UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 1

GOOD SAMARITAN MEDICAL CENTER and CAMILLE A. LEGLEY, JR., an Individual	**Case No. 01-CA-082367**
1199SEIU UNITED HEALTHCARE WORKERS EAST and CAMILLE A. LEGLEY, JR., an Individual	**Case No. 01-CB-082365**

RESPONDENT 1199SEIU's BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

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STATEMENT OF THE CASE

Pursuant to the Rules and Regulations of the National Labor Relations Board ("the Board"), including 29 C.F.R. § 102.46, the Respondent 1199SEIU United Healthcare Workers East ("the Union" or "1199SEIU") submits to the National Labor Relations Board ("the Board" or "the NLRB") this brief in support of its exceptions to the Decision of Administrative Law Judge ("ALJ") Raymond P. Green, issued in the above-captioned case on August 8, 2013. The fundamental issue before the Board as to the Respondent Union is whether the Union "caused or attempted to cause" the discharge of Charging Party Camille Legley, Jr., a probationary employee on his second day of work where, in the ALJ's words, "The evidence does not show that anyone from the Union asked for, suggested, recommended, or demanded that the Employer discharge Legley." ALJ Decision at 6:30-31.[1] Rather, in a bald exercise of utter speculation, the ALJ imagines that the Union's delegates

[1] Hereinafter, citations to the ALJ's Decision shall appear as "Dec." followed by page and line numbers, respectively, separated by a colon. Testimony will be designated by the name of the

"reasonably would have foreseen that Lavigne's complaints about Legley's "bad" behavior on his first day of employment…" – i.e., that his rude, loud, and overbearing conduct had brought the experienced delegate to tears – "… would likely lead to his discharge." Dec. 6:38-41. In addition, the Union excepts to the ALJ's finding that a single statement of Lavigne to the effect that his co-workers would not "put up with him," even were the statement so made, constituted a "threat of unspecified reprisals" because of certain protected statements made by the Charging Party in the course of a stream of unprotected complaints and interruptions. Dec. 6:49-52.

The lack of any evidence whatsoever that the Union sought, let alone caused, Legley's discharge – or that anyone affiliated with the Union even contemplated that his rude conduct at orientation would warrant discharge, rather than correction, as Union delegates sought to offer – requires that the Board reverse the ALJ's overreaching decision and order. Equally clear, the record evidence fails to support the ALJ's erroneous conclusion that, to the exclusion of any other aspect of his conduct or speech either at orientation, Human Resources, or Employee Health, "the Company (sic) discharged Legley because of [his] protected statements…." Dec. 5:32-34. The Board cannot find such a conclusion supported by substantial evidence in the record in light of, *inter alia*, the uncontradicted and wholly ignored evidence that 1) Legley complained loudly and repeatedly to Lavigne about not being met in the lobby and having to walk up five flights of stairs; 2) that neither Lavigne, delegate Nicholaides, representative Leveille, nor any other individual affiliated with the Union said much, if anything, about the content of Legley's statements concerning union membership as they discussed Lavigne's upset; and 3) that, to a highly unusual degree, Legley had badgered and alienated multiple Hospital employees in multiple departments during his pre-employment processing. If adopted by the Board, the ALJ's Decision surely will undermine and chill other employees' desire and willingness to serve as union stewards if behavior such as Legley's need be tolerated, and invites abusive employees simply to "salt" their misconduct with protected speech in order to gain immunity from otherwise permissible, and warranted, consequences. Such a

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testifying witness followed by citation to the page in the transcript of hearing, designated as "Tr. __". Exhibits are designated as General Counsel exhibits ("GC") followed by exhibit number or Employer exhibits ("Ex.").

result undermines rather than effectuates the purposes of the Act.

QUESTIONS PRESENTED

1. Did the Administrative Law Judge err in finding facts unsupported by a preponderance of the evidence?

2. Did the Administrative Law Judge err in finding that by causing or attempting to cause the Employer to discharge Camille A. Legley, Jr., because of his protected concerted activity, the Union violated Sections 8(b)(1)(A) and 8(b)(2) of the Act?

3. Did the Administrative Law Judge err in finding that by threatening Camille A. Legley, Jr., with unspecified reprisals because of his protected concerted activity, the Union violated Section 8(b)(1)(A) of the Act?

4. Did the Administrative Law Judge err in ordering as remedy that Camille A. Legley, Jr., be reinstated to employment and made whole for any loss of earnings and other benefits caused by his discharge from employment?

FACTS

Legley's Interview And Offer Of The Hard-To-Fill Weekend Boiler Operator Position.

The Charging Party was hired as a weekend boiler operator for the weekend evening shifts (4-12 pm) at Good Samaritan Medical Center. (Legley, Tr. 29; Jordan, Tr. 172). The Facilities and Maintenance Department of the Medical Center is overseen by Scott Kenyon, who in December, 2011, held the title of Facility Director and Safety Officer. (Kenyon, Tr. 387).[2] Supervisor Sean Brennan reported to Kenyon and was responsible for the direct supervision of the leads and employees of the department, including Lead Boiler Operator Kevin Jordan, Lead HVAC Refrigeration Mechanic Neal Nicholaides, and Lead Plumber Gerry Monahan.

Kenyon made the decision to hire the Charging Party at the recommendation of Sean Brennan. (Kenyon, Tr. 388, 394; Jordan, Tr. 190). As is the Department's custom, area leads in the department sat in on the Charging Party's job interviews. In light of the fact that the position at

[2] At the time of the hearing, Kenyon held the title of Senior Director of Environmental Health and Safety for the Respondent Medical Center.

issue was as a boiler operator, lead boiler operator Jordan attended Legley's first interview with Brennan. (Legley, Tr. 32; Jordan, Tr. 168, 191). Jordan was joined by leads Nicholaides and Monahan for Legley's second interview. (Legley, Tr. 36; Nicholaides, Tr. 202). Notably, when Jordan mentioned that the Medical Center was unionized, the Charging Party replied that he had past experience with unions and had no objection to it. (Legley, Tr. 34, 78).

Jordan, the lead boiler operator, was a veteran employee of 29 years at the time of hearing. In addition to serving as a lead, Jordan serves as a Union delegate (formerly called "steward") – a position to which he was elected by fellow bargaining unit members. (Jordan, Tr. 169). Nicholaides, at the time of hearing, had been employed at Good Samaritan for 26 years as an HVAC Refrigeration Mechanic. Nicholaides had been serving as a Union delegate for more than twenty years. (Nicholaides, Tr. 200.) As Union delegates, their activities include dealing with employees' problem or complaints, enforcing the contract, filing and processing grievances, and generally serving as the communications link between employees and the Union. (Jordan, Tr. 169; Nicholaides, Tr. 200-01, 219-20). Their participation in Legley's job interviews, however, arose strictly from their respective positions as area leads in the department, unrelated to their roles as Union delegates. (Jordan, Tr. 191).

During the interview process, Jordan had a conversation with Legley about the hours of the position, weekend evenings from four p.m. to midnight. (Jordan, Tr. 172). Jordan wanted to make sure Legley was comfortable with those hours because the department had an extremely difficult time finding someone to fill the position; Legley was agreeable. (Jordan, Tr. 173). At the conclusion of the interview process, Jordan sent an email to Brennan recommending Legley for the position because Legley "had the qualifications, he didn't mind the hours, and he seemed like a good candidate." (Jordan, Tr. 174). Although as leads, Jordan and Nicholaides are welcome and encouraged to make recommendations for hiring, they have no decision-making authority – actual or effective – and play no role in decisions to terminate employees. (Jordan, Tr. 190-191).

Legley's Conduct During Pre-Employment Contacts With Human Resources And Employee Health Personnel Prompts Multiple Expressions Of Concern And Leads HR Manager Patnaude To Question The Department's Decision To Hire Legley.

Sometime before December 5, 2011, Human Resources Administrative Assistant Jennifer Dorsey spoke with Legley by telephone to arrange an appointment for him to come into the Medical Center to fill out pre-employment paperwork. (Dorsey, Tr. 289). Dorsey testified at hearing that Legley's "agitated" tone on the phone call "stood out" to her, and that he "made a fuss" and gave her "a hard time" from the outset. (Dorsey, Tr. 290, 296). Dorsey noted specifically that Legley kept interrupting her and had questions about everything "at every step," even before she had a chance to explain the specifics of the information she needed to convey. (Dorsey, Tr. 290, 299). She felt "like I couldn't get a word in edgewise" as she tried to move through her script. (Dorsey, Tr. 290). Expressing a sentiment that Union delegate Darlene Lavigne would echo following her own encounter with Legley two weeks later, Dorsey "found it frustrating because I knew that I was trying to go over everything and he, he wouldn't even give me a chance to finish what I was saying before questioning it." (Dorsey, Tr. 300). By the end of the twenty- to thirty-minute phone call, Dorsey had formed the impression that Legley "was going to be difficult" when he came in for his pre-employment appointment. (Dorsey, Tr. 290, 297).

On December 5, 2011, Legley arrived at Good Samaritan to fill out pre-hire paperwork, meet with then Human Resources Manager Jennifer Patnaude[3] and undergo a pre-employment physical at the Employee Health Department. (Legley, Tr. 39; Patnaude, Tr. 248, 250; Dorsey, Tr. 291, 297, 298). As Dorsey sensed from their initial conversation, Legley indeed made the process of filling out routine paperwork unusually difficult. For example, for the first and only time in Dorsey's experience, Legley numbered every page and asked for copies of each and every form. (Dorsey, Tr. 291, 297, 298). At hearing, Legley recalled that he "had to fill out about forty forms," admitted asking why he needed blood work done, and admitted taking copies of every form he filled out (Legley, Tr. 39, 41). When Dorsey asked Legley if he had had an interview yet with Human

[3] At the time of the hearing, Patnaude held the position of Human Resources Director for Steward Healthcare Good Samaritan Medical Center.

Resources, she "couldn't get a straight answer, he went off on a tangent, and at the end I still didn't have a straight answer." (Dorsey, Tr. 291). In sum, Dorsey found Legley's resistant and challenging attitude uniformly frustrating – "he came in with the attitude that we were making him go above and beyond what's necessary" – and, although, in her role, she "did not have the ability really to make any decision" or recommendation, she continued to believe he would be a difficult employee. (Dorsey, Tr. 291, 294).

Legley – who could not recall the name of a single woman with whom he interacted throughout his experience at Good Samaritan – next met with another "lady" whose name he did not recall – then Human Resources Manager Patnaude. (Legley, Tr. 39, 118). Patnaude holds an MBA in management and is a Human Resources professional with more than twenty years of experience; at the time in question she reported to then HR Director Thomas Watts. (Patnaude, Tr. 278-79). Patnaude testified at hearing that hiring decisions at Good Samaritan are made jointly between the hiring department head and HR. One purpose of a candidate's interview with Human Resources is to determine whether a candidate fits with Good Samaritan's culture. (Patnaude, Tr. 246-47). Typically, a candidate's interview with HR precedes any department interview and HR makes a recommendation to the department head whether or not a candidate is suitable for hire. (Patnaude, Tr. 246). Occasionally, Patnaude noted, candidates contact hiring managers directly and the managers set up interviews themselves, however an HR interview always is required. (Patnaude, Tr. 248). The instant case was unusual in that Patnaude interviewed Legley after hiring manager Brennan already had offered Legley the position. (Patnaude, Tr. 248).

Patnaude's interview with Legley lasted approximately fifteen minutes. See, GC 16. Patnaude did not have a positive experience with or impression of Legley in the interview. She noted on her Interview Checklist, "Seemed like it was bothering him to answer my questions & gave very brief answers." *Id.* At hearing, Patnaude described her impression of Legley as "uncooperative" and "disrespectful," impressions that she conveyed to Brennan at the time. (Patnaude, Tr. 251-52). In sharing her reservations about Legley with Brennan, Patnaude apparently asked if he were sure he wanted to hire the Charging Party. Brennan replied that the shift

for which Legley was hired – week-end evenings from 4 p.m.-12 a.m. – was difficult to fill, that Legley had interviewed well 'with all of the guys' in the department, and that Brennan wanted to 'give him a shot,' or words to that effect (Patnaude, Tr. 252, 267).

As soon as Legley left HR to go to Employee Health, Dorsey told Patnaude about the problems she had perceived in dealing with Legley and that she thought Legley was going to be difficult. (Dorsey, Tr. 294). Later the same day, Dorsey received a telephone call from Employee Health nurse Eileen Rainey, RN, who told her that Legley had been difficult at every step of his pre-employment physical. (Dorsey, Tr. 292-93). According to Dorsey, Rainey rarely called her about a candidate, and only did so to give HR a "heads-up." (Dorsey, Tr. 293). Dorsey estimated that Rainey had made such a call perhaps five times in the previous two years. (Dorsey, Tr. 293, 302). To Dorsey, the fact that Rainey called at all signified Rainey's desire that the information about Legley be conveyed to Patnaude, and Dorsey did so. (Dorsey, Tr. 302). She told Patnaude that Rainey had reached out to alert the HR staff that Legley had been problematic to deal with at Employee Health, and had questioned and required copies of every document he filled out there. (Dorsey, Tr. 293, 302). Rainey, a registered nurse who conducted the Medical Center's employee medical examinations, was unavailable to testify at hearing in this matter. However Annette Miller, a Medical Assistant in the Employee Health Department who helps to administer pre-employment physicals, also observed and interacted with Legley at Employee Health. At hearing, Miller recognized Legley in the hearing room and variously described his comportment at Employee Health as "kind of agitated as to why we were conducting all these tests" and unusually "suspicious." (Miller, Tr. 411-12).

Legley Repeatedly Disrupts Lavigne's Presentation And Overwhelms The Veteran Delegate With A Series Of Rude Interruptions.

Legley arrived for his first day of work at Good Samaritan on Monday, December 19, 2011; he was to spend the day in an orientation program devised and administered by the Human Resources Department. (Legley, Tr. 44; see also, Derby, Tr. 134; Lavigne, Tr. 327). The first meeting of the day was scheduled as a twenty-minute or so orientation to the Union, conducted by Union delegate and bargaining unit member Darlene Lavigne. (Lavigne, Tr. 327). No representative

of management or Human Resources attended the meeting. (Lavigne, Tr. 327, 342). The meeting was held in a small conference room on the fifth floor of the Medical Center; four or five new employees, including Legley, attended. (Lavigne, Tr. 328; Derby, Tr. 134 ["It wasn't too big"]; Leveille, Tr. 374 ["it's really a small, tight space"]).

Lavigne has worked at Good Samaritan for thirty years and holds the position of unit coordinator on a med.-surg./oncology floor. (Lavigne, Tr. 322). She has served as a Union delegate (formerly, steward) for many years (Lavigne, Tr. 323), since the very beginning when the unit was organized in or around 1999. (Leveille, Tr. 365, 368). Among her activities as a delegate, Lavigne conducts union orientation sessions for new employees and conducted approximately twenty such sessions per year for between five and ten years.[4] (Lavigne, Tr. 323). Union Administrative Organizer MaryEllen Leveille, on staff at the Union, trained Lavigne in how to make such presentations, including how to address issues related to Union membership and payments. (Leveille, Tr. 368-369). Leveille testified:

> We instruct the delegates who do orientation to have people look at the information on the form that talks about being an agency fee person. If they don't want to join the union, they don't have to. It's their right. And they are just, you know, they have the information there to be able to give to people.
> … because the time is so limited, I have instructed the people that do the orientation in the Stewart (sic) system to tell people that they will meet with them after to be able to more fully explain it, because we don't have a tremendous amount of time allotted to us….

(Leveille, Tr. 369:2-7, 12-16).

Lavigne has a routine for conducting the sessions: She introduces herself, including where she works and how long she's been at the hospital; she tells new workers how many union employees there are, how many hospitals are involved, and describes the benefits of the union. She tells them "a little bit about PAC, political action," and encourages employees to become involved in the union. (Lavigne, Tr. 324). Lavigne gives each employee a packet of materials that includes the collective bargaining agreement between Good Samaritan and the Union, a form described by Lavigne as "the form that the employees fill out so the union can know what hospital they worked at

[4] Union orientations are given during Good Samaritan's bi-monthly new employee orientation days and, as was true here, typically are scheduled for twenty minutes. (Lavigne, Tr. 323, 327).

and if we need to contact them … an informational form" (GC 5), and an information packet titled, "Information for Union Members" (GC 6). (Lavigne, Tr. 324-325; GC 5, GC 6). The "informational form," GC 5, is a two-sheet 8½" x 11" pamphlet that bears a cover with a large 1199SEIU United Healthcare Workers East logo and the phrases, "Proud of our Union" and "Proud of our Future." The second page is titled, "Application for Membership" and contains three boxes: The first calls for an employee's identifying information, the second calls for identifying information about the employee's employer, and a third box is titled, "Signature," and reads, "I hereby accept membership in 1199SEIU United Healthcare Workers East, and designate 1199 to act for me as collective bargaining agent in all matters pertaining to conditions of employment. I hereby pledge to abide by the Constitution of 1199SEIU United Healthcare Workers East." GC 5. The third page contains a boxed "Union Dues Check Off Authorization" and boxed "Political Action Fund Check Off Authorization." A banner at the bottom of the page, in large bold type, reads, "**See Reverse for Information on Membership Rights →**". *Id.*

The reverse page contains a box titled, "Membership Rights," which congratulates workers on their new jobs, welcomes them to 1199, and informs them, "You have the opportunity to join the largest health care union, with the highest standards (wages and benefits) in the United States….We hope you will join with us and become an active member of 1199." GC 5, p. 4. There follows a short paragraph describing some of the benefits of union membership, and two lengthy paragraphs describing in detail employees' rights under federal law to "choose not to be a member of 1199, and still receive the terms of the collective bargaining agreement (but not the benefits of Union Membership)," the right to pay agency fees in lieu of union dues, and the "right to object to providing financial support to union activities not germane to collective bargaining…." *Id.* Detailed instructions provide the employee with step by step guidance on exactly how and when to inform the Union of a choice not to be a member of 1199 and how to submit an objection. *Id.* Likewise, on the fourth page of the Information booklet that Lavigne distributes, the following appears as one of nine "Frequently Asked Questions":

Q. May I pay an agency fee rather than become a member?

> **A.** Every employee has the right to choose to become an agency (fair share) fee payer instead of a union member. However, by doing so, you will forfeit all rights and benefits of union member-ship (sic). Information on agency (fair share) fee is included on the Information on Dues and Fees sheet in this packet.

GC 6 at 6. Information About Dues and Fees appears on page 11 of the packet and includes a detailed paragraph that begins, "You may choose not to become a member and to pay an Agency Fee for the union's cost of representing you. …" The paragraph goes on to describe agency fee and objector status in detail, including examples of expenditures germane to collective bargaining and expenditures not germane. GC 6 at 11. Asked what she tells new employees about GC 5, Lavigne testified she tells new workers that the "form needs to be filled out and given back to me. I go over a little bit about the PAC, that it's all voluntary, … but that form does need to be filled out and given back to me before I leave." (Lavigne, Tr. 326).

Lavigne remembers the orientation session Legley attended on December 19, 2011, in part because it was her day off and she came into Good Samaritan solely to present the orientation, scheduled for first thing in the morning. (Lavigne, Tr. 331, 334). As usual, Lavigne had about twenty minutes to get through the information she routinely presented, after which a representative of Human Resources would come in and proceed with the Medical Center orientation. (Lavigne, Tr. 327). Lavigne recalled that Legley – the sole male – entered the room several moments after the rest of the group, and immediately looked at Lavigne, pointed his finger at her, and said, "You were supposed to meet me in the lobby." (Lavigne, Tr. 329). Lavigne replied that she didn't meet people in the lobby, and continued to introduce herself. Legley interrupted her and repeated that Lavigne was supposed to meet him in the lobby, to which Lavigne again replied that that was not something she did. *Id.* She tried again to resume her presentation and Legley interrupted again to complain that the elevators didn't work and he had to walk up five flights of stairs. Lavigne replied that she knew, that there had been a power shortage. *Id.* As soon as Lavigne returned to her presentation, Legley interrupted a third time, and continued to mumble about not being met in the lobby. *Id.*

Lavigne described Legley's manner as "overbearing" – she felt "like I was in the room with this big man and there was nobody else there." (Lavigne, Tr. 330)[5]. She described the scene:

> He kept talking. And time was going by and I knew I was running out of time. And I was trying to tell the new employees about the benefits of the union … And he just kept interrupting me….
> … [The other employees in the room] looked like they were stunned, afraid, or that they shouldn't dare ask any questions. And he was consuming the whole meeting that it just wasn't fair.
> … He wasn't yelling, but he was talking loudly. He was exerting his power, like he was just – it was all about him….

(Lavigne, Tr. 331). When Lavigne asked the employees to bring out the form to fill out, GC 5, Legley had it in hand and already was reading it. Id. Lavigne described what followed:

> A When I asked the people to bring out the form to fill out, he was already looking at it, and flipping to the back, and pointing to the back. This is a federal law, I don't have to join the union. And he was letting people know. He wasn't just talking to me. He was talking loud enough so everyone knew. And I just said we can talk about this later, if you'd like. No response from him. He just kept going.
> …Q Okay. Then tell us as much as you do recall of how things went from that point forward, who said what.
> A You know I asked him, I said three times if you would like to talk about this after, we can. I said I came in here on my day off. I have a limited amount of time. HR is waiting out the door. I need to finish this.
> Q And did he reply?
> A He says, well, I don't even know if I want to work in a place like this. I had no response. He said I'm making a copy of this. I gave him no response. He got up, went and made a copy, came back. And I said, please, everyone, hand in your forms, I need to take them.
> Q Did you tell people that they had to fill out the forms?
> A Yes. The forms need to be filled out.
> Q Do you recall anything else that he said?
> A He just simply said I don't know if I want to work in a place like this.
> Q And do you recall anything else that you said?
> A No. I just – I said my time is up. I said HR is out the door, I need to leave. And that was it.
> Q And at any point in time did you see him read the information on the back of the –
> A He was reading it. He was pointing to the white section, but he wouldn't let me explain.
> Q Okay. And when someone raises a question about joining the union, do you have information that you typically or that you were trained to give people about that?
> A I'm sorry, if they?

[5] The ALJ could observe for himself Lavigne's diminutive stature – perhaps five feet tall and of average weight – relative to Legley's size, estimated to be well over six feet tall and more than well-nourished.

Q Yeah, if somebody says, well, I don't have to join the union or I can pay an agency fee, I mean was there information that you were prepared to give him about that?
A I would tell him about the yellow section on the back of that form where he could join the agency fee, but he didn't let me.
Q Okay. And did he ever respond to your saying we can talk about this afterwards?
A No.

(Lavigne, Tr. 331-332). As she related in testimony her experience with Legley, Lavigne became visibly upset and tearful. Asked whether she was upset back when the interaction happened, Lavigne replied, "I was upset because of the interruptions, the rudeness, the overpowering of my presentation." (Lavigne, Tr. 333). Asked whether it mattered to her that Legley was saying that he didn't have to join the union, Lavigne answered, simply, "No." What mattered was Legley's rude, overbearing demeanor that scared her (Lavigne, Tr. 350-351) and, to her observation "was scaring the other ladies … I mean they're like they were shocked. They were like waiting to see like what's going to happen next." (Lavigne, Tr. 333).

In the end, Legley filled out the application form, signed it, made a copy of it, and gave the form to Lavigne. He did not speak with Lavigne. As Lavigne exited the conference room, she saw Rebecca Cadima, from Human Resources, standing close by; Lavigne waved Cadima over and told her that she had come in on her day off for the orientation and that "he really, really gave [her] a hard time." Cadima replied, "I know, he gave me a hard time, too." (Lavigne, Tr. 334). That exchange with Cadima was Lavigne's only conversation with any representative of management or Human Resources before the Medical Center decided to terminate Legley's employment.

Kimberly Derby, who worked briefly for Good Samaritan as a sleep technologist and was present at the orientation on December 19, 2011, also testified. (Derby, Tr. 131). As did Lavigne, Derby described the initial portion of Lavigne's presentation as a self-introduction and description of some of the benefits of joining the Union. (Derby, Tr. 135). Unlike Lavigne or Legley himself, who attributed to Legley statements, not questions, about joining the union, Derby testified that Legley asked whether he had to join the union (Derby, Tr. 137), and further testified that Lavigne answered that he did. (Derby, Tr. 137-138). Derby described Legley's voice as "loud" the first time he asked the question, and described Lavigne's demeanor as "normal" when she answered. (Derby,

Tr. 138). According to Derby, Lavigne then continued her presentation and that Legley then read "that part of the paperwork about not having to join." (Derby, Tr. 138). Derby described Lavigne as saying Legley did have to join the union, Legley reading from the union pamphlet, GC 5, that he did not have to join, and continuing to question Lavigne throughout the meeting. She described both Legley and Lavigne becoming "irritated," (See, e.g., Derby, Tr. 138, 141), and, after Legley asked to make copies of the paperwork, quotes Lavigne as asking where Legley worked and telling him she was going to warn the workers there "that he was coming and that they would not put up with him," a statement she took as "a threat." (Derby, Tr. 140).

Derby's hearing testimony on direct examination, however, guided (and sometimes led) by counsel for the General Counsel, underplayed the force of Legley's conduct. On cross examination, Derby confirmed that Legley asked more questions than anyone else, that he asked some of his questions multiple times, and that he might have been perceived as interrupting Lavigne. (Derby, Tr. 151). As she had attested in her affidavit to the Board during its investigation, at hearing Derby confirmed that Legley "continued questioning the union rep. about having to join the union" after Lavigne's initial answer, and that he read from the Union booklet, GC 5, that "Federal law requires us to inform you that you don't have to join." (Derby, Tr. 153). In her affidavit, written nine months before the hearing, Derby stated that Legley "was getting irritated because he was pretty passionate about being sure there was a law," and at hearing confirmed that Legley's voice was raised, his manner "very forceful and energetic," and that his voice filled the room. (Derby, Tr. 154-156).

In sum, Derby agreed that Legley was "a big guy with a big voice … a big presence in the room," whose body language expressed his irritation and whose emotional state had escalated. (Derby, Tr. 156). Lavigne, in contrast, although appearing to Derby also to be "irritated," was by comparison diminutive and did not have "a boisterous voice like Mr. Legley." (Derby, Tr. 156). Derby was clear that her memory of the session was imperfect[6] – that she didn't hear everything that

[6] For example, Derby did not remember how many employees attended the union orientation, whether there were any other males present besides Legley, whether Lavigne sat or stood during her presentation, whether Rebecca Cadima was present, or whether she received from

was said and was occupied with filling out paperwork as the meeting went on. Accordingly, she could not say that Lavigne did not invite Legley to talk with her after the session about his concerns. Nor did she recall whether or not Lavigne expressed feeling pressured for time to get through the information she had to convey. She did, however, observe Lavigne to be organized for her presentation and could not be sure what it was about Legley that caused Lavigne's apparent agitation. (Derby, Tr. 152). In sum, in answer to the Administrative Law Judge's question, Derby remembered Lavigne saying simply "that all employees of Good Samaritan were union employees." (Derby, Tr. 161). Derby did not attribute to Lavigne any word of threatened consequence to non-membership. *Id.*

Lavigne's Complaints To Union Personnel And The Ensuing Discussions of Legley's Conduct Ignore Almost Completely The Content Of His Interruptions At The Orientation Session.

By the end of the orientation session, Legley's conduct had left Lavigne distraught "at being treated in such a manner," and more emotionally upset than any interaction with any Medical Center employee – union member or not – had caused her to feel in her thirty years of employment. (Lavigne, Tr. 334). Not only had Legley been loud and rude and scary to Lavigne, she experienced him as calling her a liar by pointing to the form's statement of federal law but not letting her explain. (Lavigne, Tr. 335). As it was her day off, she went home immediately and from there called Union Administrative Organizer Leveille. (*Id.*; Leveille, Tr. 366-367).

Lavigne began the conversation by telling Leveille that "she owed me big time," that she "had this person, he was rude. He was constantly interrupting me. He wouldn't let me give a proper presentation. He was overbearing. And I've never, ever had a new employee act like this. Why would someone come into a new business, the first day, and act like this? You don't do that." (Lavigne, Tr. 335). She told Leveille about Legley's complaints that she did not meet him in the lobby and that he had to climb the stairs, which to Lavigne was "his 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."

Lavigne or someone else the packet of union information that each received. (Derby, Tr. 134). She did not recall whether Lavigne discussed the duties of a union delegate. (Derby, Tr. 135).

(Lavigne, Tr. 336). She did not ask Leveille to do anything about Legley – as she testified at hearing, "I basically was venting." (Lavigne, Tr. 336).

Leveille recalled receiving the call from Lavigne at around 9 a.m., and that Lavigne "was quite upset … she was choked up, like she was crying." (Leveille, Tr. 371). The first things Lavigne told Leveille about the orientation that morning were that "there was a man who came in and he was, you know, he was very intimidating. He started pointing his finger at me and yelling at me, and I couldn't get through everything I had to tell everybody. He kept interrupting me … he was just very loud and he was pointing his finger at me. And then she explained about him accusing her of not meeting her in the lobby…and then he had to climb up the stairs." (Leveille, Tr. 371-372). As Leveille described Lavigne's upset, nothing initially was said about the union or union membership: "It was his, you know, when he came in the room and he really just started badgering her about not meeting him in the lobby and then having to take the stairs. And Darlene is somebody that really likes to stay on her program when she does her orientation, so she really felt discombobulated because he just kept interrupting her." (Leveille, Tr. 372).

Well into their phone conversation, Lavigne told Leveille something to the effect that the man "said he didn't have to do, he knew his rights, and that he did sign the form, he did make a copy, and he did say that he didn't even know if he wanted to work in a place like this," (Lavigne, Tr. 336; Leveille, Tr. 373), however Leveille took no particular note of the membership issue. (Leveille, Tr. 373). Asked if she replied to Lavigne on the subject, Leveille testified, "Not about that. My immediate concern was about her emotional state. If he didn't want to join the union, I don't care. That wasn't of importance." *Id.* The bargaining unit at Good Samaritan includes non-member agency-fee payers and objectors who pay only their share of collective bargaining related expenditures, all of whom receive representation on the same terms as dues-paying members. (Leveille, Tr. 373-374; 379). Nicholaides 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, "Absolutely," and so he offered assistance. (Nicholaides, Tr. 233).

Leveille later called Nicholaides and asked him "what the [expletive] was going on, a worker that is going to be working with you guys just gave Darlene a really hard time in orientation. She called me. She's crying. And you know Darlene; this isn't like her, what's going on." (Leveille, Tr. 375). Nicholaides already had spoken with Lavigne and knew she was very upset. There was no mention of any statements by Legley concerning Union membership. Leveille simply asked to let her know how things went once Legley started work. (Leveille, Tr. 376). Leveille testified that what occurred to her, in fact, was that she was "going to have to be defending this guy somewhere down the line if he's going to continue to act like this." *Id.* The next Leveille heard about Legley, Neal informed her later in the week that the Good Samaritan had terminated him. (Leveille, Tr. 377).

Nicholaides testified that he received a call from Lavigne that morning, that she was "extremely upset, her voice was shaky, she told me she had never been treated this way before, that he came in right from the get-go complaining that he had to walk up the stairs….no one met him when he first came in, and that he didn't even know if he wanted to work at a place like this." (Nicholaides, Tr. 216). Nicholaides testified that to the extent Darlene mentioned to him any issue about union membership, it was that Legley "was calling her a liar, basically." (Nicholaides, Tr. 217). "Because Darlene was so upset," Nicholaides called Rebecca Cadima, who he knew to be conducting the orientation for the hospital. (Nicholaides, Tr. 205-206, 226). He asked Cadima if she knew what had happened at orientation because he never had seen Lavigne so upset. *Id.* Cadima replied that she hadn't been in the room, but knew that Lavigne was very upset. (Nicholaides, Tr. 223). Cadima added that throughout the whole hiring process, Legley "ran us through the ringer" and that "we were going to have our hands full with him." (Nicholaides, Tr. 223, 226-227).

At some point that day, Cadima called Jen Patnaude and told her that something had happened at orientation. Patnaude recalls Cadima saying "that Darlene was visibly upset when she left the room," but that Cadima had not had a chance to speak with Lavigne. (Patnaude, Tr. 261). Either in that conversation or on some other occasion, Cadima also related to Patnaude having difficulty with Legley when he filled out his pre-employment paperwork. (Patnaude, Tr. 280).

The Events Of December 20, 2011

The day after orientation, Legley reported to work in the Facilities and Maintenance Department. He immediately told lead boiler operator Jordan that he had "had a disagreement with the girl giving the orientation," and that he had done "nothing wrong," comments that Jordan heard as something that "could be a disciplinary problem." Accordingly, he took Legley down to the plumbing shop to tell his story to all three union delegates – himself, Nicholaides, and Monahan. (Jordan, Tr. 178-179). Legley related his version of the session – that Lavigne wasn't being truthful and "said you had to join the union" – and added, "Maybe I'm not a good fit here." (Jordan, Tr. 180). When Jordan heard from Nicholaides that the Union delegate had become very upset and called him – that "she was very, very distraught, she said she had never been treated that way" – Jordan became concerned not about any union issue, but about "a respect and dignity issue." (Jordan, Tr. 181). Jordan recalls saying something to the effect that it was not a good thing but that "[i]t might just blow over. Let's continue our day." (Jordan, Tr. 182). Jordan planned to spend the remainder of the day training Legley. *Id.*

Nicholaides recalls Legley telling the men that Lavigne "lied to him and that he knows his rights, he doesn't have to join the union." (Nicholaides, Tr. 228). Nicholaides asked Legley whether he had made the statements Lavigne had mentioned, and Legley admitted he complained about not being met in the lobby, complained about having to take the stairs, and that he "might have said" that he didn't even know if he wanted to work at "a place like this." (Nicholaides, Tr. 229). Nicholaides went on to tell Legley, "Well, she may not have been lying to you, you have to fill out that information card, they need to have all your information. And then whether you decide to join the union or not, that's up to you." (Nicholaides, Tr. 229). When Legley said – twice, in Nicholaides' recollection – 'If I'm not a good fit here I'll just leave,' Nicholaides told him plainly, "That decision is not up to us, that's up to you." (Nicholaides, Tr. 229).

During the afternoon of December 19, Nicholaides encountered Patnaude after a meeting and they spoke briefly about Lavigne's extreme distress and Legley's behavior. (Nicholaides, Tr. 212). Patnaude mentioned that she had had dealings with Legley and he had been problematic all

along, even during his physical. (Nicholaides, Tr. 210). Patnaude told Nicholaides that the nurse had called to complain about Legley. (Nicholaides, Tr. 210). There was no discussion of the content of Legley's statements at the orientation. (Nicholaides, Tr. 212).

On Tuesday, December 20, after a hospital-wide holiday lunch, Nicholaides came over and spoke with Patnaude, Kenyon, and Tom Watts. At that point, Patnaude already had heard about Legley from Cadima, who reported Lavigne's upset (but nothing concerning any of the things about which Legley expressed irritation). Patnaude testified concerning the events that followed:

> … 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 disrespectful when he came in and interviewed with me, he was very rude. And then when he came in to complete his new hire paperwork, he was rude to the HR staff. He was also rude when he went to employee health. (Tr. 259:8-15)
> … Neal was talking about how upset Darlene was. And at some point, Neal left and Tom, Scott and I talked about the length of time it would take to train [Legley], to get him up to speed with the facility and the different duties that he would have beyond what he would do as a boiler operator, and decided at that point to cut our losses and terminate his employment. (Tr. 260:19-25).

In answer to a question from the Judge ("Did somebody make a recommendation saying, well, I think we ought to do X, Y, and Z?"), Patnaude testified:

> Well, that was when I was talking with Tom Watts, our regional HR director, and Sean Brennan – Scott Kenyon. Based, you know, based on the fact that I didn't think he should be hired in the first place and his behavior, his poor behavior continued wherever he went throughout the on-boarding process, and then continued at orientation. (Tr. 262:13-18).

When further questioned by the Judge about her reliance solely on Lavigne's report, Patnaude added that Cadima had seen that Lavigne was visibly upset after the orientation and that Legley never raised any concern, if he had one, to Cadima, the hospital's HR representative who immediately followed Lavigne into the orientation room. (Patnaude, Tr. 263-264):

> It was really a decision between the three of us that this is going to take time to train this person. He was rude and disrespectful from the time he interviewed with me through, you know, when he came back for his new hire paperwork in HR. Eileen Rainey in employee health called us to tell us…. that he was disrespectful when he went to complete his pre-employment physical. (Tr. 264:23-265:2, 265:12-13).

> It was based on what we had discussed. It was his poor behavior every single time he came to or met with some of our employees. I didn't feel it was necessary to ask the individuals at orientation, based on what I had experienced myself with this individual. (Tr. 265:20-24).

Shown notes she wrote later in the day (Tr. 270:24-25), Patnaude testified that others came in and out of the initial conversation, likely supervisor Brennan and Jordan. Patnaude was clear, however, that "in the end it was Tom, Scott, and I who talked in more detail. … But I know at the end we discussed how long it was going to take to train him, what type of investment that would be. And he's working the night shift where somebody with inappropriate behavior on every experience we've had with him and we're going to unleash him on the night shift was a concern, too." (Tr. 273:18-274:5). Kenyon, who testified, corroborated Patnaude's testimony that the focus of concern was Legley's "rude and condescending behavior" (Kenyon, Tr. 400:1, 400:16-17). Kenyon specifically had heard of Legley's complaints about not being met in the lobby by Lavigne. (Kenyon, Tr. 401). When he learned of Patnaude's initial assessment that Legley should not be hired, the complaints that arose throughout Legley's contacts with HR and employee health, and took account of investment of time Legley's training would involve, Kenyon determined, with Patnaude and Watts, that termination was the best course. (Kenyon, Tr. 391-392). Kenyon testified plainly that Nicholaides took no part in the decision-making conversation and made no recommendation about Legley's employment. (Kenyon, Tr. 391).

Late in the day, Jordan, Nicholaides, and Kenyon came to be in the director's office together, an occurrence that was not unusual. (See, e.g., Jordan, Tr. 185-186, 187). By then, as Jordan attested, "it was no secret … that Mr. Legley had caused a commotion, and Scott expressed concern about Mr. Legley being trouble and not a good fit because of the 'I believe' code and said he wasn't going to take a chance of having disruption in the department, or words to that effect." (Jordan, Tr. 188). At no time in the conversation did Nicholaides, Jordan, or any other participant express concern that union membership was one of the things Legley complained about to Lavigne. (Nicholaides, Tr. 219).

The Relationship Between The Union and Good Samaritan: The Strategic Alliance And The "I Believe" Culture

Steward Healthcare System, of which the Medical Center is a part, and the Union are partners in what's referred to as the "Strategic Alliance." (Jordan, Tr. 192). Jordan described the alliance as "a strategy Steward implemented [s]o that management and the staff would have a more harmonious working environment….Treating each other with dignity and respect was a big aspect … making the work force harmonious so that employees were happier, which ultimately resulted in better patient care, which was the ultimate goal." (Jordan, Tr. 192). For a long period of time, Jordan carried in his pocket a pamphlet titled, "I Believe," that contained sayings related to "conduct and respect and conducting yourself." *Id.*; Ux. 1. HR Director Patnaude described the central tenet of Steward's philosophy or culture as "Positive communication and respect for one another," and the hospital has terminated employees for incivility.[7] (Patnaude, Tr. 282). See, also, GC 2, Ux. 1, Ex 1. Union and Medical Center witnesses alike confirmed that conflicts and disagreements between the Union and management continue, including some that advance to arbitration (Jordan, Tr. 198; Nicholaides, Tr. 222).

There was no dispute that the Union plays no role in decision-making about a worker's continued employment, (Leveille, Tr. 379 ["We have zero, zero input on that"]), and the advent of the Strategic Alliance and the Code worked no change in that relationship. Id. In fact, in Leveille's fourteen years of involvement with the bargaining unit at Good Samaritan,[8] the Union never has caused, suggested, requested, recommended, or taken any step to procure a worker's termination from employment at the hospital. (Leveille, Tr. 380). In the Facilities and Maintenance Department specifically, employment decision-making rests with Director Scott Kenyon, with some level of participation by supervisor Sean Brennan. No bargaining unit member and no Union delegate plays any role in decisions to terminate a worker's employment. (Jordan, Tr. 191. See, also, e.g., Kenyon, Tr. 393). To the extent that workers in Facilities sit in on interviews of job candidates in the

[7] The two examples of such terminations entered into evidence involved regular employees, who had passed their respective probationary periods and, as members of unions (MNA and a guards union), were protected by the just cause requirements of their unions' respective union contracts with Good Samaritan, and subject to progressive discipline. (Patenaude, Tr. 310-311; GC 18, GC 19).

[8] Leveille became employed by the Union in 1997, and began servicing the bargaining unit at Good Samaritan in 1999. (Leveille, Tr. 365).

department, they do so as leads in their respective areas of expertise – i.e., Lead HVAC Refrigeration Mechanic Nicholaides, Lead Plumber Monahan, Lead Boiler Room Operator Jordan. (Jordan, Tr. 191).

DISCUSSION AND ANALYSIS

Despite recognition that "[t]he evidence does not show that anyone from the Union asked for, suggested, recommended or demanded that the Employer discharge Legley;" and recognition that "a 'cause or attempt to cause' must be shown by some evidence of union conduct [Citation omitted];" the ALJ's decision proceeds to ignore uncontradicted record evidence and strain credulity in holding:

> …the Union's delegates, knowing of the Company's Workplace Civility Policy, reasonably would have foreseen that Lavigne's complaints about Legley's 'bad' behavior …would likely lead to his discharge. As a consequence, her reports to her union colleagues which were transmitted to management, were in my opinion, the proximate cause of his discharge.

Decision at 6. Not a shred of evidence supports the ALJ's overreaching speculation, however; rather, substantial evidence calls for the opposite conclusion – i.e., every person associated with the Union who communicated with Lavigne or with management concerning Legley's conduct at orientation testified credibly to anticipating Legley's continued employment at the Medical Center.

Moreover, the ALJ's decision ignores completely the ample record evidence – either corroborated or uncontradicted by every percipient witness who testified – that, 1) what so distressed and unsettled Lavigne was Legley's loud and disruptive conduct in the orientation, in the form of repeated complaints in a loud voice about various subjects, which Lavigne reported as such to Leveille and Nicholaides immediately after the orientation; and 2) that Lavigne barely mentioned Legley's statements about union membership to Leveille and Nicholaides, and Leveille and Nicholaides barely mentioned them, if at all, to Medical Center representatives. Such complete disregard for substantial record evidence in the ALJ's fact-finding requires that the Board reject the ALJ's erroneous findings and conclusion concerning Union responsibility for Legley's discharge, and order the complaint against the Union dismissed in its entirety. See, *Permaneer Corporation*, 214 NLRB 367, 368-369 (1974) ("An Administrative Law Judge cannot simply ignore relevant evidence bearing

on credibility and expect the Board to rubber stamp his resolutions by uttering the magic word "demeanor").

I. The ALJ Erred In Finding Legley's Conduct Toward Lavigne At Orientation, Described By Lavigne To Leveille And Nicholaides And Mentioned By Nicholaides To Hospital Representatives, Was Protected Under The Act.

Under the circumstances present in this unusual case, the ALJ erred in finding Legley's behavior toward Lavigne at the orientation meeting protected, notwithstanding that portion of it that asserted his right to elect non-membership in the Union. As the ALJ noted, the Board and the courts have recognized that even an employee engaged in otherwise protected concerted activity can lose the protection of the Act by particularly abusive or contemptuous conduct. *Atlantic Steel*, 254 NLRB 814, 816-817 (1979) (reversing ALJ's refusal to defer to arbitrator's award that upheld discharge and ALJ's contrary finding that discharge unlawfully based on employee's protected activity). In *Atlantic Steel*, the Board articulated a standard for deciding whether an employee has crossed the line between protected and unprotected activity in the context of an employee's insubordination directed toward his supervisor. *Atlantic Steel*, 245 NLRB at 814. In that context, the Board stated:

> The decision as to whether the employee has crossed that line depends on several factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice.
> To reach a decision, the Board or an arbitrator must carefully balance these various factors.

Atlantic Steel, 245 NLRB at 816-817.

However the ALJ does not point to and the Union has not found any precedent that standards developed through case law under *Atlantic Steel* necessarily and properly apply to the Charging Party's conduct here, where the conduct on the basis of which the ALJ would inculpate the Union is directed by one employee at another in the presence of co-workers, but not the employer. The distinction is critical. In assessing employee speech or conduct directed toward supervisors or managers, the Board balances the more or less "bedrock" prohibition on employee insubordination directed toward a representative of the employer, against an employee's Section 7 right of free choice and expression. *Atlantic Steel*, *supra* at 814. In the context of protected activity,

however, because a co-worker is not clothed in the authority of the employer and has no immediate power or authority to protect him- or herself from verbal abuse, that employee should not have to be willing and expected to absorb abusive conduct short of the usual *Atlantic Steel* exceptions – assault, threats, etc. – in order to serve as a Union delegate. The co-worker simply does not wear the same shield as a supervisor or manager and so the boundary for acceptable conduct appropriately may (and should) fall short of the *Atlantic Steel* type extremes.

Here, Legley's conduct was not directed at a figure clothed in the employer's authority or with any ability to affect his employment status, and thus his conduct neither constituted insubordination nor undermined the employer's authority in the presence of other employees. Moreover, the evidence was unrebutted, and the ALJ did not find otherwise, that the Union has no actual or effective authority to affect the Charging Party's employment status. Yet the ALJ held the Union responsible, in part, for the Medical Center's termination of the perpetrator of the conduct despite finding the Union not to have taken any action to procure it. Decision at 6.[9] Under these circumstances, and where the conduct at issue took place solely among employees, the purposes of the Act do not require, but counsel against requiring misconduct of the sort articulated in *Atlantic Steel* to remove such conduct from protection. If anything, such circumstances require reining in the boundary of tolerable protected conduct in order to avoid undermining the union in the eyes of other employees present, as would result from an employer condoning, in effect, that Union delegates may be abused and treated worse than other co-workers. See, *Laborers International Union of N.A. Local 872*, 2012 WL 1797725 (N.L.R.B. Div. of Judges) ("the Respondent's reliance on *Atlantic Steel Co.*, 245 NLRB 814 (1979), to evaluate a confrontation between a member and a union agent is misplaced").

Untethered from case law applying the *Atlantic Steel* standard to measure whether or not Legley's conduct was protected under the Act – e.g., he used no unprecedented vulgarities, he made no threatening physical gestures – the weight of the credible evidence compels a finding that his

[9] For reasons argued elsewhere herein, as well as by the Respondent Medical Center, the Union objects to the ALJ's determination that the Medical Center terminated Legley because of protected conduct.

conduct directed against Lavigne was not and should not be protected. Asserting the right not to become a dues-paying member of the Union in the presence of other "interested" employees (as Derby was prompted by the General Counsel to describe herself) generally is protected activity. For a large man to do so in a loud, irritated, overbearing voice, in the course of a stream of persistent interruptions and complaints that began with and repeatedly returned to unprotected subjects, all directed at a relatively diminutive female co-worker to a degree that scared her and brought her to tears – that is not and should not be protected conduct.

A finding otherwise, far from effectuating the Act, undermines the purpose of the Act to protect employees' participation in union activities and will chill employees from serving as delegates, should they be required to endure such conduct from co-workers. As the Board noted in *Atlantic Steel*, "We find nothing in the arbitrator's decision [upholding the charging party's discharge] that is repugnant to the Act. Indeed, a contrary result in this case would mean that any employee's offhand complaint would be protected activity which would shield any obscene insubordination short of physical violence. That result would not be consistent with the Act." *Atlantic Steel*, 245 NLRB at 817. See, also, *Laborers International Union of N.A. Local 872*, 2012 WL 1797725 (NLRB Div. of Judges) (where charging party's conduct exceeded the bounds of language and behavior generally accepted in the hiring hall, and caused "concern and nervousness" in its recipient, a union dispatcher who never before had been treated in like manner, discharge was lawful notwithstanding otherwise protected content). Although the conduct at issue in *Laborers* included vulgarities not present here, the Board noted also with approval the arbitrator's consideration of factors outside the incident itself, including the employee's past record. In light of these principles, and of the abundant evidence (discussed below) of Legley's interruptions and complaints concerning subjects unrelated to Section 7 rights, the Board should find the ALJ to have erred in holding Legley's behavior in this case, directed at a co-worker in the presence solely of co-workers, to be protected under the Act.

II. The ALJ Erred In Finding The Union Responsible To Any Degree For Causing Legley's Discharge, Based Solely On Speculation Unsupported By Any Evidence And Contradicted By Unchallenged Evidence That Union-Affiliated Personnel 1) Anticipated Legley's Continued Employment At The Medical Center, and 2) Expressed No Concern To Each Other Or To Management About Legley's Statements At Orientation Concerning Union Membership.

E. The ALJ Erred In Adopting Legley's Testimony As Fact Without Regard To Substantial Contradictory, Unrefuted Evidence And Legley's Frequent Confusion And Inconsistent Testimony.

In *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951), the Board set forth the standard of review of an Administrative Law Judge's findings of fact. The Board stated:

> In all cases, save only where there are no exceptions to the Trial Examiner's proposed report and recommended order, the Act commits to the Board itself, not to the Board's Trial Examiners, the power and responsibility of determining the facts, as revealed by the preponderance of the evidence. Accordingly, in all cases which come before us for decision we base our findings as to the facts upon a *de novo* review of the entire record, and do not deem ourselves bound by the Trial Examiner's findings.

Standard Dry Wall Products, Inc., 91 NLRB at 544-545. Here, the ALJ's conclusion that Union delegates "reasonably would have foreseen" that their conversations with management about Lavigne's emotional upset "would likely lead to his discharge," Decision at 6, represents a stretch of imagination unwarranted and unsupported by a shred of record evidence, and must be rejected by the Board. As well, the ALJ adopted as fact confused and contradictory testimony of Legley without any explanation of the basis for rejecting substantial record evidence that contradicted Legley's version of the facts.[10] *Permaneer Corporation*, *supra*, 214 NLRB at 368-369. Finally, the ALJ's factual findings concerning Legley's statements during the orientation session, focused solely on those concerning union membership, ignore completely Lavigne's testimony – corroborated by Leveille and Nicholaides in describing her "fresh complaints" to them – that Legley complained repeatedly

[10] For example, the ALJ found that Nicholaides told Legley that Lavigne had contacted the the head of Human Resources and the head of the Union, and that because of him Lavigne had not collected any contributions to the union's political action fund. Decision at 4; but see, Legley, Tr. 127 (testifying that Nicholaides also told him that Lavigne contacted the "head of the hospital"). The preponderance of the evidence, however, wholly unaddressed by the ALJ, did not support Legley's rendition of what Nicholaides said to him: Lavigne testified credibly that she spoke about the orientation only to Nicholaides and Leveille just after the session (other than a brief exchange of vague and passing comments with Cadima as she left the conference room), and that she neither kept track of nor talked with Nicholaides about political contributions made by new employees; Human Resources Manager Patnaude testified that she never spoke with Lavigne about Legley or the orientation session; Nicholaides credibly denied that Lavigne mentioned anything about political contributions; and Derby testified that in fact she did allocate a contribution to the political action fund. GC 7.

about not being met in the lobby and about having to walk up five flights of stairs to the conference room – testimony that Derby nowhere contradicted.[11] Moreover, Legley's denial of having made such complaints was grounded in his plainly erroneous testimony that it was Lavigne who had met him in the lobby and accompanied the new employees up the stairs to the fifth floor conference room, a version contradicted not only by Lavigne but also by Derby. (Derby, Tr. 132).

F. There Is No Evidence, Let Alone Substantial Evidence, To Support The ALJ's Speculation That Union Delegates "Foresaw" That Their Conversations With Management About Legley "Likely Would Lead To His Discharge," And No Evidence Of Union Or Medical Center Animus Against Non-Members.

Not a shred of record evidence supports the ALJ's conclusion that, under a speculative, tort-like finding of reasonable foreseeability, the Union "attempted to cause and caused the Respondent Good Samaritan to terminate" the Charging Party's employment for any reason, let alone on account of arguably protected activity. The General Counsel did not prove that any individual believed discussing Lavigne's distress and Legley's conduct with Patnaude would result in his termination, and did not prove any circumstances that would support such a belief;[12] nor did the ALJ cite to any specific Union delegate or to staff representative Leveille as harboring such a belief. Rather, all of the record evidence concerning the 'state of mind' of Union-affiliated employees, with respect to Legley's employment status, supports just the opposite conclusion, that all expected Legley to continue to be employed:

- Lavigne, on the phone immediately after the orientation and still in tears over Legley's behavior toward her, did not ask or even suggest that Leveille or Nicholaides do anything further about the incident;

- Leveille credibly testified that what occurred to her, after hearing about Legley's behavior from Lavigne, was that she was "going to have to be defending this guy somewhere down the line if he's going to continue to act like this;"

- Jordan, after hearing from Legley that he had had a "disagreement with the girl giving the orientation" and hearing Legley's rendition of what occurred, offered that it was "not

[11] Moreover, contrary to the ALJ's finding, Derby's testimony did not undermine Lavigne's description that Legley interrupted her multiple times in a manner that was overbearing.

[12] The General Counsel did not and could not produce evidence of any comparable conduct resulting in summary termination, even of a probationary worker.

a good thing," but "might just blow over," and went on to train Legley throughout the day;

- Nicholaides, twice in his recollection, responded to statements by Legley that perhaps he "was not a good fit" not by encouraging or even agreeing with that line of thinking but by telling him "That decision is not up to us, that's up to you." (Nicholaides, Tr. 229).

Moreover, the General Counsel did not and could not produce evidence of a single comparable instance that resulted in summary termination, even of a probationary worker, such as would provide Union representatives a basis to believe that by discussing with management Legley's effect on Lavigne, such an isolated incident would lead to Legley's termination. Rather, the General Counsel produced records of two terminations, neither of which occurred as a consequence of a single incident of rude, overbearing, and disruptive conduct such as was reported concerning Legley. GC 18, GC 19. Rather, both terminations produced by the General Counsel came after more than one incident of "inappropriate behavior," and involved situations more egregious than the orientation.[13] The General Counsel thus provided no circumstantial evidence to support the ALJ's speculation that Union delegates did or could foresee Legley's termination. The ALJ plainly erred in grounding Union liability on such unsupported speculation.

The complete absence of any evidence to support the ALJ's speculation distinguishes the instant case from the cases cited in the ALJ's decision. In *Town & Country Supermarkets*, 340 NLRB 1410, 1411-1412 (NLRB 2004), the Board adopted the ALJ's application of a *Wright Line* analysis to find a union president's explanation for reporting a dissident's alleged threats pretextual. *Wright Line*, 251 NLRB 1083 (1980), *enf.*, 662 F.2d 899 (1981), *cert. den.*, 102 S. Ct. 1612 (1982). The ALJ in *Town & Country* grounded his conclusion of pretext in multiple stated factors, that included: The union president's knowledge that reporting a threat of violence would result in termination; discrediting of the union president's testimony that he felt physically threatened by the dissident's words, "I'm gonna kick your ass;" that the union president didn't report the alleged threat until after

[13] In one matter, termination followed on a series of eight incidents over almost a five-year period, that included insubordination to a supervisor and job abandonment (GC 18). In the second matter, a security officer involved in a prior incident of altercation and, arguably, assault, was fired after he got into a rude altercation with a Stoughton (Mass.) Police sergeant during the emergency room treatment of a patient, about which altercation the Stoughton officer complained. (GC 19).

the dissident stridently opposed the president at a union meeting and repeated her threat to "kick his ass." The ALJ thus concluded, "These facts establish that Rongers seized on this isolated episode as a pretext to purge the bargaining unit of a vocal opponent to Rongers' administration of IEU." *Town & Country Supermarkets*, 340 NLRB at 1411-1412. The ALJ in the instant case did not and could not point to any facts to support his conclusion that the delegates would or could foresee Legley's termination based on the events at the orientation.

Similarly, the ALJ's citation to the *Paperworkers* case is inapposite and fails to support the ALJ's strained and wholly speculative inference. *United Paperworkers International Union Local 1048 (Jefferson Smurfit)*, 323 NLRB 1042, 1044 (NLRB 1997) (hereinafter, "*Local 1048*"); Decision at 6. In *Local 1048*, a union officer made a long belated allegation that a co-worker uttered a racially discriminatory remark, after a suspicious and lengthy chain of events evidencing the co-worker's active and overt opposition to the union leadership. *Local 1048*, 323 NLRB at 1043-1044. In holding the union officer's report to be discriminatory, the ALJ in *Local 1048* explained:

> … the Union's representative, Rick Young, reported an allegation of racial harassment to the Employer with full knowledge of the Employer's rules concerning such conduct and of its policy of assigning strong discipline to violators of those rules. That report, particularly when coupled with his statement, apparently unsupported by any factual basis, that the African-American employees were upset by the alleged remark, and with Bill Young's [the union president's] complaint when [manager] Madore refused to discipline [the dissident] Ramsey, warrants the inference of an implied request that Ramsey be disciplined. The inference stands unrebutted on this record.

Local 1048, 323 NLRB at 1044. In the instant case, no such careful marshalling of evidence accompanied the ALJ's utter speculation and the Board must reject the finding that the Union's delegates "reasonably would have foreseen that Lavigne's complaints…would likely lead to his discharge." Dec. 6. Accordingly, the Board should dismiss the counts of the Complaint alleging the Union violated 8(b)(1)(A) and 8(b)(2) by causing or attempting to cause Legley's discharge because of his protected concerted activity. On the contrary, the overwhelming preponderance of the evidence establishes that Legley's statements about not having to join the Union played no role either in Lavigne's unprecedented emotional distress, in Nicholaides' conversations with

management about the effect Legley had on Lavigne, or in the Medical Center's decision to terminate Legley from probation.

G. By Ignoring An Entire Body Of Evidence Concerning The Totality Of Legley's Conduct At Orientation, Lavigne's Emotional Reaction To Him, And The Conversations Among Lavigne, Nicholaides, And Leveille That Immediately Followed, The ALJ Erred In Finding Legley's Statements About Union Membership Could Not Be Separated From His Demeanor Throughout The Orientation And Were The Cause Of Lavigne's Profound Emotional Distress.

The preponderance of the evidence establishes that the substance of Legley's statements concerning his right not to join the union did not cause Lavigne's emotional upset and did not cause any Union delegate or representative to talk with management about Legley's behavior at orientation. Other than conjecture that lacks any probative value, no evidence supports that Lavigne was brought to tears by Legley's statements about not having to join the Union, rather than by what she experienced as repeated, loud interruptions and disrespect for her presentation that began the moment he walked in the room. In large part, those interruptions and complaints concerned non-protected matters, such as his complaints about not being met in the lobby and about having to climb ten flights of stairs – which so impressed him he calculated the climb to total 250 stairs. *See, e.g.*, *NLRB v. Local 46, Metallic Lathers Union and Reinforcing Iron Workers of New York and Vicinity*, 149 F.3d 93, 106 (2nd Cir., 1998) ("*NLRB v. Local 46*"), citing and quoting, *Woods v. United States*, 724 F.2d 1444, 1451 (9th Cir. 1984) ("Substantial evidence cannot be based upon an inference drawn from facts which are uncertain or speculative and which raise only a conjecture or a possibility") and *Radio Officers' Union of Commercial Telegraphers Union, AFL v. NLRB,* 347 U.S. 17, 49, 74 S. Ct. 323, 98 L.Ed. 455 (1954) (Board may draw reasonable inferences from proven facts, not conjecture).

The more supported, as well as credible, testimony establishes that it was Legley's loud, overbearing, and persistent interruptions that disrupted Lavigne's ability to present her material, ignored her invitations to speak with him afterward, and left her feeling personally attacked and disrespected. Contrary to the ALJ's suggestion, moreover, nothing in Derby's testimony contradicted such a conclusion, as she corroborated Lavigne's description of Legley as large, loud, and continuing to read aloud beyond the point that Lavigne responded to him in a "normal tone."

Derby described Legley as "a big guy with a big voice … a big presence in the room," whose body language expressed his irritation and whose emotional state escalated. She admitted he might have been perceived to be interrupting Lavigne. And she recalled him to have asked more questions than anyone else and asked some of them multiple times. Likewise, Derby admitted that, distracted by the paperwork she received, she did not hear everything that Lavigne said during her presentation and could not deny that Lavigne offered to speak with Legley after the session.

Abundant evidence, rather than supposition by Legley and Derby, supports that what so deeply upset Lavigne was Legley's overbearing and intimidating rudeness in commandeering the session. First, Lavigne's "fresh complaints" to Leveille and to Nicholaides were altogether consistent in their emphasis on her experience of Legley's domineering, disrespectful, and self-centered complaints that began the moment he walked in the room and complained, repeatedly, about not being met in the lobby and having to climb the stairs. Both Leveille and Nicholaides testified credibly that in her telephone call with each of them on the day of the orientation, Lavigne began by reciting those complaints, expressed how shocked she was at Legley's persistence on those subjects, and expressed how shocked she was at the rudeness and disrespect he showed on his very first day of employment. Lavigne did not even mention Legley's statements about not having to join the union until drawn out by questioning from Leveille and Nicholaides, well into their respective conversations with her. Even while testifying at hearing, Lavigne became emotional as she revisited in her testimony the effect of Legley's loud, persistent interruptions and accusatory tone, and her feeling of helplessness and disrespect in the orientation.

Second, Leveille has worked with Lavigne as a Union activist at the hospital for almost fifteen years, including on the organizing drive and in contract negotiations, and observed Lavigne have "to deal with lots of things at the hospital." (Leveille, Tr. 369-371). Never, however, had Leveille ever seen Lavigne cry (under any circumstance), nor seen her as emotionally upset as she was over Legley's treatment of her. (Leveille, Tr. 370). Nor has Leveille received or been made aware of a single complaint from any source concerning Lavigne's demeanor or conduct while

conducting her duties as a delegate, including the scores of orientations she presented. (Leveille, Tr. 370-371).

Third, substantial evidence from multiple witnesses confirmed that whether or not Legley chose full union membership or fee payer status didn't really matter to anyone. As Leveille and Nicholaides credibly testified, neither responded or paid much attention to the extent Lavigne even mentioned the content of Legley's protests concerning union membership in her telephone calls with each of them. Asked at hearing whether she replied when Lavigne mentioned that Legley said he didn't have to join and "knew his rights," Leveille candidly answered, "Not about that. My immediate concern was about her emotional state. If he didn't want to join the union, I don't care. That wasn't of importance." Tr. 373. Nor did Leveille and Nicholaides discuss the subject with each other when they spoke later in the day. The bargaining unit includes both agency fee payers and objectors, all of whom receive representation on the same terms as dues-paying members.

Likewise, virtually all of the evidence of conversations among the Union delegates and representatives of management reveals little or no attention to arguably protected statements concerning Union membership:

- In his call to Cadima on December 19, Nicholaides simply asked whether Cadima knew what had happened, and told her he had never heard Lavigne in such a distressed emotional state. Cadima did not know, but had observed Lavigne's upset, and remarked that Legley had put everyone through the ringer and would be a 'handful.'

- In Nicholaides' first brief exchange with Patnaude, when he encountered her after a meeting, they briefly discussed that Lavigne had become extremely upset by Legley's conduct at orientation. Patnaude seemed to know that Legley had upset Lavigne, and added that HR had received other complaints about Legley dating back to his initial visits at the hospital. (Nicholaides, Tr. 210, 212). There was no mention of Legley's comments about union membership. (Nicholaides, Tr. 212).

- Nicholaides and Jordan both spoke briefly about Legley with Director Scott Kenyon. There was no mention of Legley's comments about joining the Union, only that he had been disruptive and upset Lavigne greatly. (Nicholaides, Tr. 215-216; Jordan, Tr. 186, 188).

- According to Jordan, Kenyon stated that he was concerned about Legley "being trouble and not a good fit because of the 'I believe' code and he wasn't going to take a chance of having a disruption in the department." (Jordan, Tr. 188). According to Kenyon, he had heard complaints from his staff, including Nicholaides, that Legley was "rude and

condescending" (Kenyon, Tr. 391, 400). Kenyon became concerned because "One of the things, our core values are to treat people with dignity and respect, and that's what we expect. We treat people with dignity and respect, and for me to be hearing things like that on the first day of employment is really not appropriate." (Kenyon, Tr. 391).

- On December 20, Nicholaides spoke informally with Patnaude, Kenyon, and Regional HR Director Thomas Watts following a hospital-wide holiday luncheon. Nicholaides related how upset Lavigne was by Legley's rude and disrespectful behavior and that he had made her cry. Patnaude mentioned that she hadn't wanted to hire Legley to begin with, based on her own observations and complaints she received about his behavior at HR and Employee Health. Nicholaides did not inquire nor make any request or recommendation for action concerning Legley by the hospital. (Patnaude, Tr. 259-260; Kenyon, Tr. 391).

- After Nicholaides walked away from the table, Patnaude, Kenyon, and Watts spoke further. Of particular concern were not only the stream of complaints about Legley's rudeness, disruptiveness, and oppositional tendencies with all of the personnel he encountered in HR, Employee Health, and at orientation [all of whom happened to be women], but also the length of time it would take to train him and that he would be working on an evening shift with no supervision. Together, Patnaude, Kenyon, and Watts decided to terminate Legley's employment. There was no mention of Legley's statements about Union membership or attitude toward the Union during the decision-making portion of the conversation. (Kenyon, Tr. 391-392, 400; Patnaude, Tr. 265, 279-280, 286). There is no clear evidence that any Union-related content to Legley's conduct was mentioned in the post-luncheon conversation, even before Nicholaides departed the table.

On the record in this case, there was no competent evidence that the content of Legley's statements concerning his right not to join the Union troubled anyone in the Union; it was the manner in which they were delivered, among a host of clearly unprotected complaints and accusations, that brought Lavigne to tears and caused concern in Leveille and Nicholaides. Thus the ALJ erred in finding, without analysis of or even reference to much of the evidence, that one cannot "separate the protected nature of his comments from the way he made the comments." The conclusion ignores completely the preponderance of the evidence that proves otherwise, and relies solely on what Legley and apparently Derby 'supposed' caused Lavigne to become upset. See, *Webco Industries, Inc.*, 1998 WL 1984973 (NLRB Div. of Judges, 1998) (Cases 17-CA-19047, JD-(SF)-37-98) (even assuming without deciding that protected activity played a substantial role in discharge, under *Wright Line*, where employee's conduct constituted "dischargeable offense independent of the [protected activity]," termination not unlawful); also, *American Medical Response Of Connecticut, Inc.*,

2013 WL 3293591, 4 (where General Counsel has shown that employer has discharged employee for misconduct committed in the course of protected activity, General Counsel must prove that the asserted misconduct did not, in fact, occur, in order to establish violation of Section 8(a)(1)).

H. The ALJ Erred In Discounting The Significance Of The Medical Center's Experience With Legley Before He Arrived For Orientation, The Length Of Time It Would Take To Train Him, The Concern About "Turning Him Loose" On A Less Closely Supervised Shift, And, Most Importantly, His Probationary Status.

The evidence plainly established that the kind of conduct and attitude for which Good Samaritan terminated Legley occurred and was known to management prior to the Union orientation, already had been the subject of discussions among Human Resources (and Employee Health) personnel, and even had caused Patnaude to recommend against hiring the Charging Party. In this regard, the fact that Legley was not just a probationary employee, but brought a co-worker to tears and disrupted a meeting on his very first day of work, assumes great significance.

The very purpose of a probationary period of employment is to afford an employer the maximum discretion and flexibility to assemble a workforce whose demonstrated skill and conduct, in the employer's sole judgment, merit cementing an employment relationship that thereafter will be governed by a union contract. (See, e.g., Kenyon, Tr. 393:10-18; Patnaude, Tr. 310). It is an exercise of discretion of which the Medical Center has availed itself on multiple occasions. (Ex. 2; Patnaude, 313-316). Legley's probationary status under the Hospital's collective bargaining agreement with the Union, in effect rendered him an at-will employee for purposes of discharge for the 90 days beginning on December 19, 2011. See, GC 4 at 8 ("Article VII. Probation. There will be a ninety calendar day probationary period for new hires…During the 90-day probationary period of employment, a worker may be discharged without resort to the grievance and arbitration procedure hereunder…."); see, also, GC 4 at 12 ("Article XL. Discipline And Discharge. Any employer covered by this Agreement has the right to discipline, suspend or discharge a worker for Just Cause only, except in the case of a probationary worker who may be terminated without recourse to the Grievance Procedure"). Accordingly, the Hospital was free to discharge Legley for <u>any</u> reason other than an unlawful one, and in this proceeding need not prove any particular level of

misconduct nor due process as would be required under the contractual just cause standard.

III. The ALJ Erred In Finding Lavigne To Have Threatened Legley With Unspecified Reprisals Where, As The ALJ Correctly Found, The Union, By Lavigne, Did Not Threaten Employees That They Could Not Become Employees Unless They Joined The Union; The Union's Literature, From Which Legley Read, Correctly Informed Him Of His Of His Rights Under *General Motors* And *Beck*; And Substantial Evidence Does Not Support That Lavigne Was Upset By Or Referred To Legley's Arguably Protected Statements Should The Board Find That She Told Legley She Would Call His Department And That They 'Wouldn't Put Up With Him.'

A. Lavigne's Inquiry About What Department Legley Worked In And, If Found By The Board, Any Statement That She Would Call The Department And They 'Would Not Put Up With Him,' Did Not Constitute Threats Within The Meaning Of The Act.

There is no evidence – other than the subjective statements of Legley, which are self-serving, and the speculation of Derby, who admitted to not hearing everything that was said during the orientation – that what caused Lavigne to become agitated was the content of some (but not all) of Legley's loud interruptions, i.e., that he didn't have to "join the union." Undisputed evidence suggests otherwise. Nor do the events that followed the orientation support a finding that Legley felt restrained, coerced or threatened, rather than confused and increasingly irritated at encountering a statement he took to conflict with his understanding. Legley's conduct immediately following the orientation does not support that he felt threatened by Lavigne at the conclusion of the orientation. When HR representative Rebecca Cadima entered the conference room immediately after Lavigne's departure, Legley made no mention or complaint relating to whether or not he had to "join" the union, or whether he was wrong even to question the point. He did, however, ask if he could be fired for asking a co-worker to go for a coffee. (Legley, Tr. 59). *See, e.g.*, *Dean Junior College*, 1992 WL 1465849 (in declining to find union president's statements to co-worker threatening, ALJ noted that neither co-worker nor other employees present made any comment or complaint to campus security officers who arrived within minutes of the incident, "as one might expect they might in the wake of a genuine threat to person or property").

Accordingly, even should the Board adopt the ALJ's finding that, contrary to Lavigne's denial, she told Legley that she was going to call down to his department and that "they wouldn't

put up with him," there is no evidence other than conjecture that Lavigne believed or intended to suggest that Legley's co-workers wouldn't put up with Legley's attitude toward the union. See, e.g., *Amsted Industries and Belton Nails*, 309 NLRB 860, 861-862 (1992) ("*Amsted Industries*"). In *Amsted Industries*, the Board reversed an ALJ's finding that a union president (Underwood) sought and procured a charging party's (Nails') discharge because of Nails' threat to resign from union, rather than because the latter had become angry, belligerent, and had threatened Underwood physically. *Amsted Industries*, 309 NLRB at 861-862. To be sure, Nails' language in *Amsted Industries* crossed lines of vulgarity and physical threat not at issue in this case. However, the analysis in the Board's decision focused not on whether or not Nails' threat to resign from the union remained protected activity, but whether, in the totality of the circumstances, it was Nails' threat to resign that actually motivated Underwood to report the conduct to management and request that something be done about it.[14] *Id.*

Among the factors the Board relied upon in rejecting the ALJ's finding, two bear squarely on the matter at issue. First, the Board found that the judge was not warranted in inferring that Underwood's subsequent statement to a union committeeman, that Nails "needed to be taught a lesson," referred to a "lesson" in the power of the Union. *Id.,* at 862. Specifically, the Board found the judge failed to note the portion of Underwood's comment … that came after the word "lesson," to wit: "and show that we won't tolerate that language." *Id.* Here, too, should the judge find that Lavigne told Legley she would call down to his department and that the guys there 'would not put up with him,' the great weight of the evidence that followed that comment establishes that what troubled Lavigne and what co-workers would not put up with was Legley's unusually rude and disruptive behavior toward her. Moreover, as in *Amsted*, there is nothing in the evidence of events that followed the orientation to indicate that either Lavigne or Nicholaides was concerned with whether or not Legley became a full dues-paying member. In fact, as in *Amsted*, Nicholaides expressly told Legley he didn't have to join. See, *Amsted*, at 862 (crediting the evidence that

[14] In stark contrast to the instant case, in *Amsted Industries* the union president specifically stated to a foreman that he "wanted something done about" the Charging Party's conduct toward him – a request made at no time in this case by any employee affiliated with the Union. *Amsted Industries*, 309 NLRB at 861.

Underwood "specifically *assured*" Nails that he had the right to resign if he desired) (emphasis in original).[15]

Rather, what upset Lavigne and what she did convey to Nicholaides were Legley's domineering interruptions and usurpation of the orientation, that began with persistent complaint about not being met in the lobby and having to climb the stairs. The content of Lavigne's conversations with Leveille and Nicholaides immediately following the orientation underscore that the Charging Party's statements about union membership were of no import to Lavigne, Leveille, Nicholaides, or anyone else. The testimony at hearing was consistent among the three witnesses, as with the affidavits each submitted months earlier to the Board, that what troubled them and occupied their conversations were first and foremost, Lavigne's very apparent, and uncharacteristic, emotional distress, caused by what she described as Legley's exceedingly rude and disrespectful treatment of her. Likewise, Cadima's brief exchange with Lavigne as the latter departed and Cadima entered the conference room focused solely on Legley's deportment (Lavigne: "he really, really gave me a hard time. And she [Cadima] said, I know, he gave me a hard time too") and not at all on the content of his interruptions.

When they spoke on the telephone that same morning, Lavigne did not ask and Leveille did not offer to "do anything" about Legley. Rather, Leveille told Lavigne she would call Nicholaides to see what he knew about what had happened and "what was up" with this new employee. And that is all that Leveille did. By the time Leveille spoke with Nicholaides, the latter already had spoken with Lavigne.[16] In the conversation between Leveille and Nicholaides, very little (if anything) was

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[15] That Derby perceived Lavigne's comment about calling the Facilities Department, if believed, "was a threat," represents nothing beyond speculation and does not establish the cause of Lavigne's emotional state. In fact, as set forth above, Derby corroborated Lavigne's description of Legley's repetitive questions, his escalating irritation, and was unsure whether or not Legley actually arose from his seat at some point. (Derby, Tr. 142). Nor is it clear what Derby perceived Lavigne to be 'threatening' – since there was no evidence that Lavigne could or would affect Legley's employment.

[16] Immediately after hearing from Lavigne on December 19, Nicholaides called Cadima simply to ask what, if anything, Cadima knew about what had happened. Cadima did not, but told Nicholaides that they 'were going to have their hands full' with Legley, who already had run HR 'through the ringer.' There was no mention in the conversation of any issue raised by Legley about the Union membership.

said about Legley's statements concerning Union membership. The only comment about Legley's employment status was Leveille's request that Neal let her know how things went once Legley started work – hardly a statement that foretold undertaking efforts to be rid of him. *See, e.g.*, *Bed, Bath & Beyond, Inc.,* 2013 WL 100862 (noting supervisor's instructions to discharged charging party contemplated continued employment, before supervisor learned of union activity); *Amsted Industries*, 309 NLRB at 862.

The events of December 20 only confirm that Legley's statements about not having to join the Union played no role whatsoever in Union representatives' understanding of and response to Lavigne's distress over the orientation, and confirm also that to a man the delegates expected that Legley would continue his employment. When Legley arrived at work on December 20, it was he – perhaps reflecting awareness that his behavior was unacceptable – who immediately raised his conduct at the orientation to Jordan and said he 'did nothing wrong.' (Legley, Tr. 101-102). Perceiving Legley's statements to indicate that there "could be a disciplinary problem" (Jordan, Tr. 178-179) immediately set in motion the Union's representative function and took Legley to speak with delegates Nicholaides and Monahan.

In that gathering, Legley admitted to Nicholaides that he complained about not being met in the lobby, that he complained about having to take the stairs, and he "might have said" he didn't even know if he wanted to work at "a place like this." Legley told the men that Lavigne "had lied to him and that he knows his rights" (Nicholaides, Tr. 228) and that he doesn't have to join the Union, or words to that effect. Nicholaides replied to Legley that in fact he did have to fill out the information on the union application, but that "whether you decide to join the union or not, that's up to you." Id. When Legley said, twice, that if he was not "a good fit here" he would "just leave," Nicholaides told him plainly such a decision was Legley's and Legley's alone, and said nothing to concur or encourage Legley's stated contemplation of resigning.

Jordan's response to learning from Nicholaides of Lavigne's emotional state after the orientation and to learning from Legley what he had said at orientation focused entirely on concern about "a respect and dignity issue." Jordan's poignant testimony about the seriousness with which

he and others took the "I Believe" philosophy served to corroborate that it was not the words, but the music – and Lavigne's uncharacteristic, tearful distress – that concerned everyone about what happened at the orientation. *See, Radio Officers' Union of Commercial Telegraphers Union, AFL v. NLRB,* 347 U.S. at 49. There can be no doubt Nicholaides would have spoken with Cadima, Patnaude, and the other hospital personnel had Legley said not a word about Union membership in the orientation. In the end, Jordan suggested that perhaps "[i]t might just blow over," proposed that they "just continue our day," and proceeded to spend the day training the Charging Party. Neither Nicholaides' reassurances that Legley was free not to join the Union, nor deflection of Legley's suggestion that he was "not a good fit," nor Jordan's words and actions aimed at continuing to train Legley, bespeak any intent or expectation of seeing Legley's employment cease. See, e.g., *Bed Bath & Beyond*, 2013 WL 100862 (measuring likelihood of intent to seek termination by statements made at the time); *Amsted Industries*, *supra*, 309 NLRB at 861 (no violation where one union committeeman's statement to charging party that he could not resign from the union corrected by union president).[17]

[17] The ALJ's findings adopting Legley's attributions to Nicholaides and Jordan of various statements are unsupported by a shred of corroborating evidence and, in light of Legley's frequent expressions at hearing of confusion and uncertainty, did not warrant the credence accorded them. Emblematic of his persistent confusion and confabulation, Legley initially testified the delegates did not know the identity of the delegate at the orientation (Legley, Tr. 61-62), but went on to attribute to the delegates statements describing specific actions Lavigne allegedly took and her history as a seasoned steward. Accordingly, the ALJ erred in finding that Nicholaides told Legley that Lavigne complained to the head of Human Resources and to the head of the union. Decision at 4. In fact, the evidence is clear that Lavigne never spoke with any Union officer in Boston and did not speak with the head of HR (Patnaude) (until after the decision to fire Legley was made). Likewise, Nicholaides did not tell Legley that Lavigne usually collected "90% donations" for the Political Action Fund and had failed to collect any donations in his session: The ALJ gave no reason for his crediting of Legley and discrediting of Lavigne and Nicholaides, who testified that Lavigne did not routinely or on this occasion take account of political donations; nor did the ALJ take account of the fact that Derby did make such a contribution. (Lavigne, Tr. 359-361; Derby, Tr. 144). Nor did Jordan leave to go to a union meeting because "they wanted to meet" him, and then return to say "they didn't want to meet him now." (Legley, Tr. 64; Jordan, Tr. 193-194). There was no dispute that at no time on December 20 did Jordan attend any union-related meeting. (Jordan, Tr. 193-194).

IV. Even If The Board Finds Legley Engaged In Some Protected Conduct At Orientation, The ALJ Erred In Refusing To Apply A *Wright Line* Analysis To The Totality Of The Circumstances, And The General Counsel Did Not Meet His Burden Under *Wright Line* To Prove That Any Protected Aspect Of Legley's Conduct Played A Role In The Union's Conduct Or In Good Samaritan's Decision To Discharge Legley, And Did Not Rebut That Both The Union And The Medical Center Would Have Behaved Identically Had Legley Not Asserted Any Protected Right.

The ALJ had no basis to ignore completely, let alone not credit, Lavigne's testimony concerning Legley's repeated, disruptive complaints that Lavigne had not met him in the lobby and that he had to climb five flights of stairs – subjects unrelated to Union membership and plainly unprotected. Likewise the ALJ erred in ignoring the preponderance of evidence that Legley's presence and demeanor were loud and overbearing; and that what brought Lavigne to tears – and what she vented about to Leveille and Nicholaides – had nothing to do with the content of any statements relating to Union membership, but rather that Legley's stream of loud interruptions filled the room, scared her and seemed to scare other women present, and threatened her ability to get through her presentation. Lavigne's testimony about the unprotected subjects and conduct in which Legley engaged was corroborated by the two people she spoke with immediately after the session, in effect "fresh complaint" witnesses Nicholaides and Leveille; nor, as discussed *supra*, did Derby's testimony contradict Lavigne.[18]

As a consequence of the ALJ's disregard of all evidence concerning Legley's clearly unprotected speech and conduct, the ALJ further erred in failing to apply a *Wright Line* analysis to the totality of circumstances.[19] Where an employer discharges an employee for a combination of

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[18] Derby's testimony, upon which the ALJ relied, that Legley asked whether he had to join the Union and Lavigne answered that he did, finds no support in the record either from Legley himself or Lavigne. The latter two testified unequivocally that Legley repeatedly and emphatically stated that he did not have to join the Union, a fact reinforced by the Union documents he held in his hand and from which he read.

[19] In the Union's view, as argued *supra*, the ALJ erred in finding that protected conduct played any, let alone a substantial role, in the actions of the Union or Good Samaritan vis-à-vis Legley. For purposes of this argument only, the Union posits but does not concede that the Union

lawful and unlawful reasons,[20] or where a respondent employer's (or union's) motivation in taking action against an employee is at issue, the Board applies the standard set forth in *Wright Line*, approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400-401 (1983). See, *Wright Line,* 251 NLRB at 1089. As applied in its case against the Union here, first the General Counsel must prove that protected conduct was a "substantial or a motivating factor" in moving Nicholaides to discuss Legley with Patnaude and other management representatives. *Transportation Mgmt. Corp.,* 462 U.S. at 400, 103 S.Ct. 2469. This the General Counsel could not and did not do.

As argued at length above, the General Counsel could not and did not prove that conduct protected by §7 of the Act was a substantial or a motivating factor in Nicholaides' talking with Patnaude or Kenyon or Watts about Legley's conduct toward Lavigne, Lavigne's extreme and unprecedented distress in response to Legley's conduct, and Legley's admissions in response to questioning that indeed he had complained about not being met in lobby and had complained at having to climb the stairs and perhaps had said he didn't know if he even wanted to work at Good Samaritan. Likewise, as the ALJ correctly found, the General Counsel failed to prove that the Union ever requested in any explicit or implicit manner that adverse action – or any action – be taken vis-a-vis Legley on account of any statements he made at orientation concerning joining or not joining the Union. (Nicholaides, for one, thought union membership was a non-issue because Legley had told the men during his job interview that he had no problem with a union shop and in fact had signed the application).

In any event, even had the General Counsel succeeded in such proof, which he did not, the burden would shift to the Union to demonstrate that it would have taken the same action – i.e. discussed Legley's behavior with Patnaude et al., even in the absence of the protected conduct. *Id.* See, e.g., *NLRB v. Local 46,* 149 F.3d 93 at 107-108 (Union showed that under referral rules it would not have referred charging party for work even in the absence of unlawful motive). On this element as well, the complaint against the Union cannot stand. The wealth of evidence concerning the

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[20] disclosed to management the effect of Legley's conduct on Lavigne, and/or that the Medical Center discharged Legley for a combination of lawful and unlawful reasons.

esteem in which Lavigne was held, her steadiness as a delegate over many years, and the unprecedented level of distress that she experienced and expressed, in tears, to Leveille and Nicholaides on the telephone, serves to corroborate that what troubled Nicholaides and Leveille (who had no contact with management before Legley's termination) was that Legley had behaved in a manner so rude and disrespectful that Lavigne, whom neither had ever seen cry, was reduced to tears. Nor was there any evidence to credit the speculation that what brought Lavigne to tears had anything to do with that portion of Legley's constant, loud interruptions that may have concerned a protected subject.

Finally, there was no evidence in the record, and the ALJ did not find, that the Union harbored animus against non-members in the bargaining unit, a factor to which the Board often looks in assessing a charged party's motivation under *Wright Line*. *See, e.g.*, *Kidde, Inc.*, *supra*, 294 NLRB at 849. Instead, there is ample evidence from Union and Medical Center witnesses alike that the culture of respect embodied in the "I Believe" philosophy is of central importance to the Union and to the Medical Center, and that the Medical Center has terminated for incivility other employees – who, unlike Legley – had contractual rights to due process and progressive discipline. Thus, absent any protected content to Legley's rants during orientation, his complaining and persistent interruptions, taken with his treatment of the women in Human Resources and Employee Health, would have prompted Good Samaritan to terminate the Charging Party. Under the *Wright Line* standard of proof as under any other, the General Counsel failed to meet his burden to prove that the Union violated Section 8(b)(1) or 8(b)(2) by causing or seeking to cause the Medical Center to discharge Legley.

V. Under The Unique Facts Of This Case, The ALJ Erred In Ordering Reinstatement And Backpay As Remedies.

In this unusual case, the ALJ erred in ordering Legley reinstated to employment with back pay, where the evidentiary record provides no basis to conclude that, were he to be reinstated, Legley would cease engaging in agitated, disrespectful, and/or disruptive misconduct on any occasion where either things did not go as he expected, or he felt put upon (especially by women), or even where he felt confused by unexpected circumstances. Because he would be working on an

isolated shift, with no supervision present to whom he could turn in such moments; in light of the lengthy contractual probationary status that confers on the Medical Center no obligation to afford Legley progressive discipline; because of the disruption to smooth functioning that he caused in Human Resources, Employee Health, and the Union orientation; and in light of the extreme disrespect and distress his complaints and interruptions caused in Lavigne, wholly apart from any protected content, it does not promote the policies of the Act to order his reinstatement, and the ALJ erred in doing so. See, e.g. *Precoat Metals*, 341 NLRB 1137, 1256-1257 (2004).

In *Precoat*, the Board found the employer to have violated the Act by its discharge of the charging party, but declined to award reinstatement or backpay. *Precoat*, 341 NLRB at 1256. In denying back pay, the Board noted particularly that the charging party's misconduct in that case undermined employees' trust in the local union and its international body. *Id.* In this case, finding that the Charging Party's discharge was unlawful surely undermines and chills other employees' desire and willingness to serve as delegates, if behavior such as Legley's need be tolerated. Accordingly, as in *Precoat*, should the Board find Legley's discharge here unlawful, neither reinstatement nor back pay serves to effectuate the purposes of the Act, and neither remedy should be awarded. In explicating its holding, the Board made two observations that apply equally to the Union as to the Employer and are particularly apt in this case:

> Eliminating reinstatement and backpay remedies does not somehow allow Respondent-Employer to escape the consequences of its unlawfully motivated actions toward [the charging party]. It remains subject to a cease and desist order. That order will remain as background should Respondent-Employer again engage in conduct which violates Section 8(a)(4) of the Act. That is not an inconsiderable consequence.

Precoat, 341 NLRB at 1256-1257. And, finally,

> … in a different setting the United States Court of Appeals for the Seventh Circuit stated that "there must be room in the law for a right of an employer somewhere, sometime, at some stage, to free itself of continuing" employee misconduct. *NLRB v. Eldorado Mfg. Co.,* 660 F.2d 1207, 1214 (7th Cir. 1981). No differing approach is warranted in connection with the Board's evaluation of its remedial power. Parallel logic dictates a like conclusion where a discriminatee's actions, and likely future actions, are contrary to the objectives and policies of the Act. This situation presents the place, the time and the stage for withholding reinstatement and backpay as remedies.

Precoat, 341 NLRB at 1257. So too here.

CONCLUSION

For all of the reasons set forth herein, the Board should sustain the Union's Exceptions, reverse the decision of the Administrative Judge, find that the Union did not violate Sections 8(b)(1)(A) and/or 8(b)(2) in any manner (and the Employer did not violate Sections 8(a)(1) and 8(a)(3) of the Act), and order the unfair labor practice charges set forth in the Complaint against Respondent 1199SEIU and against Respondent Good Samaritan Medical Center be dismissed in their entirety.

Respectfully submitted,

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By Its Attorneys,

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Certificate of Service

I hereby certify that on October 21, 2013, I caused a copy of 1199SEIU's Brief In Support Of Exceptions to be served by electronic or regular mail, as indicated, on:

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