

Summit Healthcare Association, d/b/a Summit Regional Medical Center and Kelly Bunton. Case 28–CA–022308

December 9, 2011

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER
AND HAYES

On February 4, 2010, Administrative Law Judge James M. Kennedy issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions only to the extent consistent with this Decision and Order.

The judge found, among other things, that the Respondent did not violate Section 8(a)(1) of the Act by discharging RN Kelly Bunton for making comments related to the Respondent's diet order policy. For different reasons, we find that Bunton's discharge for engaging in this conduct was not unlawful.²

I. FACTS

The Respondent operates a hospital in Show Low, Arizona. Bunton was hired by the Respondent in 2003. Bunton worked under the supervision of Jayne Simms, the director of the Respondent's medical-surgical department, and Diana Anderson, the assistant director of the department.

In about 2005 or 2006, the Respondent changed its dietary policy for hospital patients. Under the new policy, a patient was not permitted to eat or drink anything unless a diet order, written by the patient's physician, was in the patient's file. Further, nurses were no longer permitted to bring food to their patients under any cir-

cumstances; rather, only dietary department employees—usually so-called “runners”—were authorized to deliver food to the patients, and only after a dietary assistant had verified that the food to be delivered met the guidelines set forth in the physician's written diet order.³ If a patient did not have a written diet order in the file, the patient would not be permitted food or drink. In such circumstances, the task of locating and informing the doctor of the need to submit a written diet order usually fell to the patient's nurse.

After the new diet order policy was implemented, Bunton raised concerns about the policy. Shortly after its implementation, she circulated a petition among employees protesting the policy changes. In addition, from time to time nurses raised the issue of missing diet orders with Anderson and Simms. At some point in 2008, Bunton also communicated her concerns directly to Anderson.⁴

Events surrounding two missing diet orders form the basis of the instant case. The first incident occurred on December 2, 2008,⁵ when Bunton called dietary assistant Jody Overstreet to request that a runner deliver food for a patient who had spent the day undergoing medical testing. Overstreet was unable to locate the patient's diet order, and she and Bunton spent 20 minutes searching for it. During their search, Overstreet became increasingly frustrated over their inability to locate the missing diet order and over repeated complaints from the runner that the patient—who had not eaten all day—was very hungry. Overstreet was not, however, upset with Bunton.

The next morning, Overstreet reported the incident to the Respondent's diet clerk, Jackie Moeller, who then met with her supervisor, Karla Hoffert, about the incident. Hoffert also spoke to Overstreet about the matter, and in so doing noticed that Overstreet was upset. Hoffert reported the matter to the Respondent's dietary department head, Syble Hartley, who in turn reported it to Simms. Due to a lack of precision by Overstreet in explaining the incident to Moeller and Hoffert, and also due to subsequent misinterpretations when the incident was reported to others, Simms erroneously assumed that Bunton was responsible for Overstreet's distress.⁶ Dur-

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

² The judge also dismissed an allegation that the Respondent violated Sec. 8(a)(1) of the Act by discharging Bunton for discussing wages with a fellow employee. There are no exceptions to the dismissal of this allegation.

The judge also dismissed allegations that the Respondent (a) promulgated an unlawful rule prohibiting protected speech, and (b) made a threat of discharge for engaging in protected speech. As explained below in fn. 9, we adopt the judge's dismissals of these allegations.

³ The record indicates that, previously, nurses were permitted to bring food to their patients. The record is not clear, however, as to the degree of discretion the nurses exercised—or the latitude they were given—in bringing the food to their patients.

⁴ The record does not reveal what specifically was stated, either in the petition or in any of the occasional comments the nurses made concerning missing diet orders. In the latter case, the testimony was also devoid of names and dates.

⁵ All dates hereafter are 2008, unless otherwise stated.

⁶ There are no exceptions to the judge's finding that “the Overstreet matter was entirely beyond [Bunton's] control and was essentially based on information we now know to have been inaccurate, as it was based on a serious mistake by Hartley and her staff.”

ing a December 4 meeting between Simms, Hartley, and Hoffert, Simms stated that she would investigate Bunton's conduct during the incident. However, no such investigation occurred.

On December 5, Bunton was involved in another incident concerning a patient's missing diet order. That day, Bunton and fellow nurse Dana Crandell were working at the nurses' station. Also present were physician Michael Foote, Anderson, and Kim Kent, a visiting attorney-nurse who was at the Respondent's facility to provide in-service training on proper charting procedures. Crandell mentioned to Bunton that a certain patient—admitted to the hospital the previous day—did not have a diet order on file, and she asked Bunton to help her with this matter. Within earshot of Anderson, Foote and Kent, Bunton responded by humorously acting out the problem concerning missing diet orders.⁷ Specifically, Bunton asked Crandell about the patient's diagnosis. When Crandell responded that the patient had pneumonia, Bunton, in a mocking tone, stated "Oh, just give him anything he wants to eat. Just give him whatever," or "just give him a regular diet."⁸

Everyone present at the nurses' station understood that nurses were not permitted to issue diet orders or bring food to the patients. In view of that understanding, Foote chuckled at Bunton's remarks, while Anderson became embarrassed because the remarks were made in Kent's presence. Anderson disguised her embarrassment, however, and responded by asking those present to do a role play about nurses who overreach their authority. Later that day, Anderson reported to Simms that Bunton had instructed Crandell to write a diet order.

Upon receiving Anderson's report, Simms decided to discharge Bunton. On December 10, Bales and Simms met with Bunton and informed her that she was discharged for her December 5 conduct at the nurses' station, and for being rude to Overstreet on December 2.⁹

⁷ The judge described Bunton's remarks as having presented "a show" using "droll humor." There are no exceptions to these characterizations.

⁸ In finding that Bunton made these remarks, the judge appeared to rely on both Bunton's and Anderson's testimony concerning this incident. Bunton testified that she said, "Oh, just give him anything he wants to eat. Just give him whatever." Anderson testified that that Bunton said, "Just give him a regular diet."

⁹ The complaint alleges that, in explaining the basis for Bunton's discharge, Bales promulgated an unlawful rule prohibiting protected speech and, further, made an unlawful threat of discharge. In excepting to the judge's dismissal of these allegations, the General Counsel relies on Bunton's testimony that Bales accused Bunton of directing Crandell to write a diet order and, when Bunton disputed this accusation, rephrased it to state that Bunton had insinuated that Crandell should write the order. When Bunton again disputed the assertion, Bales accused Bunton of making an inappropriate comment. Although the judge did not specifically reference this testimony in his decision, we find that,

II. THE JUDGE'S DECISION

Dismissing the complaint allegation that the Respondent unlawfully discharged Bunton, the judge found that Bunton's December 5 remarks concerning the missing diet order did not constitute protected concerted activity. The judge explained that although Bunton's conduct raised a complaint about the physicians' failure to provide written diet orders for their patients, such action was not protected because "Section 7 does not speak to employee-patient . . . connections" and while "nurses are free to band together for their own mutual aid and protection, that does not mean the Act frees them to band together for the protection of their patients." The judge cited in support of his dismissal *Waters of Orchard Park*, 341 NLRB 642, 644 (2004) (finding that nursing home employees did not engage in protected activity when calling a State patient care hotline to express concerns about excessive heat and lack of drinking water at the facility). The judge concluded that because there was no evidence that the "lack of diet orders would redound to the nurse assigned to the complaining patient," Bunton's conduct at the nurses' station was an unprotected expression of concern over patient welfare.

Although we do not agree with the judge's reasoning, we find for the reasons stated below that Bunton's discharge did not violate Section 8(a)(1).

III. ANALYSIS

Section 7 of the Act protects employees when they engage in "concerted activities for the purpose of . . . mutual aid or protection." Thus, an employer may not retaliate against employees for engaging in "legitimate activity that could improve their lot as employees." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 567 (1978). The Board has also recognized, however, that "some concerted activity bears a less immediate relationship to employees' interests as employees than other such activity [and] . . . at some point the relationship becomes so attenuated that an activity cannot fairly be deemed to come within the 'mutual aid and protection' clause." *Id.* at 567–568.

In deciding whether Bunton's conduct was for mutual aid and protection, it is important to keep that question analytically distinct from the questions of whether it was also concerted and, if it was both concerted and for mutual aid and protection, whether it was nevertheless un-

even considering it in the light most favorable to the General Counsel, it does not support a finding that the Respondent promulgated a rule. See generally *Palms Hotel & Casino*, 344 NLRB 1363 fn. 2 (2005) (finding that a supervisor telling a group of employees that they should "stop it" when discussing wages, while a violation of Sec. 8(a)(1), was not a promulgation of a rule). Similarly, the testimony that Bales informed Bunton of her discharge, does not—by its terms establish a separate *threat* of discharge violation.

protected because it involved misconduct. In this regard, it is useful to ask whether the conduct would have been concerted if Bunton, together with fellow nurse Crandell or with dietary assistant Overstreet, had protested the policy and its implications when physicians failed to place dietary orders in patients' files to responsible management officials. We think the answer is unquestionably yes.

The policy and its application when physicians failed to place orders in patients' files directly affected nurses' conditions of employment. Nurses could not adequately perform their duties in the absence of the orders and the absence of the orders altered their duties. Assistant Director Anderson testified that "our responsibilities as a registered nurse within the scope of our practice as a registered nurse is to ensure that our patients have what they need." If a physician failed to place an order in a patient's file, Anderson continued, "It's our responsibility to call that physician and say, I need a clarification."

The order is a tool that is necessary for the nurse to perform her duties. If mechanics protested that they were not provided a tool needed to perform their duties—repairing cars—the protest would clearly be for mutual aid and protection. See *Bronco Wine Co.*, 256 NLRB 53, 54 fn. 4, 60 (1981) (upholding judge's conclusion that "it can hardly be disputed that the complaints about the lack of 'materials and parts' that each of these [maintenance] employees had voiced related to terms and conditions of employment and were, therefore, protected concerted activities"). This would be no less so because the tool was needed to make the cars safe for the customers. The same is true of the diet order here. The fact that the order is necessary to insure that a patient consumes only appropriate food and drink does not alter the fact that its absence affects nurses' working conditions.

Parr Lance Ambulance Service, 262 NLRB 1284 (1982), enfd. 723 F.2d 575 (7th Cir. 1983), is directly on point. In that case, the Board adopted a judge's finding that an ambulance driver and an emergency medical technician (EMT) engaged in protected activity when they refused to operate an inadequately equipped ambulance. In so doing, the Board adopted the judge's finding that although a primary motive of the employees' refusal to operate the ambulance was the desire to provide adequate patient care, their refusal was also to protest missing equipment which impacted their ability to perform their jobs. In these circumstances, the Board held that their actions constituted a concerted protest over their working conditions.¹⁰ *Id.* at 1284 fn. 1. Similarly, in

¹⁰ The Board further noted that with respect to the EMT, his professional certification could be revoked for operating an ambulance that is not in conformance with State equipment requirements. *Id.*

Misericordia Hospital Medical Center, 246 NLRB 351, 356 (1979), enfd. 623 F.2d 808 (2d Cir. 1980), the Board adopted a judge's finding that a nurse's participation in preparing a report, which described problems with staffing and cleanliness at the hospital, was protected concerted activity. In finding that the participation was protected, the judge noted that the report concerned matters "intimately related to the conditions under which the employees worked." *Id.* at 356.¹¹

Thus, the fact that the primary purpose of the diet policy was to protect patients does not alter the fact that the policy and, in particular, its application when a patient's file contained no order, affected nurses' working conditions. In the healthcare field, many terms and conditions of employment will be set in order to benefit patients; a rule limiting nurses' working hours, for example. As noted by the Second Circuit Court of Appeals in *Misericordia Medical Center v. NLRB*, 623 F.2d 808 (1980), "in the health care field such issues often appear to be inextricably intertwined."

Here, Bunton's actions at the nurse's station similarly expressed concern about a condition under which the nurses worked, as well as about proper patient care. Clearly, the intent of Bunton's actions was to dramatize the nurses' frustration with the Respondent's policy relating to missing diet orders. The frustration was rooted in the interruption of their other duties, their need to track down and request that a doctor provide a written diet order for a patient, and their need to comfort and treat hungry and disgruntled patients from whom food and drink was being withheld.

The incident involving Overstreet only 3 days earlier demonstrates how the application of the policy affected the working conditions of various employees in a manner that could quickly become frustrating. As explained above, Bunton and Overstreet dropped their other duties to spend about 20 minutes searching for a missing diet order. Adding to Overstreet's frustration was the fact that she repeatedly had to explain to an agitated food runner that even though the patient was getting increasingly hungry, he could not be given any food until the diet order was found and verified. Thus, the work and morale of three employees was interrupted and adversely affected by the incident. Indeed, it was so upsetting that Overstreet reported it to her superior; the report, in turn,

¹¹ The judge also noted that the issue of hospital cleanliness was "a matter clearly of concern to the employees as well as the patients." *Id.*

Compare *Lutheran Social Service of Minnesota*, 250 NLRB 35, 42 (1980) (finding that employees' statements critical of direction and philosophy of patient treatment fell outside the objectives of "mutual aid or protection" guaranteed by the Act).

set off a chain of events that resulted in a false accusation of misconduct against Bunton.

While the diet orders policy undeniably related to sound patient care, it also had a direct effect on nurses' and other employees' working conditions. The impact on employees and patients was "inextricably intertwined." Bunton's protest thus related to terms and conditions of employment and was for mutual aid and protection.

We thus find that the judge's reliance on *Waters of Orchard Park*, supra, is misplaced. In that case, the Board found that two nursing home employees did not engage in protected activity when they called a State patient care hotline and, pretending to be a relative of a patient, complained about the excessive heat and insufficient drinking water at the facility. In finding that the employees' conduct did not implicate a term or condition of their employment, the Board emphasized that the employees "explicitly disclaimed an interest in their own working conditions when they called the [patient care] hotline." 341 NLRB at 643. The Board further noted that the employees even conceded at the hearing that they did not call the hotline to address their own working conditions. Rather, they did so for the welfare of the patients, and thus the interests expressed were not encompassed by the Act's "mutual aid and protection" clause. *Id.* at 644. Here, neither Bunton's presentation at the nurse's station nor her testimony at the hearing included any such disclaimer.

Moreover, the Board did not overrule *Parr Lance Ambulance* in *Waters of Orchard Park*. Rather, it distinguished the earlier case on grounds equally applicable here. The *Waters* Board observed, "in *Parr Lance Ambulance* . . . , the employees' concern—inadequate equipment—was directly related to the performance of their work." 341 NLRB at 644. As explained above, the same is true here.¹²

Having found that Bunton's actions were for mutual aid and protection, we turn to the question not reached by the judge—whether the actions were concerted. We find that they were not. Significantly, Bunton acted alone when she spontaneously poked fun at the Respondent's policy. Further, there is no evidence that Bunton was seeking to move other employees to action. Bunton's action could nevertheless be deemed concerted if it were

¹² The *Waters* Board also noted that the employees in *Parr Lance* also faced the possibility of license revocation or a law suit if they failed to provide adequate care due to missing equipment. 341 NLRB at 644. But, in fact, only one of the two employees in *Parr Lance* was licensed (the EMT, not the driver). In addition, the nurse at issue here is licensed and subject to the same type of legal duties as the EMT in *Parr Lance*. Finally, the possibility of a lawsuit, surely remote in both cases, is just as present here as in *Parr Lance*.

a continuation of earlier concerted activities.¹³ The record, however, does not support such a conclusion.

The main evidence adduced by the General Counsel arguably showing a continuation of concerted activity was Bunton's testimony that she had circulated a petition protesting the Respondent's new policy. However, the petition was circulated at least 3 years prior to the conduct for which she was discharged. Moreover, because the petition was not introduced into the record and the testimony lacked any specifics, there is no evidence of what the petition actually stated, the extent of circulation among other employees, or their response.¹⁴ Similarly, the evidence of other employee comments concerning missing diet orders lacked any detail such as the names of employees involved, dates, or what specifically was said, and thus we are unable to determine whether any of these earlier conversations constituted or arose out of concerted activity. In the absence of such a determination, we find that the evidence is insufficient to show that Bunton's conduct at the nurses' station was a "continuation," or a "logical outgrowth" of, prior concerted activity. For this reason, we find that there is a failure of proof demonstrating that Bunton's conduct was concerted, and accordingly affirm the judge's dismissal of the complaint.

ORDER

The recommended Order of the administrative law judge is adopted and the *complaint is dismissed*.

MEMBER HAYES, concurring.

I concur in affirming the judge's dismissal of the allegation that the Respondent unlawfully discharged nurse Kelly Bunton. The discharge was based on conduct that was not concerted, and consequently not statutorily protected. Bunton was discharged for an ill-considered mocking comment, in the presence of management, that was facially contrary to a strict policy about patient diet orders. There is no basis for finding that her comment

¹³ See, e.g., *Consumers Power Co.*, 282 NLRB 130, 131–132 (1986) (finding that even if employee had acted alone, his individual complaint would have been concerted because it was a continuation of his and his coworkers' earlier concerted complaints raised at the employer's weekly meetings.); *JMC Transport*, 272 NLRB 545 fn. 2 (1984), *enfd.* 776 F.2d 612 (6th Cir. 1985) (finding an employee's pay protest concerted because it was "a continuation of protected concerted activity" involving a meeting wherein two employees jointly complained to management about wage payments); *Mike Yurosek*, 306 NLRB 1037, 1038 (1992) ("We will find that individual action is concerted where the evidence supports a finding that the concerns expressed by the individual are logical outgrowth of the concerns expressed by the group.")

¹⁴ It is therefore unknown whether that petition concerned the matter that Bunton was addressing here, i.e., the problems caused by a missing diet order, or whether it concerned that the new policy prohibited nurses from bringing any food at all to their patients.

could reasonably be understood as part of a group protest about the impact of that policy on nurses' jobs or as solicitation of a coworker to join in making such a protest. Instead, her conduct was properly understood as the latest and fatally final example of repeated acts of unprofessional behavior for which she had been placed on final warning status. Thus her discharge did not come within the Act's protection without regard to whether the object of her action might be of concern to other employees.

I write separately only to emphasize that it is unnecessary to reach the issue of whether Bunton's conduct reflected any concern related to employee interests. Once this conduct is found not to be concerted activity, the legality of her discharge is determined. Instead, my colleagues begin their opinion with a lengthy analysis of whether Bunton's activities were for the purpose of mutual aid and protection.¹ This analysis, blurring the distinction in the health care industry between concerns about patient care and concerns about conditions of employment,¹ is dictum by a two-member plurality.

William Mabry III, for the General Counsel.

Amy J. Gittler and Jeffrey W. Toppel (with George X. Cherpelis on brief), (*Jackson, Lewis, LLP*), of Phoenix, Arizona, for Respondent.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was tried in Show Low, Arizona, on June 23–25, 2009, based on a complaint issued on March 31, 2009, by the Regional Director for Region 28. The complaint is based on an unfair labor practice charge filed on January 9, 2009, by Kelly Bunton, an Individual (Bunton or the Charging Party). The complaint alleges that Summit Healthcare Association, d/b/a Summit Regional Medical Center (Respondent or the Hospital) committed certain violations of Section 8(a)(1) of the National Labor Relations Act. Respondent denies the allegations in their entirety. All parties have filed posthearing briefs and they have been carefully considered.

Issues

The principal issue is whether Respondent discharged Bunton on December 10, 2008, for reasons prohibited by Section 8(a)(1) of the Act. The complaint also alleges some lesser, independent violations of Section 8(a)(1). More specifically, the General Counsel asserts that Respondent discharged the Charging Party, a registered nurse, because she had engaged in the protected concerted activity, defined by Section 7 of the Act, of discussing wages with her fellow employees, contrary to a rule which supposedly prohibited employees from doing that. Indeed, the General Counsel also asserts that one of the two reasons which Respondent assigned for the discharge—that she had concertedly tried to get Respondent to correct some

shortcomings relating to patient dietary orders—was also protected. Indeed, it asserts that the other proffered reason—alleged rude and abusive behavior directed to a dietary department employee—was contrived and untrue, suggesting that the real reason was a reprisal for Bunton's involvement in one or both of the protected activities.¹

Respondent denies that it discharged Bunton as retaliation for her protected conduct. Moreover, it asserts that Bunton did not participate in any activity protected by Section 7, averring that it discharged her for endangering patients by urging another nurse to perform work outside the scope of practice, and because she in fact had been verbally abusive to the dietary staffer.

Both the General Counsel and Respondent have filed briefs which have been carefully considered. Thereafter, Respondent moved to strike portions of the General Counsel's brief as inaccurate descriptions of the facts as developed during the hearing and, therefore, not supported by the record. I advised the parties that I would address the motion in this decision. While there is a certain merit to the motion, the shortcomings of the General Counsel's theory will subsume most, if not all, of the issues raised in the motion. Accordingly, the matters will be covered in the discussion of the complaint's merits.

Based on the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent admits it has been at material times an Arizona corporation operating a hospital in Show Low, Arizona, where it provides both inpatient and outpatient medical care. It therefore admits that it meets the definition of a health care institution as set forth in Section 2(14) of the Act. It further admits that during the year preceding the issuance of the complaint, in the operation of its business, Respondent's gross revenues exceeded \$250,000 and during the same timeframe it purchased goods from directly outside Arizona valued in excess of \$50,000. Accordingly, it admits that it meets the Board's jurisdictional standard for hospitals engaged in commerce within the meaning of Section 2(5), (6), and (7) of the Act.

Background

Kelly Bunton is a registered nurse who, until her discharge on December 10, 2008,² had worked for Respondent since 2003. Her immediate supervisors during 2008 were Jayne Simms, the director of the medical-surgical department and Diana Anderson, the assistant director of that department. Simms, with Anderson's concurrence, is the individual who determined that Bunton should be discharged. Others involved in the approval process were Correen Bales, the director of the human resources department and Robin Conklin, the vice pres-

¹ In addition, the complaint cites other, supposedly protected concerted acts—complaints about equipment failures, the method of assigning patients and “other matters” related to wages, hours, and working conditions. The General Counsel did not support any of these with evidence indicative of a violation.

² All dates are 2008, unless stated otherwise.

¹ See *Waters of Orchard Park*, 341 NLRB 642, 644 (2004).

ident for patient care services. Syble Hartley, the director of the dietary department and her assistant, Karla Hoffert, provided information which contributed to the decision.

In October 2006, Thomas D. Plantz became the chief operating officer of the Hospital. At some point, he determined that the pay and salary structure needed to be modified. The change took several months to formulate and it was not implemented until April 2008. Respondent undertook a large-scale explanatory campaign in order to educate the staff concerning what was happening and how the calculations were to be made. Essentially, the changeover implemented a pay for performance program, replacing a program which had placed more value on experience. Employees were urged to ask questions about the program and told that they could discuss it privately with the human resources staff. The new structure meant a change in the employee evaluation criteria, and Respondent undertook to educate the staff concerning how future evaluations would be used for pay raises.

At the same time, a wage survey was conducted and a formula established to make certain that the staff was being properly paid for purposes of establishing a correct baseline on which to build the new merit pay system. The testimony was that no employee's pay was reduced in this process, though some upward adjustments were made. As with the system itself, Respondent tried to explain what was happening and why adjustments occurred. Some of Respondent's educational efforts are described in the June 2008 edition of its newsletter to the staff.

In addition, there is no evidence, under either the previous system or the new system, that there was any rule which prohibited employees from discussing wages with one another. Certainly no written rule has been shown, and Human Resources Director Coreen Bales has testified (corroborated by others) that there is no such rule. There is some evidence that the CEO who preceded Plantz was perhaps more protective of such information, but even so it never amounted to a prohibition. There is no evidence that any employee has ever been disciplined for speaking to colleagues about each other's level of remuneration, and Bales denies it has ever occurred.

Kelly Bunton

The Charging Party, Kelly Bunton, does not accept her managers' testimony that rules against talking about wages are non-existent—at least insofar as oral instructions are concerned. She testified that sometime in July she and perhaps four other nurses had a discussion at the nurse's station on her floor. She gave the following testimony:

Q. [BY MR. MABRY] Okay. Now during your employment with the Respondent, have you ever had the occasion to discuss wages with other employees?

A. [WITNESS BUNTON] Yes.

Q. When did you do that?

A. Sometime this last July, July '08.

Q. And how did that come about?

A. They had issued across the board the new policy of how we were being paid by the different standards evaluations was not—had not really taken effect yet. It was in place, but they hadn't been using it. And they had given

across the board wage increase increases to various people. And we were trying to decide—it was myself and several other nurses. We were trying to decide how they came up with some of those figures and stuff.

Q. Now where did these—where did this conversation take place? Was it one conversation?

A. Yeah, it was one conversation. It was in the nurses' station on the first floor.

Q. And how many nurses were involved?

A. It was probably three or four of us at least. It was a very quiet conversation.

Bunton then testified:

Q. Now do you know if management ever was aware of your discussion of wages?

A. I became aware a couple of weeks later when Jayne Simms called me into her office regarding that conversation.

Q. And did she advise you as to why you were coming into her office?

A. When I got in there she said that she understood that there had been a conversation regarding wages and I was a participant and did I know or I knew it was against policy and was—I could be terminated immediately for it.

Q. Who was present in the office with you and Ms. Simms?

A. Nobody. It was just Jayne and I.

Q. Now, did you say anything in response to this?

A. I said, "Well, I wasn't talking about specific like, you know, specific. We were just wondering how the figures were reached."

Q. And did she have anything in response?

A. Just that it was a warning that we were not to discuss wages.

Simms denies that this conversation ever occurred. Certainly no one was present who could corroborate it. Even so, if Bunton is credited, it would not establish that Respondent had a "rule" against employees discussing salaries among themselves. It would only establish that Simms told Bunton that she could not have such discussions. As the Board observed in *Hotel Roanoke*, 293 NLRB 182, 189 (1989), an employer who told a food service worker that she could "talk about the veal and the lemon sauce, but not the union," was not the promulgation of a rule. Nevertheless, it found the comment itself coercive. See also *American Thread Co.*, 270 NLRB 526, 528 (1984).

In support of Bunton's testimony that Simms made the remark, and that it was consistent with what Respondent had told others, the General Counsel called two other witnesses, Lura Gorman and Dana Crandell, both RN's who worked with Bunton. Gorman, one of Bunton's best friends, testified that employees had been "encouraged not to talk about our wages." She did not say who had done that or when it had occurred.

Crandell testified:

Q. BY MR. MABRY: According to you, are you aware of the—is there a policy at Summit that talks about whether employees can discuss their wages?

A. [WITNESS CRANDELL] I don't know if there's a policy, but I do know that it's been mentioned that we weren't supposed to discuss wages with other RNs.

Q. And who—

A. Or other staff.

Q. Or other staff? And who advised you of that?

A. I don't remember a certain person. I don't know if I heard it through other nurses or if it was at a staff meeting. I don't remember. I just remember hearing that, that we weren't supposed to discuss our wages with others.

Like Gorman, Crandell was unable to say who had made such a statement or when. Indeed, she seems to think she may have heard it from other nurses rather than a manager. Certainly Simms is absent from the testimony of both of these supposedly corroborative witnesses.

During the same timeframe, recorded by Vice President Roblin Conklin and a followup email to Bunton, Bunton had gone to Conklin in the belief that Gorman, under the new salary structure, was now making more than she was. How Bunton had come to that conclusion is not reflected in the record—perhaps from the nursing station discussion? Nevertheless, Conklin checked into the request and advised Simms of the results. In turn, Simms on September 26, emailed Bunton to advise that “[Conklin] researched the situation with HR and it was found that [Gorman] is not making a higher wage than you. You actually make more than she does.”

At a minimum, this email tends to corroborate Respondent's contention that there is no policy or practice which would bar employees from speaking to each other about their wages. It had reason to conclude that whatever information that had come to Bunton, it had come from an employee source. Yet its response, via Simms, was helpful and benign. It fully answered the inquiry and the answer was consistent with its effort to educate staff about the actual impact of the wage structure modification. It suggests a preferred choice of openness over wage matters, rather than suppression. It also suggests that Bunton had asked a question which was not so much concerned with the wage system as it might be applied to employees in general, but instead applied exclusively to her own pay rate. Her concern here was not concerted, but personal.

Why, then, would Bunton have testified to a separate conversation with Simms which accused her of making a coercive statement aimed at keeping wage matters confidential?

A look at Bunton's record over the year yields at least some reasons. In February, Bunton had undergone her annual appraisal. She had been given the opportunity to assess herself and had given herself high marks in all of the categories. She was stunned to discover that Simms strongly disagreed with her, so much so as to warrant imposing a ‘final warning.’ Indeed, the final warning status required her to complete an action plan (a corrective action plan) in order to improve her performance. It was due March 7. Bunton, claiming to have misunderstood, says she thought the action plan was only a suggestion. Her explanation makes little sense. Employee action plans, such as this, in the face of a final warning cannot be viewed as a suggestion—it was mandatory, and she knew it. She just wanted to avoid it. Now, it should be observed here

that the shortcomings which Simms (and her assistant Anderson) had perceived and recorded in her February 20 warning—aside from some minor incident reports—were not aimed at her capabilities as a nurse, but at her lack of a professional demeanor.³ She was reported as engaging in excessive socializing, being too loud, using inappropriate/foul language and having unprofessional conversations in public places. It all added up to her failure to maintain a professional demeanor.

Respondent allowed her until May 7 to complete the action plan. As finally submitted and approved, it covered two issues:

Talking too much and talking too loudly. For the first, she agreed 1. To think first. . . , 2. chat away from the crowd, 3. take her prescribed meds, and 4. enlist the help of key persons to let her know when she was “runn[ing] away at the mouth.” For the second, she agreed 1. to practice using a soft voice, not only at work but at home, 2. to try to stay calm inside (take meds) so voice doesn't sound excited and loud, and 3. to enlist the help of soft-spoken persons at work.

The negative appraisal and the required action plan did not sit well with Bunton. Nevertheless, over the next few months she was observed to have improved herself as required. Anderson noted that Bunton had improved sufficiently in August and suggested that Bunton be permitted to train a “capstone” nursing student,⁴ persuading Simms to go along. Simms acknowledged that improvement. However, by mid-October, as the student's training came to an end, Anderson observed that Bunton was returning to her “old habits of non-stop talking.” This led to an October 14 meeting with Bunton on the point.

Those action plan restrictions are obviously at odds with her personality. Indeed, as I observed Bunton's demeanor during the hearing, I could see she had difficulty restraining her naturally loquacious and gregarious nature and was unduly fidgety. At the small table where the parties and I were seated, she often nodded and shook her head as she agreed or disagreed with what was being said, whether by counsel or by a witness. I had to admonish her at least twice. And, outside the hearing room, her nature led her to being misunderstood as having offered a witness a bribe of a trip to Disneyland.

The point here is that Bunton has a high opinion of herself, allowing her to do or say things, yet unaware of the impact those remarks have on others, because essentially she believes she is saying or doing harmless things. From her point of view, the negative appraisal was unjust and the people involved, particularly Simms, were being unfair. To me, that resentfulness is a reason to reject her credibility concerning the conversation where she says Simms told her not to discuss wages with other employees.

³ This is not to suggest that Bunton's nursing capabilities were perfect. The record reflects a number of incidents which, rightly or wrongly, had caught the attention of supervision and were sufficiently remarkable so as to be recorded. (At least one of these may have been recorded by the health unit clerk who may have misunderstood what was transpiring.) It is not necessary to describe this aspect of the case in any detail.

⁴ A “capstone” student nurse is one who is entering the final weeks of in-hospital training prior to graduating from nursing school.

However, there is more than just the issue of a ban on discussing wages. There is the question of whether having the conversation she described with fellow employees over wages is conduct protected by Section 7 and the connected question of whether that contributed to her discharge. Those questions will be further explored in the analysis section below.

But first, I recount the incidents leading to the discharge.

The Diet Order Issue

According to Bunton, there has been an ongoing, if infrequent, issue with physicians who occasionally neglect to provide a diet order for newly admitted patients. There is no disagreement that patients may not be treated without a doctor's order—and that includes diet orders, since some patients may be denied food for certain conditions or their diet may be restricted for other conditions. It is all part of the treatment plan. Lack of a diet order means that the patient cannot be permitted to eat. When that occurs, the nurse in charge of that patient must contact the attending physician and obtain the diet order. The doctor either fills out the order or verbally provides it to the nurse, but signs off on it later. That order is then placed into the hospital's computer system by the health unit coordinator where it becomes available to the staff, particularly the dietary department (kitchen staff), which needs to know what diet it needs to prepare for that patient.

According to Bunton, as far back as 2004 or 2005 ("probably three and a half, four years ago"), she had circulated a petition aimed at the issue of diet orders. Aside from her testimony—which really speaks to opposing some sort of policy change, rather than doctors forgetting to write them—there is no definitive evidence concerning what she intended to accomplish. Indeed, she seems to be the only person who recalls it at all, and her testimony leaves the matter unclarified. Then she testified haltingly about expressing her concerns on the subject in 2008.

Q. [BY MR. MABRY] Have you ever had a discussion with management concerning dietary orders?

A. [WITNESS BUNTON] I'm not sure.

Q. The lack of diet orders being in a patient's chart.

A. Yeah.

Q. When did you have these conversations?

A. I can't recall when those were, sometime in 2008. It's been an ongoing thing.

Q. What particular concern did you have concerning diet orders?

A. Just lots of times the patient would be there a long time and we couldn't get a diet order because you couldn't get a hold of the physician, so the patient would be there with no food.

Q. Do you recall a particular management member that you raised this issue with?

A. It was raised with Diana.

Q. Anderson?

A. Uh-huh. [affirmative]

Q. Do you recall when?

A. I don't.

Q. Was it in 2008?

A. Yes, I believe so.

It can readily be seen from this testimony that Bunton does not really have any specific conversation in mind. At best she can only recall one conversation with her immediate supervisor about the problem. She does not tie the matter to any concerted or mutual employee concern. Even so, she does not go on to describe what Anderson's response, if any, actually was. Bunton's testimony here is most vague.

With that background, I turn first to the Overstreet matter and then to the nurse's station incident.

Overstreet. Jody Overstreet is the PM assistant (afternoon, evening) who handles orders for the kitchen. Her lead person is diet clerk Jackie Moeller and the first line supervisor is Karla Hoffert. All report to diet department head Syble Hartley; Hoffert serves as Hartley's principal assistant.

Shortly before 5:30 p.m., on December 2, one of Bunton's patients returned to the ward after undergoing testing for a lengthy period during the day. Until his return, the patient had been unable to eat and was now hungry. At 5:30 p.m., Bunton called the kitchen to order some food for him; Overstreet answered the call. Following procedure, Overstreet checked the computer to confirm the doctor's diet order. For some reason, never explained, the order was missing from the computer. This was odd, because the patient had previously had an order on file. In any event, Overstreet told Bunton that she could not find the order.

This resulted in a roughly 20-minute standoff regarding what to do next. There is no real need to describe it, for the merits are unimportant here and eventually the order was found. What is significant here is that Overstreet testified as follows:

Q. [BY MR. MABRY] There's been testimony regarding the conversation between you and Ms. Bunton. Do you recall a conversation some time in the first week of December?

A. [WITNESS OVERSTREET] Yes.

Q. There has been some testimony that Ms. Bunton was rude and disrespectful and abusive to you. Is that true?

A. No.

The incident nonetheless upset Overstreet, not because of anything that Bunton had done, but because the whole thing was so frustrating. In fact, she essentially pointed at one of the 'runners' (runners are kitchen employees who deliver trays to the rooms): "[H]ow I recalled it was that our runner at the time, he was fairly new and he came back to the kitchen, you know, really upset about a tray for a patient, that he wasn't getting it yet. And I was trying to explain to him how I can't send a tray out unless I have the diet order. And he wasn't understanding, you know, that I can't send it out. He's saying, you know, the patient's hungry, he wants his food. And I kept trying to explain to him that he can't—I can't send that tray out until I get the diet order."

But, Overstreet, unnecessarily distraught, reported the matter to Moeller the next day. Moeller says she got a note from Overstreet. Overstreet was not asked if she left a note for Moeller, but if so, it has now been lost. Moeller, in turn, reported the matter to Hoffert who then informed Hartley. Unfortunately, Overstreet is simply not very good at explaining things, and somehow blame for the matter fell upon Bunton. This was nothing more than a child's game of "Telephone"

where no one thought to question Overstreet very thoroughly.⁵ Overstreet's distress was escalated by the nonwitnesses into a belief that Bunton had treated Overstreet rudely and with disrespect. Yet, as Hoffert says in the quote set forth in the footnote, Overstreet never said that Bunton yelled at her—but only 'almost' did so. It seems to me that there is a great likelihood that Hoffert is now backfilling her failure to initially get it right; she even denies a runner was involved, a fact she had entirely missed. In any event, I must credit Overstreet's testimony that Bunton was never rude or disrespectful to her. Overstreet was the percipient witness, even if she has descriptive shortcomings of her own. She knew it best.

Armed with this misinformation, Hartley decided to take the matter up with Simms and did so at a December 4 meeting between herself, accompanied by Hoffert, and Simms, joined by Anderson. Simms, well aware of Bunton's history, became dismayed, to say the least, and agreed to investigate Hartley's complaint about Bunton. She did not do so because of what happened next.

The Nurse's Station Incident. The following morning, December 5, at 7:30 a.m., Bunton, fellow nurse Dana Crandell and Dr. Michael Foote⁶ were all at the nurse's station. That morning a training official, an attorney-nurse named Kim Kent, had come to the Hospital to offer in-service training concerning proper charting by nurses. Having had no takers, she and Anderson had joined the group at the nurse's station. Bunton, at least, knew who Kent was and what she was visiting for.

Crandell was reviewing a patient's chart and had been unable to find a diet order from the patient's doctor (not Dr. Foote). She asked Bunton to help her look for one. When both continued to come up empty, Bunton decided to try some droll humor, which as I note, was never understood. She was acutely aware of the Hospital's problem concerning doctors forgetting to place diet orders, so she decided to act it out for Kent's benefit and possibly for Anderson's discomfort.

In an ill-conceived manner, Bunton made a show of asking Crandell what the patient's illness was. Crandell, not aware of Bunton's purpose, replied "pneumonia." Maintaining her tone, Bunton said, depending on which witness one asks, either "Oh, just give him anything he wants to eat. Just give him whatever"

⁵ Hoffert did speak to Overstreet. She testified: "Okay. She told me the previous night she got a call from Kelly, who needed a diet for a patient. We did not have a diet order in the computer on this patient. And Jody told Kelly that we could not send a diet unless we had a diet order through the computer. Or a hard copy, and that would be the—coming to the kitchen and handing us a diet order. And she said it went on that way for probably 20 minutes or so, and—And it went on for maybe 20 minutes, and it was done. And a diet order came through probably—she doesn't know when the diet order came through at that time. She said she was upset. When she told me, she was upset, she was almost crying to me. When she told me. . . . She was very upset. She just looked like she was just going to cry on me. She was very upset. . . . She said that Kelly was rude. . . . That Kelly was almost yelling at her."

⁶ Dr. Foote was supposedly subpoenaed by the General Counsel. Whether service was ever perfected on him is unclear, nor is there any suggestion that a pretrial effort to contact him had been made. He is said to have been out of the state during the hearing and he did not appear.

or "Just give him a regular diet."

That remark set off alarm bells, though they weren't the bells Bunton expected. As noted above, nurses cannot issue treatment orders themselves. Everyone at the station knew it, including Bunton. Crandell, busy with hunting down the order, was already arranging to track down the doctor and paid no attention. Foote is said to have chuckled and Anderson, because of Kent's presence, says she was mortified because this was exactly the type of charting which Kent had been brought in to counsel against. Moreover, she was already suspicious of Bunton due to some earlier events and because of the complaint she had heard from Hartley the day before.

In addition, neither Anderson nor Simms brooks any nonsense from the professionals who report to them. Both have military nursing backgrounds. And, both take their professional responsibilities extremely seriously.⁷ Droll humor in their workplace is not likely to be appreciated, particularly if it is aimed at professional rules. Based on their training and the culture they wish to present, in their view, false drama is out of place in the nursing profession, particularly on a ward. They don't expect it and are likely to take it at face value.

Embarrassed, Anderson disguised her feeling and sought to use the incident as a training vehicle. She asked those present to do some role playing about nurses who overreach their authority. Despite her outward equanimity, Anderson was furious over Bunton's seeming exhortation to Crandell and took it seriously. Shortly thereafter, Anderson reported the incident to Simms. Simms accepted Anderson's verbal and followup written report to the effect that Bunton had told Crandell to write a diet order, and had thereby exceeded the scope of practice. She decided that enough was enough.

Combined with the diet department complaint, Simms concluded the situation had reached the level where it had become necessary to fire Bunton. Simms immediately began the preparatory steps to fire Bunton. That procedure took a few days, as she needed to review and marshal incidents from the past year, and because she needed the approval of HR's Bales and CEO Plantz. There was no dissent to her recommendation and on December 10, Bales and Simms informed Bunton that she was discharged.

II. ANALYSIS AND CONCLUSIONS

On the foregoing facts, I am unable to find that the Act has been violated as alleged in the complaint. The complaint's primary theory is that Bunton was discharged because she spoke to fellow employees about wages, in breach of an illegal Hospital rule. In any event, the General Counsel asserts her conduct should be deemed protected by law as at least a preliminary step toward the concerted act leading to the mutual protection of employees. See, e.g., *Whittaker Corp.*, 289 NLRB 933 (1988). While I have no problem with the legal concept in the abstract, the facts do not support it here.

First, it is clear that Respondent maintained no such rule. It was not against Hospital policy for employees to speak to each other about either their own wages or the newly installed remuneration.

⁷ Both have advanced degrees in nursing and/or health administration.

neration structure. Indeed, the evidence shows that the Hospital encouraged such discussions, as it believed the better it was understood, the better the employees would perform. Second, I cannot credit Bunton's version of the July or early August admonition supposedly given to her by Simms. Not only is it uncorroborated, it simply does not make sense in the circumstances. Both Conklin and Simms, apparently following Plantz' policy, were unoffended by Bunton's own wage inquiry as Bunton herself reported. Accordingly, I find the allegation has not been proven.

Connected to that are the complaint allegations arising out of that same Bunton-Simms conversation asserting that what Simms said qualifies as both an unlawful threat and an unlawful impression that Bunton's protected conduct was under surveillance. Since I find the conversation did not occur as Bunton described, it follows that there can be no proof of any independent 8(a)(1) threats or impressions of surveillance arising from it. The only credited conversation Bunton had with a manager over wages was her inquiry to Conklin about her own situation. That was not a concerted act, nor was it aimed at the mutual aid or protection of her fellow employees. It was entirely personal.

Third, even if one were to credit Bunton's version, it does not follow that she was discharged for her efforts. She was operating under a last warning for shortcomings concerning her professional demeanor. The two incidents which occurred in early December both involved a failure to comply with her promise to present a professional demeanor. The Overstreet matter was entirely beyond her control and was essentially based on information we now know to have been inaccurate, as it was based on a serious mistake by Hartley and her staff. Yet, Hartley's complaint had nothing to do with any putative protected conduct by Bunton. Hartley was only protecting her own staff from what she thought was unwarranted abuse, behavior for which Bunton already had a poor reputation. Fourth, Bunton has only herself to blame for the misunderstood silliness at the nursing station, where she provided Anderson with proof that she had not kept the promise she had made in her corrective action plan. If Anderson did not understand Bunton was playing a game, it is hardly Anderson's fault.

Finally, the alternate theory, that Bunton was engaged in protected, concerted conduct when she complained (actually played) in front of other employees about physicians' common failure to provide diet orders for their patients, does not hold water as a matter of law. Although nurses are free to band together for their own mutual aid and protection, that does not mean the Act frees them to band together for the protection of their patients. Section 7 does not speak to employee-patient or employee-customer connections. It speaks of the mutual protection of employees. In pertinent part, it says "Employees shall have the right . . . to engage in [] concerted activities for the purpose of collective bargaining or other mutual aid or protection." The word "mutual" refers to employees, not anyone else. See *Autumn Manor*, 268 NLRB 239, 243 (1983). There, the Board adopted my statement holding "If the proper test is

that which is cited in *G & W Electric Specialty*⁸—that is, the interest must be employee *qua* employee [footnote omitted] Hill and Broz' situations fall short. They were not engaged in employee *qua* employee conduct but in employee *qua* patient conduct." The Board upheld the dismissal of that portion of the case. See also *Waters of Orchard Park*, 341 NLRB 642 (2004).

Indeed, the Board's language in *Waters of Orchard Park* is very pointed on this question. See 341 NLRB 642 at 644 where it said:

The Board has held repeatedly that employee concerns for the "quality of care" and the "welfare" of their patients are not interests "encompassed by the 'mutual aid or protection' clause." *Lutheran Social Service of Minnesota*, 250 NLRB 35, 42 (1980) (concerted activity of employees of a home for troubled youth who complained about planned policy changes found unprotected, where the employees were found to be disturbed by decisions by management and a "perceived lack of competency of management which, in their view, threatened the 'quality of care,' 'the quality of the program,' and the 'welfare of the children'") See also *Good Samaritan Hospital & Health Center*, 265 NLRB 618, 626 (1982) (concerted activity of hospital's occupational therapists who complained about the management of the hospital's developmental learning program found unprotected, where the therapists were concerned with the "quality of the care offered by the program and the welfare of the children") Complaints motivated by concerns for "residents' living conditions" have also been found to be "not directly related to the employees' working conditions." *Damon House*, 270 NLRB 143, 143 (1984) (concerted activity of counselors at a drug treatment center found unprotected, where counselors sent a letter attacking the center's executive director and his impact on the adolescent residents).

See also *Tradesmen International v. NLRB*, 275 F.3d 1137 (D.C. Cir. 2002) (same, but concerning construction industry employees).⁹

⁸ *G & W Electric Specialty Co.*, 154 NLRB 1136 (1965) (Member Jenkins dissenting), enf. denied 360 F.2d 873 (7th Cir. 1966).

⁹ The court in *Tradesmen* said: "But the 'mutual aid or protection' clause is not without bound. That is, an employee's activity will fall outside Sec. 7's protective reach if it fails in some manner to relate to 'legitimate employee concerns about employment-related matters.'" *Kysor/Cadillac*, 309 NLRB 237, 237 fn. 3 (1992); see *Eastex*, 437 U.S. at 567-568. Thus an essential element before Sec. 7's protections attach is a nexus between one's allegedly protected activity and "employees' interests as employees." *Eastex*, 437 U.S. at 567. Here, however, the bonding requirement is not a "union standard." It applied to all subcontractors, whether they employed union workers, nonunion workers, or both. Moreover, in the traditional area-standards picketing scenario, benefits flow to both union and nonunion employees. When effective, union employees receive increased job security and nonunion employees receive, for example, increased employee benefits, or at least that is the theory, and a plausible outcome in many cases. In the present case, Oakes' activity was not an effort to improve any employees' (union or nonunion) working conditions. So far as the record shows, it was solely an effort to raise Tradesmen's costs. Paying the bond would not place Tradesmen on a more level playing field with union companies, it would instead subject leasing companies to one

It is conceivable under *G & W Electric's* logic that some employee conduct could be "close enough in kind and character, and bear[] such a reasonable connection to matters affecting the interest of employees *qua* employees, as to come within the general reach of the 'mutual aid and protection' the statute is concerned to protect." However, the connection cannot be tenuous; it must be evident from the circumstances. For example, it is close to self-evident that employee staffing at a health care institution can affect the workload of other healthcare employees. See, e.g., *Damon House*, 270 NLRB 143 (1984), and *Reading Hospital*, 226 NLRB 611 (1976). In those cases the Board did find that Section 7's "mutual aid and protection" language had application because of the relationship of staffing to workload.

Nevertheless, here the General Counsel's diet order argument is entirely unpersuasive. There is certainly no record evidence that lack of diet orders would redound to the nurse assigned to the complaining patient. Furthermore, the evidence contradicts the contention. Nurses are not responsible for a doctor's failure to provide a diet order, and if a patient were to make such a complaint against the nurse, Respondent's own rules (as well as limits imposed by State practice rules) could not hold it against the nurse. Nurses have no authority to order a diet, so how could such a complaint legitimately fall upon the nurse, much less find its way into the nurse's annual appraisal? It just won't happen. Even the Charging Party said she had received no such complaint nor did she have knowledge of any directed to any other nurse. Therefore, the General Counsel's argument here goes beyond speculation and into the realm of the inconceivable. Accordingly, it is rejected.

I think it is fair to say that Bunton was not guilty of at least some of what Respondent suspected. Yet her conduct never was within the sphere of the protection of Section 7 of the Act. The Board has long held that an employee may be dismissed

discreet element of construction costs required of contractors and subcontractors, regardless of whether either the leasing companies or contractors employed union or nonunion employees. Moreover, neither the Board nor the intervening union has suggested any meaningful sense in which the bond related to employees' interests as employees."

for any reason, or no reason at all, so long as the employee's Section 7 activity is not the basis for the discharge. *Lawson Milk Co. v. NLRB*, 317 F.2d 756, 760 (6th Cir. 1963); *Auto-Truck Federal Credit Union*, 232 NLRB 1024, 1027 (1977). The fact that Respondent failed to accurately assess what transgressions Bunton had or had not committed is not of any concern to the Board so long as activity protected by Section 7 is not implicated. Here the General Counsel's proof is woefully short of showing that Bunton ever did anything falling within the ambit of the Act.

Finally, the complaint makes some independent 8(a)(1) allegations relating to December 10, the day of Bunton's discharge. A review of the record reveals no sign of any facts supporting the allegations. Presumably those facts would have occurred during Bunton's exit interview in Bales' office. Yet Bunton supplied nothing in support when describing that meeting. Accordingly, those allegations stand unproven. The complaint should be dismissed.

Based on the foregoing findings, I make the following

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) and a health care institution as defined by Section 2(14) of the Act.

2. The General Counsel has failed to demonstrate by that Respondent committed any of the unfair labor practices alleged.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁰

ORDER

The complaint is dismissed in its entirety.¹¹

¹⁰ 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.

¹¹ Respondent's motion to strike portions of the General Counsel's brief has been rendered moot by this order.