

Alta Bates Summit Medical Center and National Union of Healthcare Workers. Cases 32–CA–024459, 32–CA–024469, and 32–CA–024470

July 29, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS PEARCE
AND HAYES

On June 16, 2010, Administrative Law Judge Burton Litvack issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Acting General Counsel and the Charging Party each filed answering briefs. The Respondent filed a reply brief. The Acting General Counsel filed limited cross-exceptions and a supporting brief, and the Respondent filed an answering brief. The Acting General Counsel filed a reply brief. The Respondent also filed a motion to reopen the record with supporting affidavits.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.¹

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,² and conclusions, and to adopt the recommended Order as modified.³

¹ Member Becker has recused himself and took no part in the consideration or disposition of this case.

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

In addition, the Respondent's brief in support of its exceptions implies that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit. The Respondent further requests that the Board remand this case to a different judge, even if there was no disqualifying bias or prejudice, and that we disavow some of the judge's "intemperate" language. While the judge used strong language in discrediting some of the Respondent's witnesses, we do not find the judge's language to be sufficiently "intemperate" to warrant either disavowal or remand to a different judge. Accordingly, we deny the Respondent's requests. Although Member Hayes agrees that a remand is not warranted, he does not condone or rely on the judge's unnecessary characterization of some of the Respondent's witnesses.

³ We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996). Further, in accordance with our decision in *Kentucky River Medical Center*, 356 NLRB 6 (2010), we shall modify the judge's recommended remedy to require that backpay shall be paid with interest compounded on a daily basis. We shall also modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require elec-

We adopt the judge's findings that the Respondent violated the Act by giving a disciplinary warning notice to employee Beverly Griffith on February 23, 2009; engaging in surveillance of its employees' union activities and redefining its solicitation/distribution policies in order to inhibit and stifle its employees from engaging in activities in support of the National Union of Healthcare Workers (NUHW) on March 20 and 23, 2009; evicting Griffith from its cafeteria, threatening to suspend her, and suspending her on March 23, 2009; and discharging Griffith on April 6, 2009. We also adopt his analysis, as further discussed below.⁴

1. Applying the analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the judge found that Griffith's disciplinary warning, cafeteria eviction, threat of suspension, suspension, and discharge violated Section 8(a)(3) and (1) of the Act. We adopt the judge's findings and his *Wright Line* analysis.

In his cross-exceptions, the Acting General Counsel asserts that the Board should find that the Respondent's adverse actions taken against Griffith also violated the Act under the analysis set forth in *Burnup & Sims, Inc.*, 379 U.S. 21 (1964). Under *Burnup & Sims*, if an employee's discipline is based on alleged misconduct undertaken in the course of protected activity, the burden shifts to the Respondent to show that it had an honest or good-faith belief that the employee engaged in the misconduct. If the Respondent meets that burden, the bur-

tronic distribution of the notice. We shall issue a new notice conforming to the Order as modified.

⁴ In affirming the finding that Griffith's warning notice was unlawful, Member Hayes does not rely on the adverse inference drawn by the judge from SEIU Representative McDuffie's failure to testify. The majority adopts the judge's adverse inference but would find Griffith's warning notice unlawful even without relying on the judge's adverse inference.

Member Hayes finds that initially the Respondent lawfully arranged for security and surveillance in its cafeterias because of legitimate concerns that the NUHW would be taking over the cafeterias based on the notices announcing plans for an all-day meeting there. He finds, however, that the Respondent unlawfully continued its surveillance after it became clear that there was no takeover and that the employees were engaged in the sort of nondisruptive conduct that the Respondent conceded was permitted.

In finding that Griffith's discharge was unlawful, Member Hayes relies on the judge's discrediting Supervisors Tito Aquino's and Carla Biddle's testimony. In that regard, he does not rely on the judge's speculation that their written statements, R Exhs. 5 and 7, may have been fabricated or on the judge's finding that Aquino gave three inconsistent versions of Griffith's conduct on March 24. The majority affirms the judge's analysis but would also find Griffith's discharge unlawful based on the judge's discrediting of Aquino's and Biddle's testimony, even without relying on the judge's speculation concerning Exhs. 5 and 7 or his comments concerning Aquino's inconsistent versions of Griffith's conduct.

den then shifts back to the General Counsel to establish by a preponderance of the evidence that the employee did not in fact engage in the alleged misconduct. If the General Counsel meets that burden, the Board finds that the adverse action taken against the employee violates Section 8(a)(1). *Marshall Engineered Products Co.*, 351 NLRB 767 (2007). *Burnup & Sims* usually applies only in an 8(a)(1) context, and, in light of our agreement with the judge's *Wright Line* analysis, it is not necessary to apply it here. See *Walmart Stores*, 350 NLRB 879, 882 (2007).

Nevertheless, if we were to apply *Burnup & Sims*, we would find the Respondent's actions unlawful.⁵ Even assuming that the Respondent demonstrated a good-faith belief that Griffith engaged in misconduct in the course of protected activity,⁶ in light of the judge's credibility-based factual findings concerning Griffith's behavior on February 17, March 23 and 24, 2009, the Acting General Counsel met his burden of establishing that Griffith's alleged misconduct did not occur.⁷

2. The Respondent filed a motion to reopen the record. Because we find no extraordinary circumstances warranting reopening the record, we deny the Respondent's motion.

First, the Respondent seeks to reopen the record to receive the testimony of Erica McDuffie or to determine whether any factual basis exists for the judge's drawing an adverse inference from McDuffie's failure to testify about the water-spilling incident on February 17. The Respondent's attorney states in his affidavit that he attempted to contact McDuffie through SEIU counsel before the hearing, but was unsuccessful. Although osten-

⁵ Member Hayes finds it unnecessary to apply a *Burnup & Sims* analysis.

⁶ The Respondent here claimed that Griffith, among other things, deliberately spilled a glass of water near coworkers while discussing a pending election petition and the state of the parties' negotiations, engaged in disruptive behavior while soliciting support for the Union in the cafeteria, refused an order to leave the cafeteria, and later engaged in a profanity-laced tirade upon being informed of her suspension. The judge discredited those claims.

⁷ In support of the Respondent's argument that it had a good-faith belief that Griffith intentionally spilled water on or around SEIU Representatives Carlos Hernandez and Erica McDuffie on February 17, 2009, the Respondent relied in part on the testimony of its Labor Relations Specialist Bruce Hatten concerning a conversation he had with McDuffie in which she reported the incident to Hatten. The judge characterized Hatten's testimony about his conversation with McDuffie as "absolute hearsay." We do not rely on that characterization, and have considered the conversation as evidence of Hatten's state of mind when he disciplined Griffith. Even assuming that the conversation establishes a good-faith belief that Griffith spilled the water intentionally, a violation would still be found because the judge credited Griffith's testimony that she did not spill the water intentionally.

sibly unable to find McDuffie before the hearing,⁸ Respondent's counsel was subsequently able to locate her after it retained a private investigator. Thus, the Respondent chose not to pursue the search for McDuffie until *after* the judge drew an unexpected adverse inference from McDuffie's failure to testify. In these circumstances, we find that the Respondent has not shown that the evidence sought to be adduced was newly discovered or previously unavailable. Nor has the Respondent demonstrated that McDuffie's testimony would require a different result. To the extent that the Respondent is suggesting that McDuffie's testimony could potentially have affected the judge's decision to credit Griffith's testimony that the water-spilling incident was unintentional, the Board has long held that it will not reopen a record so that a party may attack a judge's credibility resolutions. See *Precoat Metals*, 341 NLRB 1137, 1137 fn. 1 (2004); *Labor Ready, Inc.*, 330 NLRB 1024, 1025 (2000); *P & T Metals, Inc.*, 316 NLRB 1189, 1189 fn. 2 (1995).

Second, the Respondent seeks to reopen the record to "determine whether any factual basis exists" to support the judge's suspicion that Respondent's Exhibits 5 and 7 were fabricated after Griffith's discharge. Again, the Respondent has not shown that the evidence it seeks to adduce was newly discovered or previously unavailable. Although the Respondent claims that it did not know the evidence would be necessary because the judge did not provide notice that he suspected that the documents were fabricated, the judge was not required to provide such notice. In addition, the Respondent's motion does not specify what type of evidence it seeks to adduce or how it would change the result. To the extent that the Respondent is suggesting that the evidence the Respondent now seeks to adduce could potentially affect the judge's credibility resolutions concerning Griffith's behavior on March 24, 2009, as stated, the Board does not reopen a record so that a party may attack a judge's credibility resolutions. See *Precoat Metals*, 341 NLRB at 1137 fn. 1. Accordingly, we deny the Respondent's motion to reopen the record.⁹

⁸ Although McDuffie had relocated to the East Coast before the hearing, McDuffie's affidavit shows that an SEIU employee was aware of her whereabouts. That employee and McDuffie discussed the possibility that McDuffie would be subpoenaed to testify at the upcoming hearing, and McDuffie was told that she would be contacted by an attorney. McDuffie did not, however, receive a subpoena or any official notice about the hearing.

⁹ Because Member Hayes does not rely on the adverse inference or the judge's suspicions about Aquino's and Biddle's written statements, he agrees that there is no reason to reopen the record.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Alta Bates Summit Medical Center, Berkeley and Oakland, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a) and reletter the subsequent paragraphs.

“(a) Within 14 days from the date of this Order, offer Beverly Griffith full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Beverly Griffith whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the judge’s decision as amended in this decision.”

2. Substitute the following for relettered paragraph 2(e).

“(e) Within 14 days after service by the Region, post at its Berkeley and Oakland, California facilities copies of the attached notice marked “Appendix.”¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, 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. If 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 February 23, 2009.”

3. Substitute the attached notice for that of the administrative law judge.

¹⁰ 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.”

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT discharge you, suspend you, threaten you with suspension, issue a disciplinary warning notice to you, or evict you from our cafeterias for engaging in activities in support of the National Union of Healthcare Workers (NUHW).

WE WILL NOT reinterpret our solicitation/distribution policies in order to inhibit and stifle our employees from engaging in activities in support of the NUHW in our cafeterias.

WE WILL NOT engage in surveillance of our employees, who are engaged in union or other protected concerted activities in our cafeterias.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board’s Order, offer Beverly Griffith full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Beverly Griffith whole for any loss of earnings and other benefits suffered as a result of our discrimination against her, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board’s Order, remove from our files any references to the unlawful discharge, suspension, eviction from our Alta Bates Hospital campus, and warning notice given to Griffith, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the above-described unlawful actions will not be used against her in any way.

Amy L. Berbower, Esq. and Yaromil Valez-Ralph, Esq., for the General Counsel.

Christopher T. Scanlan, Esq. and Ellinor R. Coder, Esq. (Jones Day), of San Francisco, California, for the Respondent.

David J. Tubman Jr., Esq. (Tubman Law Group), of Oakland, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge. The unfair labor practice charge in Case 32–CA–024459 was filed by National Union of Healthcare Workers (NUHW), on April 9, 2009; the unfair labor practice charge in Case 32–CA–024469 was filed by NUHW on April 14, 2009; and the unfair labor practice charge in Case 32–CA–024470 was filed by NUHW on April 14, 2009. After investigation of each of the unfair labor practice charges, on August 31, 2009, the Regional Director for Region 32 of the National Labor Relations Board (the Board), consolidated the aforementioned matters and issued a consolidated complaint, alleging that Alta Bates Summit Medical Center (Respondent), had engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(3) and 1) of the National Labor Relations Act (the Act). Respondent timely filed an answer, essentially denying the commission of any of the alleged unfair labor practices and asserting several affirmative defenses. Pursuant to the Regional Director's order, a trial on the merits of the alleged unfair labor practices was held before the above-named administrative law judge in Oakland, California on November 30 and December 1–3, 2009.¹ During the trial, each party was afforded the opportunity to call and examine witnesses on its behalf, to cross-examine witnesses for the opposing parties, to offer into the record any relevant documentary or pictorial evidence, to argue its positions on points of law orally, and to file a posthearing brief. Each party filed a posthearing brief, and said documents have been examined carefully by me. Accordingly, based upon the entire record, including the said briefs and my observation of the testimonial demeanor of each of the several witnesses, I make the following²

FINDINGS OF FACT

I. JURISDICTION

At all times material, Respondent has been a California nonprofit corporation and has been engaged in the business of providing acute-care, emergency medical, and surgical services at its facilities located in Berkeley and Oakland, California, including its Alta Bates Hospital and Summit Hospital campuses. During the 12-month period preceding the issuance of the consolidated complaint, in the normal course and conduct of its aforementioned business operations, Respondent received gross

¹ Unless otherwise stated, all events herein occurred during 2009.

² Sadly, notwithstanding my admonitions to each witness regarding the seriousness of the oath to tell the truth and *not* to fabricate his or her testimony, two witnesses, in particular, seemingly decided not to adhere to my demand and gave feigned testimony. Others testified, for the most part, honestly but felt the need to fabricate important aspects of their testimony. These individuals will be identified *infra*.

revenues in excess of \$250,000 and purchased and received goods or services in excess of \$5000 directly from suppliers located outside the State of California. Respondent admits that it is now, and has been at all times material, an employer within the meaning of Section 2(2), (6), and (7) and a healthcare institution within the meaning of Section 2(14) of the Act.

II. LABOR ORGANIZATION

The parties stipulated that NUHW is a labor organization within the meaning of Section 2(5) of the Act.

A. *The Issues*

The consolidated complaint alleges that Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act by, on March 20, at its Summit Hospital campus cafeteria, engaging in surveillance of its employees engaged in union or other protected concerted activities and by, on March 23, at its Alta Bates Hospital campus cafeteria, engaging in surveillance of its employees engaged in union or other protected concerted activities. The consolidated complaint further alleges that Respondent engaged in acts and conduct violative of Section 8(a)(3) and (1) of the Act by, on March 20 at its Summit Hospital campus cafeteria and, on March 23 at its Alta Bates Hospital campus cafeteria, discriminatorily enforcing its solicitation/distribution rule by telling employees that they could not solicit support for the NUHW or distribute NUHW literature in its cafeteria; by, on March 23, at its Alta Bates Hospital campus cafeteria, discriminatorily enforcing its solicitation/distribution rule by threatening to suspend an employee for soliciting support for the Union and/or for distributing union literature in its cafeteria and by ordering an off-duty employee to leave its cafeteria; by, on February 21, issuing a disciplinary warning to its employee, Beverly Griffith; by, on March 23, suspending its employee, Beverly Griffith; and by, on April 6, discharging its employee Beverly Griffith, and, since said date, failing and refusing to reinstate her to her former position of employment.

B. *The Alleged Unfair Labor Practices*

1. The facts

Respondent is a California nonprofit corporation, and, since 1992, it has owned and operated four hospital facilities in northern California, including its Summit Hospital facility (the Summit Hospital campus), located in Oakland, and its Alta Bates Hospital facility (the Alta Bates Hospital campus), located in Berkeley, at which it provides acute-care, emergency, medical, and surgical services. Since prior to its acquisition of the entities comprising its aforementioned business operations, Respondent's various employees have been represented for purposes of collective bargaining by labor organizations, with its service employees, including the environmental services employees, having been represented by Service Employees International Union, United Healthcare Workers—West (SEIU-UHW), since, at least, 1978. The most recent collective-bargaining agreement between SEIU-UHW and Respondent was effective from February 14, 2006, through June 30, 2008. Subsequent to the expiration of the above-described agreement, the parties have entered into extensions and have been engaged in on-going negotiations for a successor contract. On approxi-

mately January 26, the Service Employees International Union (the SEIU), placed SEIU-UHW into trusteeship. Shortly thereafter, the ousted SEIU-UHW officers and executive board members established a new labor organization, the NUHW, and immediately began an organizing campaign throughout California amongst the hospital employees, including Respondent's service employees, who had previously been represented by SEIU-UHW. By January 29, several of Respondent's service employees commenced circulating a petition, designed to decertify SEIU-UHW and to certify the NUHW as their collective-bargaining representative, amongst their coworkers, represented by SEIU-UHW. Ultimately, after approximately 70 percent of said employees had executed the petition, several of them went to the office of Warren Kirk, Respondent's chief operating officer, presented the petition to his secretary, and verbally demanded that Respondent recognize the NUHW as their bargaining representative. In February, the NUHW filed a decertification petition with the Board, which remained pending as of the commencement of the instant hearing.

Prior to proceeding with a discussion of the alleged unfair labor practices, I note that two of Respondent's employment policies and one asserted "practice" are directly pertinent to the factual and legal issues involved in the instant matters. First, Respondent's employee handbook sets forth written policies regarding disruptive conduct and misconduct. The former behavior is defined as "... conduct that has the potential for adversely impacting both the quality of patient care and the ability of other employees to work effectively." Then, the written policy notes several forms and examples of prohibited behaviors including tirades; abusive treatment of patients, employees, physicians, visitors, or others; behavior during meetings which has the effect of seriously interrupting the meeting; verbal attacks directed at individuals or groups "which are personal, irrelevant, or go beyond the bounds of fair professional comments;" impertinent and inappropriate comments written in official documents which "Impugn the quality of care in the medical center;" and nonconstructive criticism addressed to its recipient in such a way as to "intimidate, undermine confidence, belittle, or imply stupidity or incompetence." Finally, said written policy states that "when the behavior disrupts the operation of the workplace, affects the ability of others to get their jobs done, and creates a sense of hostility in the workplace, it will be necessary to take appropriate action to address such conduct." Next, the employee handbook defines misconduct as behaviors "... so serious in nature and so contradictory to the goals of and expectations of [Respondent] that they require immediate action" and sets forth several types of employee misconduct, including insubordination or willful refusal to carry out a reasonable order, inappropriate behavior while on duty, or "the use of foul or abusive language on company property or while performing duties at any location." With regard to either disruptive conduct or misconduct, Respondent's progressive disciplinary policy, which begins with a documented verbal warning and includes possible termination, applies.

Next, Respondent maintains written policies regulating solicitations and distribution of literature, which are set forth in the human resources department policy and procedures manual. Initially, nonemployees are prohibited from soliciting or dis-

tributing literature on Respondent's property at any time for any purpose; however, said individuals may conduct authorized business in designated areas on Respondent's property with the prior approval of Respondent.³ As to employees, they are not permitted to solicit any patient or patient's family for any reason at any time, and they are not permitted to solicit or distribute literature during scheduled working time, which includes the scheduled working time of both the employee doing the soliciting or distributing and the employee to whom the activity is directed but which does not include the time prior to or following a work shift and meal and break periods. Further, soliciting and distributing literature are prohibited in all patient care areas and in all other areas where employees normally work. As defined, work areas do not include the hospital cafeterias and street lobbies, employee lounges and break rooms, public and private sidewalks, driveways, and parking areas.⁴ Likewise, the guidelines for Respondent's security services state that employees may solicit and distribute literature in hospital parking lots, lounges, restrooms, and restaurants and that security guards are not to "forbid" employees from soliciting on their own time, to engage in surveillance of such activities or to "spy" on union meetings or union activities. Further, according to Bruce Hatten, who is a labor relations specialist for Respondent and a supervisor within the meaning of Section 2(11) of the Act, "some time after we learned that there was a new union forming," Respondent commenced issuing small cards to its managers and supervisors, on the front of which cards are set forth Respondent's solicitation/distribution rules and on the back of which are set forth rules for how the managers and supervisors should and should not act with regard labor relations matters.

As stated above, Respondent's restaurants are not considered to be work areas in which employee solicitations and distributions of literature are prohibited. In this regard, Respondent maintains large, full service cafeterias at its Summit Hospital campus and at its Alta Bates Hospital campus. The former facility's cafeteria is located on the first floor and accommodates between 150 and 300 people, and that the latter facility's cafeteria is located on the first floor near the front lobby and seats approximately 200 individuals. Each campus's cafeteria is divided into a service area in which patrons select food and then pay for their food selections and a dining area in which are located chairs and tables so that patrons can sit and eat their food. At the Summit Hospital campus, the food service and dining areas of the cafeteria are separated by an open space⁵ from three rooms or annexes,⁶ two of which are divided by a folding partition, and, adjacent to the cafeteria at the Alta Bates

³ Apparently, while in a hospital cafeteria, nonemployees may sit and have a meal as long as they are not disruptive.

⁴ The solicitation/distribution policy states that an employee "must not" be identified with Respondent while engaged in soliciting or distributing literature, meaning that he or she must be out of uniform and not wearing his or her identification badge while doing so.

⁵ Francis Kidd, Respondent's administrative director for support services, described this area as a corridor. However one describes it, viewing Respondent's Exhibits eight and nine, it is apparent that the dining area tables and chairs are close by this area.

⁶ These are referred to as annex A, B, and C.

Hospital campus is an auditorium. The cafeterias at both facilities are open to and utilized by the public, visitors to patients, employees and staff doctors, visiting physicians, outpatients, and patients' family members. Because of dietary restrictions, patients are normally prohibited from eating in the cafeterias; however, they do occasionally sit at the tables with their families. Employees utilize the cafeterias for their lunches and during their break periods, and only between five percent and ten percent of the customers of the cafeterias are nonemployees.

Employees have historically utilized the cafeterias for distributing literature, selling various items, solicitations, and for collecting union dues. Thus, employees testified, without contradiction, that, without restriction and with the tacit consent of managers, who have been among the purchasers, they and co-workers have sold church and school raffle tickets, dinner tickets, and food items such as peanuts and egg rolls in the cafeterias by approaching other employees or by walking from table to table and that, without impediment from Respondent until the events described infra, employees have regularly solicited their coworkers for religious, charitable, or union-related purposes and distributed literature to them indirectly by leaving leaflets on tables or directly by hand. Further, outside vendors also have been permitted to sell items inside both campuses but not inside the cafeteria dining areas. Thus, upon receiving permission from Respondent, outside organizations or individuals are allowed to place tables and to sell items such as books, candy, leather items, or jewelry in the open area or corridor⁷ beside the cafeteria in the Summit Hospital campus and in the lobby area and the auditorium of the Alta Bates Hospital campus. Other outside organizations, such as banks and credit unions, are permitted to set up in these areas and solicit for their respective organizations, giving away free pens or stress balls along with application forms.

There is no dispute that Respondent maintains no written rule or policy regarding the conduct of meetings inside the cafeterias at its facilities; nor is there any such written policy, prohibiting outside organizations from conducting meetings in the cafeterias. Indeed, several of the witnesses, who testified on behalf of the General Counsel, stated that they were unaware of any restrictions, placed by Respondent, upon the holding of meetings in its cafeterias. Witnesses, including Beverly Griffith, the alleged discriminatee, Lawana Williams, a member of the SEIU-UHW bargaining committee and a shop steward, and DeAnn Horne, also a member of the SEIU-UHW bargaining committee and a steward, each testified that, prior to the trusteeship, SEIU-UHW stewards and union representatives advertised and used Respondent's cafeterias to meet with bargaining unit employees/members and to conduct general membership meetings without interference by Respondent. According to Griffith, the SEIU-UHW stewards would conduct such meetings "as often as we need to," usually three or four times a year, and, at the Summit Hospital campus, these were held "in the far left" of the cafeteria, near the open space and the annex rooms. She added that the stewards would move tables together and

⁷ In describing where vendors set up for sales, employees, who testified on behalf of the General Counsel, described the area as the dining area.

place literature on them for members to take and read. Williams testified that SEIU-UHW agents have utilized the cafeteria for meetings—"we've had meetings . . . where we vote on contract issues. We've had steward meetings there. Just general membership meetings," normally on a monthly basis. These meetings would be held in ". . . the corner right on the side, right there on the annex wall."⁸ Likewise, Horne testified that the SEIU-UHW stewards would use the cafeteria at the Alta Bates Hospital campus for meetings with employee/members. She recalled doing so "quite a few times;" at least two or three stewards ". . . sat at a table . . . and we'd hand out literature and discuss what was going on with the union at that particular time." Also, according to Griffith and Horne, the California Nurses Association would use the cafeterias for meetings with Respondent's nurses, and Griffith testified that she has seen Respondent's student nurses sitting at table and, without eating, meeting with their instructors.

As an example of the foregoing, Griffith testified, without contradiction, regarding participating at a January 29 SEIU-UHW membership meeting in the Summit Hospital campus cafeteria. According to Griffith, in order to publicize the meeting, notices, reading SEIU-UHW membership meeting in the cafeteria from 6 a.m.–7 p.m. on January 29, had been posted on break room bulletin boards and on the union's bulletin board next to the cafeteria door and distributed to employee/members. Griffith added that Respondent was aware of the meeting in the cafeteria as ". . . they can read it just like everybody else can if they pass the union bulletin board," and as she observed managers, including Bruce Hatten, inside the cafeteria during the day. Also, approximately 45 minutes after the meeting commenced, Griffith had a conversation with Hatten in front of the elevator in the main lobby area. She initiated the conversation because she thought it "very odd" that Hatten would be standing outside the cafeteria so early in the day, and she asked why he was there so early. Hatten replied that Respondent had received a letter, advising it that SEIU-UHW had been placed into trusteeship and that the trustees wanted Respondent to "obey their instructions." Griffith asked since when had Respondent "obeyed the union . . ." and said Respondent's employees were the union, not "downtown." As to the conduct of the meeting, as was their normal practice, the stewards set up for it by moving tables together in the far left corner of the cafeteria by the annex walls. The meeting lasted the entire work day, and "it was just a general membership meeting that was scheduled a month or two months . . . to bring people up on what was going on, any questions or any concerns on their

⁸ Bruce Hatten admitted that he was aware that the SEIU-UHW stewards would conduct meetings with bargaining unit employees in the left-hand corner of the Summit Hospital campus cafeteria—"Periodically I've seen them in there"—and that the stewards were never disciplined for conducting such meetings. According to him, ". . . as long as they would have small quiet meetings . . . they weren't disrupting anything, we didn't have a problem with that. I didn't have a problem with that." While denying he ever observed literature being distributed, Hatten was contradicted by his pretrial affidavit in which he stated "I am sure that SEIU stewards came into the cafeteria prior to the trusteeship, handed out flyers, and did other things to encourage support for SEIU."

behalf.” It was conducted by the chief steward, Deborah Kirtman, without any SEIU-UHW agents being present, and Griffith helped during her lunch period and morning and afternoon break periods, spending her time soliciting bargaining unit employees to execute the decertification petition. She further testified that “people would come in, sit down, eat their lunch [at the steward’s tables], and we would talk” and that the stewards would “sometimes” walk to other tables in order to solicit employees to come back to the area in which the stewards were sitting—“we would ask them to come back and talk, if [they] didn’t, we would go to them,” carrying petition materials. Griffith personally observed stewards going to other tables in order to solicit unit employees in that regard and testified she had never been told such activity was not permitted.⁹

While conceding the lack of any written rules or policy regarding the conducting of meetings in its cafeterias, Bruce Hatten asserted that Respondent’s policy was a matter of “practice,” where people “. . . can’t take over the cafeteria having meetings that are disruptive, basically not being used for what the cafeteria is intended to be used for.” He added that what Respondent permitted inside its cafeterias were “small quiet meetings” that “weren’t disrupting anything;” however, any type of activity during which the group “. . . draws attention to [it]self in a way disturbing to the environment” is not tolerated. With regard to the Summit Hospital campus cafeteria, Francis Kidd, Respondent’s administrative director for support services, denied that the dining area was available for meetings—“you can’t schedule a meeting in the cafeteria because it is not listed for a meeting room”—and added that, if there came a time where an event seemed like a meeting, “we would require them to leave the cafeteria and book a room like everybody else.”¹⁰ However, under further questioning, Kidd began to backtrack. Thus, when asked about the student nurses, he conceded that “from time to time you might see an instructor having breakfast with their students.” On said occasions, “. . . they’re sitting in one of the booths having breakfast, and . . . they might have a textbook open or they might have some paperwork in front of them.” Then asked if union representatives hold meetings in the cafeteria, Kidd said that “if they’re sitting at a table in a small group of people, they could be sitting there having that meeting. . . .” Asked about shop stewards meetings in the cafeteria, he repeated, “if they’re sitting at a table, someone on a break sits down with them and has their coffee on a break with a union rep, to me that’s not a meeting,” and, if two tables were pushed together, it would be permissible for “eight, ten maybe” employees to sit with them. He added that the people must be eating; “we wouldn’t just let people sit there if they weren’t a customer.” As to when such gatherings would become a prohibited meeting, Kidd averred that, if tables were moved and chairs set up in a “classroom style” and, if someone set up an easel and began pointing at it, “I’d be concerned.” As to the Alta Bates Hospital campus cafeteria, Kidd was not aware of any outside organizations, which scheduled meetings

there. He added that the same rules, as enforced at the Summit Hospital campus, would apply to prohibited meetings and permitted group gatherings. Richard Hinshaw, Respondent’s director of employee and labor relations, was emphatic that “we don’t allow any meetings in the cafeteria[s]” at our facilities. However, he added that employees “. . . may have met with people in the cafeteria and talked about union business, which is fine, but to conduct a union meeting in the cafeteria is not allowed. Asked to define a meeting, Hinshaw stated, “a meeting is where it’s being conducted by a facilitator employed by the union on union issues, and he’s using our facility, the cafeteria, where people sit down and eat, to discuss union business with employees, that is a union meeting.”¹¹ He then compared such a prohibited event to a permissible gathering where “. . . if two or three people are sitting at a table and they’re talking about union issues, that’s . . . not a union meeting.” However, such would become prohibited if the union agent is “. . . disrupting people from taking their break and getting back to work” Given the example of ten people sitting at two tables, which are pushed together, and discussing union business, Hinshaw contradicted Kidd, saying “it would not be okay.” Asked about shop stewards having meetings with bargaining unit employees in the cafeterias, Hinshaw testified “. . . if they’re conducting a meeting that disrupts the function of the cafeteria, that would not be okay. But, if they’re talking to people about . . . union business, that’s fine as long as they’re not disrupting the purpose of the cafeteria.” Asked what he meant by the “purpose of the cafeteria,” he stated “. . . if somebody is . . . standing up and walking around, and yelling at people, that’s disrupting. If they’re sitting there talking in a normal voice about whatever issues they had . . . that would be acceptable.” Thereupon, contradicting his earlier testimony, Hinshaw conceded “. . . you may have two tables pulled together and they’re sitting there talking . . . in a normal voice, they’re eating . . . their lunch and . . . not taking over tables . . . for purposes other than the cafeteria use, then that would be okay.” As an example of what Respondent prohibited in its cafeterias, Hinshaw pointed to an October 13, 2004 letter (R. Exh. 17) he sent to SEIU Local 250, the predecessor to SEIU-UHW, in which he referred to a flyer advertising a general membership meeting for the next day in the Alta Bates Hospital campus cafeteria and wrote that such a meeting was prohibited under Respondent’s “procedures” and “use of meeting space.” However, he testified that he envisioned the labor organization having an “assembly” and would not have objected to a business agent merely sitting at a table and meeting with bargaining unit employees.

Regarding the alleged discriminatee’s activities on behalf of SEIU-UHW and the NUHW, Beverly Griffith, who worked at the Summit Hospital campus for 31 years in the environmental services department (EVS), performing housekeeping work, until her termination by Respondent on April 6, was a member of SEIU-UHW and its predecessor, SEIU, Local 250, at all

⁹ Hatten was present inside the courtroom throughout the trial and failed to deny being aware of what occurred on January 29.

¹⁰ Kidd testified that the only rooms at the Summit Hospital campus which may be reserved for meetings are Annex rooms A, B, and C.

¹¹ Such a prohibited meeting could involve as few as two or four individuals “. . . depending on how loud, how boisterous, what they’re doing.” Further, what would proscribe the conduct of the union agent would be any attempt “to gather an audience.”

times during her employment at the hospital. The record establishes that, throughout her employment tenure, Griffith was an active participant in union affairs. Thus, she served as a steward and chief steward,¹² represented coworkers in numerous grievance and *Weingarten* disciplinary meetings, and served on the employees' bargaining committee during contract negotiations. In the latter regard, she routinely discussed contractual issues with her coworkers, and during bargaining for a successor to the parties' most recent collective-bargaining agreement, she attended and participated in, at least, eight negotiating sessions. The record further establishes that, after SEIU imposed trusteeship upon SEIU-UHW, while Griffith continued working as a steward for SEIU-UHW, she immediately became an active supporter of the NUHW's organizing campaign, participating in the solicitation of decertification petition signatures¹³ and "I was one of the ones that let folks in to take it over to our CEO, Warren Kirk's office." There is no dispute that Respondent became aware of the NUHW's organizing efforts and the campaign to decertify SEIU-UHW almost immediately after the onset of the latter's trusteeship. Thus, Hatten confirmed that, as early as January 27, he himself learned that the SEIU-UHW bargaining unit employees were organizing for the NUHW, conceding that "I perceived that" employees were soliciting co-workers for their support for the NUHW. Further, while Hatten denied having suspicions as early as February that Griffith was involved in the NUHW organizing ("I couldn't say for certain"),¹⁴ it is clear that Respondent—and, most certainly, Hatten—did, in fact, harbor such a belief at that early date. Thus, on February 20, Richard Hinshaw, sent the following email and attachments to several other management officials, including Hatten—"Carolyn and Jill found these flyers on the Summit Campus yesterday. Pete Clayton and Beverly Griffith have been around the campus at night reportedly."¹⁵ The two documents, attached to Hinshaw's email, appear to be copies of NUHW campaign literature.

2. The February 17 water-spilling incident and Respondent's subsequent written warning to Griffith

Turning to the first of the alleged unfair labor practices, Carlos Hernandez, a staff development assistant with the Service Employees International Union, who was assigned to work with SEIU-UHW after the imposition of the trusteeship, testified that

¹² For the performance of some of her responsibilities on behalf of SEIU-UHW, Griffith served as a "lost timer." The "Lost Time" provision of the most recent collective-bargaining agreement permits one of Respondent's bargaining unit employees to take up to 6 months leave in order to perform union-related activities. Taking advantage of this contract provision, for 6 months in 2008 and for an additional 3 months, from approximately November 2008, until the imposition of the trusteeship in January 2009, Griffith took leave from her EVS duties to serve as a full-time SEIU-UHW representative for the bargaining unit employees at Respondent's facilities.

¹³ Her first activity in this regard was during the aforementioned January 29 meeting.

¹⁴ Hatten did concede becoming aware of Griffith's involvement in the NUHW's organizing campaign "at some point in time" prior to her termination.

¹⁵ Clayton was an SEIU-UHW business representative, who had been forced out of his position subsequent to the trusteeship.

he and a coworker, Erica McDuffie, had been assigned to visit Respondent's facilities and ascertain who, amongst the bargaining unit employees, were the stewards and who were the members of the employees' bargaining committee and that, on February 17, they were visiting Respondent's Alta Bates Hospital campus. According to Hernandez, as he and McDuffie were walking toward the cafeteria, he heard voices behind him. He turned and recognized an employee, whom he had encountered at the Summit Hospital campus, Beverly Griffith¹⁶ and another woman, named Jocelyn, whom Hernandez knew as a NUHW agent, and they were pointing and yelling ". . . we were scabs, and the scabs are here." Hernandez and McDuffie continued walking towards the cafeteria, passing other employees, who also yelled "the scabs are here." Once inside the cafeteria,¹⁷ they sat down at a table, and, eventually, Griffith, who had followed them into the cafeteria, sat at a table next to the one at which Hernandez and McDuffie were seated and talking. After a while, Hernandez noticed that Griffith arose, walked away, eventually returned with two cups of water, sat next to him at the adjoining table,¹⁸ and placed the two cups of water in front of her. The SEIU agent, who averred that he and Erica were attempting to "ignore" Griffith because he did not want to become involved in any sort of "provocation" and denied speaking to her, then recalled, "I kept talking to Erica when I was sitting like this, then I saw the water just coming toward me. And I got up, grabbed my notebook, the information that I had, and I [asked] her, why are you doing this? . . . Erica said we've got to stop this, that's it. So then she went to call security." According to Hernandez, he arose because "my things were getting wet." After McDuffie reported on what had occurred to a security officer, Griffith approached the officer, and said whatever happened was "an accident." Asked to describe exactly what had occurred, Hernandez replied, "That, I don't know. I can't tell you if that was an accident or not, but what I can tell you is like the way she was sitting with two cups in front of me and I saw a move. . . ." He denied becoming wet as a result or the water spill—"No, not really."

Beverly Griffith did not dispute that the water spilling incident occurred.¹⁹ According to the alleged discriminatee, on

¹⁶ Hernandez claimed that Griffith previously had been rude to him at the Summit Hospital campus. Hernandez testified that he and coworkers had gone to that facility to meet the SEIU-UHW staff in the cafeteria. They were about to depart when he overheard a bargaining unit employee speaking on his cell phone and saying "they're here." A few minutes later as Hernandez and the others were about to board an elevator, he encountered Griffith. "And it was not, I mean a way to talk to her. She started screaming and yelling at us. And that's basically the first experience like this that I have with her." He recalled Griffith saying ". . . what f—ing part don't you understand mother f—ers or something like that. That's what she yelled at us."

¹⁷ Hernandez testified that he and McDuffie were in the cafeteria as "we went to talk to workers and pass out flyers." He did not recall ordering any food while in the cafeteria, and no one denied him permission to engage in his union activities.

¹⁸ Hernandez estimated they were no more than a foot or two apart.

¹⁹ During cross-examination, Griffith admitted having seen Hernandez and McDuffie at the Summit Hospital campus earlier in the day and having seen both SEIU-UHW agents prior to that day "maybe three times." She denied having any hostile "relationship" with them.

February 17 after concluding her work shift at the Summit Hospital campus, “I went [to the Alta Bates Hospital campus] to talk to the PM shift about the trusteeship” and was in the cafeteria, speaking to bargaining unit employees. Griffith continued, “. . . I was sitting in the cafeteria and two reps from the International SEIU came into the cafeteria, and they sat down at a table where I was sitting. And they were trying to convince me that there wasn’t going to be any vote . . . and that I should get on board with them to continue the bargaining that was taking place. And I stressed to them I wasn’t interested. . . . And after I’d had enough of it, I picked up my coat and my coat hit a Dixie cup of water and the water spilled over and it went on the floor between the cracks of the table, and they . . . had some flyers and maybe water may have gotten on the flyers”²⁰ One of the union reps, Erica McDuffie, accused Griffith of spilling the water on her²¹ and threatened to report the incident to the police. Then, the two SEIU agents left the cafeteria. Shortly thereafter, Griffith also left the dining area and observed the two SEIU agents speaking to hospital security guards and accusing Griffith of deliberately spilling the water. Griffith approached and asked what McDuffie was talking about because she was not even wet from the water. The alleged discriminatee then told the guards that the water spill had been merely an accident, but a guard said he would have to make a report of the incident. During her testimony, Griffith was emphatic that no water spilled on either Hernandez or McDuffie; rather, such spilled onto the table and down to the floor.

Respondent’s security officer, _____ Watts, did, in fact, create a report regarding the incident, (R. Exh. 16). There, the officer, whose title for the report was “union activity,” wrote that “new union reps” Hernandez, and McDuffie, “old union rep,” Jocelyn Olick, and Griffith were sitting at the same table and that “Beverly Griffith turned a cup of water over at the table and it spilled on Hernandez.” Further, the report notes that the security officers observed “a considerable amount of water” on one of the cafeteria tables and on the floor below and that Griffith said what occurred was an accident. Finally, the report quotes Hernandez as saying “He was sitting at a table with Ms. Griffith and Ms. Griffith knocked over a glass of water and the water spilled on him.”

Three days later, on Friday, February 20, the same day he received an email message, which linked Griffith to the distribution of NUHW literature on Respondent’s property, Bruce Hatten was informed of the February 17 incident. Thus, according to him, Erica McDuffie telephoned him, complaining that bargaining unit employees were placing NUHW literature on the SEIU-UHW bulletin boards and, as a result, demanding that the locks on the bulletin boards be changed. She then turned to the

²⁰ Griffith denied saying anything derogatory to either of the SEIU-UHW representatives, specifically denying calling them scabs. With regard to the tone of their conversation, “I don’t think that it was calm. I think they were aggressive and I was aggressive. . . . Our tone wasn’t like a low key tone, it was a little high-pitched.”

²¹ During cross-examination, asked for McDuffie’s reaction to the water spilling, Griffith said “she sat there for a minute and then she just got up and said . . . ‘you ain’t going to spill water on us . . . intentionally.’”

water-spill incident, asserting that she had an “incident” with Beverly Griffith in the Alta Bates Hospital campus cafeteria a night or two before involving the spilling of some water, that Griffith had been “rude” to her at the time of the water spill,²² “. . . and that water was spilled on a co-worker of hers . . . Carlos Hernandez.” After speaking to McDuffie,²³ whom he believed as “. . . she didn’t seem to be like [she] wanted to do anything other than report . . . and ask that we investigate it,” and after obtaining a copy of the security officer’s report regarding the incident²⁴ but failing to interview either Hernandez or the officer, who compiled the report, Hatten perceived the matter as an employee deliberately spilling a cup of water on a guest—“the issue was that [Griffith spilled] water in an attempt to get it on somebody . . .”—and as a matter of significant import “because . . . even though it was an SEIU rep, they’re still a guest and we still expect people to . . . treat guests appropriately.”²⁵ Notwithstanding his perception of what had occurred, asserting he “normally” obtains “another side of the story,” Hatten testified that, at approximately 3 that afternoon, he went to the EVS department office on the ground floor level and “. . . tried to have a meeting with [Griffith] to ask her side of [the incident].” In this regard, according to Hatten, he met Griffith’s supervisor, Tito Aquino, and they spent the next 25 minutes searching for the alleged discriminatee, unsuccessfully paging her and looking for her in her assigned work areas on the fourth floor of the building. At approximately 3:30, they returned to the EVS office and stationed themselves across from the entrance to the patient transportation department room in which a time clock, utilized by the EVS department employees in order to clock in and out, is located. Moments later, they observed Griffith enter the EVS department office in order to leave her pager prior to clocking out. When she walked out of the office, Hatten further testified, he approached and said “. . . ‘I’ve been looking for you.’” Griffith asked why, and Hatten replied “I have somebody who has alleged that you were rude to them and knocked water on them.” Griffith retorted “‘Says who?’” At this point, Hatten recalled, “I showed her the security report,” and, after glancing at the document for no more than 10 seconds, Griffith responded “. . . ‘It says right here it’s an accident.’” To this, Hatten asked “. . . ‘That’s an accident . . . ?’” Without replying, Griffith turned around, went over to the time clock to punch out, and walked away. According to Hatten, the entire conversation lasted no longer than “thirty se-

²² Hatten was unable to recall McDuffie saying how Griffith had acted rudely except “I think she said that [Griffith] was loud. . . .” On this point, he was contradicted by his pretrial affidavit where he said he could not recall McDuffie saying how Griffith had acted rudely.

²³ Respondent failed to call McDuffie as a witness and failed to explain her absence. Accordingly, I shall draw a negative inference from Respondent’s failures in the above regards.

²⁴ Hatten conceded that the report said nothing about Hernandez pointing to a wet spot on his clothing. While the security guard, who drafted the security report, wrote that Hernandez said that water had been spilled on him, during his testimony, Hernandez made such assertion and never explained the discrepancy between his testimony and what he told the security guard.

²⁵ Hatten also conceded that Hernandez never claimed that Griffith deliberately spilled the water on him.

conds,” and, after Griffith left, he and Aquino went into the EVS department office in order to ascertain whether Griffith’s pager was operating properly. After determining that it was, “. . . I went back to my office.” Asked where Aquino stood as he approached and spoke to Griffith, Hatten stated “He was in the supervisor’s office checking employees out.” He denied that Aquino witnessed the conversation as it was “kind of impromptu.”²⁶

Beverly Griffith testified that she worked her normal work shift on February 20. Shortly before finishing her shift, “. . . I got a call from one of my co-workers and they said that Bruce Hatten was in the EVS department and that they overheard my name. And it was about 3:25 and so when I came downstairs they said that he was there and he was waiting for me. . . .” According to the alleged discriminatee, as she walked down the hallway toward the EVS department office, she observed Hatten and Aquino standing outside the door to the office. “And so, I walked past Bruce Hatten and Tito [where they were talking], and I turned [in] my pager and I signed out, and then I clocked out and went home. And I said nothing to them.” Corroborating Griffith and contradicting Hatten, Tito Aquino, who supervises the housekeeping employees, including Griffith, testified that during the afternoon on February 20, Hatten came to his office and said he wanted to speak to Griffith. Unable to reach her by pager, Aquino and Hatten went looking for her on the fourth floor, her normal work area, but were unable to find her. Then, at approximately 3:25, “close to quitting time,” they returned to the EVS department office and stood together “outside the office by the hallway.” Thereafter, “. . . we were seeing people come in . . . carrying soiled mops . . . and rags, and that’s . . . before coming to clock out. . . . As we were standing there . . . we saw Ms. Griffith went to the time clock and [clock] out right away” and return her pager to the EVS office. According to Aquino, “I assume she’s going home. . . we didn’t stop her from leaving at all.” Then, “. . . Mr. Hatten told me that she had already clocked out, so we will meet again on Monday morning.” Asked by me whether Hatten was able to speak to Griffith, Aquino replied, “No, sir.”

There is no dispute that, on the following Monday, February 23, Respondent ordered Griffith to report to Bruce Hatten’s office in the human resources department office and that, during the *Weingarten* interview there, Hatten gave a written warning notice, (R. Exh. 4), to the alleged discriminatee. As to why he decided to give Griffith a written warning over what appears to have been a rather trivial incident, averring he believed McDuffie’s assertion that the water spilling was intentional,²⁷ Hatten explained that he wanted to give Griffith an opportunity to give her side of what occurred, and “. . . when she didn’t want to give me her side . . . other than it just was an accident, that changed my mind, that made me believe, well, maybe she did do that. . . . You say it’s an accident, explain to me how it

was an accident. She had no interest to do that.” Asked by me if his decision was based more on Griffith’s behavior after the fact, Hatten replied, “I would say it weighed more heavily, yeah.”

However, not only was Hatten’s testimony, regarding speaking to Griffith, contradicted by Aquino, but also what occurred during the disciplinary meeting casts further doubt upon Hatten’s explanation for the warning notice. Thus, presumably believing she might be disciplined for the water spilling incident, Griffith asked Lawana Williams, a coworker in the EVS department and another steward for SEIU-UHW, to accompany her for the meeting. They reported to Bruce Hatten’s office where they encountered Hatten and Tito Aquino. During the discussion, according to Griffith, Hatten handed her the foregoing written warning notice “for misconduct and inappropriate behavior,” based upon her actions on February 17. Executed by Hatten, the warning notice accused Griffith of “. . . intentionally knock[ing] over a glass of water that spilled onto a guest. The guest complained to hospital security but decided not to summons [sic] the police department at the time of the incident. This behavior is unacceptable and will not be tolerated.” Upon reading the document, Griffith testified, she was “shocked and “upset” and complained “how could you give me a discipline and you haven’t even asked my side of the story?” Thereupon, “. . . Hatten took the paper and he threw it across the table at Griffith, saying “it sounds like me.”” As a response, Griffith wrote across the bottom of the document “This is harassment by SEIU and Bruce Hatten, No investigation by my part. This is back door dealing by management and Alta Bates Summit to discipline me for union activities. Anyone can say and accuse me, and management believes it, Bruce said, it sounds like me and something I would do.” Williams corroborated Griffith, recalling that Hatten gave the former the written warning and “. . . said that he had received a complaint against Beverly . . . that she had knocked over some water intentionally on some guests of the hospital . . . Beverly . . . told him . . . that he didn’t hear her side of what happened and asked him . . . was he just going to accuse her of knocking water over on somebody intentionally. And he stated that because of whom she was, her involvement with the [NUHW], it was believable that she did this. . . . She kind of . . . repeated what he had just said” and “she looked at me and said “Can you believe this?”” Finally, when asked if Hatten responded to Griffith that, in fact, he had, spoken to her three days before, Williams said, “No.” Likewise, Tito Aquino testified that Hatten read the contents of the warning notice to Griffith and that after the latter read the document herself, she asked Hatten who his witnesses were. He replied “people that were present.” To this, Griffith asked why she wasn’t asked anything about the incident, and, rather than asserting that he had spoken to her, Hatten merely reiterated “that [he] had already spoken to . . . people that were present when the incident had happened.” With regard to Griffith’s writing on the bottom of the warning notice, Aquino recalled that Griffith “. . . wrote it down because she . . . did say that this is harassment, I’m not going to sign” Finally, as to whether he heard Hatten say to Griffith “that sounds like something you would do,” Aquino said, “I don’t recall hearing anything like that.”

²⁶ While conceding it is “generally” customary to take notes during an investigatory interview, Hatten admitted he failed to draft notes of his putative conversation with Griffith either during or after their meeting.

²⁷ Hatten conceded not pressing McDuffie for details of Griffith’s “deliberate” act.

3. The March 20 Incident at Respondent's Summit Hospital Campus Cafeteria

The record reveals that, on March 20, the SEIU-UHW stewards, including Beverly Griffith, who had requested and received a vacation day for March 20, Lawana Williams, and Deborah Kirtman, a chief steward, conducted an all day "membership meeting" for the SEIU-UHW bargaining unit employees in the Summit Hospital campus cafeteria, the same location at which the January 29 membership meeting and prior similar meetings had been held; that, in the days prior to March 20, the stewards, including Griffith, Kirtman, and Williams, posted and distributed leaflets,²⁸ announcing a March 20 membership meeting in the Summit Hospital campus cafeteria from 6 a.m. until 7 p.m.; and that the purposes for the meeting were to afford the stewards an opportunity to "update" the bargaining unit employees on the status of the trusteeship and the on-going contract negotiations and to solicit signatures for the decertification petition. The record further reveals that, having become aware of the membership meeting possibly from a flyer, on which the NUHW logo appears, Respondent engaged in two separate courses of conduct in order to prevent or, at least, discourage its SEIU-UHW bargaining unit employees from supporting another labor organization. First, in a March 13 letter to the Union, Hinshaw demanded that, as Respondent's facilities are private property and as it does not permit outside organizations to conduct group meetings in the cafeterias,²⁹ "your group must cease and desist from holding or advertising 'meetings' on our premises."³⁰ Next, Respondent hired the services of Allied Barton Security Services, which provides private security guards for employers, and, on March 20, two of its security guards reported for work at Respondent's Summit Hospital campus. One of the guards, Ronnie Parks, who testified that "I was just told to report in a suit in order not to be confused with the regular security," arrived at the facility at approximately 6:15 a.m. and was escorted alone³¹ to the cafeteria where he met Bruce Hatten. According to Parks, "Bruce showed me the letter that was sent to the Union and . . . said that some of the employees were starting to form . . . a new union so they posted notices that they were going to hold meetings in the cafeteria but they're not allowed to hold the meetings . . . this is not allowed . . . they can't solicit funds and they can't hand out literature and . . . we're there to observe . . . if

²⁸ While Griffith and Williams each acknowledged distributing leaflets announcing the membership meeting; both denied distributing any leaflets on which were printed a NUHW logo. While a leaflet bearing a NUHW logo was offered and received as General Counsel's Exhibit No. 6, Griffith denied having seen it until being asked about it at the time she gave a pretrial affidavit to the General Counsel.

²⁹ According to Bruce Hatten, "our sense, when we first heard about this . . . meeting, that was advertised in our cafeteria by this other group, was that this was going to be a takeover of the cafeteria with . . . rallies and noise and basically disrupting the flow of things."

³⁰ At Respondent's behest, its attorney sent a subsequent letter, dated March 18, to the law firm, which represents the NUHW. In said letter, Respondent's attorney demanded assurances that NUHW, its officers, employees, and agents would "cease and desist from advertising and holding 'meetings' on Respondent's property."

³¹ The other security officer had not yet arrived.

any of those violations occur . . . anything that would disrupt the normal cafeteria operations."³² According to Parks, Hatten was clear the reason for the employees' planned union activity that day was that ". . . they were in the process of trying to form a new union." He added that, if a prohibited meeting³³ occurred, Hatten gave the guards a camera in order "to take pictures of the violation," and they had notebooks in order "to take notes." Also, Hatten instructed them to be "close enough" to observe but they should not interfere with the employees and specified that ". . . if we witness . . . actual violations occurring, to . . . call him and he'd come deal with it." When he finished explaining to Parks what he expected would happen that day, Hatten pointed to two women, who were sitting at a table across the cafeteria, identified them as Beverly Griffith and Deborah Kirtman, and ". . . explained that they're the ones that will probably have the meeting."

Griffith testified that she arrived at the Summit Hospital campus cafeteria at "about" 6 in the morning and observed Kirtman sitting at a table in the "far right" corner of the dining area and Hatten seated at a table in the far left corner of the room, the area in which the SEIU-UHW stewards usually stationed themselves. Griffith walked over to Kirtman's table and sat down beside her. They placed stacks of two separate documents³⁴ and a sign-up sheet on the table. Moments later, according to the alleged discriminate, a "few" bargaining unit employees approached their table, and the two stewards and the employees spoke about the decertification petition and other union matters. Eventually, the employees walked away, and Hatten and Ronnie Parks³⁵ approached the table. Standing in front of the two women, Hatten asked what was going on "over here" and abruptly "snatched" some papers from Griffith's hands. She "tried" to grab the documents back from him, ". . . and he told me I couldn't have them. And I told him that if he didn't [return the documents], I [would] call the police on him." Hatten returned all but one document, began reading it, and remarked that it concerned the on-going negotiations for a new collective-bargaining agreement between the parties. Then, Hatten turned toward Kirtman and reached for the documents in

³² The other security guard, Thomas George, did not arrive until 7:30 a.m., and, Hatten "briefed" him as to the situation.

Respondent stipulated that Parks and George were its agents within the meaning of Sec. 2(13) of the Act.

³³ Asked if Hatten ever explained his definition of a meeting, Parks said, ". . . we discussed that and my understanding was . . . it has to be a group of people discussing the union business . . . to count as the meeting that we're watching for. Obviously, they are allowed to gather and speak socially, that doesn't count as a meeting." He added that the legitimacy of the meeting would ". . . depend on the content of the conversation." In this regard, numbers did not matter rather, "it was . . . the context of what they're gathering to discuss . . . if it was union business, then our understanding was if they were speaking union business with a group of people, they were holding a meeting that they were told not to."

³⁴ One document bore the photograph of former Board member, Peter Hurtgen, and concerned whether employees would lose their contractual wages and benefits if they vote and switch unions. The second document concerned Respondent's and the SEIU-UHW's most recent bargaining positions on subcontracting.

³⁵ At some point during the day, Parks introduced himself to Griffith.

the stacks of flyers in front of her, including the sign-in sheet, knocking over a coffee cup while doing so, but Kirtman was quicker, placing her hands on the papers, and urged Hatten to calm down.³⁶ Hatten then glanced at Griffith's cell phone, which she had plugged into a wall socket, and, when he moved as if to reach for it, Griffith warned him not to touch it. Thereupon, Hatten announced to Griffith and Kirtman ". . . that we [were] not allowed to be there conducting any meetings for any outside unions. And he said that we [were] not allowed to pass out flyers,³⁷ to solicit funds, and he said we were trespassing."³⁸ Kirtman responded that she and Griffith continued to be SEIU-UHW members and had a right to use the cafeteria "and to inform our members." At that point, Hatten turned and, along with Parks, walked out of the cafeteria.

Bruce Hatten initially denied attempting to terminate or impede whatever union activities, which Griffith and Kirtman attempted to engage in on March 20, and specifically denied approaching the table at which they were seated, grabbing a stack of documents, and saying they were not allowed to distribute them inside the cafeteria. Asked if other witnesses were lying about his conduct, Hatten reiterated he could not recall the incident. Moments later, Hatten reversed himself, admitting he reached for the stack of papers in front of the two women because he wanted to discover the reason for the announced meeting and the subject matter of the documents which the women were prepared to distribute. Asked if he also reached for a sign-in sheet, Hatten denied doing so, but, upon being confronted with his pretrial affidavit and questioned as to whether Kirtman attempted to stop him from seeing it, he conceded the truth. Further, Hatten conceded informing the women that they could neither distribute the flyers nor engage in soliciting.

Parks testified that, after Hatten pointed out Griffith and Kirtman to him, he followed Hatten as the latter walked over to the table at which the women were seated. According to Park, ". . . Mr. Hatten asked how they were doing and what's going on and they said nothing's going on. There was a table next to them had a bunch of different flyers laid out. And Mr. Hatten asked them about what they were doing . . . are they planning on handing out the flyers. They didn't really answer. . . . And then Mr. Hatten [grabbed an entire stack of flyers], and they got upset," saying he couldn't do that, accusing him of harassing them, and asserting the cafeteria was a public facility and they had a right to be there.³⁹ Then, after the women became quiet, Hatten returned all but one of the documents, ". . . and then he

³⁶ Although not clear, at some point during the incident, Griffith reached into her handbag for a tape recorder and told Hatten to speak into it.

³⁷ Griffith testified that, prior to her conversation with Hatten that day, she had "never" been informed that she was not allowed to distribute literature in the Summit Hospital campus cafeteria.

³⁸ Asked if Hatten specifically stated she was acting in violation of Respondent's solicitation/distribution policy, Griffith said, "No, I never heard that, that policy. He just said that we could not be there to distribute flyers for another union or conduct a meeting."

³⁹ Having been told that the women had announced a meeting in the cafeteria, Parks was certain the meeting had not yet commenced at the time of the incident—"it hadn't occurred at the time yet."

explained that they cannot hold a meeting, they cannot distribute literature or flyers, and . . . they are not allowed to solicit funds."⁴⁰

Griffith next testified that, after Hatten and Parks left their table, she and Kirtman stood, picked up their documents, moved to the area of the dining room in which they "normally" sat, pushed two tables together, placed their documents on the tables, and sat. Approximately 15 minutes later, she noticed Parks, another man wearing a similar dark suit, two regular hospital security officers, and Susan Kessler, Respondent's EVS director, entering the cafeteria together. Moments later, Parks and Thomas George walked over to the area in which Griffith and Kirtman were seated and sat down "not even four feet across from us at another table." Griffith testified that she stayed in the cafeteria for the remainder of the day until the announced end of the meeting and that Parks and George also ". . . stayed there until 7:00 that night . . . in the same location," "each not moving unless he went to get something to eat or to use the restroom." During the day, Griffith asked who they were and what they were doing, "and they said, 'we're here to monitor . . . and watch you.'" According to Griffith, notwithstanding the surveillance, she spoke to approximately 114 bargaining unit employees about union matters and distributed both of the above-described documents to them in the cafeteria during the day; "I tried to talk with [them]" as they came through the cafeteria, eating meals or taking breaks from work. "And some sat with us and some did not sit with us because they thought the [two security officers were] with us." She knew this was the fact as members would ask about the identities of the two men and whether they were with Griffith and Kirtman.⁴¹

The deleterious effect of the guards' presence was confirmed by Lawana Williams, who helped draft and distribute the flyers, announcing the meeting.⁴² She testified that she was able to go down to the cafeteria three times that day—for her lunch and her two break periods at 9:30 in the morning and 2:30 in the afternoon. On her morning break, there were not many patrons in the dining area, and those present were "kind of scattered" through the facility. Griffith and Kirtman were sitting at a table and, in the same section, "a couple of guys" were sitting at a table directly across from the two women and no more than a "few" feet from them. Williams walked over to her co-workers' table,⁴³ and Griffith told her they ". . . were being watched by security." Williams further testified that she re-

⁴⁰ In contrast to the treatment of Griffith and Kirtman on March 20, Carlos Hernandez testified that he and McDuffie met with bargaining unit employees in Respondent's cafeterias, speaking to them about union matters and passing out flyers and that Respondent never interfered with their activities.

⁴¹ Griffith testified that the guards' presence in the cafeteria was "very uncommon. We've had meetings like this in the past but never have we had guards sit at the table with us."

⁴² Williams recalled that the purpose of the meeting was to give bargaining unit employees "information . . . pertaining to what was going on with the . . . trusteeship." She denied that a purpose was to solicit membership in the NUHW.

⁴³ Flyers were stacked on the table. She recalled that one document contained a picture of an NLRB member.

mained at the table with Griffith and Kirtman for 15 minutes during which time only one bargaining unit employee came to their table. During her afternoon break, she again observed the two security officers sitting at the same table across from Griffith. According to Williams,⁴⁴ on both occasions, the two security officers appeared to be paying attention to what Griffith and Kirtman were doing; each had a notebook and would start writing whenever employees approached the table.

Ronnie Parks testified that, after Hatten warned the women about what they couldn't do, they walked away from the table; that Tom George, the other guard, arrived at approximately 7:30 and Hatten "briefed him" as to the situation; and that Griffith and Kirtman soon left their table and moved to another table in the back corner of the room. According to Parks, he and George remained inside the Summit Hospital campus cafeteria until 7:15 p.m., and, in order to observe Griffith's and Kirtman's activities, the two men stationed themselves at a table "roughly across the aisle" from the women six to eight feet away with tables between them. As to what occurred during the remainder of the day, Parks stated that "there were no actual meetings . . . on Friday. . . . People would trickle over, a few at time . . . but what conversation we could hear was normal social conversation, it was not union business. . . ." Parks added that, sometimes during the day, there were as many as eight employees gathered around Griffith and Kirtman, with people standing when there were not enough seats. Also, while he did observe the two women leave their table from time to time to go for food or to the restroom and, in the process, stop and speak to other employees, ". . . it did not appear they were going around conducting business."⁴⁵ As to the distribution of flyers, Parks did not observe the women handing their flyers to employees, who stopped at their tables ("I didn't see them leave the table with the flyers"); however, during the day, he did observe employees, who were not carrying papers when they entered, leave the dining room with papers in their hands. Finally, as to the security officers' effect on employees stopping at the tables, which Griffith and Kirtman had pushed together, Parks stated that he heard approximately half of the employees, who approached the tables, asking about him; "they asked who we were and Beverly explained that we were security. . . ." Of those who asked, "probably four or five" employees immediately walked away after learning who he was.

⁴⁴ With regard to the distribution of literature in the cafeteria, Williams said she had freely distributed literature in the dining area prior to that day, including the flyer announcing the March 20 meeting.

⁴⁵ As to whether what the two women did was disruptive of the operations of the cafeteria, Parks said, "not the overall function, other than taking up the tables that they were at."

Hatten conceded that he did not believe Griffith or Kirtman engaged in any misconduct during that day, stating "what happened on Friday was nice, one, two person conversations, there wasn't a lot of attention drawn to them in having their discussions." Therefore, he permitted them to continue what they were doing.

4. The March 23 Incidents at Respondent's Alta Bates Hospital Campus Cafeteria

The record establishes that, just as on the prior Friday at the Summit Hospital campus, the SEIU-UHW stewards scheduled another membership meeting for the bargaining unit employees at Respondent's Alta Bates Hospital campus cafeteria on Monday, March 23 from 6:30 a.m. until 7 p.m.; that they advertised the time and location for the meeting by posting and distributing flyers;⁴⁶ and that Beverly Griffith, who had scheduled a vacation day for the event, participated in the organizing and conducting of the meeting. According to Griffith, she and DeAnn Horne, a ward clerk for Respondent at the Alta Bates Hospital campus,⁴⁷ arrived at the latter campus at approximately 7 in the morning, immediately walked to the cafeteria where they met Dee Mayberry, another steward, sat at a table in the far right corner of the dining area, and placed stacks of the same documents, which the stewards had distributed the prior Friday, on the table. Griffith testified that the purpose of the meeting was "to talk with my co-workers about the trusteeship and to answer questions and concerns," and Horne testified that their purpose was also ". . . to let people know what was going on with . . . the new [NUHW] and [getting] . . . information out so people could feel a little more secure with . . . the union vote. . . ." At that early hour, the cafeteria, which was under renovation at the time, was sparsely filled with no more than 10 or 12 patrons, and Griffith immediately noticed that, across the dining area, sitting at a table by a window were Bruce Hatten, Joan Davis, an HR specialist for Respondent, Ronnie Parks, and another security guard, Mahir Said.⁴⁸ There is no dispute that, moments later, Hatten left the cafeteria, and Parks and Said arose, walked towards Griffith's table, and sat at a table no more than 6 feet behind the two women.

At that point, Horne announced she was going "upstairs" in order to inform bargaining unit employees that Griffith was waiting for them in the cafeteria, and she then stood and walked out of the cafeteria. While Horne was away, according to Griffith, "I got a chance to talk to a few dietary workers. . . . I went to their table and they were . . . across from me." At first, she stood, but then she sat down and spoke to the employees, who were eating breakfast. "And I asked them did they have any concerns and did they understand what was going on. . . . And they [said] . . . we're fine, we understand, we're ready to vote." After "maybe five, six, seven minutes, or so," Griffith walked back to her table. Kenny Hill, a chief steward for SEIU-UHW, came to her table and sat, and, having been gone for no more

⁴⁶ As with GC Exh. 6, the flyer announcing the March 20 meeting, Griffith denied seeing GC Exh. 9, the flyer announcing the March 23 meeting, until the time she gave her pretrial affidavit.

⁴⁷ Horne was scheduled to be off work on March 23; however, she was called into work and told to report "no later" than 9 a.m.

⁴⁸ Parks testified that he reported to the Alta Bates Hospital campus at 6:15 a.m., that Mahir Said arrived 45 minutes later, that they met Bruce Hatten, that the latter gave them "basically the same briefing" as on the prior Friday, that he (Parks) had the same camera, and that Hatten again instructed him "to take pictures of violations." According to Parks, they observed Griffith and DeAnn Horne enter the cafeteria at approximately 7:30 a.m., and "we waited to see where she was going to sit, so we could sit by to observe."

than half an hour, Horne returned and took her seat at Griffith's table. Moments later, Griffith further testified, as the three employees were talking amongst themselves, Hatten returned to the cafeteria and approached Griffith's table. He looked first at Hill and then at Horne and then where each was working. He then addressed the three employees as a group, saying "I need you to cease and disperse. . . . I'm giving you a direct order to leave the premises now." He added that they were not to hand out any flyers. Hearing Hatten's instructions, Griffith, Horne, and Hill arose, and Griffith, who understood that an employee must comply with a direct order and would be subject to discipline for failing or refusing to do so, turned to Horne, said it was time to leave as they "were getting kicked out of the cafeteria," and asked to use Horne's cell phone in order to arrange for a ride. Then, Hatten repeated his order—"I'm giving you a direct order to leave the premises now." Griffith and Horne immediately began gathering their documents and stuffing them in a bag, and Hatten added, "And, if you don't leave before security comes, you will be suspended and you could be terminated." Griffith and Horne began walking out of the cafeteria, with the former a foot or two behind Horne; however, before they left the room, two security guards entered the cafeteria,⁴⁹ "and they escorted us out of the cafeteria" and to the front doorway of the building. At the door, Griffith looked back at the guards, and one told her she would have to leave Respondent's property. Asked if she said anything to Hatten during their confrontation or if she ever refused to leave the cafeteria, Griffith answered "no" to both questions. Also, she denied that she asserted her right to remain in the cafeteria or that Horne left the cafeteria by herself after Hatten asked both women to leave. Finally, she specifically denied being told by Hatten that she was suspended—"My understanding was that I was given a direct order to leave and, if I didn't, I would be suspended."⁵⁰

Corroborating Griffith, Horne testified that, a short while after she returned to the cafeteria and again sat at Griffith's table, Hatten approached their table. She testified, "He came up to the table and he says, I'm going to give both of you a direct order that you are to cease and disperse your union activities and, if you don't, you will be put on suspension with the possibility of termination. And, if you're not gone by the time the guards get here, you will be suspended." Horne was unable to recall Griffith saying anything to Hatten; however, she did recall Hatten asking her where she was going. Horne replied she was going to work. Hatten asked if she was going to Herrick, another facility owned by Respondent, and warned her not to take any of the "stuff" with her. Horne replied that she did not work at Herrick. Thereupon, the security guards arrived, and ". . . we proceeded to walk out. . . ." As they did so, according to Horne, Griffith asked to use her cell phone and made a call. Horne estimated that only 2 or 3 minutes elapsed from the time Hatten ordered them to leave and when they actually

⁴⁹ Griffith testified that the security guards arrived before Hatten "even finished his sentences."

⁵⁰ Having been a steward for several years, Griffith was well aware of the procedure when an employee is suspended. Thus, the employee is immediately ordered to surrender his security badge. According to Griffith, at no point that morning did Hatten demand that she turn in her security identification.

left the cafeteria.⁵¹ Horne denied hearing Griffith argue with Hatten about their right to be in the cafeteria and denied that Griffith ever refused to leave. Finally, asked if Hatten ever said to Griffith that she was suspended, Horne replied, "no."⁵²

Ronnie Parks testified that the table, at which he and Said⁵³ were sitting, was next to the one at which Griffith was sitting. He confirmed that the crowd in the cafeteria was "sparse;" however, "eventually," a table across from them started filling with people, who appeared to be hospital "service workers." According to Parks, he observed Griffith leave her table and approach the table at which the hospital employees were sitting.⁵⁴ "And then she was talking . . . about everybody needs to give \$25 to the new union . . . and that the dues are cheaper than SEIU." Hearing this, Parks immediately telephoned Hatten in order to inform him that Griffith was committing a violation.⁵⁵ After a while, Parks recalled, Griffith left this table, moved to another table, at which employees were sitting, "behind her," sat down, and "conversed" with them about "union stuff." Finishing her conversation, Griffith walked away from the second table and returned to her table. Moments later, Hatten arrived, and "I informed him that Ms. Griffith had crossed over to the other table and sat with . . . six people . . . and was . . . asking for funds for the new union, about it stagnating and that their dues were cheaper than SEIU's." Then, Hatten asked Parks to accompany him over to where Griffith, Horne, and Hill were sitting. They approached Griffith's table, and Hatten ". . . explained that they're not allowed to hand out flyers, solicit funds or hold a meeting and that they needed to cease and desist these activities and that they were being asked to leave the premises immediately . . ." "I don't believe [either Griffith or Horne] said anything; they just kind of looked at him with kind of a blank stare. Hatten then repeated that he was giving them "a direct order" and, if they refused, ". . . you can be put on administrative suspension." Hearing this, Horne said "I'm outa here," stood up, and "departed." However, rather than following, Griffith ". . . took out her cell phone and said she was going to call her lawyer."⁵⁶ Observing Griffith's actions, Hatten turned to Parks, said, ". . . 'it doesn't appear that she wants to comply with the direct order' . . .," and instructed Parks to call for Respondent's security guards. Parks then "radioed for security," and, when he finished, Hatten told Griffith ". . . that if she is not departing before security arrives, that he

⁵¹ Horne added that the security guards arrived two minutes after Hatten's warning.

⁵² Horne said that, if suspended, "they would take your badge." She added that such was Respondent's "practice," and Hatten never asked for Griffith's badge or said she should not return for work the next day.

⁵³ Respondent stipulated that Said acted as its agent within the meaning of Sec. 2(13) of the Act.

⁵⁴ Parks estimated the employees' table was approximately 15 feet from where he was sitting. As Griffith "can project pretty well," and the cafeteria was not filled, he could hear what Griffith said "very clearly."

⁵⁵ Parks recalled hearing additional conversation between Griffith, who stood at first and then sat down, and the employees at the table. "I don't remember details. I just remember it was . . . the union stuff. I don't remember every detail."

⁵⁶ According to Parks, "I don't know if she actually made the call, but she had the phone out."

will accept that as refusal to comply with the direct order.” Thereupon, in what seemed to Parks as reluctant compliance with Hatten’s instructions, Griffith slowly began gathering her stacks of leaflets and packing the documents into a bag. She had not yet completed her preparations to leave when Respondent’s security guards entered the cafeteria,⁵⁷ and upon their arrival, Hatten said to Griffith, “. . . ‘you’re on administrative suspension because you haven’t complied.’”⁵⁸ He then told the guards to escort Griffith out and told Griffith she was not allowed to be in any of Respondent’s facilities pending an investigation.⁵⁹

Bruce Hatten testified that he went directly to the cafeteria after being informed that Parks had called and reported something had occurred there. Arriving, he observed 35 to 40 patrons sitting in the entire dining area,⁶⁰ and everything appeared to be “normal” with people seating, eating, and talking. Hatten immediately met with Parks and Said, who told him Griffith had been “disruptive” in that she had stood up from where she had been seated and began addressing the people around her, “talk[ing] loud enough . . . saying something about . . . this new union. She was talking about them needing to raise funds in order to stay afloat. . . .”⁶¹ With the guards following, Parks approached and confronted Griffith. He began by saying that the security guards had reported she had conducted a meeting, and Griffith responded that she could conduct meetings that day and the next day, which, Hatten understood, as her saying she could conduct a meeting whenever she wanted to do so. Hatten replied that he was giving her a direct order to cease and desist conducting meetings, handing out flyers, and soliciting funds and to leave the cafeteria.⁶² According to Hatten, upon hearing his order, Griffith became “just defiant” as “I’m trying to explain to her what she needs to so moving forward,” and she is “. . . saying ‘I need silence.’” Then, she said she was going to call her attorney, and she, in fact, did telephone her lawyer “after I gave her [the] direct order to leave. Asked at what point during their confrontation he told Griffith she was being

suspended, Hatten said, “It was after the second time I gave her a direct order to leave . . . believe that I said, ‘you are refusing to comply with a direct order to leave the premises . . .’ and that she’s ‘suspended pending investigation for insubordination for refusing a direct order.’”⁶³ Griffith responded, “for what.” Rather than replying, Hatten said he then turned to Parks and asked him to telephone for the hospital security guards to come to the cafeteria. Hatten estimated that “probably” 5 or 10 minutes elapsed between Parks’ telephone call for Respondent’s security guards to come to the cafeteria and their arrival. He testified that, during this interval, “I don’t remember” Griffith making any effort to leave the cafeteria; she was merely “sitting at the table.”

Annie Block, who is employed by Allied Barton Security and assigned to Respondent’s Alta Bates Hospital campus as a guard supervisor, testified that, at 9 in the morning on March 23, she was “called” to come to the facility’s cafeteria by Officer Said and that she went there with two other guards. Upon arriving in the cafeteria, Block observed Hatten, Griffith, whom she knew by sight, Horne, the guard Said, and another person all standing in “probably like a half circle . . . in front of [a] table” but did not observe Griffith holding any materials. According to Block, “I arrived and I spoke with Bruce Hatten and he told me that Beverly had violated the orders and that she was to be escorted out.” Then, “Bruce told [Beverly] that she was suspended from Alta Bates Summit Medical Center” and instructed Block to escort her out of the facility. She added that, hearing what Hatten said, Griffith⁶⁴ “. . . just had this kind of look on her face like . . . I’m suspended. . . . It was a look like she understood.” Thereupon, with Horne walking along with them, Block escorted Griffith out of the cafeteria and to the front entrance to the facility. Finally, Block estimated that five minutes passed from the time she went to the cafeteria until the time Griffith left the building and that she was inside the cafeteria for only 2 or 3 minutes.

As to his reasons for confronting Griffith that morning, Hatten initially testified that Griffith had violated Respondent’s cafeteria policy by “basically getting up and taking over part of the cafeteria to have a meeting. It was disruptive, it was calling attention to herself.” Asked with whom she was meeting, Hatten said they were “employees of the organization” or “. . . groups of people at tables that she was going to, talking to loudly.” He added that he considered Griffith holding a meeting every time she went to a table at which employees were sitting.⁶⁵ Hatten stated that Griffith’s actions were disruptive; for

⁵⁷ Parks estimated that “maybe five minutes” passed from when he called security until the guards arrived in the cafeteria.

⁵⁸ Respondent offered Parks’ handwritten report of the incident, which the latter claimed he prepared “maybe 20 to 30 minutes” after the incident, as corroboration of his testimony. However, analysis of the report discloses that, after describing the entire sequence of events, including what Hatten assertedly said to the hospital security guards as they began escorting Griffith out of the cafeteria, in the last sentence, Parks added the words, “Bruce also said Beverly is suspended pending investigation and is not allowed on campuses.”

⁵⁹ Asked if Hatten asked for Griffith’s security badge, Parks said, “Not to my recollection.” Also, Parks did not recall Griffith saying anything to Hatten during the encounter.

⁶⁰ Hatten, who described the dining area as being “pretty full,” estimated “about 20” people sitting in the area in which Griffith’s table was located. He added that most of these individuals appeared to be employees. Further, most of the nonemployees were seated more towards the front of the room, and the sections were divided by planters.

⁶¹ According to Hatten, “I understood that she went [to] a table and talked to these folks.”

⁶² Regarding DeAnn Horne, Hatten said, “I believe when I gave the direct order to cease and desist and leave the premises to Beverly, he observed Horne leaving the cafeteria, and “she was gone.”

⁶³ While stating that “generally” Respondent’s practice is to collect a suspended employee’s name badge and keys, Hatten conceded that he failed to ask for Griffith’s security identification.

⁶⁴ Block denied hearing Griffith say anything to Hatten after he suspended her.

⁶⁵ Asked what was wrong with what Griffith did that morning when Respondent had no written policy explicitly forbidding such conduct, Hatten replied “because it makes an environment for our guests or patients, or visitors that do go . . . to the cafeteria.” He added that, while not a written work rule, such “. . . is a practice . . . that was communicated to Beverly on the 20th.” Asked to describe this “practice,” Hatten stated, “That you can’t take over the cafeteria having meetings

“she was carrying on a lot of conversation to people that were at a table within earshot of many other visitors to the hospital . . . trying to raise money, we’re trying to do things for this new union.” Denying he was actually concerned with the content of her message to her coworkers,⁶⁶ Hatten accused Griffith of “. . . disturbing the environment for the people that are in [the cafeteria]. . . .” Further, noting that his concern was that the NUHW was going to engineer some kind of “takeover” of the cafeteria with much noise and fanfare causing a disruption “of the flow of things,” Hatten asserted that Griffith had engaged in such conduct that morning. Then, asked to explain how her actions March 23 differed from her conduct 3 days earlier, Hatten replied that he permitted Griffith to engage in her union activities then as “what happened on Friday was nice, one, two person conversations, there wasn’t a lot of attention drawn to them in having their discussions.” He added that what was worse on March 23 was that “. . . Ms. Griffith then proceeded to stand up and take over that section of the cafeteria. . . . She started conducting a meeting loud enough in front of all of the people in the section and loud enough to where people in the next area, who were visitors to the hospital, could hear.”⁶⁷ Finally, conceding that no employee or visitor complained about Griffith’s conduct on March 23 and that he observed none of the foregoing, Hatten testified that he relied upon what he was told by the security guards, Parks and Said, and that they described Griffith’s acts and conduct as being “disruptive.”

Pursuant to the posted announcements, the membership meeting in the Alta Bates Hospital campus cafeteria on March 23 was scheduled to continue until 7 p.m. Roxie Osborne, an LVN for Respondent at that facility, testified that she, along with other SEIU-UHW bargaining unit employees, had volunteered to help conduct the meeting in shifts and that her shift was scheduled to be from 10 a.m. until noon.⁶⁸ According to Osborne, who had been a steward for SEIU-UHW but had been “relieved” of her steward responsibilities by the labor organization,⁶⁹ she arrived at the cafeteria at approximately 10 a.m. and observed that there did not appear to be any union activity occurring. She immediately approached a coworker, who said

that are disruptive basically not being used for what the cafeteria is intended to be use for.”

⁶⁶ Specifically asked by me whether it made any difference the record evidence was that, on the morning of March 23, Griffith had been distributing union literature and speaking about a union, Hatten replied, “That was not my concern.”

⁶⁷ Hatten opined that Griffith’s actions on March 23 were akin to making a speech—“it may have been only to this group instead of all of the [people in the cafeteria], but she was [speaking] . . . to this group . . . in a manner that was loud enough for anybody else around to be able to hear it clearly.”

⁶⁸ Osborne testified that, in the past, Respondent had permitted SEIU-UHW agents, stewards for the labor organization, and its employees to conduct SEIU-UHW membership meetings in the Alta Bates Hospital campus cafeteria, and “we never had a problem” doing so. Further, she was not aware of any restrictions on the use of the cafeteria for such meetings.

⁶⁹ The witness testified that SEIU-UHW had similarly relieved all its other stewards and bargaining committee members of their responsibilities.

there wouldn’t be a meeting that day and nodded toward “. . . two gentlemen that was sitting at a table against the wall.” She continued, stating that the two men, whom Osborne identified as Parks and Said, “. . . had stopped the meeting and had hustled Beverly Griffith out of the cafeteria.” Thereupon, noticing several bargaining unit employees sitting at another table, Osborne “. . . walked over to them and started talking with them, and I had brought a flyer [with me] . . . and I had that also in my hand. And as I started talking with them, Ronnie Parks . . . got up and . . . walked around the table where the employees were sitting. . . .” Osborne testified that the employees at the table “started staring at” Parks, and “. . . they got a little restless.” Moments later, a security guard for Respondent, whom Osborne recognized, entered the cafeteria, approached the table at which she sat, walked around it, and then walked out of the dining area. At the end of their break periods, the employees, who were sitting with Osborne, left the table. The latter remained sitting as she had observed several other bargaining unit employees enter the cafeteria and sit at another table. Osborne arose from her seat, walked over to the other table, sat, and began giving these employees “updates,” similar to those which she had discussed with the employees at the other table, on union issues. Then, Parks, who had left his table, approached Osborne and said “. . . that I’m not to talk about my union stuff. I’m not to . . . hand out any . . . union flyers, and I’m not to take any donations.” Osborne asked Parks to identify himself, and Parks did so loudly enough for all the employees, at the table, to hear, stating that Respondent had hired him. Osborne emphasized that she and the other employees “have a right to be here,” and “. . . he reiterated again that I’m not to talk about any union stuff, not to take any donations, and not to hand out any flyers . . . and I said this is [an] Alta Bates flyer and I’m sharing this with the co-workers. . . .” Parks walked away, and, spotting another bargaining unit employee, who had just entered the cafeteria, Osborne walked over to where she was seated with other employees, sat, and began speaking to the employee. Parks observed Osborne’s actions, left his table, approached to within a few feet of Osborne, and then returned to his seat. At this point, Osborne stood and walked out of the cafeteria.

Ronnie Parks testified that, subsequent to Respondent’s guards escorting Griffith out of the cafeteria, he and Said stayed for the remainder of the day “. . . observing the cafeteria for any activity that we were asked to watch for. . . .” At approximately noon to 1 p.m., Parks observed a short woman across the cafeteria and noticed her jacket had the UHW logo over the left breast. Seeing this logo, Parks began paying attention to the woman, who was carrying some papers in her hands, eventually standing and approaching “close” in order to identify what documents she was carrying and distributing. According to Parks, the woman remained in the cafeteria for 20 to 30 minutes, going from table to table, handing out flyers, which, Parks was able to identify as “union related” documents. He also took photographs of the woman’s activities. Then, Parks telephoned Hatten, who was in a meeting, and was instructed by the person to whom he spoke to approach the woman and request that she cease her union activities. According to Parks, he did so, and the woman ceased distributing her flyers. Specifically, Parks told her “you can’t hand out flyers, you can’t

solicit funds, and you can't hold a meeting . . . in relation to this material." Parks further testified he remained at the woman's table for 5 minutes and, after satisfying himself, she was not engaging in any prohibited conduct, he walked away from the woman.

Finally, with regard to this later March 23 incident, Bruce Hatten testified that he understood from what Parks reported to him that Osborne had been speaking loudly and disrupting other people in the cafeteria. He added that Osborne's conduct caused a "disruption" as "she did the same thing that Ms. Griffith did." However, he decided against any discipline; for ". . . when she was told to stop, she stopped."

5. Beverly Griffith's Suspension and Ejection from the Summit Hospital Campus on March 24 by Respondent

On Tuesday, March 24 dressed in her usual work clothes, Beverly Griffith arrived at the Summit Hospital campus at 6:55 a.m. in order to start working her normal 7 a.m. to 3:30 p.m. shift. The record establishes that, each morning, many of the EVS department employees arrive several minutes prior to the start of the work shift and gather in the EVS lounge/break room, which is located on the first floor of Respondent's facility across from the EVS department manager's office, talking and eating breakfast, and that, also, Tito Aquino normally holds a preshift meeting with them in order to discuss any departmental problems or issues. According to Griffith, her plan that morning was to arrive several minutes early in order to distribute a flyer⁷⁰ and alert her coworkers as to what occurred the previous morning at the Alta Bates Hospital campus cafeteria. In this regard, Griffith walked into the break room,⁷¹ and ". . . set my flyers down and my coat, and my purse, and I had a cup of coffee, and I started . . . telling everybody what had happened . . . at [Alta Bates] and . . . before I could finish what I was saying . . . Tito walked by and . . ." asked if she would step outside to speak to him. After initially refusing, Griffith agreed to follow him but asked Lawana Williams to accompany her. They walked out of the break room, and Aquino motioned her towards the elevators at the end of the hallway. Approximately 10 to 15 feet from the break room door, the supervisor stopped, turned to Griffith, and ". . . he said that he had got a call this morning from Bruce Hatten saying that I was suspended. And I was totally shocked. . . ." She managed to ask why, and Aquino replied that he did not know why. Griffith responded that she had a right to know the reason and asked Aquino if her suspension had been placed into written form. He said, no, ". . . and he told me I had to leave the campus. . . ." Thereupon, Griffith returned to the break room and announced that she had

⁷⁰ The headline on this flyer was "Sutter ABSMC is Un-American," and the paragraph beneath the above heading read "On Monday March 23, 2009 ABSMC tried to cancel a union membership meeting in the cafeteria. HR representative Bruce Hatten threatened Shop Stewards and bargaining team members Beverly Griffith, DeAnn Horne, and Kenny Hill with suspension and possible termination for having a informal meeting in the cafeteria. The purpose of the meeting was simply to update the membership and answer questions about what is happening to our Union."

⁷¹ When Griffith entered, there were already between 20 and 25 employees in the breakroom.

just been suspended but did not know the reason. Aquino, who had walked into the room behind her, demanded that she leave immediately. Asserting she had become upset at the reality of being suspended, while she "gathered" and repacked her materials, Griffith admittedly exclaimed ". . . this is bullshit" or something." Then, having finished picking up all the items she brought with her into the break room, Griffith, with Williams accompanying her, left the room. When they reached the elevators, they were met by a security guard, who accompanied the two women to the front entrance. Griffith stepped outside and, using her cell phone, telephoned for her husband to come and drive her home. Asked whether, besides the word "bullshit," she uttered any other profanity that morning, Griffith said, no.⁷²

Lawana Williams corroborated Griffith's account of what occurred that morning. Thus, Williams testified that she was inside the break room, drinking coffee, when Griffith arrived; that the alleged discriminatee immediately turned to the other employees and said ". . . listen up everybody. I just want to let you guys know what happened yesterday at the [Alta Bates] campus." She went on to describe the events of the previous day, and "at that point, Tito came to the door and asked if he could speak with her. She said he could speak in front of everybody and he said, no, I need to speak with you in private. And so she asked do I need to bring Lawana? He said . . . okay. So we . . . went out in the hall, we followed Tito down about 30 feet . . . to the elevators. And he informed Beverly that he had gotten a call from HR . . . from Bruce Hatten . . . to say that she was suspended for the day." Griffith exclaimed "suspended" and asked for what. Aquino only said ". . . that she was suspended and she needed to leave the campus." Griffith said "okay" and asked if she could retrieve her belongings. Aquino said, yes, and she turned and walked back toward the EVS break room. Williams continued, saying that she and Aquino followed behind Griffith by "maybe" a couple of seconds. "I went into the lounge. Tito kept walking. [Inside], Beverly [was telling everyone] she had been suspended. Everybody was upset, asking why. And she just [said] 'because this is what Lawana and I have told you guys . . . was going to

⁷² She denied saying "Can you believe that I've been f-cking suspended. I can't even speak to you in a f-cking public place." Further, she denied using profanity towards another person that morning, specifically denying telling Aquino she could be wherever the f-ck she wanted and he couldn't tell her what the f-ck to do. On this point, she said, "I don't have a reason to use profanity against Tito when Tito was only being told to tell me that I was suspended and I needed to leave."

Griffith averred that she hears employees use profanity in the break room "all the time" and that no one has ever been disciplined for using such language there.

During cross-examination, Griffith conceded there is nothing in her pretrial affidavit about her saying this is "bullsh-t" after hearing of her suspension but maintained "I said it" inside the lounge. Further, Griffith conceded that, during her March 26 *Weingarten* interview prior to her discharge, she admitted she might have said "f" something. However, she added that "after thinking about what [Hatten] said . . . I said, no, I did not say that."

happen.’ And she . . . said ‘because it’s a bunch of bullsh–t.’”⁷³ Aquino then came to the door and said he needed her to leave. Williams volunteered to carry some of Griffith’s things and accompanied her out of the room and to the front entrance.⁷⁴ Aquino followed them as far as the elevators and then turned and walked back toward his office. Williams estimated that no more than “probably two minutes, two and a half minutes at the most, elapsed between the time Griffith walked back toward the break room and when, having gathered all her materials, she walked out of the break room.

Tito Aquino testified that, during the afternoon on March 23, he received a telephone call from Brett Rogers, Respondent’s EVS director, who informed him that Griffith was being placed on suspension and would not be allowed on the premises. The next morning, according to Aquino, he was in his office when he became aware that Griffith was in the building. He immediately telephoned for security, saying a suspended employee was inside the facility and she should be escorted out. He then went across the hall to the EVS lounge “. . . and when I got to the door, I saw Ms. Griffith standing in the middle of the lounge table; she was in uniform and . . . holding some blue flyers.” He called to Griffith that he wanted to speak to her. After she hesitated, Aquino said he needed to speak to her outside. This time, Griffith assented but asked Lawana Williams to accompany her. They walked toward the service elevators and Aquino told Griffith that he had been informed by HR that she had been suspended and she had to immediately leave the hospital building. Griffith responded, “Says who,”⁷⁵ and Aquino repeated that she had been suspended and had to leave immediately. Thereupon, Griffith walked back into the lounge, and, according to Aquino, “. . . I just walked behind [Griffith and Williams] and stood “by the doorway” of the lounge.” From that position, he heard Griffith, who he characterized as being “loud” and “upset,” say to the EVS employees “. . . ‘Did you all hear that. I’m being f–cking suspended. I can’t even speak to you in a f–cking public place.’”⁷⁶ At this point, according to

⁷³ Williams specifically denied hearing Griffith utter any other profanity, including the “f” word. Further, she denied that Aquino was in the lounge listening to what Griffith said.

⁷⁴ Bertha Dorrrough, an EVS department employee, testified that she also was in the EVS department lounge early in the morning of March 24. She observed Griffith enter and join into a discussion “about scarves.” Then, Aquino entered the room and asked Griffith to step outside, and Lawana Williams accompanied her. Griffith “. . . came back in a few minutes later and told us that she was being suspended. Employees began asking why, and Griffith responded “. . . ‘Oh, it’s for a bunch of bull,’ and she was grabbing her purse [and other personal items] . . . and she just started walking and Lawana . . . followed her out the door.” Dorrrough did not see Aquino until he came back to the lounge later. Asked if she heard Griffith utter any profanity that morning, Dorrrough replied, “no . . . I didn’t hear her say any profanity,” including the “f” word.

⁷⁵ Aquino conceded that “when I first told her about [her suspension] . . . she appeared . . . this is the first time that she knew about it.”

⁷⁶ Moments later, during his testimony, Aquino changed his testimony, quoting Griffith as saying to the other employees in the lounge, “. . . ‘can you all . . . believe that I’ve been suspended.’” Subsequently, under questioning by me, asked to repeat what he heard, Aquino embellished his original account, testifying “she did say profanity words . . .

Aquino, he asked Griffith to leave immediately and accompanied her to the elevators where a security guard had just arrived. He instructed the guard to escort Griffith out of the building and watched as the guard, Griffith, and Lawana Williams walked towards the front entrance to the building.⁷⁷

Carla Biddle, who worked as an EVS supervisor for Respondent from March 3 until she voluntarily quit on July 10, testified that she supervised 32 day shift employees including the alleged discriminatee⁷⁸ and that Aquino informed her on March 23 Griffith had been suspended. Biddle testified that she arrived for work on March 24 at 5:40 a.m. and “began rounding my areas in the hospital.” She finished at approximately 7:00, and “I was heading to the Environmental Services corridor . . . to the EVS break room, the lounge. . . . The moment I stepped off the elevator, Tito Aquino was coming towards me and I went to ask him a question regarding rounding, and he said, ‘not now, we have a situation. . . .’ He turned around to head back to the EVS lounge and I followed him. . . . [He] walked into the EVS lounge and I stopped at the doorway to the left-hand side . . . it was a very heated situation that I walked into. . . . Ms. Griffith was standing in the room, to the right side of the table, handing out . . . a blue flyer [to the employees who were seated around the table] . . . and she was speaking loudly. Mr. Aquino raised his hand and told her, ‘you don’t belong here, you need to leave, I’ve called security.’ At which point,

when she walked back into the lounge . . . ‘Did you all hear that. I was being fucking suspended and I’m not even allowed to be f–cking . . . talking in a f–cking public place.’”

⁷⁷ Aquino testified that Griffith directed no profanity towards him. Further, he could not recall Griffith saying to him “I can be wherever the f–ck I want to be” or “You can’t tell me what the f–ck to do or where to go.” Aquino stated that he has heard employees use profanity during private conversations but maintained he would have requested that Griffith be given a warning notice for her profanity that morning.

Aquino testified that, after Griffith departed, he informed Brett Rogers of what had occurred; that the latter asked him to draft a written statement regarding the incident; and that he did draft such a statement “somewhere around 9:00, 9:30” and gave it to Rogers. Aquino further testified that Bruce Hatten requested that he revise his report. Asked why he did this, Aquino testified, “I revised it because . . . I did not see any union flyers that were inside the employee lounge on the table. . . . And that’s what I added . . . and that . . . she was holding a blue paper which is a flyer form the union.” Respondent offered as its fifth exhibit Aquino’s revised written statement; however, it neither offered the original draft as an exhibit nor offered an explanation for its failure to do so. Further, Hatten failed to corroborate Aquino as to the reason for revising his statement.

⁷⁸ During cross-examination, Biddle, who was virtually inaudible for much of her testimony, stated that she was assigned to supervise EVS employees who were working on the “. . . ground, first, second, and third floor” of the Summit Hospital campus. She added that Griffith was assigned to the fourth floor and that, while Aquino was the supervisor of the fourth floor EVS employees, she did supervise Griffith on Monday, which was Aquino’s “scheduled day off” and on his vacation days and personal leave days. Of course, given that Biddle had only been working for 2 weeks at the time of Griffith’s suspension, her supervisory time over Griffith would have been negligible—at most, 2 days. Finally, during cross-examination, Biddle stated she was responsible for supervising “. . . ballpark, 13 to 15 employees.” Asked if she supervised “32” employees only when Aquino was away, Biddle replied, “correct.”

Ms. Griffith raised her voice to talk over him, and Mr. Aquino again repeated it and turned around and exited the room.⁷⁹ Asked what she heard Griffith⁸⁰ say, Biddle stated, “Ms. Griffith was . . . speaking what her rights were, that she had a right to be there, she shouldn’t have been suspended, numerous words of profanity involved in this. . . . The “f” word was repeatedly used during her angry outburst.”⁸¹ During cross-examination, Biddle was more specific, stating that Griffith⁸² angrily said “. . . she had been wrongfully [suspended], she had [f-cking] rights.” Then, after Aquino said she had to leave and he had called security, Griffith spoke over him, saying “. . . she had rights, she could be ‘any [f-cking] place’ she wanted to be, he couldn’t tell her what to do.”⁸³ At this, Aquino left the break room, walking past her. Biddle then immediately turned and crossed the hall into the EVS supervisor’s office⁸⁴ and unsuccessfully tried to contact Brett Rogers by telephone. Moments later, Susan Kallister, Biddle’s supervisor, entered the office, and Biddle explained the “explosive” situation, involving Griffith, to her, and Kallister “. . . asked me to come with her to see Bruce Hatten because I was very upset.”

However, notwithstanding the “explosive” situation apparently continuing in the break room and Kallister’s instructions to her, feeling the urge to “regroup at that moment,” Biddle decided to take a smoking break. Thereupon, she left the EVS office and eventually exited the hospital through the front entrance, walked to the left side of the building past a brick wall, and stepped off the curb. While doing so, according to Biddle, she noticed that Beverly Griffith “. . . was on the other side of the entrance partitions pacing back and forth, speaking loudly on her cell phone” and using the “f” word during her conversation. No patients or visitors were in the vicinity of Griffith. Biddle stayed outside smoking for 5 or 6 minutes, and, when finished, she again passed by Griffith, who was speaking to a

⁷⁹ In her subsequent statement, which she gave to Respondent, Biddle wrote that she first encountered Aquino at the elevators. Asked what she first encountered Aquino, Biddle said “. . . I encountered him at the elevators. . . . The doors opened, at the time I step out, he’s right there. . . .”

⁸⁰ Asked to describe Griffith’s demeanor, Biddle characterized her as “angry, agitated, highly upset.”

⁸¹ Biddle stated that the situation between Aquino and Griffith lasted “I would say between three to four minutes.”

⁸² Asked if she thinks Griffith would have reported for work on March 24 knowing she had been suspended the day before, Biddle said, “I was surprised she did.”

⁸³ According to Biddle, Griffith was not looking at Aquino; rather, she was “speaking to the wall while “angrily” throwing flyers down on the table.

In a statement (R. Exh. 7) which Biddle claimed she drafted after the incident at the behest of Bruce Hatten, she more explicitly described what she heard Griffith say to Aquino, “. . . ‘I can be wherever the [f-ck] I want, you can’t tell me what the [f-ck] to do, where to go, it’s my right to be wherever the [f-ck] I want to be and you have no right to [f-cking] suspend me for exercising my [f-cking] rights.’” Biddle adopted this latter version as what she actually heard.

⁸⁴ According to Biddle, Griffith remained standing by the right side of the table and continuing to talk in a loud voice. She denied that Griffith appeared to be making any effort to leave the lounge.

woman and giving her a blue flyer,⁸⁵ as Biddle entered the hospital building. The latter testified that she eventually returned to the EVS office and encountered Bruce Hatten who requested that she “document” what she had earlier witnessed and send it to him.

As to whether she saw Carla Biddle that morning, Beverly Griffith testified, “I don’t remember seeing Carla until I was walking out of the building and she was coming towards me” Later, according to Griffith, as she was standing outside the glass entrance doors and telephoning for her husband to come and pick her up, she again noticed Biddle outside in the designated smoking area approximately 65 to 70 feet from her. Likewise, Lawana Williams testified that, while she and Griffith walked towards the front entrance, they passed by Carla Biddle and the hospital “dispatcher,” both of whom were coming from the opposite direction, at the hospital gift shop. Williams stated that she believed both had been outside smoking as “they smelled like smoke.” Asked whether he saw Biddle at any point during the incident, Tito Aquino contradicted her, stating “I was at the doorway when I saw her that time . . . shortly after . . . I followed Lawana and Beverly . . . back to the EVS lounge area. . . . She came from the elevator side of the hallway. . . . She was walking towards the office and the EVS lounge . . .” and went past where he was standing. Aquino failed to corroborate Biddle regarding her stopping in order to observe what was occurring inside the break room and, as set forth above, regarding most of the comments attributed to Griffith by Biddle.

6. Respondent’s April 6 Discharge of Beverly Griffith

Two days after her suspension, on March 26, Respondent requested that Griffith report to its HR department for a *Weingarten* interview. Bruce Hatten conducted the meeting for Respondent, and Griffith asked Deborah Kirtman to represent her. The alleged discriminatee testified that, prior to this meeting, she had no information or knowledge as to the allegations against her and that, during the above meeting, she learned for the first time that Respondent contended that Hatten had suspended her prior to her leaving the Alta Bates Hospital campus cafeteria on March 23. Hatten told her this and then asked, knowing she had been suspended and ordered not to return to Respondent’s campuses, nevertheless, she reported to work the next day with the intent of being paid? “And I said, yes, I was in my uniform and yes, I came to work to get paid because I wasn’t aware that I was suspended until that morning.” Also, Hatten asked her if she remembered his admonition, on March 20, that she could not conduct a meeting, and she said she did. He asked if she stood up and spoke to a group on March 23, and Griffith replied that she could not recall doing so. Further, Hatten asked Griffith whether she had ever used the word “f-cking,” and the latter replied that she was not sure but might have said it.⁸⁶ “And then he said, didn’t you use the word . . . to Tito . . . and when he said that, I says, no, I did not say that

⁸⁵ Biddle asserted that the blue flyer, which Griffith distributed that morning, “. . . stated she had been suspended. . . . She was stating she had been unfairly suspended.”

⁸⁶ According to Griffith, she wanted to be “truthful” in her answers to Hatten.

to Tito.” Then, at the hearing, Griffith sought to revise her initial response to Hatten, adamantly denying her use of the word “f-cking” on March 24—. . . no, I did not say that.”

Either later on March 26 or the next day, Hatten met with Brett Rogers in order to determine discipline for Griffith, and, according to Hatten, the “outcome” of their meeting was the decision to terminate Griffith’s employment with Respondent. During their discussions, while not discussing Respondent’s unwritten “no meetings policy,” Hatten and Rogers did delve through all the evidence regarding Griffith’s asserted violations of Respondent’s work rules, direct orders, and policies, including its solicitation/distribution rules and Griffith’s violations of said policies and all the disciplinary actions involving Griffith during the preceding 12 months. On Griffith’s alleged use of profanity, noting the discrepancies, they nevertheless decided to accept the accounts of Aquino and Biddle as both supervisors were “sincere” about what they described and neither “gained” anything from volunteering information.⁸⁷ However, Hatten agreed that the primary reason, which he and Rogers discussed, for discharging Griffith, was that she violated Hatten’s direct orders to cease and desist her meeting and to leave Respondent’s Alta Bates Hospital campus cafeteria on March 23. Asked to describe Griffith’s insubordination that day, Hatten stated, “Basically getting up and taking over part of the cafeteria to have a meeting. It was disruptive, it was calling attention to herself.” Finally, asked, if prior to deciding to terminate Griffith, he was aware of or had concerns Griffith had been involved in soliciting signatures for the decertification petition, Hatten replied, “I don’t think so.” In this regard, General Counsel’s Exhibit No. 24, a March 27 email from Richard Hinshaw to various individuals, including Hatten, reads as follows: “Bruce is pursuing some recently received information that Beverly was observed at least on one occasion taking EVS Staff sign in sheets . . . and copying the staff signatures. We suspect they may have been used by NUHW to demonstrate a 30% showing of interest for the decertification petition. We think part of Beverly’s activities doing NUHW business has been collecting signatures for the petition. . . .”

Notwithstanding having reached the decision 9 days earlier, Respondent waited until April 6, to terminate Griffith. According to Hatten, the delay was caused by having to “. . . [go] up my line and reviewing a termination with my boss.” Also, he spent “a few days” prior to discharging the alleged discriminatee researching whether Respondent previously had discharged employees based upon similar acts and conduct. In this regard, Respondent offered evidence of five allegedly similar prior terminations—the first, dated September 4, 2008, concerns an employee who falsified time records, engaged in intimidating behavior toward coworkers, created a hostile work environment, and engaged in insubordinate behavior; the second, dated June 4, 2007, concerns an employee who was terminated for sleeping on the job, being dishonest about said misconduct, and deliberately violating a direct order to leave the hospital; the next, dated December 15, 2006, involves an employee who opened a sealed envelope addressed to a

⁸⁷ Hatten failed to interview any employee, who was inside the EVS lounge early in the morning of April 24.

coworker, replied “who gives a f-ck” when questioned by a supervisor, and violated a direct order not to speak to coworkers while under suspension; the fourth, dated November 20, 2006, concerns an employee who had been untruthful about returning to work after an excused absence and about his absence from work on another occasion; and the final discharge, dated April 19, 2007, involves an employee who destroyed medical records, improperly used Respondent’s email system, and failed to follow a direct order regarding retaliation.⁸⁸

On April 6, Respondent telephoned Griffith and told her to report for a meeting that day. She was unable to do so that day; however, on April 7, she met with Hatten in his human resources department office. “He said that he was terminating me, and he read the whole termination papers to me, and I signed it. I said I’m being . . . terminated for union activity.” After noting that, on March 23, she had been observed in the Alta Bates Hospital campus cafeteria conducting an advertised meeting for an “outside organization” in violation of Respondent’s policy, including displaying literature on a table, changing tables “several times,” and distributing flyers, that she left only after security escorted her out of the cafeteria, and that she had been suspended for her actions, the termination notice, which Hatten gave to Griffith, states, “You are being terminated for unacceptable behavior. You failed to obey a direct order from a management representative. You attempted to return to work and receive pay while under an investigatory suspension, and you used foul language on medical center property. . . . The conduct described above violated multiple disciplinary rules, specifically including our rules against disruptive conduct, harassment, insubordination, and the use of foul language on hospital property.”

C. Legal Analysis

As set forth above, the General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by engaging in surveillance of its employees’ union activities in its Summit Hospital campus cafeteria on March 20, and in its Alta Bates Hospital cafeteria on March 23; Section 8(a)(3) and (1) of the Act by discriminatorily enforcing its existing solicitation/distribution policies at its Summit Hospital campus cafeteria on March 20 and at its Alta Bates Hospital campus cafeteria on March 23; and Section 8(a)(3) and (1) of the Act by issuing a disciplinary warning to Griffith on February 23, by suspending Griffith on March 24, and by discharging her on April 6. Clearly, credibility resolutions are essential for determining what occurred during the above-described February 17, March 20, 23, and 24 incidents and for determining the merits of the unfair labor practice allegations. At the outset, in these regards,

⁸⁸ Counsel for the General Counsel offered examples of Respondent’s discipline of employees, who engaged similar misconduct as allegedly engaged in by Griffith but who were not discharged. In this regard, in May 2008, an employee received a final warning notice and was suspended for 12 days for disobeying multiple instructions from a supervisor, becoming loud and abusive in a work area, and refusing to leave when instructed and, in July 2005, an employee received a final warning notice and was suspended for 5 days for using foul and abusive language in a meeting with a supervisor in front of other employees and refusing to leave despite multiple instructions.

while I was troubled by Beverly Griffith's timorous testimony explaining her admittedly equivocal response to Hatten, during her March 27 *Weingarten* interview, as to her use of profanity, I, nevertheless, viewed her demeanor, while testifying, as that of a veracious witness, one who clearly paid attention to and understood my admonition to tell the truth, and I shall credit and rely upon her version of events. Likewise, each of the current bargaining unit employees who testified (DeAnn Horne, Lawana Williams, Bertha Dorrrough, and Roxie Osborne) impressed me as adhering to my admonition and attempting to convey her recollection of events as accurately as possible, and, in this regard, I note that, at a time when job security is a paramount concern, each testified adversely to Respondent's interests with a management representative, Bruce Hatten, observing her testimony. As with the alleged discriminatee, I shall rely upon the respective corroborative testimony of Horne, Williams, Dorrrough, and Osborne. SEIU representative Carlos Hernandez' testimonial account of the February 17 water spilling incident did not differ greatly from that of Griffith; however, inasmuch as Hernandez, an otherwise seemingly candid witness, gave a contradictory version to Respondent's security guard immediately after the event and as Respondent failed to call Erica McDuffie as a corroborative witness nor offered any explanation for failing to do so, I shall credit Griffith whenever she and Hernandez conflict. Three other witnesses (Tito Aquino, Ronnie Parks, and Annie Block), for the most part, appeared to be testifying honestly; however, any credence, which I might give to these individuals must be palliated by Aquino's three divergent accounts of Griffith's asserted profanity on March 24, Parks, Block, and Bruce Hatten contradicting each other as to the timing of the latter's asserted suspension of Griffith on March 23, and Parks' and Block's contradictory testimony as to DeAnn Horne's continued presence in the Alta Bates Hospital campus cafeteria on March 23 after Hatten confronted Griffith and her. In these circumstances, whenever these latter three individuals' accounts of events conflict with those of Horne, Williams, and especially Griffith,⁸⁹ I shall rely upon the latter three witnesses.

In stark contrast, noting the demeanor of each while testifying and the content of the testimony of each individual, which, in significant ways, was contradicted by other, more credible witnesses and by the documentary evidence, two witnesses, Bruce Hatten and Carla Biddle, impressed me as being particularly disingenuous, deceitful, and not worthy of belief as to any aspect of his or her testimony. Bluntly put, Hatten, who was the instigator behind each of the alleged unfair labor practices, was a duplicitous witness, one whose primary intent, I believe,

⁸⁹ Respondent offered several documents, assertedly corroborative of the testimony of its agents' respective testimony. I harbor doubts regarding these documents. Thus, while Ronnie Parks' written report of the March 23 incident does portray Hatten as informing Griffith she was suspended, I note that, notwithstanding its import, Parks' failed to mention Hatten's act in his description of the incident. Rather, the sentence containing Hatten's suspension of Griffith is the last sentence and is introduced by "Bruce also. . . ." Moreover, while Respondent offered as corroboration of Aquino, his second draft of his written statement, it failed to offer the original statement and failed to explain its absence.

was to buttress Respondent's defense rather than to testify truthfully, and was contradicted on crucial points by Tito Aquino (whether Hatten spoke to Griffith at the end of the latter's work shift on February 20), Annie Block, and Ronnie Parks (whether DeAnn Horne left immediately after Hatten ordered Griffith and her to cease and desist from engaging in their union activities and to leave the Alta Bates Hospital campus cafeteria on March 23 and whether Griffith acted in a "defiant" manner in response to said orders) and by Respondent's own email messages (contrary to Hatten, as early as February 20, Respondent harbored suspicions that Griffith was distributing union organizing campaign literature at its facilities and, while denying he was aware of the alleged discriminatee's activities in support of a decertification petition, as of March 27, the day he was involved in the decision to discharge Griffith, Hatten was in the midst of "pursing" the extent of Griffith's involvement in obtaining signatures for the petition). Likewise, noting that the aforementioned Aquino either failed to corroborate or flatly contradicted her on almost every meaningful aspect of her testimony, I think Biddle, who testified inaudibly as if she desired not to be heard and appeared unable to articulate, with any specificity, the profanity which she attributed to Griffith,⁹⁰ dissembled as to her version of the events of the early morning on March 24. In particular, Aquino contradicted Biddle concerning their initial encounter, as to where each stood while assertedly observing and overhearing Griffith inside the EVS break room,⁹¹ and, of course, most importantly, regarding whether, after venting angrily to her coworkers inside the lounge, Griffith turned to Aquino and assertedly attacked him with a scabrous outburst of profanity. Also, rather incredibly, Biddle was internally inconsistent regarding seemingly innocuous, irrelevant points including the number of employees whom she supervised and her asserted supervision of Griffith.⁹²

In light of my aforementioned credibility resolutions, I find that Respondent and SEIU-UHW have been engaged in ongoing negotiations for a successor collective-bargaining agreement since, at least, July 2008; that, on January 26, 2009, the SEIU placed SEIU-UHW into trusteeship; that, shortly thereafter, ousted SEIU-UHW officers and executive board members formed the NUHW and immediately commenced an organizing campaign in California amongst hospital employees who were then represented by SEIU-UHW, including Respondent's bargaining unit employees; that, by January 29, several of Respondent's bargaining unit employees, including Beverly Griffith and other stewards, began circulating a petition to decertify SEIU-UHW as their bargaining representative and organizing on behalf of the NUHW; that, after approximately 70 percent of said employees executed the petition, Griffith led a delegation of employees to Respondent's chief operating officer's office and presented the petition and a demand for recognition of the NUHW to the latter's secretary; and that, as early as late Janu-

⁹⁰ Eventually, she adopted what she claimed to have written in her statement of events for Respondent.

⁹¹ Crediting both, they would have been standing in each other's shoes while stationed in the doorway of the lounge.

⁹² Of course, I give no credence as corroboration to Biddle's written statement of the events of March 24. Without delving into conjecture as to its origin, I view nothing in the document as truthful.

ary, Respondent became aware of the decertification campaign. Next, I find that, on February 17, SEIU-UHW representatives, Hernandez and McDuffie, encountered Griffith at a table in the Alta Bates Hospital campus cafeteria; that they began arguing about the pending election petition before the Board and the state of the negotiations for a new collective-bargaining agreement between SEIU-UHW and Respondent; that, having no desire to continue their heated conversation, Griffith arose and inadvertently knocked over a small cup of water, with the contents spilling over the table top and down to the floor; that no water spilled on Hernandez; and that McDuffie accused Griffith of spilling the water deliberately and threatened to report the matter to the police. Then, the two SEIU-UHW representatives left the dining area and exited the cafeteria; shortly thereafter, Griffith observed them speaking to a security guard for Respondent and accusing Griffith of deliberately knocking over the cup of water on them; Griffith approached and said it had been an unfortunate accident; the guard said he would have to file a report of the incident and did so; and, in his report, the guard quoted Hernandez as accusing Griffith of knocking over the cup of water, with the contents spilling on him. I further find that, 3 days later, Bruce Hatten received an email from Richard Hinshaw; that, in said email, Hinshaw intimated that Griffith was responsible for leaving some NUHW organizing campaign literature at the Summit Hospital campus facility; that, later, Hatten received a telephone call from McDuffie; that during the course of their conversation, McDuffie accused Griffith of having been “rude” to Hernandez and her and of having deliberately spilled water on Hernandez; that Hatten then requested and received the security guard’s incident report; that, failing to interview Hernandez, Hatten assertedly believed McDuffie and perceived the incident as an employee deliberately spilling a cup of water on a guest; that, later in the day, along with Tito Aquino, Hatten went looking for Griffith but was unable to locate her on her work floor; and that, notwithstanding his professed desire to speak to the alleged discriminatee and ascertain her version of events, at approximately 3:25 p.m., near the EVS office, Griffith walked past Hatten and Aquino on her way to clock out for the day and, in abject disregard of his usual practice of obtaining each party’s version of a disputed incident, Hatten made no effort to speak to her. Finally, I find that, on February 23, Hatten met with Griffith for a *Weingarten* interview; that, during the course of their meeting, he gave Griffith a written warning notice, accusing her of “. . . intentionally knock[ing] over a glass of water that spilled onto a guest. . . . This behavior is unacceptable and will not be tolerated;” that Griffith became upset and accused Hatten of disciplining her without obtaining her version of the incident; that Hatten responded “it sounds like [you];” and that Hatten never protested he had, in fact, spoken to Griffith 3 days earlier.

Alleging that Respondent violated Section 8(a)(3) and (1) of the Act by giving Griffith the foregoing disciplinary warning notice, counsel for the General Counsel posits two different theories underlying the alleged unfair labor practice. First, she argues that the Supreme Court’s rationale in its *Burnup & Sims, Inc.*, 379 U.S. 21 (1964), decision applies inasmuch as Griffith was disciplined “. . . for allegedly engaging in misconduct in the course of protected activity” and as, in such a setting, Re-

spondent’s good-faith belief that Griffith had engaged in the alleged misconduct would not constitute a defense if, in fact, she had not committed the alleged misconduct. *White Electrical Construction Co.*, 345 NLRB 1095, 1096 (2005). Utilizing the *Burnup & Sims* analysis, in order to establish a violation of Section 8(a)(3) and (1) of the Act, the General Counsel must have first established that discipline occurred; the burden then shifted to Respondent to establish that it possessed a good-faith belief that Griffith engaged in misconduct; and then the burden shifted back to the General Counsel to establish by a preponderance of the evidence that she, in fact, did not engage in the alleged misconduct or that her entire course of conduct constituted protected activity. *Marshall Engineered Products Co.*, 351 NLRB 474, 475 (2007). Counsel next argues that Respondent’s acts were likewise unlawful utilizing the *Wright Line* analytical framework. In this regard, under *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the General Counsel had the initial burden of establishing, by a preponderance of the evidence, that protected activity was a “motivating factor” in Respondent’s decision to discipline the alleged discriminatee. Thus, the General Counsel had the burden of showing that Griffith engaged in union or other protected concerted activities; that Respondent possessed knowledge of Griffith’s actions; and that Respondent demonstrated unlawful animus against her. Upon such a showing, the burden of persuasion shifted to Respondent to demonstrate that it would have disciplined Griffith notwithstanding her protected activities. *Detroit Newspapers*, 342 NLRB 1268, 1269–1270 (2004); *Senior Citizens Coordinating Council*, 330 NLRB 1100, 1105 (2000).

Pursuant to the *Wright Line* analysis,⁹³ the record establishes that, notwithstanding her status as a steward, Griffith was a dissident member of SEIU-UHW and an ardent supporter of the NUHW’s organizing campaign. Thus, following the January trusteeship, she assisted the bargaining unit employees’ decertification effort against the SEIU-UHW by soliciting employees to execute the decertification petition, and she not only became a founding member of the NUHW but also solicited funds and support from their coworkers for said labor organization. Moreover, not only was Respondent aware of that its bargaining unit employees were circulating a decertification petition against the SEIU-UHW but also it is clear that Respondent probably was aware of Griffith’s dissident activities and, at least, suspected her involvement with the NUHW. Thus, Bruce Hatten admitted that he became aware of the decertification campaign as early as January 27, and Griffith was amongst the group of employees, who carried the decertification petition and the NUHW’s demand for recognition to the office of Respondent’s chief operating officer. Moreover, as early as February 20, the day Hatten launched his putative investigation of the water-spilling incident, Richard Hinshaw sent an email to

⁹³ I do not believe that this issue may properly be analyzed using the *Burnup & Sims* approach as the discipline was not based upon the discussion between Griffith and Hernandez and McDuffie, which may have been protected activity but, rather, upon an act, which occurred outside the conversation—the spilling of water.

several management representatives, including Hatten, advising them that Respondent had discovered copies of the NUHW's organizing campaign literature at its facilities and suggested Griffith's participation, noting sightings of her "around" Respondent's facilities in the evening after the conclusion of her work shift. The Board has long held that suspicion of an employee's involvement in protected activities is tantamount to direct knowledge of such. *Heritage Hall, E.P.I. Corp.*, 333 NLRB 458, 461 fn. 24 (2001). Next, I believe that, having become aware of its bargaining unit employees' antipathy towards the SEIU-UHW by virtue of their decertification petition and of the NUHW's nascent organizing efforts amongst said employees, Respondent favored the SEIU-UHW and embarked upon a campaign designed to quell its employees' suspected growing support for the NUHW. As to this, I note that, having become aware of the March 20 and March 23 membership meetings, Respondent informed the two guards, whom it hired from Allied Barton Security for the purpose of engaging in surveillance of its employees' activities, that its employees were attempting to form a new union and directed them to be vigilant for any employees meeting on this subject, soliciting funds on behalf of the new union, or distributing flyers and to immediately report such "violations." That Respondent's preference for the SEIU-UHW and aversion for the NUHW innervated Hatten's decision, on behalf of Respondent, to discipline Griffith is evident. Thus, having been informed earlier on February 20 that Griffith may have been involved in distributing NUHW literature at Respondent's facilities at night and egregiously ignoring his own normal practice of obtaining an employee's version of events prior to imposing discipline, Hatten issued the written warning to Griffith without first interviewing her, asserting as justification that it "sounds like" something she would do. Moreover, in deciding to discipline the alleged discriminatee, Hatten claimed he believed McDuffie but failed to press her for the details of Griffith's "deliberate" act and failed to interview Hernandez, who, of course, was the asserted victim of Griffith's rude behavior. The Board has previously concluded that the failure to conduct a "meaningful" investigation and to give the employee, who is the subject of the investigation, an opportunity to explain are clear indicia of discriminatory intent. *New Orleans Cold Storage & Warehouse Co.*, 326 NLRB 1471, 1477 (1998); *K&M Electronics*, 283 NLRB 279, 291 (1987). In these circumstances, I find that the General Counsel has established that Respondent was unlawfully motivated in disciplining Griffith on February 23.

The burden of persuasion then shifted to Respondent to establish that it would have disciplined Griffith notwithstanding the existence of unlawful motivation. In this regard, in his posthearing brief, counsel for Respondent contends that Griffith engaged in "unacceptable" or "disruptive" behavior during the incident in the Alta Bates Hospital campus cafeteria on February 17; that Respondent has a consistent history of disciplining employees for similar misbehavior; and that, even if he did not speak to Griffith on February 20, Hatten spent time searching for her but was unable to locate her. Initially, with regard to said defenses, Bruce Hatten's account of his telephone conversation with McDuffie was absolute hearsay, and, as Respondent failed either to call her as a witness or to explain her absence, I

believe she would not have corroborated Hatten. Further, while, by all accounts, a water spillage occurred on February 17, I believe Griffith inadvertently knocked over the cup, filled with water, and none of the liquid spilled onto Hernandez, a fact which the latter did not dispute. Also, as stated above, I do not believe Hatten ever conducted an investigation of the incident. Rather, he relied solely upon the security guard's incident report, admittedly neither pressed McDuffie for details nor spoke to the asserted victim, Hernandez, and disciplined Griffith because deliberately spilling water sounded like something the alleged discriminatee would do. Moreover, while Hatten originally testified that the import of the incident concerned Griffith deliberately spilling a cup of water on a guest, he later contradicted himself, stating that the alleged discriminatee's behavior, when he assertedly spoke to her on February 20, "weighed more heavily." Nevertheless, Hatten failed to mention the latter point in the written warning notice. Finally, crediting Tito Aquino, while, on February 20, Hatten may have spent some time searching for Griffith, he later had an opportunity to speak to her near the EVS office but made no effort to do so. In these circumstances, Respondent failed to establish that it would have disciplined Griffith on February 23 even absent the existence of unlawful animus, and I, therefore, find that it issued the written warning notice to Griffith that day in violation of Section 8(a)(1) and (3) of the Act.

Concerning the SEIU-H-UHW bargaining unit employees' membership meeting at the Summit Hospital campus cafeteria on March 20, I initially find that, as had been their custom for prior membership meetings, including the similar January 29 meeting, the SEIU-UHW stewards publicized this meeting by posting and distributing flyers, which announced a membership meeting and did not bear the NUHW logo;⁹⁴ that the stewards, including Griffith, were supporters of the NUHW's organizing campaign and of the campaign to decertify the SEIU-UHW; and that the purposes of the meeting were to "update" the bargaining unit employees on the status of the SEIU trusteeship and the on-going bargaining, and to solicit support for the NUHW and the decertification campaign. Next, I find that, notwithstanding, prior to the advent of the Union's organizing campaign and the commencement of the SEIU-UHW decertification effort, having permitted the SEIU-UHW stewards to conduct day-long general membership meetings⁹⁵ for bargain-

⁹⁴ There is no evidence as to the provenance of GC Exhs. 6 and 9, and, while I do not doubt the authenticity of each, I do not believe either was prepared by Griffith or any of the other SEIU-UHW stewards, who organized the March 20 or 23 membership meetings.

⁹⁵ While Bruce Hatten conceded that Respondent had no written rules or policies regarding the holding of meetings in its cafeterias but asserted that Respondent maintained a "practice" of not permitting any group to "take over" a dining area so as to be "disruptive" of the intended purpose of the facility, I credit the alleged discriminatee Griffith and employees Williams and Horne that, prior to the SEIU-UHW trusteeship, they had been unaware of any restrictions, placed by Respondent, upon the holding of meetings in the latter's cafeterias. In this regard, I credit the three employees that the labor organization's stewards utilized Respondent's cafeterias for general membership meetings without interference from Respondent; that, in the Summit Hospital campus cafeteria, such meetings were held in the far left area of the dining area near the annex rooms; that the stewards would move tables

ing unit employees in its cafeterias without interference and believing the membership meeting, scheduled for March 20 at the Summit Hospital campus cafeteria, would, in reality, be nothing less than an organizing event and a showing of support for the NUHW, Respondent embarked upon a two-pronged effort to thwart it—sending a letter to the NUHW, demanding that its officers, employees and agents cease and desist from conducting such a meeting, and hiring Allied Barton Security Services to provide two security officers to engage in surveillance of the membership meeting. Next, on March 20, I find that Bruce Hatten informed the two security officers, who wore clothing different than worn by Respondent’s own security officers, its employees were attempting to form a new union but were not allowed to hold a meeting in support,⁹⁶ solicit funds, or distribute union literature in the cafeteria and instructed them to “closely” observe and to take notes and photographs of such “violations;” that Griffith, who was off duty that day, and Deborah Kirtman, a chief steward, met inside the cafeteria at approximately 6 a.m. and placed stacks of documents and a sign-up sheet on top of a table; that, moments later, some bargaining unit employees approached the table and the two stewards engaged them in conversation; that, after the employees walked away, Hatten and a security officer, Ronnie Parks, approached the stewards’ table; that Hatten asked what was going on and “snatched” some papers from Griffith; that, when she attempted to retrieve the documents, Hatten rebuffed her efforts and said he would not return the documents; that Griffith then threatened to call the police and Hatten returned all but one of the documents, began to read it, and remarked it concerned the on-going bargaining between Respondent and SEIU-UHW; that Hatten then turned toward Kirtman and reached for the documents in the stacks in front of her, including the sign-in sheet; that Kirtman placed her hands over the documents in order to protect them and asked Hatten to calm himself; that Hatten then told the two stewards that they were not allowed to conduct a meeting for “outside unions,” pass out flyers, or solicit funds,

together and place literature on them for distribution; that employees would sit at these tables during their lunch and break periods, eating meals or snacks and speaking to the stewards; that, on occasion, the stewards would walk to other tables at which employees were sitting in order to distribute literature and union-related issues; and that demonstrative of Respondent’s forbearance on such occasions was the stewards’ day-long membership meeting in the above cafeteria on January 29 during which the stewards moved tables together in the normal location by the annex rooms, met with employees at these tables and at others, solicited employees to support the decertification effort, and distributed literature. In this regard, I note that Francis Kidd and Richard Hinshaw, who testified on behalf of Respondent on the issue of meetings in the cafeteria, were each internally inconsistent, contradicted each other, and were not credible. Thus, I note that, while Kidd testified that, if two tables were pushed together, it would be permissible for eight to ten employees to sit and meet with a union representative and discuss union business, Hinshaw contradicted him and said such would not be permissible. Later, however, the latter reversed himself and conceded such would be tolerated.

⁹⁶ Hatten was clear that a prohibited meeting was one during which Respondent’s employees discussed the new union. In this regard, I credit Parks that Hatten’s objection to a union-related meeting was content based.

and they were “trespassing;” and that, after Kirtman replied that she and Griffith continued to be SEIU-UHW members and had a right to utilize the cafeteria in order to inform members, Hatten turned and walked away. Also, on March 20, I find that, after their confrontation with Hatten, Griffith and Kirtman moved to the area of the dining room where they normally conducted union business, pushed two tables together, placed their document on top of the tables, and sat; that Parks and the other security officer moved close to the two women, sitting at a table a few feet from where Griffith and Kirtman sat and remaining there for the remainder of the day, carefully listening for and observing potential “violations;” that Griffith, who stayed in the cafeteria for the entire day, met with approximately 114 bargaining unit employees throughout the remainder of the day, discussing union-related matters and distributing her documents to them; and that, throughout the day, some employees did not approach Griffith and others expressed their reluctance to speak to her because of the presence of the two security officers.

With regard to the SEIU-UHW bargaining unit employees’ membership meeting in the Alta Bates Hospital campus cafeteria on March 23, I find that, having conducted a membership meeting at the Summit Hospital campus 3 days earlier, the SEIU-UHW dissident stewards, including Griffith, planned to hold an identical meeting on March 23 at the Alta Bates Hospital campus; that they publicized the latter meeting with flyers announcing a union membership meeting, that the purposes of said meeting were similar to the reasons underlying the March 20 meeting; and that Bruce Hatten, on behalf of Respondent, again intended to thwart the stewards, utilizing security guards to maintain surveillance, including taking photographs, of the stewards’ activities in the facility’s cafeteria and to report any “violations,” including holding union-related meetings, soliciting funds, or distributing union literature, to him. I next find, on March 23, that the Alta Bates Hospital campus cafeteria was sparsely filled when Beverly Griffith, who was again off duty for the day, and DeAnn Horne arrived at approximately 7 a.m.; that they immediately walked to a table in the right corner of the dining area, placed stacks of the same documents, which the stewards had distributed on March 20, on the table, and sat; that Bruce Hatten, Ronnie Parks, Mahir Said, another security officer, and Joan Davis, an HR specialist for Respondent were sitting at a table when Griffith and Horne entered the dining area; that Hatten left the room and Parks and Said arose and moved to a table no more than 6 feet behind the two women; that Horne left the dining area and Kenny Hill, a chief steward for the SEIU-UHW approached and sat with Griffith; that, while Horne was out of the room, Griffith noticed some bargaining unit dietary workers sitting and eating at another table; that she arose, walked to the employees’ table, initially spoke to them while standing, and then sat in a chair; that she spoke to the employees about their various union-related matters including the pending decertification petition; that, after 5 or 6 minutes, Griffith returned to her table; that Parks overheard Griffith soliciting money for the NUHW and immediately telephoned for Hatten to return to the cafeteria; and that, having been gone for half an hour, Horne returned to the cafeteria and sat at Griffith’s table. I further find that Hatten entered the

cafeteria and Parks reported observing Griffith walk over to another table and overhearing her soliciting funds for the new union; that Hatten, accompanied by Parks, walked over to Griffith's table; that Hatten addressed Griffith, Horne, and Hill, demanding that they "cease and disperse," leave the cafeteria "now," and no longer engage in their union activities, including distributing literature and soliciting funds; that, upon hearing Hatten's order, the three stewards arose and Griffith, who understood that an employee, who failed to adhere to a manager's direct order, would be subject to discipline, told Horne it was time to leave as they were being kicked out of the cafeteria and asked to use her cell phone in order to arrange for a ride; that Hatten repeated his order for the stewards to leave; that Griffith and Horne began stuffing the stacks of flyers into a bag and, before she finished, Hatten warned, "and if you don't leave before security comes, you will be suspended and you could be terminated;" that Griffith and Horne finished packing the documents and began walking out of the cafeteria; that, before they left, two hospital security guards entered and escorted Griffith out the front entrance of the building. Finally, I find that, at no point during this incident, did Hatten ever inform Griffith that she was suspended.⁹⁷

Regarding the events in the Alta Bates Hospital campus cafeteria later on March 23, I find that, having volunteered to help during the membership meeting, employee Roxie Osborne arrived at the cafeteria at approximately 10 a.m. and, observing no on-going union activity, approached a coworker, who informed her there would not be a meeting and nodded toward Parks and Said, who were seated at a nearby table. I next find that the coworker informed Osborne that Parks and Said earlier had stopped the meeting and "hustled" Griffith out of the cafeteria; that, thereafter, noticing several other bargaining unit employees sitting and eating at another table, Osborne, who was carrying union flyers, walked over to the table and began speaking to the employees about union issues; that Parks left his table and moved closer to where Osborne was speaking to her co-workers; that Parks identified the flyers as "union related" and began photographing Osborne's activities; that the employees, to whom Osborne was talking, observed Parks and became "restless;" that, eventually, having reached the end of their break periods, the employees arose and left the dining area; that Osborne then observed several other employees enter the dining area and sit at a table; that Osborne walked over to that table and began giving those coworkers "updates" on union issues; and that, having telephoned Hatten's office, Parks was instructed to stop Osborne's activities. I further find that, at

⁹⁷ I base this conclusion on several factors. First, of course, I credit Griffith and Horne that, while he threatened suspension, Hatten never specifically said that Griffith was suspended. Moreover, the record does not warrant a conclusion that Hatten informed the alleged discriminatee she was suspended. Thus, notwithstanding standard procedure, Hatten never asked Griffith for her identification badge; it defies logic that, aware of her suspension, Griffith would have reported for work the next day and carried with her leaflets, describing the events at the Alta Bates Hospital campus cafeteria but omitting her suspension; and, most significantly, all witnesses, including Tito Aquino, describe Griffith as acting with absolute surprise and shock when Aquino announced she had been suspended. I do not believe she was merely acting.

this point, Parks approached Osborne and told her "you can't hand out flyers, you can't solicit funds, and you can't hold a meeting . . . in relation to these materials;" that Osborne replied the flyer was an Alta Bates document and she was sharing it with coworkers; that Parks walked away and, spotting another coworker, Osborne approached and began speaking to that employee; that Parks approached within a few feet of them and then returned to his seat; and that Osborne then left the cafeteria.

The General Counsel contends that during the foregoing incidents, Respondent engaged in unlawful surveillance of its employees' union or other protected concerted activities in violation of Section 8(a)(1) of the Act and discriminately enforced its solicitation/distribution rule by telling employees they could not solicit support for the NUHW or distribute NUHW literature in violation of Section 8(a)(3) and (1) of the Act. With regard to the former allegation, there is, of course, no dispute that Respondent engaged in surveillance on both occasions, closely monitoring Griffith's and Kirtman's activities in the Summit Hospital campus cafeteria on March 20 and Griffith's, Horne's, and Osborne's activities in the Alta Bates Hospital campus cafeteria on March 23. The Board holds that a supervisor's observation of employees engaged in open Section 7 activity on company property does not constitute unlawful surveillance. However, an employer does violate Section 8(a)(1) of the Act when it monitors its employees, who are engaged in Section 7 activity, by observing them in a way that is "out of the ordinary" and thereby coercive. *Partylite Worldwide, Inc.*, 344 NLRB 1342, 1342 fn. 5 (2005); *Loudon Steel, Inc.*, 340 NLRB 307, 313 (2003). Indicia of coercive surveillance include the duration of the observation, the employer's distance from the employees while observing them, whether the surveillance is an isolated act, and whether the employer engaged in other coercive behavior during its observation." *Wilshire Plaza Hotel*, 353 NLRB 304, 322 (2008); *Aladdin Gaming, LLC*, 345 NLRB 585, 585-586 (2005); *Sands Hotel & Casino, San Juan*, 306 NLRB 172, 172 (1992), enfd. sub nom. *Mem. S.J.P.R. v. NLRB*, 993 F.2d 913 (D.C. Cir. 1993). Further, photographing open, public union activity on an employer's property is unlawful as such "pictorial recordkeeping" tends to create fear amongst employees of reprisals. *Wilshire Plaza Hotel*, supra; *National Steel & Shipbuilding Co.*, 324 NLRB 499 (1997), enfd. 156 F.3d 1268 (D.C. Cir. 1998). Photographing union activities can only be justified by a legitimate security objective or a reasonable belief that misconduct may occur. *Town & Country Supermarkets*, 340 NLRB 1410, 1414-1415 (2004); *Alle-Kiski Medical Center*, 339 NLRB 361, 365 (2003).

Here, I have found that, on March 20 at the Summit Hospital campus cafeteria, pursuant to Bruce Hatten's instructions and after the latter's confrontation with Griffith and Kirtman, Ronnie Parks and his fellow security guard, who were Respondent's agents, followed the two employees when they moved to the area of the dining room where stewards normally sat and conducted union business, stationed themselves at a table only a few feet from the table at which the two stewards sat, and remained at that table for the remainder of the day, carefully observing and listening to what occurred at the employees'

table and that, as a result of the guards' actions, employees expressed reluctance to speak to Griffith and Kirtman. I have also found that, on March 23 at the Alta Bates Hospital campus cafeteria, when Griffith and Horne entered the dining room and sat at a table, security guards, Parks and Said, who were Respondent's agents, moved to a table no more than 6 feet from where Griffith and Horne were seated and closely monitored Griffith's conduct when she moved to a nearby table in order to speak to bargaining unit employees and that, subsequently, when Roxie Osborne arrived at the cafeteria, carrying union flyers, sat at a table and began speaking to coworkers about union matters, Parks moved close to where Osborne was seated and began photographing her activities. Moreover, I find that, on March 20 and March 23, Griffith, Kirtman, Horne, and Osborne engaged in classic Section 7 protected activity—conducting union business including soliciting support for the NUHW and distributing union literature. In the foregoing circumstances, there can be no doubt that the security guards' observations of Respondent's employees' Section 7 activities in the Summit Hospital campus cafeteria on March 20 and in the Alta Bates Hospital campus cafeteria on March 23 were not mere happenstance. Rather, as Parks and his fellow security guards' actions were guided by Bruce Hatten's instructions, their acts of surveillance were calculated, and Respondent failed to deny that the guards were hired specifically to closely monitor its employees' union activities and does not contend that said acts of surveillance were conducted in the ordinary course of business. Further, the guards' surveillance, including the photographing of Osborne, was blatantly conducted only a few feet from where Griffith, Kirtman, Horne, and Osborne attempted to engage in their Section 7 activities and continued unabated for the entirety of each day. Moreover, as I shall discuss below, Respondent's above-described surveillance on both days was conducted concomitant with its unlawful, discriminatory redefinition of its solicitation/distribution rules against its employees. Finally, while Respondent's attorney asserts that the posting of the additional security guards in its cafeterias on March 20 and March 23 was a reasonable response to the NUHW's announcement of membership meetings on those days, given Ronnie Parks' admissions regarding Bruce Hatten's explanation for their surveillance duties, as stated above, I believe Respondent's real purpose on each date was to trammel and stymie its SEIU-UHW bargaining unit employees' increasing support for a new bargaining representative—the NUHW. Accordingly, I find that Respondent's surveillance of its employees' Section 7 activities on March 20 and 23 was violative of Section 8(a)(1) of the Act. *Wilshire Plaza Hotel*, supra; *Partylite Worldwide*, supra.

Turning to Respondent's alleged discriminatory enforcement of its solicitation/distribution rules on March 20 and March 23, while Respondent maintains written policies, regarding solicitations and distributions, which prohibit employees from soliciting or distributing literature during scheduled working time and from engaging in said actions in all patient care areas and in all other areas in which employees normally work, said work areas do not include any of Respondent's cafeterias. Further, the record evidence is that, historically prior to March 20, Respondent's employees had utilized the cafeterias for solici-

tions, including collecting union dues, and for distributing union-related literature without restriction by Respondent. Notwithstanding the foregoing, I believe that when, on March 20 in the Summit Hospital campus cafeteria, acting on behalf of Respondent, Bruce Hatten approached Griffith and Kirtman and warned the two employees they could not conduct a meeting for an "outside union," distribute literature, or solicit funds and when, on March 23 at the Alta Bates Hospital campus cafeteria, Hatten demanded that Griffith and Horne cease and desist from their union activities, including distributing literature and soliciting funds, and Ronnie Parks admonished Roxie Osborne that she was not allowed to solicit funds or distribute literature on behalf of a union, Respondent, in fact, redefined its solicitation/distribution rules to make said restrictions applicable to its cafeterias, which are non-patient-care areas. Moreover, given Bruce Hatten's comments to Ronnie Parks, I reiterate my conclusion that, as with its unlawful surveillance of its employees on the above occasions, as a result of its SEIU-UHW bargaining unit employees' overt showing of support for the NUHW subsequent to the trusteeship, Respondent redefined its solicitation/distribution policies on March 20 and March 23 specifically in order to hinder said employees' actions in support of the NUHW. In this regard, I note that Respondent placed no similar restrictions upon SEIU-UHW agents, who utilized its cafeterias to meet with bargaining unit employees in order to discuss union business and distribute literature.

The Board's rules and presumptions, concerning limitations and/or restrictions on employees, who are engaged in solicitations or distributions of literature, by hospitals, are different than those which the Board generally applies to other types of employers. Thus, in *St. Johns Hospital & School of Nursing*, 222 NLRB 1150, 1151 (1976), the Board recognized that, in order to provide a "tranquil atmosphere" which is essential for patient care, a hospital may lawfully ban employee solicitations and distributions during nonworking time in immediate patient care areas. However, the Board also recognized that, as ". . . the possibility of any disruption in patient care resulting from solicitation or distribution is remote," broader restrictions, extending such to visitor access areas other than those involved in patient care, are not justified by the above considerations. Further, as to patient access areas, including hospital cafeterias, the Board was emphatic about bans on soliciting and/or distributions—" . . . we do not perceive how patients would be affected adversely by such activities. On balance, the interests of patients well enough to frequent such areas do not outweigh those of employees to discuss or solicit union representation." The Board's ruling, that prohibiting solicitations and distributions in areas other than immediate patient care areas, absent a showing that disruptions to patient care would necessarily result from said activities, would be unjustified and unlawful, was upheld by the Supreme Court in *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978). There, the Court upheld the Board's "general approach" of ". . . requiring health-care facilities to permit employee solicitation and distribution during nonworking time in nonworking areas, where the facility has not justified the prohibition as necessary to avoid disruption of health-care operations or disturbance of patients. . . ." Subsequently, in *NLRB v. Baptist Hospital*, 442 U.S. 773 (1979), the Court determined that

the Board's aforementioned approach was, in reality, a presumption which placed the burden upon the health-care institution to prove, with respect to areas which a prohibition against solicitations' and distributions applies, that these activities may adversely affect patients. *Id.* at 781. Accordingly, the law is of longstanding validity that, with regard to health care institutions, restrictions on solicitation during nonworking time or distribution of literature during nonworking time and in non-working areas are presumptively unlawful with respect to areas, such as a cafeteria, that may be accessible to patients. *Hospital Pavia Perea*, 352 NLRB 418, 422 (2008); *Brockton Hospital*, 333 NLRB 1367, 1368 (2001); *Eastern Maine Medical Center*, 251 NLRB 224, 225–226 (1980). However, said presumption appears to be a rebuttable one, placing the burden upon the health care employer, which institutes such a restriction in its cafeteria or a like area, to prove that the prohibited employee solicitations and distributions may adversely affect patients. *Eastern Maine Medical Center*, supra at 226, fn. 9. Clearly, while Respondent's published solicitation/distribution policies comport with the foregoing precedent, its March 20 and 23 redefinitions of said rules do not. Moreover, I reiterate my view that said redefinitions were designed to impede the SEIU-UHW bargaining unit employees from engaging in support of the NUHW.

In defense and in order to rebut the above presumption, counsel for Respondent argues that the redefined restrictions, which Hatten announced on March 20 at the Summit Hospital campus cafeteria and which Hatten and Parks announced on March 23 at the Alta Bates Hospital campus cafeteria, were justified to ensure an appropriate environment for health care and to ensure that its cafeterias were used for their intended purposes. However, with regard to the former, the Board has consistently recognized in considering restrictions on employee solicitations and distributions for unions in health care facilities that, in areas, other than immediate patient care areas, such as cafeterias or gift shops, where the possibility for a disruption in patient care is remote, the interests of patients, who may be healthy enough to frequent such areas, do not outweigh the interests of employees to discuss union representation or engage in solicitations on behalf of a labor organization. Regarding patient care interests in the instant matter, the record establishes that most of the patrons of Respondent's cafeterias are its own employees and that, due to dietary concerns, patients are discouraged or restricted from using the cafeterias. Further, there is no record evidence of any patient care inside or near any of Respondent's cafeterias. As to whether Griffith,⁹⁸ Kirtman, or Horne engaged in acts and conduct inimical to the normal operations of Respondent's cafeterias on either March

⁹⁸ Respondent's counsel argues that "... Griffith's status as an employee who was not scheduled to work on either day of the meetings further diminishes her claim to protection under the Act." I disagree. While it is true that Griffith was off duty on both March 20 and 23, Respondent maintains no rule, denying access to its facilities to off duty employees, and there is no record evidence that Respondent has ever limited the access of off duty employees to its cafeterias or other non-patient care areas. In this regard, Respondent's own rules require that, while soliciting or distributing literature inside its cafeterias, employees must not be wearing their work uniforms.

20 or March 21, Hatten conceded that Griffith and Kirtman engaged in no such actions on March 20 and, notwithstanding that Parks only mentioned she had moved to another table and was soliciting money from employees there and that the cafeteria was sparsely populated that morning, Hatten's dubious descriptions of Griffith's asserted misconduct on March 23 were tortuous and recriminatory, variously accusing her of "taking over part of the cafeteria," conducting a meeting, "calling attention to herself," being disruptive, and, generally "disturbing the environment" for the patrons of the cafeteria. In his post-hearing brief, counsel for Respondent contends that "... employees may socialize in small groups and participate in meals as is normally expected in a cafeteria and engage in solicitation and distribution incidental to that normal use." However, a dining room may not be commandeered as a public meeting place by any group." Counsel is undoubtedly correct that an outside group or even a group of its own employees may not sequester a hospital's entire cafeteria or even a section thereof for a large scale rally or assembly or engage in other actions inimical to the normal operations of the said cafeteria. Per contra, no such miscreant activity occurred on either March 20 or March 23. Moreover, I have found that, historically, Respondent has permitted its employees to hold union meetings in its cafeterias without restrictions, and, given Bruce Hatten's instructions to Ronnie Parks on March 20 and 23, rather than fear of any disruption to patient care or even to the operation of its cafeterias, what appears to have motivated Respondent on said dates to redefine its solicitation/distribution rules was its opposition to and desire to squelch the SEIU-UHW bargaining unit employees' increasing support for the NUHW. That such was, in fact, Respondent's motivation may be inferred from the fact that, on both dates, Hatten failed to merely caution Griffith and Kirtman, and Horne that they must not engage in their Section 7 protected activities in a disruptive manner, that they must speak softly so as not to disturb other patrons who were eating and conversing, or that they should not move from table to table while engaging in their union activities. Instead, Hatten explicitly warned that they could not solicit or distribute literature for an outside union, or hold a meeting. Contrary to Hatten's protestations at the hearing, as Hatten informed Parks that a forbidden meeting would be "... a group of people discussing the union business . . .," the latter prohibition was clearly content driven and had nothing to do with the size of such or any disruptive effect. Finally, I note that Respondent made no effort to stop SEIU agents Hernandez and McDuffie from meeting with employees or distributing literature to them inside its cafeterias. Based upon the foregoing, I find that Respondent discriminated against its employees in violation of Section 8(a)(1) and (3) of the Act by precipitously redefining its solicitation/distribution rules in response to and in order to stifle the SEIU-UHW bargaining unit employees' support for the NUHW. *Youville Heath Care Center*, 326 NLRB 495, 495 (1998).

Next, the General Counsel alleges that, on March 23, Respondent threatened to suspend Griffith, ordered her to leave the Alta Bates Hospital campus cafeteria, and suspended her in violation of Section 8(a)(3) and (1) of the Act. In this regard, I have found that, upon confronting her that morning in the said

cafeteria, Bruce Hatten threatened to suspend her unless she left the cafeteria before Respondent's security officers arrived and that he evicted Griffith from the cafeteria. Further, I find that, at some point later in the day, subsequent to the cafeteria confrontation, Respondent suspended Griffith as a prelude to eventually discharging her and informed her supervisor, Tito Aquino, of said personnel action. Utilizing the *Wright Line*, supra, analytical approach, I have found that Griffith was involved in the decertification effort against SEIU-UHW and was an ardent supporter of the NUHW's organizing campaign amongst the bargaining unit employees and that she participated in the March 20 and 23 meetings during which she solicited support and funds for the Union—actions privileged by Section 7 of the Act. Likewise, I have found that Respondent suspected Griffith's support for the NUHW, and, of course, there can be no question that Respondent was keenly aware of the alleged discriminatee's participation in the March 20 and 23 union meetings, including her solicitations in support of the NUHW. I have previously concluded that Respondent was unlawfully motivated in disciplining Griffith with a written warning notice on February 23. Also, I have determined that Respondent unlawfully engaged in surveillance of Griffith's activities and discriminatorily redefined its solicitation/distribution rules in order to impede her actions in support of the NUHW during the above two union meetings. Accordingly, I believe that the General Counsel has amply established that Respondent threatened to suspend Griffith, evicted her from the Alta Bates Hospital campus cafeteria, and later suspended her on March 23 because of her support for the NUHW.

Therefore, the burden shifted to Respondent to establish that it would have taken the foregoing disciplinary actions against Griffith notwithstanding the existence of unlawful animus, and, in its defense, Respondent contends that the alleged discriminatee engaged in patent acts of misconduct on March 23 and that its employment actions were warranted. Counsel for Respondent initially asserts that "any legal protection that may have attached to Griffith . . . did not extend to moving from table to table and otherwise exceeding the normal and customary ways in which patrons use a cafeteria" and that Parks reported Griffith's foregoing conduct to Hatten. In this regard, while Griffith admitted, that, after Horne left the cafeteria, she left her table, moved to another table, at which bargaining unit employees were sitting and eating, and commenced speaking to them about union matters and soliciting funds for the NUHW, I have concluded and reiterate that Bruce Hatten's second-hand testimony, regarding Griffith's asserted disruptive acts and conduct on March 23, was convoluted and exaggerated. In short, rather than the truth, such was indicative of his intent merely to bolster Respondent's defense. Further, counsel is certainly correct that, in several decisions (for example *Montgomery Ward & Co.*, 256 NLRB 800, 801 (1981), *Harolds Club*, 267 NLRB 1167, 1167 (1983), and *Southern Maryland Hospital Center*, 293 NLRB 1209, 1216 (1989)), the Board has held that employees or union organizers, who move from table to table in an employer's restaurant or cafeteria, termed "table-hopping," engage in conduct inconsistent with the purpose of such a facility and are not entitled to the protection of the Act; however, such is not a truism. Thus, in its underlying *Beth*

Israel Hospital decision,⁹⁹ notwithstanding that an employee had engaged in table hopping while distributing union-related literature, the Board concluded that, by disciplining him for violating a no-solicitation rule inside its cafeteria, the respondent had acted in violation of Section 8(a)(3) and (1) of the Act. Here, Griffith moved from her table to just one other table and then directly returned to her table, and there is no evidence that her actions disrupted other patrons' use of the cafeteria in any way, or that any patrons complained. Counsel for Respondent next contends that, after being warned of the consequences for failing to comply, Griffith refused Hatten's direct order to leave the premises. While the alleged discriminatee and Horne may not have departed as promptly as Hatten desired, in accord with my credibility resolutions, I do not believe that, at any point during her confrontation with Hatten, did Griffith ever argue with the latter or act defiantly in response to his order, engage in a telephone conversation with her lawyer, or, in any other manner, refuse to comply with Hatten's demand or engage in any action suggestive of such. Moreover, Hatten's testimony, concerning Griffith's refusal to leave the cafeteria, was uncorroborated by any other witness. In the foregoing circumstances, given the overwhelming evidence of unlawful animus, I do not believe that Respondent has established that, on March 23, it would have demanded that Griffith leave the Alta Bates Hospital campus cafeteria, threatened to suspend her, and, subsequently, suspended her notwithstanding her activities in support of the Union. Accordingly, I find that Respondent's above-stated actions were violative of Section 8(a)(3) and (1) of the Act.

Turning to the events of March 24, there is no dispute, and I find, that, sometime during the previous afternoon, Brett Rogers telephoned Tito Aquino and told the latter Griffith had been suspended and would not be allowed to be on the premises. Next, I find that, prior to the start of her work shift, Griffith, wearing her work clothes and carrying flyers which set forth her version of the events in the Alta Bates Hospital campus cafeteria the previous day, including Hatten's threat to suspend her, arrived at the Summit Hospital campus and immediately went to the EVS break room in order to drink coffee and report to her coworkers what had transpired the day before; that, as she was talking to her coworkers, Tito Aquino entered the room and asked to speak to Griffith out in the hallway; that, after initially demurring, she agreed to speak to Aquino but asked Lawana Williams to accompany her; that, in the hallway, Aquino informed Griffith she had been suspended and would have to leave the hospital building immediately; that Griffith, who was "shocked" and surprised by the news, asked why and whether her suspension was in writing; that Aquino said no and repeated that Griffith had to leave the facility; that Griffith, followed by Aquino, who stood at the door, returned to the breakroom and, while gathering her personal items, angrily exclaimed that she had just been suspended and it was a bunch of "bullsh—t;" that Aquino entered the room and told Griffith she had to leave immediately; that the latter finished gathering her belongings and, with Williams accompanying her, left the break room and walked toward the service elevators; that a

⁹⁹ 223 NLRB 1193 (1976).

security guard met her at the elevators and escorted her to the front entrance; and that outside Griffith used her cell phone to arrange for a ride home.

There is, of course, no dispute that 13 days later, Respondent fired Griffith on April 6, and the General Counsel alleges that said discharge was violative of Section 8(a)(3) and (1) of the Act. Utilizing the *Wright Line* analytical framework, the record evidence is that Griffith engaged in protected activities and that Respondent was well aware of most of her actions and suspected others. Thus, Griffith actively participated in the decertification effort against SEIU-UHW, became an ardent supporter of the NUHW's organizing campaign, and solicited for and distributed literature on behalf of the NUHW on March 20 in the Summit Hospital campus cafeteria and March 23 in the Alta Bates Hospital campus cafeteria. Through its unlawful surveillance of her actions on March 20 and 23, Respondent became aware of her protected activity; on February 20, Respondent distributed an email, linking Griffith to the distribution of NUHW literature on its property; and, on March 27, approximately when Respondent reached its decision to discharge her, Richard Hinshaw distributed another email, announcing that Hatten was pursuing information linking Griffith to the copying of "staff signatures," which, Respondent suspected, ". . . may have been used by NUHW to demonstrate a 30% showing of interest for the decertification petition. We think part of Beverly's activities doing NUHW business has been collecting signatures for the petition. . . ." Moreover, there also exists overwhelming record evidence establishing Respondent's unlawful animus against Griffith. In this regard, I have previously concluded that Respondent was unlawfully motivated in disciplining Griffith over the February 17 water spilling incident, that Respondent redefined its solicitation/distribution policies in order to stifle its SEIU-UHW bargaining unit employees' support for the NUHW, and that, on March 23, Respondent unlawfully evicted Griffith from the Alta Bates Hospital campus cafeteria, threatened to suspend her, and eventually suspended her in retaliation for her activities in support of the NUHW.¹⁰⁰

Clearly, the burden shifted to Respondent to establish that it would have discharged Griffith notwithstanding the overwhelming record evidence of its unlawful animus against the alleged discriminatee. In this regard, counsel for Respondent contends that Griffith's return to work on March 24 was not activity actively protected by Section 7 of the Act, that Griffith

¹⁰⁰ The termination notice, which Respondent gave to Griffith, refers to the March 23 meeting at the Alta Bates Hospital campus cafeteria as "an advertised meeting for an outside organization," held in contravention of Respondent's policy. I do not think that said meeting was held on behalf of or for the NUHW. Thus, while the NUHW logo does appear on the announcement, which is in the record, Griffith credibly testified that the flyer, which was published prior to the March 20 meeting, did not have such a logo and that she did not see GC Exh. 9 until she gave her pretrial affidavit. Moreover, the announcements for the March 20 and 23 meetings refer to membership meetings, and the documents, which Griffith and the others were prepared to distribute, included material pertinent to the bargaining between Respondent and SEIU-UHW. Finally, while the termination notice mentions Respondent's policy against meetings held in the cafeteria for outside organizations, such was not a written practice and no bargaining unit employees were aware of the existence of such a policy or practice.

lost any remaining protection of the Act due to her use of profanity, and that Respondent was lawfully motivated by Griffith's recent disciplinary history. At the outset, while Bruce Hatten testified that Respondent's primary reason for discharging Griffith was that, on March 23, she violated his direct order to cease and desist her meeting and to leave the Alta Bates Hospital campus cafeteria, I reiterate that, while she may not have moved as quickly as Hatten desired, Griffith complied with his explicit instructions to leave and that she never refused to leave the cafeteria or acted in any manner suggestive of her refusal to comply with his order. As to her disorderly behavior that morning, while Hatten asserted that Griffith arose and took over part of the cafeteria to have a meeting, which actions were "disruptive" and "calling attention to herself," I have previously documented Hatten's utterly self-serving and disingenuous testimony regarding Griffith's actions, and I believe that moving from her own table to another and then back to her table hardly constitutes the inappropriate behavior termed table-hopping. Also, I note that, without restriction, Respondent has permitted its employees to engage in table hopping while soliciting or selling food items for charities, schools, or religious purposes. Next, Respondent's counsel's contention—the Act does not privilege Griffith's return to work after her suspension—is, of course, based upon a canard. In this regard, I have previously credited the alleged discriminatee that, during their confrontation on May 23, while he threatened to do so, Hatten never actually suspended Griffith, and, as previously discussed, the record clearly warrants said conclusion. Thus, contrary to normal procedure, Hatten failed to demand that Griffith relinquish her security badge; Griffith reported for work the next morning wearing her work uniform and carrying flyers, detailing the events of the previous morning including Hatten's threat to suspend her; and, by all accounts, Griffith became shocked and outraged upon being informed of her suspension by Tito Aquino. Therefore, contrary to counsel, I believe that Respondent suspended Griffith on March 23 at some time *subsequent* to the above incident and that, when she reported for work on March 24, Griffith was absolutely unaware that Respondent had acted upon Hatten's threat and suspended her. On this point, given Griffith's ignorance of Respondent's act, counsel's reliance upon the Board's decision in *Special Touch Home Care Services*, 351 NLRB 754, 757 (2007), is misplaced. Finally, turning to Respondent's contention that its termination of Griffith was justified due to her use of profanity in the EVS break room on March 24, said assertion is based upon the respective accounts of Aquino and Carla Biddle, neither of whom impressed me as testifying candidly on this point. In particular, as noted above, although ostensibly observing the same event, their respective versions of Griffith's attributed words are not corroborative and utterly contradictory on salient points such as where each supposedly stood while listening and, in particular, Griffith's asserted profanity-laced attack upon Aquino. In addition, the latter related three inconsistent versions of Griffith's comments inside the break room. In short, I do not believe their accounts¹⁰¹ and, therefore, can not conclude that Griffith

¹⁰¹ The record contains ostensible, contemporaneous statements from Aquino and Biddle, which corroborate the testimony of each. I give no

uttered the word “f-cking” or any variant thereof while venting inside the break room immediately after being informed of her suspension. In the foregoing circumstances, I find that Respondent has failed to sustain its burden of proof and that, as the patent record evidence of unlawful animus makes perfectly clear, the latter discharged Beverly Griffith because of her support for the NUHW in violation of Section 8(a)(3) and (1) of the Act.

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. The NUHW is a labor organization within the meaning of Section 2(5) of the Act.
3. By engaging in surveillance of its employees, who were engaged in union or other protected concerted activities at its Summit Hospital campus cafeteria on March 20 and at its Alta Bates Hospital campus cafeteria on March 23, Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act.
4. By redefining its solicitation/distribution policies in order to inhibit and stifle its employees from engaging in activities in support of the NUHW at its Summit Hospital campus cafeteria on March 20 and at its Alta Bates Hospital campus cafeteria on March 23, Respondent engaged in acts and conduct violative of Section 8(a)(3) and (1) of the Act.
5. On February 23, by giving a disciplinary warning notice to its employee, Beverly Griffith, because she participated in activities in support of the NUHW, Respondent engaged in acts and conduct violative of Section 8(a)(3) and (1) of the Act.
6. On March 23, by evicting its employee, Beverly Griffith, from its Alta Bates Hospital campus cafeteria and threatening to suspend her because she engaged in union or other protected concerted activities, including activities in support of the NUHW, and, subsequently, suspending her because she participated in said activities, Respondent engaged in acts and conduct violative of Section 8(a)(3) and (1) of the Act.
7. On April 6, by discharging its employee, Beverly Griffith, because she participated in activities in support of the NUHW, Respondent engaged in acts and conduct in violation of Section 8(a)(3) and (1) of the Act.
8. Respondent’s above-described acts and conduct affect commerce within the meaning of Section 2(6), and (7) of the Act.

REMEDY

I have found that Respondent engaged in serious unfair labor practices within the meaning of Section 8(a)(1) and Section 8(a)(3) and (1) of the Act. Accordingly, I shall recommend that

credence to either. Thus, Aquino’s purported statement was his second draft, and Respondent failed to offer the original to corroborate revisions made by Aquino. Biddle’s written version of Griffith’s comments, which she drafted at the behest of Hatten, and her testimonial version were utterly contradictory. Finally, given their dubious nature, I suspect that each is a fabrication, drafted subsequent to Griffith’s discharge as justification for Respondent’s action. In short, I do not credit the guileful Hatten that he relied upon these documents in deciding to discharge Griffith.

Respondent be ordered to cease and desist from engaging such acts and conduct. Generally, I shall recommend that Respondent be ordered to cease and desist from interfering with, restraining, and coercing its employees in the exercise of their rights guaranteed by Section 7 of the Act, including their actions in support of the NUHW. Specifically, I have found that Respondent unlawfully discriminated against its employee, Beverly Griffith, including issuing a written warning notice to her, evicting her from the Alta Bates Hospital campus cafeteria, threatening to suspend her, suspending her, and subsequently discharging her. With regard to Respondent’s unlawful discharge of Griffith, I shall recommend that it be ordered to offer her immediate reinstatement to her former position of employment or, if said position no longer exists, to a substantially equivalent position, with no loss of seniority or any other rights and privileges previously enjoyed and to make her whole for any loss of earnings and other benefits, computed on a quarterly basis from April 6, 2009, to the date of a proper offer of reinstatement to her, less any interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1960), with interest as computed in *New Horizons*, 283 NLRB 1173 (1987). Further, I shall recommend that Respondent be ordered to expunge from its records any references to its unlawful discriminatory actions against Griffith, including its February 23 warning notice to her, its eviction of her from the Alta Bates Hospital campus cafeteria, its suspension of Griffith, and her termination, and to inform her that such has been done. Finally, I shall recommend that Respondent be ordered to post notices to its employees at each of its campuses, advising them of its unfair labor practices and the steps it is required to take to remedy them.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁰²

ORDER

The Respondent, Alta Bates Summit Medical Center, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Engaging in surveillance of its employees, who are engaged in union or other protected concerted activities in its cafeterias;
 - (b) Redefining its solicitation/distribution policies in order to inhibit and stifle its employees from engaging in activities in support of the NUHW in its cafeterias;
 - (c) Giving disciplinary warning notices to employees because they participate in activities in support of the NUHW;
 - (d) Evicting its employees from its cafeterias and threatening to suspend its employees because they engage in union or other protected concerted activities, including activities in support of the NUHW, and, subsequently, suspending them because they participated in said activities;
 - (e) Discharging its employees because they have engaged in activities in support of the NUHW;
 - (f) In any like or related manner interfering with, restraining,

¹⁰² 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.

or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Within 14 days from the date of this Order, offer Beverly Griffith full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed and make Griffith whole for any loss of earnings 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 this Order, remove from its files any references to the unlawful discharge, suspension, eviction from its Alta Bates Hospital campus cafeteria, and warning notice given to Griffith and within 3 days thereafter notify Griffith in writing that this has been done and that the above-described discipline will not be used against her 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 several hospital campuses in Oakland and Berkeley, California, copies of the attached notice marked "Appendix."¹⁰³ Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. 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 February 23, 2009.

(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.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

National Labor Relations Board

An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge you, suspend you, threaten you with suspension, issue a disciplinary warning notice to you, or evict you from our cafeterias if you engage in activities in support of National Union of Healthcare Workers (the NUHW).

WE WILL NOT reinterpret our solicitation/distribution policies in order to inhibit and stifle our employees from engaging in activities in support of the NUHW in our cafeterias.

WE WILL NOT engage in surveillance of our employees, who are engaged in union or other protected concerted activities in our cafeterias.

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

WE WILL within 14 days from the date of this Order, offer Beverly Griffith full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed and make Griffith whole, with interest, for any loss of earnings and other benefits suffered as a result of our discrimination against her.

WE WILL, within 14 days from the date of this Order, remove from its files any references to the unlawful discharge, suspension, eviction from our Alta Bates Hospital campus, and warning notice given to Griffith, and within 3 days thereafter notify her in writing that this has been done and that the above-described unlawful actions will not be used against her in any way.

ALTA BATES SUMMIT MEDICAL CENTER

¹⁰³ 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."