

**Aroostook County Regional Ophthalmology Center
and Jacquelyn Shepard and Sheila Lamoreau.**
Cases 1-CA-29433 and 1-CA-29434

April 28, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND COHEN

On November 22, 1993, Administrative Law Judge Stephen J. Gross issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions and a supporting brief. The Respondent and the General Counsel also filed answering briefs.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions¹ only to the extent consistent with this Decision and Order.

The issues we address in this decision are whether the Respondent violated Section 8(a)(1) of the Act by maintaining a rule that prohibited employees from discussing grievances within "earshot of patients," and by discharging employees Buck, Lamoreau, Shepard, and James because of their protected concerted activity. Contrary to the judge, we find that the Respondent violated the Act in both instances.

1. *The rule prohibiting the discussion of grievances.* The judge found, and we agree, that the rule in the Respondent's Office Policy Manual requiring all grievances to be discussed in private with the office manager or physicians can reasonably be read as forbidding employees from engaging in the protected activity of discussing with one another grievances against the Respondent with a view to pursuing concerted action. We disagree, however, with his finding that the second part of the rule, prohibiting employees from discussing "any grievances within earshot of patients," lawfully may be maintained by the Respondent. We conclude that the Respondent's rule, which has no limitations as to time or place, is an overly broad restriction of the employees' statutory right to engage in protected concerted activity.

The Board, with Supreme Court approval, has established special rules concerning restrictions on the exer-

¹ The Board adopts the judge's conclusions that the Respondent violated Sec. 8(a)(1) by promulgating and maintaining rules prohibiting its employees from communicating about their terms and conditions of employment with fellow employees, family members, or friends and by conditioning the reinstatement of four discharged employees on their agreement to bring complaints only to the owner and president of the Respondent and to stop complaining among themselves.

cise of Section 7 rights in health care institutions.² These rules require striking a balance between employees' statutory rights and the needs of the health care employer to provide undisrupted patient care in a tranquil atmosphere. Thus, the Board has held that health care facilities may prohibit solicitation in immediate patient care areas. The Board found that in such areas as patients' rooms, operating rooms, and places where patients receive treatment, solicitation might be unsettling to patients who need quiet and peace of mind. The Board concluded that in such circumstances, the balance must be struck against employee rights. With respect to areas other than those involved in immediate patient care, however, such as cafeterias and lounges to which patients have access, the Board held that solicitation must be permitted in the absence of a showing that disruption to patient care would necessarily occur if solicitation were allowed in those areas. The Board concluded that the balance should be struck against the health care employer's interests in such cases: "On balance, the interests of patients well enough to frequent such areas do not outweigh those of the employees to discuss or solicit union representation."³

Applying these rules to the Respondent's prohibition of employee discussion of grievances "within earshot of patients,"⁴ we find that the Respondent's prohibition does not strike a proper balance. The restriction on discussion of grievances has no limitation as to time or place. If a patient can hear the grievance discussion, the employees are in violation of the Respondent's rule, regardless of when or where the discussion takes place. It may reasonably be inferred that the wide reach of the Respondent's rule discourages employees from any discussion of grievances for fear that a patient may overhear the discussion. Thus, the Respondent's rule may be construed as making no accommodation for employees' exercise of statutory rights.

Further, the Respondent has made no showing that disruption of its patient care would necessarily occur if grievances were overheard by patients in certain circumstances. At best, the Respondent has shown that all its patients have some malady and that most of them are elderly. In this regard, the Respondent's operation

² *NLRB v. Baptist Hospital*, 442 U.S. 773 (1979); *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978); and *St. John's Hospital*, 222 NLRB 1150 (1976).

³ *St. John's Hospital*, 222 NLRB at 1151.

⁴ The *St. John's Hospital* line of cases involved rules restricting employee communication in the forms of solicitation and distribution of literature. The Board's reasoning in those cases applies with equal force here, where the protected communication concerns grievances regarding wages, hours, and conditions of work. Cf. *Vanguard Tours*, 300 NLRB 250 (1990), in which the Board approved the administrative law judge's application of no-solicitation rules to the employer's rule prohibiting employee discussion of wages, hours, and working conditions.

is not significantly different from the acute care facilities involved in the *St. John's Hospital* line of cases. The Respondent has shown no reason why it should be permitted to have more restrictive rules than those facilities.

Accordingly, we find that the Respondent's rule against discussing grievances within earshot of patients violates Section 8(a)(1) insofar as it is not restricted to immediate patient care areas. In making this determination, we emphasize that we do not bar the Respondent from establishing rules to ensure the peaceful, uninterrupted delivery of patient care. As the Supreme Court recognized in *Beth Israel Hospital*, "the importance of the employer's interest in protecting patients from disturbance cannot be gainsaid."⁵ Instead, we require that the Respondent's rules governing employees' conduct allow for an adequate balance between the need to deliver patient care and the rights of employees to engage in protected concerted activity. By failing to place any limitations on the rule against discussing grievances, the Respondent has foreclosed the striking of such a balance.

2. *The discharges of employees Buck, Lamoreau, Shepard, and James.* On May 28, 1992,⁶ nurses Buck, Lamoreau, and Shepard and ophthalmic technician James complained to at least one other employee about the Respondent's announcement of a change in their schedule for the following day. On May 29, the Respondent's owner and president, Craig Young, acting on reports of these complaints, called the four employees to his office and terminated them. Young then immediately offered to reinstate the four employees if they would agree, inter alia, to stop "gossiping and complaining" to one another and to bring any complaint they had to him alone. The judge concluded that the May 28 activity of the four was neither concerted nor protected and that the Respondent, therefore, did not violate the Act by terminating them. The judge also found, however, that the Respondent's conditions for their reinstatement were unlawful. We agree with the judge's finding that the conditions for reinstatement were unlawful. Contrary to the judge, however, we also find that the termination of the four employees was unlawful.

The facts, as more fully set forth in the judge's decision, are as follows. On May 28, the Respondent learned that a patient needed to be scheduled for emergency surgery the following day. The May 29 schedule had to be changed to accommodate the emergency. Buck, Lamoreau, Shepard, and James were required to go to a different satellite office than the one originally assigned to them.

After learning of the schedule change, Buck complained loudly about the change to employee Cormier

in the recovery room in the presence of two or three patients. Shortly afterward, Buck saw Lamoreau in the hall outside the recovery room and spoke to her about the schedule change. They complained to each other, at normal speaking volume, about the change for May 29 and about the way the Respondent changed their schedules on short notice.

After speaking with Buck, Lamoreau returned to the operating room and began to talk about the schedule change with ophthalmologist Lindahl, an employee of the Respondent. Lamoreau spoke in a normal, but exasperated tone. Lamoreau's conversation with Lindahl took place about 3 feet from the patient being prepared for surgery. Employee Smith, who was also in the room, told Lamoreau to "shush" and said that Lamoreau's remarks were inappropriate in the circumstances. All talk ceased.

Rebecca Palmer, the Respondent's scheduling coordinator and receptionist, informed Shepard about the schedule change in the waiting room. Shepard complained about the change in an angry tone of voice at normal volume. James then entered the waiting room. Shepard informed James of the change and James responded, "what?" or "why?" in a tone of voice reflecting that she was surprised and upset. A patient was sitting in the waiting room during these exchanges.

After office hours on May 28, employees Cormier, Smith, and Paler reported, each on the heels of the next, to Young about Buck, Lamoreau, Shepard, and James' responses to the schedule change. According to Young's testimony, he was upset by these reports and decided that he would fire all four complaining employees and then offer to reinstate them if they would agree to certain conditions such as not complaining to one another, and bring all complaints directly to Young. He admitted that he devised the termination and conditioned reinstatement sequence as a "power play." Young stated that the four employees were his "right hand people." He testified that "[w]ithout them, our ability to see patients would be cut in half, had they gone. So doing this was a drastic maneuver, but I felt it was important, it had to be done, because the, the organization was being destroyed."

On the morning of May 29, Young met with Buck, Lamoreau, Shepard, and James and carried out his plan. Using a written agenda, Young told the employees that he was dissatisfied with their behavior over the last year. He spoke of their complaints about work schedules, clinic assignments, cliques, and the like. He described the previous owner's attempt to deal with these complaints in the past year through team meetings as "failing miserably." Young said that their conduct on May 28, which had been overheard by patients, including "the biggest gossip in town," was "the last straw." He said, "on top of this, there have

⁵ 437 U.S. at 505.

⁶ All subsequent dates are in 1992.

been rumblings about the absence of raises in 1992; remarks have been made, no raise no work.” Chastising the four employees for their “lack of judgment, gratitude and loyalty,” Young informed them that they were fired. When James asked if there was anything they could do to get their jobs back, Young said, “Here are the ground rules, take them or leave them.” Young then set out the conditions for reinstatement that included bringing complaints only to him and not discussing them with other employees or physicians. Young ended by telling the employees: “This is a power play.”

The judge found that the May 28 conduct of the four employees did not fall within Section 7 of the Act for two reasons. First, the conduct was not concerted because it involved only talk about schedule changes with nothing to suggest that the employees had the object of initiating group action. Although the judge acknowledged that the Board has held that employee talk about wages, without evidence of intent to engage in group action, is concerted action, he concluded that those cases did not apply here, where the talk was about schedule changes rather than wage levels. Second, the judge found that even if the May 28 conduct were concerted, it was not protected because the employees had voiced their complaints in the presence of patients against the Respondent’s rules. The judge also found that although Young would not have fired the four employees on May 29 had he not already been unhappy about their pre-May 28 conduct, there was insufficient evidence of the context of this earlier conduct to support a finding that it was a reason for termination of the four employees.

We disagree with each aspect of the judge’s analysis.⁷ Initially, we find that the judge erred in finding that the employees’ discussions about schedule changes were not concerted because there was no suggestion that they had the object of initiating group action. We find that the employees’ discussions here are similar to the wage discussions held protected and concerted in *Trayco of S.C.*⁸ and the other cases cited by the judge. Those cases hold that discussion of wages is protected concerted activity because wages are a

⁷ Member Cohen does not pass on the issue of whether the May 28 activity of the employees, in the operating and recovery rooms, was protected activity. In this regard, he notes that these employees would have been terminated in any event for protected activity engaged in prior to May 28. Thus, the terminations were unlawful without regard to whether the May 28 activity was protected. Further, even if the terminations were lawful, the Respondent immediately agreed to reinstate the employees, subject to the unlawful condition that they refrain from complaining to each other about working conditions. Thus, but for this unlawful condition, the employees would have been permitted to continue their employment. Accordingly, a reinstatement and backpay remedy would be appropriate for this violation.

⁸ 297 NLRB 630 (1990).

“vital term and condition of employment,”⁹ “probably the most critical element in employment,”¹⁰ and “the grist on which concerted activity feeds.”¹¹ Changes in work schedules involve when and where employees will work. They are directly linked to hours and conditions of work—both vital elements of employment—and are as likely to spawn collective action as the discussion of wages. Moreover, the minutes from the team meetings held during the previous year show that the Respondent’s employees had expressly identified schedule changes as an important issue concerning their working conditions. In such circumstances, we conclude that the employees’ complaints to each other about the schedule changes constitute protected concerted activity.¹²

Contrary to the judge, we further conclude that Buck, Lamoreau, and Shepard did not lose the protection of the Act because they voiced their complaints in the presence of patients. The judge’s reasoning for his finding was that the Respondent had a valid rule against discussing grievances within earshot of patients. For the reasons discussed earlier in this decision, we have found this rule to be invalid. It cannot, therefore, be a ground for removing from protection activity that is otherwise protected by Section 7 of the Act.

Nor do we find the conduct of the four employees so egregious as to compel a finding that it otherwise lost the protection of the Act. The Board has long held that in the context of protected concerted activity by employees, a certain degree of leeway is allowed in terms of the manner in which they conduct themselves.¹³ Although flagrant, opprobrious conduct may sometimes cause an employee’s concerted activity to lose the protection of the Act,¹⁴ impropriety alone does not strip concerted conduct of statutory protection.¹⁵ Here, the employees engaged only in verbal conduct.

⁹ *Scientific-Atlanta, Inc.*, 278 NLRB 622, 624 (1986), quoting *Tirana Industries*, 245 NLRB 1258 (1979).

¹⁰ 278 NLRB at 625.

¹¹ *Id.*, quoting *Jeanette Corp. v. NLRB*, 532 F.2d 916, 919 (3d Cir. 1976).

¹² In agreeing that the employee activity in issue here was concerted within the meaning of the Act, Chairman Gould and Member Browning decline to rely on, and question the continuing vitality of *Meyers Industries*, 268 NLRB 493 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), reaffd. 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

¹³ *Health Care Corp.*, 306 NLRB 63, 65 (1992).

¹⁴ See, e.g., *Paper Board Cases*, 292 NLRB 995 (1989) (employee made serious threats to put gun to head of another employee); and *Chrysler Corp.*, 249 NLRB 1102 (1980) (employee who was union steward persisted, contrary to orders, in following a foreman around the shop floor while engaging in loud and abusive conduct).

¹⁵ See, e.g., *Health Care Corp.*, supra (employee demeanor during meeting with employer involved “body language,” rolling of the eyes, and facial expressions); and *Severance Tool Industries*, 301 NLRB 1166 (1991) (disrespectful, rude, and defiant behavior toward a management representative as well as use of a vulgar word).

Their language was not abusive. At worst, the employees spoke in the presence of patients in a loud volume with a tone of voice that conveyed their distress and exasperation. This conduct is not so flagrant or egregious as to warrant a loss of statutory protection.

Having found that the complaints made by the four employees on May 28 were concerted protected activity, we turn to the question whether the Respondent terminated the employees because of their May 28 and pre-May 28 protected concerted activity. We find that Young's testimony, considered together with the conditions he placed on reinstatement, establishes that the termination of Buck, Lamoreau, Shepard, and James was motivated by their protected concerted activities both on and before May 28. We further find that the Respondent has not shown that it would have terminated the four employees even in the absence of their protected concerted activity.

Young's testimony makes clear that his reasons for terminating the four employees were rooted in their conduct over an 18-month period. On direct examination, he stated: "I was experiencing utter frustration over the behavior that had been exhibited over the previous extended period of time, I think I said 12 to 18 months. I referred to specific instances of bitching, and I think I used that word, between employees." On cross-examination, Young acknowledged that he was referring to "complaints about most everything, work schedules, clinic assignments, cliques, which doctor you're assigned to, being overworked, underpaid, and job description." Young told the employees that Dr. Martin had set up the team structure to deal with these problems but Young described the team approach as "failing miserably." Young went on to tell each employee how appalled he was by their conduct on May 28. He referred to that conduct as unprofessional, and a continuation of the behavior that had been going on for a year. With regard to patients overhearing their complaints, Young stated that "quibbling over anything" was the last thing patients needed to hear, "especially unrest among the employees as to the way a practice is managed." In closing, Young told the employees that on top of all this, there had been "rumblings about the absence of raises in 1992, remarks have been made no raise, no work." He told the employees that he could not believe "the lack of judgment, gratitude and loyalty" they had shown and that he was not going to tolerate it any longer. Young informed the employees that they were fired.

Young's testimony shows that his overriding concern about the employees' behavior was their continued complaints about working conditions—complaints which amounted to unrest among the employees about how the practice was managed. To be sure, Young also expressed genuine concerns about the impact of the employees' conduct on the patients, but his testimony

shows that concern for the well-being of patients was not the driving force behind his frustration with the employees. The well-being of the practice he had taken over was the central focus of his attention. The "problems" that Young identified were not confined to employees' interaction with patients. On the contrary, the problems involved complaints about work schedules, job descriptions, assignments to doctors, and the amounts of work and pay. Any doubt that the central motivation for the termination was to silence employee complaints about working conditions is dispelled by Young's concluding remarks in his termination speech. Again, he made no reference to interaction with patients. Instead, he referred to rumblings among employees about the absence of raises in the past year and remarks about "no raise, no work." Young told the employees that they had shown an unbelievable lack of judgment, gratitude, and loyalty. The clear import of these remarks is that Young feared that all the complaints and unrest about working conditions would culminate in a work stoppage—the ultimate demonstration of lack of gratitude and loyalty.¹⁶

Young's conditions for reinstatement of the four employees further establish that the motivating factor for the terminations was the employees' protected concerted activity. Immediately after firing the four employees, Young told them they could have their jobs back if they agreed not to complain to the other two doctors, who were also employees, not to gossip or complain among themselves, and to bring complaints to Young alone. These conditions reveal the types of employee conduct which weighed heaviest in the Respondent's decision to terminate the four employees. Only if this conduct were abandoned, would the Respondent allow the employees to return to their jobs.

Each condition for reinstatement was directed against concerted activity. Each, as the judge found, "obviously" violated Section 8(a)(1). We find that these conditions for reinstatement make it equally obvious that the Respondent's decision to terminate the four employees was driven by the desire to end their protected concerted activity—to make certain that their complaints to each other and to other employees did not result in such serious action as a work stoppage.

We further find that the Respondent has not shown that it would have terminated the four employees even

¹⁶In this regard, we disagree with the judge's finding that it is not possible to discern from the record that the remarks about "no raise, no work" referred to protected concerted activity. The plain meaning of the words suggests group action over wages. Young supplied the context for these words by placing them in the litany of other employee complaints about working conditions. In his view, the rumblings about no raise, no work were one more example of the behavior that caused such frustration for him.

in the absence of their protected activity.¹⁷ Young criticized the employees' unprofessional conduct toward one another and their voicing of complaints in the presence of patients in the operating and recovery rooms. There is no reason to doubt that these were matters of genuine concern to Young. The overall thrust of Young's termination remarks and the unlawful conditions he imposed for reinstatement, however, indicate that Young would not have terminated these employees solely on the basis of their May 28 complaints in the presence of patients. As discussed above, the focus of Young's remarks was on the employees' complaints about terms and conditions of employment over a 12- to 18-month period. Young admitted that he devised the termination and conditioned reinstatement sequence as a "power play" to get the employees to "play by the rules." Young stated that the four employees were his "right hand people." He testified that "without them, our ability to see patients would be cut in half, had they gone. So doing this was a drastic maneuver, but I felt it was important, it had to be done, because the, the organization was being destroyed." Young's conditions for reinstatement show that his major fears about the destruction of his practice centered on the employees interacting with each other on matters of scheduling, raises, and conditions of employment. Reviewing Young's testimony as a whole, we conclude that although he expressed true concerns about the employees' conduct toward patients, those concerns, alone, would not have led him to engage in such a drastic maneuver. It was the continuing concerted complaints about working conditions and the rumblings about a work stoppage that drove him to such desperate measures.

Accordingly, we conclude that the Respondent violated Section 8(a)(1) by terminating employees Buck, Lamoreau, Shepard, and James.

ORDER

The National Labor Relations Board orders that the Respondent, Aroostook County Regional Ophthalmology Center (ACROC), Presque, Maine, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating and maintaining unlawful rules prohibiting its employees from communicating about their terms and conditions of employment at ACROC with fellow employees, family members, or friends, within the hearing of patients.

(b) Discharging employees because they exercised the rights guaranteed to them by Section 7 of the Act.

(c) Failing to reemploy any discharged employee because the employee refuses to agree to abide by rules

¹⁷ *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981).

that purport to restrict the rights granted to employees by Section 7 of the Act.

(d) 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) Offer Jacquelyn Shepard and Sheila Lamoreau immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the Respondent's action against them in the manner set forth in the remedy section of the administrative law judge's decision.

(b) Make whole Susan Buck and Gayle James for any loss of earnings and other benefits suffered by them as a result of the Respondent's action against them in the manner set forth in the remedy section of the administrative law judge's decision.

(c) Remove from its files any reference to the unlawful discharges of Jacquelyn Shepard, Sheila Lamoreau, Susan Buck, and Gayle James and notify the employees in writing that this has been done and that the discharges will not be used against them, in any way.

(d) Rescind the following provisions of the Respondent's Office Policy Manual:

No office business is a matter for discussion with spouses, families or friends.

All grievances are to be discussed in private with the office manager or physicians. It is totally unacceptable for an employee to discuss any grievances within earshot of patients.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its facility in Presque, Maine, and in those of its other offices in which the Respondent customarily posts notices to employees copies of the attached notice marked "Appendix."¹⁷ Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including

¹⁷ 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."

all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT promulgate or maintain unlawful rules prohibiting you from communicating with fellow employees, family members, or friends about your terms and conditions of employment within the hearing of patients.

WE WILL NOT discharge you because you exercised rights guaranteed to you by Section 7 of the Act.

WE WILL NOT fail to reemploy any discharged employee because the employee refuses to agree to abide by rules that purport to restrict the rights guaranteed to employees by Section 7 of the Act.

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

WE WILL offer Jacquelyn Shepard and Sheila Lamoreau immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL make whole Susan Buck and Gayle James for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL notify Jacquelyn Shepard, Sheila Lamoreau, Susan Buck, and Gayle James that we have

removed from our files any reference to their discharge and that the discharge will not be used against them in any way.

WE WILL rescind the following provisions in our Office Policy Manual:

No office business is a matter for discussion with spouses, families or friends.

All grievances are to be discussed in private with the office manager or physicians. It is totally unacceptable for an employee to discuss any grievance within earshot of patients.

AROOSTOOK COUNTY REGIONAL OPHTHALMOLOGY CENTER

Kathleen F. McCarthy, Esq., for the General Counsel.
Linda D. McGill, Esq. (Moon, Moss, McGill & Bachelder), of Portland, Maine, for the Respondent.

DECISION

STATEMENT OF THE CASE

STEPHEN J. GROSS, Administrative Law Judge. Craig Young is the owner and president of the Respondent, Aroostook County Regional Ophthalmology Center (ACROC). In May 1992, Young fired four employees. He then offered to reemploy each of them if, but only if, each accepted certain conditions that he then specified.

The General Counsel contends that (1) two ACROC rules governing employee behavior violate Section 8(a)(1) of the National Labor Relations Act (the Act); (2) Young fired the four employees because of the employees' protected activity and because the employees' behavior conflicted with the two unlawful ACROC rules; and (3) the conditions that Young set for reemployment violated Section 8(a)(1) of the Act.¹

ACROC admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Board accordingly has jurisdiction over this matter. But ACROC denies that it violated the Act in any respect.

I. ACROC'S OPERATIONS AND FACILITIES

Young is a physician. More particularly, he is an ophthalmologist. He and several other physicians whom ACROC employs perform eye surgery (dealing with cataracts and retinal problems, for example) and provide other kinds of treatment for people suffering maladies of the eye. Most of ACROC's patients are elderly.

ACROC's main facility is in Presque Isle, Maine. All the surgery performed by ACROC's physicians is done either in the "ambulatory surgery center" of ACROC's Presque Isle facility or, if general anesthesia is needed, in a hospital in Presque Isle.

¹ Shepard and Lamoreau filed their unfair labor practice charges on June 4, 1992. They subsequently amended the charges on July 16. The consolidated complaint issued on July 17, 1992, and was amended at the hearing. I held the hearing in Presque Isle, Maine, on March 17 and 18, 1992. The General Counsel and ACROC filed posthearing briefs.

ACROC has additional facilities elsewhere in northern Maine. During the relevant period—mid-1992—these “satellite” offices were in Millinocket, Houlton, and Madawaska. (All of the events to which I refer in this decision took place in 1992.) ACROC operates each of the satellite offices only a relatively few days per month. On such days ACROC personnel travel from the Presque Isle area in the morning and return to Presque Isle in the evening.

ACROC’s employees are not represented by a union.

II. DO ANY OF ACROC’S RULES VIOLATE THE ACT?

ACROC has an “Office Policy Manual” (the OPM). As Young put it, the OPM is “the working Bible of the practice” at ACROC, it is “the guideline by which all employees are expected to perform and behave.” Every ACROC employee gets a copy. “Nearly yearly” Young and all of ACROC’s employees “sit down and hammer it out, page by page.”

The General Counsel contends that two of the OPM’s provisions violate the Act.

One of the provisions at issue reads:

No office business is a matter for discussion with spouses, families or friends.

Ordinarily “office business” may reasonably be interpreted to include employees’ terms of employment. Because employees have the right to seek the assistance of, among others, “spouses, families or friends” on matters pertaining to their terms of employment, the provision is, *prima facie*, a violation of Section 8(a)(1) of the Act. E.g., *Kinder-Care Learning Centers*, 299 NLRB 1171 (1990); *Pontiac Osteopathic Hospital*, 284 NLRB 442, 465–466 (1987); *The Loft*, 277 NLRB 1444 (1986); *Enterprise Products*, 265 NLRB 544, 553 (1982).

ACROC contends that, in context, it is evident that the provision relates only to information about patients. And I will assume, for argument’s sake, that the provision would be an appropriate one if it read: “No information about patients is a matter for discussion with spouses, family or friends.”

It is true that the provision follows a long paragraph about the need to keep confidential information about patients. But the heading of the relevant part of the OPM (sec. B, pt. II) is called “confidentiality”—not “patient confidentiality” and the provision of concern to us is in a paragraph separate from the discussion about patient information.

As a result it is at least ambiguous whether the “no office business” provision is intended to be limited to matters of patient information. And “[w]here ambiguities appear in employee work rules promulgated by an employer, the ambiguity must be resolved against the promulgator rather than [against] the employees who are required to obey it.” *Norris/O’Bannon*, 307 NLRB 1236 (1992).

Young testified that ACROC has not applied the provision to restrict discussions about terms of employment among employees. But the question here does not concern intraemployee discussion. It is whether employees would reasonably read the provision as restricting their ability to seek support from their families and from the community should they have a dispute with ACROC about any terms or conditions of employment. In any case “[a]s long as the rule re-

mained in existence, and as long as the Respondent failed to notify employees of its revocation or rescission, the possibility of its application against employees engaged in protected activities” would tend to interfere with the expression by ACROC’s employees of their Section 7 rights. *The Loft*, supra, 277 NLRB at 1461.

I conclude that the provision does tend to restrict employees from engaging in activity the Act protects and that, by maintaining the provision, ACROC violated Section 8(a)(1).

The second provision at issue is two sentences long. It reads:

All grievances are to be discussed in private with the office manager or physicians. It is totally unacceptable for an employee to discuss any grievances within earshot of patients.

Let us first consider the second sentence.

As touched on earlier, ACROC treats people who need eye surgery or who have maladies of the eye. No one goes to ACROC to be fitted for glasses or for a routine eye examination. All ACROC patients, that is, are ill. And almost all are elderly. Under these circumstances, it seems to me, it is in the best interest of ACROC’s patients for ACROC’s employees always to discuss their grievances out of earshot of patients. Concomitantly, at all of ACROC’s offices there are rooms in which intrastaff discussions can be held out of all patients’ hearing. I conclude, therefore, that ACROC can lawfully maintain a rule prohibiting employees from discussing grievances “within earshot of patients.” Cf. *NLRB v. Baptist Hospital*, 442 U.S. 773 (1979); *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 505 (1978); *Presbyterian St. Luke’s Medical Center*, 258 NLRB 93, 98 (1981).

But what about the first sentence, the one that reads: “All grievances are to be discussed in private with the office manager or physicians.”

To begin with, I appreciate that there are appropriate, entirely lawful, reasons why Young would want to encourage employees to bring their grievances directly to someone in management.

Secondly, the sentence does not mean what it says. Young handles employee grievances, not ACROC’s “office manager” (who is ACROC’s bookkeeper). And, as we shall see, Young specifically forbade four employees from discussing their grievances with any physician except Young.

For all of that, the sentence can reasonably be read as forbidding employees from engaging in the protected activity of discussing with one another, with a view to pursuing concerted action, grievances they have with ACROC.

Again, we must consider the sentence’s context in that it is immediately followed by the sentence about not discussing grievances “within earshot of patients.” But if the only point of the first sentence is to remind employees not to discuss grievances when they are near patients, then the sentence would not be needed at all. (The second sentence handles that concern.) Thus the context virtually compels the conclusion that the first sentence is intended to restrict employees in terms of with whom they may discuss their grievances.

ACROC contends that it is not the intent of the sentence to limit intraemployee discussions. ACROC further contends that employees know very well that they are permitted to discuss among themselves issues concerning their terms and conditions of employment. In fact, for a considerable period

ACROC maintained a “team” system by which employees were encouraged to do so.

For two reasons, however, I conclude that those contentions are not persuasive. The first is that the evidence shows that Young did indeed want to limit (or eliminate) the discussion of grievances among employees. Thus (as will be discussed below), when Young fired four employees in May 1992, one of the reasons he gave to those employees for his action was that they complained to one another about conditions at ACROC. Second, ACROC failed to show that all its employees did understand that the sentence did not prohibit them from discussing with other employees their concerns about their terms and conditions of employment. I thus conclude that by maintaining the following rule, ACROC violated Section 8(a)(1) of the Act: “All grievances are to be discussed in private with the office manager or physicians.” See *K Mart Corp.*, 297 NLRB 80, 83 (1989); *Pontiac Osteopathic Hospital*, supra; *The Loft*, supra; *Norris/O’Bannon*, supra.

The remaining pages of this decision consider whether ACROC violated the Act when Young fired four employees and required that, in order to be rehired, they agree to certain conditions that he specified.

III. ACROC’S PERSONNEL

The events at issue involved so many ACROC personnel that the reader may find it difficult to remember the roles each played in ACROC. Here is an alphabetical listing of these personnel. (I will repeat some of this information when I discuss the various events.)

Susan Buck—Young fired Buck on May 29. Buck is a registered nurse (RN). Buck was one of the ACROC nurses who traveled to the satellite offices as the need arose.

Kathy Cormier—Cormier is an RN and had the title of “director of nursing” for ACROC. Cormier worked in ACROC’s surgery center in Presque Isle. Despite her title, at all relevant times she was an employee, not a supervisor.

Gayle James—Young fired James on May 29 but rehired her that same day. James is an “ophthalmic technician.” James travels to the satellite offices as the need arises.

Sheila Lamoreau—Young fired Lamoreau on May 29. Lamoreau is an RN. Lamoreau was one of the ACROC nurses who traveled to the satellite offices as the need arose.

Kenneth Lindahl—An ophthalmologist. An employee of ACROC.

Martin (the record does not tell us what his first name is)—An ophthalmologist. For a period that ended sometime prior to May 29 (1992), Martin had an ownership interest in ACROC. After that ownership interest came to an end he worked for ACROC as an employee.

Rebecca Palmer—ACROC’s “scheduling coordinator” and a receptionist. She traveled to the satellite offices as the need arose.

Jane Pryor—The receptionist in ACROC’s surgery center (in Presque Isle).

Jacquelyn Shepard—Young fired Shepard on May 29. Shepard is an RN. Shepard was one of the ACROC nurses who traveled to the satellite offices as the need arose.

Verna Smith—A licensed practical nurse (LPN) employed by ACROC in its surgery center in Presque Isle.

Craig Young—As noted above, Young is an ophthalmologist who is ACROC’s owner and its president. As far as the record here is concerned, he is ACROC’s only supervisor.

A. *The Events of May 28*

On the morning of May 29 Young fired employees Susan Buck, Gayle James, Sheila Lamoreau, and Jacquelyn Shepard. Young did so on the basis of information related to him by three other employees on the evening of May 28 about events that occurred earlier on May 28.

B. *The Schedule Change*

Martin (an ACROC ophthalmologist) was treating patients in Millinocket on the morning of May 28. He discovered that one of the patients needed emergency surgery. Martin told Palmer, who also was in Millinocket that day (as the receptionist), to schedule the surgery for May 29 in a hospital in Presque Isle. Palmer called Presque Isle and gave Martin’s message to Pryor (the surgery center’s receptionist). Pryor called the hospital, scheduled the surgery for noon on May 29, and then told Young. ACROC’s schedule for May 29 had been set sometime before. (ACROC’s schedule specifies which personnel are to work in which offices.) But the May 29 schedule had to be changed because of that emergency surgery. Young makes all scheduling decisions and, accordingly, it was Young who thereupon rearranged the May 29 schedule. The rearrangements affected, among other things, which personnel would be going to the various satellite offices. The changes affected in the following ways the four employees whom Young fired on May 29:

- (1) Under the revised schedule, Buck was to work in ACROC’s surgery center in Presque Isle. She had been scheduled to go to Houlton. The way Young had rearranged the schedule gave Buck no time off (on May 29) for lunch; the schedule had Buck working from 8 a.m. straight through until 2:30 p.m.
- (2) Under the revised schedule, Lamoreau, like Buck, was to work in Presque Isle instead of Houlton. And like Buck, the rearranged schedule required Lamoreau to work without a break from 8 a.m. to 2:30 p.m.
- (3) Shepard, who had been scheduled to work in Presque Isle, was to go to Houlton.
- (4) James, like Shepard, was to work in Houlton instead of Presque Isle.

Young gave the rearranged schedule to Pryor. Pryor left Young, gave a copy of the new schedule to Buck (who briefly complained to Pryor about the change) and then went toward the operating room, where she told Lamoreau about the rearranged schedule. Pryor then telephoned Palmer, who was in ACROC’s Millinocket office, and told Palmer about the changes.

C. *Buck’s Complaints to Cormier*

Buck was in the “recovery room” of the Presque Isle surgery center when he got the news from Pryor. (The term “recovery room” is a partial misnomer in that it is used by patients awaiting surgery as well as by patients who have just completed surgery.) Two or three patients were seated in the recovery room. Buck expressed her unhappiness about the change first to Pryor and then, louder and longer, to

Cormier (the “director of nursing”) who was also in the recovery room.

At least one of the waiting patients was within 5 feet of Buck when she complained about the schedule change to Cormier and thus was within easy earshot of Buck. And because the room is small, all the patients in the room may have overheard Buck’s complaints. (Buck contended that the noise from a fan together with piped-in music may have drowned out her words. I do not credit that testimony. No party called any of ACROC’s patients as a witness, and thus we do not know whether any patient actually heard this or any other utterance at issue here—it is conceivable, for instance, albeit very unlikely, that they were all hard-of-hearing—or, if any patient did, whether it bothered the patient in any way.)

D. Buck and Lamoreau

Lamoreau had been in the operating room. An operation ended and Lamoreau escorted the patient through a hall that led to the recovery room. Buck, meanwhile, had finished her conversation with Cormier. When the door between the hall and the recovery room opened, Buck saw Lamoreau and entered the hallway to talk to Lamoreau.

Buck, still upset, spoke to Lamoreau about the new schedule, complaining about it. Buck knew that Lamoreau was pregnant and had not been feeling well. Buck thus was concerned at least as much for Lamoreau’s sake as her own about the fact that the new schedule provided no break for either of them from 8 a.m. until 2:30 p.m. Buck and Lamoreau agreed to cover for each other during the day so that each could take a break. Additionally they complained to one another about the way ACROC schedules were changed on short notice. The entire conversation was at normal speaking volume.

The door between the recovery room and the hallway is set to close after a 40-second delay. As a result the door was open during at least some of the Buck-Lamoreau conversation. A patient was seated in the recovery room next to the doorway, and Buck and Lamoreau were both within a few feet of the doorway. While the door was open, therefore, the patient was well within earshot of Buck and Lamoreau.

Buck and Lamoreau were not alone in the hallway. Smith (the surgical LPN) was also there, headed for the recovery room. Smith was not on friendly terms with either Buck or Lamoreau. Smith overheard the Buck-Lamoreau conversation and noticed that the patient seated nearby was an individual who knew many members of the ACROC staff and who was reputed to be a gossip.

E. The Events in the Operating Room

Lamoreau returned to the operating room when she finished talking to Buck. A patient was seated in a chair specially designed for eye operations. The operating room staff prepared the patient for the operation. That meant that the eye to be operated on was anesthetized and that, except for that eye, the patient was completely “draped.” The patient, who was fully conscious, thus could hear but could not see anything (since one eye was covered and the other anesthetized).

In the room with the patient were Lamoreau, Smith (the LPN), Lindahl (the ophthalmologist), an anesthesiologist, and two other ACROC employees.

It was in this setting that Lamoreau began talking to Lindahl about the schedule change. At the time, Lamoreau and Lindahl were at most 3 feet from the patient; they may have been within inches. Lamoreau was upset, for two related reasons. One was that the change had been made on such short notice. The other, more important, reason had to do with medication that Lamoreau knew would be needed to treat a patient in Houlton the next day (May 29). Lamoreau had been planning to take the medication to Houlton herself, and she was concerned that, now that she was going to be in Presque Isle, the medication would not get to Houlton.

All this led Lamoreau to tell Lindahl, at normal volume but with an exasperated tone in her voice, that yet again there had been a schedule change and that she was not going to Houlton on May 29. Lindahl responded, “who’s going?” Lamoreau started to reply, “I don’t know.” But in the midst of Lamoreau’s reply Smith broke in with a loud “shush.” Smith went on, angrily, to say something about Lamoreau’s remarks being inappropriate under the circumstances at hand. Everyone stopped talking. (The operation proceeded normally.)

F. Shepard’s Response

On May 28 Shepard (one of the four employees whom Young fired on May 29) was in ACROC’s office in Millinocket.

As noted earlier, on May 28 Palmer, who was the receptionist for the Millinocket’s office, was told about the schedule change for May 29 by Pryor. Late in the morning of May 28, with Shepard standing next to Palmer’s desk, Palmer told Shepard about the schedule change. Palmer’s desk is in one corner of the waiting room. A number of patients were seated in the waiting room, within easy earshot of Palmer and Shepard.

Shepard had a commitment in Presque Isle on the evening of May 29 that was founded on her expectation that she would be working in Presque Isle that day. She first responded to the news about the schedule change by exclaiming “what!” Palmer replied with more information about the change. Shepard then launched into a complaint about schedule changes being made on short notice. Shepard’s voice probably was normal in terms of volume. But Shepard was angry and her tone of voice reflected that.

G. James’ Response

James, it may be recalled, is the fourth ACROC employee whom Young fired on May 29. James is an ophthalmic technician.

Just as Shepard turned away from Palmer, James entered the waiting room. (She had been in one of the examining rooms.) Shepard said to James, “guess what, we’re going to Houlton tomorrow.” James responded with only one word, either “what?” or “why?” In either case, James’ voice reflected the fact that the change surprised and upset her.

At least one patient was close to James and Shepard at the moment of this exchange.

H. *Cormier, Smith, and Palmer Meet with Young*

When office hours ended on May 28, Cormier asked to speak to Young (in the Presque Isle office). Cormier proceeded to tell Young about Buck's response to the schedule change. Cormier's description was much as set out above, except that, as Cormier portrayed it to Young, Buck's complaints lasted many minutes and included explicit attacks on the way ACROC is managed. Additionally, Cormier characterized Buck's behavior as "completely unprofessional" (because Buck could be heard by patients), a characterization that Cormier rarely had used before in speaking to Young about ACROC's nurses. (Cormier's criticism of Buck to Young was also noteworthy because Cormier considers herself to be a friend of Buck. Indeed, at the hearing in this case Cormier testified that she did not consider that Buck misbehaved in discussing the schedule change and that Cormier did not remember speaking to Young about Buck's remarks. As my description of the events indicates, I do not credit that testimony by Cormier.)

Soon after Cormier departed, Smith asked to speak to Young. Smith was visibly upset. Smith thereupon described Lamoreau's behavior in the operating room. Smith's description was much as set forth above, except that, as Smith remembered the circumstances, Lindahl had not said anything. Smith also described the Buck-Lamoreau conversation in the hallway. Smith went on to opine that "it was totally inappropriate for staff to be bitching and complaining about schedule changes in front of patients."

Palmer, meanwhile, had returned to Presque Isle from Millinocket. She entered Young's office just as Smith was winding up her description of the events in the operating room.

Palmer, referring to what she heard of Smith's account, began with, "if you think that is bad, let me tell you what happened in Millinocket!" Again, Palmer's description of Shepard's behavior and of the Shepard-James conversation was much as described above, except that, as Palmer told it, Shepard spoke loudly; further, Palmer did not tell Young that James' side of the conversation amounted to just one word. Palmer told Young that everyone in the waiting room heard what Shepard had said and that, because of that, Palmer was "mortified."

Palmer does not get along well with ACROC's nurses and not infrequently complained to Young about what Palmer considered to be the inappropriate behavior of the nurses.

I. *Young Fires Buck, James, Lamoreau, and Shepard*

By the time Palmer left, Young was furious and upset. He had just heard independent accounts from three different employees that three of ACROC's four RNs and its one ophthalmic technician had behaved in ways that, in Young's estimation, must have been troubling to patients in the process of receiving medical treatment and may have damaged ACROC reputation. (I will hereafter sometimes refer to Buck, James, Lamoreau, and Shepard, collectively, as the "four nurses," even though James is not, technically, a nurse.)

Young decided that the following morning he would fire all four nurses and then offer to reinstate them if they agreed to conditions that would prevent a recurrence of the events

of May 28 and, additionally, would deal with some other employee problems that concerned Young.

Young made that decision without first hearing from Buck, Lamoreau, Shepard, or James or from any of the other ACROC personnel involved (such as Lindahl).

Young met with the four nurses early in the morning of May 29.

Young started the meeting by expressing his dissatisfaction with the way ACROC's employees had behaved over the past year or so. Young spoke of "bitching between employees," "back biting," "playing one physician against another," and the formation of "cliques." He also spoke about "rumblings" that he had heard about "no raise, no work," when ACROC did not increase employee remuneration in 1992. Young followed that reference by complaining about the employees' "lack of judgment, gratitude and loyalty."

Young then went on to describe in detail what Cormier, Smith, and Palmer had told him of the behavior of Buck, Lamoreau, Shepard, and James the day before. Young made it very plain how much he disapproved of that conduct, focusing on the fact that the nurses had aired their complaints while they were near patients. Lamoreau tried to give her own account of the events of May 28, but Young cut her off, saying that he believed Smith.

It was at that point that Young told the four nurses that they were fired.

Young proceeded to say that each of the four could nonetheless remain employed by ACROC if they followed a set of rules. "Here are the rules," Young said, "take them or leave them." Some of the "rules" that Young then spoke about are not alleged to violate the Act in any respect. They involved such things as acting "like professionals" toward both patients and coworkers and being willing to treat however many patients happened to be scheduled on a given day—even an extraordinarily large number.

Two other of the rules enunciated by Young, however, raise the question of whether ACROC "conditioned the re-employment of the [four] employees . . . on their waiving their Section 7 rights," in the words of the General Counsel's complaint.

1. If the employee had a complaint, she was to bring it to Young, "and no one else." The "no one else" specifically included Lindahl and Martin (the two ophthalmologists whom ACROC employed). Young's words in that respect were: "If I hear of you going to Dr. Martin or Dr. Lindahl complaining about office policy, it's over."
2. The "gossiping and complaining" between the four nurses had to stop immediately.

Shepard told Young that she was not willing to comply with the rules he had just described. She left. Lamoreau went with Shepard.

James agreed to Young's conditions and was still employed by ACROC as of the hearing.

Buck agreed to Young's conditions but advised him that, for reasons unrelated to anything Young had said, she was considering leaving ACROC for a job in Portland, Maine. Buck did leave ACROC in July (1992).

IV. DID ACROC VIOLATE THE ACT WHEN YOUNG FIRED
THE FOUR NURSES

It was the behavior of the four nurses on May 28 that precipitated Young's action against them. That behavior, in summary, was:

Buck, within earshot of patients, complaining about the schedule change to Cormier.

Buck and *Lamoreau*, within earshot of a patient, complaining to one another about the schedule change.

Lamoreau, sounding exasperated, telling Lindahl about the schedule change while both were standing next to a patient in the operating room.

Shepard, within earshot of patients, complaining to Palmer about the schedule change.

Shepard and *James*, within earshot of patients, communicating to one another about the schedule change.

One question, then, is whether that behavior is the kind that is protected by Section 7 of the Act.

My conclusion is that, for two reasons, that behavior was unprotected.

In many circumstances employee discussions about scheduling are protected. See, e.g., *K Mart Corp.*, supra. But generally, where the employee activity at issue consists only of talk, for that activity to be deemed protected by Section 7 "it must appear that it was engaged in with the object of initiating group action." *Meyers Industries*, 281 NLRB 882 (1986) (*Meyers II*). *Mushroom Transportation*,² which is cited with approval by *Meyers II*, puts it this way:

We look in vain for evidence that would support a finding that [the discharged employee's] talks with his fellow employees involved any effort on his or their part to initiate or promote any concerted action It follows that, if we were to hold that [the discharged employee's] conversations constituted concerted activity, it could only be on the basis that any conversation between employees comes within the ambit of the activities protected by the Act provided it relates to the interests of the employees. We are unable to adopt this view.

It is true that some Board cases can be read as holding that talk among employees about conditions of employment is, even without evidence of any intent to engage in concerted action, activity that Section 7 protects. See *Trayco of S.C.*, 297 NLRB 630 (1990); *U.S. Furniture Industries*, 293 NLRB 159 (1989). But those cases concern discussions by employees of wage levels. And discussions among employees of their wages "are inherently concerted activity clearly protected by Section 7 of the Act." *Automatic Screw Products Co.*, 306 NLRB 1072 (1992). The utterances here at issue, of course, were unrelated to wages.

Nothing in the record suggests that any of the four nurses engaged in any of the behavior at issue "with the object of initiating group action." Each of the four was angry and upset by the schedule change, and each simply reacted out loud to the news. That does not constitute concerted activity. See *Adelphi Institute*, 287 NLRB 1073 (1988); *Daly Park Nursing Home*, 287 NLRB 710 (1987).

²*Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 684-685 (3d Cir. 1964).

Compare the circumstances at hand to those in, for example, *Circle K Corp.*, 305 NLRB 932 (1991) (employee circulated a letter); *Whittaker Corp.*, 289 NLRB 933 (1988) (employee criticized management in the course of a meeting called by management); *Pontiac Osteopathic Hospital*, supra, 284 NLRB at 450-454 (fake company newsletter criticizing management).

A different question would be presented had some sort of group action regarding scheduling been in the works as of May 28. Then one might infer that at least some of the remarks by the four nurses were in furtherance of that action. See, e.g., *Health Care Corp.*, 306 NLRB 63 (1992), enf. denied on other grounds 142 LRRM 2728 (1993); *Zack Co.*, 278 NLRB 958 (1986); *The Loft*, 277 NLRB 1444 fn. 2 (1986). But the record contains no indication of any such previously contemplated group action. The four nurses did previously discuss with one another and with other employees, in the "team" setting (touched on earlier), various concerns they had about their terms and conditions of employment, including scheduling issues. But there is no hint that the utterances on May 28 had any connection with those earlier, team, discussions.

The circumstances might also be different if Young had mistakenly thought that the four were engaged in some sort of group action on May 28. (See, e.g., *Mashkin Freight Lines*, 261 NLRB 1473, 1476 (1982).) In this regard, the General Counsel contends that Young's decision to call Buck, James, Lamoreau, and Shepard to his office together evidences a belief on Young's part that when each of the four nurses sounded off about the schedule change, each was acting as part of a group. But Young's decision to meet with the four makes sense simply in terms of timing. That is, the night before three employees separately told him of what they considered the misbehavior of Buck, James, Lamoreau, and Shepard. And as those three—Cormier, Smith, and Palmer—described that misbehavior, there was nothing about it that indicated a group purpose. I suppose it would have been possible for Young nonetheless to jump to the conclusion that the four nurses were trying to stir up group action by their behavior on May 28. But the record does not suggest that he did.

In any event, I would conclude that the behavior on May 28 of three of the four nurses (Buck, Lamoreau, and Shepard) would be unprotected even if each, by her utterances, did intend to initiate group behavior (or if Young thought they did). Young's outrage stemmed largely from the fact that the nurses had sounded off in the presence of patients. And, as discussed earlier, ACROC had in force a valid rule providing that: "It is totally unacceptable for an employee to discuss any grievances within earshot of patients." Whether because of that rule or otherwise, each of the four nurses knew very well that Young did not want employees to discuss perceived management failures in the presence of patients.

The General Counsel contends that a reason that Young fired the four nurses is that they violated this within-earshot-of-patients rule and the ACROC rule that limited with whom employees could discuss their grievances. The General Counsel's point is that an employer violates the Act if the employer fires an employee for violation of an unlawful rule. But (1) Young was not thinking in terms of ACROC's OPM rules when he decided to fire the four nurses; and (2) as dis-

cussed above, my conclusion is that the within-earshot-of-patients rule is not unlawful.

The record does show that, even prior to May 28, Young was dissatisfied with, among other things, the four nurses' "lack of . . . gratitude and loyalty" in that they complained to one another about the way ACROC was run. And, in Young's discussion leading up to his telling the four that they were fired, he spoke of that "bitching" and, additionally, referred to "remarks [that had] been made [about] no raise, no work."

In this regard, I find that had Young not already been unhappy about these facets of the four nurses' behavior, he would not have fired them on May 29. That, in turn, raises the question of whether this earlier behavior was protected. Of most concern here is that reference by Young to "remarks" (presumably uttered by one or more of the four nurses) about "no raise, no work." After all, where an employee says "no raise, no work," in most contexts that communication itself would seem to be evidence of an "effort . . . to initiate or promote . . . concerted action," in the words of *Mushroom Transportation*. (And, of course, the statement addressed the "vital term and condition of employment" of salaries. *Automatic Screw Products*, supra.) But because the record tells us nothing of the context in which any employee uttered those words (or what Young believed the context to be) or of the context of any of the other complaints to which Young referred, I am unable to conclude that a reason that Young fired the four nurses was their pre-May 28 protected activity.

V. DID ACROC VIOLATE THE ACT WHEN YOUNG ESTABLISHED CONDITIONS FOR THE REEMPLOYMENT OF THE FOUR NURSES

After firing the four nurses, Young told them that he would reemploy them, but only if they agreed that they would bring their complaints to Young and to "no one else," that they would not raise any of their concerns with Lindahl or Martin, and that all "gossiping and complaining" between the four would cease.

These conditions, which essentially were rules by which the four would have to abide, obviously violated Section 8(a)(1). See *K Mart Corp.*, supra; *The Loft*, supra.

First, physicians Lindahl and Martin were both employees of ACROC. Young thus prohibited each of the four nurses from expressing to two other employees any dissatisfaction about ACROC's treatment of employees.

Second, the demand that the nurses bring their complaints only to Young also amounted to a prohibition against communications with other employees even when those communications were of the kind the Act protects.

Third, what is "gossiping and complaining" to an employer might very well reasonably be considered by an employee to be an effort to initiate group action about terms and conditions of employment. Thus a generalized prohibition on "gossiping and complaining" also violates the Act.

It hardly need be said that ACROC violated the Act when Young conditioned the reemployment of the four nurses on their agreement to abide by unlawful rules. See, e.g., *Garman Construction Co.*, 287 NLRB 88, 100-101 (1987)

ACROC argues that the four nurses should reasonably have understood that Young in fact was demanding only that they discuss their grievances outside the presence of patients.

But the record shows that Young did not mean to limit his conditions in that way, that the four nurses did not understand Young to mean that, and that Young's words could not reasonably be so interpreted.

ACROC also argues that Lamoreau and Shepard would have refused reemployment even had Young's conditions not limited with whom they could discuss grievances. And it is clear that Shepard was primarily concerned about Young's insistence that the four nurses comply with whatever schedule Young might establish. But it was up to ACROC to show that Lamoreau and Shepard would have refused reemployment with ACROC even had Young not imposed the unlawful conditions discussed above. ACROC did not carry that burden of proof.

To summarize, ACROC did not violate the Act when Young fired Buck, James, Lamoreau, and Shepard. But ACROC did violate Section 8(a)(1) when Young offered to reinstate the four nurses if, but only if, they agreed to abide by rules under which they would be prohibited from engaging in activity that the Act protects.

Additionally, ACROC violated Section 8(a)(1) of the Act by establishing and maintaining the following rules governing employee behavior:

No office business is a matter for discussion with spouses, families or friends.

All grievances are to be discussed in private with the office manager or physicians.³

IV. THE REMEDY

ACROC failed to reemploy Lamoreau and Shepard solely because the two refused to agree to conditions that Young imposed, some of which conditions were unlawful. The recommended Order accordingly requires ACROC to offer to reemploy the two nurses and to make them whole for any loss of earnings and other benefits that they suffered as a result of such unfair labor practice. Loss of earnings and benefits shall be computed on a quarterly basis from May 29, 1992, to the date of a proper offer of reemployment, less any interim net earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The recommended Order also requires ACROC to cease and desist from its unlawful actions, to rescind its unlawful rules, and to notify its employees of the requirements of the

³ Upon their discharge by ACROC, Lamoreau and Shepard applied to Maine's Bureau of Employment Security (BOES) in order to obtain unemployment benefits. ACROC opposed their claims, and the BOES held a hearing in the matter. At the hearing in this proceeding, the General Counsel moved for the introduction of documents associated with Lamoreau's and Shepard's BOES claims. ACROC opposed the motion on the ground that, under Maine law, information submitted to the BOES may not be used in any other proceeding. (On brief ACROC cites 26 M.R.S.A. § 1047.) I granted the General Counsel's motion. As it happens, I have not found the documents to be useful. But I remain of the view that my ruling was correct. ACROC cites no Federal law authorizing me to give effect to the Maine statute in question. And absent such Federal law, the Maine statute may not be applied so as to limit the scope of NLRB proceedings. U.S. Const., Art. VI; *McCulloch v. Maryland*, 17 U.S. 159, 213 (4 Wheat. 316, 436) (1819); cf. *Garner v. Teamsters*, 346 U.S. 485, 500-501 (1953).

Board's Order. In that last regard, the General Counsel asks that ACROC be required to post notices in its satellite clinics as well as in ACROC's Presque Isle facility. The recommended Order does require postings of the notice in the

satellite offices, but only to the extent that ACROC customarily posts notices to employees in them.

[Recommended Order omitted from publication.]