

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

GOOD SAMARITAN MEDICAL CENTER

And

CAMILLE A. LEGLEY, JR., An Individual

CASE 01-CA-082367

1199SEIU HEATHCARE WORKERS EAST

and

CAMILLE A. LEGLEY, JR., An Individual

CASE 01-CB-082365

**EMPLOYER'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE  
ADMINISTRATIVE LAW JUDGE'S DECISION DATED AUGUST 8, 2013**

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Pursuant to Section 102.46(a) of the Board's Rules and Regulations, as amended, Good Samaritan Medical Center ("Good Samaritan") files the following Brief in support of its Exceptions to the Decision issued by Administrative Law Judge Raymond P. Green on August 8, 2013, and states as follows:

## **I. PRELIMINARY STATEMENT**

This matter was heard before the Honorable Raymond P. Green, Administrative Law Judge, on April 17 and 18, 2013. The consolidated complaint alleged that the Union caused Good Samaritan to terminate Legley's employment because he asserted his right to not join the Union and that by enforcing its Workplace Civility Policy as it applied to Legley, Good Samaritan violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act.

The ALJ ignored several important facts, including that Legley was an at-will probationary employee at the time of his discharge, that he had demonstrated an increasingly difficult personality on successive occasions, that he did not, in fact, oppose joining the Union and that there is no evidence that the Hospital terminated Legley because he raised the issue of union membership at orientation. Moreover, the ALJ failed to apply the correct legal standard in deciding the case. Accordingly, the ALJ's decision should be reversed.

## **II. FACTUAL BACKGROUND**

### **A. Legley is conditionally offered the hard-to-fill position of weekend Boiler Operator.**

Good Samaritan is a member of the Steward Health Care System, New England's largest community-based hospital network. In Fall 2011, Good Samaritan was searching to fill a 16-hour Boiler Operator position. The Boiler Operator position was a difficult one to fill because it involved two weekend night shifts. (TR. 172-173.)<sup>1</sup>

Legley became aware of the position on or about September 7, 2011 and applied for the position. (TR. 29; G.C. Ex. 11.) Legley interviewed with Hospital Facilities Manager Sean Brennan ("Brennan") as well as other members of the department, including Lead Operator Kevin Jordan ("Jordan"). During the interview process, Legley was informed that the Hospital was unionized and he replied that he had no problem with that. (TR. 34.) Jordan recommended hiring Legley to Brennan because Legley "had the qualifications, he didn't mind the hours, and he seemed like a good candidate." (TR. 174.) On November 15, 2011, Brennan informed Hospital Human Resources Manager, Jennifer Patnaude ("Patnaude") that he wanted to make an offer to Legley. (G.C. Ex. 12.)

Thereafter, on or about November 28, 2011, the Hospital made Legley a conditional offer of employment. (G.C. Ex. 13.) The letter explicitly stated that Legley's first three months of employment would "be an introductory period to allow you and Good Samaritan Medical Center to determine whether you are a good fit for the position." Id.

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<sup>1</sup> All references to the hearing transcript will be made by page number and will be listed as ("TR. \_\_").

**B. In Legley's routine pre-employment procedures, a pattern of difficult behavior emerges.**

Legley reported to the Hospital Human Resources department on December 5, 2011, to meet with human resources, complete paperwork and have his pre-employment physical. This was Legley's first interaction with anyone from the Hospital outside of the Facilities Department. When he arrived, Patnaude interviewed Legley. She found him to be rude and disrespectful. (TR. 259.) In her notes, Patnaude described Legley as follows: "Seemed like it was bothering him to answer my questions and gave very brief answers." (G.C. Ex. 6.)

Unbeknownst to Patnaude at that time, Legley was also disagreeable in his interactions with HR Assistant Jennifer Dorsey ("Dorsey") in completing his pre-hire paperwork, as well as with Medical Assistant Annette Miller ("Miller") and Employee Health Nurse Eileen Rainey ("Rainey"), who gave Legley his pre-employment physical. As Dorsey testified, from her first interaction with Legley via telephone, she knew he would be difficult: "Just the overall tone. I just knew when he would come -- I had the perception that when he was going to come in, he was going to be difficult. And usually over the phone, people will have questions, but I felt like he had extensive questions about is every step and why the documentation was needed." (TR. 290.) Dorsey further testified that she felt she "couldn't get a word in edgewise" and feeling when she got off the phone that Legley "was a difficult person that I just had to deal with." Id. She further described Legley as having "an attitude that we were making him go above and beyond what was needed to come to work for us" despite that what he did was no different than anyone else. (TR. 292.) Miller testified that Legley was "difficult" (TR. 412) or "high maintenance" (TR. 413) in her interactions with him at his physical on December 5, and that her

supervisor, Rainey, called HR to advise about their difficulties with Legley. (TR. 414.) Dorsey corroborated Miller's testimony that Rainey called to express that Legley was difficult during the pre-employment physical. (TR. 293.)

**C. Legley's difficult behavior continues during his employee orientation.**

Despite Patnaude's misgivings, Brennan wanted "to give [Legley] a shot" (G.C. Ex 16), so Legley reported for orientation on December 19, 2011. Legley continued to demonstrate his disagreeable nature. When he arrived, the elevator was broken and so Legley and the other orientees had to walk up five floors up stairs to the orientation room. (TR. 45-46.) Legley was the last one to enter the room. (TR. 47.) When he entered, Legley was expecting a Hospital HR representative but was surprised instead to find Darlene Lavigne ("Lavigne") who was presenting information on the Union. (TR. 47.) Legley admittedly was "confused" and "upset" because he "thought it was going to be an HR meeting." (TR. 57.)

Legley's behavior was rude and disrespectful from the start. Lavigne testified that Legley "kept interrupting me, every two seconds, every word got out of my mouth he was muttering about something, about the form, or climbing up the stairs, or me not meeting him. He was so set on me not meeting him in the lobby." (TR. 354.) Lavigne further testified that she told Legley they could address his questions later, which Legley does not recall her saying, although he admits that he may not have heard everything Lavigne said. (TR. 123.) Regardless, Legley was irritated with Lavigne (TR. 141) and his tone was described as irritated and speaking with a raised voice. (TR.155.) Legley's behavior actually reduced Lavigne, a 30 year Good Samaritan employee and long-time Union delegate who had given over a hundred of these

orientation presentations (TR. 322-233), to tears. Lavigne testified that in all her years giving these presentations, no employee—Union or non-Union—had ever treated her so poorly. (TR. 334.)

It is undisputed that Legley also asked questions regarding whether someone could be legally required to join the union, although there is some dispute about the exact words used. Both Legley and Lavigne testified generally that Legley accused Lavigne of not being truthful in her presentation (TR. 49-50, 352) and both testified that Legley pointed to the Union form that Lavigne was requesting he and the other orientees complete and saying that he did not need to join the Union. (TR. 50, 353.) In fact, Legley admits that he knew that he was not required to join the Union, that he read in the Union document a paragraph “that says you don’t have to belong to the union.” (TR. 86.) Indeed, Legley testified that he had no objection to joining the Union, had no ill feelings about joining a union and ultimately did join the Union. (TR. 93.)

Legley acknowledged that civility and respect are positive traits for a workplace.

Q: “But that would be something you would like about working somewhere, right, that you were working with nice people?”

Legley: “Absolutely.”

Q: “And that things like civility and respect would be positive traits for a workplace, right?”

Legley: “It always is.” (TR. 114.)

Legley also recognized that his conduct at orientation was not appropriate as evidenced by the fact that he approached Jordan the following morning about what had transpired.

Legley: “I want to make things right before they keep spiraling out of hand.”

Q: “But you knew things had started to spiral the day before, right?”

Legley: “Well, she was very upset and all of that, yeah.” (TR. 103.)

Jordan brought Legley to Union Delegate Neil Nicholaides, who was already aware of the situation from Lavigne, who had called him after the orientation. Nicholaides was concerned because Lavigne was upset and that was “not in her nature to be upset.” (TR. 208.) Upon hearing from Lavigne, Nicholaides called HR Manager Rebecca Cadima (“Cadima”) who was the HR representative at the orientation. According to Nicholaides, Cadima said, “We’re going to have our hands full with [Legley]. He ran us through the ringer.” (TR. 206.) She went on to say that Legley questioned every aspect of the hiring process. (TR. 224.) Nicholaides did not, however, tell Cadima what Lavigne had told him.

Later on December 20, after a holiday luncheon at the Hospital, Nicholaides approached Patnaude, Brennan and Facility Director Scott Kenyon (“Kenyon”) to talk about Legley’s behavior. During the discussion, Nicholaides did not discuss with Patnaude the substance of Legley’s comments to Lavigne. (TR. 212.) Nor did Nicholaides tell Brennan or Kenyon that the disagreement between Lavigne and Legley involved his questions about union membership. (TR. 219.) As Kenyon testified, Nicholaides’ concerns were “really around Legley’s behavior from the day or from the moment he came in the front door through orientation, through employee health, his rude and condescending behaviors.” (TR. 389.)

As Patnaude, Brennan, Kenyon and HR Director Tom Watts continued the conversation, Patnaude shared that Legley had been “disrespectful from the time he interviewed with me through, you know, when he came back for his new hire paperwork in HR.” (TR. 264-265.) Patnaude shared Dorsey’s and Rainey’s experiences with Legley, as well as her own. (TR. 390.) Patnaude, Kenyon and Watts agreed that Legley should be discharged “based on what we had

discussed. It was his poor behavior every single time he came to or met with some of our employees.” (TR. 265.)

**D. The decision to terminate Legley was based solely on his behavior.**

Both Patnaude and Kenyon testified that Legley’s comments regarding his questions about the union played no role whatsoever in their decision-making process:

Q: “Did the substance of Mr. Legley’s comments regarding his questions about the necessity of joining the union play any role whatsoever in your decision, the hospital’s decision to terminate his employment?”

Patnaude: “Not at all.”

(TR. 285-286)

Q: “Did it factor --since you’re not sure when you heard it, did it factor in any way into your decision-making as to whether or not Mr. Legley should remain employed?”

Kenyon: “Absolutely not.”

(TR. 392)

**III. ARGUMENT**

**A. Standard of Review.**

The Act specifically authorizes the Board (rather than the administrative law judge) to make findings of fact and draw conclusions from the record. 29 U.S.C. §160(c). Accordingly, the Board is authorized to review the administrative law judge’s decision de novo as to findings of fact as well as conclusions of law. The Third Circuit explained this in NLRB. v. Duquesne Elec. & Mfg. Co., 518 F.2d 701, 704 (3rd Cir. 1975): “Section 10(c) of the Act, as amended, 29 U.S.C.A. § 160(c), expressly provides that, after having referred a case to an agent, such as a

hearing examiner or administrative law judge, who is authorized to conduct a hearing and after having received back the transcript of the testimony taken by him, the Board may take further testimony and ‘upon the preponderance of the testimony taken . . . the Board shall state its findings of fact. Under this clear statutory authority it is the Board itself which is responsible for determining the facts and not its trial examiner or administrative law judge. The administrative law judge’s findings and recommendations, when contested, become merely advisory, and the Board itself makes an original disposition of the case. Thus the Board is not bound to follow an administrative law judge’s findings even though they are not clearly erroneous, but may decline to follow such a judge’s finding even as to the credibility of a witness who testified before him and make a contrary finding on the subject if its determination is supported by substantial evidence.’”

**B. The ALJ simply ignored, but did not discredit, all testimony contrary to that of Legley and Derby.**

In ALJ Green’s summary of the facts of the case, he essentially adopted the testimony of Legley, as corroborated by Derby, and ignored the considerable body of contrary testimony, particularly that of Lavigne, Patnaude, Nicholaides, Dorsey, Miller, and Kenyon. He did so without any discussion of the credibility of the witness and without giving any reason for ignoring their explanation of Good Samaritan’s reason for Legley’s termination. In Permaneer Corp., 214 NLRB 367, 368 n.3 (1974), the ALJ “set forth a summary of the testimony” of two witnesses and “fail[ed] to discuss the reasons for rejecting their stories while crediting that of

[another employee].” The Board found this to be “unacceptable.” Id. The Board made clear that where an ALJ “simply ignor[es] without explanation” the testimony of certain witnesses, he “completely undermines the validity of the . . . credibility determination.” Id. at 368. The present case is even more disturbing than Permaneer since the ALJ did not even mention the testimony of these witnesses. While the witnesses in question are Good Samaritan employees, none of them have any personal stake in the outcome of this matter and no reason to exaggerate or otherwise give non-credible testimony. ALJ Green’s failure to consider the testimony of the witnesses for Good Samaritan and the Union completely undermines whatever his factual and legal findings.

**C. The ALJ erred in failing to apply Wright Line to this mixed-motive case.**

**1. The ALJ’s application of Atlantic Steel is circular and internally inconsistent.**

ALJ Green’s application of the standard articulated in Atlantic Steel, 254 NLRB 814 (1979) is so inherently flawed as to cast doubt on the integrity of his entire opinion. First, his decision to apply Atlantic Steel is circular—he concludes that Atlantic Steel applies because “Legley’s statements and conduct at the orientation meeting do not meet the Atlantic Steel criteria for concluding that he engaged in misconduct that would justify his discharge. Nor in the absence of legally defined misconduct, can one separate the protected nature of his comments from the way he made the comments.” ALJD p.5, lines 27-30.<sup>2</sup> In other words, because the ALJ

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<sup>2</sup> References to the Administrative Law Judge’s Decision will be listed as “(ALJD, p. \_\_, line(s) \_\_\_\_)”.

did not find Legley's conduct to be sufficiently "opprobrious" to remove him from protection of the Act, his conduct cannot be separated from his statements and Atlantic Steel applies. See Hawaiian Hauling Service, Ltd., 219 NLRB 765, 766 (1975) This puts the cart before the proverbial horse: the ALJ's logic confuses the question of how Atlantic Steel applies with whether it applies at all.

The ALJ then further clouds the issue with his reference to NLRB v. Burnup & Sims, 379 U.S. 21 (1964), which he cites for the proposition that Good Samaritan cannot defend its action based on good faith belief because "[e]ven assuming that company management had a good faith belief that Legley's behavior at the orientation program was worse than it was, that belief was, in my opinion, mistaken and his action conduct was insufficient to warrant the conclusion that Legley overstepped the bounds of legally protected concerted activity." ALJD p.5 n.2, lines 47-51. Burnup applies, however, where an employer *wrongly* believes the employee engaged in misconduct during the course of his protected concerted activity. 379 U.S. at 23 ("§ 8(a)(1) is violated if an employee is discharged for misconduct arising out of a protected activity, despite the employer's good faith, when it is shown that the *misconduct never occurred.*")(emphasis added). Atlantic Steel applies where the employer *rightly* believes the employee engaged in misconduct, but the misconduct is not legally sufficient to deprive the employee of the protection under the Act. 254 NLRB at 816. Therefore, by applying Atlantic Steel, the ALJ necessarily concedes that Legley engaged in misconduct –by its own terms, Atlantic Steel applies where an employee is disciplined or discharged for conduct that is part of the *res gestae* of protected concerted activities and the pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act. Id. Since ALJ Green chose to apply Atlantic Steel, he

cannot simultaneously find that Legley did not engage in any misconduct and deprive Good Samaritan of a good faith defense.

The ALJ also ignores the fact that this case is factually distinguishable from Atlantic Steel. Atlantic Steel is applicable where an employee's conduct vis-à-vis the employer is so extreme that otherwise protected concerted activity is removed from the Act's protection. 254 NLRB at 816-817. Atlantic Steel does not apply where, as is the case here, the conduct in question is between an employee and a union. Laborers International Union of N.A. Local 872, 2012 NLRB LEXIS 286 at \*45 (NLRB Div. of Judges 2012) ("the Respondent's reliance on Atlantic Steel to evaluate a confrontation between a member and a union agent is misplaced.")

Finally, the ALJ's application of the Atlantic Steel standard is virtually non-existent. After articulating the four elements of the Atlantic Steel test, the ALJ gave no discussion as to which elements weighed in Legley's favor or how he reached the conclusion that "Legley's statements and conduct at the orientation meeting do not meet the Atlantic Steel criteria for concluding that he engaged in misconduct that would justify his discharge." ALJD p.5, lines 27-29. Because of the ALJ's logically flawed choice to use Atlantic Steel as the standard for this case, followed by his failure to give any reasoning in his application of it, the Board should disregard the ALJ's conclusions entirely.

**2. Wright Line, not Atlantic Steel, is the appropriate standard in this case.**

With Good Samaritan and the General Counsel each presenting conflicting reasons for Legley's termination, this case presents a classic example of mixed-motive. General Counsel contends that Legley was terminated because he engaged in protected activity in the orientation

meeting with Lavigne. Good Samaritan contends that Legley was terminated because he was a new, probationary employee who had repeatedly proven to be difficult, disagreeable, and rude. Wright Line, 251 NLRB 1083, 1089 (1980), as adopted by the Supreme Court in NLRB. v. Transportation Management Corp., 462 U.S. 393 (1983), sets forth the familiar burden-shifting analysis for determining whether an employee was terminated for a lawful reason (difficult, disrespectful, disagreeable conduct) or an unlawful reason (because the employee “opposed” joining the union).

Despite the fact that Good Samaritan has articulated a legitimate reason for Legley’s termination, and despite the fact that ALJ Green did not discredit any of the testimony of the numerous individuals who had difficult interactions with Legley, the ALJ nevertheless concluded that “as the Company discharged Legley because of these protected statements, a Wright Line analysis is not even appropriate.” (ALJD, p. 5, lines 32-34) This conclusion is wholly unsupported by law or fact and should be reversed. Because Good Samaritan’s motivation in terminating Legley is a matter of dispute in this case, ALJ Green should have decided this case under the Wright Line standard. See, e.g., El Rio Santa Cruz Neighborhood Health Center, Inc., 1990 NLRB LEXIS 697 at \*\*11-16 (applying Wright Line where a probationary employee was terminated for both performance deficiencies and her complaints about the performance of a fellow employee) upheld at 301 NLRB 637 (1991).

**2. Dispensing with Wright Line is only appropriate in single-motive cases.**

ALJ Green’s statement that “[t]he correct test for determining whether the discharge [or] other discipline of an employee who is engaged in protected concerted activity is the one articulated in Atlantic Steel” is only true where the employer has not articulated an alternative motivation for the adverse employment action. (ALJD, p. 5, lines 19-20) The ALJ cites New York Party Shuttle LLC, 2013 NLRB LEXIS 312 (2013)(ALJD, p. 5, line 43) as support for the proposition that because “the Company discharged Legley because of these protected statements, a Wright Line analysis is not even appropriate.” In New York Party Shuttle, the Board upheld ALJ Green’s decision that an employee of a tour bus company was discharged for posting disparaging comments about his employer on Facebook. The Board stated that “[i]n a single-motive case where there is no dispute as to the activity for which discipline was imposed, the dual-motive analysis set forth in Wright Line . . . is not applicable,” (Id. at \*5) citing to Hispanics United of Buffalo, Inc., 359 NLRB No. 37, 2012 NLRB LEXIS 852 at \*7 fn. 8 (2012). Hispanics United also concerned employees’ postings on Facebook about a supervisor. However, in Hispanics United, “[t]he judge found and the Respondent agrees that the Facebook postings were *the sole reason* for the discharges.” Id. [emphasis added]

For its part, the General Counsel cited to three cases in its Post-Hearing Brief for the proposition that Wright Line was not applicable: Felix Industries, 331 NLRB 144, 145-146 (2000), Neff Perkins Co., 315 NLRB 1229 (1994), and Mast Advertising and Publishing, 304 NLRB 819 (1991). These three cases are also off-point. First, all of these cases are distinguishable on grounds that, in each case, the discipline of the employees in question was based on a single incident. Felix, 331 NLRB at 146 (employee terminated based on profane and

insubordinate language used in a single phone call with supervisor), Neff Perkins Co., 315 NLRB at 1233 (employees were discharged for “disloyalty” in front of an important customer in a single meeting), Mast Advertising and Publishing, 304 NLRB at 819 (employee suspended for “insubordinate” conduct in meeting concerning fellow employee’s request for medical leave). Additionally, in both Felix and Mast Advertising, the Respondent either conceded or did not dispute that the employee in question was disciplined for his or her conduct during that meeting. Felix, 331 NLRB at 146 (“it is undisputed that the Respondent discharged Yonta because of his telephone exchange with Petrillo.”); Mast Advertising, 304 NLRB at 820 (“The Respondent admits it was this conduct which led it to suspend Bergstrom”).

In sum, these cases stand for the unremarkable position that where a Respondent admits or concedes that the single meeting or conversation in question was the sole reason for the employee’s discipline, and the Board finds that incident to be protected concerted activity, Wright Line is not applicable. But that is not the case here. In this case, Good Samaritan has articulated, and the Union has supported, a clear alternative reason for Legley’s termination—a pattern of difficult behavior incompatible with Good Samaritan’s culture and Workplace Civility Policy. Furthermore, Good Samaritan and has not admitted or conceded that Legley was solely terminated because of his conduct in the orientation meeting. Contrary to the General Counsel’s self-serving and unsupported assertion that “it is undisputed that Respondent discharged Legley because of his conduct at the orientation meeting” (G.C. Post-Hearing Brief, p.47), Good Samaritan’s motivation is very much in dispute. Therefore, as a mixed-motive case, it must be analyzed under Wright Line.

**D. The Board Cannot Establish Discriminatory Animus Under Wright Line.**

Where, as here, there is a dispute as to what motivated the employer's allegedly unlawful action, the ALJ should have applied Wright Line. Under the Wright Line test, the Board's General Counsel must first demonstrate that "the employee's protected conduct was a substantial or motivating factor in the adverse action." Transportation Management, 462 U.S. at 401; accord Holsum de P.R., Inc. v. NLRB, 456 F.3d 265, 269 (1st Cir. 2006). The General Counsel satisfies this test by demonstrating (i) the employee's engagement in the protected activity; (ii) the employer's knowledge of that activity; (iii) the employer's antipathy toward it; and (iv) a causal link between the antipathy and the adverse employment action. Id. at 401-03. If the General Counsel establishes discriminatory motive, the burden shifts to the employer to demonstrate that it would have taken the same action absent the protected conduct. ADB Utility Contractors, 353 NLRB 166, 166-167 (2008), enf. denied on other grounds, 383 Fed. Appx. 594 (8th Cir. 2010); Internet Stevensville, 350 NLRB 1270, 1274-1275 (2007); Senior Citizens Coordinating Council, 330 NLRB 1100, 1105 (2000). The Board must then show that the employer's reason is pretextual. Holsum, 456 F.3d at 269. The Board can demonstrate this with evidence of suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct, departures from past practices, tolerance of behavior for which the employee was allegedly fired, or disparate treatment of the discharged employee. Relco Locomotives, Inc., 358 NLRB No. 37. slip op. at 14 (2012).

**1. The General Counsel cannot make its *prima facie* case.**

Even assuming that Legley did engage in protected activity, the General Counsel cannot prove any of the remaining elements of its *prima facie* case.

First, it has not been established that Good Samaritan even knew exactly what it was that Legley had said. Nicholaides testified that he never spoke with Patnaude about the content of Legley's questions or interruptions of Lavigne. (TR. 212)

ALJ Green: Well, from what [Patnaude] said to you did you . . . figure out she knew what was said at the orientation?

Nicholaides: No. Only that Darlene was upset and there were issues there with Camille's behavior. Nothing was discussed about the . . . content of him joining the Union or not." (TR. 212)

Kenyon testified that he had heard Legley had behaved in a rude and condescending manner but that the details were "vague." (TR. 400) Contrast St. Francis Reg'l Med. Ctr. & SEIU Healthcare Minn., 2013 NLRB LEXIS 417 (noting that the employer was "well aware" of protected activity).

Second, the record demonstrates no animus by the Hospital towards the Union or towards non-union employees and, importantly, no animus between the Union and those who elect to pay the agency fee. To the contrary, Nicholaides' testimony establishes that he once learned of an agency fee payer unhappy with a shift change and specifically called the union office to ask whether he should represent her. The answer he received was yes, "Absolutely" and so he offered assistance. (TR. 233.) Finally, Legley testified that he had no problem with joining the union and, although he clearly understood his rights as set forth on page 4 of the materials provided to him to be an agency payor instead, he joined the Union.

Finally, the General Counsel cannot establish any causal link between Legley's arguably protected conduct and Good Samaritan's decision to terminate him. On the contrary, Patnaude and Kenyon explicitly testified that Good Samaritan did not consider the substance of what

Legley said—only his demeanor in saying it. See supra sec. II.D. On the contrary, as is discussed further below, the bulk of the evidence shows that Legley was terminated after a pattern of difficult behavior demonstrated that he was not a good fit for Good Samaritan.

**2. Good Samaritan lawfully terminated Legley, a probationary employee, for his failure to follow the Workplace Civility Policy.**

As has been discussed at length above, and has not been discredited by the ALJ, Legley had difficult interactions with numerous individuals at Good Samaritan before he even started work. Patnaude, Dorsey, and Miller all credibly testified to Legley’s disagreeable attitude during routine pre-employment procedures (Patnaude, TR. 251-252, 265, G.C. Ex. 16; Dorsey, TR. 292-294, 302; Miller TR. 411-412). Having been informed in his conditional offer letter that first three months of employment would “be an introductory period to allow you and Good Samaritan Medical Center to determine whether you are a good fit for the position” (G.C. Ex. 13), one would assume Legley would be on his best behavior during his orientation. Instead, his misconduct escalated, leading to the incident during the orientation meeting with Lavigne.

Kenyon testified that “[w]hen an employee is in their probationary period ... we wouldn’t necessarily follow [the steps in the collective bargaining agreement.] That’s why there is a probationary period. It’s a get-to-know period, to get to know the person’s personality and behaviors.... And if they don’t meet our criteria ... at times we terminate people on probation.” (TR. 393.) Indeed, the Board has recognized that employers have enhanced discretion in deciding whether to terminate or continue the employment of a probationary employee. In BH Copper, Inc., 2013 NLRB LEXIS 518 at \*\*43-44 (2013), the Board considered whether a newly hired probationary employee, Newton, had been lawfully terminated for several safety violations

or unlawfully terminated for his particularly vocal participations in safety meetings. The Board noted that “Newton was a probationary employee. As the probationary employees, including Newton, would soon be completing their probationary period, it simply made sense for the Respondent to terminate those employees, whose work performance was unacceptable, prior to their conversion to regular employee status.” Id. at \*55. Indeed, Newton’s supervisors noted that his poor attitude was a factor in their decision to terminate him. “Contrary to counsel for the General Counsel’s contention that a ‘poor attitude’ is a euphemism for engaging in protected conduct, in this specific instance it clearly meant that when Newton was counseled by his supervisors, instead of accepting responsibility for his mistakes, he made excuses for his conduct, blaming others, or simply saying that it was no big deal. Under these circumstances, it is understandable that the Respondent, having decided that Newton’s work performance was poor and did not warrant his retention, would want to terminate him before the end of his probationary period, which was rapidly approaching.” Id. at \*\*56-57.

Here, it is undisputed that Legley was given an offer of employment conditioned on the satisfactory completion of a three month introductory period which would “allow you and Good Samaritan Medical Center to determine whether you are a good fit for the position.” (G.C. Ex. 13.) After a series of contentious interactions with Good Samaritan HR personnel, his dispute with Lavigne, and Cadima’s report that “we’re going to have our hands full. He ran us through the ringer” (TR. 223), even Legley acknowledged the lack of fit – “Maybe I’m not a good fit here.” (TR. 180.) Rather than keep on a new employee whose attitude had already made numerous well-established staff members uncomfortable, Good Samaritan made the lawful decision to terminate Legley’s employment during its probationary period.

**3. Good Samaritan's reason for terminating Legley was not pretextual.**

Wright Line describes a pretextual motive as one where “examination of the evidence may reveal, however, that the asserted justification is a sham in that the purported rule or circumstance advanced by the employer did not exist, or was not, in fact, relied upon.” 251 NLRB at 1084. Because ALJ Green refused to apply Wright Line, he never considered the issues of causation or pretext. Under Wright Line, and in consideration the credible testimony of Good Samaritan's witnesses, General Counsel cannot show that Good Samaritan's stated reasons for terminating Legley were pretextual.

There is nothing in the record to support the conclusion that Good Samaritan's stated reason for terminating Legley – his disagreeable, difficult personality – was a sham or otherwise false. That Patnaude, Dorsey, Rainey and Cadima on *four separate occasions* experienced the same conduct is not in dispute. However, it was not until Legley actually started work that it became crystal clear that he was not a suitable fit for Good Samaritan. Rather than resulting from his conduct at the orientation meeting, or any other single incident, Good Samaritan's decision to terminate Legley was based on a pattern of difficult interactions with several individuals, all of which the ALJ ignored. While this conduct may have been tolerated from an employee who had established himself or herself at Good Samaritan—anyone can have a bad day—the series of incidents that culminated in Legley's disruption of Lavigne's presentation, was sufficient ground for termination of a new probationary employee. As Kenyon testified, Good Samaritan was “concerned about this person right out of the gate. If we're having these types of personnel issues with a person, then why would we keep somebody?”

**E. Good Samaritan acted in good faith in deciding to terminate Legley.**

Even where the Board does not perform a Wright Line analysis when an employer ostensibly disciplines an employee for misconduct committed while the employee was engaged in protected activity, that does not end the inquiry as to which analytic framework should be applied to the facts. See Mesker Door, Inc., 2007 NLRB LEXIS 466. The General Counsel bears the threshold burden of establishing that an employee had engaged in protected activity and that the disciplinary action resulted from conduct associated with that activity. *Id.* Once the General Counsel has carried this burden, the respondent may rebut the government's case by showing that it held an honest belief that the employee had engaged in misconduct during the course of that protected activity. Proof that the respondent held such an honest belief defeats the government's case *unless the General Counsel then can prove that the employee actually did not engage in the misconduct.* See, e.g., Pratt Towers, Inc., 338 NLRB 61, 95-96 (2002) (Emphasis added).

Here, Legley was terminated only after a series of difficult interactions, culminating in Legley's altercation with Lavigne. As Patnaude testified, Legley was terminated because "he was disrespectful and rude at every point along the process to hire him. And then once he came on board, was very disrespectful in the orientation, made our employee very upset by his behavior, and then also expressed the fact that he wasn't even sure he wanted to work here the next day." Legley's confrontation with Lavigne only confirmed Patnaude's initial suspicion

that that he would not be a good fit at Good Samaritan. As Patnaude testified, when Nicholaides approached her and Watts at the luncheon:

... we talked about the incidents at orientation, how rude he was to Darlene, that he made her cry she was so upset. And I, at that time, expressed the fact that *I didn't want to hire him in the first place* and he was rude and disrespectful when he came in and interviewed with me, he was very rude. And then when he came into complete his new hire paperwork, he was rude to the HR staff. He was also rude when he went to employee health. (TR. 259) (emphasis added).

Patnaude's personal experience with Legley, corroborated by the experiences of *several* of her colleagues (including Lavigne, a 30-year Good Samaritan veteran, about whom Patnaude had never received any reports of disrespectful or uncivil behavior (TR. 280)), provided ample grounds for Good Samaritan to conclude, in good faith, that it should terminate his employment during his probationary period.

**F. Good Samaritan's Workplace Civility Policy was not unlawful as applied to Legley.<sup>3</sup>**

To maintain a professional and respectful workplace, the Hospital maintains a Workplace Civility Policy (the "Policy"). The Policy states as follows:

"Steward recognizes that excellent care is best delivered in a work environment of respect and cooperation.

As a Steward workforce member I will:

- Treat all coworkers and individuals with respect, patience and courtesy;
- Refrain from conduct that would intimidate or threaten other individuals;
- Never engage in abusive or disruptive behavior;

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<sup>3</sup> To the extent that ALJ Green intended to hold that the Policy is unlawful on its face, this holding is inconsistent with Karl Knauz Motors, Inc. d/b/a Knauz BMW, 358 NLRB No. 164, 2012 NLRB LEXIS 679 (2012) and Lutheran Heritage Village Livonia, 343 NLRB 646 (2004) and should be overturned.

-Not tolerate any threats of harm—either direct or indirect—or any conduct that harasses, disrupts, or interferes with another workforce member’s work or performance or that creates a hostile work environment.”

In his opinion, ALJ Green states that “[i]n light of the majority opinion in [Karl Knauz Motors, Inc. d/b/a Knauz BMW, 358 NLRB No. 164, 2012 NLRB LEXIS 679 (2012)], and in light of the fact that the rule in this case was applied to discharge an employee who engaged in protected speech in a concerted setting, I conclude that the application of this rule to employee protected, concerted and /or union related activity violated Section 8(a)(1) of the Act.” (ALJD, p. 6, lines 20-23) This holding misreads the law set forth in Karl Knauz and Lutheran Heritage Village Livonia, 343 NLRB 646 (2004) and should be reversed.

Evaluating the legality of workplace conduct rules involves “working out an adjustment between the undisputed right of self-organization” and “the equally undisputed right of employers to maintain discipline in their establishments. . . . Opportunity to organize and proper discipline are both essential elements in a balanced society.” Lafayette Park Hotel, 326 N.L.R.B. 824, 825 (1998), enforced, 203 F.3d 52 (D.C. Cir. 1999) citing Republic Aviation v. NLRB, 324 U.S. 793, 797-798 (1945). Such rules are only unlawful where they would “reasonably tend to chill employees in the exercise of their Section 7 rights.” Id.

The Board applied this standard to two different kinds of workplace rules in Lutheran Heritage and Karl Knauz. In Lutheran Heritage, the Board held that rules prohibiting abusive and profane language, harassment, and verbal, mental and physical abuse were lawful because they were “intended to maintain order in the employer’s workplace and did not explicitly or implicitly prohibit Section 7 activity.” 343 NLRB at 647. Relying on Adtranz ABB Daimler-

Benz Transp., N.A. Inc. v. NLRB, 253 F.3d 19 (D.C. Cir. 2001), the Board held that “employers have a legitimate right to establish a civil and decent work place” and that “employers have a legitimate right to adopt prophylactic rules banning [profane and abusive language] because employers are subject to civil liability under federal and state law should they fail to maintain a workplace free of racial, sexual, and other harassment and abusive language can constitute verbal harassment triggering liability under state or federal law.” Id.

In contrast, the work rule at issue in Karl Knauz contained two separate sections. The first section stated that “[e]veryone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees.” 358 NLRB No. 164, 2012 NLRB LEXIS 679 at \*2. The second section stated that “[n]o one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership.” Id. It was the broad anti-disparagement provision in the second sentence of the rule, not the general civility provision in the first, that the Board found to violate Section 8. “We find the ‘Courtesy’ rule unlawful because employees would reasonably construe its broad prohibition against ‘disrespectful’ conduct and ‘language which injures the image or reputation of the Dealership’ as encompassing Section 7 activity.” Id. at \*4. Moreover, the Board acknowledged that if the rule had contained only “the positive, aspirational language of the first section,” they might have agreed with the dissent the rule was nothing more than a lawful “commonsense behavioral guideline for employees.” Id. at \*5.

Good Samaritan’s Workplace Civility Policy, as applied to Legley, has more in common with the lawful rule in Lutheran Heritage than the unlawful rule in Karl Knauz. As set forth above, Good Samaritan’s decision to terminate Legley’s employment was based on repeated and

successive incidents in which Legley showed himself to be difficult and argumentative, only one of which, his altercation with Lavigne, even arguably constituted concerted activity. Rather than showing that Legley's questions about joining the union motivated Good Samaritan's decision to terminate his employment, this evidence shows the opposite—that Legley's overall attitude was intolerable and would have been grounds for termination regardless of the content of the discussion. As Patnaude testified, "I didn't want to hire him in the first place." (TR. 259.)

Lavigne, who became visibly upset and tearful at the hearing, did *not* testify that she was upset by *what* Legley said; rather, she "was upset because of the interruptions, the rudeness, the overpowering of my presentation." (TR. 333.) According to Lavigne, "[Legley's] biggest complaint ... To me that was the whole tone of him being upset walking into the room. And he just took it out on me." (TR. 336.) Lavigne's testimony is consistent with Derby who testified that Legley had a loud voice that "filled the room" and that he was "passionate." (TR. 137, 154 and 156.) Legley's repeated interruption of Lavigne violated Good Samaritan's Policy by not treating her "with respect, patience and courtesy" and by engaging in "disruptive behavior." If Legley had raised his objections politely or accepted Lavigne's suggestion that they discuss his concerns after her presentation, there would have been no problem. It is one thing to ask a question, it is quite another to repeatedly interrupt to the point that the presenter – Lavigne – is reduced to tears. This is precisely the kind of behavior that Good Samaritan's Workplace Civility Policy prohibits, and has the right to prohibit regardless of the content of the speech.

Good Samaritan's Workplace Civility Policy, as applied to Legley, is exactly the kind of "commonsense behavioral guideline for employees" that the Board deemed to be lawful in

Lutheran Heritage and Karl Knauz. Therefore, the ALJ's decision, which does not pass the common sense test, should be reversed.

#### **IV. CONCLUSION**

For the foregoing reasons, the decision of the Administrative Law Judge should be overturned. Respondent respectfully requests that the Board reverse the decision and vacate the order.

Respectfully submitted,

Date: October 21, 2013

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