UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 34

GAYLORD HOSPITAL **and** **JEANINE CONNELLY, AN INDIVIDUAL**	**Case 34-CA-13008** **34-CA-13079**

COUNSEL FOR ACTING GENERAL COUNSEL'S REPLY BRIEF TO RESPONDENT'S ANSWERING BRIEF TO COUNSEL FOR ACTING GENERAL COUNSEL'S EXCEPTIONS

Pursuant to Section 102.46(h) of the Board's Rules and Regulations, Counsel for the Acting General Counsel files this Reply Brief to Gaylord Hospital's (Respondent's) Answering Brief to Counsel for Acting General Counsel's Exceptions and Supporting Brief concerning the Decision of Administrative Law Judge Lauren Esposito, which issued on September 6, 2012 in the above case.

For the reasons set forth below, and based upon the record as a whole, Counsel for the Acting General Counsel (herein referred to as Counsel) urges the Board to reject the arguments raised in Respondent's Answering Brief and reject those portions of the judge's findings, conclusions, and recommended Order to which Counsel previously excepted.[1]

Respondent's answering brief generally contends that Counsel fabricated certain relied-upon facts surrounding the charging party's discharge. However, beyond the fact

[1] Throughout this brief, the following references will be used:
Respondent's Answering Brief.....RAB (followed by page number)
Acting General Counsel's Exceptions.....GXE (followed by number)
Acting General Counsel's Brief Supporting Exceptions.....GCSB (followed by page number)
Administrative Law Judge's Decision.....ALJD (followed by page number)
Transcript.....Tr. (followed by page number)

that Respondent thereafter entirely failed to support this claim by pointing to relevant examples, Respondent entirely overlooked Counsel's principal argument in its Exceptions, namely, that the judge erred in her decision by failing to properly allocate Respondent's burden under *Wright Line*. In this regard, as noted in Counsel's exceptions, once the judge correctly found that the Counsel had established a prima facie case (GXE 1, ALJD 22-24), under *Wight Line*, it was incumbent upon Respondent to persuasively prove by a preponderance of the evidence that it would have discharged Ms. Connelly regardless of her protected, concerted activities. The evidence in the record shows that Respondent failed to meet that burden.

As both parties' briefs and the judge's decision outlined, under *Wright Line*,

> the General Counsel must first prove, by a preponderance of the evidence, that the employee's protected conduct was a motivating factor in the employer's decision to take action against them. *Manno Electric, Inc.*, 321 NLRB 278, 280 (1996). The General Counsel makes a showing of discriminatory motivation by proving the employee's protected activity, employer knowledge of that activity, and animus against the employee's protected conduct. *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999). If the General Counsel is successful, the burden of persuasion then shifts to the employer to show that it would have taken the same action even in the absence of the protected conduct. *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Septix Waste, Inc.*, 346 NLRB 494, 496 (2006); *Willamette Industries*, 341 NLRB 560, 563 (2004). Once General Counsel has met its initial burden under *Wright Line*, an employer does not satisfy its burden merely by stating a legitimate reason for the action taken, but instead must persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of the protected conduct. *T&J Trucking Co.*, 316 NLRB 771 (1995); *Manno Electric, Inc.*, 321 NLRB at 280 fn. 12 (1996).

(ALJD 22) (emphasis added).

Respondent contends in its answering brief that the three supervisors and/or managers (Vice President Charlotte Hyatt, Director Paul Trigilia, and Supervisor

Michael Burke) involved in the decision to issue an unlawful warning on April 1, 2011 to the Charging Party Connelly, did not harbor unlawful animus towards Connelly and, therefore, did not taint the investigation that ultimately led to Connelly's discharge a mere week later. Respondent's contention is a non-sequitor and is inconsistent with the following relevant and undisputed facts: the judge found that Respondent violated Section 8(a)(1) of the Act on April 1, 2011 when it unlawfully issued a written warning to the charging party, Jeanine Connelly, because Connelly engaged in protected concerted activity a day earlier on March 31. The judge also found that the three above-referenced supervisors and/or managers (Hyatt, Trigilia and Burke) were each involved in, and each recommended, the decision to issue that unlawful warning to Connelly. Accordingly, it is beyond dispute that all three of these individuals exhibited unlawful animus toward Connelly by issuing and/or recommending the issuance of the April 1warning to Connelly.

It is also beyond dispute that between April 1 and 5, at the same time they necessarily harbored unlawful animus toward Connelly, as described above, the same exact set of managers and supervisors (Hyatt, Trigilia and Burke) were critically (if not exclusively) involved in the investigation of the incident that led to Connelly's suspension on April 5, a mere four days after they issued the unlawful April 1 warning to Connelly.

Based upon the above facts, and the judge's finding that Counsel had established a prima facie case regarding Connelly' discharge, the burden should have then shifted to Respondent to persuade by a preponderance of the evidence that it would have discharged Connelly in the absence of her protected activity. Instead of

allocating that burden to Respondent, the judge improperly thrust this burden onto Counsel, first, by finding that Counsel did not prove that Respondent did not hold a reasonable, good faith belief in discharging Connelly for intentionally falsifying a medical record; and second, by requiring Counsel, and not Respondent, to perfect other glaring examples of disparate treatment in the record. Such an improper allocation of the burdens by the judge completely stands the *Wright Line* test on its head.

In its answering brief, Respondent, like the judge in her decision, relies heavily on the testimony provided by Respondent's Supervisor of Information Services, Rena Susca, as proof that Connelly intentionally falsified a medical record (RAB 4). However, there are two problems with such reliance.

The first is that Respondent was entirely unaware of such "facts" at the time it decided to discharge Connelly. Indeed, Respondent did not discover such "facts" until July 2011, three months after Respondent discharged Connelly (Tr. 1606-1607, 1615-1616). Moreover, nothing in Susca's credited testimony precludes the possibility that Connelly made an unintentional computer entry error (Tr. 1614-1615). The only thing known for sure is that Respondent did not know, or care to know how, Connelly came to enter the wrong doctor's name on the verbal order at the time it discharged her (Tr. 1616). Thus, Respondent's conclusion regarding Connelly's supposed misdeed could not have been, as determined by the judge, "reasonably based" at the time Respondent made the discharge decision. Rather, the only undisputed element that remained in the air at the time of the discharge decision was Respondent's undisputed unlawful animus toward Connelly, as found by the judge.

The second problem with this reliance relates to Respondent's Wright Line burden. Assuming arguendo, Susca's testimony somehow "proves" that Connelly intentionally mis-entered a record, it does not assist Respondent meet its Wright Line burden in the face of other evidence showing that Respondent does not routinely discharge individuals for such an offense.

With regard to disparate treatment, as discussed in greater detail in Counsel's Brief Supporting Exceptions, in addition to Respondent being unaware of the information provided by Susca at the time it discharged Connelly, Respondent was also unaware of the one example of discipline that the judge incorrectly relied on to show that Respondent's treatment of Connelly did not amount to disparate treatment -- Lulu Irabor (ALJD 29). Irabor's discipline was incomplete, not remembered or even known of by Hyatt, Trigilia or Burke at the time it discharged Connelly, and was only discovered by Respondent after the trial had already commenced. In its answering brief, Respondent does not refute the fact that it discharged Connelly without any of its "key" evidence against her. Therefore, it is clear that the judge fell into the understandable pitfall of believing Respondent met its *Wright Line* burden when it merely stated a legitimate reason for the action taken. But, as the judge made clear in her decision, "an employer does not satisfy its burden merely by stating a legitimate reason for the action taken, but instead must persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of the protected conduct." *T&J Trucking Co.*, 316 NLRB 771 (1995) (emphasis added); *Manno Electric, Inc.*, 321 NLRB at 280 fn. 12 (1996).

In contrast to all the evidence Respondent relies on that it was unaware of at the time it decided to discharge Connelly, Respondent was aware of evidence that supports a finding that Respondent discharged Connelly in violation of the Act. For example, Respondent was aware that CNA Nellysa Couvertier had falsified a medical record and had prior discipline in her file. Respondent wants to distinguish CNA Nellysa Couvertier's final written warning for falsifying a medical record from Connelly's mistake based on CNA's allegedly being held to a different standard than Respiratory Therapists (RAB 22). But, Hyatt, who the judge found to be the ultimate decision maker in Connelly's discharge, also oversaw Couvertier's department and Respondent never showed that CNA's are held to a different standard than those applicable to Respiratory Therapists. Accordingly, the judge impermissibly failed to require Respondent to prove that its treatment of Courvertier was consistent with its treatment of Connelly. Rather, as noted above, the judge either placed that burden on the Acting General Counsel or developed some unjustified speculations of her own allowing Respondent to escape its requirement to perfect its *Wright Line* burden.

Respondent was also aware that Connelly admitted her mistake to Dr. Gerstenhaber immediately upon discovery, but falsely claims that Connelly "made no effort to report her error or seek help to correct it" (RAB 8 fn.11). This, of course, patently ignores Connelly's entire post-test behavior, which is completely consistent with an innocent mistake and shows that Connelly had no motive to falsify the medical record. Finally, Respondent conveniently and repeatedly ignores Hyatt's own testimony that Connelly's discharge had nothing to do with her taking a verbal order from Dr. Gerstenhaber, which Respondent obviously knew at the time it discharged Connelly

(RAB 5). Respondent would like us to believe that there were no other non-emergency verbal orders taken during the time Connelly took the verbal order from Dr. Gerstenhaber, but this is also untrue (RAB 5, fn. 8). Respondent's own exhibit showed that two other Respiratory Therapists took verbal orders around the time Connelly was discharged (RX 17). Significantly, neither of those Respiratory Therapists was disciplined, and Respondent failed to provide any evidence that those verbal orders were taken due to a medical emergency.

In view of all of the above as well as Counsel's Brief Supporting Exceptions, Respondent utterly failed to meet its *Wright Line* burden. Accordingly, Counsel for the Acting General Counsel respectfully urges the Board to reverse the judge's finding that Respondent did not violate Section 8(a)(1) of the Act by suspending and discharging Jeanine Connelly in retaliation for her protected concerted activity.

Dated at Hartford, Connecticut, this 4th day of January, 2013.

Respectfully submitted,

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 34

GAYLORD HOSPITAL Charged Party and **JEANINE CONNELLY, AN INDIVIDUAL** Charging Party	**Cases 34-CA-013008** **34-CA-013079**

AFFIDAVIT OF SERVICE OF COUNSEL FOR ACTING GENERAL COUNSEL'S REPLY BRIEF TO RESPONDENT'S ANSWERING BRIEF TO COUNSEL FOR ACTING GENERAL COUNSEL'S EXCEPTIONS

I, the undersigned employee of the National Labor Relations Board, state under oath that on January 4, 2013, I served the above-entitled document(s) by e-mail and regular mail upon the following persons, addressed to them at the following addresses:

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