

**UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
REGION 8**

**DHSC, LLC, D/B/A AFFINITY MEDICAL CENTER**

**and**

**NATIONAL NURSES ORGANIZING  
COMMITTEE (NNOC)**

**CASES 08-CA-090083  
08-CA-090193  
08-CA-093035  
08-CA-095833**

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**COUNSEL FOR THE ACTING GENERAL COUNSEL'S AMENDED<sup>1</sup> REPLY TO  
RESPONDENT'S EXCEPTIONS TO THE DECISION ISSUED BY  
ADMINISTRATIVE LAW JUDGE ARTHUR J. AMCHAN**

In its Exceptions, Respondent goes to great lengths to make it appear that each alleged discriminatory action occurred in a vacuum. It does this in furtherance of its claim that the Administrative Law Judge erred in finding that the record evidence supports Counsel for the Acting General Counsel's prima facie case.<sup>1</sup> Notwithstanding Respondent's strategy, the evidence clearly shows that between August 28, 2012 and January 3, 2013, Respondent violated the Act nine times and that it did so as part of its overall plan to thwart employees' effort to exercise their statutory rights.

Properly evaluating the evidence, the ALJ concluded that the record, as a whole, substantiated a finding of anti-union animus. In this connection, the ALJ correctly found that the

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<sup>1</sup> Many of Respondent's exceptions to the ALJ's findings of no moment, are not reversible error and are disingenuously raised for what appears to be a calculated attempt to waste this tribunal's time. Specifically, Respondent's contention that Regional Directors do not have the authority to issue final determinations on challenges and objections and final certifications in consent elections because the ALJ reviewed the Director's actions is a specious. Respondent Exceptions brief, p. 12. Respondent claims that the ALJ erred by revoking Respondent's subpoena pertaining to its affiliation defense because the Regional Director had not referred the subpoenas to the Division of Judges is a similarly unfounded argument. Respondent's Exceptions brief, p. 13. Respondent also raises in support of its defense pertaining to the affiliation of the Union a host of facts about the NNOC which are not in the record. See Respondent's Exceptions brief, pages 15-18.

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<sup>1</sup> Amended for the limited purpose of adding a table of contents and table of authorities.

Respondent violated Section 8(a)(1) of the Act by denying the National Nurses Organizing Committee (Union) and union organizer Michelle Mahon access to its property; by physically threatening employees who engaged in protected activities by completing assignment despite objection (ADO) forms; by closely scrutinizing patient charts because employees completed the ADO forms; by coercively telling employees that after reviewing a patient chart completed by a prominent union supporter, Kress would derive some joy from the impending discipline and, finally by retaliating against intensive care unit employees by creating more onerous working conditions. Additionally, the ALJ correctly found that Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily disciplining Wayt on September 5, 2012; by terminating Wayt's employment on September 26, 2013, and by discriminatorily reporting Wayt to the Ohio State Board of Nursing. The ALJ also properly concluded that the record, as a whole, substantiated a finding that Respondent violated Section 8(a)(1) and (5) by failing to recognize and bargain with the Union,.

**I. Affinity's Refusal to Recognize and Bargain violated the Act.**

Respondent suggests that an alleged oral agreement between it and the Union prevents any finding that Respondent violated Section 8(a)(1) and (5) when it refused to recognize and bargain with the Union after the Regional Director properly certified the Union as the exclusive collective bargaining representative of the unit. Respondent contends that the alleged oral agreement negated the Board's jurisdiction over any objections and challenges to the representation election and ceded that jurisdiction to an arbitrator. These arguments are baseless.

In summary, Respondent failed to present to the Region, in the underlying representation case any evidence to support its objections to the election and, in the absence of any evidence to support the objections, the Regional Director overruled the objections and issued the final

certification. Respondent now argues that it failed to submit evidence in support of the objections based on some alleged oral agreement and it claims that the ALJ erred by not allowing Respondent to present now its evidence related to the representation case.

As a matter of background, the Union filed the election petition in Case 08-RC-087639 on August 20, 2012. On August 22, 2012, the Regional Director approved a consent election agreement and the election was held on August 29, 2012 in a unit composed of Respondent's RNs. Out of some 213 eligible voters, 100 cast ballots for the Union, 96 cast ballots against the Union, and there were seven challenged ballots. On September 5, 2012, Respondent filed timely objections but, as noted above, failed to submit any evidence in support of those objections. The record establishes and even more significantly, Respondent admits, that after it filed objections to the elections, it failed to present any evidence in support of those objections.<sup>2</sup>

On September 21, 2012, the Regional Director issued a Report on Challenged Ballots and Objections overruling four of the challenged ballots and sustaining three of the challenged ballots. In the absence of any evidence in support of the objections, the objections were overruled. On October 5, 2012, the Regional Director issued a Certification of Representative.<sup>3</sup>

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<sup>2</sup> See Section 102.69 of the Board's Rules and Regulations. Respondent now argues that it had a side-bar agreement with the Union to resolve any objections and in furtherance of that ad hoc agreement, it was precluded from producing support for its objections to the Board.

<sup>3</sup> 29 CFR 102.62 - **Consent-election agreements.** (a) Where a petition has been duly filed, the employer and any individual or labor organizations representing a substantial number of employees involved may, with the approval of the Regional Director, enter into a consent-election agreement leading to a determination by the Regional Director of the facts ascertained after such consent election...Such consent election shall be conducted under the direction and supervision of the Regional Director. The method of conducting such consent election shall be consistent with the method followed by the Regional Director in conducting elections pursuant to 102.69 and 102.70 except that the rulings and determinations by the Regional Director of the results thereof **shall be final**, and the Regional Director shall issue to the parties a certification of the results of the election, including certifications of representative where appropriate, with the same force and effect, in that case, as if issued by the Board, provided further that rulings or determinations by the Regional Director in respect to any amendment of such certification shall also be final. See

On various dates in October and November 2012, by e-mail, letter and in person, the Union demanded that Respondent recognize, meet and bargain with it as exclusive collective bargaining representative of the bargaining unit.<sup>4</sup> Respondent has, to date, refused to respond to these requests. In this connection, Respondent now complains about the composition of the unit, and does so only after it had voluntarily entered into a valid consent election agreement which clearly set forth the agreed-upon unit description and composition. Notably, during the representation case, Respondent never claimed that there was an oral side agreement between it and the Union. Only after it failed to submit evidence in support of the objections and after the Regional Director issued the final certification did Respondent raise the supposed existence of this alleged agreement.

Sections 102.79 and 102.62(a) of the Board's Rules and Regulations grant Regional Directors the authority to make rulings and determinations in the context of consent elections as well as the authority to issue final certifications. Having entered into a valid consent election agreement and thereafter participated in the election conducted pursuant to that agreement, and having participated in the Regional proceeding that disposed of the post-election issues, Respondent cannot now complain about the legitimacy of those proceedings.

Additionally, Respondent's claim that the ALJ incorrectly granted the Union's Motion in Limine thereby barring Respondent's attempt to offer evidence of the alleged oral ad hoc agreement also fails of its own weight.

In making this claim, Respondent states in its exceptions that the "[j]udge relied upon the fact that Affinity did not inform the Region that the Agreement precluded the Hospital from

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also § 102.79 **Consent-election agreements**. Where a petition has been duly filed, the parties involved may, subject to the approval of the regional director, enter into an agreement governing the method of conducting the election as provided for in § 102.62(a), insofar as applicable

<sup>4</sup> GC Ex. 3, 4; Tr. 20-27

submitting any evidence or a position statement in support of its objections.”<sup>5</sup> Respondent submits that in its Opposition to the Motion in Limine, it argued, albeit for the first time, that the oral ad hoc agreement precluded the Respondent from submitting to the Region any evidence in support of its objections. There is simply nothing to support the Respondent’s claim that the ALJ gave inappropriate weight to the admitted fact that Respondent had never raised this matter of the ad hoc agreement to the Region, but alone any details of the supposed agreement. As the ALJ in his Order Granting the Motion specifically notes:

On September 7, 2012, the Regional Director advised Respondent in writing that failure to submit evidence in support of its objections would result in their being overruled. The Regional Director’s Report of September 21, 2012 gives no indication that he was advised in writing that Respondent was relying upon an oral ad-hoc agreement with the Charging Party in failing to submit evidence or a position statement with the Region.

Respondent also argues, but to no greater effect, that the ALJ improperly dismissed Respondent’s Second Affirmative Defense based on the Board’s policy against re-litigation of representation issues. Respondent maintains that the alleged oral ad-hoc agreement required confidentiality, which it believed to be a “compelling reason” for not disclosing the agreement to the Region during the representation proceeding. Respondent illogically claims that the ALJ tacitly recognized the existence of the alleged oral agreement when he found that Respondent was not permitted to “re-litigate the representation proceedings.” Respondent seeks to buttress this argument by noting that the ALJ concluded that he was not required to defer the representation issues, namely the objections, to an arbitrator.

Respondent’s arguments lack merit, find no support in Board precedent and are in derogation of both the Board’s Rules and Regulations and the statute itself. Notably, Respondent fails to present any Board law to support its assertion that an arbitrator can be vested with

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<sup>5</sup> R. Ex. Brief at pg. 9

authority to make final determinations on objections and challenges. In the context of a consent election, Sections 102.79 and 102.62(a) of the Board's Rules and Regulations grant Regional Directors authority to make such determinations and to issue final certifications in consent election situations. Again, in ruling on the Motion in Limine the ALJ correctly concluded that, assuming *arguendo* the existence of a confidentiality clause in the alleged oral ad hoc agreement, Respondent waived any reliance on the terms of the supposed agreement by its failure to raise even the existence of such an agreement during the representation proceeding.

In addition, Respondent not only failed to submit any evidence to support its objections to the conduct of the election, it failed to request review of the Regional Director's Report on Challenged Ballots and Objections pursuant to Section 102.69(c)(2).<sup>6</sup> Respondent's attempt here, through the use of thinly supported affirmative defenses, to resurrect matters pertaining only to the representation case is unfounded.<sup>7</sup> The ALJ appropriately followed historical precedent that a respondent in a Section 8(a)(1) and (5) proceeding is not entitled to re-litigate issues that were or could have been raised in prior representation proceedings.<sup>8</sup>

A second matter raised by Respondent concerns the ALJ's decision to limit Respondent's effort to litigate, as part of an affirmative defense, the matter of this Union's affiliation with another union subsequent to the certification. Respondent seeks to justify its refusal to recognize and bargain with the Union predicated on this event. In this connection, Counsel for the Acting General Counsel submits that Respondent's attempt to raise an affirmative defense predicated on the Union's subsequent affiliation was nothing more than a ploy aimed at precluding the Acting

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<sup>6</sup> JX. 3 at Ex. 1 & 2.

<sup>7</sup> In the instant case, the ALJ issued an Order dated April 26, 2013, finding that Respondent waived any reliance on such an agreement.

<sup>8</sup> *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941); *LTV Electrosystems, Inc.*, 166 NLRB 938, 939-40 (1967), *enfd.* 388 F. 2d 683 (4th Cir. 1968); *Warren Unilube, Inc.*, 357 NLRB No. 9, slip op. at 1 (2011); Board's Rules and Regulations Sections 102.67(f) and 102.69 (c).

General Counsel for successfully moving for summary judgment in the test of certification matter.

First, the ALJ permitted the Respondent to present any evidence that it relied on this affiliation when it refused to recognize and bargain with the Union.<sup>9</sup> The ALJ also stated on the record that he would allow Respondent to put into the record whatever evidence on this issue it had in its possession. Respondent failed to put any evidence regarding the Union's affiliation into the record. It stated that it needed to subpoena numerous union witnesses to gather its evidence to support its affiliation defense. The ALJ correctly noted in his decision that under established Board law, Respondent failed to meet its burden to show that it was justified in refusing to recognize and bargain with the Union based on evidence that there was a change in continuity occasioned by the affiliation sufficiently dramatic to alter the Union's identity.

Indeed, again as noted by the ALJ, Respondent failed and refused to recognize and bargain with the Union from the Union's initial demand on October 16, 2012, six weeks before the alleged affiliation on November 30, 2012. (*See* Motion in Limine, pg. 2). Respondent, in its Second Amended Answer to the Complaint in Case No. 08-CA-093035 dated February 8, 2013, averred as an affirmative defense that subsequent to the election and issuance of the certification, the Union affiliated with another labor organization. Prior to the start of the hearing the ALJ issued an Order granting the Union's petition to revoke Respondent's subpoenas as they pertained to its affiliation defense. The ALJ's Order provided that Respondent would be permitted to make an offer of proof with regard to the subpoenaed information sought on the

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<sup>9</sup> See also Order Granting Charging Party's Motion in Limine at pg. 2

affiliation issue and would also be permitted to present evidence already in its possession at trial.<sup>10</sup> Respondent neither made an offer of proof nor submitted any evidence into the record. The ALJ clearly gave Respondent an opportunity to present evidence in support of its affirmative defense that the Union's affiliation six weeks after the Union's demand for recognition and bargaining justified its refusal to recognize and bargain with the Union. However, Respondent failed to present any evidence in support of that affirmative defense and the ALJ's finding that Respondent violated Section 8(a)(1) and (5) was not error.

In a footnote in its exceptions to the Administrative Law Judge's decision (Exceptions, p. 8 n.1), Respondent asserted that the Certification of Representative "is invalid" under *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted*, 81 U.S.L.W. 3629 (U.S. June 24, 2013) (No. 12-1281). For the reasons below, this argument is without merit.

As an initial matter, Respondent agreed to a consent election. Under that well-established procedure, the Regional Director's issuance of the Certification is final. *See Gen. Tube Co.*, 141 NLRB 441, 445 (1963); NLRB Casehandling Manual (Part Two) Representation Sec. 11084-11084.1.

In addition, the Regional Director's issuance of the Certification of Representative in this matter is unaffected by any issue concerning the composition of the Board. In the absence of a Board quorum, the Regional Director had the authority to issue the certification and process the representation petition under the Board's 1961 delegation of its decisional authority in representation cases. *STG Int'l, Inc.*, 2013 WL 1786666 at \*1, n.1. Indeed, three Courts of Appeal have held that valid prior delegations of Board authority survive a loss of Board quorum. *See Frankl v. HTH Corp.*, 650 F.3d 1334, 1354 (9th Cir. 2011), *cert. denied* 132 S.Ct. 1821

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<sup>10</sup> Pages 14-18 of Respondent's Exceptions refers to facts not in the record and Counsel for the Acting General Counsel has no knowledge of those facts and thus cannot respond.

(2012); *Overstreet v. El Paso Disposal, LP*, 625 F.3d 844, 853 (5th Cir. 2010); *Osthus v. Whitesell Corp.*, 639 F.3d 841, 844 (8th Cir. 2011). Therefore, Respondent's attempt to justify its failure to recognize and bargain with the Union by challenging the Certification is without merit.

**II. The Judge Did Not Err by Concluding that Affinity's Termination of Ms. Wayt Violated the Act.**

Respondent claims that the ALJ improperly characterized Ann Wayt as one of the more prominent Union supporters and that he erred by finding that her support for the Union was instrumental in Respondent's decision to remove her. Respondent also argues, without any legal support, that the ALJ was required to make a finding of: (1) which of Respondent agents had *direct* knowledge of Wayt's union activity; (2) whether Wayt's supervisor, Paula Zinsmeister, had knowledge of Wayt's union activity; and (3) whether Human Resources manager Angela Boyle had direct knowledge of Wayt's union activity. In asserting that the ALJ erred by not making these findings, Respondent ignores the record evidence and Board precedent. Such findings are simply not crucial to the ALJ's ultimate finding that Respondent had knowledge of Wayt's union activities.

The record evidence establishes that: (1) Wayt was active in the Union's campaign and spoke with the co-workers in her unit, as well as with nurses who worked in other units at the hospital<sup>11</sup>; (2) many of these conversations took place in the break room; (3) Wayt did not hide her support for the Union- she openly attended Union luncheons at Respondent's facility and she attended Union meetings in the evening;<sup>12</sup> (4) Wayt's photograph appeared on the Union's

<sup>11</sup> Tr. at 216

<sup>12</sup> Tr. at 217-18;

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pamphlet which circulated at the hospital a few weeks before the August 28, 2012 election.<sup>13</sup>

The pamphlet showed Wayt giving two-thumbs up with a quote saying, “we are voting yes for NNOC to work towards a contract that improves our standards, including staffing, on-call pay, wages and working conditions.”<sup>14</sup>; (5) Respondent’s witnesses admitted that they saw the Union’s pamphlet, Wayt’s photograph and admitted that they knew that Wayt supported the Union.<sup>15</sup>

Respondent’s argument that the ALJ erred by failing to make a specific finding that human resources manager Boyle and Wayt’s direct supervisor Zinsmeister had knowledge of Wayt’s union activity is unsupported by Board law. The ALJ correctly concluded that there was significant direct and circumstantial evidence of Wayt’s protected activities and of the Respondent’s knowledge of those activities. Likewise, Respondent provides no legal authority to support its Exception that to establish union activity, the Counsel for the Acting General Counsel is required to present evidence to show that Wayt wore buttons, clothes, etc., engaged employees in the parking lot, or personally distributed the flyer in which she is pictured.<sup>16</sup>

As noted above, the ALJ’s decision clearly sets forth all of the evidence he relied on in finding that Wayt engaged in protected activities. He did not, as suggested by Respondent, limit his finding to the evidence of Wayt’s photograph on the Union’s pamphlet. He appropriately and correctly considered the record evidence as a whole in concluding that Wayt engaged in union activities and that Respondent had knowledge of those activities.

Respondent claims that the ALJ erred in finding direct evidence of anti-union animus. The Respondent ignores record evidence and Board precedent in suggesting that there is no

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<sup>13</sup> Tr. at 220; G.C. Ex. 11

<sup>14</sup> G.C. Ex. 11

<sup>15</sup> Tr. at 79, 151-2 (Osterman); 116 (McDonald); 117-24, (Union Pamphlet discussed at managers meeting); 424 (poster board of Union supporters in cafeteria); 497 (Perone).

<sup>16</sup> Respondent’s Exceptions at pg. 21

evidence of animus here. The ALJ correctly considered the record as a whole in finding anti-union animus. The ALJ provided specific examples of direct and circumstantial evidence of animus, including the abundant direct evidence of disparate treatment. ALJD at 25-31. Respondent cannot ignore that between August 28, 2012 and January 3, 2013, it violated the Act nine times. The ALJ correctly concluded that Respondent harbored anti-union animus and the record is replete with that evidence.

Respondent parses word usage and contends that the ALJ erred in considering the timing of Wayt's discharge as evidence of Respondent's discriminatory motive.<sup>17</sup> Respondent's grammatical parsing is of no consequence and is irrelevant in the finding unlawful motive. Respondent attempts to except independently to each piece of evidence that the ALJ relied on in finding discriminatory motive. This piecemeal analysis is plainly inconsistent with established Board precedent. Board law is clear that the record as a whole should be considered in making a finding of discriminatory motive.<sup>18</sup> It is readily apparent from the ALJ's decision that he considered the record evidence as a whole in finding both direct and circumstantial evidence supporting his finding of discriminatory motive.<sup>19</sup> The ALJ considered the timing of the discharge in connection with the Union's campaign; the timing of Respondent's investigation and its failure to take action to protect the patient it claimed Wayt had endangered; Respondent's faulty investigation in which it never addressed with Wayt the incidents falsely imputed to her until after the decision to discharge her; the clear and abundant evidence of disparate treatment and Respondent's failure to follow its own disciplinary policy.

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<sup>17</sup> See Respondent's Exceptions brief, p. 25.

<sup>18</sup> The Board mandates that the evaluation of an employer's intent and motives proceed from an assessment of the "total circumstances proved." Fluor Daniel, Inc., 304 NLRB 970 (1991). The required analysis involves the examination of both direct and circumstantial evidence as to motive. As the Board has explained, "[p]roof of discriminatory motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole." Embassy Vacation Resorts, 340 NLRB 846, 847 (2003).

<sup>19</sup> ALJD, p. 25.

Respondent's contention that there can be no finding of an unlawful motive in terminating Wayt because at the time of her discharge the results of the election were still an uncertainty is equally without merit. Respondent provides no legal support for its hypothesis that a Section 8(a)(1) and (3) violation cannot be found when the results of a representation election are not final. In this connection, the ALJ properly noted in his decision that it is difficult to imagine a more effective coercive message to the union supporters in the bargaining unit than the termination of a nurse with an exemplary employment history.<sup>20</sup>

Respondent further suggests that the ALJ erroneously inferred discriminatory motive based on the timing of the investigation into Wayt's conduct initiated by Respondent's Director for Critical Care Services Susan Kress.<sup>21</sup> It incorrectly suggests that the timing of Kress' initial, albeit incomplete, investigation which fell on the day of the union election is not probative. Plainly, Board law supports an examination of timing as an element in such a finding.<sup>22</sup> Furthermore, the record showed that any alleged misconduct by Wayt was not formally raised until August 29 when Rhonda Smith complained to her supervisor that she was not timely relieved at the end of her shift.<sup>23</sup> Kress took it upon herself to conduct her own investigation into Wayt's conduct on August 28. Respondent contends that the ALJ has no basis to pass judgment on when Respondent should begin its investigation into improper patient care. Respondent again is wide of the mark. The ALJ clearly considered the timing of Kress' investigation and her

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<sup>20</sup> ALJD, p. 27.

<sup>21</sup> Respondent's suggestion that the record is barren of any evidence of animus outside the context of ADO's is equally unsupported. As noted previously, the ALJ concluded that the record, as a whole, substantiated a finding of union animus, including Kress's role in the investigation of Wayt, her lack of credibility as a witness, and her role in numerous incidents found to violate Section 8(a)(1), including her threats of physical harm to employees who completed ADO forms; by more closely scrutinizing patient charts, by stating how much she would enjoy disciplining a prominent union supporter and by retaliating against employees that worked in the ICU by creating more onerous working conditions.

<sup>22</sup> See, Jewish Home for the Elderly, 343 NLRB 1069, 1107 (2004).

<sup>23</sup> ALJD, p. 8

failure to talk to Wayt about the alleged misconduct.<sup>24</sup> Respondent claims that given the allegations of improper patient care and the risk of harm to the patient, it was obligated to conduct an immediate investigation. However, Respondent conveniently ignores that Respondent assigned Wayt to continue caring for the patient at issue for several days after the alleged incident- well after Kress had conducted her preliminary investigation.

Respondent suggests that in considering the record evidence of disparate treatment, the ALJ erred by applying an “apples and oranges” analysis. Respondent asserts that the nurses used as comparators are not *proper* comparators as they were disciplined and not terminated for substandard patient care. This argument clearly demonstrates that Wayt was treated less favorably than other employees who were given discipline for engaging in more egregious conduct. Respondent treated other nurses more leniently with verbal warnings or written warnings for repeated conduct. Wayt, a known union supporter, was fired.

Respondent speciously argues that most of the disciplinary actions issued to other employees arose from *errors* in patient care rather than from the omission of patient care. Respondent’s suggestion that an error in patient care is somehow a ‘lesser’ offense fails to admit that either an error or an omission could conceivably endanger a patient’s lives. Falsely documenting that medication has been administered to a patient when it has not, can create a dangerous situation and a serious health hazard. To claim that such a situation is somehow a lesser offense stretches credulity. And, in any event, the ALJ cited numerous instances of nurses who received discipline, rather than termination, because they had omitted some aspect of patient care and/or because they had incorrectly charted their hourly rounding. Conduct on all fours with the conduct Wayt was accused of and which formed the pretext for her termination.<sup>25</sup>

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<sup>24</sup> See ALJD, p. 25.

<sup>25</sup> See ALJD at 21-24, *See also* GC Exhibits 6, 11, 14

Next, Respondent submits that the ALJ erred in his review of the Hospital's investigation into Wayt's discharge and the application of Respondent's disciplinary policy. Respondent's claim that McDonald and Zinsmeister met with Wayt about her alleged misconduct is a mischaracterization of the September 5 meeting. Respondent suggests that Respondent informed Wayt that her conduct was under investigation.<sup>26</sup> The record is clear that on September 5, McDonald and Zinsmeister claimed that they were performing a chart audit and there was no mention of any alleged misconduct. Tr. 822-823. Respondent continued its ruse in the September 13 meeting with McDonald and Zinsmeister, Zinsmeister's notes from that meeting reflect that they inaccurately and falsely told Wayt that Respondent had four witnesses who reported that Wayt did not round on the patient. Tr. 187; G.C. Ex. 7 at 11-12. At the time of that meeting, Respondent had interviewed a single witness, not the four that it claimed. Tr. 793-94.

Indeed, the ALJ did not err in concluding that Respondent decided to terminate Wayt long before it had adequately investigated Wayt's alleged misconduct. The record shows that as early as September 4, Respondent concluded that Wayt falsified the chart and failed in her patient care duties. At this point, Respondent relied solely on Kress' word and the patient's chart without addressing these "failures" with Wayt. Notwithstanding Respondent's asserted need for quality patient care, there is no evidence to show that the Respondent had any follow-up with the patient or the patient's family about the care given by Wayt. Respondent also ignores the record testimony that the night nurse who relieved Wayt on August 28 also made charting errors. Zinsmeister admitted that the night nurse incorrectly noted that the patient's skin was intact. TR. 191-92. Zinsmeister testified that the night nurse's charting was simply an "error" and she was not issued any discipline for the incident. Tr. 191-92; 854. Wayt, however, was fired.

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<sup>26</sup> Respondent's Exceptions, p. 34.

Respondent's corporate quality director, Veronica Benson herself questioned Respondent's hasty decision to terminate Wayt. After being informed that Wayt was to be terminated, Benson responded:

**[i]t is not uncommon** to have some time discrepancies such as 9ish, 9:30 or so....I'd be interested to (sic) know the **details on this nurse including age, tenure and prior disciplinary action.** If we determine this is falsification...(sic) how has the facility handled this in the past? **Seems a weak case for termination** without more information.<sup>27</sup>

It is undisputed that Boyle failed to respond to Benson's questions. Boyle forwarded Benson's e-mail to Jason McDonald and Paula Zinsmeister, neither of whom provided Benson with the requested information. Id. While the Hospital then gave the appearance that it was conducting an investigation, the record shows that the decision was already made.<sup>28</sup>

Thus, Respondent did not take witness statements until after the September 13 suspension meeting and then refused to consider probative facts showing that Wayt performed proper patient care.<sup>29</sup> Namely, Respondent learned in its investigation from Smith's statement that Wayt had been in the room at 10:00 a.m., which contradicts McDonald's assertions that Wayt did not check on the patient until noon. G.C. Exh. 7 at 14. Smith also stated that Wayt properly addressed the patient's pain and admitted that Wayt had the opportunity to perform the head-to-toe assessment when Smith was not in the room. However, these facts were given no weight in the Respondent's decision to terminate. Also, Respondent's assertion that it gave Wayt the opportunity to submit a defense is not corroborated by Respondent's own notes of the meeting. Tr. 790, G.C. Ex. 7 at 11-12. Respondent never conducted a thorough and fair inquiry

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<sup>27</sup> G.C. Ex. 19 at 6-7.

<sup>28</sup> Boyle testified that her first impulse was to proceed immediately to termination and thus forgo the investigatory meeting to avoid Weingarten rights. Tr. 1061-62. Additionally, Boyle, Director testified that prior to McDonald's phone call with Wayt, Boyle directed both McDonald and Zinsmeister that Wayt's meeting was *disciplinary* and that the decision was already made to proceed straight to discipline and to terminate Wayt. Tr. 1060-61; GC. Ex. 19.

<sup>29</sup> Zinsmeister admitted that she only had one witness for fifteen minutes and one witness for the other two hours. Tr. 195.

into the allegations prior to reaching the decision to terminate Wayt. The ALJ did not err in reaching the conclusion that the Respondent's investigation was cursory. His reliance on this faulty investigation, coupled with the totality of the evidence showing direct and circumstantial evidence of the Respondent's discriminatory motive lead to an ultimate conclusion squarely based on the record evidence and consistent with settled Board law.

The ALJ properly analyzed the record evidence under established Board law in concluding that Respondent's failure to follow the dictates of its own disciplinary policy is further evidence of its improper motive. Respondent incorrectly asserts that the ALJ gave improper weight to Respondent's failure to follow its own policy. The ALJ's decision clearly shows that he considered the record as a whole in making his finding that Wayt's discharge was unlawfully motivated. Although the Respondent would have it otherwise, the ALJ's inquiry did not turn solely upon the Respondent's failure to apply its disciplinary policies.<sup>30</sup>

### **III The Judge Did Not Err by Concluding that, by Reporting Ms. Wayt to the Board of Nursing, Affinity Violated the Act.**

Respondent argues that the record does not support a finding that Respondent violated the Act when it reported Wayt to the state Board of Nursing. It claims that the ALJ had no basis to infer that Respondent's decision to report Wayt to the State Board of Nursing was motivated by her protected activities. It is clear from the ALJ's analysis that he properly followed Board law in finding that reporting Wayt to the state nursing board was discriminatory and violates Section 8(a)(1) and (3).

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<sup>30</sup> Respondent's exception to the ALJ's finding that the record shows that the Hospital had a reasonable good faith belief that Wayt engaged in the offenses of which she was accused is one of argument and not of reversible error and/or application of the law. In that regard, Counsel for the General Counsel renews its arguments made in its Trial Brief.

Respondent's report to the state nursing board jeopardized Wayt's nursing license and her future employment prospects. The record clearly shows that Respondent had previously reported only one other nurse who was terminated for improper patient care and falsification of hospital records.<sup>31</sup> That nurse was terminated for photographing a harvested eye.

The record is replete with evidence of other nurses who were disciplined and/or terminated for significant misconduct but who were not reported to the nursing board. Without any explanation, however, Respondent apparently concluded that Wayt's alleged misconduct warranted such a report. In so doing, Respondent has never explained why the performance issues related to employees Bowser and Shapiro which endangered patients' lives did not warrant such a report, while Wayt's alleged misconduct did. Respondent did not report a single nurse who received verbal and/or written warnings for charting failures and failing to round on patients. The weight of evidence shows that Respondent's decision to report Wayt was unlawfully motivated. Respondent's failure to report nurses who risked patients' lives contradicts any suggestion it might make about being duty-bound to report Wayt. The ALJ properly concluded that Respondent's action was discriminatory and violates Section 8(a)(1) and (3) of the Act.

**IV. The Judge Did Not Err by Concluding that the Written Warning that Affinity Gave To Ms. Wayt Violated the Act.**

Respondent asserts that the ALJ erred in finding that the written warning to Wayt violated the Act. In so doing, Respondent relies on an absence of evidence that Respondent's pharmacy director John Perone either knew of Wayt's support for the Union or that he had any

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<sup>31</sup> Again refusing to consider any evidence to support Wayt's proper performance, McDonald told the State Board of Nursing that Wayt did not enter the patient's room until noon despite Smith's statement that Wayt entered the Patient's room at 10:00 a.m. Tr. 67. This is further evidence to infer that Wayt's support for the Union played a role in Osterman's decision to report Wayt to the State Board of Nursing.



animus toward employees who engaged in union or other protected activity. In this connection, Respondent again ignores the relevant record evidence, to wit the undisputed evidence that McDonald and Zinsmeister decided to issue this written warning and not Perone. As we have shown previously both McDonald and Zinsmeister were aware of Wayt's union sympathy and support. Furthermore and importantly, the incident that occurred between Perone and Wayt occurred on August 30, the day after the election. However, Wayt was not given the written warning until September 5 which was well after the decision had been taken to terminate Wayt. Counsel for the Acting General Counsel submits that the written warning issued, not by Perone, rather issued by McDonald and Zinsmeister was intended as a makeweight to buttress the unlawful discriminatory decision to terminate her.

It is important to note that the discipline issued to Wayt asserts that she failed to comply with hospital policy and exhibited an unprofessional attitude when she told Perone that she would help him resolve the Pyxis discrepancy at a later time.<sup>32</sup> Undercutting the rationale for this discipline is Perone's admission that as the director of the pharmacy and consistent with the Respondent's Pyxis policy, he has authority to resolve such discrepancies without the assistance of any other person.<sup>33</sup> Perone admitted that Wayt was busy at the time he was working on the Pyxis machine. Hospital policy, as noted above, specifically provides that Perone could have resolved the issue in doubt without Wayt's assistance. Furthermore, Wayt's immediate supervisor Zinsmeister conceded that patient care- which was what Wayt was involved with at the time- has a higher priority than resolving a Pyxis discrepancy.<sup>34</sup> Accordingly, Respondent's claim that Wayt was disciplined for "failure to comply with hospital policy" is mere invention.<sup>35</sup>

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<sup>32</sup> Resp. Ex. 16.

<sup>33</sup> Tr. 502; 513-14.

<sup>34</sup> Tr. 501; 879.

<sup>35</sup> Resp. Ex. 16 (Violation noted- Failure to Comply with Hospital Policy).

As for the question of Wayt's supposed "unprofessional conduct." The record suggests otherwise. For example, Perone admitted that other employees have been rude to him and that he has reported this behavior to their supervisors.<sup>36</sup> But there is no evidence presented by Respondent that any such employees were disciplined in any way for such "unprofessional conduct" or rudeness. And, significantly, Respondent has no records of any employee disciplined for refusing to resolve a medication discrepancy.<sup>37</sup>

Finally, Wayt testified and Perone corroborated her testimony that shortly after the incident relied upon by the Hospital to issue its warning, Wayt apologized to Perone for a response she recognized he might have taken as perfunctory. In sum, the ALJ's finding that the discipline violated the Act when the record failed to show a violation of the Employer's rules or policies and when the target of the discipline was an exemplary employee like Wayt is fully supported by the record evidence and the inferences fairly drawn from that evidence.

V. **The Judge Did Not Err by Concluding that, by denying Ms. Mahon Access to the Facility, Affinity Violated the Act.**

Respondent ignores the record evidence that supports the ALJ's determination that there was no HIPAA violation when union representative Mahon presented a letter in Wayt's defense to her termination.<sup>38</sup> In this connection, Respondent suggests that the Board recognize and appreciate the key role that HIPAA plays in patient care and that, in effect, the Board make secondary the policies of the NLRA to the policies that support HIPAA. Counsel for the Acting General Counsel submits that Respondent's formulation of this issue is nothing more than a red

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<sup>36</sup> Tr. 503.

<sup>37</sup> Tr. 1080-83.

<sup>38</sup> See, ALJD at p. 28.

herring. The importance of HIPAA is not in dispute here and giving priority to the policies that underlie HIPAA is not relevant in this case.

The ALJ properly concluded that the Respondent never enforced its rule barring non-employees from the cafeteria until after the Union prevailed in the election. Respondent seized on an opportunity to prevent the Union from accessing its facility by alleging that the Union's letter in Wayt's defense amounted to a violation of HIPAA. Respondent ignores the admission by its own HIPAA Compliance Officer Pat Kline that the Union's letter did not identify the patient and that without additional information, the patient could not be identified based on the information contained in the letter.<sup>39</sup> Kline does nothing more than assert that she had "concerns" about the letter. However, she goes on to admit that in the normal course, the Hospital would do no more than to issue a verbal warning to an individual involved in this type of situation.<sup>40</sup> Notably, in the meeting with Mahon, Wayt, and Kline, when asked how the letter should have been written, Kline replied "it was up to Wayt to figure out for herself how she could talk about the incident without violating what the hospital perceives as the HIPAA law."<sup>41</sup> Respondent used this incident to justify its decision to permanently exclude Mahon and the Union from all areas of the facility, including the cafeteria and parking lot. The Board has held that employers violate Section 8(a)(1) by selectively and disparately denying nonemployee union organizers access to public areas including cafeterias.<sup>42</sup>

Assuming *arguendo* that the Union's letter was a HIPAA breach, the Board has found that in certain situations, a union's need for information, which might otherwise violate HIPAA,

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<sup>39</sup> Tr. 1153-1160.

<sup>40</sup> Tr. 1153-1160.

<sup>41</sup> Tr. 440.

<sup>42</sup> See Southern Maryland Hosp. Ctr., 293 NLRB 1209 (1989).

outweighs a patient's privacy concerns. *See, Salem Hospital*, 359 NLRB No. 83 (2013), in which the Board noted that some individually identifiable health information, including a patient's identity, may require disclosure. Respondent presented no viable, non-discriminatory reason to justify excluding Mahon from its premises. The timing of her exclusion, a record replete with Respondent's anti-union animus, Respondent's refusal to recognize and bargain with the Union all show that the rule was discriminatorily adopted and violates Section 8(a)(1).<sup>43</sup>

The ALJ correctly found that there was no violation to the patient's privacy here. He concluded that even if the letter could be considered a HIPAA violation, Respondent had no non-discriminatory reason to take any action against Mahon and certainly not any action more stringent than a verbal warning.

**VI. The Judge Did Not Err by Concluding that, through the Actions of Kress, Affinity Violated the Act.**

In its exceptions, Respondent again mistakenly asserts that employees' use of the "assignment despite objection" (ADO) forms is not protected concerted activity. It further suggests that since, in its view, the completion of these ADO forms is not protected concerted activity, Kress' threats and other coercive conduct with regard to these forms do not violate Section 8(a)(1). Respondent ignores the record evidence showing that the Union gave the ADO forms to employees to document unsafe situations or practices assigned to them by the Respondent. Kress loudly complained that employees who submitted the ADO forms "wrote her

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<sup>43</sup> *See, Cannondale Corp.*, 310 NLRB 845, 849 (1993) (showing a Section 8(a)(1) violation for discriminatory adoption when an employer promulgates a non-solicitation rule shortly after a union campaign, with evidence such as anti-union speeches given to employees and the employer giving no indication the rule was created for discipline and production).

up.”<sup>44</sup> Kress then stated that if employees thought they could get away with writing Kress up, she would make them work short-staffed.<sup>45</sup> Clearly, based on Kress’ response to the submission of the ADO forms, the ADO forms worked as intended. The employees used the forms to change their working conditions by giving Respondent notice of inappropriate, unsafe situations and assignments. Furthermore, Respondent knew that the Union gave the nurses the ADO forms. The ADO forms notify the employer of situations which inherently impact employees’ terms and conditions of work. The record here shows that the ADO forms were most commonly used to document short-staffing situations, which impact all of the nurses on a given shift. The use of the ADO forms is activity protected by Section 7.<sup>46</sup>

Respondent’s argument that the use of the ADO forms puts patients at risk is so misplaced as to border on the ludicrous. It is clear from the record that the ADO forms are used to put Respondent on notice of what employees believe to be unsafe or hazardous situations. The use of the forms is not in any conceivable sense a refusal to perform work or any type of work stoppage. Respondent’s contention that the “imminent danger” doctrine is relevant here is meritless. There is no danger to patients when nurses complete ADO forms.<sup>47</sup> Furthermore, Respondent’s claim that the ADO forms present a danger to Respondent’s risk management system is wholly unsupported as is Respondent’s asserted fear that the Union would seize control of its risk management system.

Respondent’s contention that the completion of the ADO forms is not protected concerted activity is baseless. It makes no cogent argument as to why Kress’ conduct does not violate

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<sup>44</sup> Tr. 408

<sup>45</sup> Tr. 409.

<sup>46</sup> Meyers Industries, 268 NLRB 493, 497 (1984) (Meyers I); Reef Industries, Inc. v. NLRB, 952 F.2d 830, 835 (5<sup>th</sup> Cir. 1991); Prill v. NLRB, 835 F.2d 1481, 1484 (D.C. Cir. 1987) *cert. denied*, 487 U.S. 1205 (1988).

<sup>47</sup> Respondent’s assertion that the Union’s use of the ADO forms is coercive and violates Section 8(b)(1) [sic] is irrelevant and not part of the instant case. Respondent’s brief, p. 53.

Section 8(a)(1). Kress admitted that she made physical threats that she would slap completed ADO forms onto employees' foreheads. The evidence is clear that after Kress made the threat about the ADO forms, she started to scrutinize the patient charts more closely. TR. 409-10. After finding a charting error committed by a known union supporter, Kress coercively announced to employees that she was going to enjoy disciplining that employee. Tr. 410. Kress also threatened employees that if employees were going to complete ADO forms, they would work short-handed. Kress then directed a nurse to a different unit to short-staff the employees. Tr. 409. The ALJ properly found that Kress' conduct violates Section 8(a)(1) of the Act. Each of these actions violates Section 8(a)(1) of the Act. The ALJ correctly found Kress' conduct to be coercive.

For the reasons stated above, Counsel for the Acting General Counsel respectfully requests that the Respondent's Exceptions be denied and the ALJ's findings be affirmed.

Dated at Cleveland, Ohio this 10<sup>th</sup> day of September, 2013.

Respectfully submitted,

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