

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 20

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 REPLY TO  
RESPONDENT'S ANSWERING BRIEF

Submitted by  
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**I. The ALJ’S Critical Finding That The GC Established a Prima Facie Violation Under *Wright Line* Stands Uncontested**

The Administrative Law Judge (the ALJ) found, as fact, that Respondent bore anti-Union animus and that that animus was a substantial motivating factor in its decisions to discharge employees Rowland and Whitmire (ALJD page 16, lines 31-36 and page 18, lines 20-21 and 49-50).<sup>1</sup> Respondent chose not to except to these critical and damning findings.

Accordingly, the sole question for the Board at this juncture is whether the ALJ correctly found that Respondent met its *Wright Line*<sup>2</sup> burden of showing that it would have discharged the employees in any event or, as the Acting General Counsel (GC) contends, that he erred in so finding. As the GC has shown, and Respondent has failed to rebut, the ALJ misapplied Respondent’s *Wright Line* burden. Accordingly, the decision should be reversed, and the Board should find that Respondent violated Section 8(a)(3) of the Act as alleged.

**II. The ALJ Did Not Apply The Correct Burden Shifting Analysis Under *Wright Line***

The ALJ’s analysis of Respondent’s *Wright Line* burden fails on two levels. First, with respect to both Rowland and Whitmire, and as fully set forth in GC’s brief in support of its exceptions, the record demonstrates that Respondent based its discharge decisions on unreliable, equivocal evidence and faulty investigations. More fundamentally, however, the ALJ failed to evaluate Respondent’s treatment of Whitmire and Rowland with reference to Respondent’s prior and subsequent treatment of similarly situated employees; rather, in the face of his underlying finding of unlawful motivation—he substituted his subjective acceptance of Respondent’s self-

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<sup>1</sup> The ALJ based this finding, in part, on Respondent’s Administrator Anne Gilles’ admission that Rowland’s suspension and subsequent termination was “all about the Union.” (ALJD 13:45 – 46; Tr. 354, 483). This clear statement not only of union animus, but also of the nexus between Rowland’s Union activities and her discipline, is, at this point, undisputed.

<sup>2</sup> *Wright Line*, 251 NLRB 1083 (1980), enfd. 622 F.2d 899 (1st Cir. 1981), cert. denied 495 U.S. 989 (1982).

serving justification for its conduct. Nothing in Respondent's answering brief can overcome these basic flaws in the ALJ's analysis.

The applicable legal principles are well established. Once the General Counsel's initial burden is met under *Wright Line*, it is then incumbent upon Respondent to prove it would have taken the same actions regardless of the employee's union activities. 251 NLRB1083 (1980). It is not enough to show that Respondent could have done so, but it must prove that it *would* have taken the same actions in the absence of union activities. *Avondale Industries Inc.*, 329 NLRB 1064, 1066 (1999). As we stated in our opening brief, the "would have" test is not an invitation for the ALJ to substitute his own subjective evaluation of whether Respondent'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 Respondent of its burden of persuasion.

The burden rests squarely with Respondent to rebut the General Counsel's prima facie case. *Structural Composite Industries*, 304 NLRB 729 (1991). In finding the employer in *Structural Composite Industries* discriminated against an employee for protected activity, the Board placed heavy emphasis on the fact that the respondent "presented no evidence that employees who had threatened supervisors or other employees in the past had been automatically discharged." *Id.* (emphasis added). In this case, Respondent similarly failed to produce a single example of an employee who was terminated for violating elder abuse policies, despite receiving multiple complaints of alleged abuse every month. (Tr. 762). Therefore, Respondent failed to rebut General Counsel's prima facie case.

Further, the more substantial the showing of animus, the more evidence the employer must produce proving it would have taken the same actions absent union activity. Where the

employer's evidence shows "substantially less than a consistent disciplinary practice" and "the evidence of [r]espondent's unlawful motive is strong," the Board has found the employer disciplined an employee in a discriminatory manner. *Publix Super Markets*, 347 NLRB 1434, 1439 (2006). A substantial showing of unlawful motive is enough to defeat an employer's defense when there is a lack of evidence that it would have taken the same actions absent union activity. *Septix Waste, Inc.*, 346 NLRB 494 (2006). Essentially, the ALJ's finding of animus in the instant case, expressed specifically as the reason that discipline was being issued, heightens the importance of Respondent's burden to prove it would have, not only could have, terminated Whitmire and Rowland regardless of their union activity.

Here, the ALJ relieved Respondent of its burden to prove it would have terminated Whitmire and Rowland despite the finding of animus and substituted his personal opinion of what Respondent would likely have done absent union activity. The ALJ concluded "In my view, such misconduct on the part of any employee would likely have resulted in similar disciplinary action, even where said employee had engaged in no protected activity." (ALJD 21: 41 – 43, emphasis added). But, the standard is not whether Respondent "would likely" have taken the same actions absent union activity, but whether the evidence shows it *would* have. *Avondale Industries*, supra. Thus, by the ALJ's own finding, Respondent failed to meet its burden.

The Board recently overturned a similar finding in *Camaco Lorain Manufacturing Plant* where the ALJ used his own subjective judgment to determine how an employer could act instead of relying on the record to show that it would have acted in the same way absent union activity. There, the Board stated "[w]hile the proposition stated by the judge may be valid in other circumstances, the record here demonstrates that the Respondent did not consistently act in

conformity with that proposition.” *Camaco Lorain Mfg. Plant*, 356 NLRB No. 143, slip op. at 4 (April 29, 2011). In finding the discharge unlawful, the Board in *Camaco Lorain* noted that respondent was more lenient to another known union supporter who engaged in more egregious conduct after the termination of the discriminatee. Thus, while the discriminatee was discharged for failing to meet production standards, and the employer asserted that it would terminate any employee for slowing down production or refusing to perform work, two weeks later, the employer issued only written discipline to a different employee engaged in similar conduct. *Id.* at 4.

Similarly, here the ALJ relied on Respondent’s protestations of intention and its presumptive ability to terminate employees for engaging “elder abuse,” instead of examining whether Respondent had, in fact, acted consistently in conformity with that supposed policy. Within a short period of time after Rowland’s discharge, employee Ron Rich was accused of physically abusing the very same patient as Rowland. Not only did Respondent refrain from disciplining Rich, but it endorsed his continued employment to the State and excused Rich based on Resident B’s history of violent outbursts. Thus, just as in *Camaco Lorain*, Respondent treated two employees very differently who were accused of similar conduct. In the case of Ron Rich, Administrator Ann Gilles chose to consider and rely upon the fact that the person who reported Rich was not familiar with Resident B and her behavior and took *no disciplinary action* against Rich. In stark contrast, in Rowland’s case, Gilles did not take into account Resident B’s known behavior and instead relied upon three individuals who never saw the alleged incident of “patient abuse.”

By stating it was his own belief that Respondent would have terminated Whitmire and Rowland even in the absence of their union activities, the ALJ simply relied on Respondent’s

claimed policy of terminating employees for engaging in elder abuse instead of determining from the evidence whether Respondent had acted consistently in conformity with that policy.<sup>3</sup>

### **III. The ALJ Incorrectly Found That Rowland Threatened Resident B**

As fully discussed in our brief in support of exceptions, the ALJ's finding that Angelia Rowland yelled a threat of physical harm at Resident B is against the clear weight of the evidence and thus cannot stand. The finding is based almost entirely on the testimony of the three medical assistants.<sup>4</sup> As GC argued in its post-hearing brief to the ALJ and its brief in support of exceptions, the medical assistants were simply mistaken in what they heard, but did not testify untruthfully. The primary reason that they were mistaken in what they heard, was that they admittedly could not see who was speaking. (Tr. 801, 805, 811, 838, 839, 840).

Respondent's argument that they were the only credible percipient witnesses completely glosses over that important detail. Therefore, it is entirely possible that they testified truthfully to what they heard, but did not realize that Resident B was the person yelling and not Rowland.

The other witnesses to the screaming incident were van driver Lewis Johnson and Rowland herself. Johnson was present for the screaming incident and was familiar with both Rowland and Resident B in his capacity as a para-transit driver. Johnson consistently denied that

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<sup>3</sup> In *Encino Hospital Medical Center*, 359 NLRB No. 78, slip op. at 2 (March 19, 2013), the Board again noted the importance of considering whether the evidence shows that a respondent has adhered to its disciplinary procedures. It is also of note in that case that the Board remanded the case to the judge to make findings concerning animus, concluding that it was insufficient that the judge assumed that the GC had established a prima facie case. In the instant case, the ALJ specifically found unlawful motivation (to which Respondent failed to take exception) which places a greater onus on the ALJ to explain why he determined that Respondent met its *Wright Line* burden. In these circumstances, there is no need for the Board to remand the matter to the ALJ.

<sup>4</sup> Respondent attempts in its answering brief to bolster the credibility of the three medical assistants by arguing their testimony was consistent with the affidavits they gave during the investigation. (R. Answering Brief, fn. 4). None of the affidavits are in evidence and cannot be relied upon.

Rowland screamed at Resident B. (Tr. 457, 705; R Exh. 26). He was a neutral witness in that he was not employed by Respondent and had no knowledge of Rowland's union activities. The ALJ discredited his testimony on the unprecedented basis that Johnson was more animated when testifying at the hearing when compared to his supposedly "disinterested" attitude toward Respondent during its own cursory investigation. (ALJD 20:20 – 27). The ALJ's hearsay-based discrediting of Johnson should carry no weight.

Rowland herself testified consistently and truthfully that she never yelled at Resident B. Indeed, the ALJ found her to be "a generally credible witness." (ALJD 19:31). The ALJ's sudden about-face in discrediting her only when she denied that she screamed at Resident B is not based on anything in the record or her demeanor. In fact, the ALJ was forced to concede "there is certainly some considerable doubt that Rowland made the threat that she is accused of." (ALJD 20:40-41). In order to justify his finding that Rowland threatened Resident B while finding Rowland to be otherwise credible and a "gentle" and "kind caregiver," the ALJ went on to speculate as to what Rowland's mental state might have been at the time. (ALJD 19:13 – 33; ALJD 20:43 – 47). There is nothing in the record to support such speculation. The ALJ thus clearly erred in finding Rowland threatened Resident B.

Respondent argues in its answering brief that the sole issue in deciding whether Respondent unlawfully terminated Rowland is whether Respondent reasonably determined Rowland made the threat. As the GC argued in its exceptions and supporting brief, the ALJ erred in finding it was reasonable for Respondent to conclude Rowland yelled at Resident B. Respondent had ample knowledge of Resident B's well-documented history of violent verbal outbursts. (Tr. 319 – 321, 544, 779, 783; GC Exh. 21, p. 18 – 19). Respondent was also keenly aware of Rowland's impeccable twelve-year employment history. (ALJD 9:33 – 38).

Respondent had every reason to know that Resident B was likely the person screaming based on her well documented history, as fully discussed in GC's brief in support of exceptions.

Respondent's assertion that Rowland threatened Resident B, far from being a reasonable belief, was in fact a pretext for its unlawful motive.<sup>5</sup>

#### **IV. Respondent's Arguments Regarding The General Counsel's Exceptions To Findings Of Fact Lack Merit**

Contrary to Respondent's claims, the General Counsel's exceptions to the ALJ's findings of fact have significant bearing on resolution of the issues at hand. Much of the ALJ's decision rests on factual determinations as to what conduct occurred, who witnessed it, and the actions Respondent took. General Counsel's Exceptions 10 and 11 address the ALJ's failure to find that Johnson corroborated Rowland's testimony and that he was present for the critical screaming incident. These two facts are crucial to making an informed finding of fact as to what occurred in the doctor's office between Rowland and Resident B. Without a finding of fact based on undisputed record evidence as to who was present for the screaming incident, it is not possible to properly conclude what occurred in the doctor's office. The ALJ's error in not placing Johnson in the lobby of the doctor's office at the time of the screaming incident had significant bearing on the ALJ's decision. That error allowed the ALJ to base his credibility resolutions on the three third-party witnesses who never actually saw the incident rather than on the first-hand witnesses who did see the incident.

Respondent also argues that General Counsel's Exception 24 is irrelevant because it speaks to the ALJ's speculation of Rowland's state of mind. As Respondent correctly points out, it does not matter what Rowland was thinking at the time. Yet the ALJ took it upon himself to

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<sup>5</sup> Even if the Board were to adopt the ALJ's findings that Rowland screamed at Resident B, the Board should still conclude for the reasons discussed above and argued in GC's brief in support of exceptions, that Respondent failed to meet its *Wright Line* burden.

analyze her mood, while failing to analyze Respondent's dearth of evidence that it would have terminated Whitmire and Rowland absent their union activities. This dichotomy is of great importance in analyzing the ALJ's decision.

Finally, with regard to General Counsel's Exception 9, this goes to Respondent's *Wright Line* burden in that it calls for a finding that Respondent admitted to receiving two or three complaints of patient abuse per month. That finding of fact coupled with Respondent's failure to provide a single example of an instance in which they have treated another employee in a similar manner to Whitmire and Rowland is perhaps of the greatest importance to finding that the ALJ erred in concluding that Respondent met its *Wright Line* burden.

## V. CONCLUSION

For the reasons set forth above, Respondent's arguments in its answering brief are unpersuasive. The Board should reverse the ALJ and find that Respondent violated Sections 8(a)(1), (3) and (5) of the Act as alleged in the consolidated complaint. An appropriate remedy should be ordered, which in the instant case requires 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.

Dated at San Francisco, California, this 24<sup>th</sup> day of April, 2013.



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**AFFIDAVIT OF SERVICE OF ACTING GENERAL COUNSEL’S REPLY TO  
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I, the undersigned employee of the National Labor Relations Board, state under oath that on April 24, 2013, I served the above-entitled document(s) by electronic mail upon the following persons, addressed to them at the following addresses:

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