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St. Bernard Hospital and Health Care Center and Earl Liggins. Case 13–CA–074311

December 2, 2013

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS JOHNSON
AND SCHIFFER

On April 30, 2013, Administrative Law Judge Melissa M. Olivero issued the attached decision. The Respondent filed exceptions and a supporting brief. The Acting General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order as modified.³

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² Member Johnson does not dispute that precedent cited in fn. 18 of the judge's decision establishes the three specific elements of the initial burden of proof under the test set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), and would not include a fourth separate and distinct element that the General Counsel establish a link or nexus between the employee's protected activity and the adverse employment action. However, he emphasizes that *Wright Line* is inherently a causation test. As such, identification of a causal nexus as the fourth element of the initial burden is superfluous, because the "[t]he ultimate inquiry" is whether there is a nexus between employees' protected activity and the adverse employer action in dispute. *Chevron Mining, Inc. v. NLRB*, 684 F.3d 1318, 1327–1328 (D.C. Cir. 2012). Accordingly, not just any evidence of animus borne against protected activity generally, even if involving the same employees subject to the disputed employer action, will necessarily satisfy the initial *Wright Line* burden of proving unlawful motivation for that particular action. See, e.g., *Roadway Express, Inc.*, 347 NLRB 1419, 1419 fn. 2 (2006) (Board found that, although there was some evidence of animus in the record, it was insufficient to sustain the General Counsel's initial *Wright Line* burden of proof); *Atlantic Veal & Lamb, Inc.*, 342 NLRB 418, 418–419 (2004), enfd. 156 Fed. Appx. 330 (D.C. Cir. 2005) (Board found insufficient facts to show that the respondent's animus against employee Rosario's union activity was a motivating factor in the decision not to recall him).

³ We have modified the judge's recommended Order in accordance with *Latino Express, Inc.*, 359 NLRB No. 44 (2012).

modified below and orders that the Respondent, St. Bernard Hospital and Health Care Center, Chicago, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Insert the following as paragraph 2(c) and reletter the subsequent paragraphs.

“(c) Compensate Earl Liggins for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.”

Dated, Washington, D.C. December 2, 2013

Mark Gaston Pearce, Chairman

Harry I. Johnson, III, Member

Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Jeanette Schrand, Esq., for the Acting General Counsel.
Scott M. Gilbert, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

MELISSA M. OLIVERO, Administrative Law Judge. This case was tried in Chicago, Illinois, on March 4, 2013. Earl Liggins, an individual, filed the charge on February 12, 2012, and the Acting General Counsel issued the complaint on December 13, 2012. The complaint alleges that St. Bernard Hospital and Health Care Center (Respondent) violated Section 8(a)(1) of National Labor Relations Act (the Act) by discharging Charging Party Earl Liggins, an employee of Respondent, because he engaged in protected concerted activity. Respondent filed a timely answer denying the alleged violation in the complaint.¹ Respondent's answer further raised three affirmative defenses. (GC Exh. 1(e)).² On the entire record,³ including my own ob-

¹ Abbreviations used in this decision are as follows: “Tr.” for transcript; “R. Exh.” for Respondent's Exhibit; “GC Exh.” for Acting General Counsel's Exhibit; “GC Br.” for the Acting General Counsel's brief; and “R Br.” for Respondent's brief.

² Respondent's affirmative defenses were laches and two allegations of failure to mitigate damages by the Charging Party. Initially, I note that laches may not defeat the action of a governmental agency in enforcing a public right. *Harding Glass Co.*, 337 NLRB 1116, 1118 (2002). In addition, Respondent presented no evidence supporting its affirmative defenses at the hearing and the affirmative defenses were

servation of the demeanor of the witnesses,⁴ and after considering the briefs filed by the Acting General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a hospital engaged in providing health care services, with an office and place of business in Chicago, Illinois, annually derives gross revenues in excess of \$250,000 and receives goods valued in excess of \$5000 directly from points outside the State of Illinois. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview of the Respondent's Operations

1. The radiology department

The radiology department, consisting of several offices, a CT (computed tomography) suite, and several X-ray suites, is located on the second floor of Respondent's facility. (GC Exh. 2; Tr. 22, 27.) In about January 2010, Respondent undertook an extensive renovation of its CT suite. (Tr. 23.) The entire layout of the CT suite was changed during the renovation; walls were moved and the room which houses the CT scanner was made larger to accommodate a new scanner. (Tr. 22, 242–243.) From the start of the renovation through about June 2011, CT scans were performed in a trailer in the parking lot of Respondent's facility. (Tr. 23, 144.) Upon completion of the renovation, CT services returned to the second floor of Respondent's facility. (Tr. 23, 144.)

Respondent's CT suite consists of two rooms: a CT scanning room, which houses the CT scanner; and a CT control room, which houses computers and controls with which CT technicians perform the scans. (GC Exh. 2; Tr. 24–25, 80–81.) During a scan, the patient is in the scanning room. (R. Exh. 8A; Tr. 97–98.) The patient is transferred to the scanning machine, if necessary, by the technician. (Tr. 179.) The patient lies on a gray "bed" during the scan, which moves into the CT machine. (R. Exh. 8A; Tr. 98.) Sometimes intravenous contrast material is administered by the CT technician performing the scan; this can cause vomiting. (Tr. 189.) After the patient is positioned on the scanner, the technician goes into the adjoining control room. (Tr. 62–63, 166.) There is a window between the scanning room and the control room through which the technician can observe the patient during the scan. (R. Exhs. 8B, C; Tr. 25–26.) The control room may be accessed through two doors, one comes from the scanning room and the other comes from a

hallway. (GC Exh. 2; R. Exhs. 8E, H; Tr. 26.) There are two doors leading into the scanning room, as well; one is the door to the control room and the other leads to a waiting area outside of the scanning room. (GC Exh. 2; R. Exhs. 8G, J; Tr. 44–45.) Both doors leading to the scanning room are very heavy and close automatically when someone enters or exits the room. (R. Exhs. 8G, H, J; Tr. 44, 235.) CT technicians generally remain in the control room even when they are not performing scans. (Tr. 62–63, 166.)

2. Employee concerns after the renovation

Two of the physical changes made to the CT suite during the renovation caused concern for the CT technicians employed by Respondent. (Tr. 41, 145–147.) First, the window between the control room and the scanning room was repositioned during the renovation. (R. Exhs. 8B, C; Tr. 28, 145.) After the renovation, a CT technician could not see a patient in the scanning machine if the technician were seated in the control room. (Tr. 28, 175.) Instead, due to the height of the window, technicians needed to stand in order to see a patient during a scan. (Tr. 175.) The technicians felt that the window was positioned too high on the wall and made numerous complaints about this issue to Respondent's management. (Tr. 34, 145, 158, 207–208.) The technicians were concerned that they might not be able to see if a patient was about to fall from the bed of the scanning machine or was attempting to dismount the machine. (Tr. 138–39, 180.) Eventually, Respondent provided an adjustable height chair for the control room, which allows the technicians to view a patient in the scanning machine from a seated position in the control room. (R. Exh. 8D; Tr. 105–106, 175–176.)

Second, a sink in the CT scanning room was removed during the renovation. (Tr. 28–29, 145.) The technicians were concerned that they no longer had a place in the scanning room to wash their hands if they should come in contact with blood, vomit, urine, or other bodily fluids in the course of assisting a patient. (Tr. 29, 150, 156–157, 179–180, 185.) The technicians had previously used this sink many times a day to wash their hands. (Tr. 137.) Although the scanning room no longer had a sink in it following the renovation, Respondent placed three hand sanitizer and glove dispensing stations within the scanning room. (R. Exhs. 8F, G, H, I, J; Tr. 116.) Gowns and masks are also available for use by the CT technicians. (R. Exh. 8I; Tr. 115.) CT technicians have access to a restroom just outside of the CT suite to wash their hands, if needed. (R. Exh. 8E; Tr. 109–110.) The presence of hand sanitizer, gloves, masks, gowns, and a nearby restroom did not allay the concerns of the CT technicians, however. (Tr. 157, 159.) The technicians were concerned about both their own health and the safety of their patients if they should have to leave the room to wash their hands. (Tr. 157, 159, 164.) They worried that in an emergency they would not have time to don gloves before they were exposed to pathogens. (Tr. 159.) The technicians also worried because they come into contact with multiple door knobs on the way to the restroom and might contaminate them. (Tr. 36.) The technicians believed that washing their hands with soap and water was better than using hand sanitizer. (Tr.

not raised in Respondent's brief. As Respondent seems to have abandoned its affirmative defenses at this stage of the proceedings, I will not address them further.

³ On my own motion, I make the following corrections to the transcript. Certain changes in the transcript have been noted and corrected.

⁴ I note that although I have included several citations to the record to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are not based solely on those specific record citations, but rather are based on my review and consideration of the entire record for this case.

157.) The nearby restroom has been found to be occupied “quite often” by technicians needing to wash their hands. (Tr. 131, 165.) In addition, Liggins was worried about the risk of infection due to personal health issues. (Tr. 133–134.)

The concerns over the placement of the window between the scanning room and control room and the absence of a sink in the scanning room were raised by the technicians, and specifically by Charging Party Earl Liggins, to Respondent’s supervisors and/or agents on multiple occasions within the 2 to 3 months preceding his discharge.

3. Management structure

Janet Nohos is Respondent’s vice president. (GC Exh. 6, p. 2; Tr. 221.) Lorie Chew is the director of Respondent’s radiology department, a position she has held for 10 years. (Tr. 221.) Chew reports to Nohos. Debbie Wilson is the manager of Respondent’s radiology department; she is the direct supervisor of the CT technicians and reports to Chew. (Tr. 145, 221; R. Br. p. 3.) Ereka Worthy is the clerical supervisor of Respondent’s radiology department; she also reports to Chew.⁵ (Tr. 222.)

Dr. Joseph Carre is a radiologist and vice chair of Respondent’s radiology department. (GC Exh. 6, p. 1; Tr. 202.) He has no supervisory authority over Chew. (Tr. 203.) Donna Dertz is Respondent’s director of human resources, a position she has held for over 7 years. (Tr. 304.) Dertz reports to Nohos. (Tr. 322.)

Respondent has admitted that Chew, Dr. Carre, and Dertz are supervisors of Respondent within the meaning of Section 2(11) of the Act and/or agents of Respondent within the meaning of Section 2(13) of the Act. (GC Exh. 1(e).)

4. Earl Liggins’ employment with Respondent

Earl Liggins was employed as a CT technician by Respondent from January 2009 through mid-September 2011, when he was discharged for what Respondent alleges was sleeping on the job. (Tr. 19.) Liggins was one of six CT technicians employed by Respondent. (Tr. 22.) No evidence was presented that Liggins had ever been formally disciplined while employed by Respondent. However, he had been “counseled” by Debbie Wilson regarding the prioritization of patients waiting for CT services on September 1, 2011. (R. Exh. 9; Tr. 254.) A counseling is a record of a conversation. (Tr. 253.) Counselings are maintained by individual managers in their own files, but are not kept in an employee’s official personnel file in human resources. (Tr. 342.) September 13, 2011, was to be Liggins’ last day of work before beginning a lengthy medical leave. (Tr. 134.)

Liggins frequently wore a pillowcase draped over his head while at work because he was cold. (Tr. 42.) Liggins is bald. (Tr. 42.) Chew testified that she had seen Liggins with a pillowcase over his head on other occasions. (Tr. 230.) Another CT technician, Monica Hopkins, testified that she saw Liggins with a pillowcase over his head almost every day. (Tr. 167.) The temperature in the scanning room was described as cold (not over 67 degrees) and the temperature in the control room was described as “pretty chilly.” (R. Exh. 8K; Tr. 166–167.) Chew admitted that most of the technicians have com-

plained about the cold temperature in the scanning room. (Tr. 250.)

5. Liggins raises employee concerns to Respondent’s supervisors and/or agents

In mid-June 2011,⁶ Respondent held a 5-day training session (also called an “in service”) for the radiology technicians on the use of the new CT scanning machine. (Tr. 30–31.) During the week of the training, several of the technicians talked about their concerns over the height of the window between the scanning and control rooms and the absence of a sink in the scanning room. (Tr. 31–32, 35, 159.) Liggins was very vocal about the sink issue. (Tr. 32.) Liggins raised the concerns about both the sink and window to Lorie Chew during the training. (Tr. 33, 156.)

When Chew came to the training and asked the technicians how things were going, Liggins raised the concern over the absence of a sink in the scanning room. (Tr. 33, 156–157.) Chew stated that if the technicians came into contact with blood or some other substance they should use hand sanitizer and then find a washroom to wash their hands. (GC Exh. 4, p. 5; Tr. 34, 157.) Chew said they would not be getting a sink and the technicians should drop the issue. (Tr. 157–158.) Liggins or another technician then brought up the height of the window. (Tr. 34, 158.) Chew stated that it would be too difficult to move the window. (Tr. 34.) Chew left the meeting at that point, but the technicians remained and continued discussing their concerns among themselves. (Tr. 34, 158–159.) They were not happy with the way that the meeting with Chew turned out. (Tr. 35, 159.)

Liggins also spoke to Dr. Carre on more than one occasion regarding his concerns over the window height and absence of a sink in the scanning room. (Tr. 35.) In June, shortly after the in-service training, Liggins told Dr. Carre that the technicians had concerns over the renovated CT suite. (Tr. 36.) Liggins said that the window was too high and the technicians could not see the patient if something happened. (Tr. 36.) He also said that the technicians were concerned that if they came into contact with blood, there would be no way to get it off until they touched two or three doorknobs on the way to wash their hands. (Tr. 36.) Liggins told Dr. Carre that he had brought his concerns to Chew. (Tr. 37.) Dr. Carre did not respond to Liggins’ statements, but acknowledged that he had heard them.⁷ (Tr. 36.)

After the training, Hopkins witnessed a conversation between Liggins and either Lorie Chew or Debbie Wilson. Liggins again said that the technicians needed a sink. (Tr. 161–162.) Chew or Wilson answered, “[Y]ou already know the answer to that.” Hopkins walked away because of the tension between Liggins and Chew or Wilson.⁸ (Tr. 161–162.)

In early September, Liggins had another conversation with Dr. Carre. (Tr. 37.) Liggins again told Dr. Carre about the technicians’ concerns regarding the height of the window and

⁶ All dates hereinafter are 2011, unless otherwise indicated.

⁷ Liggins testified that he told Dr. Carre, “[W]e [the CT technicians] were worried.” (Tr. 36.)

⁸ Hopkins’ testimony regarding this conversation is uncontroverted.

⁵ Neither Wilson nor Nohos were called as a witness.

the absence of a sink. (Tr. 37, 210–211.) In response, Dr. Carre stated that the only way the technicians were going to get the problems fixed was for them to band together to get her [Chew] out. (Tr. 37–38.) Liggins testified that following this conversation, he went home and began working on letters to Nohos and Dertz about the technicians' concerns. (Tr. 38.) He hoped that Nohos and Dertz could make changes to create safer working conditions. (Tr. 38.) Liggins did not finish these letters before he was suspended. (Tr. 38–39.)

Liggins talked to Dr. Carre twice more during the week of September 13. In the first conversation, Liggins informed Dr. Carre that he was working on some letters about the CT technicians' concerns regarding the window and sink issues. (Tr. 39–40.) The next day, Liggins told Dr. Carre, “[Y]our idea worked, we the [CT] techs have banded together.” (Tr. 41.) Dr. Carre looked surprised by this statement. (Tr. 41.) Dr. Carre admitted that the CT technicians raised concerns over the height of the window and absence of a sink with him. (Tr. 207–208.) He told Chew about the window height concern. (Tr. 208.) Dr. Carre denied telling Liggins that the technicians should band together or take action against Chew.⁹ (Tr. 209.)

Liggins had other conversations with his coworkers about the CT technicians' concerns over the absence of a sink.¹⁰ In one such conversation, Liggins told Hopkins, “[W]e should bring that to someone's attention.” (Tr. 146–147.) Hopkins agreed with Liggins' assessment. (Tr. 147.) On another occasion, Liggins told Hopkins that he had brought the issue of the sink to the attention of someone in management. (Tr. 147.) In another conversation, involving Hopkins and a third technician, Liggins mentioned the absence of a sink. (Tr. 148.) The third technician felt that a sink was needed. (Tr. 148.) Liggins then said he thought they should bring this concern up as a group. (Tr. 150.) Hopkins remembered that all three were in agreement about bringing up the concern as a group. (Tr. 150.)

Hopkins and Liggins also discussed the height of the window between the control room and the scanning room on other occasions. During one such conversation, Liggins pointed out the new desk in the control room and said it looked too low to see out the window while seated. (Tr. 152.) Liggins said he would bring this to someone's attention. (Tr. 152.)

Chew was aware of the technicians' concerns regarding the height of the window between the scanning and control rooms. (Tr. 245–246.) Chew remedied this concern by providing an adjustable height chair for the technicians to use. (Tr. 246.) Chew also admitted being aware of the technicians' complaints regarding the absence of a sink in the scanning room. (Tr. 246, 271.) She claimed that she learned of the sink complaint from Wilson. (Tr. 246.) Chew then brought the sink concern to the attention of Nohos. (Tr. 246.) After discussing the matter with Nohos, Chew told Wilson that there was no requirement for a sink in the scanning room.¹¹ (Tr. 246.) Chew fumbled a bit in her testimony on this point. She initially said she told “them”

⁹ Although Chew and Dr. Carre both denied ever having a conversation about the CT technicians banding together or trying to get Chew fired, I do not credit their testimony for reasons discussed infra.

¹⁰ All of these conversations occurred in July. (Tr. 180.)

¹¹ Wilson was not called as a witness by Respondent.

that there was no requirement for a sink in the scanning room; only when Respondent's counsel asked who she meant by “them” did Chew reply that she meant Wilson. (Tr. 247.)

Chew's testimony about her conversation with Wilson echoed the uncontroverted testimony of Hopkins regarding a similar conversation. Hopkins testified that she witnessed a conversation between Chew and Liggins a few weeks before the in-service training. (Tr. 154.) During this conversation, Liggins brought up the technicians' concerns regarding the height of the window and absence of a sink. (Tr. 154.) Chew responded that she would talk to “them,” by which Hopkins assumed she meant someone in administration. (Tr. 154.) Chew also said she would get a higher chair for the technicians.¹² (Tr. 155.)

B. Events Preceding the Suspension and Termination of Earl Liggins

On September 13, Chew came to the control room twice and spoke to Liggins. (Tr. 42.) During both visits, Liggins had a pillowcase draped over his head because he was cold. (Tr. 42, 45.) During her first visit, Chew told Liggins about a patient that would be coming to the CT suite from ultrasound. (Tr. 42.) Chew told Liggins, “I hear you are trying to get me fired.”¹³ (Tr. 42.) This testimony stands un rebutted; Chew has never denied making this statement. Chew then left the room. (Tr. 42.)

About an hour later, Chew returned to the control room. (Tr. 43.) When Liggins heard the door of the scanning room open, he initially thought that it was the patient that Chew had spoken to him about earlier. (Tr. 43.) Liggins instead saw Chew through the window between the control room and scanning room. (Tr. 44.) Chew entered the control room and told Liggins about another patient that would be coming to the CT suite. (Tr. 43.) Chew then asked Liggins if he was sleeping, to which Liggins replied, “[N]o.” (Tr. 43.) She also asked him why he had a pillowcase over his head, to which Liggins replied that he was cold. (Tr. 43–44.) Chew then stated that if she found Liggins sleeping it would be grounds for automatic termination or dismissal. (Tr. 44, 223, 227.) Liggins replied, “[Y]es,” and Chew left the control room. (Tr. 44.)

Chew testified she came to the control room only once on September 13, in order to deliver a work order. (Tr. 222.) It was uncommon for Chew to come to the control room to deliver such documents, which were usually delivered by Wilson. (Tr. 223.) Although Chew testified that Wilson had already left work for the day at the time she went to the control room, there is no independent evidence of this (such as the work order she was allegedly delivering) and Wilson did not testify. (Tr. 223–224.) Chew testified that she entered the CT suite through the scanning room. (Tr. 222.) She said she did not see anyone in

¹² When talking to Chew, Wilson used the word “we” in addressing the technicians' concerns. (Tr. 154.)

¹³ Liggins' testimony regarding Chew telling him this is corroborated by two contemporaneous writings. On his suspension paperwork, Liggins wrote, “Earlier Ms. Chew came into the CT area and indicated that I was trying to get her fired.” (GC Exh. 3; R. Exh. 4.) In addition, Liggins wrote a letter to Nohos and Dertz immediately following his suspension; the letter begins, “I HEAR YOU ARE TRYING TO GET ME FIRED.” (GC Exh. 4; R. Exh. 6.)

the control room as she passed the window. (Tr. 222.) Upon entering the control room, Chew testified that she saw Liggins lying on the CT control console with his head down. (Tr. 222–223.) She said Liggins raised his head when he heard the door leading from the scanning room to the control room close. (Tr. 223.) According to Chew’s testimony at the hearing, Liggins had a pillowcase tied on his head and a sheet wrapped around him over the pillowcase. (Tr. 223, 233.) She testified that Liggins had difficulty getting the sheet off his head. (Tr. 223.) She also testified that his eyes were red and he appeared disoriented. (Tr. 223.) She then stated that sleeping on the job is grounds for termination. (Tr. 223, 227.) Chew testified that she left the control room and shortly thereafter saw Liggins in the radiology department outside of the control room. (Tr. 227.)

Chew then went to Worthy’s office where the two discussed this incident. (Tr. 235–236.) Following this discussion, Chew called Nohos. (Tr. 236.) Nohos advised Chew to call Dertz, but Dertz was not available. (Tr. 236.)

C. First Meeting

Chew called Liggins at about 2:30 p.m. on September 13 and summoned him to her office. (Tr. 47.) Chew stated that she had found Liggins sleeping. (Tr. 48.) Chew then gave Liggins a paper suspending him. (GC Exh. 3; R. Exh. 4; Tr. 48, 238–239.) Liggins wrote notes challenging the suspension directly on this document. (GC Exh. 3; R. Exh. 4; Tr. 49–50, 66–67.) Liggins testified that he was unable to write a complete version of the events leading up to his termination on the form, however, due to space constraints and because he was still in shock over the suspension. (Tr. 79–80.)

A statement of Chew is attached to Liggins’ suspension paperwork in Respondent’s Exhibit 4, but not Acting General Counsel’s Exhibit 3. Liggins testified that he did not receive Chew’s statement attached to Respondent’s Exhibit 4 at the time of his suspension. (Tr. 83–84.) In her statement, Chew indicated that she had found Liggins sleeping with a pillowcase on his head. (R. Exh. 4.)

D. Second Meeting

The next day Chew called Liggins at home and advised him to return to the hospital for a second meeting. (Tr. 51.)¹⁴ The second meeting took place in Respondent’s human resources department. (Tr. 51, 243.) Dertz, Chew, and Faye Terry attended this meeting. (Tr. 51, 318.) Wilson or Worthy may also have attended this meeting. (Tr. 243, 298, 325.) At the beginning of the meeting, Liggins distributed a packet of letters to those in attendance. (GC Exh. 4; R. Exh. 6; Tr. 52, 244, 320.) These letters contained details of Liggins’ alleged harassment by Chew during the course of his employment, as well as two letters specifically outlining the technicians’ concerns regarding the sink and window. (GC Exh. 4; R. Exh. 6.) The letters concerning the sink and window indicate that Liggins had discussed these issues with radiology department management, who did not remedy the concerns, and ask Nohos and Dertz

¹⁴ I find that the date of this meeting was September 14, the date on Liggins’ termination document. (GC Exh. 5; R. Exh. 5.)

(upper management) to intervene with department management to fix the problems. (GC Exh. 4; R. Exh. 6.) Dertz and Chew did not read the letters at that time.¹⁵ (Tr. 52, 244, 320.)

Dertz asked Liggins what had happened. (Tr. 56, 320.) Liggins relayed his version of events. (Tr. 56–58.) Chew gave her version of events next. (Tr. 58.) She said that she came into the scanning room and did not see Liggins in the control room through the window. (Tr. 58.) Chew stated that when she opened the door to the control room, she saw Liggins sleeping. (Tr. 58.) Liggins asked Chew why she did not get a witness if she passed the window and he was sleeping. (Tr. 58–59.) Chew responded that she could not see Liggins through the window. (Tr. 59.) Liggins told Dertz this was not possible. (Tr. 59.) Dertz said she did not believe Chew would make this up. (Tr. 59.) Liggins replied that maybe she [Chew] had a reason to make it up. (Tr. 59.) Liggins said that maybe Chew had talked to Dr. Carre and maybe Dr. Carre told her about their discussions regarding the sink and window, or the letters Liggins had been writing. (Tr. 59; GC Exh. 4; R. Exh. 6.)

Dertz then told Liggins he was fired. (Tr. 60.) When Liggins asked why, Dertz responded that she believed Chew’s story. (Tr. 60.) Dertz handed Liggins a document indicating that he had been terminated. (GC Exh. 5; R. Exh. 5; Tr. 60.) Liggins did not request to have Dr. Carre brought into the meeting at any time, as Liggins believed that Dertz had already made up her mind to fire him.¹⁶ (Tr. 80.)

Dertz admitted that she did not read the documents provided to her by Liggins, despite Liggins’ claim that Chew had been harassing him. (GC Exh. 4; R. Exh. 6; Tr. 320, 326.) She recalled that Liggins and Chew giving their respective versions of events. (Tr. 320–324.) Dertz testified that the representatives of Respondent left the room to discuss a final decision on Liggins’ continued employment.¹⁷ (Tr. 325.) Dertz called Nohos who, she testified, makes the final decision on termination. (Tr. 325, 338.) According to Dertz, everyone (Dertz, Nohos, Chew, and possibly Wilson and Worthy) agreed Liggins should be terminated. (Tr. 325.) Liggins was then given a termination document. (R. Exh. 5; Tr. 325.) Moments after the meeting, Dertz allegedly prepared notes regarding what occurred at the second meeting. (R. Exh. 12; Tr. 318–319.) Dertz denied that Dr. Carre was mentioned at the meeting. (Tr. 323.)

I find that the decision to terminate Liggins ultimately belonged to Chew. Although Dertz testified at the hearing that the decision was Nohos’ to make, I do not credit this testimony.

¹⁵ Dertz testified she initially believed that the letters were addressed to Nohos, but later determined some were also addressed to her. (Tr. 336.) Dertz merely “threw [them] in a file with the rest of Liggins’ things;” she also had the letters copied and forwarded to Nohos. (Tr. 334–336.) Some of the letters concerned issues not previously brought to Respondent’s attention and they are not at issue in this case.

¹⁶ Respondent’s version of Liggins’ discharge paperwork (R. Exh. 5) contains a 1-page typed statement of Chew dated September 14, which is not attached to the General Counsel’s version (GC Exh. 5). In this statement, Chew indicates she saw Liggins sleeping with his head covered by a pillowcase.

¹⁷ Neither Liggins nor Chew testified to this sort of a break during the meeting. Worthy was not asked about the second meeting.

In her earlier sworn affidavit to the counsel for the Acting General Counsel, Dertz said that the decision was Chew's to make. (Tr. 338–339.) Chew was not asked if it was her decision or Nohos' to terminate Liggins.

Complaint Allegations

The complaint alleges that Respondent violated Section 8(a)(1) of the Act by discharging Earl Liggins on or about September 14, 2012, because Respondent believed Liggins was engaging in protected concerted activity and to discourage employees from engaging in these or other concerted activities. (GC Exh. 1(c), par. 4.)

Legal Standards

A. Witness Credibility

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003); see also *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006) (noting that an ALJ may draw an adverse inference from a party's failure to call a witness who may be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, 335 NLRB at 622.

B. The 8(a)(1) Violation

Section 8(a)(1) of the Act states that it is an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 [of the Act]. 29 U.S.C. § 158(a)(1). Rights guaranteed by Section 7 include the right to engage in “concerted activities for the purpose . . . of mutual aid or protection.” 29 U.S.C. § 157. An employee's discharge independently violates Section 8(a)(1) of the Act where it is motivated by employee activity protected by Section 7. The Board will find that activity is concerted where the evidence supports a finding that the concerns expressed by the individual employee are a logical outgrowth of concerns expressed by a group. *Amelio's*, 301 NLRB 182 (1991). A respondent violates Section 8(a)(1) of the Act if, having knowledge of an employee's concerted activity, it takes adverse employment action that is motivated by the employee's protected concerted activity. *CGLM, Inc.*, 350 NLRB 974, 979 (2007) (citation omitted).

The legal standard for evaluating whether an adverse employment action violates Section 8(a)(1) of the Act is set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395 (1983) (approving *Wright Line* analysis). In *Wright Line*, the

Board determined that the General Counsel carries the burden of persuading by a preponderance of the evidence that an employee's protected conduct was a motivating factor (in whole or in part) for the employer's adverse employment action. Proof of such unlawful motivation can be based on direct evidence or can be based inferred from circumstantial evidence based on the record as a whole. *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004), enfd. mem. 179 LRRM (BNA) 2954 (6th Cir. 2006); *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003). This includes evidence that the employer's reasons for the adverse personnel action were pretextual. *Rood Trucking Co.*, 342 NLRB 895, 897–898 (2004), citing *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 229 (D.C. Cir. 1995) (“When an employer presents a legitimate basis for its actions which the factfinder concludes is pretextual . . . the factfinder may not only properly infer that there is some other motive, but that the motive is one that the employer desires to conceal—an unlawful motive.”).

Under *Wright Line*, the elements commonly required to support such a showing are protected concerted activity by the employee, employer knowledge of that activity, and animus on the part of the employer. *Consolidated Bus Transit, Inc.*, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009); see also *Relco Locomotives, Inc.*, 358 NLRB No. 37. slip op. at 14 (2012) (observing that “[e]vidence of suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct, departures from past practices, tolerance of behavior for which the employee was allegedly fired, and disparate treatment of the discharged employee all support inferences of animus and discriminatory motivation”).¹⁸

If the General Counsel makes the required initial showing, then the burden shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of the employee's union or protected activity. *Consolidated Bus Transit, Inc.*, 350 NLRB at 1066; *Pro-Spec Painting*, 339 NLRB 946, 949 (2003); *Bally's Atlantic City*, 355 NLRB 1319, 1321 (2010) (explaining that where the General Counsel makes a strong initial showing of discriminatory motivation, the respondent's rebuttal burden is substantial), enfd. 646 F.3d 929 (D.C. Cir. 2011). The General Counsel may offer proof that the employer's reasons for the personnel decision were false or pretextual. *Pro-Spec Painting*, 339 NLRB at 949 (noting that where an employer's reasons are false, it can be inferred that the real motive is one that the employer desires to conceal—an unlawful motive—at least where the surrounding facts tend to reinforce the inference). (Citation omitted.) A respondent's defense does not fail simply because not all of the

¹⁸ Contrary to Respondent's assertion on brief, under extant Board law there is no fourth element to the analysis. (R. Br. p. 7.) A “causal nexus” is not an element of the Acting General Counsel's burden. *Mesker Door*, 357 NLRB No. 59, slip op. at 2 fn. 5 (2011); see also *Praxair Distribution, Inc.*, 357 NLRB No. 91 slip op. at 1 fn. 2 (2011) (“we clarify that under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the General Counsel's initial burden . . . does not include a fourth element, set forth by the judge, that the General Counsel establish a link or nexus between the employee's protected activity and the adverse employment action”).

evidence supports its defense or because some evidence tends to refute it. Ultimately, the General Counsel retains the burden of proving discrimination. *Relco Locomotives, Inc.*, 358 NLRB No. 37, slip op. at 13.

However, when the evaluation of the General Counsel's initial case, or the respondent's defense, includes a finding of pretext, this defeats any attempt by the respondent to show that it would have discharged the discriminatee absent his or her union activities. *Rood Trucking*, 342 NLRB at 895; *La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1124 (2002). This is because where the evidence establishes that the reason given for the respondent's action is pretextual—that is, either false or not relied upon—the respondent fails by definition to show that it would have taken the same action for that reason. *Id.* Thus, there is no need to perform the second part of the *Wright Line* analysis. *Rood Trucking*, supra, citing *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003). See also *Sanderson Farms, Inc.*, 340 NLRB 402 (2003).

Discussion and Analysis

A. Credibility Analysis

My credibility findings are generally incorporated into the findings of fact set forth above. My observations, however, were that the Acting General Counsel's witnesses were poised, forthright, and composed when they testified. By contrast, Respondent's witnesses (particularly Chew) took great pains to assert having no knowledge of Liggins' protected concerted activity, only to have their testimony and credibility undermined by their prior affidavit testimony, notes, and by other witnesses.

It is not possible to reconcile the two versions of events given by Liggins and Chew regarding the events preceding Liggins' suspension and termination. Chew testified that she caught Liggins sleeping at work and Liggins testified he was not sleeping at work. My observations lead me to doubt the accuracy of the testimony offered by Chew. As more fully discussed below, her testimony was rife with contradictions.

Chew gave confusing and contradictory testimony about what transpired after she allegedly caught Liggins sleeping. (Tr. 273–275, 284–291, 291–292.) On direct examination, she testified that after she left the control room, she saw Liggins heading toward the X-ray quality control area, near hall A on Acting General Counsel's Exhibit 2. (Tr. 229.) She later testified that she saw Liggins in the hallway labeled "Corridor" on Acting General Counsel's Exhibit 2. (Tr. 275.) She then again testified that she saw Liggins down hall A. (GC Exh. 2; Tr. 285.) She later testified that she saw Liggins he was in a corridor not shown on Acting General Counsel's Exhibit 2, near where the exhibit shows "outpatient waiting area." (Tr. 292.)

Chew went to great lengths to dispute that she knew of Liggins' complaints on behalf of the technicians regarding the height of the window and absence of a sink in the CT suite. Chew testified Dr. Carre never came to her with any of Liggins' concerns regarding the workspace in the radiology department. (Tr. 241.) However, this contradicts Dr. Carre's testimony that he raised the technicians' concerns over the height of the window with Chew. (Tr. 208.) In addition, Chew testified she speaks with Dr. Carre two or three times a day.

(Tr. 277.) This amount of contact, coupled with Dr. Carre's admission that he told Chew of the technicians' concerns regarding the window, make it very likely he also told Chew about the sink complaints and Liggins' statement that the technicians were banding together against Chew.

At the hearing, Chew testified that Hopkins brought concerns regarding the height of the window to her attention. (Tr. 245–246.) However, in her sworn affidavit, Chew testified that she did not remember any of the CT technicians bringing the concern over the window height to her attention. (Tr. 268–271.) Chew was obviously made aware of the concern because she remedied it by providing an adjustable chair for the technicians to use.¹⁹ (Tr. 246.)

Chew initially denied that any of the technicians brought the sink issue to her attention.²⁰ (Tr. 246.) She claimed that she learned of the sink complaint from Wilson. (Tr. 246.) Chew brought the sink concern to the attention of Nohos. (Tr. 246.) After discussing the matter with Nohos, Chew told Wilson that there was no requirement for a sink in the scanning room.²¹ (Tr. 246.) On cross-examination, however, Chew stated that Hopkins brought the sink concern to her attention. (Tr. 271.) This contradicts Hopkins' un rebutted testimony that Liggins raised these issues with Chew on two separate occasions.²² (Tr. 146–148, 154–155.)

Chew has given contradictory statements and testimony regarding what she observed in the control room on the day that she allegedly saw Liggins sleeping. On the days that Liggins was suspended and terminated, Chew stated that she saw Liggins with a pillowcase on his head. (R. Exhs. 4, 5.) In a sworn affidavit given to the counsel for the Acting General Counsel, Chew stated that she saw Liggins with two pillowcases covering his head. (Tr. 268.) At the hearing, Chew testified that she saw Liggins with a pillowcase and a folded bed sheet over his head. (Tr. 223, 233.)

Chew also testified that she could not see Liggins in the control room through the window as she passed through the scanning room. (Tr. 277–278.) She testified that the computer monitors in the control room blocked her view through the window because they cover the window by 6 to 12 inches. (Tr. 279.) This testimony is not credited because, as shown in Respondent's Exhibit 8B, the computer monitors in the CT control room do not extend above the edge of the window sill.

Overall, Chew was a difficult witness. She was quite argumentative with counsel for the Acting General Counsel. She

¹⁹ Chew quibbled with the counsel for the Acting General Counsel on this point. According to Chew, the issue raised was the height of the chair, not the height of the window. Chew eventually admitted that these are, in fact, related issues. (Tr. 270–271.) I find that these are the same issue. The technicians needed the adjustable height chair to see patients in the scanning room *because of* the height of the window.

²⁰ I do not credit Chew's testimony on this subject because it is contradicted by the testimony of Hopkins and Liggins, who I find to be more credible witnesses for the reasons set forth infra.

²¹ Wilson was not called as a witness by Respondent.

²² Although Chew testified that Hopkins brought the technicians' concerns to her attention, her testimony on this point was not specific; she did not provide any detail regarding her conversations with Hopkins.

gave nonresponsive answers on cross-examination. She struggled when presented with her own affidavit testimony. (Tr. 267, 270–271.) Her overall demeanor on the witness stand, and the inconsistencies contained in the record, including those discussed above, lead me to not credit significant portions of her testimony, particularly her testimony that she caught Liggins sleeping at work.

Respondent's attempt to corroborate Chew's testimony by relying on Worthy's testimony is without merit. Worthy was not present when Chew allegedly saw Liggins asleep at work. Her testimony was only that she and Chew had a discussion after Chew had allegedly seen Liggins sleeping. I have already discredited Chew's testimony regarding her claim that she caught Liggins sleeping. In addition, I find Worthy to be an unreliable witness because she equivocated throughout her testimony by the use of modifiers such as "I believe," (Tr. 298, 300, 302), "I guess," (Tr. 300, 302), and "basically" (Tr. 296, 298, 302).

I also find that Dertz was not a credible witness. Dertz fervently denied reviewing any documents in preparation for giving her testimony. (Tr. 332–333.) Only later, after Respondent's counsel interjected, did she admit meeting with Respondent's counsel and looking at some documents, although she could not remember what she looked at.²³ (Tr. 343.)

Dertz also appeared evasive in responding to cross-examination questioning. For example, Dertz engaged in the following exchange with counsel for the Acting General Counsel:

- Q. Did you ever read the letters that Mr. Liggins gave you at the meeting where you told him he was terminated?
 A. No.
 Q. Never read them?
 A. Like ever?
 Q. Okay. Did you read them before the charge was filed by Mr. Liggins?
 A. Before the charge was filed with who? With you?
 Q. Yes, before the charge was filed with us . . . February 12th 2013. . . ?
 A. I'm not sure. [Tr. 333–334.]

In addition, Dertz testified twice at the hearing that it was ultimately Nohos' decision to fire Liggins. (Tr. 325, 338.) She was later confronted with her sworn affidavit testimony, in which she said that it was ultimately Chew's decision to fire Liggins. (Tr. 338–339.) Dertz then stated that her affidavit mis-characterizes her testimony. (Tr. 339.) I have already found that the decision to fire Liggins was for Chew to make.

Dertz also provided contradictory testimony regarding the letters presented by Liggins at his termination meeting. (GC Exh. 4; R. Exh. 6.) At the hearing she testified that she had no idea what was contained in Liggins' letters at the time he was terminated. (Tr. 320.) Her notes, prepared immediately following the termination meeting with Liggins, indicate that the letters were complaining about Chew. (R. Exh. 12; Tr. 335.) It seems impossible that Dertz could have known immediately

after the termination meeting that Liggins' letters were complaining about Chew unless she read them, at least in part, at that time. Dertz then tried to recover by saying Liggins said this [that the letters were complaining about Chew], although this was not clear in her direct testimony. (Tr. 320, 335.) Dertz further testified that the letters were not addressed to her; she later agreed that the letters are addressed to her. (GC Exh. 4; R. Exh. 6; Tr. 336.)

Dertz testified that she had a meeting with Liggins and Chew about the counseling he received in September. Liggins credibly testified he did not know Dertz even knew about the counseling before he provided her the letters at his termination meeting. (Tr. 340, 347.) His letter entitled "Prioritization vs. Harassment vs. Patient Safety," appears to be a rebuttal of the counseling. (GC Exh. 4; R. Exh. 6; Tr. 346.) Chew did not corroborate Dertz' testimony about the meeting, as she was not asked about any such meeting. In addition, such a meeting seems un-necessary, as a counseling is not placed in an employee's official personnel file in human resources and Dertz cannot make a manager remove a counseling. (Tr. 342.) Also, given that the counseling was given to Liggins by Wilson and not Chew, it seems odd that the meeting would have involved Chew and not Wilson. (Tr. 341.)

In sum, I did not find Dertz to be a reliable witness. The inconsistencies between her hearing testimony and her previous affidavit testimony, deportment on the witness stand, and reluctance to admit reviewing any documents in preparation for the hearing support this finding.

I further do not credit the testimony of Dr. Carre. Most of his testimony on direct examination was given in response to leading or "yes or no" questions. He contradicted himself while testifying at the hearing and his hearing testimony contradicted his prior affidavit testimony. His testimony also contradicted that of Chew.

Dr. Carre testified that he told Chew about the CT technicians' complaints about the placement of the window between the scanning room and the control room. (Tr. 207–208.) However, he denied telling Chew about the technicians' complaints about the sink, as he did not believe that the sink complaint was associated with Chew's job requirements. (Tr. 207.) It is difficult to understand why the placement of the window would, by contrast, have anything to do with Chew's job requirements. Also, as he spoke with Chew two–three times per day, it is difficult to believe he would not relay complaints made by all of the CT technicians to Chew, who was manager of the department and in the technicians' direct chain of command.

Dr. Carre's testimony at the hearing also contradicted his affidavit testimony. He argued with counsel for the Acting General Counsel, refusing to admit what was contained in his affidavit. (Tr. 211–213.) He attempted to answer questions put to him by counsel for the Acting General Counsel before she finished the questions. (Tr. 213, 215.) At the hearing he attempted to deny that he understood the technicians' complaints about the absence of a sink in the scanner room, and then admitted that he gave testimony to the opposite effect in his affidavit. (Tr. 211–213; GC Exh. 6, p. 3.) Dr. Carre stated in his affidavit that all of the technicians raised the window height issue to

²³ I note that all of this testimony was given in response to leading questions by Respondent's counsel. (Tr. 343.)

him. (GC Exh. 6, p. 3; Tr. 213–214.) At the hearing he said that only the technicians who worked during the day raised the issue. (Tr. 214.) He also admitted on cross-examination that he “probably” told the technicians to talk to Chew about their issues. (GC Exh. 6, p. 3; Tr. 215.) Although on direct examination he testified he did not tell the technicians to band together, his affidavit testimony was more equivocal; in the affidavit he testified, “I don’t think I ever told any employee to band together to get the window or the sink issue fixed.” (GC Exh. 6, p. 3; Tr. 215–216.) In his affidavit, Dr. Carre stated that it was Liggins who brought the concerns over the window to him and may have brought the concerns over the sink to him. (GC Exh. 6, p. 3.) Dr. Carre also stated in his affidavit that he spoke to Liggins every day while Liggins was employed by Respondent. (GC Exh. 6, p. 3.) Dr. Carre, like Respondent’s other witnesses, was not a reliable witness.

Conversely, I find the testimony of Liggins and Hopkins both believable and reliable. Liggins testified in a direct and forthright manner. His testimony about raising employee complaints regarding the window height and absence of a sink to Chew is corroborated by Hopkins. In addition, his testimony that he frequently wore a pillowcase on his head at work was corroborated by Hopkins. He did not waiver in his testimony on cross-examination. He readily admitted that he did not advise Chew about the technicians banding together. (Tr. 69.) Although Liggins’ testimony contained a few minor contradictions, I do not find this detracts from his overall credibility. Therefore, based upon Liggins’ consistent testimony and demeanor on the witness stand, I credit the testimony of Liggins where it is not contradicted by the testimony of Hopkins or certain documentary evidence.²⁴

As for Hopkins, who was still employed by Respondent when she testified, I note that current employees are likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests. *Advocate South Suburban Hospital*, 346 NLRB 209 fn. 1 (2006), citing *Flexsteel Industries*, 316 NLRB 745 (1995), affd. mem. 83 F.3d 419 (5th Cir. 1996); see also *American Wire Products, Inc.*, 313 NLRB 989, 993 (1994) (Current employee providing testimony adverse to his employer is at risk of reprisal and thus likely to be testifying truthfully). Moreover, as noted above, Hopkins’ testimony is almost completely un rebutted and largely corroborated by Liggins’ testimony.²⁵ Counsel for Respondent did not cross-examine Hopkins about the conversations she witnessed between Chew and/or Wilson and Liggins.²⁶ Thus, I credit the testimony of Hopkins above other witnesses.

²⁴ On brief, Respondent’s counsel correctly indicates that Liggins asserted that he had been working on the letters contained in R. Exh. 6 (at p. 3) “for months.” (R. Br. p. 8.) While I agree that this does not corroborate Liggins’ testimony, I find the discrepancy minor.

²⁵ While it is possible to dismiss or disregard uncontroverted testimony, it may not do so without a detailed explanation. *Missouri Portland Cement Co. v. NLRB*, 965 F.2d 217, 222 (7th Cir. 1992).

²⁶ Neither did he ask Chew about these conversations on direct examination.

B. Respondent Violated the Act When it Terminated Liggins

The evidentiary record establishes, and I find, that Respondent terminated Liggins for engaging in protected concerted activity by repeatedly raising employee concerns over the absence of a sink in the scanning room and the height of the window between the control room and scanning room. I further find that the record establishes that Liggins had conversations with Dr. Carre, as set forth above, in which the idea of banding together to get Chew fired was raised. Within days of the last of these conversations, Respondent discharged Liggins.

First, I find that Liggins’ activities were both protected and concerted. Liggins’ repeated raising of employee concerns regarding the absence of a sink in the scanning room and the height of the window between the scanning and control rooms constituted concerted activity under the Act. Rights guaranteed by Section 7 include the right to engage in “concerted activities for the purpose . . . of mutual aid or protection.” 29 U.S.C. § 157. In *Phillips Petroleum Co.*, 339 NLRB 916 (2003), an employee was discharged after attempting to obtain changes in the company’s family medical leave policy. The Board noted that the employee’s efforts originated due to a personal need to care for his own family, but also, “embraced the larger purpose of obtaining this benefit for all of his fellow employees.” 339 NLRB at 918. The Board held that concerted activity occurred “when an individual attempts to bring a group complaint to the attention of management.” 339 NLRB at 918. The evidence in this case convincingly establishes that Liggins brought his own concerns and those of his fellow employees regarding the window height and absence of a sink to the attention of Respondent’s supervisors and/or agents, including Dr. Carre and Chew. The Board has held that an employee who raises safety issues with his employer is engaged in concerted activity that is protected by Section 7 of the Act. *Talsol Corp.*, 317 NLRB 290, 316–317 (1995). See also *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962); *Daniel Construction Co.*, 277 NLRB 795 (1985). The concerns raised by Liggins, particularly those regarding the sink, involve employee safety. Even though Liggins had a personal reason for wanting a sink in the scanning room (i.e., his health), this was also a concern of the larger group of technicians. Liggins used words indicating that this was a group concern, such as “we,” when he spoke of these issues. I therefore conclude that Liggins’ individual efforts to address these issues, which involve employee safety, with Respondent’s supervisors and/or agents, were both protected and concerted activity within the meaning of the Act.

The technicians may have mistakenly believed that the law required the presence of a sink in the scanning room. (Tr. 149, 159, 184.) This is of little import because, whether or not the law required such a sink, Liggins’ actions in this case constituted protected concerted activities. The reasonableness of workers’ decisions to engage in concerted activity is irrelevant to the determination of whether a labor dispute exists or not. *Odyssey Capital Group*, 337 NLRB 1110, 1111 (2002), citing *NLRB v. Washington Aluminum*, 370 U.S. 9 (1962). Whether the protected working condition was actually as objectionable as the employees believed it to be is irrelevant to whether their con-

certed activity is protected by the Act. *Tamara Foods*, 258 NLRB 1307, 1380 (1981), *enfd.* 692 F.2d 1171 (8th Cir. 1982), *cert. denied* 461 U.S. 928 (1983). Section 7 of the Act protects the rights of employees to engage in protests over what the employees believe to be unsafe or unhealthy working conditions. *Tamara Foods*, 258 NLRB at 1380. Complaints regarding lack of adequate hand washing facilities have been found to be protected concerted activity under the Act. *Hayes Corp.*, 334 NLRB 48, 49 (2001). Therefore, whether or not the law requires a sink in the CT scanning room, employees' efforts to obtain one were protected concerted activity under the Act.

Respondent tacitly admitted that the employee complaints over the height of the window between the scanning and control room (such as were raised by Liggins) had merit. Chew remedied the problem by providing an adjustable height chair to the technicians.

Second, contrary to Respondent's contentions, I find that Respondent was well aware of Liggins' protected concerted activities. (R. Br. p. 9.) Both Liggins and Hopkins testified that Liggins brought the technicians' concerns over the sink and window directly to Chew at the in-service training; this testimony has not been rebutted. Dr. Carre admitted that he was aware of the technicians' concerns over the sink and window and that he brought the technicians' concerns, at least regarding the window, to the attention of Chew. Liggins was a leading advocate of the CT technicians' concerns, having raised the issues several times to Respondent's supervisors and/or agents. Liggins further raised these concerns again in his letters given to Chew and Dertz (and later forwarded to Nohos) on the day he was terminated. Therefore, I find Respondent was aware of Liggins' protected concerted activity.

Finally, this case rests on Respondent's motivation. Under *Wright Line*, the Acting General Counsel must show that the discharged employee's protected conduct was a motivating factor in the employer's decision. 251 NLRB at 1089. Several factors establish that Respondent discharged Liggins based on his protected conduct.

Chew's statement to Liggins that she heard he was trying to get her fired provides powerful evidence of animus toward Liggins' protected concerted activity. Chew did not specifically rebut Liggins' testimony about her statement. Although she initially denied it, Chew had input into the redesign of the CT suite, and specifically into the removal of the sink from the scanning room. (Tr. 263, 276–277.) Therefore, Liggins and the other technicians were questioning a decision made, in part, by Chew. Chew was clearly peeved by Liggins' questioning of her decision. She told employees at the in-service training to drop the sink issue. Dr. Carre advised the technicians to take their complaints to Chew, who was the manager of their department. (Tr. 215.) Chew's statement that Liggins was trying to get her fired further demonstrates that she was annoyed by his discussions with Dr. Carre about the sink and window. I have already found that Dr. Carre and Liggins discussed the idea of the technicians banding together to get rid of Chew. These discussions about banding together came in response to Liggins' complaints on behalf of the other technicians about the absence of a sink in the scanning room. There has been no direct rebuttal of Liggins' testimony that Chew said, "I hear

you are trying to get me fired" and this provides strong evidence of Chew's animus toward Liggins' protected concerted activity.

The timing of Liggins' suspension and later discharge, the same day as Chew told Liggins she heard he was trying to get her fired, within days of Liggins' conversations with Dr. Carre about banding together to get rid of Chew, and 2 to 3 months after he began his campaign to address employee concerns over the height of the window and absence of a sink, provides further evidence of animus. Animus can be inferred from the relatively close timing between an employee's protected concerted activities and his discipline. *La Gloria Oil & Gas Co.*, 337 NLRB 1120 (2002) (timing of discipline imposed 4 months after service on bargaining team and ULP hearing appearance suspect); *Relco Locomotives, Inc.*, 358 NLRB No. 37, slip op. at 19 (2012) (timing of discipline imposed 2 months after an employer learned of protected activities suspect). Thus, it is suspicious that Respondent discharged Liggins within 2 months of Liggins raising the sink and window issues with Chew at the in-service training. It is even more suspicious that Liggins was discharged at about the same time as he told Dr. Carre that the technicians were banding together against Chew and on the same day as she told Liggins she heard he was trying to get her fired. I find the timing of Liggins' suspension and discharge in relation to his protected concerted activity provides further evidence of animus.

With this foundation, I find that this is a case involving pretext. I find that the Acting General Counsel has established, by a preponderance of the evidence, that Liggins was not asleep at work on September 13, 2011, as alleged by Respondent. Instead, I find that this reason was fabricated by Chew. The events leading up to Liggins' discharge, as testified to by Liggins and Chew, are irreconcilable. I have discussed at length the reasons I do not credit Chew's testimony and instead credit Liggins'. As I have credited Liggins, I find that he was not sleeping on duty as alleged by Chew.

Accordingly, I find that the evidence establishes that Respondent's proffered reason for terminating employee Earl Liggins was pretextual—that is, it was false. Rather, the evidence shows that Respondent terminated Liggins for engaging in protected concerted activities. Where a reason for discharge is found to be false, I can and do infer that the true motive lies elsewhere—namely, Liggins' protected concerted activity. *Shattuck Denn Mining Corp.*, 362 F.2d 466 (9th Cir. 1966). Therefore, I find that this discharge violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. By terminating Earl Liggins on or about September 14, 2011, because he engaged in protected concerted activity, by complaining to Dr. Carre and Lorie Chew and others about working conditions in the CT suite (the height of the window and absence of a sink), Respondent violated Section 8(a)(1) of the Act.

2. The unfair labor practice stated in conclusion of law 1 above is an unfair labor practice that affects commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in an unfair labor practice, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent, having discriminatorily discharged employee Earl Liggins, must offer him reinstatement and make him whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

For all backpay required herein, Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatee for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.*, 359 NLRB No. 44 (2012).

Further, Respondent shall be required to remove from the personnel file of Earl Liggins any reference to his unlawful termination, and advise him in writing that this has been done. In addition, Respondent shall be required to cease and desist from engaging in unlawful discriminatory conduct and to post an appropriate notice, attached hereto as an "Appendix."

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁷

ORDER

The Respondent, St. Bernard Hospital and Health Care Center, Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for engaging in protected concerted activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Earl Liggins full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Earl Liggins whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge and

²⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Chicago, Illinois, copies of the attached notice marked "Appendix."²⁸ Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 14, 2011.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 30, 2013

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection

²⁸ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Earl Liggins full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Earl Liggins whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest compounded daily.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate Earl Liggins for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Earl Liggins, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

ST. BERNARD HOSPITAL AND HEALTH CARE CENTER