JD–40–14
River Falls, WI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

RIVER FALLS HEALTHCARE, LLC
d/b/a KINNIC HEALTH AND REHAB

and

18–CA–106165
18–CA–110713

UNITED FOOD AND COMMERCIAL WORKERS,
LOCAL 1189

Tyler J. Wiese, Esq. and
Nichole L. Burgess-Peel, Esq.,
for the General Counsel.

John C. Hauge, Esq.,
for the Respondent.

Curtis Neff,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

THOMAS M. RANDAZZO, Administrative Law Judge. This case was tried in Minneapolis, Minnesota, on January 8–10, 2014. The United Food and Commercial Workers, Local 1189 (the Union) filed the charges in Case No. 18–CA–106165 on May 30 (and amended charges on June 14 and August 7, 2013) and in Case No. 18–CA–110713 on August 7, 2013, and the General Counsel issued the order consolidating cases, consolidated complaint and notice of hearing on September 30, 2013.[1]

The complaint alleges that the Respondent violated Section 8(a)(3) and (1) of the Act as reflected in paragraph 6 by: (a) harassing employee Cathi Curry and thereafter discharging

[1] All dates are in 2013 unless otherwise indicated.

and/or caused her discharge;[2] (b) removing employee Lee Ann Ager from the schedule and informing her she was under investigation; (c) suspending Ager and subsequently reducing that suspension to a written discipline; (d) banning Ager from Respondent's premises; (e) refusing to change Ager's weekend shift schedule; (f) issuing a written verbal warning to employee Ruth Curry; and (g) refusing to grant Ager a holiday shift on the Fourth of July.

In addition, complaint paragraph 5 alleges that the Respondent violated Section 8(a)(1) of the Act by the following: (a) Director of Nursing Kristina Ijomah threatening that Respondent did not want an employee to be a member of the labor-management committee; (b) Administrator Derrick Maidl prohibiting employees from discussing employment matters; (c) Director of Environmental Services Randall Koller, threatening that Respondent wanted to get rid of the Union; (d) Ijomah threatening that Respondent was trying to get rid of the Union; (e) Maidl, Ijomah, and Human Resource Director/Accounts Payable Judith Hammer, interrogating an employee about what was heard on the floor regarding Respondent's plan for getting rid of union supporters, threatening an employee for spreading rumors, and asking for names of employees who were spreading rumors; (f) Maidl and Ijomah, creating the impression that employees' union and/or protected concerted activities were under surveillance; (g) Maidl and Ijomah, threatening that Respondent would file harassment charges against an employee for engaging in union and/or protected concerted activities; (h) Maidl, threatening that an employee did not need union representation; (i) Maidl and Ijomah, threatening an employee that Respondent would continue to investigate the employee's union and/or protected concerted activities; (j) Maidl and Ijomah, threatening an employee not to talk to other employees on the floor about terms and conditions of employment; (k) Maidl and Ijomah, threatening an employee by falsely stating the employee had been given a verbal warning because of the employee's union and/or concerted protected activities; (l) by Maidl and Ijomah, threatening an employee with insubordination because the employee attempted to call a union representative; (m) Maidl and Ijomah, threatening an employee that Respondent was going to call the police if the employee did not leave Respondent's premises and did so in response to the employee's union and/or other concerted protected activities; (n) Maidl and Koller, threatening an employee for discussing terms and conditions of employment with other employees; (o) Maidl, threatening an employee by stating that the employee did not need union representation; (p) Maidl, threatening an employee with termination for refusing to sign a disciplinary form and/or if the employee was found to have discussed terms and conditions of work with other employees.[3]

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[2] Complaint allegation 6(a) was amended at the hearing. However, in its brief, the General Counsel states that he wishes to withdraw the allegation of constructive discharge which he moved to add by amendment at the hearing. The General Counsel, however, failed to file a motion to withdraw this allegation and thereby provide the Respondent an opportunity to respond to it. Despite the fact that the General Counsel wishes to abandon this theory, it was litigated and I find it appropriate to consider it in this decision.

[3] At the hearing, counsel for the General Counsel moved to amend the complaint to include subpar. 5(q) alleging that, on or about December 19, 2013, Respondent, by Maidl, interrogated employee Ager regarding her union activity and testimony before the NLRB, but counsel later withdrew that motion to amend the complaint, and said withdrawal was granted.

On the entire record, including my observation of the demeanor of the witnesses,[4] and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, with an office and place of business in River Falls, Wisconsin, has been engaged in the operation of a skilled nursing care facility. During the calendar year ending December 31, 2013, Respondent derived gross revenues in excess of $250,000, and has purchased and received goods valued in excess of $50,000 from entities located within the State of Wisconsin, which in turn, purchased and received goods directly from suppliers located outside the State of Wisconsin. 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 and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Events Preceding the Alleged Unfair Labor Practices

1. Background

The Respondent is a subsidiary of Grace Healthcare, based in Chattanooga, Tennessee, which operates nursing home facilities throughout the country. The Respondent purchased the Kinnic nursing home facility in April 2011, from predecessor Heyde Companies. The skilled nursing care facility houses approximately 50 residents. The Respondent's directors consist of: Randy Koller, the director of environmental services; Kristina (Kris) Ijomah, the director of nursing; Judith (Judy) Hammer, the human resources director; Patty Miller, the social services director; Amanda Mason, the activities director; Larissa Fayweather and Erin McLagan, the clinical managers; Rasalie Maas, the dietary director; and Beth Palo, the business office manager. Administrator Derrick Maidl was hired by the Respondent in September 2011 to run the facility and oversee the directors and their respective departments.

The Respondent employs approximately 80 to 90 employees who are represented by two unions. The registered nurses (RN) and licensed practical nurses (LPN) are represented by the Minnesota Nurses Association (MNA). The certified nursing assistants (CNA), housekeepers, laundry aides, activity assistants, cooks, and dietary aides are represented by the UFCW (the

[4] In making my findings regarding the credibility of witnesses, I considered their demeanor, the content of the testimony, and the inherent probabilities based on the record as a whole. In certain instances, I credited some but not all, of what the witness said. I note, in this regard, that "nothing is more common in all kinds of judicial decisions than to believe some and not all" of the testimony of a witness. *Jerry Ryce Builders*, 352 NLRB 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp*., 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951). See also *J. Shaw Associates*, LLC, 349 NLRB 939, 939–940 (2007).

Union). There are approximately 40 employees in the UFCW bargaining unit, and the Union has represented those employees for approximately 20 years. The parties' relationship has been embodied in successive collective-bargaining agreements, the most recent of which was effective during the time period in this case from August 1, 2011, to July 31, 2013.[5]

2. The Respondent's purchase of the Kinnic facility and the changes in Respondent's management and the Union's representatives at the facility

The record reveals that shortly after purchasing the facility in April 2011, the Respondent underwent a transition in management. Derrick Maidl replaced the previous administrator and subsequently took over operation of the facility in September 2011. The Respondent also hired a new director of nursing, Kris Ijomah, in November 2011.

After the Respondent's purchase of the facility, the Union likewise experienced changes in its representatives. Union Steward Charity Hill was replaced by Laundry Aide Cathi Curry, who served as union steward from 2011 until her termination on April 4, 2013. Certified Nurse Assistant Lee Ann Ager subsequently replaced Cathi Curry as union steward. In addition, the union representative servicing the unit changed in the Fall of 2012, when Curtis Neff replaced long-time Union Representative Mike Dryer.

It is undisputed that after the Respondent's purchase of the facility the transition was smooth and the parties enjoyed a good relationship. This cooperative relationship was reflected in the fact that when the Respondent took over the facility, it assumed the existing collective-bargaining agreement between the Union and Respondent's predecessor. Thereafter, in the summer of 2011, the Respondent quickly reached an agreement on a successor collective-bargaining agreement. The successor agreement contained a wage reopener pursuant to which the parties reopened in 2012, and negotiated an increase in wages for union members. The parties also maintained and utilized a labor—management committee that included employee members and which successfully dealt with resolving various workplace issues.

3. Labor—Management issues arise between the parties in the Fall of 2012

The industrial peace at the Respondent's facility, however, would not last long. The record reveals that in the Fall of 2012, around the time that Neff replaced Dryer as the union representative for the unit employees, problems arose between the parties. At that time, one of the Respondent's laundry machines malfunctioned, which resulted in an increase in the workload for the laundry department employees, and subsequently, a perceived decline by Respondent in the quality of the laundry work. During this time period, it appears that Koller became frustrated with certain aspects of his job, such as posting and maintaining schedules consistent with the provisions of the collective-bargaining agreement. The record shows that Cathi Curry attempted to help Koller fashion a schedule for the employees that was consistent with the contract.

It is undisputed that during that time period, problems arose between the parties and there were complaints from the employees and the Union with regard to the way management, in particular Koller, was treating the employees. The Respondent acknowledged these problems in

[5] After that agreement expired, the parties negotiated a successor agreement.

an email from Miller to Maidl on September 10, 2013. In that email, Miller stated that Koller informed her he had told the laundry employees that he was going to report them every time he saw them smoking, prompting her to acknowledge: "No wonder they have union problems."

The issues in the laundry department resulted in a grievance being filed on September 24, 2012, by Neff. That grievance, described as a "class action grievance on behalf of Cathi Curry and the laundry staff . . ." complained of rude and disrespectful treatment from Koller and the alleged creation of a "hostile work environment" in the laundry department. (GC Exh. 5.) Koller's perceived mistreatment of the employees in the laundry department led to several emails from Cathi Curry to Maidl in September 2012, concerning employees' terms and conditions of employment and terms of the contract, such as scheduling. (GC Exh. 8.) In response, Maidl informed Curry that he was going to speak to Koller about the schedules and the "issues." The parties met over the grievance in October 2012, and the conditions improved in the laundry department, which in turn led to the Union's withdrawal of the grievance.

4. Issues between the parties arise again in early 2013

In early 2013, the parties enjoyed improved relations. The record shows that the parties continued to work together to try and resolve disputes, and Neff acknowledged that Maidl consistently tried to work with the Union to discuss issues and resolve disputes, including during the Spring and Summer of 2013. Likewise, Cathi Curry testified that she felt at ease bringing employee issues directly to Maidl or Ijomah for discussion and resolution.

However, the record also shows that during this time period, problems were arising between the parties, and the labor-management committee stopped meeting in or around February 2013. Cathi Curry testified that the issues between Koller and the laundry employees resumed in the early months of 2013, as she fielded complaints regarding alleged harassment and scheduling issues. She testified that when she would attempt to address scheduling issues with Koller, he would tell her that the Union was hindering his ability to do his job.[6] It is undisputed that the relationship became so bad that Cathi Curry was visiting Maidl's office several times per week in an attempt to get better treatment for the employees by management, and she filed 5 to 6 grievances in 2013, prior to her discharge on April 4, 2013.[7]

In addition, during this time period, Cathi Curry complained that fellow laundry employee Jackie Cataract was receiving special treatment from Koller. She specifically complained that Cataract left her shift early on March 9 without talking to any of her coworkers or managers, and that perceived favorable treatment led Cathi Curry to complain about those issues to Maidl in an email dated March 9. Maidl responded to the email on March 12, stating that the situation would be addressed, and that Cataract did talk to her supervisor before she left work. Curry also requested that Neff file a grievance against Cataract, but he refused to file a

[6] Koller did not contradict this assertion.

[7] The record shows that problems were also developing between the CNAs and Ijomah. It is undisputed that during this time period, in response to a flu outbreak at Respondent's facility, Ijomah mandated that employees either take Tamiflu, get a flu vaccine, or be removed from the schedule. Based on employee complaints to the Union about being required to get a flu vaccine, Cathi Curry addressed the issue with Ijomah. Curry informed Ijomah that she would take the issue to the Union, and Ijomah ceased the mandatory program.

grievance against another union member. These events led to a meeting in March 2013 with Maidl to discuss the issues in the laundry department, such as the scheduling problems and alleged preferential treatment for Cataract by Koller. Unlike the meeting in October 2012, there was no resolution of the labor—management issues, and in subsequent discussions that Curry had with Koller pertaining to scheduling and the collective-bargaining agreement, Koller told her that "if the Union was not involved, I'd be able to do my job."

The Respondent does not dispute that labor—management issues worsened during this time period. In fact, the deteriorating relationship between the parties was recognized and acknowledged by Janet Cannon, Respondent's corporate human resources director in Chattanooga, Tennessee. Cannon wrote in an email dated February 8, 2013, to prior Union Representative Dreyer, that the parties needed to speak as soon as possible regarding ". . . the deteriorating relationship between management and union at the facility." (GC Exh. 37). While it appeared the Union and employees were frustrated with Respondent's managers, the Respondent appeared equally frustrated with the actions of Neff, whom Respondent believed was bypassing the contractual dispute resolution process and instead was opting to file unfair labor practice charges against the Respondent. Cannon followed her email pertaining to the "deteriorating relationship" with an email to Neff's supervisor in the Union, Jennifer Christensen, stating that Neff's behavior and attitude towards management was ". . . confrontational, antagonistic, and harassing in nature." (GC Exh. 37.)

5. The relevant provisions of the collective-bargaining agreement and Respondent policies

The parties collective-bargaining agreement in effect during the relevant time period in this case was from August 1, 2011, to July 31, 2013. (GC Exh. 2.) This agreement included a provision that discipline not be issued to employees absent just cause (art. 21), and a grievance procedure that provides for mediation and, if necessary, final and binding arbitration (art. 22). The Respondent also maintains an employee handbook that contains additional personnel policies and rules governing employee conduct, including policies addressing pay and leave issues. In addition, the Respondent maintains some stand-alone policies, those being of relevance to the instant matter consist of a no-fault attendance policy.

B. The Alleged Unfair Labor Practices Concerning Ruth Curry and Her Subsequent Investigation and Discipline for Spreading Rumors

1. The April 8, 2013 statement by Koller that the Respondent wants the Union and old people removed from the facility

Ruth Curry is the mother of Cathi Curry. She has been a laundry aide at the Respondent's facility since February 2009. She credibly testified that on or about April 8, 2013, she was alone with Koller in his office when the subject of the Union came up. According to Ruth Curry, she said something about the Union, and Koller told her he was not going to lose his job, and the Union was "not going to get him out of there." She testified that Koller then stated that "we really want the Union out of here and the old people." Despite the fact that Koller testified in the hearing, he did not specifically dispute this allegation by Ruth Curry.

The General Counsel alleges in complaint paragraph 5(c) that Respondent violated Section 8(a)(1) of the Act by stating that it wanted to get rid of the Union. It is undisputed that Koller informed Ruth Curry that the Respondent wanted to get the Union and older people out of the facility. The Board has held that the standard by which to evaluate whether alleged conduct violates Section 8(a)(1) of the Act is not whether the respondent has acted with the intent to violate the Act, but whether the alleged unlawful conduct has the tendency to interfere with, restrain, or coerce the employees in the exercise of their Section 7 rights. *Cox Fire Protection, Inc.*, 308 NLRB 793 (1992). The test does not take into consideration the subjective impressions of employees, nor the intent of the respondent. *Grand Canyon Education, Inc*., 359 NLRB No. 164 (2013).

In applying the Board's criteria to this allegation, I find that Koller coercively informed Ruth Curry that it wanted to remove the Union and the older employees (some of which were likely union members) from the facility, in violation of Section 8(a)(1) of the Act. Koller's statement was coercive because it came from a high-ranking manager at the facility in the confines of the manager's office. The Board has held that similar statements had the tendency to interfere with, restrain, and coerce employees in the exercise of their rights under the Act to form, join or assist the Union. See *Rosdev Hospitality*, 349 NLRB 202 fn. 3 (2007) (where the Board held that statements from supervisors telling employees that it wished to get rid of an established union unlawfully interfered with employees' Section 7 rights). I therefore find that the Respondent coercively informed an employee that it wanted to remove or get rid of the Union and the older employees from the facility, in violation of Section 8(a)(1) of the Act.

2. In the beginning of May 2013, Ijomah states that Respondent wants to get rid of the Union and the older employees.

Ruth Curry testified that in the beginning of May 2013,[8] while at the facility standing near the nursing station with coworker Nancy Stein, Ijomah walked by while speaking to another person whom Curry did not know. When Ijomah was approximately 10 feet away from Curry, Ijomah told the unknown individual that she (Ijomah) "wanted to get rid of the Union and get rid of some of the old people." Ruth Curry testified that she asked Stein if she heard what Ijomah said, and Stein responded that she heard some of the statement. Ruth Curry testified that Stein, a senior employee, then commented that she would probably be the first to go, and Ruth Curry stated that she would probably be the next to go.

Ijomah denied making that statement. She testified that she was aware there was a rumor that she had said the Respondent wanted to get rid of the Union and the older people, but that Ruth Curry misunderstood her statement that she made regarding getting rid of "old carpeting."

I find that Ijomah stated that she, and therefore the Respondent, wanted to get rid of the Union and the older employees. In situations such as this, where Ijomah's testimony differs from that of Ruth Curry, I credit Ruth Curry's testimony. In this regard, I found Ruth Curry to

[8] While there was some confusion in the record concerning when this statement and subsequent investigatory meeting occurred, Ruth Curry eventually clarified that both Ijomah's statement at the nurse's station and the initial investigative meeting occurred at sometime in May 2013.

be a very credible witness who testified in a straight forward and honest manner.[9] Ijomah, on the other hand, was at times unbelievable and evasive. Regarding the rumor issue, she testified that she made a comment about getting rid of something old, but that she "was really talking about getting rid of old carpeting." I find that assertion is unbelievable, and I give it no weight.[10]

The General Counsel alleges in paragraph 5(d) of the complaint that the Ijomah's statement violated the Act. Ijomah's statement was not directed to, but was overheard by employees. Ijomah is a high-ranking management official of the Respondent as the director of nursing, and her statement about wanting to get rid of the Union (and older individuals who are most likely union members) has the tendency to coerce and restrain the employees in the exercise of their right to support and assist the Union. *Unbelievable Inc.,* 323 NLRB 815, 816 (1997). The statement was not made directly to the employees as it was intended to be heard by the unidentified person with Ijomah. It was nevertheless overheard by the employees in the hallway of the facility, which I find was coercive and threatening. The intent or motive of the respondent is not relevant with regard to 8(a)(1) violations of the Act. Id. (Board finding a restaurant supervisor's coercive threat, overheard by a hidden busboy, violative of Sec. 8(a)(1) regardless of the supervisor's lack of knowledge of a busboy's presence). See also *Williams Motor Transfer*, 284 NLRB 1496, 1499 (1987) (finding respondent president's threats, overheard by a driver, unlawful regardless of president's intent or whether he was aware of the driver's presence). On this basis, I find that through Ijomah's statement that the Respondent wanted to get rid of the Union and the older employees, the Respondent committed a violation of Section 8(a)(1) of the Act.

3. The May 2013 investigatory meeting with Maidl, Ijomah, and Hammer concerning Ruth Curry spreading rumors.

Ruth Curry credibly testified that approximately 1 week later, she was called into a meeting with Maidl, Ijomah, and Hammer.[11] She testified that in the meeting, Maidl stated that she was spreading rumors on the floor. Ruth Curry was then directly asked if she was in fact spreading rumors. According to Ruth Curry, she informed the management officials that she was

[9] Ruth Curry's credibility is bolstered by the fact that her testimony was honest, even where it could be viewed as going against the interests of her daughter, Cathi Curry, and her discharge/constructive discharge allegation. In this connection, Ruth Curry honestly testified that on the day her daughter walked off the job, she told Cathi Curry not to leave her shift. Contrary to Cathi Curry's testimony that Koller was mean to her and treated her badly, Ruth Curry testified that Koller was actually "nice," and that she liked him. She also truthfully testified, contrary to Cathi Curry's interests, that Koller had given Cathi Curry time off of work in March 2013 for personal reasons, and when there came a time when Ruth Curry was worried about her daughter's health and safety outside of work, she called Koller, who came to Cathi Curry's apartment and summoned the proper authorities which eventually provided her daughter the assistance she needed.

[10] Ijomah's evasive and inconsistent demeanor is also reflected by the fact that while she initially testified that management was not attempting to get to the source of the alleged rumors, she testified that in a meeting with Ruth Curry (discussed below), Maidl questioned Curry about who initially informed her of the rumors. In addition, Ijomah's evasive demeanor is reflected in the fact that she alleged in that same meeting with Ruth Curry, that she did not "instruct" her to stop spreading rumors, but merely "clarified" that the Respondent did not want her to spread rumors.

[11] It appears from the record that this meeting occurred sometime in May 2013.

not spreading rumors. However, Ijomah stated that she wanted to know the names of the persons spreading the rumors, and that Ijomah stated that she was "going to throw harassment charges at us." Ruth Curry testified that when Ijomah made that statement, Maidl laughed and told Ijomah, "do it."

Hammer testified that the meeting concerned things that were being said throughout the facility, and that she was aware that employees were worried about their employment as a result of this "talk" going around. Hammer, however, testified that Maidl and Ijomah told Ruth Curry that they did not want her spreading gossip, including the comment Ijomah made about trying to get rid of the "old stuff," not the "old staff." I find Hammer's assertion that Ijomah was talking about "old stuff" is incredible and entitled to no weight, as the record reflects that Hammer purposefully lied under oath about what Ijomah said was the subject of the rumor. Under cross-examination and after being confronted with her affidavit, Hammer eventually admitted that Ijomah's statement concerned getting rid of the "old staff."[12]

Ruth Curry testified that she asked if she was going to have a union representative at the meeting, but Maidl told her she did not need one, and he then told her to "shut her mouth" and to "zip it." Maidl also told her that the corporate management personnel would be at the facility the following week, and they would "get to the bottom of it."

Neither Maidl, nor Ijomah, offered credible testimony that contradicts Ruth Curry's assertions regarding this May 2013 meeting. In fact, to the contrary, Ijomah acknowledged being aware of the fact that employees were discussing her statement that she wanted to rid the Respondent of the Union and the older people, and she understood that the employees believed she had made those statements. Ijomah also admitted that she questioned Ruth Curry about the rumor that she wanted to "get rid of the old people in the Union," because Ruth Curry's name came up in connection with the rumor. She testified that she wanted to figure out who was spreading the rumor and she wanted to "clarify it."

The General Counsel alleges in paragraphs 5(e)-(j) that the Respondent violated the Act during its conduct in this meeting with Ruth Curry. The Respondent argues in its brief that it was confronting Ruth Curry regarding "spreading rumors about personal information about co-workers," and therefore it had a legitimate nondiscriminatory reason for questioning Ruth Curry. (R. br. p. 20.)

I agree with the General Counsel that the Respondent committed numerous violations of Section 8(a)(1) of the Act in this meeting. Even if some of the alleged rumors concerned personal information about employees, it is undisputed that Ijomah's statement about wanting to get rid of the Union and the older employees who are likely union members, was one of those rumors, and it is equally undisputed that such a subject concerned the terms and conditions of employment for the employees. Ruth Curry's discussion with other employees about the Union

[12] Contrary to Hammer's testimony at the hearing, Hammer's sworn affidavit stated: "so there was a comment made that Kris was trying to get rid of the old staff." As discussed more fully below in the Lee Ann Ager paycheck incident portion of this decision, where Hammer's testimony conflicts with the testimony of others, her testimony is given little if any weight, as I found her testimony to be incredible, and at times, blatantly false.

and its members being removed from the Respondent's facility, or the Respondent's desire to remove them, despite being characterized by the Respondent as "rumors," nevertheless concerned those terms and conditions of employment, and was clearly protected under Section 7 of the Act.

I find that the questioning of Ruth Curry by Maidl and Ijomah as to whether she was talking to her fellow employees about the Respondent's desire to rid itself of the Union, or as the Respondent characterized it, by "spreading rumors," constituted unlawfully interrogation of her union activities and support, in violation of Section 8(a)(1) of the Act. I also find Respondent's questioning of Ruth Curry as to what if any "rumors" regarding employees' terms and conditions of employment she may have heard from other employees, and asking her to identify who she heard the "rumors" from, was coercive. Thus, I find that the Respondent coercively requested that an employee identify employees who were engaging in union or protected activities, in violation of Section 8(a)(1) of the Act.[13]

I further find that Respondent's questioning of Ruth Curry in this context unlawfully created the impression that her union and protected concerted activities were under surveillance, in violation of Section 8(a)(1) of the Act. *Upper Great Lakes Pilots, Inc.*, 311 NLRB 131, 134–135 (1993) (statement by respondent manager that he knew of protected activity and some employees who participated in activity created the unlawful impression of surveillance).

In addition, the record shows that Ijomah threatened to file harassment charges against Ruth Curry for engaging in protected and union activities. See *Carborundum Resistant Materials Corp*., 286 NLRB 1321 (1987) (respondent's threat to file a lawsuit in retaliation for protected activity found unlawful). The Respondent's unlawful threat to file harassment charges against Ruth Curry for engaging in union and protected activities violated Section 8(a)(1) of the Act. Finally, Maidl's statement to Ruth Curry that she should "shut her mouth" and to "zip it," was specifically directed to, and concerned, her discussion of employees' terms and conditions of employment. I find through Maidl's statement, the Respondent coercively threatened and directed Ruth Curry not to speak to other employees about terms and conditions of employment, including the Respondent's desire to remove the Union and older employees from the facility, in violation of Section 8(a)(1) of the Act.[14]

[13] The Board has held that requesting the identity of employees who allegedly engaged in protected activities, violated Sec. 8(a)(1) of the Act. See *Guess?, Inc.*, 339 NLRB 432, 434–435 (2003) (respondent's questioning employees about the names of employees who engaged in protected activity, even in the context of a deposition, constituted a violation of the Act).

[14] I note that complaint par. 5(a) alleges that on or about May 30, 2013, during the meeting, Maidl and Ijomah threatened an employee that Respondent would continue to investigate the employee's union and protected concerted activities. However, I do not find that the record supports that allegation, and I will therefore dismiss it.

4. The June 5 or 6, 2013 investigatory meeting where Ruth Curry is questioned and issued discipline for discussing terms and conditions of employment with other employees (spreading rumors)

Ruth Curry also testified that she was called to a second meeting with Maidl and Koller, in Maidl's office, on June 5, 201
3. The record shows that this meeting occurred either on June 5 or 6, 2013.[15] According to Ruth Curry, Maidl stated in that meeting that there were more rumors "flying around" the facility. Maidl identified one of the rumors as allegedly concerning Judy Hammer. Ruth Curry denied knowing anything about spreading rumors. Koller subsequently stated that Ruth Curry was harassing the laundry employees, and she denied any knowledge of harassing employees.

The Respondent failed to offer testimony to contradict Ruth Curry's version of what was said in this meeting. However, the Respondent argues that it was justified in inquiring about and preventing rumors concerning the personal lives of the employees. As mentioned above, it is undisputed that regardless of what rumors may have been out there, some involved discussions about employee terms and conditions of employment. In fact, in regard to that meeting, Maidl admitted management discussed the rumors that Ruth Curry was spreading at work, which involved her discussion with coworkers about the Respondent getting rid of the Union and the older people, and which he acknowledged involved the employees' working conditions. Maidl also acknowledged at the hearing that Ruth Curry was issued discipline in that meeting for allegedly "spreading rumors."[16] Ijomah specifically testified that Maidl, in the June 5/6 meeting, asked Ruth Curry whether she discussed with other employees the rumor about the Union and the older people. Ijomah also acknowledged that she told Ruth Curry that she did not want her spreading rumors that were untrue. With regard to this June 5/6 meeting where Ruth Curry was issued a written "verbal warning," Koller admitted that the rumors included discussions about the Union and union activity, and that Ruth Curry was directed by management not to repeat rumors about the Union. On cross-examination by Respondent's counsel, Ruth Curry further testified that in that meeting, Maidl told her to "keep [her] mouth shut and [she] wasn't allowed to talk to anyone."

At the end of the meeting, Maidl issued Ruth Curry a personnel consultation form indicating that she was receiving a verbal warning for spreading rumors and harassing coworkers. She testified that Maidl told her to sign it, and she did as directed. According to Ruth Curry, Maidl told her that if she did not keep her mouth shut, it could lead to her termination. Ruth Curry testified that, at this point of the meeting she was crying, and she asked Maidl why she was receiving the discipline. In response, Maidl informed her that it was for all the things they had spoken about in the meeting. During this meeting, Ruth Curry asked if there was going to be a union representative present, and Koller informed her there would not be one present. The Union filed a grievance over the discipline she received that day, but subsequently settled the grievance by ceasing to process it further.

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[15] The record shows it was either June 5 or 6, because the personnel consultation form allegedly issued to Ruth Curry in this meeting was dated June 6, 2013.

[16] In this regard, the personnel consultation form states in part that "there have been concerns that Ruth is spreading rumors about personal information about employees."

The General Counsel alleges in paragraphs 5(n)-(p) that the Respondent violated the Act during its conduct in this meeting with Ruth Curry. As in the May meeting, the Respondent argues that it was confronting Ruth Curry regarding "spreading rumors about personal information about co-workers," and therefore it had a legitimate nondiscriminatory reason for questioning Ruth Curry.

I find that in the June 5 or 6 meeting, similar to the May meeting, the Respondent committed numerous violations of Section 8(a)(1) of the Act, consisting of the following: (1) when Maidl told Ruth Curry that there were more rumors "flying around" the facility, he inferred that she was talking to employees about terms and conditions of employment, and when (as Ijomah testified) Maidl asked Ruth Curry whether she discussed the rumor about the Union with other employees, he unlawfully interrogated her regarding her union and protected activities; (2) when Maidl asked Ruth Curry about the rumors or discussions of terms and conditions of employment with other employees, he unlawfully created the impression that an employee's union and protected activities were under surveillance; (3) when Ijomah told Ruth Curry she did not want her spreading rumors, she unlawfully threatened an employee not to talk to other employees about terms and conditions of employment; and (4) when Maidl told Ruth Curry that, if she did not keep her mouth shut about discussing employees' terms and conditions of employment, it could lead to her termination, he unlawfully threatened to terminate an employee if she continued to engage in union and protected activities.

5. The Respondent issued discipline to Ruth Curry in the June 5 or 6 meeting for discussing terms and conditions of employment with other employees (spreading rumors).

The record reveals that after interrogating Ruth Curry with regard to her discussions with employees about terms and conditions of employment, it issued her a "personnel consultation form" during the June 5 or 6 investigatory meeting in which it states in the "supervisor's description of occurrence," section:

> Staff have brought forward concerns about the way Ruth works with them and acts like their supervisor. They feel that she is "bullying and intimidating" towards them. Also there have been concerns that Ruth is spreading rumors about personal information about employees. This is against our Code of Conduct policies and could be considered to create a hostile work environment. (GC Exh. 20).

With regard to the written "verbal warning," Koller admitted that the rumors included discussions about the Union and union activity, and that Ruth Curry was directed by management not to repeat rumors about the Union. Even though the disciplinary document mentions concerns about how Ruth Curry was allegedly treating other employees, the record is clear, and it is undisputed, that Respondent issued Ruth Curry the written discipline in the form of a "verbal warning," because she was "spreading rumors" at work, which as mentioned above, encompassed discussing employees' terms and conditions of employment such as Ijomah's statement that Respondent wanted to rid itself of the Union and the older employees.[17] I find that

[17] The record shows that Maidl was asked the following question: "And at this second meeting, you actually issued Ruth Curry a discipline for spreading rumors, isn't that right? Answer: "Yes." (Tr. 114.)

the Respondent's issuance of this discipline to Ruth Curry constitutes discrimination against her for her engagement in union and protected activities and is facially unlawful in violation of Section 8(a)(3) and (1) of the Act.

Even assuming that the discipline was not facially unlawful, an analysis under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), demonstrates that the discipline issued to Ruth Curry was discriminatorily motivated.

In *Wright Line*, supra, the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) of the Act turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. On such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1993). In *Manno Electric*, 321 NLRB 278 fn. 12 (1996), the Board restated the test as follows. The General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity.

To establish the initial burden under *Wright Line*, the General Counsel must establish four elements by a preponderance of the evidence. First, the General Counsel must show activity exists that is protected by the Act. Second, the General Counsel must prove that the respondent was aware that the employee in question engaged in such protected activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the General Counsel must establish a motivational link, or nexus, between the employee's protected activity and the adverse employment action. *American Gardens Mgmt. Co.*, 338 NLRB 644, 645 (2002), citing *Tracker Marine, L.L.C.*, 337 NLRB 664, 646 (2002).

I find that the evidence supports finding that the General Counsel has been made a prima facie showing sufficient to show that Ruth Curry's protected conduct was a "motivating factor" in the employer's decision to issue her discipline in the form of a written "verbal" warning. First, it is undisputed that Ruth Curry was identified by Respondent as someone who was engaged in union and protected activities by discussing terms and conditions of employment with other employees (or "spreading rumors," as the Respondent characterized it), such as the fact that the Respondent wanted to rid itself of the Union and the older employees. Second, it is also undisputed that the Respondent was aware that she was engaged in such protected activities. Third, Ruth Curry suffered an adverse employment action when she was issued discipline. Fourth, the evidence establishes a nexus between her protected activities and the discipline. In this regard, the record reveals Respondent's animus through its threats and other 8(a)(1) violations committed in the investigatory meetings, and in the close timing of the discipline with her engagement in the protected activities.

Thus, based on the above, the General Counsel has made a prima facie showing that Ruth Curry was discharged for engaging in union activities. On such a showing, the burden shifts to

the Respondent to demonstrate that the same action would have taken place even in the absence of the protected conduct. It is apparent that the respondent does not sustain its burden by simply showing that a legitimate reason for the action existed. As the Board stated in *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984):

> We have held that the burden shifted to an employer under *Wright Line* is one of persuasion, and affirmative defense in which the employer must demonstrate by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. If an employer fails to satisfy its burden of persuasion, the General Counsel's prima facie case stands unrefuted and a violation of the Act may be found. See *Wright Line*, supra at fn. 11; *Bronco Wine Co*., 265 NLRB 53 (1981); *Rikal West, Inc*., 266 NLRB 551 (1983); Cf. *Magnesium Casting Co*., 259 NLRB 419 (1981).

Therefore, in rebutting the General Counsel's prima facie showing that the protected conduct was a "motivating factor" in the Respondent's decision, Respondent cannot simply present a legitimate reason for its action but must persuade, by a preponderance of the evidence, that the same action would have taken place even in the absence of the protected conduct.

I find that the evidence supports finding that the Respondent failed to present a nondiscriminatory justification for having disciplined Ruth Curry. While the Respondent argues in its brief that "Ruth Curry bullied her coworkers and spread malicious gossip about their personal lives,"[18] there is no credible evidence of such facts in this record. Even if one were to accept Respondent's purported justification for the discipline was that she was being rude and bullying her fellow coworkers or discussing rumors that were not pertaining to terms and conditions of employment, those allegations are pretextual and are not supported by the record. In this regard, even though the Respondent suspected other employees of "spreading rumors," Ruth Curry was the employee who heard and allegedly spread Ijomah's statement that Respondent wanted to rid itself of the Union and the older employees, and she was the only employee disciplined for that alleged infraction.

In addition, the record does not contain credible evidence that Ruth Curry committed any infractions of the Respondent's rules with regard to the way she was treating other employees, and there is no evidence that the Respondent previously warned or disciplined her for such alleged conduct. There is also no evidence that the Respondent, if it believed she was committing infractions with regard to her interactions with other employees, ever suggested or directed her to seek counseling for such problems, or directed her to attend any employee assistance type training with regard to those alleged infractions. Thus, I find the Respondent's asserted reasons are mere pretext for its unlawful motivation. Accordingly, I find that the Respondent has failed to present any legitimate nondiscriminatory reason for disciplining Ruth Curry, and that the Respondent also violated Section 8(a)(3) and (1) of the Act under the Board's dual motive *Wright Line* analysis.[19]

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[18] R. br., at p. 67.

[19] The Respondent argues in its brief (pp. 44–45) that even if it violated the Act with regard to its actions toward Ruth Curry in the May meeting, it somehow "cured" those violations by its actions in the subsequent June 5/6 meeting. Contrary to the Respondent's assertions, I find that the Respondent

6. The alleged threat and *Weingarten* violations in the May meeting and the June 5–6 meeting

The General Counsel asserts in complaint paragraphs 5(h) and (o) that the Respondent's statements to Ruth Curry in both the May and June 5/6 meetings, that she did not need union representation constituted threats in violation of Section 8(a)(1) of the Act. In this connection, the record reveals that Ruth Curry asked if there would be a union representative at each of the meetings, and Maidl informed her that she did not need one. Contrary to the General Counsel's assertion, I do not find this statement to be threatening or coercive. Instead, I find that Maidl's statement that she did not need a union representative was simply an expression (albeit incorrectly) of his opinion on this matter, and it did not contain any repercussions or threats of reprisals. Such a statement is protected by Section 8(c) of the Act, and I will dismiss this allegation.

However, in a separate issue, the General Counsel asserts in its brief, without specifically alleging in the complaint, that the Respondent allegedly committed a *Weingarten* violation under Section 8(a)(1) of the Act.[20] In support of this contention, the General Counsel asserts that in the meetings, Ruth Curry "made a valid request for a Union representative in the context of the two meetings which and did, in fact, result in discipline." Despite this assertion, the General Counsel did not move at trial to amend the complaint to include such an allegation.

In regard to this alleged *Weingarten* violation, the first question before me is whether the two meetings were investigatory in nature. In both meetings, Ruth Curry was confronted with the allegation that, contrary to the Respondent's policies or rules, she was spreading rumors. In both meetings, the Respondent's managers proceeded to question her as to whether she had been one of the employees responsible for spreading the rumors, whether other employees were spreading such rumors, and she was asked/directed to identify those employees who were spreading the rumors. These meetings were investigatory in nature and it was reasonable for Ruth Curry to believe that discipline may result. This fact is evident by Ruth Curry's question to management as to whether a union representative was going to be present at the meetings.

Ruth Curry did not specifically demand or insist that a union representative be present at the above-mentioned meetings, but she did ask if a union representative was going to be present. Thus, the second issue I must address is whether Ruth Curry's question to management is sufficient to be construed as a request for union representation. I find that it is. I note that the Board has found that in some circumstances employees have sufficiently requested that a union representative be present without specifically "asking" the employer for such a representative. In *Southwestern Bell Telephone Co.,* 227 NLRB 1223 (1977), the Board held that when an employee told his supervisor in the investigatory meeting "I would like to have someone there that could explain to me what was happening," it was sufficient to invoke the *Weingarten* right to

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committed additional unfair labor practice violations in the June meeting, and I specifically find there is no credible evidence to show, or even suggest, that the Respondent cured any of the unfair labor practice violations.

[20] In *NLRB v. J. Weingarten*, 420 U.S. 251 (1975), the Supreme Court held that an employer violates Sec.8(a)(1) of the Act when it denies an employee's request that a union representative be present at an interview which the employee reasonably believes may result in discipline.

representation. In addition, in *General Die Casters, Inc.*, 358 NLRB No. 85, slip op. at p. 1, and 7–9 (2012), the Board found that when an employee twice asked the examining manager whether he needed "to get somebody else in here," and the manager responded, "no," that was sufficient to request representation under *Weingarten*.

Based on the above, I find that Ruth Curry's question to Respondent's managers was sufficient to invoke her *Weingarten* right to representation in the meetings, and that the Respondent failed to provide such representation. Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act by failing to provide Ruth Curry with a union representative pursuant to her *Weingarten* rights, in both the May and June 5–6 investigatory meetings.[21]

C. The Alleged Unfair Labor Practices Concerning Cathi Curry and Her Discharge/Constructive Discharge

1. In early 2013, Respondent allegedly threatened an employee by stating that Respondent did not want Ager to participate in the labor-management committee.

The General Counsel alleges in complaint paragraph 5(a) that Respondent in or about mid-February 2013, by Ijomah, threatened an employee by telling the employee that Respondent did not want an employee to be a member of the labor-management committee. The General Counsel relies on Cathi Curry's testimony that, when she informed Ijomah that Lee Ann Ager was going to join the labor-management committee, Ijomah stated "I hope you can keep this between you and me, but I just don't think Lee Ann is the ideal person for the position." According to Cathi Curry, Ijomah then went on to explain that she believed Ager would not be an ideal fit because she thought Ager ". . . would not keep stuff to herself, the things that went on behind closed doors."[22] There is no assertion, nor evidence, that Ijomah stated or insisted that Ager could not join the committee. In addition, there is no evidence that Ijomah made any threats or promises of reprisals if the Union elected to have Ager become a member of the labor-management committee.

The General Counsel, citing *Whitesell Corp.*, 357 NLRB No. 97, slip op. at 25 (2011), argues that Ijomah's statement constituted a threat to Ager, through Cathi Curry, that the Respondent did not want her to become a member of the labor-management committee. The

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[21] I find that the record supports a *Weingarten* violation despite the fact that it was not alleged in the complaint because it is sufficiently related to the complaint allegation that the Respondent violated Sec. 8(a)(1) of the Act by Maidl's threat that Ruth Curry did not need union representation. In addition, the circumstances surrounding the alleged denial of a union representative was litigated, and the Respondent addressed it in its brief. See *Irving Ready-Mix, Inc.*, 357 NLRB No. 105, slip op. at 23 fn. 13 (2011) (where the Board found that unalleged statements by a respondent manager violated Section 8(a)(1) of the Act where the complaint alleged similar violations). See also, *Hi-Tech Cable Corp.*, 318 NLRB 280 (1995), enfd in part 128 F.3d 271 (5th Cir. 1997) (the Board found that unalleged statements by two respondent managers violated Section 8(a)(1) of the Act where the complaint alleged other 8(a)(1) violations, including an interrogation by one of the same managers in the same conversation, and the respondent did not object to the testimony about the statements, cross-examined the witnesses and presented its own witnesses to testify about them, and addressed their legality in post-hearing briefs).

[22] Tr. p. 565.

Respondent, on the other hand, argues that Ijomah never said that Ager could not join the committee, and she never made any threats with regard to Ager joining the committee.

I agree with the Respondent and I find no merit to this allegation. First, I do not find that Ijomah's statement was threatening. It was an expression of her view or opinion that does not contain a threat of reprisal or force or promise of benefit, and it is therefore protected by Section 8(c) of the Act. Second, I find that the case relied upon by the General Counsel is distinguishable from the facts of the instant case. In this regard, *Whitesell* involved the respondent's lead negotiators attempts to force the union negotiator from the union's lead negotiator position by issuing purported discipline, stating that the lead negotiator was suspended from the negotiations, and attempting to enforce that exclusion by pursuing a grievance against that person. Id. at slip op. 25. In *Whitesell*, the Board noted that each party has the right to select its representative for bargaining and negotiations, and attempts to prohibit the union from selecting their bargaining representative is unlawful, unless there is persuasive evidence that the presence of the particular individual would create ill will and make good-faith bargaining impossible. The instant case is distinguishable in that the labor-management committee consisted of members from both management and the Union who worked together to resolve issues that arose between the parties. The labor-management committee was not chosen to engage in bargaining or negotiate a collective-bargaining agreement. In addition, the facts of the instant case do not involve bargaining representatives or 8(a)(5) violations. In addition, even if the instant case involved a statement made in the context of collective bargaining, Ijomah did not take steps to remove or prevent Ager from joining the labor-management committee, such as the lead negotiator did in the *Whitesell* case.

Thus, I find that the Respondent did not violate the Act as alleged in complaint paragraph 5(a), and I will dismiss that allegation.

2. In an email dated March 12, 2013, Maidl allegedly prohibited employees from discussing employment matters with other employees and threatened that such matters are confidential.

The General Counsel alleges in complaint paragraph 5(b) that on or about March 12, 2013, Maidl, in an email, prohibited employees from discussing employment matters with other employees and threatened that such matters are confidential. In an email dated March 9, 2013, Cathi Curry reported to Maidl that on March 8, laundry employee Jackie Cataract "just left work . . . and didn't tell anyone she left." Cathi Curry goes on to ask Maidl, "How can she just leave her job . . . [w]ithout notifying anyone. . . isn't [that] job abandonment?" In an email response dated March 12, Maidl informs Cathi Curry that:

> The situation with Jackie has and will be addressed. And will not be discussed with other staff. It is a confidential matter, and she did talk to her supervisor before she left on Friday. I spoke to (co-workers) Amanda and Jenna about this and they said they understood. (GC Exh. 6).

The General Counsel, citing *Hyundai American Shipping Agency, Inc.*, 357 NLRB No. 80, slip op. at 1, 15 (2011), argues that instructing employees not to talk about coworkers is unlawful if not justified by legitimate employer confidentiality concerns.

In *Hyundai American Shipping Agency*, supra, the Board found that a respondent violated Section 8(a)(1) of the Act by promulgating, maintaining, or enforcing an oral rule prohibiting employees from discussing with other persons any matters under investigation by its human resources department. In that case, the Board adopted the administrative law judge's finding that the respondent had failed to demonstrate that a legitimate and substantial business justification existed for a rule that adversely impacts on the employees' Section 7 rights. Id. at slip op. 15.

In the instant case, unlike the facts in the *Hyundai* case, the Respondent is not promulgating or maintaining any rules with regard to whether employees have a right to discuss discipline or disciplinary investigations involving fellow employees. In addition, there is no evidence that Jackie Cataract's leaving work was the subject of discipline or an investigation. Maidl's email was simply informing Cathi Curry that Cataract had received her supervisor's permission to leave her laundry job for a reason that was confidential in nature, and that it was not going to be discussed. The General Counsel failed to identify any company rule, either written or oral, in which the Respondent precludes employees from discussing discipline or disciplinary investigations, and I do not find that this email constitutes the promulgation or maintenance of such a rule. See *Caesar's Palace*, 336 NLRB 271 (2001) (the Board found that employees have a Section 7 right to discuss discipline or disciplinary investigations involving fellow employees). Thus, the facts of *Hyundai* are distinguishable, and I do not find that Respondent violated the Act as alleged in complaint paragraph 5(b). Accordingly, I will dismiss that allegation.

3. The Respondent's discharge/constructive discharge of Cathi Curry

a. <u>The relevant provisions in the collective-bargaining agreement and the Respondent's employee handbook and policies</u>

The collective-bargaining agreement at article 21 states that "employees may not be suspended or discharged except for just cause, consistent with Grace Healthcare's policy and procedures including but not limited to the attendance policy." (GC Exh. 2, p. 16.) The Respondent's employee handbook contains a section entitled "Employee Rules and Standards of Conduct." It lists as examples, violations for standards of conduct that are grounds for disciplinary action, up to and including discharge, such as: "leaving the premises during working hours without permission," "stopping work without authorization before time specified of such purposes," and "absence without notification." (GC Exh. 3, pp. 25–26.) In addition, the Respondent has an attendance policy which states in relevant part that "[e]mployees who fail to call-in or report for work as scheduled (no call/no show), unless medically incapacitated, will be considered to have voluntarily resigned." (GC Exh. 4.)

b. <u>The facts pertaining to the April 4, 2013 discharge/constructive discharge</u>

On April 3, 2013, Cathi Curry was scheduled to work the morning shift commencing at 6 a.m. On April 2, however, she switched shifts with laundry employee Jenna Steck, resulting in a change in her shift to 3 p.m. on April 3. The record shows that at approximately 11 a.m., on April 3, Curry called Koller and told him that she would work from 3 to 7 p.m. that day, and Steck would cover her 6 a.m. to 2:30 p.m. shift. Koller was fine with the switch and he told

Cathi Curry he already knew about the switch because Steck was currently at the facility working that shift.

Curry testified that just before her 3 p.m. shift was to begin, she called Koller and told him she would not be able to come in until after 7 p.m. She testified that Koller was fine with the change. However, she testified that Koller called her back around 4:30 p.m. that day, and said he was wondering why she was not working at 3 p.m. Curry testified that she told him that they already had that conversation that she could not come in until 7 p.m., and that he said it was fine. She testified that Koller then told her not to bother coming in because there was no work to do, and then he hung up. According to Curry, at around 6 p.m., Koller again called her and told her not to come in to work because there was no work to do. According to Curry, she told Koller that those were her hours and he had already approved it, and she was going to come in to work, and he then hung up on her.[23]

The record shows that despite Koller's repeated directions to Curry not to come into work that evening, she nevertheless went to work around 8 p.m. and worked 2½ hours, punching out at 10:30 p.m. Curry testified there was no one else working with her at that time. According to Curry, she went to work despite Koller's instructions not to, because she felt he was denying her hours.

When Cathi Curry began her 6:30 a.m. shift on April 4, she spoke with Koller at around 8 a.m. when he arrived at work, volunteering that she had worked the night before. According to Curry, Koller became red in the face and yelled at her, saying that she disobeyed him when he told her not to come in. According to Curry, she cried and said "I can't do this," and walked out of the laundry room. Cathi Curry ran into Ruth Curry on her way out of the laundry room, and informed her mother that Koller had yelled at her. Ruth Curry told Cathi that she should call Maidl, and that she should not leave the facility. Cathi Curry then saw Patty Miller and told her to tell Maidl that she wanted to talk to him.

Koller's account of the April 4 incident was that he merely asked Curry whether she had worked, without raising his voice, and that she then left work without notifying anyone and without permission.

The record shows that Cathi Curry punched out at 8:17 a.m. and left the facility without notifying or seeking the approval of management. She asserted that she tried to call Maidl and Neff, but could not reach either one. Even though Cathi Curry testified that she never intended to quit her job, and that she never told any management official that she had quit, she did leave a voicemail message for Neff at 8:23 a.m., after she left the facility, in which she told him that she had quit her employment and could not put up with Koller's harassment anymore. Specifically, that message stated in relevant part:

> Hi Curt this is Cathi from Grace Healthcare. I quit. I walked out. I don't care. I don't care about my job anymore. I'm done with Randy treating me like shit. Everything is just at the same thing. And I just, I'm done. I know, I know I'm not supposed to walk out but I can't do it anymore.

[23] Koller did not refute Cathi Curry's testimony in this regard.

Cathi Curry went on to state in that message that she would be filing EEOC charges against the Respondent.[24] The record shows that when Neff listened to Curry's voicemail, he called Curry and informed her that he was going to the facility to speak to Maidl, and he directed Curry to return to work and contact Maidl. However, Curry testified that she did not want to return to work, and instead she drove home.

The record reveals that when Maidl arrived at the facility that morning after Curry left, Judy Hammer, the human resource director, informed him that Cathi Curry left the facility. When Maidl asked Koller what happened, Koller told him that he asked Cathi Curry why she worked the previous day, and then Curry walked off the job. Even though Cathi Curry testified that Koller became upset and yelled at her about the fact that she disobeyed his order not to come in and work, Koller denied raising his voice or confronting Curry in any other way. With regard to the conflict in testimony here, I do not credit Koller's denial that he raised his voice with Cathi Curry. I found Koller to be, in general, an unconvincing witness, who was frequently unsure and hesitant in his testimony. On this particular issue, his assertion that he did not raise his voice at Cathi Curry is simply implausible, as it is reasonable to expect that he would be upset after he told her several times not to come into work, and she blatantly disobeyed him. Thus, I find that he raised his voice and yelled at Cathi Curry when stating that she disobeyed him when he told her not to come in.

Curry testified that once she arrived home, she attempted to call Maidl but was unable to get in touch with him. Neff then called and spoke to Curry, informing her that he had spoken to Maidl, and that Maidl told him that Curry had abandoned her job and was being terminated. Cathi Curry contends that she sent two emails to Maidl that morning. It is undisputed that she sent an email to Maidl at 10:55 a.m., stating: "Yes I did walk out today but only because Randy was yelling at me." Maidl responded to Cathi Curry with an email at 11:46 a.m. that day, where he told her that he wanted to schedule a time for her and Neff to come in and talk to him.

Cathi Curry also testified that she sent Maidl an email before she sent the email at 10:55 a.m., in which she told Maidl that she did not quit or leave her job. This alleged email is disputed however, as it was never produced at trial by the General Counsel, the Union, or the Respondent. Cathi Curry testified that she sent the email but she could not produce it because her former boyfriend allegedly out of spite, deleted the email from her personal email account.

I do not credit Cathi Curry's assertion that she sent an earlier email to Maidl stating that she did not quit or leave her job, because I find it strains credulity to believe that her ex-boyfriend selectively chose to delete that email from among all her emails in that email chain. In addition, there is no evidence that the alleged email was ever received by Maidl.[25] Most

[24] This is apparently in reference to Cathy Curry's allegation that Koller would sometimes refer to her as "the Curry girl," and she believed that was discriminatory.

[25] The Respondent argues in its brief that there is no evidence that it ever received this disputed email because it was never sent by Cathi Curry. The General Counsel argues that the Respondent refused to produce the email pursuant to the subpoenaed documents. However, the General Counsel never made that assertion or argument at trial, and it never requested that the hearing be postponed in order for it to seek enforcement of that item of the subpoena in the Federal District Court. I find there is no evidence that the Respondent purposefully withheld this contested email, and, in agreement with the Respondent, I

importantly, however, I do not credit her assertion that she sent the email because it is unsupported by the record, it contradicts the evidence of her statements and actions at that particular time, and it is simply implausible. In this connection, the evidence undisputedly shows that regardless of the words used to characterize her actions (i.e. "quit," "walked off the job," "abandoned her job," or "voluntarily resigned her job") she did in fact leave her job that morning without providing notice to or seeking the approval of management. Regardless of how it is characterized, she left her job even after others in the facility, such as her mother, told her not to leave, and even after Neff told her to return to her job. Such undisputed action is inconsistent with her assertion that she sent the disputed email to Maidl stating that she did not quit or leave her job. It is also inconsistent with her 10:55 a.m. email to Maidl, where she stated: "Yes I did walk out today." Furthermore, the alleged disputed email is belied by the fact that shortly after she walked off the job, she left a voicemail message for Neff in which she told him that she had quit her employment.

Thus, the credible evidence shows that Koller yelled at Cathi Curry when he told her not to come into work and she disobeyed him, and she then walked off the job and quit because she allegedly could not tolerate the harassment. Even though she may have subsequently changed her mind about quitting, that does not change the undisputed facts above which establish that she did in fact quit and leave her job.

Koller called Cathi Curry the following day and informed her that she had been taken off the schedule until the meeting scheduled for April 9, 2013. A grievance was filed alleging that Cathi Curry's termination was a violation of the contract, and the parties met on April 9, 2013, at the Respondent's facility to discuss her grievance. Cathi Curry testified that she and Neff attended the meeting on behalf of the Union, and Maidl was present for the Respondent.[26] The reason given for Curry's termination was her voluntary resignation. Curry testified that Maidl wanted her to meet with Koller and discuss what happened, but Curry refused, and the meeting ended.

A mediation of the grievance was scheduled for May 1, 2013. Sometime between the April 9 meeting and the May 1 mediation, Cathi Curry applied for unemployment benefits, which were opposed by the Respondent. On April 25, 2013, Maidl informed Respondent's contractor handling Curry's unemployment, that Curry was terminated for walking off the job and had voluntarily resigned under Respondent's policies. In a later email that day, Maidl responded further that Curry left the facility and did not contact anyone from the company to explain why she walked off. Curry's unemployment compensation was subsequently denied.

At the mediation for the grievance on May 1, 2013, Cathi Curry resigned her employment in exchange for the Respondent's agreement not to contest her unemployment.

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further find that Respondent did not produce the alleged email because it did not exist.

[26] Cathi Curry testified that Judith Hammer was also present at this meeting on the Respondent's behalf, but Neff testified that only Maidl was present at the meeting for the Respondent. Hammer testified twice at the hearing and did not offer any testimony with regard to the April 9, 2013 meeting concerning Cathi Curry's discharge.

c. The contentions of the parties

The General Counsel amended complaint paragraph 6(a) at the hearing to allege that Respondent "harassed employee Cathi Curry and thereafter discharged and/or caused her discharge on April 4, 2013," in violation of Section 8(a)(3) and (1) of the Act. Thus, the General Counsel amended the complaint to allege that Cathi Curry was either discharged or constructively discharged for unlawful reasons.[27] The Respondent alleges that Cathi Curry "quit" and abandoned her job, and therefore was properly discharged under the Respondent's rules and regulations. As mentioned above, I find that she quit and left her job, and made statements to the effect that she had quit. Based on these facts, I will first analyze this allegation as a constructive discharge.

d. The constructive discharge analysis

The Board has found that a traditional constructive discharge occurs when an employee quits because the employer has deliberately made the working conditions unbearable and it is proven that: (1) the burden imposed upon the employee must cause, and be intended to cause, a change in the employee's working conditions so difficult or unpleasant that the employee is forced to resign, and (2) the burden was imposed because of the employee's union activities. *Grocers Supply Co*., 294 NLRB 438, 439 (1989); and *Crystal Princeton Refining Co*., 222 NLRB 1068, 1069 (1976); see also *KRI Constructors*, 290 NLRB 802, 813–814 (1988).

In the instant case, I find that the evidence is insufficient to satisfy both elements of this two part test. In regard to the first element, I find that Koller's yelling at Cathi Curry on April 4 was insufficient to constitute conduct that caused, and was intended to cause, a change in her working conditions that was so difficult or unpleasant as to force her to resign. The evidence supports finding that he yelled at her because she came into work when he earlier instructed her twice not to come into work. The evidence does not show that his raised voice was accompanied by any threats or acts of violence toward Cathi Curry.

In addition, the record does not support the complaint allegation that from August 2012 through April 4, 2013, Koller "harassed" Cathi Curry. Even though there may have been other occasions when he raised his voice, the undisputed record shows that for the most part, Cathi Curry worked closely with Koller and actually assisted him in scheduling the laundry employees' work. The record also shows that for most of the time period alleged, Koller left Cathi and Ruth Curry alone to run the laundry department. In addition, based on Ruth Curry's credible testimony, Koller was a nice person and actually came to Cathi Curry's aid during the alleged period of "harassment," when Ruth Curry believed her daughter was in some form of danger, and Koller drove to her apartment to assist her. Furthermore, contrary to the alleged period of harassment, the record shows that as a union steward, Cathi Curry had a working relationship with Koller whereby she brought concerns and complaints to him to be addressed. The record shows that in an email to Maidl dated February 27, 2013, Cathi Curry informed

[27] As mentioned above, in its brief the General Counsel abandoned the constructive discharge theory and argues only that Cathi Curry was discharged. I nevertheless find the constructive discharge analysis is appropriate for this case considering that I have found that Cathi Curry left the job and quit her employment.

Maidl: "I love my job. . .," which would be inconsistent with her assertion that she was harassed by Koller at work. Thus, I find that the alleged harassment is not supported by the record, and that Koller's yelling at Cathi Curry was insufficient to force her to resign.

With regard to the second element of the test, the evidence does not show that Koller's yelling at Cathi Curry was because of, or based upon, her union activities. As mentioned above, he yelled at her because after being specifically directed twice not to come into work the night before, she defied his directives and worked. There is no evidence that Koller's yelling at her had anything to do with her union steward position or her union activities. Therefore, I find that the General Counsel has failed to prove that Cathi Curry was constructively discharged in violation of the Act.

e. The *Wright Line* discharge analysis

Even assuming that Cathi Curry did not quit her employment on April 4, but was instead discharged, I find that a *Wright Line*, analysis reveals that there is insufficient evidence to show that Respondent discharge her in violation of the Act.

As mentioned above, the Board set forth in *Wright Line* its causation test in cases alleging violations of Section 8(a)(3) of the Act turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. On such a showing, the burden shifts to the employer to demonstrate that it would have taken the same action even if the employee had not engaged in protected activity.

I find that the evidence supports a finding that the General Counsel has made a prima facie showing sufficient to show that Cathi Curry's protected conduct was a "motivating factor" in the employer's decision to discharge her. First, it is undisputed that Cathi Curry was engaged in union activities as the union steward, and filed numerous grievances for the Union on the behalf of the unit employees. Second, it is equally undisputed that the Respondent had knowledge of Cathi Curry's union and protected activities. Third, her discharge or constructive discharge constitutes an adverse employment action. Fourth, the record contains ample evidence of a causal connection between her protected activities and her discharge/construction discharge. In that regard, Respondent's union animus is reflected in the numerous 8(a)(1) violations, and in particular, its statement that it wanted to rid the Respondent of the Union and the older employees. In addition, even assuming the record did not contain direct evidence of Respondent's unlawful motivation, the timing of Curry's discharge immediately after engaging in union activities such as filing grievances and handling complaints from employees regarding working conditions, is suspect.

Thus, based on the above, the General Counsel has made a prima facie showing that Cathi Curry was discharged for engaging in union activities. On such a showing, the burden shifts to the Respondent to demonstrate that the same action would have taken place even in the absence of the protected conduct. In rebutting the General Counsel's prima facie showing, Respondent cannot simply present a legitimate reason for its action, but must persuade, by a preponderance of the evidence, that the same action would have taken place even in the absence of the protected conduct.

The General Counsel submits that Respondent has failed to show, by a preponderance of the evidence, that Cathi Curry would have been discharged in the absence of her union activities, arguing that she never informed any managers that she had quit her employment; Respondent's attendance policy concerning "voluntary resignation" technically refers to those who are considered "no call/no show" for their shifts, which is not applicable to Cathi Curry's situation; Respondent offered "shifting justifications" for its decision to terminate Cathi Curry; and that disparate treatment is shown by the fact that numerous employees had left their shifts early without being terminated.

The Respondent, on the other hand, submits that employees could be disciplined or terminated for walking off the job without notice or approval, and that policy was understood by the employees and Union, and that the Respondent has applied that principle or rule in a consistent manner pursuant to which it previously discharged two employees who engaged in similar conduct.

In analyzing this complaint allegation, I note that the evidence shows, and I have found, that Cathi Curry quit her employment and walked off the job without permission. Despite the General Counsel's assertion that she never told any managers that she had quit, she informed Maidl in the email sent at 10:55 a.m. that: "Yes I did walk out today . . . ." I find that is sufficient to indicate that Cathi Curry notified the Respondent that she walked off the job and quit. Thus, I find no merit to the General Counsel's argument on this point.

With regard to the General Counsel's argument that Respondent's attendance policy concerning "voluntary resignation" technically refers to those who are considered "no call/no show" for their shifts, which is not applicable to Cathi Curry's situation, I note that the Respondent's employee handbook, as mentioned above, lists as an example of violations of standards of conduct that are grounds for disciplinary action, up to and including discharge, as "leaving the premises during working hours without permission." (GC Exh. 3, p. 25.) The record also reveals that the Respondent, Union, and the employees appear to have all understood that regardless of what wordage is used to characterized walking off or leaving the job during the shift without permission, whether it is called "voluntary resignation," "quit," "job abandonment," or "walking off the job," it is a serious offense that is subject to discipline, including discharge.

The record shows that when employee Erin Stallons was discharged for abandoning her job in October 2012, Neff and Cathi Curry discussed whether to bring a grievance on her behalf. In an email dated October 8, 2012, Neff explained to Cathi Curry that she should "not let people walk off the job without knowing they can be fired." In response, Cathi Curry wrote that she did not believe a grievance should be filed on Stallons behalf, and she noted that Ijomah was not wrong to discharge Stallons. Cathi Curry also testified at the hearing that she received training from the Union on, and was familiar with, the "work now/grieve later" doctrine, and that it informed her opinion on the Stallons discharge. This evidence shows that the Respondent had a policy for discharging employees for resigning, walking off the job, or job abandonment, the employees and parties were aware that it existed, and that it was enforced by the Respondent. Most importantly however, this evidence is significant because it shows that Cathi Curry subsequently engaged in the same conduct that Stallons engaged in, and she believed that such conduct constituted sufficient grounds for discharge.

The General Counsel also alleges that the discharge based on the job abandonment infraction, was applicable only to those employees like the CNAs who are involved in direct patient care responsibilities, and not to those employees in other positions where the impact of walking off the job would not directly impact patient care at the facility. That assertion is also without merit, as the record shows that the issue came up in an incident where Cathi Curry believed that fellow laundry employee Jackie Cataract left her shift early without approval, and thereby walked off the job. In an email dated March 9, 2013, Cathi Curry reported to Maidl that on March 8, laundry employee Jackie Cataract "just left work . . . and didn't tell anyone she left." Cathi Curry goes on to ask Maidl, "How can she just leave her job . . . [w]ithout notifying anyone. . . isn't [that] job abandonment?" (GC Exh. 6.) Maidl responded to the email on March 12, stating that the situation would be addressed, and that she did talk to her supervisor before she left work that day. Curry also requested that Neff file a grievance against Cataract, but Neff refused to file a grievance against another union member.

I find this evidence significant in several respects. First, it is important because it shows that leaving the job is an infraction that is applicable to all employees. I note that in Maidl's response, he does not say or allege that since Cataract is a laundry employee, she is immune from the job abandonment infraction. Instead, he responded that Cataract did in fact receive permission from her supervisor to leave the job early. Second, this evidence reveals that the Union, and more importantly Cathi Curry, were aware that leaving the job constituted an infraction of the Respondent's rules and policies, and that it was important enough to enforce on those employees in her own department, even to the extent that Cathi Curry wanted to file a grievance against Cataract. Based on this undisputed evidence, I find no merit to the General Counsel's argument in this regard.

With regard to the allegation that Respondent offered "shifting justifications" for its decision to terminate Cathi Curry, the General Counsel correctly notes that at the hearing the Respondent contended that it was Cathi Curry's decision to leave work on April 4 that lead to her discharge, and nothing else. The General Counsel states that such a justification was presented by Respondent to both the Union during Cathi Curry's grievance processing, and to the State of Wisconsin during her unemployment compensation proceeding. However, the General Counsel points out that the asserted justification is inconsistent with that offered by Koller at the hearing, where he testified that, when the final decision was made to terminate Cathi Curry, the Respondent relied on other reasons besides leaving the job or voluntary resignation. In this connection, the General Counsel correctly points out that Koller testified that he relied on additional factors such as insubordination for working when he instructed her not to, and for yelling back at him when he was yelling at her on April 4 before she left work.

Even though the General Counsel is correct that Koller offered additional reasons for discharging Cathi Curry, which could be inferred as shifting reasons for the discharge, I nevertheless provide little weight to this fact because I find that Maidl, the person who made the decision to discharge Cathy Curry, has consistently asserted that she was discharged solely because she left the job. As the General Counsel points out, Maidl, on behalf of the Respondent, was consistent with that assertion in both his statements to the Union throughout the grievance process and in the information he provided the State in Cathy Curry's unemployment case.

In addition, I note that even though Koller's assertions are attributable to the Respondent as one of its managers, the evidence does not reveal that he made the decision to discharge Cathi Curry. The evidence instead shows that the Respondent's decision to discharge Cathy Curry was made by Maidl. The emails in the record reflect that Maidl solicited Koller's side of the story with regard to the April 4 incident, however, Maidl made the decision to discharge Cathi Curry, and he communicated that to Respondent's corporate human resources manager. It is a safe bet that Koller not only agreed with the decision to discharge Cathi Curry, he most likely wanted her discharged for also being insubordinate and yelling back at him. Furthermore, based on the record and Koller's demeanor at the hearing, I would put little weight in assertions of additional reasons Cathi Curry was discharged. As I mentioned earlier, I found Koller to be, in general, an unconvincing and incredible witness, who had a shaky grasp of the facts, was hesitant in his testimony, and was frequently unsure of his answers. His testimony was at times inconsistent and implausible, such as in his assertion that he did not raise his voice to Cathi Curry when she blatantly disobeyed him and came into work. In that regard, I agreed with the General Counsel's assertion that his testimony should be given little, if any, weight.

Based on the above, I find that the evidence does not show that the Respondent presented inconsistent or shifting reasons for Cathi Curry's discharge.

Finally, the General Counsel argues that disparate treatment is shown by the fact that numerous employees had left their shifts early without being terminated. On the other hand, the Respondent argues that it has discharged two other employees who walked off their jobs without permission, and that the examples of other employees who left their jobs without being terminated were distinguishable from Cathi Curry's case. For the reasons set forth below, I agree with the Respondent and find no merit to the General Counsel's argument on this point.

The Respondent presented Maidl's testimony that every employee who abandoned their job since he has been the administrator of the facility, has been discharged. In that regard, the evidence reveals that Erinn Stallons was discharge on October 5, 2012, for walking off the job after being mandated to stay. (GC Exh. 35.) The Respondent also terminated employee Natasha Johnson on May 1, 2012, after she walked off the job with no warning. (GC Exh. 37.)[28] Thus, the evidence shows that employees who engaged in the same conduct as Cathi Curry were also discharged by the Respondent.[29]

The General Counsel, however, submitted evidence from employee personnel files regarding the way Respondent responded to "no call/no show" situations. (GC Exh. 34(a)-(d).) The General Counsel's apparent theory is that a no call/no show is as bad as job abandonment and that Respondent should have discharged each of those employees, when in fact it had not done so. As discussed below, however, the record reveals that Respondent offered credible

[28] The record shows discipline for Johnson prior to the Respondent's ownership of the facility and I have therefore given no weight to those documents as they predate the Respondent's management at the facility.

[29] The General Counsel argues in its brief that Stallons and Johnson situations were distinguishable because they were involved in patient care, and Cathi Curry was not. I find no merit to this argument, as neither the Union nor Respondent made that assertion when the question of Jackie Cataract's alleged job abandonment was brought up and discussed, and she was a laundry employee who was also not involved in patient care.

testimony showing that it investigated each occurrence and chose what appeared to be a reasonable disciplinary response consistent with its applicable policies.

Specifically, with regard to employee Mirion Mispilon's missed shift, Maidl investigated the circumstances and found that she tried to call Koller and was unable to get through to him. (GC Exh. 34(c)) The record shows that Laura Nelson (GC Exh. 34(a)) and Allicia Harr (GC Exh. 34(d)) were both disciplined for failing to attend meetings, and Ijomah did not consider missing the meeting to constitute job abandonment, because the employees did not walk off their shifts. Laurie Ferguson (GC Exh. 34(b)) failed to show up for a shift, but when Ijomah investigated that situation, she testified that she learned that there had been a miscommunication about which shift that employee was supposed to work, and the employee did not realize that she was supposed to be at work. Under those circumstances, Ijomah did not consider Furguson to have abandoned her job. Ijomah credibly testified that she requires employees who become ill at work to leave work and go home early, and that all employees who leave work early are required to get approval from her or a charge nurse if Ijomah is not at the facility.[30]

With regard to the alleged disparate treatment employees set forth in GC Exh. 33(a)-(m)), Ijomah credibly testified that in each case, with the exception of two (Ana Clement and Christina McKune), the employees received approval before leaving their shift early, and in none of the cases had the employees left without approval. Those employees were: Leah Bowers (GC Exh. 33(a)) left early ill on February 1, 2012; Leisl Broeske (GC Exh. 33(b)) left early with flu January 13, 2012; Ashley Huppert (GC Exh. 33(c)) left early ill January 20, 2012; Michelle Weinzirl (GC Exh. 33(d)-(e)) left early ill January 12, 2012; and Heather Helmer (GC Exh. 33(f)) left early ill August 22, 2012). Ijomah testified that she investigated the circumstances of Clement (GC Exh. 33(l)) and McKune (GC Exh. 33(m)).[31] Those employees left work early without approval, but she did not consider them to have abandoned their jobs because they were working the overnight shift together that was scheduled to end at 7:30 a.m., and they were both scheduled to attend a CPR class later in the morning from 9 a.m. to 1 p.m. The investigation revealed they both left without permission at around 7 a.m. after the day shift had clocked in at 6 a.m. and after both had finished their work. They apparently thought it was permissible to leave because they were finished with their work, and had to come back to the facility at 9 a.m. for the CPR class. Both employees returned at 9 a.m. Ijomah testified that, given those circumstances, she determined that they had not abandoned their jobs.

Based on the credible and uncontroverted evidence presented on these employees, I find that their situations were distinguishable from that of the employees who left their jobs and were terminated.[32] Therefore, the record does not show evidence of disparate treatment in regard to

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[30] Even though I found Ijomah's testimony incredible on other allegations discussed more fully above, I nevertheless found that she testified in a truthful and convincing manner with regard to the investigations and determinations Respondent made concerning the employees who were allegedly treated disparately in this allegation of the complaint.

[31] Ijomah testified that before leaving sick, an employee is required to fill out a "sick slip" and put it under Ijomah's door, and if that is not done, the employee will receive some form of discipline, as was the case with Clement and McKune, who were both issued personnel consultation forms.

[32] The General Counsel argues in its brief that employees who allegedly missed meetings were not discharged and that also constitutes evidence of disparate treatment by the Respondent. I disagree and find that such circumstances are distinguishable from those who abandoned or left their shifts without

Cathi Curry's discharge. Accordingly, I find that the Respondent has carried its burden of demonstrating by a preponderance of the evidence that the Respondent would have discharged Cathi Curry even in the absence of her protected conduct, and it therefore did not violate Section 8(a)(3) and (1) of the Act by discharging her.

D. The Alleged Unfair Labor Practices Concerning Lee Ann Ager, Her Removal from the Schedule, Suspension, Subsequent Reduction of the Suspension to a Written Discipline, and Refusal to Change Shifts and work a holiday shift

1. Lee Ann Ager replaces Cathi Curry as union steward on May 27, 2013, and participates as a steward in a grievance meeting on May 29, 2013

It is undisputed that Lee Ann Ager replaced Cathi Curry as union steward on May 27, 2013, and that the Respondent was aware of her union position. The General Counsel's witnesses credibly testified that when Ijomah was informed that Ager was going to be a union steward, she appeared to frown and be disgruntled.[33] The undisputed record also shows that Ager participated as a union steward on May 29 for a grievance meeting concerning employee Heather Raehsler's termination, and that Ager was very vocal and aggressive in her representation of Raehsler.

2. The May 30 paycheck incident where Ager is suspended and placed under investigation,

The record reveals that on May 30, 2013, Ager was unable to work, so she called Human Resources Director July Hammer and informed Hammer that she would be unable to work due to an injury, and asked if she and Raehsler could pick up their checks, or would they have to be delivered by mail. Hammer, the Respondent's person responsible for payroll and related policies, informed Ager they could pick up the paychecks when they were available. That afternoon, Ager went to the facility with Raehsler, but Raehsler did not go into the facility because she was recently terminated. When Ager went to Hammer's office, no one was there. The paychecks were in envelopes with the employees' names on them, on top of a filing cabinet. Ager took her paycheck and Raehsler's paycheck and left the facility. Ager credibly testified that she called Hammer 15–20 minutes later to tell her that she picked up her paycheck and Raehsler's paycheck, and Hammer said "Oh, OK," and then Hammer asked about Ager's doctor's appointment. Hammer did not inform Ager that her actions were in violation of Respondent's rules or policies, nor did she indicate that she would be disciplined or investigated.

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approval from management.

[33] The General Counsel's witnesses presented differing accounts of who was present when Neff and Ager informed Respondent that Ager was serving as the replacement steward for Cathi Curry. In this connection, Neff claimed that both Maidl and Ijomah were present for this conversation, while Ager contended that only Ijomah was present.

3. The June 3 investigatory meeting and allegations that Respondent threatened Ager by falsely stating she had previously been given a verbal warning, threatened that she was insubordinate, threatened to call the police to remove her from the facility, and issued her a suspension which was later reduced to a written discipline

a. The events of the June 3 investigatory meeting

The following day, Ager was informed by Ijomah that she was under investigation and had to come into work the following Monday to talk about it. Later that day, Ager spoke to Ijomah on the telephone and asked Ijomah why she was being investigated. Ijomah stated that she could only speak about it in person. Ager called Ijomah again, about an hour later, and inquired why her investigation could not be conducted over the telephone.[34] According to Ager, Ijomah responded that she was the manager, she could conduct the investigation anyway she wanted, and that Ager had to come in to meet her in person. Ager asked again if she could be told why she was being investigated, but Ijomah did not tell her. Despite Ager's repeated requests, Ijomah would not inform Ager of the reason she was being investigated, nor would she provide any information about the investigation.

On Monday, June 3, Ager attended an investigatory meeting with her coworker, Charity Hill, serving as her union steward. The meeting was scheduled to begin at 1:30 p.m., but when Ager and Hill went to Ijomah's office, Maidl answered the door and indicated that management would be ready soon. Ager and Hill waited in the chapel at the facility until 1:55 p.m., and then went to Maidl's office where they saw him writing on a yellow memo pad. Maidl told Ager he was working on something and to check with Hammer and Ijomah in Hammer's office next door. Ager and Hill check with Ijomah, who said they were going to have the meeting.

Ager and Hill were then joined by Maidl, Ijomah, and Hammer in the chapel. Maidl apologized for having them wait, and then informed Ager they were there because Ager took another employee's paycheck. Ager became upset and responded that other employees have picked up her paychecks in the past, and they had not been disciplined. Ijomah stated that employees had to have written authorization in order to pick up another employee's paycheck. Ager told her that was not true, and that other employees had picked up her paychecks for her without written authorization, such as Heather Raeshler and Amanda Monson. Ijomah also said it was an issue because she picked up her own paycheck from Hammer's office, without Hammer being there. Ager informed Ijomah that she had picked up her paychecks in the past without Hammer being present.

At that point, Maidl said that he had previously coached Ager about taking her paycheck when she had a garnishment on her check. She denied that Maidl coached or counseled her about that in the past. Ager testified that Maidl then produced a yellow note pad, on which the top page was still attached. The document dated April 4, 2013, stated, in relevant part: "I also explained to her that she should not have picked up her check yet, especially since she did not talk to Judy beforehand. Thursday is not payday and checks can only be given out with approval." (GC Exh. 22.) Maidl stated that he had warned her previously about taking her

[34] Ager testified that she was aware that the Respondent has conducted investigations of alleged misconduct over the telephone, which the Respondent does not dispute.

paycheck without first talking to Hammer. Ager testified that she was informed that the note on the yellow note pad was a verbal warning and now they were going to the next step. Ager testified that although she was unable to read what was on the yellow note pad when Maidl was in Ijomah's office before the meeting that day, she believed that top page was the document that Maidl was drafting before the meeting that day. She testified that she was never warned or coached previously, and that the first time she saw the note on the yellow note pad was in the June 3 meeting. Ager testified that all verbal or written warnings at the Respondent's facility were on personal consultation forms, and she had never before seen a warning on a yellow note pad. Ager testified that she became upset and Ijomah stated that Ager was being insubordinate and unruly and she needed to leave and go home. Therefore, Ijomah ended the meeting

After the meeting ended and the managers left the chapel, Ager credibly testified that she was getting ready to call Neff when Ijomah came back in and was yelling at her from the chapel door. According to Ager, Ijomah specifically stated: "You're insubordinate, we told you to leave, you need to leave the facility now." (Tr. 195.) Ager responded by stating that it was a public place and she did not understand how Ijomah could make her leave because she did not do anything wrong, and she told Ijomah, "I'm just trying to get a hold of the Union." (Tr. 195) Hill credibly testified that Ager started to leave and was on the phone walking away as she was talking to Ijomah.

Ager and Hill left the chapel and walked out into the hallway which was used by employees, residents, and the public. As they walked, Ager was telling Ijomah she was attempting to call her union representative on her phone, and she and Ijomah continued to speak loudly to each other.[35] Then, according to Ager, "that's when something was mentioned about the police."

With regard to the statement about calling the police, the record shows each witness had differing versions regarding what was said, and who said it. According to Ager, one of the managers mentioned something about the police, and she responded "Really, you're going to call the police on me?" (Tr. 195) Hill testified that Ijomah told Ager she had to leave and "they could call the police." (Tr. 363) Ijomah, on the other hand, testified that it was Ager brought up calling the police, and Maidl responded, "yes, we could." (Tr. 293) Finally, Maidl testified that Ager brought up the police, stating "what are you going to do, call the police and have them escort me out or have them arrest me, one of the two?" Maidl testified that he responded, "I can," or "If I have to." (Tr. 93) In sorting through these differing versions of what was said on this subject, I find, based on the demeanor of the witnesses and the inherent probabilities of the situation, that the versions offered by Ager and Hill are the most probable and reliable. In this connection, I generally found both of their demeanors honest and reliable, and they testified in a

[35] I find that the record supports that both Ager and Ijomah were speaking loudly to each other in the hallway. In this regard, I find that both Ager and Hill were credible witnesses and testified in a truthful and convincing manner. Hammer testified that she was not present after the meeting ended. Ijomah and Maidl denied that that Ijomah raised her voice in the hallway. Where there is a conflict in testimony, I credit Ager and Hill over Maidl and Ijomah as I found the demeanor of Respondent's witnesses less impressive. Maidl and Ijomah were inconsistent in their testimony at times. In addition, as mentioned above, I found Ijomah less convincing, and she presented testimony on several occasions that differed from her sworn affidavit. (Tr. 297–300.)

convincing and believable manner. On the other hand, I found Maidl's and Ijomah's testimony generally less reliable and convincing.

In regard to this disputed exchange in the hallway of the facility, I find, as Ager alleges, that something was said about the police, and that, as Hill credibly asserted, it was Ijomah who said they "could call the police." I find that it is plausible that Ijomah said that because the record shows she already believed Ager was insubordinate and had not left when she was told to leave. I further find that Ager responded with the question, "Really, you're going to call the police on me?" and that Maidl responded something to the effect that they could do so. Ager then left the facility and there is no evidence that the police were ever called by the Respondent.

Ager was not placed on the work schedule and the Union filed a grievance that day concerning her suspension. The record shows that Neff sent an email that afternoon asking how long the investigation and suspension would take, and reminding the Respondent that the investigation of someone who is a union steward should be the same as someone who is not a steward.

The grievance over Ager's suspension was eventually settled in a meeting on June 12, by the Respondent subsequently reduced the suspension to a written discipline and Ager was paid for the days she was suspended. The record thus reveals that Ager was suspended, and not reinstated to the work schedule until the June 12 meeting, because of her alleged infractions with the paychecks on May 30, and her alleged misconduct at the meeting on June 3. On that basis, the record shows that Ijomah stated in her affidavit in referring to the June 3 meeting, "So if she had behaved herself and the meeting could have been completed, she could have potentially been back on the schedule the next day." (Tr. 297) At the hearing, Ijomah initially denied that the focus of the June 12 meeting (when Respondent changed the suspension to a written discipline) was on Ager's perceived insubordination. (Tr. 298) However, she changed her testimony when confronted with her affidavit, which read: "At that point, when the (June 3) meeting started, the bigger issue to us became Lee Ann's insubordination." (Tr. 298) Based on this evidence, the record reveals that her suspension was extended and her subsequent discipline issued based on her alleged paycheck infraction and her conduct during the meeting on June 3. The record does not show that such actions were based in any way on Ager's conduct after she left the chapel where she raised her voice with Ijomah in the hallway in the proximity of staff and residents.

In an email to Neff dated June 5, Maidl informed Neff that Ager's suspension ended on June 3 when "she came in to an agreed upon meeting." Maidl continued that "unfortunately due to her behavior the meeting ended prematurely, at which time we requested Leeann to call us when she could conclude the meeting in a professional manner." Despite Maidl's assertion that Ager's suspension ended, the Respondent did not place her back on the schedule. Instead, Maidl stated in another email later that day, that Respondent would meet the next week to discuss the suspension, and that until that time, Ager "should not come to the facility."

b. Contentions of the Parties

The General Counsel asserts that Respondent violated Section 8(a)(1) of the Act by the conduct in the following complaint paragraphs: 5(k) that Respondent threatened Ager by falsely stating she had been given a verbal warning because of her union and protected activities; 5(l)

that Respondent threatened Ager was insubordinate because she attempted to call her Union representative; and 5(m) that Respondent threatened Ager by telling her it would call the police if she did not leave the facility. The Respondent alleges that its actions in the meeting did not violate the Act.

In addition, the General Counsel contends Respondent violated Section 8(a)(3) and (1) of the Act by the conduct in the following complaint paragraphs: 6(b) removed Ager from the schedule and informed her she was under investigation; 6(c) suspended Ager, and subsequently reduced the suspension to a written discipline; and 6(d) banned Ager from the Respondent's premises.

The Respondent asserts that it was justified in its actions set forth above because Ager violated the Respondent's policies and procedures regarding taking paychecks, and that her conduct in the June 3 meeting was so outrageous that it removed any protections she had under the Act.

c. Analysis of the alleged violations involving Ager's suspension, written discipline, and prohibition from entering the property for violation of the paycheck policy

The record shows that Ager was alleged to have violated Respondent's paycheck policy when she picked up another employees' paycheck and she picked up her own paycheck when Hammer was not there and failed to sign that she picked it up. The Respondent's alleged policy was not produced at trial and there is no evidence that it was provided to employees prior to Ager's discipline. The record reveals that this policy was never enforced and no employees were disciplined for infractions prior to Ager's discipline.

With regard to Ager's suspension and subsequent issuance of written discipline for that alleged infraction, it is appropriate under *Wright Line* to first determine if the General Counsel has presented a prima facie case of discrimination against Ager. In this regard, first, the undisputed evidence shows that Ager was engaged in Union activities through her newly appointed position of union steward, and in her aggressive representation of Raehsler in her grievance meeting. Second, it is undisputed that the Respondent was aware of her protected activities as a union steward. Third, the removal from the schedule, suspension, subsequent written discipline, and banishment from the facility, constitute adverse employment actions. Fourth, the record contains evidence of a nexus between her protected activities and her suspension and discipline, which is reflected in the fact that Ijomah appeared unhappy with the appointment of Ager as union steward. In addition, animus can be found in the numerous 8(a)(1) violations found in this case and, in particular, the coercive statement that the Respondent wanted to rid itself of the Union.

The record also shows that Ager's suspension and subsequent discipline occurred only several days after her engagement in union and protected activities. The undisputed record reveals that the Respondent had never previously issued warnings or discipline to employees for alleged paycheck infractions or violations. The record further shows that even though Respondent maintained a paycheck policy, it did not provide paycheck policy training for employees until June 20, 2013, well after Ager was disciplined for the alleged infractions. I find that the timing of her suspension in relation to her protected activity, particularly in light of the

unprecedented nature of her suspension for such an alleged offense, provides strong support for finding unlawful and discriminatory motivation. *Masland Industries, Inc.*, 311 NLRB 184, 197 (1993), and cases cited therein. On that basis, I find that the General Counsel has made a prima facie showing that Ager was suspended and disciplined for engaging in union and protected activities.

In rebutting the General Counsel's prima facie showing that the protected conduct was a "motivating factor" in the Respondent's decision, the Respondent cannot simply present a legitimate reason for its action, but must persuade, by a preponderance of the evidence, that the same action would have taken place even in the absence of the protected conduct. *Roure Bertrand Dupont, Inc.*, supra. Thus, the burden now shifts to the Respondent under *Wright Line* to establish that it would have suspended/disciplined Ager and prohibited her from entering the facility, even in the absence of her union and protected activities.

The Respondent asserts that it was justified in disciplining Ager because she violated the policy when she picked up her paycheck early (before the Friday payday), she picked up her paycheck without signing out from Respondent's sign out book, she picked up another employees paycheck without providing written permission from that employee, and she picked up the paycheck without Hammer being present in her office. The credible evidence, however, shows that these asserted reasons for Ager's suspension, discipline, and banishment from the facility are merely pretext for Respondent's unlawful motivation.

The evidence shows that some employees were not aware of the Respondent's alleged paycheck policy, and the evidence does not reflect that employees were provided that policy prior to Ager's May 30 incident. In fact, Ager credibly testified that she was not aware of Respondent's paycheck policy before the incident.[36] The record also shows that it was not until two weeks after Ager's suspension ended (on June 20) that the Respondent held a meeting for the employees to discuss the paycheck policy with employees. Basing discipline on a policy that was previously unknown to some, if not most of the employees, and which was never previously enforced, supports finding that the Respondent's justification is mere pretext for its unlawful motivation.

The General Counsel also presented credible evidence of disparate treatment in the fact that other employees have picked up paychecks on Thursdays, picked them up without signing them out, picked up other employees' paychecks for them, and have picked up paychecks when Hammer was not present. Ager also testified that she had picked up other employees' paychecks in the past without Hammer being present and without signing them out, and she was never disciplined or informed that such action constituted an infraction. Employee Charity Hill also credibly testified that on occasions she had taken checks out of Hammer's office when Hammer was not present, that she sometimes failed to sign the checks out and had not been disciplined. In addition, Hill testified that she was aware that other employees have taken their checks without Hammer being present and without signing them out, and had not been disciplined. She stated that the checks were left on Hammer's desk or on the top of the refrigerator in Hammer's

[36] I do not credit Maidl's assertion that he previously issued Ager a warning with regard to a previous paycheck violation, and I credit Ager's assertion that she was never warned about such infraction, as she appeared honest and she testified in a very convincing manner.

office. She also credibly testified that employees were allowed to pick up other employees' paychecks.

On this subject, Hammer testified that she had no knowledge of employees picking up paychecks from her office without her being present. I find that assertion is incredible and unbelievable. Several employees credibly testified that such a practice was common at the Respondent's facility, and the paychecks were left on her desk or on the refrigerator, in the open, for employees to pick up. Hammer is the human resource director and accounts payable manager, who is the person responsible for ensuring that Respondent's payroll operated properly. One of her primary job functions was to handle the payroll and distribute paychecks to employees. I find it difficult to believe that she was not aware that employees were picking up their paychecks when she was not there. With regard to Hammer's testimony as to what she was aware of on this issue, she admitted that even though employees are required to sign out when they pickup up their checks, they did not always do that, and no one was disciplined for it. She also admitted that she was aware that employees sometimes picked up other employees' paychecks and were not disciplined for it, until Ager was disciplined.

This evidence also shows that the alleged paycheck policy was never enforced prior to Ager's suspension and discipline. The Board has found that such a lack of enforcement undercuts a respondent's asserted justification for disciplining employees. *SCA Tissue North America, LCC,* 338 NLRB 1130, 1130 fn. 2 (2003), enfd. 371 F.3d 983 (7th Cir. 2004).

Further evidence of Respondent's pretext is found in Hammer's response to Ager when Ager notified her that she had picked up her paycheck when Hammer was not there. In this connection, when Ager called Hammer and told her that she picked up her paycheck and Raehsler's paycheck when Hammer was not there, and Hammer said "Oh, OK," and then asked about Ager's doctor's appointment. Hammer did not inform Ager that her actions were in violation of Respondent's policies, nor did she indicate that Ager did anything improper, or that she would be investigated or disciplined. As the person in charge of Respondent's payroll and the distribution of checks, Hammer was obviously aware of the paycheck policy, yet she never informed or reminded Ager of what the paycheck policies where, she never told Ager that she committed an infraction of that policy, she never told her that she should not have picked up the paycheck when she was not present, and she never told her that she should not have picked up Raehsler's paycheck. In addition, if Ager was previously issued a warning regarding a paycheck policy infraction, it is reasonable to believe that Hammer, as the person in charge of payroll, would have been aware of the previous warning. Yet, when Ager picked up her paycheck and Raehsler's paycheck on May 30, Hammer never said anything about the fact that Ager was allegedly warned previously about such infractions, or that she committed the same policy infraction again. These facts cast a serious doubt upon Respondent's alleged justification for Ager's suspension, discipline, and banishment.

Furthermore, is it highly suspicious that when Respondent decided that Ager committed an infraction, removed her from the schedule, and commenced its investigation, Respondent's managers refused to inform her why she was being suspended and investigated until they could meet in person. In fact, Ager credibly testified that when she was informed that she was removed from the schedule and was being investigated, Ager spoke with Ijomah twice that day on the telephone. Despite Ager's requests during both calls, Ijomah would not inform Ager of

the reason she was being investigated, nor would she provide any information about the investigation. It strains credulity to believe that there is any sufficient nondiscriminatory reason why the Respondent could not have informed Ager of the reason for her suspension and pending investigation.

In addition, the fact that Ager's suspension lasted 2 weeks without pay casts further doubt over Respondent's alleged justification of a nondiscriminatory reason for its actions. Even though there may have been some legitimate nondiscriminatory reason for Ager's investigation to have lasted approximately 2 weeks, which the record reveals is much longer than the Respondent's normal investigations of infractions, no credible evidence was presented by the Respondent to establish that justification.[37] This is especially true when one considers that the facts of the alleged violation of policy was straightforward and simple, in that Ager did not dispute that she came in and took her check, and Raeshler's check, when Hammer was not there. In fact, Ager was the one who called in and reported those facts to Hammer, and there is no evidence that she denied those facts in her meeting on June 3.

Thus, based on the above, I find that the evidence shows that the Respondent has failed to prove by a preponderance of the evidence, that it would have suspended and disciplined Ager, and prohibited her from entering the facility, in the absence of her union and protected activities. Therefore, I find that the Respondent violated 8(a)(3) and (1) of the Act by removing her from the schedule and suspending her, reducing her suspension to a written discipline, and preventing or banning her from entering the Respondent's facility.

d. Analysis of the alleged violations involving Ager's June 3 meeting

i. The allegations of 8(a)(1) violations occurring in the June 3, 2013 disciplinary meeting

According to Ager's credible testimony, Maidl said that he had previously coached Ager about taking her paycheck before when she had a garnishment on her check. Ager testified that Maidl then produced a yellow note pad which stated, in part, that he had warned her previously about taking her paycheck without first talking to Hammer. Ager testified that she was informed in the meeting that the note on the yellow note pad was a verbal warning and now they were going to the next step. The evidence reveals that the Respondent did not previously issue a warning or counseling to Ager for such an alleged offense, and the Respondent was unable to produce any consultation forms for Ager to that effect.

The General Counsel asserts in complaint paragraph 5(k) that Respondent violated Section 8(a)(1) of the Act by threatening Ager by falsely stating she had been given a verbal warning because of her union and protected activities. I find, based on the credible evidence, that the Respondent, through Maidl, coercively informed Ager that he had previously warned her

[37] Neff testified that he has been involved in investigations of employee infractions at the Respondent's facility, and that Respondent's investigations, which usually involve patient abuse, last 3 days on average. (Tr. 469) Ager testified that 1 week before she became a union steward, she was involved in an investigation for alleged patient abuse (which appears would be more serious an incident than allegedly picking up paychecks improperly), and that investigation was done over the telephone and was completed in 1 day.

for an alleged paycheck infraction when in fact that was not true, and he coercively stated Respondent was "taking it to the next step," inferring that Respondent could use the alleged previous warning as a basis for further discipline.

ii. The allegations of 8(a)(3) and (1) violation occurring in the June 3, 2013 disciplinary meeting

As mentioned above, I have already found that the Respondent has violated the Act in issuing Ager a suspension, changing that suspension to a written warning, and in banning her from entering the Respondent's facility. However, the record reveals that the Respondent extended Ager's suspension and also based the issuance of discipline on her behavior at the June 3 investigatory meeting. The record does not show that Respondent's managers based the suspension and discipline in any way on Ager's conduct *after* she left the chapel where she raised her voice with Ijomah in the hallway. Thus, I do not find persuasive Respondent's argument in its brief, that Ager's conduct during and "after the June 3rd meeting" warranted discipline and, thus, did not violate the Act." (R. br. p. 49.)

Ager was clearly engaged in protected activity at the investigatory meeting while disputing her discipline. *Caterpiller, Inc.*, 322 NLRB 674, 676677 (1996). Accordingly, I must determine whether her conduct in that meeting removed her protection from the Act.

It is well established that although employees are permitted some leeway for impulsive behavior when engaged in protected activity, this leeway is balanced against "an employer's right to maintain order and respect." *Piper Realty*, 313 NLRB 1289, 1290 (1994). When an employee engages in abusive or indefensible misconduct during activity that is otherwise protected, the employees forfeits the Act's protection. *Daimlerchrysler Corp*., 344 NLRB 1324, 1329 (2005). In *Atlantic Steel Co.*, 245 NLRB 814 (1979), the Board set forth the test for determining whether an employee loses the protection of the Act. Under that test, the Board examines four factors: "the place of the discussion; the subject matter of the discussion; the nature of the employees' outburst; and whether the outburst was, in any way, provoked by the employer's unfair labor practices." Id. at 816. The Board has held that the standard is high for forfeiting the protection of the Act, stating that protected conduct must be egregious or offensive to lose the protection it is provided. *Consolidated Diesel*, 332 NLRB 1019, 1020 (2000) (citations omitted), enfd. 263 F.3d 345 (4th Cir. 2001). In this regard, the Board has determined that "the manner in which an employee exercises a statutory right must be extreme to be beyond the Act's protection." Id. See also *Trus Joist Macmillian*, 341 NRLB 369, 371 (2004).

In the instant case, an examination of the factors reveals that Ager's conduct did not rise to the level which would warrant losing the protection of the Act. The first factor, the place of the discussion, weighs in favor of protection regarding Ager's conduct. The discussion during the meeting that allegedly extended Ager's suspension occurred in the private chapel on the Respondent's premises while Ager was off the clock. The second factor, the subject matter of the discussion, weighs in favor of protection, because the discussion directly involved the legitimacy of Ager's suspension and whether that suspension comported with Respondent's past practice in such instances. The third factor, the nature of the alleged "outburst," weighs in favor of protection as even though Ager raised her voice when talking to the Respondent's managers, she did not threaten them in any way, use profanity, impugn Respondent's business, or resort to

intimidating gestures. Finally, the fourth factor of provocation weighs in favor of protection. Ager's raised voice in the meeting was provoked by Respondent's unfair labor practices, as the suspension and investigation were discriminatory and based on her union and protected activities. Thus, all the factors of place, subject matter, nature of conduct, and provocation favor Ager's protection under the Act.

I therefore find that Respondent further violated Section 8(a)(3) and (1) of the Act by basing Ager's suspension/and extended suspension, issuing her a written discipline, and banning her from the premises, upon her protected actions in the June 3 investigatory meeting.

iii. The alleged violations of Section 8(a)(1) based on Ager's actions after the June 3 meeting.

The record shows that Ijomah had ended the meeting because she believed that Ager was insubordinate. After the meeting ended, Ager testified that Ijomah came back in and was yelling at Ager from the chapel door. When asked about what specifically Ijomah was yelling, Ager said Ijomah was saying, "You're insubordinate, we told you to leave, you need to leave the facility now." (Tr. 195.) Ager responded by stating that it was a public place and she did not understand how Ijomah could make her leave because she did not do anything wrong, and she told Ijomah, "I'm just trying to get a hold of the Union." (Tr. 195.)

Ager and Hill left the chapel and walked out into the hallway used by employees, patients and the public, where she was attempted to call her union representative, and both she and Ijomah continued to speak loudly to each other, and then, as I have found above, Ijomah said the Respondent could call the police.

With regard to the General Counsel's assertion in paragraph 5(l) that Respondent threatened Ager that she was insubordinate because she attempted to call her union representative, I find that allegation is not supported by the record. The record shows that Ijomah had ended the meeting because she believed that Ager was insubordinate, before she knew Ager was going to call the union representative. After the meeting ended, Ijomah came back in and was yelling that Ager was insubordinate and she was told to leave. It was at that point when Ager told Ijomah she was trying to call the Union. Thus, based on Ager's credible testimony, I find that the evidence shows that Ijomah's statement about Ager being insubordinate was in reference to the fact that she had previously determined Ager was insubordinate in the meeting. Ager, by her own admission, did not inform Ijomah that she was trying to call the Union until after Ijomah said she was insubordinate. Thus, there is insufficient evidence to link Ijomah's statement that Ager was insubordinate with her attempt to call her union representative. In addition, I note that there were no threats or promises of reprisals that accompanied that statement, and Ager could have contacted the union representative outside the chapel, which is, in fact, what she was attempting to do as she walked out. On that basis, I do not find Ijomah's statement was threatening or coercive, and it did not constitute a violation of the Act.

With regard to that allegation in complaint paragraph 5(m) that Respondent threatened Ager by telling her it would call the police if she did not leave the facility, I find that Ijomah told Ager that Respondent "could" call the police in relation to her telling Ager to leave the facility, and that the statement was coercive and threatening.

Ager's leaving the chapel and moving into the hallway, while she had attempted to call her union representative, constituted a continuation of her protected activity that she had engaged in while in the meeting. Applying the *Atlantic Steel* factors, I still find that Ager's conduct after the meeting, as she left the chapel and walked in the hallway, did not rise to the level which would warrant losing the protection of the Act. The first factor, the place of the discussion, weighs against protection of Ager's conduct. The conduct occurred while leaving the chapel and while in the facility hallway, where employees, residents, and the public could be found. The second factor, the subject matter of the discussion, weighs in favor of protection, because it concerned a continuation of Ager's protected activities in the meeting, as while Respondent directed her to leave the facility, she was trying to call her union representative. The third factor, the nature of the alleged "outburst," weighs in favor or protection as even though Ager raised her voice, so did Ijomah. In addition, the nature of Ager's outburst did not involve threats, profanity, or intimidating gestures which witnesses could have found offensive. Finally, the fourth factor of provocation weighs in favor of protection. Ager's raised voice in the hallway, like her conduct in the meeting, was a result and continuation of the meeting, which I found was provoked by Respondent's unfair labor practices. Thus, only the factor of place weighs against protection, while the factors of subject matter, nature of conduct, and provocation favor protection. Accordingly, under *Atlantic Steel*, Ager's conduct after the meeting did not rise to the level that would cause her to lose her protection under the Act.

The Respondent, citing *Daimlerchrysler Corp*., supra, argues that Ager's outburst in an area where coworkers can witness it, was unprotected. In *Daimlerchrysler Corp*., the Board found employee Valentin's conduct unprotected in an outburst directed at a manager regarding a grievance investigation meeting, in an area where employees could hear it. Id. The facts of that case, however, are distinguishable from the instant case because in *Daimlerchrysler,* employee Valentin approached the manager in an "intimidating" manner, and loudly said, "fuck this shit," and that he did not "have to put up with this bullshit." Id. In the instant case, the encounter was fairly brief, there is no credible evidence that Ager acted in an intimidating manner towards the managers, and she did not use profanity. The evidence merely shows that she raised her voice, as did Ijomah. Thus, *Daimlerchrysler* is distinguishable from the instant case and I do not find it persuasive.

Based on the above, I find that Ijomah's statement that she could call the police, in the context of directing Ager to leave the facility immediately after her meeting concerning her suspension and subsequent discipline, and having attempted to call her union representative, was coercive and threatening. In this regard, the Board has held that, by responding to employees' protected union activity at or near its facility by threatening to call the police, an employer violates the Act. *Winkle Bus Co.*, 347 NLRB 1203 (2006). Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act.

4. The alleged violations by refusing to change Ager's weekend shift schedule (delay in granting her Heather Raehsler's shift schedule) and refusing to grant her a holiday shift on the Fourth of July, in violation of Section 8(a)(3) and (1) of the Act

a. The facts pertaining to the shift and schedule allegations

After Heather Raehsler was discharged, Ager bid on and was awarded her shift. This had the effect of changing the weekends that she would work, as under the collective-bargaining agreement, employees were required to work every other weekend. On June 12, Neff questioned Cannon about when Ager would be switched to Raehsler's shift, and Cannon assured him that she would be placed on Raehsler's shift during the next schedule, which was consistent with the provisions of the collective-bargaining agreement.

Neff exchanged emails with Cannon and Ijomah on June 26 and 27, expressing his frustration over the fact that Ager had not yet started the new shift. The Respondent indicated she would likely start in July 2013, but Respondent did not actually change her shift schedule until September 2013, which happened to be days after Respondent received two vacation requests from Ager that were based on her previous weekend schedule.

In addition, Ager was not scheduled to work on the July 4 shift. However, there was a shortage of employees for that shift and a bid sheet was posted, but no employees signed up for it. Shortly after the bid sheet was taken down, Ager asked for the shift. The nursing supervisor, Larissa Fayweather, told her she could have the shift, but after checking with Ijomah, Fayweather informed Ager that the shift was no longer available. After receiving this information, Ager exchanged shifts with another employee, which allowed her to work the July 4 shift.

The record reveals that the Respondent maintains a block schedule system whereby employees have a block schedule that repeats every 2 weeks. It is undisputed that Ijomah determines the number of staff to be scheduled based on "census." It is also undisputed that staffing and scheduling for the Respondent, as a skilled nursing facility, is driven by resident census, meaning that a certain number of care providers (nurses and CNAs) must be scheduled based on the number of patients or residents for whom care is provided. (Tr. 220, 868.) Ijomah credibly testified that she uses a grid to establish the appropriate number of nurses and CNAs to schedule based upon the number of residents.[38] The grid does not provide a specific number of staff to be scheduled, but rather a number of staff hours referred to as "full-time equivalents" or "FTE," that must be staffed. Ijomah testified that she may need to increase or decrease the number of staff pursuant to the contract's procedures, depending on the census. If the census is lower than anticipated, people are told to stay home, and if it is higher than anticipated, employees are called in. For example, if 5 residents are admitted, she might have to add another person to the schedule, and conversely, if 4 residents leave the facility, she may have to remove some employees from the schedule.

[38] Even though I have not credited parts of Ijomah's testimony as discussed above, I nevertheless found that she testified in a truthful and convincing manner with regard to the Respondent's scheduling and shifts, and her decisions made pertaining to the schedules and shifts.

In explaining the delay in placing Ager in the shift she bid into, Ijomah testified that in June 2013, the Respondent's census ranged from 43 to 46, and July 2013, from 44 to 48. (R. Exh. 34.) She testified that she cross referenced the daily census with the census grid to determine the appropriate number of staff to schedule. As an example, with a census of 44 residents, the grid would provide that the FTE for nurses should be 5.28 and the FTE for CHAs should be 12.1. Based on the numbers, Ijomah would schedule 5 nurses and 12 CNAs over a 24 hour period. In practice, she would schedule 5 CNAs for the day, 5 for the evening, and 2 overnight.

Pursuant to the block schedule, CNAs are placed in two groups for scheduling weekends and holiday shifts. (R. Exh. 2.) There are 2 weekends on each schedule, an "outside" weekend (the first Sunday of the schedule period and last Saturday of the period), and an "inside" weekend (the full weekend in the middle). The weekends are designated "A" and "B," and the employees of each group are scheduled for their respective weekends. On that basis, the "A" group works the same weekends.

Ijomah testified that Ager bid into Raehsler's shift, but she (Ijomah) came to understand that Ager really wanted to move to the group "B" or the outside weekend schedule. Raehsler was in the "B" group and Ager in the "A" group. Ijomah testified that the "B" group had a sufficient number of staff, but included two new employees. She did not believe she could move Ager, an experienced CNA in the "A" group, to the outside weekend because she felt she did not have enough experienced and properly trained employees to work the "A" group weekend with Ager gone. Ijomah testified that a review of the schedule showed that by moving Ager to the "B" weekend, it would have overstaffed that group with 6 CNAs and the "A" weekend would have been under staffed with 4 CNAs.

With regard to the Union's request for an explanation as to why Ager had not yet been allowed to change shifts, the record shows that Ijomah explained this information to Ager and Neff, and Neff acknowledged to Cannon that he understood and was satisfied with Ijomah's explanation. (GC Exh. 19.) Ijomah testified that when she, as the scheduler, was satisfied that the newer CNAs gained experience, she offered Ager the "B" group weekend schedule, which was in September 2013.

Since Ager was in group "A," she was not scheduled to work July 4. An open shift was posted for July 4, and Ager was aware of that fact, but she did not bid on it, and the posting was taken down. Ager asked the supervising nurse, Fayweather, if she could work that shift, and the supervisor said she could. However, the supervisor subsequently told Ager that Ijomah determined that she did not need an additional CNA for that shift. Ijomah testified that there were enough staff scheduled to cover the July 4 weekend based on the census, and there was not an available slot for Ager. However, Ager ended up working the July 4 weekend anyway, as Hill traded shifts and then Ager got the shift via a trade. Ijomah testified that she did not care if Ager worked on the July 4 weekend, and she made no attempt to stop Ager from working that shift.

b. <u>The contentions of the Parties</u>

The General Counsel alleges that the Respondent's delay in switching Ager's schedule and refusing to grant Ager a holiday shift for the Fourth of July, was due to her union and

protected activities and in violation of the Act. Specifically, the General Counsel argues in complaint paragraph 6(e) that since on or about June 3, 2013, Respondent refused to change Ager's weekend shift schedule, and in paragraph 6(g) that since on or about June 6, 2013, Respondent refused to grant Ager a holiday shift on the Fourth of July, in violation of Section 8(a)(3) and (1) of the Act.

The Respondent, on the other hand, argues that these allegations are not adverse employment actions and therefore cannot be violations of Section 8(a)(3), and that even if they are adverse employment actions, it has shown its actions with regard to Ager's schedule were based on legitimate nondiscriminatory reasons.

c. Analysis

With regard to the question whether the Respondent's actions constituted discrimination under the Act, an analysis under *Wright Line* is appropriate. I find that the evidence supports finding that the General Counsel has been made a prima facie showing sufficient to show that Ager's protected conduct was a "motivating factor" in the employer's decision to discharge her. First, it is undisputed that Ager was engaged in union activities where she was the union steward and was aggressive in her defense of employees in grievance meetings. Second, it is equally undisputed that the Respondent had knowledge of Ager's union and protected activities as the managers were aware of her position with the Union and they were in the grievance meetings with her. Third, the Respondent's alleged failure to timely change her weekend shift schedule and grant her a holiday shift for the Fourth of July, constituted adverse employment actions. With regard to this third element, the Respondent contends in its brief that its actions with regard to Ager's scheduling requests, are not "adverse actions" because Ager did not lose any hours, and therefore, no 8(a)(3) violation can be found. I disagree. The complaint allegations with regard to Ager's shifts and schedules are potentially adverse employment actions as the refusal to grant a shift schedule or a shift change, or to delay such actions, could adversely affect employees' terms and conditions of employment, such as the employees' wages, hours, and conditions of employment. Thus, I find no merit to this argument. Fourth, the record contains ample evidence of a causal connection between her protected activities and the alleged unlawful employment actions, as reflected in Respondent's union animus through the above mentioned 8(a)(1) violations, and in its statement that it wanted get rid of the Union. In addition, the record shows that the timing of the actions against Ager and her schedule/shifts occurred immediately after engaging in union activities, which is suspect.

Thus, based on the above, I find that the General Counsel has made a prima facie showing that Ager was discriminated against on the basis of her union and protected activities. On such a showing, the burden shifts to the Respondent to demonstrate that the same action would have taken place even in the absence of the protected conduct. I find, for the reasons stated below, that the Respondent presented legitimate nondiscriminatory reasons for its actions, proving that, by a preponderance of the evidence, that the same actions would have taken place even in the absence of Ager's protected conduct.

The General Counsel is correct in asserting that the Respondent's failure to place Ager on Raehsler's schedule until over 3 months later in September is suspicious. However, as discussed above, Ijomah credibly testified at length during the Respondent's case, about how the staffing is

census driven, and she thoroughly and convincingly explained the reason for the delay in implementing the change to Raehsler's weekend shift.

The record also shows that Respondent's reasons for this delay were explained to Neff upon his expressions of concern for the delay, and neither Neff nor any other union official disputed the Respondent's explanation that was given. The General Counsel's assertion that the change in shift was finally granted suspiciously at the time the change in weekends rendered her previous requests for long weekends useless, and as such left little doubt that the delay was discriminatorily motivated, is based solely upon suspicion and conjecture, and not credible facts. As mentioned above, Ijomah's explanations with regard to the change in shifts for Ager were not refuted.

With regard to the Respondent's failure to grant Ager work on the Fourth of July shift, Ijomah credibly stated that Ager was not in the group (group A) that was scheduled to work July 4. After Fayweather informed Ager she could work that weekend, Ijomah testified that Ager was not needed. Ijomah said there were enough staff scheduled to cover the July 4 weekend based on the census, and there was not an available slot for Ager.

The General Counsel argues that the Respondent's denial of the Fourth of July shift to Ager was based on discriminatory motive because it was "suspicious," and the timing was suspect. However, the evidence fails to show that the Respondent's decision was motivated by unlawful reasons. First, the evidence shows that Ager could have been assigned to that shift when it was posted for an opening, but she did not bid on it. In this connection, Ager testified that she knew the shift was posted, but did not apply for it. However, once the posting was taken down, she decided she wanted to work it. Second, the evidence shows that when she informed the Respondent that she wanted to work it, the Respondent gave it to her. However, Ijomah testified that after she evaluated it, and determined another employee was not needed, the Respondent informed Ager that she was not needed to work it. It seems implausible that, if the Respondent intended to discriminate against Ager with regard to her schedule or shifts, it would have initially granted her request for it. In addition, if Ijomah intended to discriminate against Ager regarding her shifts, it seems she would have instructed Fayweather to initially deny any requests Ager made to change or work additional shifts or schedules, which the Respondent's managers did not do. Third, and finally, Ijomah testified that she determined she had enough staff to cover the July 4 holiday based upon the census, to which she testified at length discussed above. However, the General Counsel failed to produce any credible evidence to rebut the legitimacy of Ijomah's articulated reasons for making the decision.

The General Counsel also argues that the asserted justification for denying Ager's holiday work request (that Respondent no longer needed a full complement of CNAs to work that day), "falls flat" because Ager eventually was able to work the Fourth of July shift. I do not find this argument persuasive, as the record reflects that Ager eventually worked the July 4 weekend shift because, as Ijomah explained, Hill traded off that holiday shift and Sylvia Frederick traded onto it; and then Frederick traded off the shift and Ager traded onto it. (Tr. 895.) Ijomah testified that she did not care if Ager worked on the July 4 weekend, and the record does not show she made any attempts to intervene or prevent Ager from trading onto that Fourth of July shift.

On the basis of the above, I do not find that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to change Ager's weekend shift schedule, or by refusing to grant her a holiday shift on the Fourth of July, and I will dismiss those complaint allegations.

E. The Deferral Issue

The Respondent argues that with regard to complaint paragraphs 5(k)-(p) and 6(a)-(f), I should defer to the contractual grievance process. It argues that applying the principles of *Alpha Beta Co.*, 273 NLRB 1546, 1547 (1985), the circumstances mandate deferral by the Board to the settlements negotiated by Respondent and the Union with respect to the grievances filed by Cathi Curry, Lee Ann Ager, and Ruth Curry. Since I have not found that the discharge allegation with regard to Cathi Curry has merit, I find that deferral to her grievance settlement is not at issue. The General Counsel strongly opposes deferral to the grievance settlements, stating that the private settlements do not effectuate the purposes of the Act, nor do they adequately protect employees from retaliation by the Respondent for engaging in union and protected activities under the Act.

The Respondent asserts that Ruth Curry's grievance concerning her written discipline for spreading rumors and discussing terms and conditions of employment with employees (complaint paragraph 6(f)), was resolved by the parties at Step 1 on June 12, 2013. However, the record reflects that the settlement consisted of the Union agreeing to drop, and no longer process, the grievance.

The record shows that Ager's grievance concerning her alleged misconduct (complaint paragraph 6(b)-(d)) was settled by the Parties as well, and memorialized in a settlement agreement executed on June 12. Under the terms of the settlement, Ager was returned to work and put back on the schedule, paid for the days she was off work, and was issued a written discipline.

In *Alpha Beta*, 273 NLRB 1546 (1985), review denied 808 F.2d 1342, 1345-1346 (9th Cir. 1987), the Board held that in deciding whether to defer to a settlement agreement reached between an employer and union pursuant to their contractual grievance/arbitration machinery, it applies the principles of *Spielberg Mfg. Co.*, 112 NRLB 1080, 1082 (1995), and *Olin Corp.*, 268 NLRB 573, 573–575 (1984). In *Alpha Beta*, the Board examined whether the settlement proceedings were fair and regular; whether all parties agreed to be bound by the settlement; whether the parties considered the facts underlying the unfair labor practices; and whether the award was repugnant to the Act.

In considering the first *Alpha Beta* factor, whether the settlement proceedings were fair and regular, the settlement in Ruth Curry grievance consisted of dropping the grievance and not processing it further, which can hardly be described as fair. The settlement in Ager's grievance was entered into when she was suspended for 2 weeks, over the fact that she committed an alleged violation of a paycheck policy. It is reasonable to believe that under such circumstances, one might feel some coercion or duress and feel pressured into an agreement so she could return to work after such a long and unreasonable delay. Thus, I find the settlement proceeding were neither fair, nor regular.

In considering the second *Alpha Beta* factor, whether all parties agreed to be bound by the settlement, the record shows that the Parties had agreed to be bound, and this factor weighs towards deferring to the settlements.

In considering the third *Alpha Beta* factor, whether the parties considered the facts underlying the unfair labor practices, the evidence shows that the parties did not consider them. None of the unfair labor practices Respondent committed with Ruth Curry would be remedied and many of the violations committed with Ager would be left unremedied. I find this factor does not weigh in favor or deferral.

In considering the fourth and final *Alpha Beta* factor, whether the award was repugnant to the Act, the record reveals, and I find, that the results of deferring to the settlements for Ruth Curry and Ager, would be repugnant to the Act. Ruth Curry's grievance settlement provides no remedy for the unfair labor practices. I also note that Ager's settlement does not provide a remedy for the written verbal warning/discipline she was issued on the unlawful basis of her union and protected activities. In addition, Ruth Curry's discipline and Ager's written verbal warning would not be removed from their personnel files, and they could still be used against them as the basis for further disciplinary actions. In addition, there would be no Notice posting, notifying employees of their rights under the Act and reflecting that the Respondent will cease and desist from committing unfair labor practice, and affirmatively remedy the unfair labor practices it has been found to have committed. Thus, this final factor does not weigh in favor of deferral.

In evaluating the *Alpha Beta* factors, I find that three factors weigh against deferral, while only one factor weighs in favor of deferral. Thus, under an *Alpha Beta* analysis, deferral is not appropriate. In addition, I find that the settlements for Ruth Curry and Ager in this case are clearly repugnant to the Act, and palpably wrong. Accordingly, I will not defer to the private settlements as such agreements are not appropriate as substitutes for the Board's well-established remedial processes.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Food and Commercial Workers Local 1189 is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by:

(a) Threatening or coercively informing an employee on or about April 8, 2013, that it wanted to remove or get rid of the Union and the older employees from the facility;

(b) Threatening or coercively informing an employee in the beginning of May 2013, that it wanted to get rid of the Union and the older employees.

(c) Unlawfully interrogating an employee in or around May 2013, regarding the employee's union and/or protected concerted activities, including discussions with other employees about terms and conditions of employment, even if they can be described as rumors;

(d) Coercively requesting or demanding in or around May 2013, that an employee identify other employees who have engaged in discussions regarding terms and conditions of employment, even if those discussions can be described as rumors;

(e) Unlawfully creating the impression in or around May 2013, that employees' union and/or protected concerted activities, such as discussing terms and conditions of employment with employees, are under surveillance;

(f) Threatening to file harassment charges in or around May 2013, against an employee for engaging in union and protected concerted activities, such as discussing terms and conditions of employment with other employees, even if they are in the form of rumors;

(g) Threatening or coercively directing an employee in or around May 2013, not to speak to other employees about employees' terms and conditions of employment, or other union and/or protected concerted activities;

(h) Unlawfully interrogating an employee on or about June 5, 2013, regarding the employee's union and/or protected concerted activities, including discussions with other employees about terms and conditions of employment, even if they can be described as rumors;

(i) Unlawfully creating the impression about June 5, 2013, that employees' union and/or protected concerted activities, such as discussing terms and conditions of employment with employees, are under surveillance;

(j) Threatening or coercively directing an employee on or about June 5, 2013, not to speak to other employees about employees' terms and conditions of employment, or other union and/or protected concerted activities;

(k) Threatening to terminate an employee on or about June 5, 2013, for discussing terms and conditions of employment with other employees, or for engaging in union and/or protected concerted activities;

(l) Unlawfully denying the request of an employee in or around May and on or about June 5, 2013, for union representation during the course of an interview conducted by it, under circumstances in which, at the time of the request, the employee had reasonable grounds for fearing that the interview might result in discipline;

(m) Coercively informing an employee that it could call the police because she engaged in union and/or protected concerted activities.

(n) Coercively and falsely informing an employee, on or about June 3, 2013, that it had issued that employee a verbal warning based on the employee's union and/or protected concerted activities.

4. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act by:

(a) Issuing employee Ruth Curry a written "verbal" warning on or about June 6, 2013, in retaliation for discussing terms and conditions of employment, such as what she heard at the facility, or for her union and/or protected concerted activities;

(b) Investigating, suspending, and extending the suspension for employee Lee Ann Ager on or about May 31, 2013, in retaliation for her union and/or protected concerted activities;

(c) Banning Lee Ann Ager from its facility on or about June 3, 2013, and continuing days thereafter, in retaliation for her union and/or protected concerted activities;

(d) Issuing Lee Ann Ager a written discipline on or about June 12, 2013, in retaliation for her union and/or protected concerted activities;

5. The above unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

6. The Respondent has not otherwise violated the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. In particular, I recommend that the Respondent make Lee Ann Ager whole for any losses in earnings and other benefits suffered as a result of the unlawful suspension and discipline imposed on her.[39] 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).

Respondent shall file a report with the Social Security Administration allocating backpay, if any, to the appropriate calendar quarters. Respondent shall also compensate the discriminate

[39] The record reveals that Ager was alleged to have been made whole for the days she was unlawfully suspended, pursuant to the settlement of her grievance. The Respondent is required to provide compensation only to the extent, if any, that Ager's losses based on the unlawful discipline exceed those for which she has already been compensated.

for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering the periods longer than 1 year, *Latino Express, Inc*., 359 NLRB No. 44 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[40]

ORDER

The Respondent, River Falls Healthcare, LLC, d/b/a Kinnic Health and Rehab, River Falls, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening or coercively informing employees that it wants to remove or get rid of the Union and the older employees at its facility.

(b) Unlawfully interrogating employees regarding their union and/or protected concerted activities, including their discussions with other employees about terms and conditions of employment, even if they can be described as rumors.

(c) Coercively requesting or demanding that employees identify other employees who have engaged in discussions regarding terms and conditions of employment, even those discussion can be described as rumors.

(d) Unlawfully creating the impression that employees' union and/or protected concerted activities, such as discussing terms and conditions of employment with employees, are under surveillance.

(e) Threatening to file harassment charges against employees for engaging in union and/or protected concerted activities, such as discussing terms and conditions of employment with other employees, even if they are in the form of rumors.

(f) Threatening or coercively directing employees not to speak to other employees about employees' terms and conditions of employment, or other union and/or protected concerted activities.

(g) Threatening to terminate employees for discussing terms and conditions of employment with other employees, or for engaging in union and/or protected concerted activities.

(h) Unlawfully denying the requests of employees for union representation during the course of interviews conducted by it, under circumstances in which, at the time of the

[40] 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.

request, the employees have reasonable grounds for fearing that the interview might result in discipline.

(i) Coercively informing employees that it could call the police because they have engaged in union and/or protected concerted activities.

(j) Coercively and falsely informing employees that it had issued verbal warnings based on the employees' union and/or protected concerted activities.

(k) Issuing employees written "verbal" warnings for discussing terms and conditions of employment, such as what they have heard at the facility, or for engaging in other union and/or protected concerted activities.

(l) Investigating, suspending, extending the suspensions, issuing written discipline, or banning employees from its facility, in retaliation for engaging in union and/or protected concerted activities.

(m) 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) Make Lee Ann Ager whole for any loss of earnings, if any, and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

(b) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discipline in the form of a written "verbal" warning issued to Ruth Curry, and the unlawful suspension and written discipline issued to Lee Ann Ager, and within 3 days thereafter notify those employees in writing that this has been done, and that the disciplines will not be used against them in any way.

(c) 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.

(d) Within 14 days after service by the Region, post at its facility in River Falls, Wisconsin, copies of the attached notice marked "Appendix."[41] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the

41 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."

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 April 8, 2013.

(e) 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.

(f) IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. July 7, 2014

_____
Thomas M. Randazzo
Administrative Law Judge

APPENDIX A

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 a representative to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT threaten or coercively inform you that we want to remove or get rid of the Union and the older employees at our facility.

WE WILL NOT unlawfully interrogate you about your union and/or protected concerted activities, including interrogating you about your discussions with employees about terms and conditions of employment, even if they are rumors.

WE WILL NOT coercively request or demand that you identify or provide the names of employees who have engaged in discussions with you or other employees regarding terms and conditions of employment, even if they are rumors.

WE WILL NOT create the impression that your union and/or protected concerted activities, such as discussing terms and conditions of employment with employees, are under surveillance.

WE WILL NOT threaten to file harassment charges against you for engaging in union and/or protected concerted activities, such as discussing terms and conditions of employment with employees, even if they are in the form of rumors.

WE WILL NOT direct or tell you not to speak to other employees about your terms and conditions of employment, or other union and/or protected concerted activity.

WE WILL NOT threaten to terminate or discharge you for discussing terms and conditions of employment with other employees, or for engaging in any union and/or protected concerted activities.

WE WILL NOT deny your requests for union representation during the course of interviews we conduct, when at that time, you have reasonable grounds for fearing that the interview might result in discipline.

WE WILL NOT coercively inform you that we could call the police because you engage in union and/or protected concerted activities.

WE WILL NOT falsely inform you that you have been issued verbal warnings based upon your union and/or protected concerted activities.

WE WILL NOT issue you written "verbal" warnings for discussing terms and conditions of employment, such as what you heard at our facility, or for engaging in other union and/or protected concerted activities.

WE WILL NOT investigate you, suspend you, extend your suspension, issue you written discipline, or ban you from our facility, in retaliation for engaging in union and/or protected concerted activities.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL remove from our files all reference to the May 31, 2013 suspension of Lee Ann Ager and the subsequent written discipline, and WE WILL notify her in writing within 5 days that this has been done and that the suspension and discipline will not be used against her in any way.

WE WILL, to the extent we have not already done so, make whole Lee Ann Ager for the wages and other benefits she lost due to her suspension and discipline.

WE WILL remove from our files all reference to the June 6, 2013 written "verbal" discipline issued to Ruth Curry, and WE WILL notify her in writing within five days that this has been done and that the discipline will not be used against her in any way

RIVER FALLS HEALTHCARE, LLC d/b/a
KINNIC HEALTH AND REHAB
(Employer)

Dated: _____ By:_____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Towle Building, Suite 790, 330 Second Avenue South, Minneapolis, MN 55401-2221
(612) 348-1757, Hours: 8 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/18-CA-106165 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (612) 348-1770.