the General Counsel's initial burden requires a showing that: (1) the employee engaged in protected, concerted activity; (2) the employer knew of the concerted nature of the activity; and (3) the employer bore animus towards the employee's protected activity. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982); *Praxair Distribution, Inc.*, 357 NLRB No. 91 n. 2 (2011) (the General Counsel's burden does not include a fourth element, that there is a link or nexus between the employee's protected activity and the adverse employment action).

After the initial elements of a violation are established, the examination turns to the employer's actual motive behind the decision. *Schaeff Incorporated*, 321 NLRB 202, 210 (1996). The burden shifts to the employer to prove that it would have taken the same adverse action even in the absence of the protected activities. *Wright Line*, 251 NLRB at 1089. An employer must not only establish a legitimate reason for its action, but must persuade by a preponderance of the evidence that it would have taken the same actions even in the absence of the employee's protected activity. *Peter Vitalie Co., Inc.*, 310 NLRB 865, 871 (1993); *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393, 395 (1993).

Where the employer's stated motive for the adverse action is false, it is proper to infer an unlawful motivation. *Shattuck Denn Min. Corp v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). The Board will infer such an unlawful motive where the employer's action is "baseless, unreasonable, or so contrived as to raise a presumption of unlawful motive." *J.S. Troup Elec.*, 344 NLRB 1009, 1015 (2005), citing *Montgomery Ward*, 316 NLRB 1248, 1253

(1995). Finally, where the employer’s explanation is false, or a pretext, it “necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel.” *International Carolina Glass*, 319 NLRB 171 (1995); also: *Limestone Apparel Corporation*, 225 NLRB 722, 736 (1981) *enfd.* 704 F.2d 799 (6th Cir. 1982).

**3. The ALJ Failed to Apply *Wright Line* to the Allegations Involving Navarro’s Coaching Discipline and the Unfavorable Employment Evaluations.**

In concluding that Respondent’s conduct did not violate the Act, the ALJ failed to properly apply the burden shifting requirements of *Wright Line* to the facts. Instead, after setting forth the correct legal standard, the ALJ simply dismissed the allegations. Regarding the coaching, the ALJ found that Respondent issued Navarro the coaching because Fellenz believed he had engaged in insubordination. As for the evaluations, the ALJ credited Fellenz’ testimony that the initial evaluation was prepared before Navarro’s concerted complaints, and found that Fellenz was influenced by complaints made to him by Navarro’s colleagues. By failing to properly apply *Wright Line*, the ALJ erred by refusing to find the violations as alleged.

a. Navarro was Engaged in Protected, Concerted Activity.

The ALJ inferred that Navarro was engaged in protected, concerted activity, when he found that Navarro’s “first performance review was filled out prior to the concerted activity.” (ALJD 5) The record evidence supports a finding that Navarro’s actions were concerted. His discussions with fellow employees about Respondent’s unprecedented instructions for cleaning and sterilizing the surgical instruments represent classic protected, concerted activities. *Shippers Dispatch, Inc.*, 223 NLRB 439, 445 (1976) (employees complaining

about work assignments engaged in concerted activity); *Phoenix Transit System*, 337 NLRB 510 (2002). The issues discussed by him and other employees concerned how they would perform their work duties. Not only did Navarro discuss with his coworkers his concerns about Respondent's new cleaning and sterilization methods, some of those employees shared his concerns. (Tr. 124, 130) Accordingly, Navarro's activity was inherently concerted. *Bell of Sioux City, LP.*, 333 NLRB 98, 105 (2001) (employee's complaints to coworkers that she had been treated unfairly was concerted activity, as it involved a speaker and listeners, and some other employees agreed her treatment was unfair).

b. Respondent Knew of the Concerted Nature of Navarro's Activity.

The record clearly demonstrates that Respondent knew Navarro was engaged in concerted activities, discussing with coworkers his concerns about Respondent's directives regarding the cleaning and sterilization of surgical instruments, which were important terms and conditions of their employment. See *Triangle Electric*, supra at 1039. Odell admitted Navarro informed her of the discussions he had with his coworkers, and she knew Navarro's concerns were shared by other employees.<sup>13</sup> Navarro also told Fellenz, before he was issued his coaching discipline, that he had discussed his concerns with coworkers, including Wilks, Hedges, and Hernandez. (Tr. 131-32) While Fellenz denied Navarro informed him of these discussions, his testimony is not credible. Moreover, Navarro's coaching was based upon Odell's recommendation, which occurred after Navarro's conversation with her. Finally, Dicob also testified that Navarro raised concerns that he had discussed with other employees. Clearly Respondent knew of Navarro's concerted activities.

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<sup>13</sup> In fact, Odell's own notes show that Navarro told her that he discussed these issues with Hernandez and Kremb. (GCX 12)

c. Respondent Harbored the Requisite Animus.

Here, Respondent's independent rule violations, as found by the ALJ and as urged in the General Counsel's Cross-Exceptions, are sufficient to find animus. *West Michigan Plumbing & Heating, Inc.*, 333 NLRB 418 n. 2 (2001) (employee handbook provision which independently violated Section 8(a)(1) evidences anti-union animus). Moreover, animus can also be imputed from circumstantial evidence and the record as a whole. *Tubular Corp. of America*, 337 NLRB 99, 99 (2001). Where disciplinary action is taken shortly after an employer becomes aware of protected activity, timing is particularly strong evidence of illegal discrimination. *Olathe Health Care Center*, 314 NLRB 54, 54 (1994).

The fact that Navarro received his coaching discipline and the unfavorable appraisals just days after his concerted activities is strong evidence of Respondent's illegal motive. *Olathe Health Care Center* supra.; *Daniel Construction Company*, 264 NLRB 569, 578 (1982), enfd. 731 F. 2d 191 (2d Cir. 1984) ("abruptness," along with timing, are often relied upon as indicia of an employer's discriminatory conduct).

Finally, evidence of animus is highlighted by the ALJ's statements that there was "clear evidence" that Fellenz was angry that Navarro had not followed his instructions to use the Sterrad to sterilize the surgical instruments. The ALJ notes that Navarro told Fellenz that he was not refusing to follow instructions, but did not want to because he had concerns about the procedures he had been directed to follow. (ALJD 5) The record evidence as a whole supports a finding that Respondent harbored the requisite animus.

d. Adverse Actions against Navarro

Just days after raising issues with his coworkers and supervisors regarding Respondent's directive that employees clean surgical instruments using hot water from the

coffee machine, and sterilize them using the Sterrad, Navarro was issued a coaching discipline, and thereafter received poor performance evaluations. As the General Counsel has met its initial burden under *Wright Line* to show that Navarro's protected activity was a motivating factor in the adverse employment actions taken against him, the burden shifts to Respondent to show that it would have taken the same actions even absent his concerted activity.

**4. Respondent does not have a *Wright Line* Defense**

a. The Coaching Discipline

The ALJ erred by finding that Respondent did not violate Section 8(a)(1) when it issued Navarro his February 21 coaching discipline, but instead finding that Fellenz issued Navarro the coaching because Fellenz believed Navarro had engaged in insubordination. (ALJD 5) The record evidence shows that, while Navarro questioned using hot water from the coffee machine and the Sterrad to clean and sterilize the surgical instruments, he did not refuse to follow Respondent's instructions. (ALJD 5) Navarro sterilized the surgical instruments using the Sterrad on February 20, and Respondent's own documents show that Navarro did, in fact, sterilize the surgical instruments using the Sterrad, as instructed. (GCX 7) Respondent did not rebut this evidence.

While Navarro was originally given instructions on how to clean and sterilize the instruments on February 19, Navarro's shift was ending when these orders were finalized. The new orders involved a process that had never previously been used during an emergency situation, and there was no time for him to personally perform the cleaning before the end of his work shift. (Tr. 122-23, 157) While Navarro did not clean and sterilize surgical instruments on February 19, it was because he did not receive instructions on the new

procedures in time to complete the task before his shift ended, and not because he was refusing to follow orders. Respondent presented no evidence that Navarro had sufficient time to clean and sterilize the surgical instruments, between the time that Kremb instructed him to clean the instruments using hot water from the coffee machine and the end of his shift at 3:00 p.m. As such, Navarro's testimony that he did not have time to complete these tasks before his shift ended is un rebutted. (Tr. 122-23) Under these circumstances, where Navarro did not refuse to follow orders, any claim that the coaching discipline was based upon Navarro's insubordination is pretext. Accordingly, the Board should overturn the ALJ's finding and hold that the reasons advanced by Respondent for the coaching discipline either did not exist or were not in fact relied upon, and that Respondent violated Section 8(a)(1) of the Act by issuing Navarro the coaching discipline.

b. Performance Evaluations

Regarding Navarro's performance evaluations, Navarro credibly testified that he had no work performance issues, and that Fellenz had never previously advised him of any work issues. Although Respondent presented Hernandez, Garcia, and Fellenz to testify that Navarro had failed to perform his work properly, their testimony is not believable.

For example, a review of the transcript demonstrates that Garcia was evasive or could not remember his own testimony. Noticeably, even during Respondent's direct examination, Garcia would not answer the question directly, but instead testified incoherently, in a stream of consciousness, and had to be redirected to focus on the questions before him. (Tr. 206-228) In addition, Garcia contradicted his own testimony, by initially testifying that he did not like to complain, but then testified that he complained "more times that he could count" about

Navarro disappearing from work, then finally testified that he did not complain about Navarro disappearing from work at all. (Tr. 224:16, 227:22)

Similarly, Hernandez' testimony was unbelievable, and she was biased and exhibited visible animosity toward Navarro. While Hernandez claimed that she complained about Navarro to Fellenz after every weekend she worked with him, she was hard pressed to testify when she made these complaints. (Tr. 103, 108:13-14) Moreover, Hernandez admitted that she was very upset (to the point of crying) that Navarro had reported her to Fellenz about spraying air in Navarro's ear, just weeks prior to the hearing. (Tr. 112)

While these two employees clearly did not like Navarro, or had a personal grudge against him, Navarro's other coworkers praised his work and valued him as a team member. (GCX 11) Significantly, these positive comments came during the same time frame covered by the discriminatory performance evaluations. However, it appears Respondent simply ignored the positive feedback concerning Navarro. Navarro's coworkers' positive feedback about his work abilities is consistent with Navarro's own testimony, that before the broken steam pipe there were no problems with his work performance. Had employees complained about Navarro as early as July 2010, certainly Respondent would have mentioned these complaints in Navarro's September 2010 evaluation, or would have otherwise noted these complaints. However, the September 28, 2010 evaluation contains no such complaints, nor is there any written documentation in Navarro's file evidencing such complaints.

Similarly unworthy of credit is Fellenz' claim that he completed Navarro's performance appraisal before Navarro's concerted activity. While the ALJ credited Fellenz' testimony that Navarro's first performance was completed before the steam pipe broke, the ALJ did not state in his decision that he credited Fellenz' testimony on this specific subject

base upon Fellenz' demeanor.<sup>14</sup> As such, when an administrative law judge makes a credibility finding based on factors other than demeanor, the Board may make independent evaluations of credibility based on the "weight of evidence, established facts, inherent probabilities, and reasonable inferences drawn from the record as a whole." *Storer Communications, Inc.*, 297 NLRB 296, 296 n. 2 (1989). Here, the established facts show it is improbable that Fellenz had completed Navarro's initial evaluation as early as January 2011. If that were true, then any changes to Navarro's 2011 evaluation would have been based only upon Navarro's work performance for only two months, November and December of 2010. It is highly improbable that Respondent would complete an annual evaluation based upon only two months worth of work, and then reduce a successful employee's evaluation one full grade based upon those two months. Instead, the inherent probabilities, and reasonable inferences drawn from the record as a whole, show that Fellenz completed the negative evaluation only after Navarro's concerted complaints about cleaning surgical instruments with water from the coffee machine and sterilizing them in the Sterrad.

In determining whether Fellenz was a credible witness, it is also important to note that his testimony directly conflicted with Kremb's, even at times when the questions were routine, and was unsupported by documentary evidence in key instances. For example, Fellenz testified about the notes he had "accurately" created on the morning of February 21, and the text messages from Kremb that he had transcribed directly to his notes. (Tr. 29; 291-293) However, Kremb testified that she never communicated with Fellenz via text message, and that all her communications with him were verbal. (Tr. 64) Also, while Fellenz claims to have spoken with Navarro five separate times regarding daily or weekly coworker complaints,

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<sup>14</sup> Instead, the ALJ only made a sweeping statement at the beginning of his decision that all of his credibility determinations were based upon a variety of factors, including the demeanor of the witnesses. (ALJD 1 n.1)

Fellenz admitted that he did not document any of these instances, and could not recall when he supposedly discussed these matters with Navarro. (Tr. 321) Navarro credibly denied this ever happened. (Tr. 330-331) In addition, although Fellenz testified that he had received written complaints about Navarro, he claimed that he had could not find them. (Tr. 328) It appears that Navarro's lack of "teamwork" is Respondent's euphemism for Navarro's concerted activities. See *Rock Valley Trucking Co.*, 350 NLRB No. 10 fn. 6 (2007) (an employer's reference to an employee's 'attitude' can be a disguised reference to the employee's protected concerted activity); *Boddy Construction Co.*, 338 NLRB 1083 (2003) (employer complaints about 'bad attitude' are often euphemisms for prounion sentiments, particularly where there is no alternative explanation for the perceived 'attitude' problem). Accordingly, the General Counsel asks that the Board reverse the ALJ, and find that Respondent has not rebutted the General Counsel's prima facie case, and therefore Navarro's unfavorable performance evaluations, coming just days after he engaged in concerted activity, violated Section 8(a)(1) of the Act.

**5. Respondent's Conduct was Unlawful under *Burnup & Sims***

In the event that the Board finds that *Wright Line* is not the proper framework to analyze Navarro's coaching discipline, a violation must be found using the analysis set forth in *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964).

Under the principles set forth in *NLRB v. Burnup & Sims*, when an employer disciplines an employee for misconduct arising out of a protected activity, the employer has the burden of showing that it held an honest belief that the employee engaged in serious misconduct. *Id.* at 23. Once the employer establishes that it had such an honest belief, the

burden shifts to the General Counsel to affirmatively show that the misconduct did not in fact occur.

Here, Respondent failed to show that it had an honest belief that Navarro engaged in any insubordination, as the documentary evidence, which Navarro presented to Respondent before receiving his coaching, shows that Navarro did, in fact, sterilize the surgical instruments in the Sterrad as ordered, on February 20. (GCX 7) Moreover, there is no evidence that Respondent ever faced a shortage of medical instruments during the steam pipe incident. As Navarro's alleged insubordination flowed from his concerted complaints about the new, and untested, cleaning and sterilization methods, under a *Burnup & Sims* analysis the finding of a violation is warranted. See also, *Arkema, Inc.*, 357 NLRB No. 103 (October 31, 2011).

**C. The ALJ Erred by Failing to Find that Respondent Maintains an Overly-Broad and Discriminatory Rule Prohibiting Employees from Talking About Information Discussed During Investigative Interviews.**

The ALJ erred when he did not find that Respondent violated Section 8(a)(1) of the Act by maintaining a rule prohibiting employees from talking about matters discussed during investigative interviews. (ALJD 4; GCX 12) Instead, the ALJ found that Respondent had a legitimate business reason, and that the rule was "analogous to a sequestration rule so that employees give their own version of facts and not what they heard another state." (ALJD 4) The ALJ erred in his finding, as it is contrary to the established law, as set forth in *Desert Palace, Inc.*, 336 NLRB 271 (2001), and *Phoenix Transit System*, 337 NLRB 510, 513 (2002).

During investigative interviews Odell uses an Interview Complaint Form as a script for her talking points. She tells employees that the interview is confidential and that they are

not to discuss the matter with their coworkers while the investigation is ongoing. (GCX 12) Odell testified that she gives this instruction because she wants to keep opinions or facts as pure as possible during her investigations. (Tr. 259) There is no evidence that Respondent limits its prohibition on employee Section 7 rights based upon the type of investigation in question, and Odell admitted giving this instruction to Navarro, as well as to an employee during an investigative interview just two weeks prior to the hearing.<sup>15</sup> (Tr. 194, 196)

Employees have a right to discuss among themselves matters that are discussed during an employer's investigation of misconduct. *Phoenix Transit System, Inc.*, 337 NLRB 510 (2002). In deciding whether a rule prohibiting an employee from discussing matters that arise during an investigative interview is a violation, the Board determines whether the employer's asserted business justifications for the prohibition outweighs employees' Section 7 right to discuss such terms and conditions of employment. *Cello Partnership*, 349 NLRB 640, 658 (2007), citing *Desert Palace*, 336 NLRB 271, 272 (2001).

In *Desert Palace*, the Board noted that employees have a Section 7 right to discuss discipline or disciplinary investigations involving fellow employees, and where the employer has a rule prohibiting such discussions, for no 8(a)(1) violation to exist, the employer's asserted legitimate and substantial business justifications must outweigh employee Section 7 rights. *Id.* at 272. In *Desert Palace* the employer imposed a confidentiality rule during an investigation of alleged illegal drug activity at the workplace, involving allegations of a management cover-up and possible retaliation, as well as threats of violence. *Id.* The employer sought to impose a confidentiality rule to ensure that witnesses were not put in danger, that evidence was not destroyed, and that testimony was not fabricated. *Id.* Under

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<sup>15</sup> Odell testified that she sometimes gives employees this prohibition, and sometimes does not. (Tr. 194)

this scenario, the Board held that the employer's business justification outweighed employee Section 7 rights. *Id.*

The facts in *Desert Palace* are in stark contrast to the facts here, where Navarro sought out Odell regarding his concerns about the broken steam pipe and Respondent's directives. Here, there are no allegations of drug or other illegal activity, no threats of violence, and no allegations of a management cover-up. The ALJ erred by failing to analyze the facts herein pursuant to the Board's established standards, and instead establishes, a per-se "sequestration rule," allowing an employer to prohibit employees from talking with their coworkers about matters discussed during an investigative interview anytime, for any reason, notwithstanding the severity of the allegations under investigation, or the surrounding circumstances. The Board never promulgated such a per se standard in *Desert Palace*.

Here, the matter of the broken steam pipe was well known throughout the department, and Respondent's instructions on cleaning and sterilizing surgical instruments during the shutdown were well disseminated among the techs. Where Navarro sought out Odell to discuss his concerns about the broken steam pipe, the matters at hand were well known among Respondent's employees, and Odell met with Fellenz and McKisson right after speaking with Navarro. In these circumstances, Respondent cannot show that its confidentiality rule outweighs employee Section 7 rights, and the ALJ erred by establishing a per se sequestration rule, allowing an employer to require confidentiality regardless of the circumstances. See *Mobil Oil Exploration & Producing, U.S., Inc.* 325 NLRB 176, 178-179 (1997) (employer failed to demonstrate substantial confidentiality interest where there was no possibility of prematurely alerting the target of the investigation or compromising the investigation).

Finally, even if the Board determines an employer has a business justification to invoke a sequestration rule during investigative interviews, Odell's directive to Navarro exceeded the scope of a legitimate sequestration request needed to protect the integrity of an investigation. Sequestration orders apply to witnesses, and are invoked so that one witness cannot hear the testimony of another witnesses. Fed. R. Evid. 615; *Greyhound Lines*, 319 NLRB 554, 554 (1994); *Opus 3 Ltd. v. Heritage Park Inc.*, 91 F.3d 615, 628 (4th Cir. 1996) (noting that the sequestration of witnesses is a principle whose lineage traces to biblical times and Daniel's effective cross-examination of the elders who traduced Susanna); *NLRB v. Stark*, 525 F.2d 422, 426 (2d Cir. 1975).

Here, Odell did not limit her confidentiality request to other witnesses. Instead she asked Navarro to "not to discuss this with your coworkers while this investigation is ongoing, for this reason, when people are talking it is difficult to do a fair investigation and separate facts from rumors." (GXC 12) According to Odell's directive, Navarro was precluded from speaking to any coworker throughout the hospital regarding the matter, and not just potential witnesses to the events. As such, Odell's directive is overly broad and exceeded the scope of any justifiable business need that may have been derived from the sequestration of witnesses. Accordingly, Odell violated Section 8(a)(1) of the Act by asking Navarro to keep their conversation confidential. *Phoenix Transit System*, 337 NLRB 510, 510 (rule, originally promulgated during the course of an investigation, prohibiting employees from discussing issues of sexual harassment, a violation); *Security Walls*, 356 No. 87 slip op. 1 n. 1, slip op. 16-17 (2011) (rule requiring employees who assist in an investigation to maintain the confidentiality of all information learned or provided during the investigation violates Section

8(a)(1)); *The NLS Group*, 355 NLRB No. 169 (2010) adopting two-member Board decision 352 NLRB 744 (2008) (confidentiality provision overly broad).

**D. The ALJ Erred by Failing to Order Respondent to Post Notices in all of its Facilities Where it uses its Confidentiality Agreement.**

The ALJ properly found that Respondent's confidentiality agreement violates Section 8(a)(1) of the Act. (ALJD 6; GCX 14, 17) However, the ALJ neglected to order that Respondent post a Notice at all of its other facilities wherever Respondent uses the confidentiality agreement. See *Fresh & Easy Neighborhood Market, Inc.*, 356 NLRB No. 145 (2011) (Board found corporate-wide remedies are not reserved for recidivist only, but are permissible and necessary to ensure that all affected employees will be informed of respondent's violation and the nature of their rights under the Act.). Accordingly, it is respectfully requested that the Board order Respondent to post a notice corporate wide wherever its Confidentiality Agreement has been utilized.

**IV. CONCLUSION**

It is respectfully submitted that the record amply demonstrates that Respondent has violated Sections 8(a)(1) of the Act, as alleged in the Complaint, as amended. Counsel for the Acting General Counsel urges the Board to issue an appropriate remedial order requiring Respondent to: (1) remove Navarro's coaching from Respondent's files; (2) rescind Navarro's revised unfavorable performance evaluation; (3) post, both physically and electronically, an appropriate notice; (4) post a notice at Respondent's other facilities wherever Respondent uses the Confidentiality Agreement; and (5) provide whatever other

relief the Board deems just and proper to remedy Respondent's violations and effectuate the policies and purposes of the Act.

Dated at Phoenix, Arizona, this 7<sup>th</sup> day of December 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF CROSS EXCEPTIONS in Case 28-CA-23438, was served by E-Gov, E-filing, and E-Mail, on this 7<sup>th</sup> day of December 2011, on the following:

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