

**Nos. 11-1277 & 11-1318**

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**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**SUTTER EAST BAY HOSPITALS  
d/b/a ALTA BATES SUMMIT MEDICAL CENTER**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION  
FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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ALTA BATES SUMMIT MEDICAL CENTER	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 11-1277 & 11-1318
	)	
v.	)	
	)	Board Case Nos.
NATIONAL LABOR RELATIONS BOARD	)	32-CA-24459
	)	32-CA-24469
Respondent/Cross-Petitioner	)	32-CA-24470
	)	

**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

Pursuant to Circuit Rule 28(a)(1), counsel for the National Labor Relations Board (“the Board”) certify the following:

**A. Parties and Amici**

Alta Bates Summit Medical Center was the Respondent before the Board in the above-captioned case and is the Petitioner/Cross-Respondent in this court proceeding, using its current legal name, Sutter East Bay Hospitals. The Board’s General Counsel was a party before the Board. The National Union of Healthcare Workers was the charging party before the Board.

**B. Rulings Under Review**

The case under review is a Decision and Order of the Board, issued on July 29, 2011 and reported at 357 NLRB No. 31.

### **C. Related Cases**

This case has not previously been before this Court. The Board is not aware of any related cases either pending or about to be presented before this or any other court.

/s/ Linda Dreeben

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Dated at Washington, D.C.  
this 21st day of December, 2011

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## **GLOSSARY**

“A”	The Joint Appendix
“the Act”	The National Labor Relations Act
“the Board”	The National Labor Relations Board
“Br.”	The Petitioner/Cross-Respondent’s brief
“the Hospital”	The Petitioner/Cross-Respondent, Sutter East Bay Hospitals d/b/a Alta Bates Summit Medical Center
“EVS”	Environmental Services Department
“NUHW”	The National Union of Healthcare Workers
“SEIU-UHW”	Service Employees International Union, United Healthcare Workers-West

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**BRIEF FOR  
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**STATEMENT OF JURISDICTION**

This case is before the Court on a petition filed by Sutter East Bay Hospitals d/b/a Alta Bates Summit Medical Center (“the Hospital”) to review, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, a Board Order issued against the Hospital. The Board’s Decision and Order issued

on July 29, 2011, and is reported at 357 NLRB No. 31. (A 848-79.)<sup>1</sup> In its decision, the Board found that the Company violated the National Labor Relations Act, as amended (29 U.S.C. §§ 151 et seq.) (“the Act”), by surveilling its employees’ union activities, redefining its solicitation and distribution policies to inhibit and stifle employee activity in support of the National Union of Healthcare Workers (“NUHW”), and taking a series of disciplinary actions against employee Beverly Griffith because of her vocal support of NUHW. (A 848.)

The Board had subject matter jurisdiction under Section 10(a) of the Act (29 U.S.C. § 160(a)), and its Order is final with respect to all parties. This Court has jurisdiction under Section 10(f) of the Act (29 U.S.C. § 160(f)), which allows an aggrieved party to obtain review of a Board order in this Circuit, and allows the Board to cross-apply for enforcement.

The Company filed its petition for review on August 5, 2011. The Board filed its cross-application for enforcement on September 13, 2011. Both of these filings were timely, as the Act places no time limit on the institution of proceedings to review or enforce Board orders.

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<sup>1</sup> Record references are to the joint appendix (“A”) filed with the Hospital’s opening brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “Br.” references are to the Hospital’s opening brief.

## **STATEMENT OF THE ISSUES PRESENTED**

1. Whether the Board is entitled to summary enforcement of its uncontested finding that the Hospital violated Section 8(a)(1) of the Act by engaging in surveillance of its employees' union activities.

2. Whether substantial evidence supports the Board's finding that the Hospital violated Section 8(a)(3) and (1) of the Act by giving a disciplinary warning to employee Beverly Griffith in February 2009 because of her dissident activities in support of NUHW, a newly formed union.

3. Whether substantial evidence supports the Board's finding that the Hospital violated Section 8(a)(3) and (1) of the Act by redefining its solicitation and distribution policies in March 2009, in order to inhibit and stifle employee activity in support of NUHW.

4. Whether substantial evidence supports the Board's finding that the Hospital violated Section 8(a)(3) and (1) of the Act by threatening to suspend employee Griffith, evicting her from a hospital cafeteria, and suspending her in March 2009, and by discharging her in April 2009, all because of her continued dissident activities in support of NUHW.

## **STATEMENT OF THE CASE**

Acting on charges filed by NUHW (A 880, 884, 886), the Board's General Counsel issued a complaint (A 889-96) alleging that the Hospital violated Section

8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by engaging in surveillance of its employees' union activities. (A 891-93.) The complaint further alleged that the Hospital violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by discriminatorily enforcing its solicitation and distribution rules, and by taking a series of discriminatory actions against employee Beverly Griffith—specifically, giving her a disciplinary warning, evicting her from a Hospital cafeteria, threatening to suspend and suspending her, and ultimately discharging her—all because of her union activities. (A 891-93.) Following a hearing, an administrative law judge issued a decision and recommended order finding that the Hospital had violated the Act as alleged. (A 851-79.) The Hospital filed timely exceptions, and the General Counsel thereafter filed timely and limited cross-exceptions.<sup>2</sup> (A 835-42, 845-46.)

After considering the parties' exceptions and briefs, the Board issued a decision affirming the judge's findings that the Hospital unlawfully surveilled its employees' union activities and discriminatorily enforced its solicitation and distribution rules to inhibit and stifle employee activity in support of a newly formed union, NUHW. (A 848 & n.4.) Applying the analysis set forth in *Wright*

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<sup>2</sup> The Hospital also filed a motion to reopen the record, seeking to explore the factual bases for an adverse inference drawn by the administrative law judge and for the judge's findings with regard to two exhibits admitted at the underlying hearing. (A 848-49.) The Board denied the Hospital's motion, and the Hospital does not challenge that disposition here. (A 849 & n.9, Br. 4 n.4.)

*Line*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981), the Board further affirmed the judge’s findings that the Hospital unlawfully discriminated against employee Griffith in several respects, all because of her vocal support of NUHW. A majority of the Board additionally found that the Hospital’s actions against Griffith would be unlawful even under the alternative analysis proposed by the General Counsel, which derives from *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964). (A 848-49.) The facts supporting the Board’s decision, as well as the Board’s Conclusions and Order, are summarized below.

## STATEMENT OF FACTS

### I. THE BOARD’S FINDINGS OF FACTS

#### A. Background; the Hospital Allows Meetings in Its Cafeterias

The Hospital is a non-profit corporation that provides acute-care, emergency, medical, and surgical services at several facilities in northern California, including the two facilities at issue here—the Summit Hospital campus in Oakland, California and the Alta Bates Hospital campus in Berkeley, California. (A 851-52; 43, 298-99, 890, 899.) The Hospital’s service employees have been represented for decades by affiliates of the Service Employees International Union (“SEIU”), and most recently by SEIU, United Healthcare Workers-West (“SEIU-UHW”). (A 852; 45-46, 911-59.)

The Hospital's written rules do not prohibit meetings in the cafeterias, and over the years the Hospital has allowed its employees to use the Hospital's cafeterias for SEIU-UHW membership meetings multiple times a year. (A 853; 102-03, 288, 361-64, 491-92, 495.) Similarly, the Hospital has allowed the California Nurses Association to use the Hospital's cafeterias for meetings with its nurses. (A 853; 106-10, 288, 497, 499.)

Moreover, the Hospital's written rules permit employee-to-employee solicitation in hospital cafeterias, so long as all of the employees involved are on a meal break or other break, and the soliciting employee is not in uniform or otherwise identified with the Hospital. (A 852; 503, 979-80.) Where distribution of literature is concerned, the rule is the same: employees can distribute literature to fellow employees in Hospital cafeterias, so long as both the distributor and the recipient are on a break, and the distributor is not in uniform or otherwise identified with the Hospital. (*Id.*)

Thus, employees on break have freely solicited and distributed literature in the Hospital's cafeterias for years. (A 853; 87, 94-95.) They have gone from table to table, soliciting for religious, charitable, and union-related purposes; selling church and school raffle tickets, dinner tickets, and food items; collecting union

dues; and distributing literature indirectly, by leaving leaflets on tables, and directly, by handing literature to seated employees.<sup>3</sup> (A 853; 87, 98-99, 365-66.)

**B. Griffith Begins Organizing for a Newly Formed Union Called NUHW**

As of January 2009, the Hospital and SEIU-UHW were in negotiations over a successor collective-bargaining agreement, as the parties' last agreement had expired and was under temporary extension. (A 852; 49-50, 964.) However, while negotiations were ongoing in late January, SEIU placed SEIU-UHW in trusteeship. (A 852; 50-53, 59.)

Shortly thereafter, the ousted officers and executive board members of SEIU-UHW formed NUHW and began a campaign to organize employees at hospitals throughout California. (A 852; 50-52, 60.) Beverly Griffith, an employee in the Hospital's Environmental Services Department and longtime member of SEIU-UHW, immediately joined the NUHW campaign. (A 855; 43, 46-49, 64, 68-69, 222.)

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<sup>3</sup> The Hospital's cafeterias are large spaces open to the public, but the overwhelming majority of people who use the cafeterias—approximately 90 percent to 95 percent—are employees. (A 852-53; 78-79, 737-38.)

**C. At a January 29, 2009 Union Meeting in a Hospital Cafeteria, Griffith and Other Employees Solicit Support for NUHW, and Circulate a Petition To Decertify SEIU-UHW**

At the time of the above events, Hospital employees at the Summit campus were preparing for a regular union meeting in the Summit cafeteria. (A 853-54; 72-73.) Notice of the meeting was given, as usual, by flyers posted on employee breakroom bulletin boards and on the union bulletin board just outside the Summit cafeteria. (A 853; 72-73.) The flyers stated that there would be an SEIU-UHW membership meeting in the cafeteria from 6:00 a.m. to 7:00 p.m. on January 29, 2009. (A 853; 72-73, 99.)

On the day of the meeting, employee Griffith, who worked at the Summit campus and served as a union steward there, saw Labor Relations Specialist Bruce Hatten near the Summit cafeteria at around 6:45 a.m. (A 853-54; 100.) Griffith found it odd that Hatten would be near the cafeteria so early in the morning, so she approached and asked him why he was there. (A 854; 100-01.) Hatten responded that he had received a letter from SEIU-UHW, informing the Hospital of the trusteeship and asking that the Hospital obey the instructions of the trustees. (*Id.*) To this, Griffith remarked, “since when have you guys obeyed the [u]nion?” (A 854; 101.) She also told Hatten that the Hospital’s employees were the union, not anyone “downtown.” (*Id.*)

After talking to Hatten, Griffith proceeded with her work that day, but returned to the cafeteria during her lunch period and her morning and afternoon breaks, to assist with the union meeting. (A 854; 74.) She met fellow steward Deborah Kirkman<sup>4</sup> in the left corner of the cafeteria, where the stewards usually positioned themselves for membership meetings. (A 854; 75-76.) There were no non-employee union representatives at this meeting. (A 854; 76-77.)

As in the past, employees on their lunch and other breaks stopped by to eat with the stewards in the cafeteria during the hours of the membership meeting. (A 854; 96-97.) At times, the stewards also walked to other tables where they saw employees, and either invited them back to the stewards' table or provided union updates to them on the spot. (A 854; 96-97, 102-06.) On January 29, the stewards' updates concerned the SEIU-UHW trusteeship, and Griffith and the other stewards particularly urged fellow employees—both at the stewards table and at other tables in the cafeteria—to sign a petition to decertify SEIU-UHW, and to certify NUHW, as the employees' collective-bargaining representative. (A 854; 74-75.) Although Bruce Hatten was aware of the day-long union meeting in the cafeteria, and was seen in the cafeteria during the meeting, neither he nor any other

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<sup>4</sup> Although the administrative law judge referred to Kirkman as “Kirtman” (A 854, 858-60, 873-75), the record reflects that this is a misspelling. (A 74.)

management representative did anything to suggest that the meeting was not permitted. (A 854 & n.9; 75.)

**D. As Griffith Continues Her Activities in Support of NUHW, the Hospital Disciplines Her for Spilling Water Near SEIU-UHW Representatives in a Hospital Cafeteria**

Over the next few weeks, Griffith continued to solicit employee signatures for the petition to decertify SEIU-UHW and certify NUHW. (A 852, 855, 869; 64, 67-69.) By sometime in February, approximately 70 percent of the bargaining-unit employees had signed the petition. (A 852; 55-56.) Based on this showing of support, Griffith and several other employees took the petition to Hospital CEO Warren Kirk's office and requested that the Hospital recognize NUHW as the employees' collective-bargaining representative.<sup>5</sup> (A 855; 68-69.) NUHW also filed a decertification petition with the Board, seeking a representation election among the Hospital's employees. (A 852; 55-56.)

Amidst these ongoing decertification activities, Griffith visited the Alta Bates cafeteria on February 17, 2009, to talk to employees there about the SEIU-UHW trusteeship and NUHW. (A 856; 110-11.) Coincidentally, two paid SEIU-UHW representatives, Carlos Hernandez and Erica McDuffie, were in the Alta Bates cafeteria at the same time, to talk to employees and distribute flyers for

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<sup>5</sup> Kirk was not available at the time, so the employees left the petition with his secretary. (A 852; 68.)

SEIU-UHW. (A 855; 804.) When they saw Griffith sitting in the cafeteria, they sat down at a table next to hers and tried to convince her that there should not be any vote to decertify SEIU-UHW. (A 856; 112.) They urged Griffith to “get on board with them” to continue contract negotiations with the Hospital. (*Id.*)

Griffith refused, and then she rose to leave. (*Id.*) As she did so, her coat brushed against a cup of water on the table, knocking it over and spilling water onto the table and through the crack separating her table from that of the SEIU-UHW representatives.<sup>6</sup> (*Id.*) Hernandez immediately removed his SEIU-UHW flyers from the table so that they would not get wet. (A 855-56; 799, 801, 804.)

McDuffie accused Griffith of purposefully spilling water on Hernandez and threatened to call the police. (A 856; 112-13.)

McDuffie then left the cafeteria, with Hernandez, and told a hospital security guard that Griffith had deliberately spilled water on them. (A 856; 113.) Seeing McDuffie in the process of making this report, Griffith approached and told the security guard that the water spill was an accident. (*Id.*) The guard responded that he nevertheless would have to make a report of the incident. (*Id.*) In his report, he recorded that Griffith “turned a cup of water over at the table and it spilled on

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<sup>6</sup> In a footnote referencing this incident (A 849 n.6), the Board inadvertently suggested that Griffith spilled a glass of water near “coworkers,” but the record is clear, and the Board elsewhere found, that the individuals in the area of the water spill were non-employee union representatives. (A 855, 869; 794, 797.)

Hernandez,” that McDuffie wanted to make a report about it, and that Griffith maintained it was an accident. (A 856; 1049.)

Three days later, on Friday, February 20, 2009, Labor Relations Specialist Hatten received an email from his supervisor, Director of Employee Labor Relations Richard Hinshaw, regarding Griffith’s union activities. (A 855; 985-89.) The email indicated that certain flyers, which were attached to the email, had been found on the Summit campus, and that “Pete Clayton [an ousted SEIU-UHW official] and Beverly Griffith have been around the campus at night reportedly.” (A 855; 51, 985-89.) The attachments to the email were copies of two flyers bearing the NUHW logo. (A 986-89.) One of the flyers accused SEIU-UHW of “teaming up with employers to stop [employees] from having a free choice,” noting that “[s]ome of us have been harassed and even disciplined by supervisors for exercising our legal right to circulate petitions for a union election.” (A 986.) The other set forth certain “facts” about the effect that a decertification election would have on employees’ terms and conditions of employment, and on collective-bargaining negotiations with the employer. (A 987.)

In addition to Hinshaw’s email, Hatten received, on the same day, a telephone call from SEIU-UHW Representative McDuffie, who similarly raised the issue of NUHW flyers appearing on Hospital premises. (A 856; 538-42, 762.) McDuffie complained that bargaining-unit employees were posting NUHW flyers

on the bulletin boards reserved for SEIU-UHW, and she demanded that the Hospital change the locks on the bulletin boards to prevent this. (*Id.*) In the same conversation, McDuffie related to Hatten her version of the water-spill incident that occurred on February 17, asserting that Griffith had been rude and had spilled water on Hernandez. (*Id.*)

Later in the day, Hatten obtained a copy of the security guard's report regarding the water-spill incident. (A 856; 763.) Shortly thereafter, he met with Griffith's supervisor, Tito Aquino, and the two set out to find Griffith. (A 856-57; 542-43, 597.) They paged her and looked for her in her normal work area, but they could not find her. (*Id.*) They ultimately returned to the Environmental Services ("EVS") department office and observed her as she punched out for the day. (A 857; 598, 601.) They did not approach her or speak to her about the February 17 water-spill incident. (A 857; 602.)

However, the following Monday morning (February 23, 2009), Hatten summoned Griffith to his office in the Human Resources department. (A 857; 121, 123.) Griffith arrived there with Lawana Williams, a fellow employee and union steward, and found Hatten waiting for her with Aquino. (A 857; 121, 123, 332-33.) Hatten handed Griffith a written warning dated the previous Friday (February 20, 2009). (A 857; 123, 960.) The warning stated that Griffith had engaged in "misconduct and inappropriate behavior" on February 17, 2009, by "intentionally

knock[ing] over a glass of water that spilled onto a guest.” (A 857; 960.) After reading the warning, Griffith asked Hatten how he could discipline her without even getting her side of the story. (A 857; 123, 333.) Hatten responded that the complaint he received sounded like something she would do. (A 857-58; 123, 333-34.) Griffith expressed disbelief to Williams and then wrote, at the bottom of the discipline form:

This is harassment by SEIU and Bruce Hatten[.] No investigation by my part. This is back door dealing by management and Alta Bates Summit to discipline me for union activities. Anyone can say and accuse me, and management believes it, Bruce said, it sounds like me and something I would do.

(A 857; 334, 960.)

**E. Griffith and Her Fellow Stewards Hold a Union Meeting in the Summit Cafeteria; the Hospital Retains Private Security Guards To Observe the Meeting; Hatten Tells Griffith and Another Steward That They Cannot Hold Meetings for an Outside Union, Solicit Funds, or Distribute Flyers in the Cafeteria**

Around the middle of March 2009, the Hospital learned that the bargaining-unit employees were planning to have a meeting in the Summit cafeteria on March 20. (A 858; 585, 998.) Apparently believing that this would be a meeting about or for NUHW, Director of Employee Labor Relations Hinshaw sent a letter to NUHW, stating that the Hospital “does not permit outside organizations to conduct group meetings in the cafeterias.” (*Id.*) As an additional preventive measure, the

Hospital retained two security guards from Allied Barton Security Services to be present in the Summit Cafeteria on the day of the scheduled meeting. (A 858; 392, 396, 398.)

When the security guards reported for duty on the morning of March 20, Hatten told them that the Hospital's employees were trying to form a new union and were attempting to hold a meeting in the cafeteria. (A 858; 398.) He said that such a meeting was not allowed and added that the employees also were not allowed to solicit funds or hand out literature in the cafeteria. (*Id.*) Having articulated these rules, Hatten instructed the two security guards to watch for "violations." (*Id.*) He further gave the two men a camera to record violations. (A 858; 412-14.)

After providing these rules and instructions, Hatten pointed to two women seated across the cafeteria—Griffith and Kirkman—and told the guards that "they're the ones that will probably have the meeting." (A 858; 402.) Griffith and Kirkman, in fact, were in the cafeteria to conduct a membership meeting from 6:00 a.m. to 7:00 p.m. They sat at a table with two stacks of flyers and a sign-up sheet in front of them. (A 858; 147-48, 151, 962.)

After a few employees came and went from the table, Hatten approached with one of the security guards. (A 858-59; 151.) He asked what Griffith and Kirkman were doing and snatched some papers from Griffith's hands. (A 859;

151.) Griffith demanded that he return the papers and threatened to call the police. (*Id.*) In response, Hatten returned all but one of the documents. (A 859; 152.) After reading that document, Hatten observed that it concerned the parties' ongoing collective-bargaining negotiations. (*Id.*) Hatten then reached for the documents in front of Kirkman, including the employee sign-in sheet, but Kirkman covered the papers with her hands and entreated Hatten to calm down. (A 859; 151.) At that point, Hatten told Griffith and Kirkman that they were not allowed to conduct a meeting for "outside unions," pass out flyers, or solicit funds, and added that they were trespassing. (A 859; 153.) Kirkman replied that she and Griffith continued to be members of SEIU-UHW and had a right to use the cafeteria to keep members informed of union matters. (A 859; 154.) Hatten simply walked away. (*Id.*)

After Hatten left, Griffith and Kirkman moved to a different table in the cafeteria and set out their flyers and sign-in sheet as before. (A 859; 157-58.) The two security guards stationed themselves at a table a few feet away and observed Griffith and Kirkman as they spoke to employees for the rest of the day, until around 7:00 p.m. (A 859; 158-60.)

**F. Griffith and Her Fellow Stewards Hold a Similar Union Meeting in the Alta Bates Cafeteria; the Hospital Again Retains Private Security Guards To Observe; the Guards Report that Griffith Is Soliciting for NUHW; Hatten Orders the Stewards To Cease and Disperse, Threatens To Suspend Griffith, and Ultimately Evicts Her from the Cafeteria**

On March 23, 2009, Griffith and fellow union stewards DeAnn Horne, Dee Mayberry, and Kenny Hill conducted a union membership meeting in the Alta Bates cafeteria. (A 861; 163, 170.) This meeting, like the March 20 meeting at the Summit cafeteria, was scheduled to take place over a number of hours, from 6:30 a.m. to 7:00 p.m. (A 861, 863; 965.) Griffith and her colleagues positioned themselves at a table in a corner of the cafeteria and set out flyers, just as they had on March 20. (A 861; 165.) The Hospital once again directed two private security guards—Ronnie Parks and a guard named Mahir Said—to observe their conduct and report any “violations” of the rules as articulated by Hatten. (A 861 n.48; 422-24.)

At one point, Griffith got up from her table and walked to a table of dietary workers who were eating breakfast. (A 861; 169-72.) She asked whether they had any concerns, and whether they understood what was going on in terms of the decertification campaign. (*Id.*) Griffith at first stood as they discussed these matters, but then sat down and joined them. (A 861; 170, 443.)

As Griffith proceeded with her discussion, Security Guard Parks was observing her and listening to her conversation with the employees. (A 861; 438, 441-42.) He overheard, among other things, Griffith soliciting money for NUHW. (A 862; 442.) On hearing this solicitation, he immediately called Hatten. (*Id.*)

Shortly thereafter, Hatten entered the cafeteria. (A 862; 445.) Parks told Hatten that Griffith had walked from one table to another, and had solicited funds for NUHW. (*Id.*) Hatten then walked to the table where Griffith and the other stewards were seated and demanded that they “cease and disperse.” (A 861; 171.) Hatten also stated that he was giving them a direct order to leave the premises. (A 861; 172.) While the stewards began putting away their flyers and packing their things, Hatten repeated his direct order for them to leave. (*Id.*) He further warned that “if you don’t leave before security comes, you will be suspended and you could be terminated.” (*Id.*) Hospital security guards arrived within minutes, and just as Griffith and the other stewards were walking out of the cafeteria. (A 861 n.49, 862 n.51; 172.) They escorted Griffith out of the building. (A 861-62; 172.)

Later in the day, at around 10:00 a.m., employee Roxie Osborne arrived in the cafeteria to assist with the membership meeting.<sup>7</sup> (A 863, 872; 479-80.) Not seeing the usual setup for such meetings, Osborne approached fellow employee

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<sup>7</sup> The responsibility for running the meeting was shared among several bargaining-unit employees, who staffed the meeting in shifts. Osborne’s shift was from 10:00 a.m. to 12:00 p.m. (A 863; 479-80.)

Mayberry and asked what was going on. (A 863-64, 872; 480.) Mayberry nodded towards Parks and Said, who were still watching employees in the cafeteria, and said they “had stopped the meeting and had hustled Beverly Griffith out of the cafeteria, out of the building.” (A 864, 872; 480, 482.)

After speaking to Mayberry, Osborne set about her union business, walking over to a group of employees who were eating nearby. (A 864, 872; 482.) She began updating them on matters related to NUHW. (A 864, 872; 483.)

Meanwhile, from his position elsewhere in the cafeteria, Parks noticed that Osborne was talking to other employees with a flyer in hand. (A 864, 872; 432.) He came closer to observe. (A 864, 872; 432, 482-83.) Parks began photographing Osborne, believing that the flyer she had was union-related. (A 864, 872; 432, 487-88, 976-77.) Several of the employees who were with Osborne became restless under Park’s watch. (A 864, 872; 483, 485.) Most of them left immediately; a few stayed and finished their meals. (A 864, 872; 485.)

Once all of the employees at the table were gone, Osborne got up and approached another table of employees. (A 864, 872-73; 485-86.) While she was updating these employees on union matters, Parks—who had reported Osborne’s activities to someone in Hatten’s office and had been instructed to stop her—went to Osborne and said, “you can’t hand out flyers, you can’t solicit funds, and you

can't hold a meeting for the, you know, in relation to these materials," referring to the flyer that Osborne was carrying. (A 864, 873; 432-33, 486.)

**G. Griffith Reports To Work the Next Day; Her Supervisor Informs Her that She Is Suspended and She Leaves; She Is Discharged Two Weeks Later**

The following day (March 24, 2009), Griffith reported to work as usual. (A 864; 176.) She arrived a few minutes before her scheduled 7:00 a.m. shift and went to the EVS lounge. (*Id.*) Once there, she told her coworkers about the events of the previous day. (A 864; 178.) She also had flyers with her addressing those same events. (A 864; 179.) The flyers stated that the Hospital had "tried to cancel a union membership meeting on March 23, 2009" and that "HR Representative Bruce Hatten threatened Shop Stewards and bargaining team members Beverly Griffith, DeAnn Horne, and Kenny Hill with suspension" for trying to have a meeting that "was simply to update the membership and answer questions about what was happening to our Union." (A 864 n.70; 966.)

As Griffith was talking to her coworkers, Supervisor Aquino interrupted and asked to speak to Griffith outside the lounge. (A 864; 179-80.) When she joined him in the hallway, he told her that he had received a call from Human Resources indicating that she was suspended, and therefore she had to leave the building immediately. (*Id.*) Griffith was surprised and visibly upset on hearing this news. (A 864, 865 n.75, 876; 611, 635.) She asked Aquino why she was suspended and

whether the suspension was in writing, but Aquino could give her no information. (A 864; 180.) He simply reiterated that she had to leave the building. (*Id.*)

Griffith went back to the lounge to gather her things. (A 864-65; 180-81.) She told her coworkers there that she had just been suspended, and that it was “bullshit.” (A 865; 180-82.) Aquino again intervened to say that she had to leave. (A 865; 351.) She then finished gathering her things and left the building. (A 865; 182, 351.) On April 6, 2009, the Hospital discharged Griffith. (A 867; 967.)

## **II. THE BOARD’S CONCLUSIONS AND ORDER**

On the foregoing facts, the Board found (A 848, 873) that the Hospital violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by engaging in surveillance of its employees’ union activities. The Board further found (A 848, 869-71, 873-77) that the Hospital violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 8(a)(3) and (1)) by: issuing a written warning to Griffith on February 23, 2009; redefining its solicitation/distribution policies in order to inhibit and stifle its employees’ union activities in support of NUHW on March 20 and 23, 2009; evicting Griffith from a hospital cafeteria, threatening her with suspension, and suspending her on March 23, 2009; and discharging Griffith on April 6, 2009.

The Board’s Order requires the Hospital to cease and desist from the unfair labor practices found, and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their statutory rights. (A 850,

878.) Affirmatively, the Board's Order requires the Hospital to: offer Griffith full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position; make Griffith whole for lost earnings and other benefits; remove from the Hospital's files any reference to the unlawful warning, eviction, suspension, and discharge of Griffith, and notify Griffith that this has been done and that the discharge will not be used against her in any way; and post a remedial notice. (*Id.*)

### **SUMMARY OF ARGUMENT**

Substantial evidence supports the Board's finding (A 848) that the Hospital took several unlawful actions against its employees in the spring of 2009, in order to impede its employees' efforts to decertify their existing union, SEIU-UHW—a union that the Hospital favored—and to certify a newly formed union called NUHW. As the Board found (*id.*), the Hospital engaged in blatant surveillance of protected employee activities in support of NUHW; redefined its solicitation and distribution rules to prohibit employee-to-employee solicitation and distribution in cafeterias where employees gathered to share information about the decertification effort; and took a series of retaliatory actions against a prominent employee supporter of NUHW, Beverly Griffith.

As the Hospital acknowledges (Br. 2-3 n.2), the Board is entitled to summary enforcement of its uncontested finding that the Hospital surveilled its

employees' protected union activities in violation of Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)). Moreover, the Board is entitled to enforcement of its remaining unfair labor practice findings under Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)), given the overwhelming evidence of the Hospital's unlawful motive to discriminate against employees based on their support of NUHW.

In arguing that the Board is not entitled to enforcement of these Section 8(a)(3) findings, the Hospital relies to a great extent on testimony that was discredited by the administrative law judge who presided over the unfair labor practice hearing. But the Hospital fails to meet this Court's high standards for proving that the administrative law judge's credibility findings, adopted by the Board, should be rejected. The Hospital's primarily factual defenses to the Board's violation findings accordingly fail.

### **STANDARD OF REVIEW**

This Court "accords a very high degree of deference to administrative adjudications by the NLRB." *United Steelworkers of America v. NLRB*, 983 F.2d 240, 244 (D.C. Cir. 1993). The Court will affirm the findings of the Board unless they are "unsupported by substantial evidence in the record considered as a whole," or unless the Board "acted arbitrarily or otherwise erred in applying established law to facts." *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1282

(D.C. Cir. 1999) (internal quotation marks and citations omitted). “Substantial evidence,” for purposes of this Court’s review of factual findings, consists of “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). A reviewing court accordingly may not “displace the Board’s choice between two fairly conflicting views of the facts, even though the court would justifiably have made a different choice had the matter been before it de novo.” *Id.* at 488.

The Court gives even greater deference to the Board’s determinations on questions of motive, because most evidence of motive is circumstantial. *Bally’s Park Place, Inc. v. NLRB*, 646 F.3d 929, 939 (D.C. Cir. 2011); *Reno Hilton Resorts*, 196 F.3d at 1282 (internal quotation marks and citations omitted). Moreover, the Court will accept an administrative law judge’s credibility determinations that are adopted by the Board unless they are “‘hopelessly incredible,’ ‘self-contradictory,’ or ‘patently unsupportable.’” *Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 28 (D.C. Cir. 1998) (quoting *Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999, 1004 (D.C. Cir. 1998)).

**ARGUMENT****I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCONTESTED FINDING THAT THE HOSPITAL VIOLATED SECTION 8(a)(1) OF THE ACT BY ENGAGING IN SURVEILLANCE OF ITS EMPLOYEES' UNION ACTIVITIES**

In its opening brief (Br. 2-3 n.2), the Hospital expressly states that it does not contest the Board's finding that it violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by surveilling its employees' union activities in the Summit cafeteria on March 20, 2009, and in the Alta Bates cafeteria on March 23, 2009. *See Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 419-20 (D.C. Cir. 1996). As the Board found (A 870), the Hospital's unlawful surveillance consisted of: retaining private security guards "for the purpose of engaging in surveillance of its employees' activities"; informing the guards that hospital employees were attempting to form a new union, and "direct[ing] them to be vigilant for any employees meeting on this subject, soliciting funds on behalf of the new union, or distributing flyers"; and, finally, instructing the guards to report any infractions.

The Board submits, and the Hospital agrees (Br. 2-3 n.2), that the Board is entitled to summary enforcement of the portions of its Order that address the uncontested finding of unlawful surveillance. *See Grondorf, Field, Black & Co. v. NLRB*, 107 F.3d 882, 885 (D.C. Cir. 1997); *accord Manor Care of Easton, PA., LLC v. NLRB*, \_\_\_ F.3d \_\_\_, 2011 WL 5839631, \*2 n\* (D.C. Cir. 2011).

Moreover, as the courts have recognized, the uncontested violation of the Act does

not disappear simply because a party has not challenged it; rather, it remains in the case, “lending [its] aroma to the context in which the remaining issues are considered.” *See NLRB v. Clark Manor Nursing Home*, 671 F.2d 657, 660 (1st Cir. 1982); *accord NLRB v. Gen. Fabrications Corp.*, 222 F.3d 218, 232 (6th Cir. 2000) (quoting *NLRB v. Talsol Corp.*, 155 F.3d 785, 793 (6th Cir. 1998)); *U.S. Marine Corp. v. NLRB*, 944 F.2d 1305, 1314-15 (7th Cir. 1991) (en banc).

**II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE HOSPITAL VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY GIVING A DISCIPLINARY WARNING TO EMPLOYEE BEVERLY GRIFFITH IN FEBRUARY 2009 BECAUSE OF HER DISSIDENT ACTIVITIES IN SUPPORT OF NUHW, A NEWLY FORMED UNION**

**A. Applicable Principles**

Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) makes it an unfair labor practice for an employer to discriminate “in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization . . . .” It is well settled that an employer violates this provision by taking an adverse employment action against an employee for engaging in protected union activity.<sup>8</sup>

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<sup>8</sup> Section 7 of the Act (29 U.S.C. § 157) protects, among other things, employees’ right to “form, join, or assist labor organizations . . . .” A violation of Section 8(a)(3) produces a derivative violation of Section 8(a)(1), which makes it an unfair labor practice for an employer to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7” of the Act. *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

See *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 397-98 (1983); accord *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1280 (D.C. Cir. 1999).

To determine whether an adverse employment action violates Section 8(a)(3) of the Act (29 U.S.C. 158(a)(3)), the Board examines the employer's motive, using the test articulated in *Wright Line*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981), and approved by the Supreme Court in *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 397-98, 400-03 (1983). Under that test, if substantial evidence supports the Board's finding that the employee's protected union activity was a factor motivating the employer's decision, the Board's conclusion that the action was unlawful must be affirmed, unless the employer demonstrates that it would have taken the same action even in the absence of its unlawful motive.

The Board may properly rely on circumstantial evidence to infer unlawful motivation. *Southwire Co. v. NLRB*, 820 F.2d 453, 460 (D.C. Cir. 1987).

Evidence that supports a finding of unlawful motivation includes the employer's hostility toward the employee's union activities, as evidenced by its other unfair labor practices;<sup>9</sup> the employer's knowledge of those union activities;<sup>10</sup> the timing

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<sup>9</sup> *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 735 (D.C. Cir. 2000).

<sup>10</sup> *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 126 (D.C. Cir. 2001).

of the adverse action;<sup>11</sup> and the employer's departure from established policies and practices.<sup>12</sup>

**B. Applying *Wright Line*, the Board Reasonably Found that the Hospital Unlawfully Disciplined Griffith in February 2009**

On February 23, 2009, the Hospital gave Griffith a written warning for “misconduct and inappropriate behavior,” stating that Griffith “intentionally knocked over a glass of water that spilled onto a guest.” (A 960.) Notwithstanding the stated reason for Griffith's discipline, the Board reasonably found that the Hospital took action against Griffith because of her dissident union activities on behalf of NUHW.

Applying the *Wright Line* test for determining motivation, there is no question that, as the Board found (A 870), the Hospital favored the incumbent union, SEIU-UHW, and disfavored NUHW's nascent organizing efforts. This became most evident when the Hospital became aware of the March 20 and 23 membership meetings for NUHW. The Hospital responded by unlawfully directing the two security guards it had hired from Allied Barton Security Services to be vigilant for any employees meeting on the subject of forming a new union,

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<sup>11</sup> *Tasty Baking Co.*, 254 F.3d at 126.

<sup>12</sup> *Parsippany Hotel Mgmt.*, 99 F.3d at 425.

soliciting funds for the new union, or distributing flyers for the new union. The guards were told to report any such activity.

Yet, even before that time, as early as January 27, 2009, the Hospital had knowledge of NUHW's dissident activities and suspected that Griffith was involved in the decertification effort. Indeed, on January 29, Labor Relations Specialist Hatten had an exchange with Griffith about the SEIU-UHW trusteeship, in which Griffith told him that the employees were the union, not anyone "downtown" working for SEIU-UHW. Just a few weeks after making this statement, Griffith helped to deliver the employees' executed decertification petition to the office of Hospital CEO Kirk and to demand that the Hospital recognize NUHW as the employees' collective-bargaining representative. *See Martech MDI*, 331 NLRB 487, 488 (2000), (noting that Board precedent applying *Wright Line* does not require a showing "that the employer had specific knowledge of an employee's union interest and activities, where other circumstances support an inference that the employer had suspicions or probable information on the identity of union supporters"), *enforced*, 6 F. App'x 14 (D.C. Cir. 2001).

Then, on February 20, 2009, Director of Employee Labor Relations Hinshaw named Griffith in an email to Hatten, regarding the appearance of NUHW flyers at the Hospital's Summit campus. The email incorporated copies of a flyer that accused SEIU-UHW of "teaming up with employers" to prevent decertification

activities, and it implicitly suggested that Griffith was responsible for posting the flyers at the Summit campus, as she had been seen there, with an ousted SEIU-UHW official, at night. Griffith's written warning was dated that same date. *See MECO Corp. v. NLRB*, 986 F.2d 1434, 1437 (D.C. Cir. 1993) (finding that timing is a telling consideration in determining whether employer action was motivated by anti-union animus).

Although Hatten testified that he disciplined Griffith based on a complaint he received from SEIU-UHW Representative McDuffie regarding Griffith's alleged intentional spilling of water on a table across from SEIU-UHW Representative Hernandez, the evidence shows that Hatten failed to take a serious interest in the substance of McDuffie's complaint.<sup>13</sup> Thus, as the Board found, there is no evidence that Hatten pressed McDuffie for the details of Griffith's assertedly deliberate act. Nor did he interview Hernandez, who was the asserted victim of Griffith's conduct. Nor did he interview Griffith. Instead, Hatten

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<sup>13</sup> Moreover, there is good reason to doubt whether Hatten had the conversation with McDuffie described in his testimony. As the Board majority noted (A 848 n.4, 870-71), the Hospital "failed to either call [McDuffie] as a witness or to explain her absence," even though her purported telephone conversation with Hatten spawned the February 2009 discipline at issue. The Hospital's glaring omission of McDuffie—a witness critical to its defense—prompted the Board majority to draw the adverse inference that McDuffie would not have corroborated Hatten's account of their telephone conversation, if she had been called to testify. Nevertheless, the Board also unanimously found that this adverse inference was not necessary to the Board's determination that the February 2009 discipline was unlawful. (A 848, n.4.)

obtained the security report from the February 17 incident, which merely documented McDuffie's accusation and Griffith's denial, and then he swiftly proceeded with the disciplinary process, based on his feeling that the conduct attributed to Griffith "sound[ed] like [her]." (A 123.) In so doing, Hatten admittedly dispensed with the investigations that usually precede written discipline. As the Board found (A 870), this departure from normal procedures, and the "failure to conduct a 'meaningful' investigation and to give the employee, who is the subject of the investigation, an opportunity to explain are clear indicia of discriminatory intent." On this basis, the Board found (*id.*) that the General Counsel carried his burden, under *Wright Line*, of proving that the Hospital was unlawfully motivated in issuing a written warning to Griffith in February 2009.

The Board further properly found (A 870) that given the General Counsel's initial showing of unlawful motivation, the burden of persuasion shifted to the Hospital "to establish that it would have disciplined Griffith notwithstanding the existence of unlawful motivation."<sup>14</sup> To meet its burden, the Hospital maintains

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<sup>14</sup> To the extent that the Hospital suggests (Br. 33) it does not bear the burden of persuasion as to its *Wright Line* defense, it is mistaken. *See Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 278 (1994) (reaffirming the *Wright Line* test as upheld by the Supreme Court in *Transportation Management*, and reiterating that the test "place[s] the burden of persuasion on the employer as to its affirmative defense"). *See also Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011) (noting that once the General Counsel meets his initial burden under *Wright*

(Br. 50-52) that Griffith intentionally spilled water on Hernandez, and that the Hospital lawfully took action against her for that misconduct, consistent with discipline it has taken with respect to the misconduct of other employees.

However, substantial evidence supports the Board's finding (A 869) that Griffith did not engage in the asserted misconduct.

Specifically, the credited testimony of Griffith establishes that she accidentally knocked over a cup of water on the table across from SEIU-UHW Representatives Hernandez and McDuffie, but neither of them got wet. Although the Hospital suggests (Br. 50-52) that the judge's decision to credit Griffith's testimony is thinly supported by considerations relating to Hernandez and McDuffie, it is, in fact, on much stronger footing. The judge's credibility determination is based, primarily, on Griffith's demeanor while testifying. (A 868.) *See NLRB v. Louton, Inc.*, 822 F.2d 412, 414 (3d Cir. 1987) (noting particularly great deference owed to credibility determinations that are based, at least in part, on witness demeanor), *cited in Stanford Hosp. & Clinics v. NLRB*, 325 F.3d 334, 337-38 (D.C. Cir. 2003).

Moreover, while a security report in evidence records a complaint, apparently made by McDuffie, that Griffith had intentionally spilled water on

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*Line*, "the burden of persuasion shifts to the company to show that it would have taken the same action in the absence of unlawful motive").

Hernandez, Hernandez testified that he was not looking at Griffith when she knocked over the cup and could not say whether the whole thing was an accident. (A 800, 807-08, 1049.) Moreover, Hernandez denied that either he or his belongings got wet as a result of the water spill, and denied that he saw McDuffie or her belongings getting wet. (A 801, 804.) In these circumstances, the Board reasonably found that the Griffith did not commit the misconduct of which she was accused—that is, intentionally spilling water on Hernandez.<sup>15</sup>

In its brief to this Court, the Hospital nevertheless argues (Br. 32-37, 50-52) that it met its *Wright Line* burden by producing “rebuttal evidence” (Br. 33) of its reasonable belief that Griffith engaged in the asserted misconduct. For good faith belief to carry the day under *Wright Line*, the employer must show, not only that it held a good faith belief that the employee engaged in misconduct, but also that it “acted on that belief in taking the adverse employment action against the employee.” *Midnight Rose Hotel & Casino, Inc.*, 343 NLRB 1003, 1005 (2004), *enforced*, 198 F. App’x 752 (10th Cir. 2006). An employer’s failure to conduct a fair investigation into alleged misconduct absolutely defeats any claim that the employer reasonably believed the misconduct occurred and acted on such belief. *See id.* Thus, Hatten’s failure to conduct a fair investigation of McDuffie’s

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<sup>15</sup> The Board unanimously reached this finding without relying on an additional finding, made by the judge and the Board majority (A 848 n.4), that an adverse inference was warranted based on McDuffie’s failure to testify.

allegations renders an argument based on the Hospital's good faith belief untenable.

In sum, the Hospital failed to carry its burden of proving that it would have taken the same action against Griffith regardless of its animosity towards her protected activities in support of NUHW. Substantial evidence therefore supports the Board's finding that the Hospital disciplined Griffith because of her dissident union activities, in violation of Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)). *See Reno Hilton Resorts*, 196 F.3d at 1280, 1285.

**III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE HOSPITAL VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY REDEFINING ITS SOLICITATION AND DISTRIBUTION POLICIES IN MARCH 2009, IN ORDER TO INHIBIT AND STIFLE EMPLOYEE ACTIVITY IN SUPPORT OF NUHW**

It is undisputed that on March 20 and 23, 2009, in the context of union meetings conducted by Griffith and other NUHW supporters in the Hospital's cafeterias, the Hospital told employees that they could not hold a meeting, distribute literature, or solicit funds in its cafeterias. (*See Br. 18, 20.*) The Board reasonably found (A 875) that the Hospital's redefinition of its rules to prohibit such conduct violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)).

The Hospital has no written rule prohibiting meetings in its cafeterias. Accordingly, bargaining-unit employees have held regular union meetings in the

cafeterias for years, and at least one outside organization—the California Nurses Association—has held meetings in the cafeterias as well. Although the Hospital cites (Br. 62-63) two instances in which it has prohibited non-employee SEIU-UHW representatives from holding meetings in the cafeterias, there is no evidence that it has prohibited any of the membership meetings openly advertised by bargaining-unit employees over the years. In addition, the Hospital’s written rules specifically allow employee-to-employee solicitation and distribution in the Hospital’s cafeterias, so long as all of the employees involved are on non-working time (e.g., taking a meal or other break). Thus, employees have freely solicited and distributed literature for a variety of causes, union-related and otherwise. Consistent with this history, Griffith and her fellow stewards faced no impediment to their membership meeting and solicitation efforts in the Summit cafeteria on January 29, 2009. (A 854; 72-76, 96-98.)

But on March 20 and 23, 2009, as it became clear that the bargaining-unit employees were mobilizing to decertify SEIU-UHW, and to certify NUHW, the Hospital articulated a new set of rules restricting employee-to-employee communications relating to the decertification effort. As the Board found (A 873-75), the Hospital’s articulation of these new rules, and abrupt departure from its written rules and longstanding practices, was clearly discriminatory.

**A. A Hospital Cannot Prohibit Employees from Engaging in Union Solicitation and Distribution in Its Cafeterias, Absent a Showing that Such Activities Would Disturb Patients or Disrupt Health-Care Operations**

As indicated above, p. 26 n.8, Section 7 of the Act (29 U.S.C. § 157) guarantees to employees, *inter alia*, “the right to self-organization” and to “form, join, or assist labor organizations.” Moreover, the Supreme Court has “long accepted the Board’s view that the right of employees to self-organize . . . necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite.” *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491 (1978) (citing *Central Hardware Co. v. NLRB*, 407 U.S. 539, 542-43 (1972)). The jobsite, after all, “is the one place where [employees] clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees.” *Eastex, Inc. v. NLRB*, 437 U.S. 556, 574 (1978) (internal quotation marks and citation omitted). *See also Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801 n.6 (1945) (the workplace is “uniquely appropriate” for exchange of views regarding organization).

The “[e]mployees’ right to self-organization at the jobsite, however, is not unlimited, conflicting as it does with employers’ property rights and managerial interests.” *Stanford Hosp.*, 325 F.3d at 338 (internal quotation marks omitted). Accordingly, the Board must “work[] out an adjustment” or accommodation

between the employer and employee rights involved. *Republic Aviation Corp.*, 324 U.S. at 797-98.

To this end, the Board has established a series of presumptions regarding employer restrictions on solicitation and distribution activities in the workplace. *See Stanford Hosp.*, 325 F.3d at 338. In *St. John's Hosp. & Sch. of Nursing, Inc.*, 222 NLRB 1150, 1150-51 (1976), the Board set forth the presumptions that specifically apply to hospitals. Under *St. John's*, a hospital's ban on solicitation and distribution in "immediate patient care areas" is presumptively valid because such activities "might be unsettling to the patients" who are being cared for in those areas. *Beth Israel Hosp.*, 437 U.S. at 495 (quoting and upholding the Board's *St. John's* presumptions). However, outside immediate patient care areas, a hospital may ban solicitation and distribution only "as necessary to avoid disruption of health-care operations or disturbance of patients." *Brockton Hosp. v. NLRB*, 294 F.3d 100, 103 (D.C. Cir. 2002) (internal quotation marks and citation omitted); *accord Beth Israel Hosp.*, 437 U.S. at 495, 507.

It is well settled that cafeterias do not qualify as "immediate patient care areas." *See Beth Israel Hosp.*, 437 U.S. at 495, 502. Therefore, prohibitions on employee solicitation and distribution in hospital cafeterias are presumptively invalid. *See NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 786-87 (1979) (finding that hospital had not rebutted presumption that ban on solicitation in cafeteria was

unlawful); *Baylor Univ. Med. Ctr. v. NLRB*, 662 F.2d 56, 57, 62-63 (D.C. Cir. 1981) (finding that hospital presented evidence potentially rebutting the presumption that its ban on solicitation in cafeteria was unlawful).

An invalid restriction on solicitation and distribution is normally construed as a violation of Section 8(a)(1) of the Act (29 U.S.C. 158(a)(1)), which makes it an unfair labor practice for an employer to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 [of the Act]” (29 U.S.C. § 157). *See Stanford Hosp.*, 325 F.3d at 338. However, a restriction that is enacted specifically to inhibit union activity additionally violates Section 8(a)(3) of the Act, which prohibits “discrimination in regard to . . . any term or condition of employment to encourage or discourage membership in any labor organization . . . .”

**B. The Board Reasonably Found that the Hospital Redefined Its Rules To Prohibit Solicitation and Distribution in Its Cafeterias, Not Out of Concern for Patients or Health-Care Operations, but To Prevent Bargaining-Unit Employees from Engaging in Support of NUHW**

Substantial evidence supports the Board’s finding (A 874) that, “as a result of its SEIU-UHW bargaining unit employees’ overt showing of support for the NUHW subsequent to the trusteeship, [the Hospital] redefined its solicitation/distribution policies on March 20 and March 23” to hinder employee activity in support of NUHW. Specifically, as the Board found (*id.*), Hatten and a

security guard acting on his instructions told employees that they could not solicit funds, distribute literature, or conduct a meeting for an “outside union” in the Hospital’s cafeterias, even though solicitation and distribution is expressly permitted in the cafeterias under the Hospital’s written rules, and even though meetings have long been permitted in the cafeterias. (A 566-67.)

In its brief (Br. 62-69), the Hospital does not defend Hatten’s redefinition of the Hospital’s written rules to completely ban solicitation and distribution in hospital cafeterias. On the contrary, the Hospital concedes (Br. 67) that employees “may engage in solicitation and distribution incidental to the normal use of a cafeteria . . . .” And although the Hospital refers in passing (Br. 68-69) to its concerns for patient care and the fact that its cafeteria facilities are used by patients and their families, it does not even attempt to make a showing that the total ban on solicitation and distribution conveyed to employees on March 20 and 23 was “necessary to avoid disruption of healthcare operations or disturbance of patients.” *Beth Israel Hosp.*, 437 U.S. at 507.

Nor could it make such a showing, given the record in this case. As the Board found (A 874), “most of the patrons of [the Hospital’s] cafeterias”—approximately 90 percent to 95 percent—“are its own employees and . . . due to dietary concerns, patients are discouraged or restricted from using the cafeterias.” (A 78-79.) Moreover, there is no record evidence of any patient care in or near the

cafeterias.<sup>16</sup> (A 874; 78.) In such circumstances, the Board reasonably viewed the possibility that solicitation and distribution would disrupt healthcare operations or disturb patients as remote. *See Beth Israel Hosp.*, 437 U.S. at 506 (finding that “a hospital cafeteria, 77% of whose patrons are employees, and which is a natural gathering place for employees, functions more as an employee-service area than a patient-care area”). *Cf. Baylor Univ. Med. Ctr.*, 662 F.2d at 65 (finding that hospital could justify at least a partial ban on solicitation in its cafeteria, where evidence showed that “approximately 40% of the cafeteria’s patrons are nonemployees”). The Hospital, accordingly, failed to rebut the presumption that its total ban on solicitation and distribution in the cafeterias was unlawful.

The Hospital nevertheless takes issue with the Board’s finding that it redefined its rules to stifle NUHW activity, arguing (Br. 62-69) that, all along, its concern was merely to prevent meetings and table-hopping. This explanation, however, rings hollow. If all that Hatten was concerned about was the prevention of disruptive meetings and table-hopping, he could have limited his redefinition of the rules to those matters; but, in fact, he went much further and flatly prohibited solicitation and distribution, in addition to meetings. Moreover, when the Hospital’s officials were asked to define the sort of meeting that they considered

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<sup>16</sup> Indeed, under the Hospital’s written solicitation and distribution rules, the cafeterias are not even considered “working areas.” (A 89, 979-80.)

impermissible, they were unable to provide a clear or consistent definition. (A 854-55; 735-36, 810-14.)

In these circumstances, the Board reasonably found (A 875) that “rather than fear of any disruption to patient care or even to the operation of its cafeterias,” what motivated the Hospital to redefine its solicitation and distribution rules was its “opposition to and desire to squelch the SEIU-UHW bargaining unit employees’ increasing support for . . . NUHW.” Because the Hospital thus discriminated against employees in regard to a term and condition of their employment—that is, their use of the cafeterias—the Board properly found a violation of Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)).

**IV. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE HOSPITAL VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY THREATENING TO SUSPEND EMPLOYEE GRIFFITH, EVICTING HER FROM A HOSPITAL CAFETERIA, AND SUSPENDING HER IN MARCH 2009, AND BY DISCHARGING HER IN APRIL 2009, BECAUSE OF HER CONTINUED DISSIDENT ACTIVITIES IN SUPPORT OF NUHW**

The credited evidence establishes that on March 23, 2009—the same day that Hatten and the security guards acting under his direction unlawfully surveilled Griffith and other NUHW supporters, and unlawfully redefined the Hospital’s solicitation and distribution rules to inhibit NUHW activities—Hatten threatened to suspend Griffith, evicted her from the Alta Bates cafeteria, and later suspended her. The evidence further establishes that the Hospital discharged Griffith about two

weeks later, while she was still in suspension. As the Board reasonably found (A 875-77), these swift and escalating actions against Griffith were unlawfully motivated, and therefore violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)).

**A. The Board Reasonably Found that the Hospital Threatened To Suspend Griffith, Evicted Her From the Alta Bates Cafeteria, and Suspended Her on March 23 Because of Her Protected NUHW Activities**

As the Board found (A 862, 872), Hatten's confrontation with Griffith on March 23 stemmed from a report that he received from Security Guard Parks about Griffith's NUHW activities. In the course of Parks' admittedly unlawful surveillance that day, Parks had observed Griffith moving from her table in the cafeteria to another table, and telling employees at that other table that "everybody needs to give \$25 to the new union . . . and that the dues are cheaper than SEIU." (A 862; 442.) Parks called Hatten to report this conduct because Hatten had instructed him, earlier in the day, to report any solicitations for the "new union." (A 858, 861 n.48, 872; 442.) When Hatten arrived in the cafeteria, in response to Parks' call, Parks told him that "Ms. Griffith had crossed over to the other table and sat with . . . six people . . . and was . . . asking for funds for the new union, about it stagnating and that their dues were cheaper than SEIU." (A 862; 445.)

Although Hatten, himself, did not observe anything amiss in the cafeteria (A 558), he walked directly to the table where Griffith was seated and confronted her.

He told Griffith and her colleagues (Union Stewards Horne and Hill) to “cease and disperse,” that they were not allowed to solicit or distribute union literature, and that they had to leave the cafeteria “now.” Griffith, having served as a union steward for most of her 31-year employment at the Hospital, understood that there was no refusing to comply with such a direct order. (A 861; 44, 49, 173.)

Accordingly, she told Horne that they were being kicked out, and they began gathering the materials they had brought for the meeting. As they did so, Hatten directed one of the two security guards hired for surveillance purposes to call hospital security. Hatten then repeated his order for Griffith and her colleagues to leave and warned that if they did not leave before security arrived, they would be suspended. Minutes later, Griffith and Horne finished packing their things and began walking out of the cafeteria. At the same time, two hospital security guards arrived and escorted Griffith out of the building. It is undisputed that Hatten never asked Griffith to surrender her employee identification badge before she left hospital premises.

At some point later in the day, the Hospital suspended Griffith and informed her supervisor of that fact. (A 876; 629.) Based on this evidence, the Board reasonably found that the Hospital threatened to suspend Griffith, evicted her from a hospital cafeteria, and suspended her because of her activities in support of NUHW.

Applying the *Wright Line* test for determining motivation, the Board found (A 875) that by the time of the acts in question, the Hospital was “keenly aware” of Griffith’s active involvement in the campaign to decertify SEIU-UHW and certify NUHW. Thus, on March 20, 2009, when embarking on the Hospital’s unlawful surveillance efforts, Hatten identified Griffith to Security Guard Parks as one of the employees who would likely be conducting a meeting for an outside union, and who would therefore have to be watched. The Hospital additionally manifested its hostility towards Griffith’s NUHW activities by previously unlawfully disciplining her under the guise that she had intentionally spilled water, and by unlawfully redefining its solicitation and distribution rules. Given these prior unfair labor practices directed specifically towards Griffith and her dissident activities, the Board found (A 875) that the General Counsel “amply established” the Hospital’s unlawful motivation for threatening Griffith with suspension and then evicting her on March 23, 2009.

Turning to the Hospital’s *Wright Line* defenses, the Board reasonably rejected (A 875-76) the Hospital’s contention that Hatten took action against Griffith because she was disruptively moving from table to table, in a manner inconsistent with the normal use of a cafeteria. As indicated above, the credited evidence shows that Griffith moved from her table—that is, the table where the stewards were sitting for the period of the membership meeting—to just one other

table. After talking to employees at that table about NUHW, Griffith directly returned to her table. Moreover, as the Board found (A 876), “there is no evidence that her actions disrupted other patrons’ use of the cafeteria in any way, or that any patrons complained.” (A 517.)

The Hospital counters (Br. 37-38) that Hatten reasonably believed that Griffith made “efforts to take over a section of the cafeteria, conduct an assembly-style meeting[, and] tablehop.” Parks, however, reported no such conduct to Hatten. Parks testified that he told Hatten that Griffith walked to a table of six employees, sat with them, solicited funds for NUHW, and then returned to her table. Moreover, in a cafeteria that seats hundreds of people, Griffith’s holding forth to six fellow employees cannot reasonably be viewed as a takeover of a section of the cafeteria, or an attempt to hold an assembly-style meeting. Nor can Griffith’s mere act of moving from her table to one other table, and then back, reasonably lead to the conclusion that she was “hopping” from table to table and thereby disrupting normal operations in the cafeteria. And, indeed, Hatten himself admitted that when he arrived in the cafeteria, everything appeared “normal.” In these circumstances, there is no support for the Hospital’s contention (Br. 37-39) that Hatten could have reasonably formed the belief that Griffith was being disruptive.

In any event, as noted above p. 33, to rebut a showing of unlawful motivation under *Wright Line*, an employer's reasonable belief that misconduct occurred is only effective when coupled with evidence that the employer acted based on its reasonable belief. *See Midnight Rose Hotel & Casino*, 343 NLRB at 1005. Such evidence—for example, that Hatten immediately confronted Griffith about her table-hopping, or complained to others present about it—is completely lacking. Accordingly, the Hospital's defense (Br. 37-38) based on Griffith's purportedly disruptive conduct in the cafeteria must be rejected.

The Board also reasonably rejected (A 876) the Hospital's *Wright Line* defense that it took action against Griffith because she defied Hatten's direct order to leave. Based on Griffith's credited testimony, the Board found (A 861, 868, 872, 876) that when Hatten gave his direct order for Griffith and her colleagues to "cease and disperse," Griffith turned to Horne, said it was time for them to leave, and asked to use Horne's phone to arrange for a ride. She and Horne then began packing the flyers and other meeting materials they had brought into the cafeteria. Within minutes, they completed the process of packing up and walked out of the cafeteria. This sequence of events does not reflect defiance of a direct order. And as the Board further found (A 876), "at [no] point during her confrontation with Hatten[] did Griffith ever argue with the latter or act defiantly in response to his order . . . ."

Notwithstanding this credited evidence showing Griffith's compliance with Hatten's direct order, the Hospital argues (Br. 38-39) that Hatten "reasonably believed that Griffith disobeyed" his order because she "insisted on using a phone rather than leav[ing]," and because she was slow to leave. However, the credited evidence provides no support for the Hospital's suggestion that Griffith lingered in the cafeteria in order to make a phone call. Horne, in fact, testified that Griffith was using her (Horne's) phone as they were *walking out* of the cafeteria. (A 861; 296-97.) Likewise, the credited evidence does not support the suggestion that Griffith moved slowly as if disinclined to leave. Instead, it shows that Griffith acknowledged that she had to leave, took just a few minutes to gather her things, and then left. In these circumstances, the Hospital has failed to establish any basis for Hatten's asserted reasonable belief that Griffith had disobeyed his order to leave.

**B. The Board Reasonably Found that the Hospital Discharged Griffith on April 6, 2009, Because of Her Protected NUHW Activities**

It is undisputed that Griffith reported to the Summit campus for work on March 24, 2009, the day after her eviction from the Alta Bates cafeteria. (A 864.) As the Board found (A 877), she arrived "absolutely unaware" that the Hospital had suspended her the previous day. Thus, when Supervisor Aquino informed her that she was suspended and had to leave the building, she was visibly upset and

asked Aquino why she was suspended, but he had no further information or documentation to give her. He merely said that he had been told by Human Resources that she was suspended, and reiterated that she had to leave the building. Griffith accordingly went to the EVS lounge to gather her things, with Aquino's permission. As she gathered her things, Griffith vented to her coworkers in the lounge that she had just been suspended, and that it was "bullshit." She thereafter left the building as instructed.

Three days later, on March 27, Labor Relations Director Hinshaw sent an email to hospital officials, announcing that Hatten was pursuing information that would link Griffith to the copying and pasting of employee signatures on a petition for NUHW. Hinshaw stated that those signatures, in turn, "may have been used by NUHW to demonstrate a 30% showing of interest for the decertification petition." (A 876; 999.)

The Hospital discharged Griffith days after Hinshaw called for information about her possible misconduct in the course of her NUHW activities. The termination notice issued to Griffith cited, as the reasons for her discharge: (1) her behavior on March 23, in conducting "a meeting for an outside organization (the National Union of Healthcare Workers)" and then failing to leave immediately when directed to do so; (2) her effort to work on March 24, 2009, after Hatten "clear[ly]" informed her that she was suspended; and (3) her failure to obey

Aquino's order to leave the building, and her profane tirades involving the word "fucking," on March 24, 2009. (A 967-68.)<sup>17</sup>

The Board reasonably rejected (A 877) these stated bases for Griffith's discharge and found (*id.*) that the Hospital once again took action against Griffith because of her dissident activities on behalf of NUHW. As the Board properly found (A 876), and as shown above, there is "overwhelming record evidence establishing [the Hospital's] unlawful animus against Griffith" during the relevant time period. Hinshaw's March 27, 2009 email, seeking to connect Griffith to the copying of employee signatures on an NUHW petition, further reinforces the Hospital's desire to discredit and stymie her protected organizing activities on behalf of NUHW.

In light of this "patent record evidence of unlawful animus" (A 877), the Hospital bears a heavy burden to prove its innocent motivations in accordance with *Wright Line*. See *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 936 (D.C. Cir. 2011) (describing employer's rebuttal burden under *Wright Line* as "substantial," where General Counsel makes a strong showing of discriminatory motivation).

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<sup>17</sup> The reasons stated in the termination notice undermine the Hospital's argument (Br. 43-44) that it was "lawfully motivated by Griffith's recent disciplinary history" in deciding to terminate her. The notice fails to mention earlier discipline as a basis for termination. (A 967-68.) And as noted above, the Hospital cannot rely on its earlier unlawful discipline of her for the water-spilling incident.

The Board reasonably found (A 876-77) that the Hospital failed to carry its heavy burden here.

As its first reason for Griffith's discharge, the Hospital relies on its suspension of Griffith for her behavior in the Alta Bates cafeteria on March 23, 2009. But as discussed above, that suspension was unlawful because it was motivated by the Hospital's animus toward Griffith's NUHW activity. Furthermore, Griffith did not engage in the misconduct attributed to her on that date (i.e., tablehopping and disruption of cafeteria operations). An employer cannot carry its *Wright Line* burden by relying on earlier, unlawful discipline. *See Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 32 (D.C. Cir. 1998).

Moreover, to the extent that the termination notice suggests that the March 23 suspension was because Griffith violated hospital policy by conducting a meeting for an "outside organization"—namely, NUHW—that assertion too must fail. As the Board found (A 861, 876 n.100), the meeting on that date was not "for" NUHW, nor is there any evidence that NUHW employees or officials were in attendance. Rather, the meeting was run by and for bargaining-unit employees, who were still members of SEIU-UHW at the time, to discuss union matters affecting them. (A 63-64, 492.) The effort to decertify SEIU-UHW and certify NUHW was just one of the matters addressed. Thus, Griffith and others conducting the meeting had a flyer on hand regarding collective-bargaining

negotiations between the Hospital and SEIU-UHW.<sup>18</sup> In any event, the record does not reveal any written policy prohibiting outside organizations from holding meetings in the cafeterias, and the employees who testified were unaware of any such policy or practice. (A 853; 106-10, 288, 497, 499.)

The Hospital advances (A 967, Br. 52-57), as a second reason for Griffith's discharge, the fact that she reported to work on March 24, despite Hatten's "clear communication" to her, on March 23, that she was suspended. However, substantial evidence supports the Board's finding (A 872 & n.97) that there was no clear communication to Griffith on March 23 that she was in fact suspended. As the Board found, Griffith and Horne credibly testified that Hatten never told Griffith that she was suspended during their confrontation on March 23. In addition, the evidence fails to show that Hatten took steps consistent with suspension. For example, he did not ask Griffith to turn in her identification badge on March 23, even though it is admittedly customary to do so when an employee is suspended. (A 577.) The Board, thus, reasonably found that Griffith did not learn

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<sup>18</sup> Even assuming that the March 23 meeting was "for" NUHW as the Hospital claims, Griffith clearly was not the only employee running the meeting, and yet there is no evidence that any of the other employees involved were disciplined. Specifically, it is undisputed that union stewards Horne and Hill were with Griffith and ostensibly running the meeting at issue when Hatten ordered all of them to "cease and disperse." Nevertheless, Horne never faced discipline for her involvement in conducting the meeting, and there is no evidence of any discipline issued to Hill.

of her suspension until March 24, when she reported to work. This finding is supported by the testimony of Supervisor Aquino, who admitted that when he told Griffith she was suspended on March 24, she seemed shocked and very upset, as if she was hearing the information for the first time.

Notwithstanding the Board's well-supported findings, the Hospital argues (Br. 52-57) that the Board erred in accepting the administrative law judge's determination to credit Griffith's and Horne's denials that Hatten told Griffith she was suspended on March 23. The Hospital specifically maintains (Br. 52-55) that the judge's decision to credit Griffith and Horne is infirm because it is based on mere testimonial inconsistencies in the contrary accounts provided by the Hospital's witnesses (Hatten, Security Guard Parks, and Security Guard Block). In so arguing, the Hospital misunderstands the basis for the judge's credibility determinations. The judge credited (A 868) Griffith's version of events based on "her demeanor . . . as . . . a veracious witness," and credited Horne to the extent that she corroborated Griffith. Further, the judge specifically *discredited* (*id.*) Hatten's contrary version of events, because Hatten's demeanor impressed the judge as that of a witness "not worthy of belief."

Accordingly, the Hospital's argument ignores the fact that this Court will not reverse an administrative law judge's credibility determinations unless they are "hopelessly incredible,' 'self-contradictory,' or 'patently unsupportable.'"

*Cadbury Beverages*, 160 F.3d at 28 (quoting *Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999, 1004 (D.C. Cir. 1998)); accord *Federated Logistics & Operations v. NLRB*, 400 F.3d 920, 924 (D.C. Cir. 2005).<sup>19</sup> The Hospital has not met this high standard here. Specifically, the Hospital has failed to show that the judge’s demeanor-based finding that Griffith was a credible witness is not worthy of acceptance. Although the Hospital asserts (Br. 56-57) that Griffith and Horne varied as to some of the details of what happened on March 23—details that have nothing to do with whether Hatten told Griffith she was suspended—those minor variances in the testimony do not render the judge’s decision to credit Griffith, and Horne to the extent that she corroborated Griffith, “hopelessly incredible, self-contradictory, or patently unsupportable.” *Cadbury Beverages*, 150 F.3d at 28 (internal quotation marks omitted).

By contrast, the inability of the Hospital’s witnesses (Hatten, Parks, and Block) to provide a consistent account as to when, on March 23, Hatten stated that Griffith was suspended casts serious doubt on the Hospital’s claim that such a statement was, in fact, made. Moreover, as the Board found (A 868 n.89), Parks’

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<sup>19</sup> Contrary to the Hospital’s contentions (Br. 49, 53, 58), the Second Circuit’s decision in *NLRB v. Interboro Contractors, Inc.*, 388 F.2d 495, 501 (2d Cir. 1967), does not establish a less deferential standard of review where the credibility determinations before the court are not based on witness demeanor. Rather, in *Interboro*, the court merely upheld the *Board’s* authority to reject non-demeanor-based credibility determinations made by an administrative law judge. *See id.*

written report of the March 23 confrontation between Hatten and Griffith fails to resolve the matter. The report indicates that Hatten told Griffith she was suspended during the March 23 confrontation, but Hatten's purported statement appears out of narrative order, as an apparent afterthought introduced by "Bruce [Hatten] also . . ." at the end of the report. In all these circumstances, substantial evidence supports the Board's finding (A 872) that Hatten did not tell Griffith she was suspended on March 23 and the Hospital, accordingly, is not right to fault Griffith for reporting to work on March 24.

With two of the Hospital's three stated reasons for Griffith's discharge found wanting, it is not even the Hospital's position that it would have discharged Griffith solely for the third reason cited in her termination notice. In any event, the Hospital's final reason for discharging Griffith is that that she allegedly engaged in a "loud tirade" involving "multiple uses of the word 'fucking'" at the time she was given notice of her suspension on March 24. (A 967.) As the Board reasonably found (A 877), the Hospital has once again failed to provide the necessary proof that the alleged misconduct occurred.

Griffith's credited testimony, which was corroborated by the testimony of employee Williams, establishes that Griffith referred to her suspension as "bullshit" while she was in the EVS lounge on March 24, but that was the only profanity she uttered. Although Supervisors Aquino and Biddle testified to the

contrary—that Griffith used variants of the word “fuck” —the Board adopted (A 848 n.4) the judge’s findings (A 869, 877) that their testimony with regard to Griffith’s statements in the EVS lounge was not credible. As the judge explained (A 877), neither [Aquino nor Biddle] impressed . . . as testifying candidly on this point,” and Biddle, in particular, “testified inaudibly as if she desired not to be heard,” and initially “appeared unable to articulate, with any specificity, the profanity which she attributed to Griffith.”

Moreover, as the judge correctly pointed out (*id.*), Aquino and Biddle contradicted one another on salient points, such as the duration and content of Griffith’s asserted tirade involving the word “fuck.” Thus, Biddle testified that, over a three- to four-minute period, Griffith angrily directed profane comments at Aquino, telling him that “she could be ‘any f’ing place’ she wanted to be, he couldn’t tell her what to do.” (A 658, 682.) Aquino, by contrast, testified that Griffith’s outburst lasted less than a minute and consisted of her expressing outrage, not at him, but at the idea that she was “fucking suspended” and could not even speak to fellow employees “in a fucking public place.” (A 609-10, 619.) Aquino further testified that Griffith was gathering her things in the less-than-one-minute period when she was in the lounge, in accordance with his order to leave the building; Biddle claimed that Griffith made no effort to gather her things, and was instead passing out flyers to employees in the lounge. (A 609, 685, 690.)

Most puzzlingly, as the judge noted (A 869 n.91, 877), both Aquino and Biddle claimed to be standing in the doorway of the lounge at the time of Griffith's profane comments, but Aquino did not see Biddle there, and Biddle claimed that Aquino was inside the lounge rather than at the doorway. (A 624-25, 678, 680.) Given these inconsistencies, as well as the judge's observations regarding Biddle's demeanor while testifying (A 868-69), the Board unanimously adopted (A 848 n.4) the judge's finding that Aquino and Biddle were not credible in their assertions that Griffith used variants of the word "fuck" in the EVS lounge on March 24 and that this finding alone was sufficient to discredit the Hospital's version of events.

A majority of the Board found further support for affirming the judge's discrediting of the Hospital's version of events in the judge's finding (A 848 n.4, 877) that Aquino's testimony was internally inconsistent as to what Griffith said while in the EVS lounge. Aquino at first testified that Griffith said, "Did you all hear that, I'm being fucking suspended, I can't even speak to you in a fucking public place." (A 609.) Later, Aquino testified that Griffith simply "made a comment about, you know, 'Can you all, you know, believe that I've been suspended . . .'" (A 610.) Still later, Aquino testified that Griffith said, "Did you all hear that? I was being fucking suspended and I'm not even allowed to be fucking to [sic.] talking to, actively talking in a fucking public place." (A 613.)

Finally, a majority of the Board also found additional support for affirming the judge's discrediting of the Hospital's version of events in the judge's finding (A 848 n.4, 877 n.101) that the Hospital may have fabricated the purportedly contemporaneous written statements prepared by Aquino and Biddle regarding the events of March 24, 2009. Aquino's statement in evidence was revised, but the Hospital failed to offer the original for comparison. (A 877 n.101; 1005.) Biddle's statement gave a different version of Griffith's alleged tirade than that provided by Biddle in her testimony. For example, in her written statement, Biddle asserted that Griffith used "many 'F' 'bombs' . . . to address the EVS Associates sitting/standing in the EVS break area stating that they 'needed to look out because (we) were out to get them.'"<sup>20</sup> (A 1008.)

Given these inconsistencies and other deficiencies in the Hospital's evidence related to Griffith's asserted use of the word "fuck" on March 24, the Board reasonably found (A 877) that Griffith did not "utter[] the word 'fucking' or any variant thereof while venting inside the [EVS lounge] immediately after being informed of her suspension." The Hospital protests (Br. 59) that Griffith, herself, admitted in a March 27, 2009 meeting regarding her potential discipline that she

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<sup>20</sup> Although the Hospital argues (Br. 27-28, 39-40) that the written reports provided by Aquino and Biddle "gave the [Hospital] a reasonable basis for believing that Griffith did, in fact, engage in profanity-laden histrionics," the administrative law judge specifically discredited (A 877 n.101) Hatten's testimony that he relied on those reports in deciding to discharge Griffith. (A 589.)

“might have” used the word “fuck” in the EVS lounge on March 24. (A 261.)

However, this admission does not prove that she engaged in the tirade of profanity that serves as the only remaining basis for her discharge. Nor does it unsettle the credibility determinations that the Board properly relied on in finding that Griffith did not use multiple variants of the word “fuck” in the EVS lounge on March 24.

As this Court has noted, a party that wishes to overturn credibility determinations that have been adopted by the Board must show, not only that the credited testimony “carries . . . its own death wound,” but also that the “discredited evidence . . . carries its own irrefutable truth.” *UAW v. NLRB*, 455 F.2d 1357, 1368 n.12 (D.C. Cir. 1971). The Hospital’s arguments in its brief (Br. 58-61) fall far short of showing that the discredited testimony of Aquino and Biddle, described above, “carries its own irrefutable truth.” *See id.*

Substantial evidence accordingly supports the Board’s credibility-based finding that Griffith did not engage in the outburst of profanity described in her termination notice.<sup>21</sup> Thus, for all the reasons set out above, the Hospital has failed to carry its *Wright Line* burden of proving that it would, in fact, have discharged

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<sup>21</sup> Because substantial evidence supports the Board’s findings (A 869, 872, 877) that Griffith did not engage in this misconduct, or any of the other forms of misconduct cited in connection with the earlier disciplines at issue in this case, the Hospital’s examples of analogous misconduct (Br. 40-45) are irrelevant.

Griffith had it not been motivated by its animus toward her dissident union activity.<sup>22</sup>

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<sup>22</sup> As the Board majority further found (A 848-49), the Hospital's adverse actions against Griffith would be unlawful even under the alternative legal analysis proposed by the General Counsel in the proceedings below. *See NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 23 (1964). Under that analysis, an adverse employment action that is based on an employee's asserted misconduct in the course of protected activity violates Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) if the General Counsel is able to show that the misconduct did not, in fact, occur. Here, the General Counsel successfully showed that Griffith did not engage in misconduct on February 17, 2009 (by intentionally spilling water), March 23, 2009 (by disrupting cafeteria operations and refusing a direct order), and March 24, 2009 (by attempting to work during her suspension and using profanities). Therefore, the Board majority found (A 849) that the Hospital's actions against Griffith based on her conduct on those dates would violate Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)), if *Burnup & Sims* were applied.

**CONCLUSION**

The Board respectfully requests that the Court enter a judgment denying the Hospital's petition for review and enforcing the Board's Order in full.

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December 2011

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**STATUTORY ADDENDUM**

**Relevant provisions of the National Labor Relations Act,  
29 U.S.C. §§ 151-69 (2000):**

**Sec. 7. [§ 157.]** Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

**Sec. 8. [§ 158.]** (a) [Unfair labor practices by employer] It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title];

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(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act [subchapter], or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act [in this subsection] as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) [section 159(a) of this title], in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) [section 159(e) of this title] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-

membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

**Sec. 10. [§ 160.]** (a) [Powers of Board generally] The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

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(e) [Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because

of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) [Review of final order of Board on petition to court] Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

SUTTER EAST BAY HOSPITALS d/b/a	)	
ALTA BATES SUMMIT MEDICAL CENTER	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 11-1277 & 11-1318
	)	
v.	)	
	)	Board Case Nos.
NATIONAL LABOR RELATIONS BOARD	)	32-CA-24459
	)	32-CA-24469
Respondent/Cross-Petitioner	)	32-CA-24470
	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief, excluding the caption, contains 13,971 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

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Dated at Washington, D.C.  
this 21st day of December 2011

**UNITED STATES COURT OF APPEALS  
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	)	

**CERTIFICATE OF SERVICE**

I certify that on December 21, 2011, I electronically filed the Board’s brief in this case with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that I served the Board’s brief on the following counsel through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the address listed below:

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this 21st day of December, 2011