

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

WINDSOR REDDING CARE CENTER, LLC

and

Cases 20-CA-070465
20-CA-070964
20-CA-075426
20-CA-082287

SEIU UNITED HEALTHCARE WORKERS - WEST,
CTW, CLC

ACTING GENERAL COUNSEL'S BRIEF
IN SUPPORT OF EXCEPTIONS TO
THE ADMINISTRATIVE LAW JUDGE'S DECISION

Submitted by
Sarah McBride
Counsel for the Acting General Counsel
National Labor Relations Board, Region 20
901 Market Street, Suite 400
San Francisco, California 94103

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. FACTS	3
A. Background.....	3
B. Denise Whitmire’s Termination	3
i. The February 14, 2012 Tissue Incident	5
ii. Respondent’s Investigation into the Tissue Incident	7
iii. Whitmire’s Suspension and Subsequent Termination	9
iv. Based on Whitmire’s Training On Reporting Abuse, She Did Not Identify the Kleenex As Evidence Of Patient Abuse.....	11
C. Angelia Rowland’s Termination.....	12
i. Background.....	12
ii. The May 24, 2012 Doctor’s Office Visit	14
iii. The Abuse Allegation	16
iv. Respondent’s Investigation of Rowland’s Conduct.....	18
v. Rowland Was Suspended Hours After Screaming Incident	22
vi. Rowland’s Suspension and Subsequent Termination was “All About the Union”	22
vii. Respondent Decided to Terminate Rowland the Same Day Gilles Said “It is about the Union. This is all about the Union.”	23
viii. Reporting Agencies Cleared Rowland of Alleged Wrong Doing.....	24
ix. Resident B’s Outbursts Were Known to Respondent	25
III. ARGUMENT.....	26

A. Respondent Failed to Show It Would Have – Not Could Have – Terminated Whitmire and Rowland, and Thus Did Not Meet Its Burden Under <i>Wright Line</i>	26
i. The Reports of Elder Abuse In the Record Show Respondent Does Not Have a Consistent Policy of Terminating Employees for Misconduct.....	28
ii. Respondent Failed to Meet its Burden, Particularly in Light of General Counsel’s Strong Showing of Unlawful Motive	32
B. Rowland Did Not Scream At Resident B	34
C. Respondent’s Investigations Into the Misconduct of Whitmire and Rowland Were So Insufficient as to be Pretextual	39
D. The ALJ Went Beyond The Bounds of the Act By Concluding Whitmire and Rowland Violated State and Federal Elder Abuse Laws	44
E. Respondent Was Obligated To Engage in Pre-Disciplinary Bargaining With the Union	46
IV. CONCLUSION.....	47

TABLE OF AUTHORITIES

	Page(s)
NLRB Decisions	
<i>Avondale Industries, Inc.</i> , 329 NLRB 1064 (1999).....	27, 30 33
<i>Clinton Food 4 Less</i> , 288 NLRB 597 (1988).....	39
<i>Connecticut Health</i> , 325 NLRB 351 (1998).....	40, 44
<i>Dennett Road Manor Nursing Home, Inc.</i> , 295 NLRB 397 (1989).....	40, 43
<i>Fresno Bee</i> , 337 NLRB 1161 (2002).....	46
<i>Hickory Creek Nursing Home</i> , 295 NLRB 1144 (1989).....	41
<i>Kidde, Inc.</i> , 284 NLRB 78 (1987).....	39
<i>Merrillat Industries</i> , 307 NLRB 1301 (1992).....	30, 33
<i>Publix Super Markets, Inc.</i> , 347 NLRB 1434 (2006).....	29, 32
<i>Septix Waste, Inc.</i> , 346 NLRB 494 (2006).....	34
<i>Structural Composites Industries</i> , 304 NLRB 729 (1991).....	28, 30
<i>Success Village Apartments, Inc.</i> , 348 NLRB 579 (2006).....	39
<i>Washoe Medical Center, Inc.</i> , 337 NLRB 202 (2001).....	46, 47
<i>Wright Line, Inc.</i> , 251 NLRB 1083 (1980), approved in <i>NLRB v. Transportation Management Corp.</i> , 462 U.S. 393, (1983).....	26, 27, 28
Circuit Court Decisions	
<i>Sarchet v. Chater</i> , 78 F.3d 305, 307 (7th Cir. 1996).....	45
<i>Green v. Shalala</i> , 51 F.3d 96, 100-01 (7th Cir. 1995).....	45

I. INTRODUCTION

The Acting General Counsel's exceptions to the Administrative Law Judge's Decision dismissing the complaint in its entirety fall in the following categories: 1) the ALJ erred in finding Respondent met its burden by showing it *would* have terminated employees Whitmire and Rowland absent union activity, rather it only showed it *could* have; 2) the ALJ erred in finding Rowland screamed a threat of physical violence against Resident B; 3) the ALJ erred in failing to find Respondent's investigations into the misconduct of Whitmire and Rowland was so insufficient as to be mere pretext; 4) the ALJ went beyond the scope of the Act in determining Whitmire and Rowland violated unspecified state and federal elder abuse laws; and 5) the ALJ misapplied Board law in finding Respondent did not have an obligation to engage in pre-disciplinary bargaining with the Union.

The Complaint and Notice of Hearing alleged that Windsor Redding Care Center, LLC, herein Respondent, violated Sections 8(a)(3) and (1) of the Act by suspending and terminating employees Denise Whitmire and Angelia Rowland. The Complaint further alleged that Respondent violated Sections 8(a)(5) and (1) of the Act by doing so without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to this conduct and the effects of this conduct. SEIU – United Healthcare Workers – West, herein the Union, was the designated collective-bargaining representative of Respondent's unit employees at all material times. The parties were in the process of negotiating their first collective-bargaining agreement at the time Respondent suspended and terminated Whitmire and Rowland. During contract negotiations the Union requested to bargain over disciplinary actions.

Respondent terminated two employees instrumental to the first successful union organizing campaign at Respondent's facility. On February 21, 2012,¹ Respondent terminated housekeeper Denise Whitmire, a two-year employee with no prior discipline, for throwing away a kleenex which had been scribbled on in pencil. Whitmire had been active on the bargaining committee and was an outspoken Union advocate. On May 29, Respondent terminated Restorative Nursing Assistant Angelia Rowland, a twelve-year employee with a flawless work history, for allegedly yelling a threat of physical violence to a resident. In both cases, the ALJ correctly concluded that the General Counsel had established a prima facie case, shifting the burden to Respondent.

In each instance, Respondent seized on unsubstantiated reports of patient abuse and failure to report suspected patient abuse in order to terminate two of the five bargaining committee members. Both Rowland and Whitmire had commendable work histories and were the more vocal supporters of the Union from the beginning. Respondent failed to conduct an adequate investigation into either claim against Rowland or Whitmire in its haste to terminate Union adherents. When confronted by the results of thorough investigations by the California Department of Public Health clearing both Rowland and Whitmire, Respondent failed to reinstate them. Respondent failed to present a shred of evidence at the hearing to demonstrate it has terminated other employees for similar misconduct. As a result, the record is void of any indication that Respondent would have taken the same actions absent the employees' union activities. The ALJ erred in finding Respondent met its burden by substituting his own judgment that Respondent would have terminated Whitmire and Rowland instead of relying on the record evidence in determining whether Respondent met its burden.

¹ All dates herein refer to 2012 unless otherwise noted.

II. FACTS

A. Background

Respondent operates a skilled nursing facility in Redding, California, owned by SNF Management and operated by Windsor Health Care. (ALJD 3:19 – 21).² There are approximately 80 residents at Respondent’s facility, which can house up to 103 residents. Respondent employs 109 employees, approximately 80 of whom are represented by SEIU-UHW-West (the Union). (ALJD 3: 23 – 36). On January 21, 2011, the Union was certified as the collective-bargaining representative for the Licensed Vocational Nurse (LVN) unit and the maintenance unit (collectively referred to as the Unit). (ALJD 3:36 – 37). Respondent’s facility was the first facility to become a union facility after being acquired by Windsor Health Care. (ALJD 4: 4 – 5; Tr. 894). Two other Windsor-operated facilities were already unionized at the time Windsor acquired them. On August 7, 2012, the Union ratified the first collective-bargaining agreement between Respondent and the Union. The Agreement is effective for one year and is the result of 20 months of continuous bargaining. (ALJD 4: 1- 3).

B. Denise Whitmire’s Termination

Denise Whitmire was employed by Respondent as a housekeeper from January 2010, until she was terminated on February 21, 2012. (ALJD 5:15 – 16; Tr. 41). Prior to her suspension on February 15, 2012, Whitmire had no record of discipline. According to her 2010

² References to the Administrative Law Judge’s Decision are indicated as (ALJD -); References to the hearing transcript are indicated as (Tr. -); references to exhibits offered by the Acting General Counsel are indicated as (GC Exh. -); references to exhibits offered by Respondent are indicated as (R. Exh. -).

annual evaluation, she was a good employee. (GC Exh. 18).³ The ALJ failed to find Whitmire had no prior discipline despite the uncontroverted evidence.

Whitmire was an active and vocal Union supporter. (ALJD 5:15 – 16). She was elected by her peers to be a member of the Union’s bargaining committee and attended bargaining sessions once or twice a month for a year and a half. (Tr. 41-42). Whitmire frequently updated her coworkers on the events at the bargaining table while she was on her breaks in the lunch room or on the smoking patio. (ALJD 5: 18 – 19; Tr. 44). Both locations are open and heavily trafficked by employees and supervisors. (Tr. 44). Whitmire often had to ask permission from her supervisor to take time off in order to attend bargaining sessions on behalf of the Union. (Tr. 74). Several members of management, including Ken Cess, Regional Vice President of Operations, Anne Gilles, the Administrator, and Josh Sable, General Counsel for Respondent, routinely saw Whitmire at bargaining sessions. (Tr. 43, 889, 895).

In addition to being an active bargaining committee member, Whitmire participated in two Union pickets in front of Respondent’s facility and maintained pro-Union signs on her car which she parked in the parking lot visible to employees at the facility. (Tr. 43, 44). Whitmire passed out leaflets about the Union to employees on a regular basis. (Tr. 44). Finally, Whitmire spoke out against Respondent’s labor practices by testifying in a State Labor Commissioner hearing on December 5, 2011, under subpoena. (Tr. 45 - 46). The ALJ did not mention the fact that Whitmire had testified against the Respondent two months prior to her termination in a case where Respondent was found to have violated wage and hour laws. (Tr. 46). Administrator

³ General Counsel subpoenaed Whitmire’s entire personnel file. Respondent produced no evidence Whitmire had been disciplined at any time prior to February 15, 2012. The only annual evaluation Respondent produced under subpoena was for the year 2010.

Anne Gilles was present for Whitmire's testimony at the State Labor Commissioner hearing. (Tr. 46).

i. The February 14, 2012 Tissue Incident

Whitmire arrived at Respondent's facility at 4:40 a.m. on February 14 and began her shift by cleaning the lobby. (ALJD 5:40; Tr. 49). The lobby is a highly trafficked room accessible to all employees and residents 24 hours a day, as well as visitors. (ALJD 5:43 – 44; Tr. 48 - 49). On the table was a kleenex, which had been scribbled on with pencil. (Tr. 48). The scribble was largely nonsensical, resembling a crossword puzzle with writing going in all directions. (Tr. 52, 83). The writing on it looked like "chicken scratch" and was nearly impossible to read. (Tr. 83, 277). The ALJ erred in stating Whitmire "initially" testified the writing was nearly illegible when she consistently testified as such. (ALJD 5:45). In block print scattered around the kleenex were the letters "M-E-E-K," which Whitmire did not recognize as the name of a resident. (Tr. 85). On the bottom of the kleenex was the phrase "They took my house and now they're going to kill me." (Tr. 85). The scribbled-on kleenex in the lobby did not resemble a note or a letter in any way. (Tr. 52).

After finding the kleenex while cleaning the lobby, Whitmire saw a group of employees walking out of the kitchen. The kitchen and dining room are about twenty-five feet down the hallway and easily visible from the lobby. (Tr. 53). Whitmire showed the employees the kleenex and asked them what they thought of it. (Tr. 48, 52 – 53, 527). Frances Marley and Ron Rich, both CNAs, looked at the kleenex. According to Whitmire, Ron Rich said the kleenex looked like trash. (Tr. 54, 549). Whitmire then heard one of the employees say "she does this all the time." (Tr. 54). Laundry employee Susan Lees was also present but could not read the kleenex because she did not have her reading glasses with her. (ALJD 6:6 – 13; Tr. 55 – 56).

The conversation lasted no more than two minutes. (Tr. 54). At the end of that conversation, Whitmire surmised the kleenex was trash and threw it away to resume her cleaning duties. (Tr. 54, 72). At no point after finding the scribbled-on kleenex in the publicly accessible lobby did Whitmire suspect it was indicative of resident abuse. (Tr. 125). The ALJ erred in finding Whitmire recognized the kleenex as a note from a resident and was able to read its contents. (ALJD 6:44 – 45). Whitmire consistently testified that she did not recognize it as a letter, had no knowledge that M-E-E-K-S referred to a particular resident at the time she found the kleenex, and could only make out one line of the text that covered the kleenex.

Sometime after 8:00 a.m. that same morning, Whitmire's supervisor Clayton Campbell called Whitmire into his office. (Tr. 58). Whitmire remained in the doorway and the two spoke for a few minutes. (Tr. 58). Campbell asked Whitmire about the kleenex she had found earlier that morning and wanted to know what Whitmire had done with it. (Tr. 59). Whitmire said she remembered it said something to the effect of "They took my house and now they're trying to kill me" and that she had since thrown it away. (Tr. 59). Campbell told Whitmire not to throw away a note like that in the future but to show it to her supervisor. (Tr. 59). Campbell never told Whitmire she could be disciplined for throwing away the kleenex. Nor did he counsel Whitmire that writing like that found on the kleenex could be considered evidence of suspected patient abuse. (Tr. 59).

Whitmire did not speak to anyone else about the kleenex on February 14. Immediately after finding it at the beginning of her shift, Whitmire spoke with Marley, Rich and Lees and briefly spoke with her supervisor about the incident. Whitmire never spoke with Administrator Anne Gilles on February 14. (Tr. 59). Despite learning about the kleenex only hours after it was

found, Gilles made no effort to speak with Whitmire directly on the day of the incident. (Tr. 59, 653).

ii. Respondent's Investigation into the Tissue Incident

Respondent conducted a cursory investigation into Whitmire's conduct prior to suspending and subsequently terminating her for throwing the kleenex in the trash. Respondent first learned Whitmire found a kleenex with scribble amounting to something along the lines of "they took my house and now they're trying to kill me" only a few hours after Whitmire found it in the lobby. When Administrator Anne Gilles arrived at the facility on February 14, she was immediately told by the receptionist, Tootie Oberg, that Whitmire found a note earlier that morning with the words "help me" on it. (Tr. 652 – 653). Gilles understood from her conversation with Oberg that Oberg had not seen the kleenex herself. (Tr. 653, 757). Oberg did not testify at the hearing. Based on this unsubstantiated report of a note, Gilles asked Whitmire's supervisor Clayton Campbell to speak to Whitmire about the incident. (Tr. 653). Gilles did not speak with Whitmire herself until the following day, February 15. (Tr. 60 – 61, 94). The ALJ erred in finding otherwise. (ALJD 8:15 – 16).

Gilles testified that she then proceeded to speak with other witnesses, and not Whitmire herself, about the alleged note. (Tr. 653). The evidence of investigatory conversations, however, shows that Gilles sought out only one witness: Susan Lees, the laundry employee present shortly after Whitmire found the kleenex. (Tr. 653). Lees told Gilles that she was unable to read what was written on the kleenex because she did not have her reading glasses with her. (Tr. 768). Respondent provided notes documenting the February 14 conversations Gilles had with Oberg and Lees, as well as the conversation Campbell had with Whitmire. (R Exh. 22, 23 and 21). There are no other notes in evidence to show that any other conversations took place as part of

the investigation into Whitmire's conduct. Therefore, the extent of Respondent's investigation by the close of the day on February 14 was a conversation between Gilles and Oberg, who was not a witness, a conversation between Gilles and Lees, who was present but could not read the note, and a brief conversation between Campbell and Whitmire.

On February 14, Gilles knew Frances Marley and Ron Rich were present shortly after Whitmire found the kleenex and that they had seen it. (Tr. 672, 679). Despite this knowledge, Gilles never spoke to them during the course of her investigation.⁴ The ALJ erred in finding Gilles interviewed Whitmire and Rich on the day of the incident. (ALJ 7:39 – 41; 8:15 – 16). Gilles admittedly made no attempt to personally speak to Marley or have Marley's supervisor speak to her about the incident. (Tr. 770). Rich never had a conversation with Gilles about the kleenex. (Tr. 534).⁵ While Gilles testified to speaking with Rich about the kleenex on February 14, she does not recall taking notes from that conversation despite having a demonstrated habit of taking notes on investigatory conversations. (Tr. 767). No notes from a conversation with Rich were produced. Similarly, Gilles claimed to have a conversation with Whitmire on February 14 but could not remember taking notes on the conversation and none were produced. (Tr. 767 – 768). Both Rich and Whitmire deny speaking with Gilles about the kleenex incident prior to Whitmire's suspension.

Based only on the second-hand report from Campbell about Whitmire's conduct and reports from Oberg and Lees, who did not see the kleenex, Gilles made a recommendation on February 14 to terminate Whitmire. Gilles called her supervisor Regional Vice President Ken

⁴ Both Rich and Marley were members of the bargaining committee with Whitmire. (Tr. 525, 275). Neither Oberg nor Lees were on the bargaining committee. (Tr. 256).

⁵ Rich met with Yolanda Thomas on February 15th for about five minutes to discuss the kleenex Whitmire found. (Tr. 534). Respondent produced no notes from that conversation, but Rich testified to telling Thomas he saw the kleenex and did not think it was evidence of patient abuse. (Tr. 534).

Cess and Yolanda Thomas in Human Resources to report the kleenex incident and recommend disciplinary action. (Tr. 661 – 662, 771). Gilles had several conversations with Cess throughout the day regarding the kleenex incident, during which Gilles recommended to Cess that Whitmire be terminated. (Tr. 898).

In the late afternoon on February 14, Gilles requested Denise Henschel prepare Whitmire's final check. (Tr. 138). Denise Henschel was employed as the payroll technician at the time and was responsible for ordering paychecks. (Tr. 129). Earlier that day, Gilles had told Henschel she was going to contact Respondent's corporate office to ask if she could fire Whitmire over the kleenex incident. (Tr. 138). At the time Gilles requested Whitmire's final check on February 14, Whitmire had not yet been suspended. (Tr. 140). The ALJ noted General Counsel's argument that Gilles's action in ordering the final check prior to suspending Whitmire demonstrates Respondent decided to terminate Whitmire prior to concluding the investigation. (ALJD 9:7 – 9). However, the ALJ did not make a finding as to whether the timing of ordering Whitmire's final check shows pretext. The ALJ did find Respondent decided to suspend Whitmire prior to conducting the suspension meeting. (ALJD 8:46 – 47).

iii. Whitmire's Suspension and Subsequent Termination

Whitmire was suspended the day after she found the kleenex, on February 15, 2012. (ALJD 8:46 – 47; Tr. 47; GC Exh. 2). On the morning of February 15, Gilles told Whitmire she needed to meet with her and that Whitmire could have a Union representative present. (Tr. 59). Gilles further instructed Whitmire that Ron Rich could not be the Union representative because Gilles needed to speak with him separately. (Tr. 59). The only other employee who acted as a Union representative or shop steward was Angelia Rowland. Whitmire asked Rowland to accompany her to the meeting. The meeting began at approximately 10:00 a.m. and lasted for

ten minutes. (Tr. 60, 61). Present for the meeting were Whitmire, Rowland, Thomas, and Gilles. (Tr. 61).

Thomas began the meeting by asking Whitmire about finding the kleenex and what was written on it. (Tr. 61). Whitmire explained how she found it, what it looked like, and that she proceeded to throw it away thinking it was trash. (Tr. 61). Whitmire then provided the names of witnesses who saw the kleenex: Ron Rich, Frances Marley, and Susan Lees, even though Lees was unable to read it. (Tr. 61). Whitmire told Gilles and Thomas that she never suspected abuse when she found the kleenex. (Tr. 61). After finding the kleenex, Whitmire learned that it belonged to Resident A. Whitmire explained to Gilles and Thomas during the suspension meeting that CNAs had told her Resident A⁶ does this all the time. Despite this information, Gilles admitted she did not look at Resident A's chart for verification until after Whitmire was terminated. (Tr. 774). The ALJ erred in finding Gilles reviewed Resident A's chart as part of her investigation prior to terminating Whitmire. (ALJD 8:27 – 28).

At the close of the brief meeting, Gilles told Whitmire she had a duty to report suspected abuse as a mandated reporter. Whitmire acknowledged she knew was a mandated reporter and had received training on identifying and reporting abuse. Gilles then handed Whitmire a notice of suspension. (GC Exh. 2). Whitmire wrote on the notice "Aides told me she does this all the time so I didn't take it seriously." (GC Exh. 2). Respondent never asked Whitmire to provide a written account of events in her own defense. (Tr. 61).

⁶ In off-the-record discussions at the hearing, the parties agreed to refer to the resident at issue in Rowland's termination as Resident A in order to protect the resident's confidentiality. Counsel for General Counsel gave the resident's name to the witnesses and explained that the resident would be referred to as Resident A.

Whitmire was suspended on February 15 pending an investigation. (GC Exh. 2). Respondent contacted her two days later to notify her that the investigation was complete and requested she come in for a meeting. (Tr. 64). Whitmire was unable to return to the facility until February 21 due to car trouble. (Tr. 64). Between February 15, when Whitmire was suspended, and February 17, when Respondent had finalized her termination, Respondent did not conduct any further investigation.

Whitmire arrived at the facility on February 21 and requested Rowland be present as a witness for the Union. Whitmire and Rowland met with Gilles and Henshel, who was present for payroll purposes. The meeting lasted only five minutes. (Tr. 70-71). Whitmire was not provided an opportunity to respond to the allegations against her prior to receiving the termination notice. (Tr. 71). At the close of the five-minute meeting, Gilles handed Whitmire her notice of termination. (Tr. 71; GC Exh. 3). The notice states Whitmire was terminated for not reporting abuse to the facility and for destroying evidence without reporting it. (GC Exh. 3). According to Ken Cess, however, Respondent does not have a policy on throwing away evidence. (Tr. 888-889). While the ALJ says Cess indicated he made the final decision to terminate Whitmire, (ALJD 9:14 – 15), Gilles admitted she was the ultimate decision maker as to Whitmire's termination. (Tr. 732 – 733).

iv. Based on Whitmire's Training On Reporting Abuse, She Did Not Identify The Kleenex As Evidence Of Patient Abuse

Whitmire had received training on the State and Federal requirements of reporting patient abuse, as well as Respondent's own policies, every six months during her tenure at Respondent's facility. (Tr. 69, 78-79; R Exh. 1 – 4). Whitmire was familiar with the duties of being a federally mandated reporter. (Tr. 70). Whitmire took her role as a mandated reporter seriously. In

November or December of 2011, she reported to Anne Gilles that her coworker Kristen Templeton had violated a resident's privacy by posing as a nurse and inquiring about a resident online. (Tr. 67 – 68). Whitmire relied on her training as a mandatory reporter in deciding to report Templeton's actions to Gilles. Whitmire's history demonstrates she held the welfare of residents in high regard, was familiar with reporting requirements, and had no qualms about following them. (Tr. 68).

Had Whitmire recognized the kleenex as a note from a resident, and therefore a sign of potential resident abuse, she would have turned it in to her supervisor. (Tr. 124 – 125). As the kleenex was found in the lobby, was covered in nearly indecipherable scribbles, and was not identifiable as belonging to a resident at the time Whitmire found it, Whitmire thought it was trash. Two more senior employees, Marley and Rich, both CNAs with years of training in identifying patient abuse, also saw the kleenex and did not identify it as evidence of suspected patient abuse. (Tr. 532, 534; 279). Neither Marley nor Rich reported the kleenex to Respondent. (Tr. 532, 534). Rich has 44 years of experience, has received training in identifying patient abuse about twice a year for the past several years, and has reported suspected abuse to Respondent previously. (Tr. 524 – 525). Whitmire relied on her training as a mandated reporter as well as the decades of experience between the two CNAs who also saw the kleenex in confirming her initial reaction that the kleenex was indeed trash and should be thrown out.

C. Angelia Rowland's Termination

i. Background

Angelia Rowland was employed by Respondent for eleven and a half years. (Tr. 308). Rowland initially worked as a housekeeper before receiving her license as a Certified Nursing Assistant nine years ago and then working as a Restorative Nursing Assistant for the last two

years of her employment. (ALJD 9:33 – 35; Tr. 308 – 309). As an RNA, Rowland was responsible for the care of residents, as well as administering restorative physical therapy treatments. (Tr. 318). The ALJ found “there is no dispute that Rowland was an excellent employee.” (ALJD 9:38 – 39).

Rowland was an active member of the Union during the initial organizing drive and throughout bargaining of the first contract. (ALJD 9:41 – 42). Rowland was an integral part of organizing the Union at Respondent’s facility. (Tr. 309). Rowland collected signatures supporting the Union prior to the representation election, made phone calls to other employees about the Union, and passed out Union literature to coworkers during the organizing drive and bargaining. (Tr. 309 - 310). Rowland also passed out Union pens, stickers, and lanyards to her coworkers and participated in two pickets at Respondent’s facility. (ALJD 9:43 – 45; Tr. 311 – 312). At the June 9, 2011, picket, Rowland was the only employee to act as a Union spokesperson on the local television news. (ALJD 9:46; Tr. 313). Gilles admitted knowing Rowland was the Union spokesperson featured on the news. (Tr. 724).

Once the Union was certified as the collective-bargaining representative, Rowland was elected by her coworkers to the five-member bargaining committee. (Tr. 310). Rowland attended bargaining meetings once or twice a month for the duration of the year and a half of bargaining, provided information at the bargaining table, and informed her coworkers on the progress at the bargaining table. (ALJD 9:44; Tr. 311). She was one of two employees, along with Ron Rich, who served as a shop steward by sitting in as a witness on disciplinary meetings of Unit members. (Tr. 312). It was in this capacity that Rowland was present for Whitmire’s suspension and termination meetings in February 2012. (ALJD 9:17 – 18; Tr. 313).

ii. The May 24, 2012 Doctor's Office Visit

On May 24, 2012, Angelia Rowland accompanied Resident B⁷ to a doctor's appointment as part of her regular RNA duties. (ALJD 10:8 – 9; Tr. 314). Rowland typically escorted residents to medical appointments once or twice a week. (Tr. 315). Resident B is wheelchair bound and requires transportation assistance from a para-transit van. On May 24, para-transit driver Lewis Johnson, who is not employed by Respondent but by Merit Medi-Trans, drove Resident B and Rowland to the doctor's appointment. From the time Resident B was loaded into the para-transit van until she was in the lobby of the doctor's office, Resident B had frequent outbursts of yelling, screaming and profanity. (ALJD 18 – 20; Tr. 321 – 324, 454). During the short drive to the doctor's office Rowland routinely talked to Resident B during these outbursts to comfort her and try to calm her down. (Tr. 321 – 322, 324, 327, 454). Rowland repeatedly told Resident B, "It's okay; it's okay" and used Resident B's name calmly in an effort to comfort Resident B while in the van. (Tr. 324). Rowland spoke to Resident B in this manner because Rowland "just want(ed) to help try to soothe her." (Tr. 330). Once the van parked at the doctor's office and Johnson unloaded Resident B in the parking lot, Resident B yelled the entire way from the van to the entrance to the doctor's office. (Tr. 324).

Rowland walked a few feet in front of Resident B while Johnson pushed the wheelchair as they passed through the two sets of double doors into the lobby of the doctor's office. (Tr. 325 – 326, 455). Resident B continued to yell as the party moved through the breezeway between the sets of double doors and into the lobby. (Tr. 326). Rowland, walking near Resident B's feet, was no more than four feet from Johnson as they entered the doctor's office. (Tr. 325 –

⁷ In off-the-record discussions at the hearing, the parties agreed to refer to the resident at issue in Rowland's termination as Resident B in order to protect the resident's confidentiality. Counsel for General Counsel gave the resident's name to the witnesses and explained that the resident would be referred to as Resident B.

326). The ALJ failed to make any finding regarding where Johnson was located relative to Rowland, which is a key fact in determining whether Johnson witnessed the alleged misconduct.

As Resident B entered the lobby to the doctor's office her outbursts became more extreme. (ALJD 10:25 – 26; Tr. 328). Johnson remembers Resident B making a statement to the effect of "god dammit" as they entered the lobby. (Tr. 455). Rowland heard Resident B using profanity as they entered the doctor's office, but does not remember the exact words because Rowland was used to hearing Resident B yell and swear so it was unremarkable to her. (ALJD 10:21 – 23; Tr. 330). Upon entering the office, Rowland and Johnson could not see the medical assistants seated at the front desk of the lobby because the reception desk is around the corner from the entrance. (Tr. 327, 333).

Upon entering the lobby, Rowland wheeled Resident B to the far end where she sat down with Resident B facing her. (Tr. 329). At no point did Rowland stop to speak with the two medical assistants behind the front counter. (Tr. 330, 332). Resident B's daughter then came in to the lobby and greeted Rowland and Resident B while they waited for the appointment. A few minutes after Resident B's daughter arrived, they were called in to the exam room.

Unbeknownst to Rowland, the three medical office assistants seated at reception called Respondent while Rowland was in the exam room to report hearing Rowland scream a threat of physical violence at Resident B. (ALJD 10:45 – 47). Medical biller Terra Pagnano had been seated in her office behind the reception desk at the time Rowland, Resident B and Johnson entered the lobby. As they entered, Pagnano thought she heard Rowland scream "If you don't knock it off, I am going to beat your ass." (Tr. 796, 805). Pagnano repeated the statement to medical assistants Lindsay Murphy and Erica Catona who were seated at the reception desk and

asked if they heard it as well. (Tr. 805). They said they had, and Pagnano called Respondent to report it. (Tr. 798).

Rowland denies having yelled at Resident B while entering the doctor's office, waiting in the lobby, or during the visit at any time. (Tr. 393, 407, 456). The ALJ erred in finding Rowland engaged in the conduct she was accused of, as discussed in greater detail in the Argument section below. At no point during the time at the doctor's office did a member of the doctor's staff speak with Rowland about her behavior toward Resident B, or about Resident B's behavior. (Tr. 333). Resident B's daughter never spoke to Rowland about her treatment of Resident B, despite being apprised by the medical assistants of the allegation. (Tr. 333). Nor did Johnson say anything to Rowland about her treatment of Resident B at any time. (ALJD 10; 32 – 37; Tr. 333). It is remarkable that the driver, who is a mandated reporter, three medical assistants, and the resident's daughter never said a word to Rowland if she in fact threatened Resident B with physical harm in their presence.

Once the appointment ended, Rowland accompanied Resident B in the van with Johnson back to Respondent's facility. Resident B continued her profane outbursts during the drive back. Once back at the facility, Rowland took Resident B back to her room and got her settled in. (ALJD 10:42 – 43; Tr. 334).

iii. The Abuse Allegation

Two medical assistants, Erica Catona and Lindsay Murphy, sat at the front desk and a billing clerk, Terra Pagnano, sat in an office behind them as Rowland, Resident B and Johnson entered the lobby of the doctor's office. (Tr. 796, 810, 826). Neither Catona, Murphy nor Pagnano could see Rowland, Resident B, or Johnson as they entered the lobby from the breezeway. (Tr. 801, 805, 811, 838, 839, 840). The ALJ failed to note the significance of this

critical fact. The three doctor's office employees heard screaming as Resident B, Rowland, and Johnson entered the lobby. At the same time, they heard a female voice yell "If you don't knock that off, I'm going to beat your ass." (ALJD 12: 13 – 15; Tr. 797, 810, 827).

After hearing the screaming, Pagnano got up from her office behind the front desk and asked Catona and Murphy if they also heard someone yell "If you don't knock that off, I'm going to beat your ass." (Tr. 797, 805, 813, 838). Pagnano, Catona, and Murphy discussed what they thought they heard and came to agreement that a female voice said "If you don't knock that off, I'm going to beat your ass." (Tr. 822, 827, 828). All three of them gave identical testimony that they heard the same phrase, verbatim. (Tr. 797, 805, 813, 838). After agreeing on what they heard, Pagnano called Respondent to report hearing a nurse yell at Resident B while in the lobby of the doctor's office. (Tr. 798, 929). In weighing the remarkable sameness of the testimony, the ALJ failed to take account of the many opportunities the medical assistants had to coordinate their stories as to what exactly happened and to ensure they gave identical statements. If the overwhelming similarities between their statements is grounds for crediting their testimony over Rowland's, then the opportunities the medical assistants had to corroborate their story is also of great importance.

Jane Thimmesch, Respondent's Director of Nursing, received the phone call from Pagnano and confirmed that Pagnano thought she heard Rowland yell "If you don't knock that off, I'm going to beat your ass" at Resident B. (Tr. 929). Thimmesch then reported the incident to Administrator Anne Gilles. (ALJD 11:12 – 13; Tr. 930 – 931).

iv. Respondent's Investigation of Rowland's Conduct

At approximately 5:00 p.m. on May 24, while Rowland was in the exam room with Resident B, Administrator Gilles arrived at the doctor's office and spoke to Catona and Murphy, who were seated at the front desk. (Tr. 703, 816). Pagnano had already left the office for the day. (Tr. 799). Gilles asked Catona and Murphy to confirm what they had reported to the facility. (ALJD 11:20 – 22; Tr. 703, 816; R Exh. 31, 32). Gilles spoke to Catona and Murphy together where they could hear each other's statements. (Tr. 776). Immediately after hearing the reports from Catona and Murphy, Gilles told them they would no longer be seeing Rowland. (Tr. 816, 830; R Exh. 32). Catona and Murphy took that to mean Rowland would be fired. (Tr. 823, 831).

Gilles then spoke briefly with the driver, Johnson, who was seated in the lobby waiting for Rowland and Resident B. (ALJD 11:37 – 39; Tr. 457, 704). Gilles asked if he had heard an incident between Rowland and Resident B. (Tr. 457, 704 – 705). Johnson told Gilles he had not seen or heard anything. (Tr. 705; R Exh. 26). He repeated to Gilles that he did not see anything and stated that nothing happened. (Tr. 457, 705; R Exh. 26). Gilles did not ask Johnson for a written statement. (Tr. 458). Gilles never asked Johnson directly if he was present for the alleged yelling, despite admitting it was an important question to ask. (Tr. 775 – 776). Nor did she impress upon Johnson the importance of his statement regarding the alleged incident between Rowland and Resident B, as she had purportedly with Pagnano, Catona, and Murphy, who originally reported the incident. (Tr. 776). If the accusations were truly as important as Gilles believed them to be, she would have impressed that importance on all witnesses – including Johnson. The ALJ failed to find Gilles' interviews of the medical assistants and Johnson were remarkably inconsistent.

According to Gilles's notes of the conversation, Johnson said "I know nothing. Nothing happened." (Tr. 706; R Exh. 26). Gilles assumed that meant "he just wasn't paying attention" and that he did not want to be involved. (Tr. 707, 775). This assumption was based on a two-minute interaction with a witness who did not know what he was being interviewed about or the importance of his answers. The total time Gilles spent at the doctor's office interviewing the two medical assistants and the van driver was less than ten minutes. (Tr. 708). The ALJ erred in adopting Gilles's assessment of Johnson, with whom she spent precious little time.

Sometime that same day, after receiving the phone call from Pagnano, Director of Nursing Jane Thimmesch spoke with CNAs who had cared for Resident B to ask about Resident B's typical statements. (Tr. 937). Those CNAs informed Thimmesch that Resident B's typical statements included the phrases "If you do that again I'll kill you" and "kick your ass" along with several pages of other profanity. (GC Exh. 21 p. 16, 18 – 19).

Gilles returned to the doctor's office the following day, May 25, and spoke to Pagnano, Catona and Murphy and requested written statements from them. (ALJD 12:50 – 52; Tr. 817, 830, 831; R Exh. 27 – 29). Gilles testified that she again impressed upon them the severity of their accusations. (Tr. 714). Gilles spoke to Pagnano, Catona, and Murphy together; never one on one. (Tr. 714, 718, 776). They heard each other's statements and verified they all heard the exact same thing. (Tr. 776). Pagnano, Catona, and Murphy wrote brief, nearly identical statements of what they heard the day before. (R. Exh. 27 – 29).

Gilles knew the doctor's office employees could not see who made the statement they reported, but only heard someone yelling. (Tr. 781). Catona and Murphy told Gilles that even though they were sitting at the front desk they could not see who said "If you don't knock it off

I'm going to beat your ass.” (Tr. 821, 839). None of them were familiar with and able to identify Resident B's voice or Rowland's voice. (Tr. 806 – 807, 838, 839 – 840). The ALJ erred in finding the medical assistants were familiar with Resident B's voice.⁸

Also on May 25, Resident B's husband approached Gilles at Respondent's facility. (GC Exh. 21 p. 12). Resident B's husband told Gilles that Rowland was an “excellent” employee and that “she would never speak to his wife in a bad way.” (GC Exh. 21 p. 12). Gilles' notes of the conversation reflect that “he fully supports Angie.” (GC Exh. 21 p. 12). Resident B's family even came to the facility and told Anne Gilles that they suspected it was Resident B who the medical assistants heard screaming the threat. (ALJD 19:36 – 37).

Approximately two weeks later, *after* Rowland had been terminated, Regional Vice President Ken Cess went to the doctor's office and spoke with Catona and Murphy about the yelling incident involving Resident B. (Tr. 833, 839). Cess testified that he made the unusual decision to interview the witnesses personally in an effort to conduct a thorough investigation and prevent an unfair labor practice charge based on Rowland's Union activity. (Tr. 883). By the time Cess interviewed Catona and Murphy, however, Respondent had terminated Rowland, and the Union had filed an unfair labor practice charge regarding Rowland's termination. (Tr. 880; GC Exh. 11; GC Exh. 1(p)). The ALJ failed to mention the timing between the filing of the unfair labor practice charge and Cess's interviews with the medical assistants. Cess lost the notes he took while interviewing Catona and Murphy. (Tr. 879). Cess stated that he did not see his role in interviewing Catona and Murphy as “discovering the facts.” (Tr. 900).

⁸ As discussed below, there is simply no evidence in the record to support the ALJ's factual finding.

Gilles attempted to contact Johnson for the first time since speaking to him at the doctor's office about two weeks after the screaming incident, by which time Rowland had been terminated. (Tr. 458, 474). Gilles called Johnson's dispatcher and asked for more information about what happened when Rowland took Resident B to the doctor's appointment. Johnson again told his dispatcher that nothing happened. (Tr. 474, R Exh. 30). Gilles made this phone call after terminating Rowland because she thought to herself "maybe I didn't do everything I should have." (Tr. 733). According to Gilles, she had not done so previously because she simply "wasn't willing to go back and talk to him" since she believed Johnson "wasn't very open or willing to talk to me in the office." (Tr. 777). Tellingly, Gilles did not ask Johnson at any time whether Resident B was the only person who yelled profanity or yelled in a rude manner.

Cess also contacted Johnson after Rowland's termination. Approximately one month after Respondent terminated Rowland, and after the unfair labor practice was filed, Cess called Johnson's dispatcher and left a message requesting Johnson return his call. (Tr. 460). Johnson misplaced Cess' phone number before he had the opportunity to return his call. (Tr. 460). Cess never spoke with Johnson and never followed up when Johnson failed to return his call. (Tr. 460).

Thus, the only witness statements Respondent based its findings on came from three people who heard a statement but could not see who made the statement or recognize the voice. The ALJ erred by failing to limit his discussion of Respondent's investigation to the steps it took prior to terminating Rowland. Any investigation conducted after the fact cannot shed light upon what Respondent based its termination decision.

v. Rowland Was Suspended Hours After Screaming Incident

Rowland was suspended on May 24, shortly after returning to the facility from taking Resident B to the doctor. Rowland was called in to a meeting with Gilles and Thimmesch when she returned from the doctor's office. Ron Rich was present as a shop steward. (Tr. 336 – 337, 535, 709). At the beginning of the meeting, Gilles told Rowland that three women at the doctor's office reported that Rowland yelled "Knock it off, or I'll beat your ass" at Resident B. (Tr. 338). Rowland denied ever yelling at Resident B. (ALJD 12:34 – 39; Tr. 339, 711). Ron Rich responded in disbelief, "Those words came out of her mouth?" pointing at Rowland. (Tr. 340, 411). Rich said "This resident talks like that all the time." (Tr. 536). Gilles, Thimmesch, and Rowland agreed that Resident B regularly used language similar to the statement overheard at the doctor's office. (Tr. 537). During the meeting, Rowland told Gilles that Resident B yelled while at the doctor's office but that she, Rowland, never yelled at anyone. (Tr. 342).

Rowland provided names of witnesses to Gilles, including Johnson, who was standing only a few feet away at the time Rowland allegedly yelled at Resident B. (Tr. 539). Rowland asked Gilles what Johnson had said. (Tr. 340, 408). Gilles told Rowland that Johnson wanted to divorce himself from the situation. (Tr. 341, 408). At the close of the meeting, Rowland was suspended pending an investigation. (ALJD 12:42 – 43; Tr. 341; GC Exh. 9). Rowland reiterated her innocence on the suspension notice before signing it by writing "I did not say or do anything out of line to the resident." (ALJD 12:44 – 45; Tr. 344; GC Exh. 9).

vi. Rowland's Suspension and Subsequent Termination was "All About the Union"

On May 25, Rowland returned to Respondent's facility in order to pick up her paycheck and to request Gilles sign a note explaining Rowland was not reporting to work due to her

suspension. (Tr. 344 – 345; R Exh. 8). Rowland asked coworker Alice Martinez to accompany her to Gilles’ office as a witness. (Tr. 345, 481– 482). After signing the note, Gilles told Rowland that Resident B’s family came in to the facility that morning to tell her they did not believe Rowland yelled at Resident B. (Tr. 348). According to Gilles, Resident B’s daughter was told by the medical assistants about the screaming incident while at the doctor’s office and “she defended you (Rowland) then, too.” (Tr. 348). Rowland asked Gilles why, then, would the doctor’s office staff call Respondent if Resident B’s daughter had defended her? (Tr. 348). Gilles then brought up the Union signs on Rowland’s car. (Tr. 345, 425, 482). Gilles said Respondent received calls from the community all the time because of the pro-Union signs on employee’s cars. Martinez, who was present as the witness to this conversation, joined in by saying they were not in Gilles’s office to talk about the Union, but about Rowland’s job. (Tr. 354, 483). The ALJ found Gilles admitted “It is about the Union. This is all about the Union.” (ALJD 13:25 – 26, 46; Tr. 354, 483). Gilles tied Rowland’s suspension and subsequent termination to the Union in the plainest terms possible, “This is all about the Union.”

vii. Respondent Decided to Terminate Rowland the Same Day Gilles Said “It is about the Union. This is all about the Union.”

On May 25, Respondent decided to terminate Rowland. The decision was made during a conference call between Anne Gilles, Ken Cess, Yolanda Thomas, and Hanita Hoffman from human resources. (ALJD 13:48 – 51; Tr. 721, 728). Respondent based the decision to terminate on the three witness reports from the doctor’s office. (ALJD 14:3 – 4; Tr. 721). None of the three witnesses could see who yelled. At the time Respondent made the decision to terminate Rowland, it did not have a statement from Johnson. Gilles did note, however, that Johnson said “I saw nothing. Nothing happened.” (R. Exh. 26). Johnson’s brief comment to Gilles corroborated Rowland’s insistence that she never yelled at Resident B. Respondent instead

focused on the three witnesses who could not see the allegedly abusive conduct in deciding to terminate Rowland less than 24 hours after the incident. (Tr. 721).

Rowland was terminated four days later, on May 29. Ron Rich attended the termination meeting as a witness at Rowland's request. Gilles and payroll technician Henschel were present on behalf of Respondent. At the beginning of the meeting Rowland handed Gilles a letter setting forth Rowland's version of events. (Tr. 355, 737; GC Exh. 10). That letter requested a full investigation and provided names of witnesses, including the van driver, Lewis Johnson, and Resident B's daughter. (GC Exh. 10). According to Rich, Gilles read the letter and then said "I didn't talk to the driver." (Tr. 541). Then Gilles told Rowland she was being terminated. Gilles handed Rowland a notice of termination. (GC. Exh. 11). After handing Rowland the termination notice, Gilles asked Rowland what the van driver was doing during the alleged yelling incident. (Tr. 358, 730). Rowland told Gilles she had already covered that during the suspension meeting and he should have been contacted during the investigation. (Tr. 358 – 359; 434). Rowland then signed her termination notice and the meeting ended. (Tr. 360).

viii. Reporting Agencies Cleared Rowland of Alleged Wrong Doing

Gilles reported the allegation that Rowland yelled at Resident B to the State of California Ombudsman on May 24. (Tr. 738, 740; GC Exh. 21). Gilles, however, never reported the incident to the police because "the resident wasn't in danger of being physically harmed." (ALJD 15: 1 – 3; Tr. 676). The State conducted an investigation and determined that the claim was unsubstantiated.⁹ (GC Exh. 12 p. 4). In addition, the California Department of Public Health, Licensing & Certification Division did not revoke Rowland's CNA license as a result of

⁹ Communications between Respondent and Department of Public Health (GC Exh. 21) identify Rowland's case number as CA-00311881, which corresponds to the May 25, 2012 reported incident on GC Exh. 12.

the report. Rowland still has a CNA license valid through October 5, 2012. (Tr. 381 – 382; GC Exh. 13).

ix. Resident B's Outbursts Were Known to Respondent

Resident B's frequent yelling and use of profanity were not only common knowledge by all those who cared for her, but were well documented by Respondent. Resident B yells in several different tones and can sound like she speaks in different voices. (Tr. 445). Rowland heard Resident B's yelling so often that she no longer noticed exactly what Resident B yelled. Rich cares for Resident B on a daily basis and hears Resident B yell "knock it off" followed by some sort of threat almost every day. (Tr. 543). Rich has also heard Resident B say "Knock it off or I'll kick your ass." (Tr. 544). Resident B's behavior has been documented in her file as part of her "activities of daily living" form. (Tr. 544). Her yelling was so extensively discussed and documented that Respondent discontinued a hand treatment Rowland would administer to Resident B after Rowland made several complaints about how the treatment caused Resident B to scream and cuss. (Tr. 319). The physical therapy treatments would cause Resident B to yell "knock it off" and to cuss and scream. (Tr. 320). This behavior was documented in Rowland's Weekly Progress Notes on Resident B. (Tr. 320 – 321).

Gilles was familiar with Resident B's behavior and testified "she screams and yells all the time." (Tr. 779). In reference to Resident B's frequent outbursts Gilles said "I heard them and they changed daily." (Tr. 783). Gilles knew that Resident B's outbursts would often be in response to movement and touch. (Tr. 784). As far as the content of Resident B's outbursts, Gilles described Resident B as "bottom fixated," frequently making statements about "your ass." (Tr. 774 – 775). The ALJ failed to take into account the Director of Nursing Thimmesch's and

Administrator Gilles' admissions that Respondent knew Resident B routinely made the exact same comments Rowland was accused of screaming.

Resident B's behavior was so well known to Gilles that Gilles wrote a letter to California Department of Health, Licensing & Certification Division, describing her behavior. The letter was in response to an allegation of abuse made against Ron Rich by a nursing student who observed him feeding Resident B. (GC Exh. 16 p. 3). In the letter Gilles states "I think this complaint came from a person who did not understand this resident's needs and misunderstood the screaming." (GC Exh. 16, P. 3). The letter was written after Rowland was terminated and after the Complaint and Notice of Hearing in this case had been served. (GC Exh. 11; GC Exh. 16, P. 3).

III. ARGUMENT

A. Respondent Failed to Show It Would Have – Not Could Have – Terminated Whitmire and Rowland, and Thus Did Not Meet Its Burden Under *Wright Line*

(Exception Numbers 2, 21, 22, 26 – 32, 41, 42)

The ALJ correctly found General Counsel met its initial burden under *Wright Line* by showing that the protected activity of Whitmire and Rowland was a motivating factor in Respondent's decision to terminate them. (ALJD 15:30 – 33; 18:19 – 21). The burden then shifted to Respondent to show that it would have taken the same actions absent the protected activity. This burden of persuasion must be made by a preponderance of the evidence. *Wright Line, Inc.*, 251 NLRB 1083 (1980), approved by *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983). The burden lies squarely with Respondent to produce evidence showing it would have taken the same disciplinary actions absent union activity.

The ALJ found “Respondent was motivated to take disciplinary action against Whitmire, at least in part, because of her union activity.” (ALJD 16:34 – 36). Similarly, the ALJ found “Rowland’s union activity was a motivating factor in the Respondent’s decision to suspend and subsequently terminate her.” (ALJD 18:20 – 21). The burden should have then shifted to Respondent to show by a preponderance of the evidence that it would have taken the same disciplinary actions against Whitmire and Rowland absent their union activity. *Wright Line, Inc.*, supra (1980). According to the Board, “Once the burden has shifted, the Respondent must show not just that it *could have* taken the challenged disciplinary action but that it *would have* done so even in the absence of union activities.” *Avondale Industries, Inc.*, 329 NLRB 1064, 1066 (1999) (emphasis in original). Stated another way, the “would have” test is not an invitation for the finder of fact to supply his or her own subjective evaluation of whether the employer's response to employee misconduct was a plausible one. Rather, it is a command to assess that response in the light of the employer's demonstrated historical practice. To require any less is to relieve the employer of its burden of persuasion.

In this case, the ALJ essentially absolved Respondent of making the required showing by focusing only on what its policies allowed for in determining whether Respondent had met its burden under *Wright Line*. By substituting the incorrect showing of what Respondent *could* have done for the required showing of what Respondent *would* have done, the ALJ erred in not finding the terminations of Whitmire and Rowland to be in violation of Section 8(a)(3) of the Act.

The ALJ found, based on ample record evidence, that General Counsel met its initial burden by showing Whitmire and Rowland were known union adherents; that Respondent harbored animus toward the union; and that Respondent was motivated by union animus in

disciplining Whitmire and Rowland. The ALJ found “there is no question” that Respondent was well aware of the extensive union activities of both Whitmire and Rowland. (ALJD 5:25; 10:4 – 5). Rowland had even appeared on the local television news channel as the Union spokesperson during a picket at Respondent’s facility. (ALJD 9:46). Respondent’s union animus was plainly shown through the comments of Administrator Anne Gilles. The ALJ found Gilles did not like Whitmire and said to another employee that Whitmire “was part of the Union, and you had to watch what you said around her.” (ALJD 5:29 – 30). In a conversation with Rowland concerning her suspension, the ALJ correctly found that Gilles said “Oh no. This is about the Union. This is all about the Union.” (ALJD 13:25 – 26). Furthermore, “Gilles expressed unhappiness with the pro-union signs that employees placed on their cars,” including Whitmire and Rowland. (ALJD 16:31 – 32). As Gilles was responsible for suspending Whitmire and Rowland, and either effectively recommended or decided to terminate both employees, the ALJD found their disciplines to be motivated by union animus. Thus, the General Counsel met its *Wright Line* burden.

**i. The Reports of Elder Abuse In the Record Show
Respondent Does Not Have a Consistent Policy of
Terminating Employees For Misconduct**

(Exception Numbers 29 – 32)

Once the General Counsel met its burden of persuasion, the burden then shifted to Respondent. Simply providing evidence that Respondent’s policies theoretically allowed it to terminate Whitmire and Rowland is insufficient for Respondent to meet this burden because “under *Wright Line*, the question is whether the Respondent has shown that it *would have* discharged” the employees. *Structural Composites Industries*, 304 NLRB 729, 730 (1991) (emphasis in original). Here, the ALJ completely ignores this line of Board law completely.

Rather, the ALJ substituted his personal opinion for record evidence in determining whether Respondent would have taken the same disciplinary actions absent protected activities.

Respondent failed to produce evidence of a single other employee terminated for failing to report suspected elder abuse, as in the case of Whitmire, or for screaming at a Resident, as Rowland was accused of doing. Administrator Anne Gilles testified that she received and documented two to three reports of suspected elder abuse each month. (Tr. 762). Gilles was employed by Respondent for 22 months at the time she testified. (Tr. 762). Therefore, Respondent had received and recorded 44 to 66 reports of suspected elder abuse at the time of hearing. Despite this multitude of abuse allegations, Respondent failed to produce one example of suspending or terminating an employee for similar conduct. As the burden to show it would have acted accordingly regardless of union activity rests with Respondent, “[c]onsequently, ambiguity in the Record evidence, especially if it is due to the lack of explanatory documents or testimony, weighs against the Respondent and negates its defense.” *Publix Super Markets, Inc.*, 347 NLRB 1434, 1439 fn.24 (2006). The complete lack of evidence that Respondent has enforced its policy consistently cuts against Respondent’s defense that it would have terminated Whitmire and Rowland absent their union activity.

It is impossible for Respondent to meet its burden based on the record evidence because, as the ALJ specifically noted, “There was no probative evidence offered that a similar incident existed where the employee was not active in the Union and discipline was handled differently.” (ALJD 17:43 – 45). Despite the “considerable period of time” devoted to the seriousness with which Respondent views elder abuse, not one example of strict enforcement was offered into evidence. (ALJD 4:7). The record contains a myriad of state and federal laws pertaining to elder abuse, the employee handbook in place at the time of the incidents which contained

Respondent's policy on elder abuse, and even a lengthy video on elder abuse. General Counsel did not dispute that such laws and policies existed, or even that Whitmire and Rowland had received training on elder abuse prevention and reporting. The issue before the ALJ was not how seriously Respondent purports to take allegations of elder abuse, or if it had policies that would allow for the Whitmire and Rowland to be terminated, but whether Respondent would have done so. *Avondale Industries*, supra; *Merillat Industries*, 307 NLRB 1301, 1303 (1992).

The ALJ erred in relying on Respondent's protestations that because it cared so deeply about preventing the horrors of elder abuse, it would have terminated anyone accused of the misconduct of which Whitmire and Rowland were each accused. In *Structural Composites*, the Board found respondent failed to meet its burden precisely because it offered no evidence to prove it enforced its policies against other employees the way it had against the discriminatee. There, in finding respondent had not met its burden, the Board stated, "[t]he Respondent presented no evidence that employees who had threatened supervisors or other employees in the past had been automatically discharged." *Structural Composites Industries*, supra at 730.

The issue here is not whether Respondent had policies in place to prevent elder abuse or discipline employees who engage in elder abuse; the issue is whether Respondent enforced them in a discriminatory manner. The only record evidence as to enforcement of elder abuse policies shows Respondent did not discipline employees consistently according to any policy. The record contains investigation notes and outcomes for four employees other than Whitmire and Rowland who were accused of engaging in some type of elder abuse. None of them were terminated. (Tr. 756 – 757; GC Exh. 16, 20, 22). Gilles admitted that Respondent had discretion in which incidents of alleged elder abuse were reported to state agencies. (Tr. 763). In fact, it was Gilles

herself, whom the ALJ found harbored union animus, who exercised discretion in reporting abuse allegations. (Tr. 763).

In the case of employee Nancy Antonson, Respondent found Antonson physically handled a resident in a rough manner. (GC Exh. 20). Gilles did not suspend or terminate Antonson, but instead used the elder abuse allegation against Antonson as “an educational process” to teach her to change her behavior. (Tr. 751). Gilles admitted that physically harming a resident is a more serious infraction than yelling a threat of physical harm. (Tr. 787). Yet Rowland was terminated and Antonson was not disciplined in any way. Therefore, the record shows Respondent did not discipline employees in accordance with the severity of their alleged misconduct. Employee Shauna Johnson was also given the benefit of an educational opportunity instead of discipline. Shauna Johnson was counseled by Gilles about yelling at a resident, and Gilles decided not to discipline her but instead to offer guidance on how to best deal with residents. (Tr. 756 – 757). Another employee, David Calvert, was accused of slapping a resident by someone who heard a slapping noise but did not see the incident. Calvert was found not to have engaged in such misconduct, was put back to work after a one day suspension and received back-pay for the suspension. (GC Exh. 20). Employee Terra Los was found by Respondent to have slapped a resident. Los was not disciplined as a result of the accusation, despite having previous disciplines for patient care in her personnel file. (GC Exh. 22). Instead, Gilles wrote a letter to the State Department of Public Health explaining “The Complaint came from a person who does not understand this resident’s mental condition.” (GC Exh. 22 p. 11). Based on Respondent’s demonstrated history of using discretion in disciplining employees accused of elder abuse, Respondent cannot show it would have terminated Whitmire and Rowland.

General Counsel has never contended that elder abuse should be taken lightly or even that Whitmire and Rowland were unaware of their duties to guard against and report elder abuse. It is undisputed that state and federal law treat those who engage in elder abuse severely. However, there is simply nothing in the record to prove by a preponderance of the evidence that Respondent *would* have taken the same actions against Whitmire and Rowland absent union activities. In the absence of evidence that it consistently enforces its policy, Respondent cannot meet its burden by a preponderance of the evidence that it would have terminated Rowland and Whitmire. All Respondent has demonstrated is that its employee handbook contained elder abuse policies which allow for the suspension and termination of employees who violated them; and that it trained employees on state elder abuse laws. Having policies theoretically in place without proof of enforcement is simply not enough to meet the *Wright Line* burden.

**ii. Respondent Failed to Meet its Burden, Particularly in
Light of General Counsel’s Strong Showing of Unlawful
Motive**

(Exception Numbers 18, 19, 21, 22, 27 – 32)

The ambiguity in Respondent’s defense caused by a lack of exculpatory documents is further exacerbated by the strength of General Counsel’s case for unlawful motive, and the ALJ’s findings that Respondent was motivated by union animus. *Publix Super Markets, Inc.*, supra at 1439. In *Publix Super Markets*, as in the case at hand, Respondent’s evidence showed “substantially less than a consistent disciplinary practice” and “the evidence of Respondent’s unlawful motive is strong.” *Id.* Accordingly, the Board in *Publix* found the respondent disciplined an employee in a discriminatory manner. Here, the ALJ erred in finding under tightly analogous circumstances that Respondent had met its *Wright Line* burden.

There is ample evidence that Respondent harbored animus toward the Union and was motivated by such animus in disciplining Whitmire and Rowland. Respondent's Administrator went so far as to spell out for Rowland that her suspension was "all about the Union." (ALJD 18:48 – 49). The ALJ found, in no uncertain terms, that "Gilles expressed feelings of hostility toward the Union." (ALJD 18:32 – 33). She forbade a payroll employee from taking breaks with Whitmire simply because she "was part of the Union." (ALJD 18:35). Gilles explained this prohibition on taking breaks with Whitmire by saying she "was part of the Union, and you had to watch what you said around her." (ALJD 16:9). The AJL went so far as to say "Gilles expressed animus toward the Union, including specifically certain union activity engaged in by Rowland" and "a personal dislike for Whitmire because she was a union supporter." (ALJD 18:32 – 33; 16:6 – 7). As the ALJ noted, Gilles' comments were "very telling" that Respondent was motivated by union animus. (AJLD 18:46).

When evidence of Respondent's unlawful motive is so strong, Respondent must do more than simply state it is "very serious about" preventing and reporting elder abuse. (ALJD 19:10). It must prove it would have terminated Whitmire and Rowland even had they not engaged in union activities. Respondent can meet its burden by showing not only that it has a rule, but "that the rule has been applied to employees in the past." *Avondale Industries*, supra at 1066 (quoting *Merillat Industries*, supra at 1303). Respondent showed only that it maintained policies under which it *could* have disciplined Whitmire and Rowland. It failed to provide a shred of evidence that it *would* have done so if the employees were not union adherents. This dearth of evidence that Respondent enforced its elder abuse policies consistently, balanced against General Counsel's showing that the case for unlawful motive is substantial, is insufficient for Respondent

to meet its burden. See, e.g., *Septix Waste, Inc.*, 346 NLRB 494 (2006). Therefore, the ALJ erred in finding Respondent met its burden.

B. Rowland Did Not Scream At Resident B

(Exception Numbers 9 – 12, 16, 17, 20, 23 – 25)

The ALJ overlooked critical testimony in order to make an unwarranted finding that Rowland screamed a threat of physical violence against Resident B. Rowland was employed by Respondent for eleven and a half years and “there was no dispute that Rowland was an excellent employee.” (ALJD 9:33 – 38). Rowland had never before been accused of any kind of elder abuse. (ALJD 19:11 – 12). She was characterized as “gentle” and “a kind care giver.” (ALJD 19:13, 33). Indeed, “her employment record supports her denials” that she yelled at Resident B. (ALJD 19:34 – 35). After finding that Rowland was a gentle care taker with a spotless employment record, the ALJ then inexplicably concluded that Rowland threatened to beat up Resident B in a public waiting room. In making that erroneous factual finding, the ALJ overlooked critical record testimony from credited witnesses.

A plain reading of all of the facts surrounding the Resident B incident points to one conclusion: Resident B had one of her frequent and notorious outbursts while entering the doctor’s office, and, from a room around the corner, the three medical assistants mistakenly believed Rowland was the one who yelled. Rowland, a trusted employee of over eleven years with no discipline for patient care, denied yelling at Resident B. (ALJD 19:27 – 29). Para-transit driver Lewis Johnson, the only first-hand witness to the incident, corroborated Rowland’s repeated denials in his own testimony that nothing happened between Rowland and Resident B. (Tr. 457, 705; R Exh. 26). Rowland and Johnson were more familiar with Resident B’s behavior

than the medical witnesses were, and they were the only two who could both see and hear the incident.

Even Resident B's family supported Rowland. (ALJD 19:36 – 37; GC Exh. 21 p. 12). The day after the screaming incident, Resident B's husband went out of his way to tell Gilles that he supported Rowland. He said Rowland was an "excellent" employee who "would never speak to his wife in a bad way" and "he fully supports Angie." (GC Exh. 21 p. 12). On that same day, Resident B's daughter informed Respondent that the "entire family supports Angie." (GC Exh. 21 p.10). Resident B's daughter told Respondent "her mom had to be the one to say those things." Critically, Resident B's daughter knew of the accusations made by the medical office staff the day of the incident, and told Respondent the following day she "did not believe the office staff then and does not now." (GC Exh. 21 p.10). The only interest Resident B's daughter had was ensuring her mother's health. To that end, the record reflects she regularly attended doctor's appointments with Resident B. Resident B's daughter had the most familiarity with both Resident B and Rowland and the most to lose by placing Resident B in the care of an abuser. Yet Resident B's daughter believed Rowland over the office staff and insisted her mother "had to be the one" who screamed. The ALJ inexplicably contradicted the well-informed conclusions Resident B's daughter came to in crediting the office staff over Rowland.

Further, though the ALJ adopts the medical assistants' version of events, he overlooked the fact that all three of them admitted that Johnson was present for the incident. All three medical assistants who reported that Rowland screamed at Resident B testified to the incident occurring just as Resident B was wheeled into the lobby. (Tr. 797, 810, 827). Johnson was the person who wheeled Resident B into the office. (Tr. 455). Rowland testified that Resident B's yelling outbursts intensified as they entered the lobby. (Tr. 328, 330). Johnson testified to

hearing Resident B scream something profane upon entering the doctor's office. (Tr. 455). Terra Pagnano called Respondent to report the incident shortly after Rowland and Resident B were taken into the exam room from the lobby. (Tr. 798). Accordingly, the screaming incident had to have taken place in the lobby with Johnson present. Despite this uncontroverted evidence, the ALJ found the screaming incident could have taken place during the 45 minutes in which Johnson was not at the doctor's office. (ALJD 20:11 – 14). The ALJ relies in part on this erroneous finding of fact to then disregard Johnson's testimony that Rowland never yelled at Resident B.

There were two versions of events at the doctor's office: one version by witnesses who could both see and hear the incident which Resident B's own family supported, and one version by witnesses who were less familiar with the parties and could not see what happened. Despite noting this dichotomy, the ALJ elected to fully adopt the version of the less prescient witnesses. (ALJD 20:31 – 32). All three medical assistants admitted that they were unable to see who was yelling when they heard the screaming. (Tr. 801, 805, 811, 838, 839, 840). Even though ALJ found "Rowland to be a generally credible witness," he selectively discredits her testimony in favoring the version of events by the medical assistants. (ALJD 19:31). Instead, the ALJ credits the testimony of witnesses who could only hear screaming from an unknown source even when the patient's doting daughter never believed them.

To justify the reliance on testimony from witnesses who could not see the commotion, the ALJ concluded that the three medical assistants recognized Resident B's voice. (ALJD 20:6 – 7). This finding was made without any discussion of the record evidence that calls into question their ability to recognize who was screaming. None of the medical office witnesses had seen Resident B more than once before the incident in question. None of them were aware that

Resident B screamed in several different voices. Most importantly, none of them were familiar with or could recognize Rowland's voice. (Tr. 806 – 807, 838, 839 – 840). The ALJ conveniently glossed over this testimony in order to reach his unsupported conclusion that Rowland yelled at Resident B.

The ALJ's conclusion that Rowland threatened Resident B completely disregards the mountain of evidence that Resident B was known to scream the same phrase the medical assistants heard. Resident B's frequent screaming and use of profanity was documented in her file as part of her activities of daily living form. (Tr. 544). Her yelling was so extensively discussed and documented that Respondent discontinued a hand treatment Rowland would administer to Resident B after Rowland made several complaints about how the treatment caused Resident B to scream and cuss. (Tr. 319 – 321). The physical therapy treatments caused Resident B to yell "knock it off" and to cuss and scream. (Tr. 320). The ALJ erred in failing to consider this evidence in his decision.

Administrator Gilles admitted that she was familiar with Resident B's behavior and testified "she screams and yells all the time." (Tr. 779). In reference to Resident B's frequent outbursts Gilles said "I heard them and they changed daily." (Tr. 783). Gilles knew Resident B would often make these outbursts in response to movement and touch. (Tr. 784). As far as the content of Resident B's outbursts, Gilles described Resident B as "bottom fixated," frequently making statements about "your ass." (Tr. 774 – 775). Employee Ron Rich testified to hearing Resident B say "Knock it off or I'll kick your ass." (Tr. 544). Rich, a CNA who cares for Resident B regularly, testified that he hears Resident B make threats of violence almost every day. (Tr. 543). Respondent provided the State Ombudsman a two-page list of the common threats and profanity Resident B yells that Director of Nursing Jane Thimmesch collected. (GC

Exh. 21, p. 18 – 19). Both Gilles and Thimmesch testified credibly that Resident B continually shouted out precisely the type of phrase that the medical assistants heard and, sight unseen, attributed to Rowland. The ALJ erred in failing to consider and discuss this specific evidence in his decision.

The ALJ found Resident B “is a very difficult patient, suffering from dementia and prone to frequent, sometimes near constant, outbursts of yelling, screaming, and threatening, accompanied by the use of profanity.” (ALJD 10:11 – 13). The ALJ correctly found that “Resident B was well known to Rowland, who frequently cared for her,” but failed to find Resident B’s behavior was equally well known to Respondent.

Resident B’s behavior was so well known to Gilles that Gilles wrote a letter to California Department of Health, Licensing & Certification Division, describing her behavior. The letter was in response to an allegation of abuse made against Ron Rich by a nursing student who observed him feeding Resident B. (GC Exh. 16 p. 3). In the letter Gilles states “I think this complaint came from a person who did not understand this residents needs and misunderstood the screaming.” (GC Exh. 16, P. 3). It was written after Rowland was terminated and after this case was set for hearing. (GC Exh. 11; GC Exh. 16, p. 3). The allegation Gilles explains away in the letter as a misunderstanding was a more serious allegation of abuse than the one for which Rowland was terminated. (Tr. 787). The exact same description of someone misunderstanding Resident B’s screams as potential elder abuse can be applied to Rowland’s trip with Resident B to the doctor’s office. Yet Respondent chose instead to spin the results of its incomplete investigation to justify its decision to rid itself of Rowland on the basis of three non-eye witnesses, ignoring the contrary statements of Rowland, Johnson and Resident B’s family. The ALJ erred in failing to discuss and consider this evidence.

In sum, the ALJ erred in finding Rowland screamed a threat of physical violence at Resident B. The finding is based on an incorrect description of the record evidence that established who was present for the incident and what the witnesses could perceive, and ignores the credibility findings Resident B's family reached. Both Resident B's husband and daughter went out of their way to tell Respondent that Rowland would never treat Resident B in such a manner. Perhaps this is why the ALJ concluded his finding by stating "there is certainly some considerable doubt that Rowland made the threat that she is accused of." (ALJD 20:40 – 41).

C. Respondent's Investigations Into the Misconduct of Whitmire and Rowland Were So Insufficient as to be Pretextual

(Exception Numbers 4 – 8, 13 – 15, 18, 19)

The Board has routinely found a failure to investigate alleged misconduct by a known union adherent demonstrates an employer's unlawful intent. *Clinton Food 4 Less*, 288 NLRB 597, 598 (1988) (Board found employer's termination of a vocal union supporter to be unlawful where employee was terminated after two customers complained of rude behavior and employer failed to investigate or consider employee's positive work history); see also *Kidde, Inc.*, 284 NLRB 78 (1987). An employer's failure to fully investigate by issuing discipline prior to obtaining the employee's version of events shows the employer is more interested in meting out discipline than discovering the truth. *Success Village Apartments, Inc.*, 348 NLRB 579, 603 (2006) (Board affirmed ALJ's finding that employer issued a warning to a known union supporter based on speculation and without regard to the underlying facts).

Here, both Whitmire and Rowland were terminated after Respondent received a complaint about their behavior that could ostensibly run counter to its elder abuse policies. Rather than conducting a thorough investigation to uncover the facts, Respondent seized on each

complaint as an opportunity to terminate a union activist. In a similar case involving employees at a nursing home, the Board affirmed the ALJ's finding that

the Respondent's failure to conduct an adequate investigation of the allegations against Gilliams or Magnano [discriminatees] demonstrates that it was not interested in determining the real egregiousness of their conduct, but that the Respondent seized upon [employee] DaLie's accusations as a pretext to rid itself of two known union adherents.

Connecticut Health, 325 NLRB 351, 365 (1998). In *Connecticut Health*, the two discharged employees were accused of both verbally and physically assaulting residents in a nursing home. The employer in *Connecticut Health* failed to speak with witnesses present for each incident, including the patients who were allegedly harmed and employee witnesses who were sympathetic to the union. The exact same thing can be said for Respondent's inadequate investigations into the claims against Whitmire and Rowland. Respondent failed to speak with para-transit driver Johnson beyond two cursory questions that did not identify the screaming incident under investigation. Respondent also failed to get a written statement from, or provide notes from an investigatory conversation with Ron Rich, a union supporter, regarding Whitmire's incident.

In *Dennett Road Manor Nursing Home, Inc.*, 295 NLRB 397 (1989), the Board also found the termination of two known union supporters to be unlawful based on the employer's failure to investigate an unsubstantiated claim of patient abuse. In that case, the employer received a letter of dubious origin claiming a resident was being abused by two nursing aides. The resident was known to suffer from Alzheimer's and have a volatile temper. The employer decided to terminate the two nursing aides, who were known union supporters, prior to getting their statements or conducting any further investigation. The ALJ in *Dennett Manor* relied in

part on the immediacy of the decision to terminate as evidence of unlawful motive, and the Board affirmed the finding.

The decision to terminate Whitmire was made with equal immediacy. Gilles recommended to Cess and Thomas on February 14 that Respondent terminate Whitmire, prior to Gilles having met with Whitmire. That same afternoon Gilles instructed Henschel to order Whitmire's final paycheck. When Respondent ordered Whitmire's check on February 14, Respondent had not spoken to Rich about the incident, and Gilles had yet to speak with Whitmire. Not until the February 15, during Whitmire's suspension meeting, did Respondent hear Whitmire's version of events. Also on February 15, Thomas spoke to Rich briefly about the kleenex incident, and Rich defended Whitmire stating the kleenex did not amount to suspected patient abuse. That minimal investigation on February 15, however, was simply for show because Respondent made the decision to terminate the previous day, on February 14.

It is well settled that "an employer's failure to conduct a full and fair investigation of an employee's alleged misconduct is evidence of discriminatory intent, especially when viewed in light of the employer's union hostility." *Hickory Creek Nursing Home*, 295 NLRB 1144, 1159 (1989). Here, there is no evidence that Gilles ever spoke to Whitmire personally prior to suspending her. The ALJ erred in finding Gilles spoke to both Whitmire and Rich on February 14. Whitmire and Rich deny speaking to Gilles on February 14. (Tr. 59, 534). Gilles testified that she took notes on each conversation, as was her habit. The record is replete with Gilles's notes from conversations during and after both investigations, yet Respondent failed to offer Gilles' notes reflecting a February 14 conversation with either Whitmire or Rich. (Tr. 59, 94, 659, 768).

If Gilles had truly been concerned about the truth of the matter, she could have easily spoken with Whitmire herself. Rather than speaking with Whitmire herself, Gilles had Whitmire's supervisor briefly speak to her in a casual manner about the kleenex without reviewing mandatory reporting requirements or counseling Whitmire about how her conduct could possibly lead to discipline. (Tr. 58 – 59). Nor did Gilles speak with Ron Rich or Frances Marley. Again, the ALJ erred in finding Gilles spoke with Rich on February 14. Rich testified that Gilles told him to speak with Yolanda Thomas from human resources but did not discuss the Whitmire incident with him. (Tr. 534). Gilles failed to produce notes to verify she spoke with Rich on February 14 regarding Whitmire's misconduct. Also, Gilles told Whitmire on February 15 that she needed to speak with Rich about the matter. (Tr. 56). It stands to reason that Gilles would not need to speak with him on February 15 if she had already done so. Thus, the ALJ's factual conclusion that Gilles spoke to Whitmire and Rich on February 14 in order to investigate the incident is in error.

Gilles admits she never bothered to speak with Marley or get a statement from her through Marley's supervisor. Notably, both Rich and Marley were active members of the bargaining committee. (Tr. 275 – 8, 525) Rich is still an active Union supporter and one of only two employees to ever act as a shop steward. (Tr. 526). Instead of speaking to Whitmire, Rich, and Marley – all members of the Union's bargaining committee – Respondent spoke to receptionist Tootie Oberg and housekeeper Susan Lees, who were not Union supporters and did not have direct knowledge of the incident. (Tr. 767, 768 – 769). Therefore, the roster of witnesses Respondent selected to interview shows Respondent weighed support for the Union more heavily than the quality of information each witness could provide. The ALJ erred in failing to find the investigation into the kleenex incident was biased and inadequate.

With regard to Rowland, Respondent communicated its decision to terminate Rowland on the same day it received the report of alleged abuse, prior to conducting an investigation. Medical assistants Erica Catona and Lindsay Murphy testified that Gilles told them during their first conversation with her that they would not be seeing Rowland any more. (Tr. 816, 830; R Exh. 32). Both Catona and Murphy understood that to mean Rowland would be terminated. (Tr. 823; 831). At the time Gilles made this statement, Respondent had not spoken to anyone other than two of the individuals who made the allegation, just as the employer in *Dennett Road Manor* made the decision to terminate at the time the allegation was made. The ALJ sidesteps the timing of Respondent's termination decision by finding "Gilles indicated that she might have to terminate Rowland, in which event they would not see her again." (ALJD 11:33 – 34). This slight change in wording drastically changes when the termination decision was made and is not an accurate representation of the record evidence. The ALJ erred in mischaracterizing the witnesses' testimony, and in not finding that Respondent decided to terminate Rowland prior to discussing the accusations with Rowland.

Respondent again de-emphasized the quality and veracity of witness statements when conducting a cursory investigation into Rowland's alleged misconduct. Respondent showed a flagrant disregard for the truth by not fully interviewing Johnson, the only licensed and neutral eye-witness to the event. Not only did Respondent knowingly fail to fully interview this key witness, but it willfully ignored exculpatory evidence. Resident B's chart contained documentation about her screaming and profane outbursts. Respondent had pages of notes from other nursing aides documenting Resident B's constant use of profanity. Resident B's husband sought out Gilles to report that Rowland was an excellent care taker and would never treat his

wife in the manner she was accused of. Gilles herself knew Resident B would often yell and curse and that these outbursts were triggered by sound and movement.

A plain reading of all of the record evidence surrounding the Resident B incident points to one conclusion: Resident B had one of her well known outbursts while entering the doctor's office, and the three office employees mistook what they heard. An adequate investigation would have led Respondent to that conclusion and established that Respondent instead seized an opportunity to terminate Rowland.

In both of its perfunctory investigations, Respondent failed to interview the most percipient witnesses and placed greater weight on the testimony of non-percipient witnesses instead of percipient witnesses. In the case of Whitmire, the overlooked percipient witnesses were open Union supporters and in the case of Rowland the percipient witnesses were exonerating. Failure to properly investigate is "supportive of unlawful motivation, since it demonstrates that the Respondent was not truly interested in determining whether misconduct had actually occurred." *Connecticut Health Care Partners*, supra at 364. The ALJ erred in failing to weigh Respondent's proffered defense in light of its inadequate investigation. The proper conclusion, therefore, is that Respondent's proffered reasons for suspending and terminating Whitmire and Rowland are mere pretext for its true unlawful motive.

**D. The ALJ Went Beyond The Bounds of the Act By Concluding
Whitmire and Rowland Violated State and Federal Elder
Abuse Laws**

(Exception Numbers 1, 3, 33 – 40)

The ALJ went beyond the bounds of the Act by concluding Whitmire and Rowland each violated state and federal laws regulating elder abuse. (ALJD 7:10 – 13; 21:4). Not only was

this issue not presented before the ALJ, and therefore should not have been determined during these proceedings, but the ALJ failed to articulate how he jumped to that conclusion. The mere conclusions of an ALJ are not sufficient to support a finding. For example, the Seventh Circuit has held that “we cannot uphold a decision by an administrative agency... if, while there is enough evidence in the record to support the decision, the reasons given by the trier of fact do not build an accurate and logical bridge between the evidence and the result.”¹⁰ Here, even though the evidence surrounding Whitmire’s and Rowland’s conduct is in the record, the ALJ’s failure to make the logical bridge between those actions and the definitive conclusion that both employees unquestionably violated State and Federal law means that the finding should not be affirmed. The ALJ simply stated that California law required Whitmire to hand over the kleenex, and failing to do so was therefore a violation of federal and state law. (ALJD 7:10 – 13). The ALJ fails to cite which laws Whitmire violated and does not engage in any type of analysis as to how her actions violated state and federal laws. In doing so, the ALJ substitutes his own judgment for that of the California Department of Public Health which investigated the incident. As to Whitmire, the pertinent investigating agency in fact did not cite her for any misconduct. (GC Exh. 23).

The ALJ again substituted his own judgment for that of the responsible state and federal agencies in reaching the legal conclusion that Rowland engaged in conduct that “would constitute elder abuse.” (ALJD 19:17 – 18). In fact, when the California Department of Public Health investigated the incident and concluded otherwise. (GC Exh. 23). After Respondent reported the incident to the State Ombudsman and California Department of Public Health, Rowland was investigated by the appropriate agencies. Rowland was cleared her of any

¹⁰ *Sarchet v. Chater*, 78 F.3d 305, 307 (7th Cir. 1996) (citing *Green v. Shalala*, 51 F.3d 96, 100-01 (7th Cir. 1995)).

misconduct, and retained her Certified Nursing Assistant license. (GC Exh. 13). Certainly, had Rowland engaged in the misconduct of which she was accused and actually engaged in elder abuse in violation of state laws, she would have lost her license. Instead she was allowed to keep her license after being investigated by the California Department of Public Health. (Tr. 381; GC Exh. 13). Presumably, the department tasked with enforcing state and federal elder abuse laws has greater familiarity with whether Rowland violated those laws than an ALJ for the NLRB does. As a result, the ALJ went beyond the scope of the Act in making this conclusion.

The ALJ's findings that Whitmire violated state and federal laws by failing to report a kleenex with scribbles on it, and that Rowland engaged in misconduct that "would constitute elder abuse" are in error and should be overruled.

E. Respondent Was Obligated To Engage in Pre-Disciplinary Bargaining With the Union

(Exception Numbers 9 – 12, 17, 20, 23 – 25)

The ALJ misapplied Board law in finding Respondent was not obligated to engage in pre-disciplinary bargaining with the Union over the suspensions and subsequent terminations of Whitmire and Rowland. (ALJD 28:38 – 43). Respondent had an obligation to bargain with the Union as the certified collective-bargaining representative, upon request, concerning discharge, discipline or reinstatement of employees. *Fresno Bee*, 337 NLRB 1161, 1187 (2002). A demand to engage in pre-disciplinary bargaining must be made in order to trigger this duty. *Washoe Medical Center, Inc.*, 337 NLRB 202, 202 fn.1 (2001). In this case, the Union did in fact make a demand to engage in pre-disciplinary bargaining. (Tr. 206 – 209; GC Exh. 5 and 8). The ALJ erred in finding that Board law requires, and the Union failed to make, a demand to bargain so specific as to include the name, type of discipline, type of employee misconduct and

specific cause of suspension and termination. (ALJD 28:40 – 43). In this case, the Union made three requests to engage in pre-disciplinary bargaining with Respondent. (Tr. 206 – 209; GC Exh. 5 and 8). The ALJ erred in finding these requests failed to meet the requirements set forth in *Washoe*. Id.¹¹

IV. CONCLUSION

The ALJ correctly found that General Counsel established a prima facie case that Respondent violated Section 8(a)(3) of the Act by showing Respondent was motivated by Union animus when it terminated Whitmire and Rowland. The ALJ erred in applying an incorrect standard for analyzing Respondent’s *Wright Line* defense. The record evidence only establishes that Respondent *could* have terminated Whitmire and Rowland, not that it *would* have. The ALJ erred in finding Rowland yelled a threat of physical harm at Resident B. The ALJ further erred in concluding Whitmire and Rowland violated state and federal laws. Finally, the ALJ erred in concluding that Respondent was not required to engage in pre-disciplinary bargaining.

For the reasons set forth and discussed in detail above, the Board should find that Respondent violated Section 8(a)(1), (3) and (5) of the Act. An appropriate remedy should be ordered, requiring Respondent to: reinstate and make whole Denise Whitmire and Angelia Rowland, and promptly hold a meeting, or meetings, scheduled to ensure the widest possible attendance, at which a responsible management official of the Respondent will read the Remedial Notice in the Presence of a Board agent.

¹¹ The Board has since clarified the duty of an employer to engage in pre-disciplinary bargaining when requested by a union prior to the implementation of a first-contract, which would have required pre-disciplinary bargaining here. *Alan Ritchey, Inc.*, 359 NLRB No.40 (2012). That decision is prospective and not controlling in this case.

Dated at San Francisco, California, this 25th day of February, 2013.

A handwritten signature in black ink, appearing to read "Sarah McBride", is written over a horizontal line.

Sarah McBride
Counsel for the Acting General Counsel
National Labor Relations Board, Region 20
901 Market Street, Suite 400
San Francisco, California 94103
(415) 356-5144