

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of)
)
WINGATE OF DUTCHESS, INC.)
)
Employer,)
)
and)
)
1199 SEIU UNITED HEALTHCARE)
WORKERS EAST,)
)
Charging Party.)

Case 03-CA-140576
03-CA-145659

CHARGING PARTY'S BRIEF IN OPPOSITION TO EXCEPTIONS

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PRELIMINARY STATEMENT

In this case, the Administrative Law Judge (“ALJ”) imposed a bargaining order on the grounds that (1) Respondent Wingate of Dutchess, Inc., (herein “Dutchess” or “Respondent”) committed serious and hallmark unfair labor practices (“ULPs”) over a period of several months preceding an election; (2) Respondent’s interference affected the entire bargaining unit and emanated from high-level management officials; (3) Respondent’s misconduct clearly affected employees’ desire for representation; and (4) the Board’s traditional remedies would be insufficient to “eradicate the lingering effects” of the ULPs committed or to sufficiently deter their reoccurrence.

In his decision, the ALJ noted that 96 of 139 bargaining unit employees signed authorization cards, but the Union lost the election by a vote of 64 to 60. Five months before, employees at a sister facility located nearby, Wingate of Ulster (herein “Ulster”), had filed a petition for representation. At the time, employees of Dutchess and Ulster shared the same terms and conditions of employment. Respondent lost the Ulster election.

In this case, Respondent interfered at the earliest sign that employees at Dutchess were organizing by announcing an attendance bonus and changing to a weekly payroll. Respondent continued to interfere up to and including on election day by: surveilling employees; calling the police to remove employees engaged in protected, concerted activities on non-employer property; interrogating employees; posting coercive bulletins threatening a loss of existing benefits if they selected the Union; threatening per diem employees with reduced hours; soliciting grievances; expressing the futility of selecting the Union; telling employees their union activity was incompatible with continued employment; and so on.

After Respondent lost the election at the Ulster facility, it decided to give the Dutchess employees an unprecedented 2% wage increase, the first increase that was not explicitly tied to annual evaluations. Respondent admits that it knew the Dutchess employees were organizing when it decided to award the 2% increase. In fact, it had known for a while, and had already come up with other ideas of how to dissuade employees from participating. To rebut an inference of unlawful motive with respect to the 2% increase, Respondent's corporate office decided to award the same increase to employees at a third New York facility, Wingate of Beacon, but not at Ulster or any of its other 16 facilities. According to the Vice President of Human Resources Kim Ianiro, Ulster was "status quo" because of the election results. Of course, Respondent knew that the organizing employees at Dutchess would learn that the organized employees at Ulster had received no wage increase.

Respondent claims that a wage increase for all of its New York facilities was in the works months before even the Ulster campaign, but the ALJ found that Respondent failed to sustain its burden. In fact, Respondent does not genuinely deny that its motive in improving terms of employment at Dutchess was to avoid unionization.¹ Rather, Respondent argues that such motive is lawful so long as it can show that it contemplated improving benefits before employees' desire for unionization "crystallized" into an "organizing" drive.

Such argument misunderstands the Act and the case law. The Act does not just prohibit interference after employees have met with a prospective bargaining agent. It prohibits conduct "immediately favorable to employees which is undertaken with the express purpose of impinging upon their freedom of choice for or against unionization and *is reasonably calculated* to have that effect" is unlawful. *Exchange Parts*, 375 U.S. 405, 409 (1964) (Emphasis added). The point

¹ "It is an employer's right to improve working conditions in hopes of diminishing the appeal of unionization generally." Respondent's Brief in Support of Exceptions at 69.

at which favorable conduct becomes unlawful is not when employees' concerted activities "crystallize" into "union organizing," but when the employer acts with the desire to interfere with Section 7 rights.

In addition to all of the above, Respondent also discharged the most visible and persuasive union supporter, Sandra Stewart, who personally solicited over half of the authorization cards in favor of the Union. Respondent suspended Stewart four days after the petition was filed, thus ensuring that her position in favor of unionization would not be considered by others during the critical period. Stewart's discharge interfered with the election as much as it instilled fear in co-workers. After removing Stewart from the facility, Respondent also unlawfully barred her and other off-duty employees from campaigning outside. Meanwhile, its own agents and labor consultants, posing as NLRB representatives, conducted mandatory anti-union meetings inside. The testimony credited by the ALJ established that Respondent unlawfully interrogated, surveilled and threatened employees for their continued support of unionization.

Respondent claims its decision-makers believed Stewart had neglected a resident and then retaliated against him for complaining. However, the ALJ discredited such claims as lacking a reasonable basis in fact. Such conclusion rested on the fact that Respondent ignored inconsistent statements by the resident, failed to adhere to its own policies in conducting its investigation, and disregarded its own finding that the resident's complaint--that Stewart had not responded to his request for help--"could not be validated." R10B.² Although Respondent claimed to have decided to impose discipline on other grounds, because Respondent never

² The following abbreviations are used throughout the document: "ALJD" refers to the ALJ's Decision and is cited with page and line number. "Tr." refers to the transcript of the hearing in this matter. References to the Counsel for the General Counsel's exhibits are referred to as "GC__", references to the Respondent's exhibits are referred to as "R__", and references to the Charging Party's exhibits are referred to as "CP__".

communicated that decision to Stewart, it was not reasonable for Respondent to believe that Stewart retaliated against the resident. The fact that Respondent failed to conduct a complete investigation and give Stewart an opportunity to respond before suspending her also defeats Respondent's reasonable-belief defense.

In light of Respondent's calculated and prolonged interference with employees' Section 7 rights, including during the critical pre-election period, and further exacerbated by the hallmark violations described above, the ALJ properly determined that a bargaining order was necessary to remedy the effect of its unfair labor practices, and to reduce the likelihood of their recurrence in the future. *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575, 615 (1969) (approving imposition of bargaining orders for both remedial and deterrent purposes). Accordingly, and for the all reasons discussed herein, the ALJ's Decision should be affirmed.

FACTS

This case involves objectionable conduct and unfair labor practices committed by Wingate of Dutchess (herein "Respondent" or "Dutchess") between July and November 2014.³ Respondent is one of 19 skilled nursing facilities owned by Wingate Healthcare Inc., (herein "Wingate") three of which are located in the New York Hudson Valley: The three being Respondent, Wingate of Ulster (herein "Ulster") and Wingate of Beacon (herein "Beacon"). Tr. 1100:3-5. Wingate's Vice President of Human Resources, Kim Ianiro testified that the corporate office looks at the Hudson Valley facilities as a group for purposes of compensation structure and it sets wage rates for these facilities based on regional comparisons. Tr. 1152.

Before 2014, Wingate was one of the only non-union operators of skilled nursing facilities in the Hudson Valley. Tr. 1181. VP Ianiro testified that for this reason Wingate was "under constant threats." *Id.*

³ Unless otherwise indicated, all dates herein are in 2014.

Respondent's Employee Handbook states at page 11:

UNION-FREE POSITION

The Company is committed to the fair treatment of our valued employees. This commitment and dedication assures you that management makes every effort to provide a working environment that will make it unnecessary for employees to be represented by a union. We are committed to providing increasing opportunities for training and advancement, competitive wages and benefits, and fair treatment of all employees. In return, we hope all employees will engage us in full and open communications to resolve the problems that all of us, will experience from time to time.

R3.

Consistent with Respondent's union-free position, Ianiro testified that Respondent was committed to getting "ahead of any concerns or issues before they blow up into something big."

Tr. 1105:21-1107:13.

1. Respondent's Contemplation of Improved Benefits.

Months before the onset of organizing in this case, on February 1, Wingate implemented an adverse change: It changed its practice of paying employees on a weekly basis to a biweekly payroll. *See* R42. VP Ianiro testified that she learned quickly that the payroll change was received "extremely poorly" by the New York facilities and that the reaction "was not pleasant." Tr. 729-730; 1108:18-24; 1995:3-7. Owner Scott Schuster also learned of employees' dissatisfaction "fairly quickly after it occurred." Tr. 1513:5-6. Employees collectively complained to Wingate management by phone, by voicing their complaints spontaneously to corporate managers, and by raising the subject in "round the clock" meetings at the facility. Tr. 1109:1-8. VP Ianiro testified that she also knew since February that the New York employees were dissatisfied with the status quo of 1% annual wage increases. Tr. 79.

Events In June: Ulster Petition, Email Seeking Regional Wage Rates

On June 3, the Administrator at Ulster,⁴ a facility located 16 miles from Dutchess, sent an email and fax to VP Ianiro, Regional HR Manager Danuta Budzyna, Regional Operations Manager Edward Blake. R34A. In her email, the Ulster Administrator, Carolyn Kazden, stated that the CNAs at Ulster had conducted “their own salary research” and presented the results to the administration.⁵ R34A. Kazden commented:

I think it is encouraging that they continue to reach out in an open way, but on the flip side, I think they are feeling the impact of the minimum raises we have been able to give. Our last regional wage salary was done in 2009 and we have not adjusted wages since that time.

I did ask Danuta to bring up the possibility of doing something like a **perfect attendance bonus**.

Id. (emphasis added). Kazden’s email reveals that as of June 3, she was not aware of any plan to increase wages at the New York facilities. It also reveals that Administrators do not have authority to approve attendance bonuses. Kazden’s email is the only document in the record that mentions the possibility of offering an attendance bonus in 2014.

VP Ianiro testified that when she received Kazden’s June 3 email, it was “very concerning for me.” Tr. 1158. Nonetheless, she denied being aware of any “organizing” at Ulster until June 12, when 1199 SEIU United Healthcare Workers East (the “Union” or “1199 SEIU”) filed a petition seeking to represent the CNAs and LPNs. GC5; Tr. 1162. Owner Scott Schuster also denied knowledge of any “organizing” at Ulster until the petition was filed. The record does not reflect when the organizing drive at Ulster began. The Dutchess Administrator, Clayton Harbby, told the Dutchess employees that Wingate had no knowledge of organizing at Ulster until “70 authorization cards had been signed.” Tr. 792:4-6.

⁴ The Administrator is the highest level manager at the facility.

⁵ Kazden was no longer employed at the time of the hearing. Tr. 1070:11, 18.

According to Owner Scott Schuster, when he learned about the Ulster petition he assumed if there were concerns at Ulster then maybe there were concerns at all three New York facilities. Tr. 1458-59. Consequently, he and other high-level managers increased their presence and the frequency of round-the-clock meetings at all of the New York facilities with the goal of understanding employees' concerns. Id.; Tr. 1191-92.

Also on June 12, at 5:52 p.m., Wingate's Senior Vice President and Chief Financial Officer, Tamilyn Levin, sent an email to the NYSHFA, with the subject heading "CNA hourly rates," wherein she requested "rate information for union and nonunion facilities in [New York] state." R35. Levin's email is the earliest documentary evidence Respondent was able to produce to establish its contemplation of wage increases for the New York facilities. See R43A; Tr. 1068:8-11.

Clayton Harbby, Respondent's Administrator, testified that he learned about the Ulster petition in "mid-June" from Regional Operations Manager Ed Blake who asked him to solicit volunteers at Dutchess to campaign against the Union at Ulster. Tr. 2056:2-6. Harbby testified that a "staff member" helped him identify employees who had previously worked at unionized facilities. Tr. 632:2-25; Tr. 2056:3-6; 2057:1-5. His ostensible purpose was to fulfill Blake's request that he solicit volunteers to speak at Ulster about why a union was "not necessary." Tr. 718:19-20; Tr. 686:3-5; Tr. 2056:21.

Events In July: Canvassing of Employees Sparks "Union" Organizing

Director of Nursing Ann Nelson, (herein "DON Nelson" or "Nelson") testified that Regional Operations Manager Blake advised her and Harbby some time before the July 24 Ulster election, to be on the lookout for trespassers at Dutchess and to call the police if they spotted any Union organizers. Tr. 1939: 14-25; Tr. 1940: 1-14. Prior to this, Wingate supervisors had never

been assigned to watch for trespassers on Wingate's property. Tr. 1757: 24-25; Tr. 1758: 1-3; Tr. 1940: 15-20; Tr. 1942: 13-6; Tr. 2006: 15-21; Tr. 1604: 1-9; Tr. 1602: 18-21; Tr. 1620: 25; Tr. 1621: 1-8. Blake did not testify.

CNA Georgann Allen testified that in late June, early July, Administrator Harbby approached her individually about campaigning at Ulster. Tr. 636. Allen told Harbby she wasn't sure about campaigning against the Union because she herself had not received an annual raise, which had been due since her anniversary date in December (she had received her prerequisite annual review in February). Tr. 637:7; 684:16-18; 719:6-9. Harbby asked her to think about it and promised to look into her raise, saying it had probably been overlooked. Tr. 684:16-22. Harbby testified that he "initially" asked five employees to campaign against the Union at Ulster. Tr. 2057:2.

At a subsequent meeting between Harbby and Allen, a social worker and the recreation supervisor were also present. Tr. 636. The ALJ credited Allen's testimony that Harbby appeared to be reading from an email and said that whoever agreed to campaign at Ulster would be assisted by prompters. *Id.* Harbby offered to pay for her time and reimbursement for mileage. Tr. 637. She testified that she repeated her reservations about volunteering and disclosed that she *and other employees* shared the same concerns as the Ulster workers. Tr. 637.

Specifically, Allen testified:

Well the people here at Wingate feels [sic] like they're in the same boat as the people at Ulster [. . .] Because I haven't received a raise. I haven't received –I can't afford the health insurance and these are all of the issues we're having here. And I kind of think that they're in the same boat as we are in Ulster. People feel that you're not a fair Administrator here. And I don't think that I can go and speak on behalf of Wingate.

Tr. 637:4-13. The ALJ credited Allen's account that Harbby replied, "Well Georgann, I'm going to tell you we don't need a Union and a Union will not get in here." Tr. 637:15-16. Respondent did not call the social worker or recreation supervisor as witnesses.

Based on the record as a whole, the ALJ found that the first meeting between Harbby and CNA Allen took place between June 30 and July 3, and the second meeting took place the week beginning Monday, July 7.⁶

Meanwhile, CNA Sandra Stewart testified that one or two weeks before the Ulster election (*i.e.*, the week of July 7, 2014), Harbby convened a meeting at the nurse's station on the Locust Grove Unit. Tr. 211. The ALJ credited Stewart's account that Harbby explained there was union activity at Ulster and he "doesn't want it in his facility." Tr. 202:19-21. According to Stewart, Harbby conducted similar meetings on other units that day. Tr. 203. Harbby never denied these meetings. He testified that he noticed Stewart dyed her hair purple "earlier in July." Tr. 1984. 1199 SEIU's colors are yellow and purple.

Stewart testified that after the meeting with Harbby, she gathered with Allen and several co-workers. Tr. 203:2-3. Stewart pointed out that employees' concerns at Dutchess – lack of job security, shortchanged pay checks, unaffordable health insurance, management ignoring employees' concerns, *see* Tr. 204:14-18 – were the same as at Ulster. Tr. 203-204. Stewart testified that Allen suggested they could seek representation by 1199 SEIU. Tr. 204:24-205:2. Allen's testimony corroborates the timing and substance of this gathering, which she testified took place after her second meeting with Harbby—*i.e.* the week of July 7. Tr. 638-39.

⁶ In doing so, the ALJ discredited Harbby's claim that he did not meet with Allen until "probably around mid-July." Tr. 2056. Allen was clear in her testimony that she met with Harbby twice, about a week apart, and that the first meeting took place in late June or early July. Tr. 718:19-20; 636:1-5. Such testimony is consistent with Harbby's account that he was asked to solicit volunteers in mid-June. Allen also testified that in both meetings she complained that her raise was overdue. Paychecks were bi-weekly and after she complained the second time, she received a retroactive paycheck dated July 18, for the period June 29 to July 12. GC33; Tr. 686. Dutchess LPN Heather Lucas testified that she campaigned at Dutchess on Friday, July 18. Tr. 1282-83.

The following day, during a break, Stewart “Googled” 1199 SEIU and left a message in Allen’s presence. Tr. 205:4-17; Tr. 639:20-23. Lori Massara, an organizer with 1199 SEIU, returned Stewart’s call a day later. Tr. 205:18-206:2. She asked Stewart to gather a list of signatures from other employees who were also interested in representation. Tr. 206:10-23. Stewart promptly collected 35 signatures on a paper she called the “party list,” which she faxed to Massara. Tr. 206:25; 207:1-7; 208:9-23.⁷ Thereafter, she arranged a meeting with Massara for July 25, the day after the Ulster election.⁸ Based on this testimony, the evidence establishes that Stewart began collecting signatures on or about July 10.⁹

CNA Allen testified that on the Monday following her second meeting with Harbby, she was asked by DON Nelson whether she intended to campaign against Ulster. She repeated to Nelson she would not campaign because she felt the Dutchess employees were in the same boat. Later that morning she conveyed to Harbby that she would not go to Ulster. The ALJ’s finding that these conversations took place on Monday July 14 was supported by the record.¹⁰ Charging Party has excepted to the ALJ’s finding that Respondent merely suspected organizing on July 13. By July 13, Stewart’s solicitation activities were clearly underway and Respondent had

⁷ In its Brief in Support of Exceptions, at 20, Respondent asserts that Stewart defiantly flouted its non-solicitation policy. However, witnesses recounted numerous instances in which employees and supervisors alike had openly solicited co-workers to purchase cookies, Avon products, and other items inside the facility without reprimand. Tr. 5: 666, 11-25; Tr. 5: 667-671; Tr. 5: 848, 1-3. DON Nelson was able to recall only one instance in which the policy was enforced--against a family member, not an employee, who distributed religious literature from a patient’s room. Tr. 12: 1940, 21-25; Tr. 12: 1941, 1-5.

⁸ Massara recalled speaking to Stewart the day before the Ulster election, on July 22. Tr. 49.

⁹ Respondent misrepresents that “Stewart testified that it was not until after the July round-the-clock meeting, which the ALJ notes himself took place on July 23, 2014 (ALJD p.7), that she first gathered with a few other employees to discuss what the Union was about. Tr. 201-203” Respondent’s Br. at 61. In fact, Stewart never referred to the meeting with Harbby as a “round-the-clock meeting” and when asked to specify when in July the meeting was, she testified that it was around a week or two before the election at Ulster. She knew this because they wanted her co-worker to go over to Ulster to talk to people about it. Tr. 211. Notably, Stewart’s name is not on Respondent’s sign-in sheet for the July 23 round-the-clock meeting. GC44-WING806.

¹⁰ Nelson admitted she asked CNA Allen about volunteering to campaign at Ulster, but claimed it was because she was under the impression that Allen had agreed to do so and she wanted to know when Allen was going. She acknowledged that this conversation took place before the Ulster election on July 24. Tr. 1883-86.

conducted sufficient surveillance and interrogations from which an inference of knowledge can reasonably be drawn.

July 18 Efforts to Nip Organizing in the Bud

Friday, July 18, was an eventful day:

On July 18 DON Nelson distributed a memo in employees' paychecks stating, "**In an effort to show our appreciation to our loyal staff** we will be awarding all nursing staff employees with perfect attendance from July 18, 2014 to September 18, 2014 a \$100 bonus." (GC19) (emphasis in original). Tr. 1934-36.¹¹

On July 18 CNA Allen received a retroactive raise covering the period June 29 to July 12. *See* GC33.

On July 18 at 2:49 p.m., Payroll Manager Helen Thomas informed VP Ianiro via email that ADP would need 7-10 business days to change pay periods from bi-weekly to weekly. Tr. 1164:1-7; R43. On Saturday July 19, at 9:20 a.m., VP Ianiro responded, "Great let's figure out the soonest we can pull this off. Thanks!!" R36 and R43.¹²

On July 18 at 7:45 p.m., VP Ianiro emailed Thomas and Judith Lima saying, "I am hoping that you will be able to help me on Monday do an analysis on providing pay increases for

¹¹ The Charging Party has excepted to the ALJ's finding that the attendance bonus memo was posted on July 14. ALJD at 24; lines 7-8. Although the memo is dated July 14, DON Nelson testified that it was posted and included in employees' paychecks simultaneously. Paychecks were distributed on July 18. *See* GC-33 (Georgann Allen's paystub); Tr. 1935-1936. As stated in the memo, the bonus required employees to have perfect attendance starting on July 18. Witnesses who testified that the memo was posted on July 14 relied on the flyer date, GC14. In fact, no witness had a clear recollection of events in "mid-July," including DON Nelson who testified that she requested approval for the bonus from Harbby "in June" and received approval in "mid-July." Tr. 1935. As noted above, Harbby did not have authority to approve an attendance bonus. Such request would have had to go through corporate. Respondent produced no documentary evidence to support DON Nelson's testimony or otherwise establish when the decision was made to approve an attendance bonus. Notably Respondent's sister facility, Beacon, offered the same \$100 bonus, but the period covered was July 30 to September 30. R24. Wingate did produce proof that it had occasionally in years past and at other facilities announced an attendance bonus in anticipation of low staffing. No such announcements were made mid-summer, however, and none mentioned employees' "loyalty" as DON Nelson's memo did in this case. R22, R23, R24.

¹² It is undisputed that Respondent made the decision to change back to a weekly payroll on July 18. Tr. 28.

Dutchess [sic] and Beacon. I'm looking at providing an increase to the CNA's the LPNs, RNs and adjusting the per diem rate." R36. Lima responded on July 21 with the cost of hourly increases of \$.25, \$.50, and \$.75 at Dutchess and Beacon (omitting Ulster). R36-1.

July 23 Anti-Union Meeting, Announcement of Weekly Paychecks

On Wednesday, July 23, Administrator Harbby and DON Nelson held mandatory meetings with at least 28 Dutchess employees, including Channel Kelly and Belinda Newkirk. Tr. 792, Tr. 201. *See also* GC44 (sign-in sheet for meetings held on July 23, 2014). Harbby testified that he held these meetings because "[t]here was a lot of scuttlebutt throughout the facility, a lot of rumors. I felt that it was necessary to convey the facts of what was going on at Ulster. It's a very small region. Ulster is only 15 to 18 miles from our facility, so I thought the staff needed to know what was going on from me." Tr. 2061.

It is undisputed that Harbby raised the subject of unionization at these round-the-clock meetings. R44. The ALJ credited Newkirk's testimony that Harbby told gathered employees that the Ulster Administrator was caught unaware of the union campaign there until after 70 authorization cards had been signed. Tr. 792:4-6. Newkirk also testified that Harbby said "he'll be dam [sic] if he sees a union come into his facility to tell him what to do with his employees." Tr. 836:23-25; *see also* Tr. 792:8-9. She recalled that Harbby said "he told his wife that he would stay at the hotel and sleep day and night to make sure that there was no Union coming into his facility." Tr. 837:1-3; Tr. 837:10. Such statement echoed his earlier comment to CNA Allen that "he would sleep in his building day and night before he would let anyone come in and take over his house." Tr. 690:1-3. Harbby denied these comments and claimed that he simply stated he "did not think [the Union] was a good fit for us at Dutchess." Tr. 2062:25.

Finally, there is also no dispute that employee Channel Kelly spoke in favor of the union at the July 23 meeting. Tr. 876-878; 880; *see also* Respondent's Brief in Support of Exceptions at 13 (noting Kelly's open union support, but neglecting to mention that Kelly was fired for violating Respondent's alleged no-solicitation policy on July 26).¹³

There is also no dispute that Harbby announced in the same meeting that Respondent would be changing back to a weekly payroll effective August 8. Tr. 2065-2066; *see also* R44 (Harbby's "Round the Clock" Meeting agenda dated July 23). Thus, Harbby linked Respondent's anti-union position to the benefit he announced on July 23.

On July 24, the Union won the Ulster election. GC6.

July 25 Employees Meet with "Union" Organizer

On July 25, 2014, Stewart, Allen and Union organizer Massara met at a Wendy's in Fishkill. Tr. 211:19; Tr. 641:21-25. Massara gave Stewart and Allen approximately 60 union authorization cards to give to fellow workers who were interested in applying for membership with 1199 SEIU. Tr. 212; 642-643. Also on that date, Stewart and Allen signed authorization cards in Massara's presence. Tr. 123:3-6, 22-25; 125:2-16; 643:6-14.

The record establishes that beginning July 25, Stewart, Allen, Kelly and Newkirk, distributed union cards at work and that Respondent knew immediately of their activities. Tr. 1965:13.

CNA Kelly was fired on July 26.¹⁴

¹³ Incredibly, Respondent's witnesses denied any knowledge of any organizing activities even after this meeting.

¹⁴ Respondent's attorney acknowledged in her opening statement that Kelly was fired for solicitation of union cards. Tr. 40:5-12. She was eventually reinstated in settlement of an unfair labor practice charge filed on her behalf, but not until a week before the Dutchess election. Tr. 880

August: Employee Survey, Promises of Wage Increase, 401(k) Match, and Child Care

It is undisputed that in late July/early August, Administrator Harbby distributed a survey to employees at Dutchess and Beacon, but not Ulster. Tr. 1174, 1176. “Attention Staff: We want to know . . . What are your top 3 concerns? 1. ____ 2. ____ 3. ____ You can drop your note at the front desk.” R37. Employee responses included, among other things, pay rate, staffing, health benefits, and 401(k). R39.

On Friday August 8, Respondent began distributing weekly paychecks. Also on August 8, off-duty employees and non-employee union organizers began conducting organizing activities on a lot adjacent to Respondent’s property during employees’ shift changes. Tr. 64: 13-20, p. 65, 15; Tr. 185: 4-9, Tr. 253: 17-25. As discussed below, Respondent’s managers surveilled employees, called the police, and sought to obstruct these activities.

On Monday August 11, Administrator Harbby received two emails from Ed Blake, Regional Operations Manager. R38, R39. The first, sent at 9:11 p.m., stated, “Scott would like the employee survey summary tomorrow morning.” R39. The second, sent at 9:26 p.m., stated “Scott would like the wage comparison he requested by tomorrow as we need to make a decision about what to do regarding this issue.” R38. Harbby compiled the survey results and sent them at 9:30 a.m. on August 12. R39. They reflected an overwhelming dissatisfaction among employees with wages and other forms of compensation. R39; Tr. 1174:6-9. He provided wage comparisons for Lutheran Care Center, an 1199 SEIU facility, at 2:21 p.m. on August 12. R38.

VP Ianiro testified that Schuster made the decision to offer the 2% increase on August 12. Tr. 1063:12-17. Only employees who were not on a performance improvement plan would be eligible for the increase. Also on August 12, Respondent disciplined Sandra Stewart for attendance infractions dating back to April. *See* CP14. VP Ianiro claimed that Wingate’s senior

executives had been discussing the “possibility” of a wage increase for the New York facilities since May, but Respondent offered no proof of such discussions. Tr. 1063:22-1064:17; Tr. 1066:9-14. Respondent also offered no evidentiary support for VP Ianiro’s claim that Wingate constantly analyzes employee pay rates to ensure they are competitive. Tr. 1540:4-7.

In mid-August, Respondent posted a flyer asking, “If we have an ‘In-House Child Care’ program, would staff use it?” GC18.

The Union obtained cards from a majority of employees on or about August 15. *See* Attachment A (summary of GC 22-1 through GC 22-98); *see generally* Tr. 271-371 (each exhibit identified on Tr. 100, 327). Stewart singlehandedly collected 56 of the 96 cards signed during the campaign. *Id.* *See* GC22-2 through 22-40, and GC22-42 through 22-56 (cards solicited by Stewart).

On August 22, Respondent distributed a letter from owner Scott Schuster stating, “As a result of the many meetings and conversations we have had over the past several weeks, one issue that has repeatedly come up in conversation is concerns about annual wage adjustments and the fact that the 1% pay increases over the past few years have resulted in a “compression” of our hourly rates particularly for longer tenured employees. We are making the necessary changes immediately to our wage rates effective September 1st as follows: A one-time wage increase **in addition to** the 1% annual increase now in effect. . . . Employees hired prior 1/1/2014 will receive 2%.” GC17; Tr. 1062:17-10. Schuster thanked “each and every one of you for having taken the time to meet with me, Kim [Ianiro], Danuta [Budzyna] and your leadership teams, and for sharing your honest comments and suggestions.” *Id.* (emphasis added). Schuster’s letter made no attempt to communicate that the increase was independent of employees’ ongoing union organizing campaign. Nor did Schuster attribute the increase to Respondent’s financial

successes. Rather, he advised employees, “We believe that this one-time additional wage increase adjustment of 2% will effectively bring our hourly rates into a more competitive level when compared with other facilities in our markets and, . . . is an important step in addressing concerns raised by a number of you. . . .” Id.

It is undisputed that the 2% wage increase was instituted only at Dutchess and Beacon. Tr. 1061:3-8. VP Ianiro explained that although Wingate’s executives typically treated the compensation of all New York employees “the same,” Tr. 1152:5-7, employees at Ulster were not given the 2% increase because the company was “in a status quo situation” following the Union’s victory. Tr. 1064:13-17; 1164:8-11. As mentioned, a June 3 email from Ulster Administrator Kazden noted that the last regional wage adjustment for facilities in the New York region was in 2009, and wages had not been adjusted since that time. R43A. VP Ianiro agreed this was true notwithstanding employee complaints about wages dating to February 2014. Tr. 1542:2-13; 1543:15-1544:1. It is undisputed that employees had never received a wage increase that did not correspond to their annual performance review. Tr. 1061:18-25.

Schuster’s August 22 letter also promised to “evaluate other key concerns and issues raised including Health Insurance and the 401(k) plan.” GC17. He suggested that Respondent was considering paying a health insurance stipend to cover cost of insurance on the state and/or federal health exchanges, or the cost of federal penalties if employees wanted to opt out of buying coverage, as a way of “creat[ing] a more flexible and financially beneficial health insurance option for everyone in 2015.” GC17. Lastly, Schuster promised to “investigat[e] a plan to bring back a match to employee 401(k) contributions” (which had been suspended since 2009). GC17; Tr. 1117. (In March 2015, for the first time in six years, Respondent offered a

maximum match of \$100 per employee per year. R49.) Respondent offered no evidence that it had considered improving these benefits before August 22.

September: Wage Increase and Attendance Bonus Distributed, 401(k) Match Reminder

From September 1 through the November 12 election, bargaining unit employees received weekly paychecks that included their 2% wage increase.

On September 22, Respondent paid eligible employees a \$100 attendance bonus. CP11-2.

On September 26, Respondent made a Financial Planner available to assist employees with 401(k) enrollment at Dutchess and Beacon. CP25, R 48. A flyer announcing the time and place of such meeting to employees of Wingate and Beacon stated, “**Don’t forget . . .** Wingate has begun evaluating our **401(k) plan** and how to get more people involved. . . . So we are investigating a plan to bring back a **match to employee 401(k) contributions**. We will be looking to include that as part of our annual budgeting process for 2015 . . . but **the first step is with you!**” CP25, R48 (emphasis in originals). Although VP Ianiro testified that “similar” flyers announced enrollment opportunities at other facilities, Respondent offered no proof similar reminders were given to employees at any other Wingate facilities.

October Representation Petition and Re-Issuance of Schuster Letter

The Union filed a petition seeking to represent the Dutchess employees on October 1, 2014. GC2.

According to Respondent’s timeline of the Dutchess anti-union campaign, the first flyer distributed in response to the petition was an October 4 re-issue of Schuster’s letter announcing the 2% wage increase and promising to consider bringing back the 401(k) match. GC42.

Respondent's 25th Hour Anti-Union Speech

On November 10, one day before the Dutchess election, Respondent's owner and highest level managers gave a 25th hour captive-audience speech to employees. Tr. 1467, Tr. 1505-06. Their talking points, which are part of the record, clearly and unequivocally linked the benefits employees had seen implemented since July to Respondent's desire that they reject unionization. Schuster's comments began:

Over the last months I have had a chance to get to know the NY employees better and thanks to feedback, we have begun to more fully understand issues. All we ask for now is the opportunity to work with you to address these issues.

We began that process back in August - we gave an additional 2% pay raise to a vast majority of employees, switched to weekly payroll, created "Team Meetings" to give you a voice on issue that impact you, committed to evaluating health care and retirement plans, and made progress on addressing some of the operational issues that you raised.

And continued:

We don't have the opportunity to work with staff at Ulster on their issues because they have hired the union to do that, with little success.

The work environment hasn't improved at Ulster, in fact it's gotten worse. Talk to the employees at Ulster, they will tell you ...the union didn't live up to their campaign promises.

CP21 (emphasis added).

2. Respondent's Harassment, Discipline and Discharge of Sandra Stewart.

As mentioned above, after CNA Sandra Stewart called the Union on or about July 10 and before she met with Massara on July 25, she collected 35 signatures from her co-workers. Stewart did not just initiate the organizing drive at Dutchess, she was the most effect organizer for the Union.

DON Nelson testified that before July she had a good relationship with Stewart and that Stewart did not have significant disciplinary issues. Tr. 1767:15-20; Tr. 1767:20. In fact, both of Stewart's job evaluations rated her performance as "outstanding," the maximum score possible. *See* CP12-2 (performance evaluation dated 1/17/14), CP13-2 (performance evaluation dated 1 3/21/11). In late July, however, Nelson's relationship with Stewart changed. Tr. 1768:1-23 (Charge Nurse Nancy Maylath informed Nelson that Stewart solicited her); Tr. 1772:5-10 (CNA Jackie Preti informed Nelson that Stewart solicited her); Tr. 1772:17 (LPN Artesia Martinez informed Nelson of same). Nelson, who was responsible for carrying out so-called "round-the-clock meetings," reported Stewart's activities to Regional Human Resource Manager Danuta Budzyna. CP16.

In the last week of July, Nelson accused Stewart of soliciting union cards in patient care areas. Tr. 1769:9-23; Tr. 228:3-6.¹⁵ Stewart asked whether Nelson could prove it. Tr. 1769:25-1770:1; Tr. 228:13-16. Nelson told her she could because she had a yellow authorization card. Tr. 228:13-16. The same day, Stewart told Administrator Harbby that she felt threatened by Nelson's accusation and he responded, "You're the one putting yourself out there [. . .] Look at what you're wearing." Tr. 230:10-12. (At the time, Stewart was wearing yellow scrubs and a purple streak in her hair. Tr. 230:14-15.) Harbby told Stewart that she needed to go "educate [herself] before [she] start[s] this Union thing." Tr. 231:5-6. The purple streak remained in Stewart's hair to the end of her employment. *See* GC21 (September 17 video recordings of shift change).

¹⁵ Wingate fired employee Channel Kelly on July 26 for soliciting union cards in the building. Tr. 880; 40:5-12. Employees were aware of the reasons underlying Kelly's discharge: Georgann Allen testified that she personally witnessed Ann Nelson escort Kelly from the building the day Kelly was fired while stating audibly, "There are certain things in the building that you cannot do." Tr. 698:21; 692:18-19; 694:12-21; 697:17-699:6. *See also* Tr. 695:6-13; 40:5-12 (Respondent's opening statement at trial referenced the unfair labor practice charge filed on behalf Channel Kelly and acknowledged the discharge was for solicitation).

In the following weeks, Nelson repeatedly summoned Stewart to her office shortly before the end of Stewart's shift to interrogate Stewart about alleged misconduct. Tr. 232. VP Ianiro testified that she was involved in Stewart's discipline from an early stage because the Union filed an unfair labor practice charge concerning Channel Kelly's discharge. Tr. 1527:4-8. *See also* CP16 (Respondent's time line of Stewart's union activity and of incidents involving Stewart), Tr. 1075-1076; R61; R67; R73; R74; R75; R76; R76a (employee statements). In several of Nelson's interrogations, she demanded written statements from Stewart. Tr. 1777-1780. Respondent did not discipline Stewart for any of these incidents. Tr. 1770:15-16 (July 26 accusation that Stewart solicited union cards in the building); CP16; Tr. 1773:20-24, 1774:4-13 (August 10 accusation that Stewart splashed Melinda Benedict with water); Tr. 1774:24-1775:22 (August 12 accusation that Stewart argued with Pam Godshall over use of a cart); Tr. 1810:6-11, Tr. 1811:1-18 (August 18 accusation that after Stewart injured her shoulder while delivering breakfast trays she stated she would sue Wingate and get \$20,000 and buy a BMW). *See also* Tr. 1567-1569.

Respondent did discipline Stewart on August 12 for excessive absences dating back to April. *See* CP14. That's the day Respondent decided to implement a 2% wage increase only for employees who were not on a performance improvement plan as of September 1.

On September 23, Nelson interrogated Stewart and demanded a written statement from her about her toileting of resident "S.M." on September 20. CP16-2; R10-B. On September 26, Assistant Director of Nursing Allison Frank gave Stewart a written "verbal counseling" for allegedly switching her lunch break with a co-worker. R16B.

The timing and frequency of the above investigations led Stewart to believe she was being harassed because of her union activity. Tr. 241:15-17; Tr. 477:4-6. She raised her concern with Frank on Friday September 26. R16A.

Resident S.M.'s September 20 and 21 Complaints

On Saturday, September 20, at approximately 2:50 p.m., the daughter of resident S.M. approached LPN Melinda Benedict,¹⁶ on the 2:45 p.m.-11:15 p.m. shift, “with a few complaints for the day.” Tr. 1302:4-5. She advised Benedict that earlier S.M. appeared disheveled – his shirt was buttoned incorrectly – and S.M. had asked to be changed “like an hour before and that the aide refused.” Tr. 1302:6-11. The resident’s daughter tried to find out who S.M.’s aide was. Tr. 1302:11-15. Benedict did not provide that information. Tr. 1304:6.

S.M. is a 95-year old resident on the Locust Grove Unit who is a “two assist,” meaning that two aides are required to lift, transfer, and toilet him. Tr. 463-464; Tr. 1833. S.M. is a “heavy wetter,” and although he usually advises staff when he needs to go the bathroom, he wears a diaper and frequently “will go” in his diaper. Tr. 463-465. LPN Benedict described resident S.M. as “very alert, very oriented [. . .] even a little demanding,¹⁷ you know, if he needed to be changed he would come out in the hallway and find you if he had to tell you. He – you know, if he wanted his food heated up by his family, he would be right there to tell you, you know. He’d be right in his room ringing his bell if he wanted to go to bed.” Tr. 1304:11-16. Stewart testified that S.M. knew who she was as of September 2014. Tr. 416:21.

Benedict testified that a few minutes after her conversation with S.M.’s family, S.M. came down the hall in his wheelchair and she observed that his clothes were soaked with urine. Tr. 1302:16-19; 1303:23-25. She testified that Stewart returned to the unit from an unknown location at the same time and S.M. identified Stewart as his aide -- but he specifically did not

¹⁶ Benedict is the same employee who alleged a few weeks earlier that Stewart intentionally bumped into her while she was drinking water after Benedict refused to sign a union card. *See* R67, R73, R74, R75.

¹⁷ Resident S.M.’s family was similarly demanding. According to unit manager Diane MacDonald, S.M.’s daughter came to her with concerns approximately once per week. Tr. 1733:22-1734:6 (concerns that S.M.’s room was messy, that his clothes were soiled, that his soiled clothes should be placed in the hamper, not his closet).

indicate that Stewart was the aide who allegedly refused to change him. Tr. 1304:1-4; Tr. 1338:17-1339:4. Benedict did not say anything to Stewart about S.M.'s soiled condition or the daughter's complaint.

LPN Benedict testified that she did not provide a statement regarding S.M.'s September 20 complaint to DON Nelson until Nelson requested the same on Monday, September 22. *See* R9A (Benedict's statement); Tr. 1309-1310. DON Nelson, on the other hand, testified that she received a statement from Benedict in her mailbox on September 22, whereupon she launched an investigation. Tr. 1796-1799. Benedict's written statement states that the daughter complained that S.M. told her that "he told his aide he was wet & that she would not change him." R9A.

On September 23, Nelson interviewed Stewart who told her that she had toileted resident S.M. at 1 p.m. on September 20 with CNA Maria Tardella, after which S.M. went to play Bingo and Stewart did not see him for the remainder of her shift, which ended at 3 p.m. Tr. 1800:4-19. Initially Stewart agreed to provide Nelson with a written statement, but she later refused citing her concern that she was being harassed. Tr. 477:4-6; Tr. 1800:4-25; 1801:2-3. Nelson then summarized her version of Stewart's statement. *See* R9D (Nelson's summary); Tr. 1802:6-12. Stewart explained that she believed she was being harassed for her union activity. Tr. 477:4-6; Tr. 1800:4-25; 1801:2-3.

Nelson testified that she did not investigate a separate complaint from S.M.'s daughter on September 21, that her father claimed he had been placed in a closet, because S.M. could not fit in a closet. Tr. 2047-48.

According to Nelson, she called Maria Tardella at home on September 23 and Tardella denied assisting Stewart with toileting resident S.M. on September 20. Tr. 1805:5-9; Tr. 1373:13. Tardella's written statement, prepared on September 24, contains no such denial. *See*

R9B. In her statement, Tardella recalled that Stewart helped her with two residents and she “really [couldn’t] remember if [she] did help toilet S.M. with [Stewart] or not.” R9B (WING 130). Respondent’s records establish that Tardella was on assignment 1 on Locust Grove, while Stewart was on assignment 2. *See* R9B. According to Tardella’s statement, she answered S.M.’s call bell at 2:50 p.m., S.M. was not wet at that time, he did not ask Tardella to change or toilet him, and he did not indicate that his aide had refused to assist him. Tr. 1395-1399; Tr. 1381-1382. According to Tardella, S.M. simply asked who his aide would be on the oncoming shift, which was a typical question, though she did not know the answer. Tr. 1399.

Nelson testified that upon receiving Tardella’s written statement, she decided that Tardella was being truthful and Stewart was not. Tr. 1823. She claims that she concluded Stewart was responsible for S.M.’s wet condition at 3 p.m. – ten minutes after Tardella responded to his call bell – because Stewart had generally failed to provide care. Tr. 1823:15-25. Nelson never informed Stewart of Tardella’s account or her alleged conclusions. Tr. 1824:20.

Nelson conceded that toileting issues with residents have occurred over the years and that sometimes it’s a true oversight. Tr. 1824:1-7. Nonetheless, she claims she recommended to Regional HR Manager Danuta Budzyna that Stewart be issued a “final warning” (Performance Improvement Plan). Tr. 1827:16-24. No evidence of Nelson’s recommendation was disclosed or submitted in evidence. Nelson conceded that ordinarily she prefers to sit down and have a conversation with employees. Tr. 1826:6-13 (“I would rather sit down, have a conversation, do a written warning and say let’s correct this going forward”). She testified that she took a different approach with Stewart because of her refusal to acknowledge responsibility and to provide a written statement. *Id.*

It is undisputed that Nelson did not sit down with Stewart or issue her any discipline. It is further undisputed that Stewart continued to be assigned to resident S.M. through her suspension on October 3, Tr. 464:23-24, longer than the usual two-week assignment. Tr. 279:8-9.

Respondent's "investigation" of Stewart's harassment allegation consisted of nothing more than a consultation with Wingate's counsel by Nelson and Regional HR Manager Budzyna. On Monday, September 29, 2014, Budzyna sent an email to Nelson and VP Ianiro with the subject heading "Dutchess – SS – Draft" and an attachment entitled "Dutchess - Stewart, Sandra – Harassment Allegations 92914 – DRAFT.docx." CP24; Tr. 1571:22-24. The attachment was a draft letter from Harbby to Stewart that included "concerns of your recent performance," and list of alleged conflicts between Stewart and her co-workers, blaming each one on Stewart for approaching employees "regarding non Wingate work or intentionally engaging in conversation or behaviors that elicit a negative outcome." *Id.* It concludes, "In respect to both you and your coworkers we ask that you keep non work related matters outside of the work environment and embrace a positive attitude toward your team, your role as an LPN, and accept responsibility for your behaviors and actions." *Id.* In connection with the toileting incident (identified as "resident grievance"), Stewart is accused only of refusing to provide a written statement and stating that she was being harassed. *See* CP24-WING 971. There is NO mention of any conclusion that Stewart had failed to toilet the resident or lied about having toileted the resident. *Id.* There is no dispute that Stewart was never given a copy of this letter.

Resident S.M.'s October 3 Complaint

On Friday morning October 3, at 8:58 a.m., Nelson emailed Budzyna and Harbby stating, "Good morning, have you received anything and are we able to move forward on this issue." Tr.

1827:16-24; R 10A.¹⁸ At 1:43 p.m., Budzyna sent an email to Nelson and Dutchess HR representative Jodi Englehardt, with copies to VP Ianiro and Harbby, with the subject heading “Dutchess – PIP/Letter – SS.” The email had two attachments dated September 29, entitled “Harassment Allegations 92914 FINAL.docx” and “Stewart Sandra-PIP Care Plan 92912 DRAFT-FINAL.doc” See R10B; Tr. 1572:4-7; 1231. Compare with CP24. In the email, Budzyna states that she removed from the PIP an allegation that Stewart did not respond to the resident’s request for help because Nelson’s review showed that the claim “could not be validated.” R10b.

None of these documents were given to Stewart because Respondent suspended her on October 4 and terminated her on October 17 for allegedly “retaliating” against and “abusing” resident S.M. earlier in the day on October 3. R12A. Tr. 1048:1-2.

At approximately 3:30-3:40 p.m. on October 3, S.M.’s daughter complained to unit manager Diane MacDonald that according to her father the aide who took care of him that day had called him “the Great Reporter”¹⁹ and that she and her father felt the statement was “threatening.” Tr. 1831-1832:2; 2011:15-22. See also R11 E, R11 D (MacDonald’s summaries of resident S.M.’s complaints). It is undisputed that no one witnessed the alleged “Great Reporter” statement to S.M. Tr. 2037. In MacDonald’s written statements there is no mention of a rough shave. McDonald testified that the daughter did mention a rough shave, but the daughter’s complaint that he had nicks did not raise any alarm bells and MacDonald did not examine S.M. herself. Tr. 1747.

¹⁸ It appears the “Subject” line of the email was redacted by Respondent. R10A.

¹⁹ The statement allegedly made to S.M. was documented inconsistently as, “the reporter,” see R11H, “the Great reporter,” R11D, R11F, R11K (WING 156) and, “the news reporter,” R11G.

Nelson immediately met with S.M. and S.M.'s daughter for about thirty minutes. 2011:15-22. In reference to alleged great reporter comment, Nelson asked S.M. "if he knew that it was the same individual that he reported had not changed him?"; S.M. responded yes. Tr. 1833:23-24. After the interview, Nelson asked S.M.'s daughter for a written statement. Nelson did not notice any nicks on S.M.'s face from a rough shave. Tr. 1982:7.

Following Nelson's interview with S.M. and his daughter, social worker Carol Burke interviewed S.M. (without his daughter present) and typed a statement which she submitted to Nelson by 4:30 p.m. Tr. 2012:8-13. *See* R11F.

When interviewed by Burke, resident S.M. indicated that the great reporter incident did not happen that day but "a few days ago." *See* R11F. S.M. was also unable to describe the person who made the statement. *Id.* S.M. also complained that the staff person who shaved him "today" was "rough," and that he did not want that aide to take care of him again. *Id.* Resident S.M. was unable to describe the aide who shaved him, and did not know her name. He only said she was "Puerto Rican."²⁰ *Id.*

Nelson conferred with Burke about her typewritten notes, and Burke conveyed that S.M. "seemed a little confused" and was referring to a war story. Tr. 1861:21-23. Respondent did not call Burke as a witness at the hearing.

Nelson claims that by 5:30 p.m. on October 3, she "felt comfortable" that she had before her an instance of "abuse reprisal." Tr. 1838:12-16. She therefore filed an incident report of patient abuse with the New York State Department of Health asserting that Stewart had called S.M. "the Great Reporter." *Id.* *See* R11K (report to Department of Health). Nelson reached this conclusion without having interviewed Stewart. Tr. 1838. Nelson's report to the Department of Health did not make any mention of a rough shave. R11K.

²⁰ Stewart is of Jamaican descent: she has a Jamaican accent and black skin. Tr. 1861:14; Tr. 1340.

On October 4, resident S.M.'s daughter, prepared a type-written complaint in letter format concerning the alleged "news reporter" comment, allegedly made by "the same CNA he had incident with on 9/20 and 9/21" and adding an allegation that while shaving her father the CNA nicked his face in several places. *See* R11G. She provided a copy to Nelson on Monday, October 6. Tr. 1837. Nelson testified that she did not notice any nicks on S.M. when she conducted her interview of him. *Id.*

Subsequently, on October 7 and 8, Nelson interviewed Stewart and CNA Michelle Angot. Angot did not testify at the hearing. When Nelson asked Stewart if she called S.M. the Great Reporter, Stewart denied doing so. Tr. 485. Nelson admits she did not ask Angot if she called S.M. the Great Reporter. Tr. 1969:5-7. Nor did Nelson interview any other aides about whether they had ever called S.M. the Great Reporter. Tr. 1969:8-10.

On October 7, Stewart provided a statement to Respondent explaining that she gave S.M. a shave on October 3 at approximately 11:10 a.m., and that Angot was present. *See* R11C. When interviewed on October 8, CNA Angot told Nelson she was not present for S.M.'s shave. Tr. 1854. Angot refused to provide Nelson a statement. Tr. 1855:2-8. *See* R11A. Stewart's statement, and Nelson's summary of her interview with Angot, are devoid of references to the "Great Reporter" allegation. *See* R11C, R11A. Instead, the focus is on the shave given to S.M. on October 3. *See* R11A; R11C.

VP Ianiro, who Respondent claims made the decision to discharge Stewart, never spoke with the social worker who interviewed S.M. Tr. 1677.

3. Respondent's Surveillance of and Interference with Union Solicitation

The Dutchess facility is located at the end of Summit Court (Lot 3) *See* GC-8. Summit Court intersects with Route 52. *Id.* Closer to Route 52, off of Summit Court, there are entrances

to two Lot 1 and Lot 2, properties that are not owned or leased by Wingate.²¹ *See* R71 (Respondent's lease) and R71(a) (Respondent's map of property). Respondent's lease, R71, defines Wingate's property to include the perimeter of the building on Lot 3 (the Dutchess Facility) and the length of Summit Court.²² However, the lease also includes an access easement for the benefit of Lot 1 and Lot 2. *See* R71, p. A-6. Although Lot 1 can also be accessed without using Summit Court, via a church parking lot, Lot 2 can only be accessed via Summit Court. Tr. 1610-11. There are no posted signs indicating the boundaries of Wingate properties. Tr. 90: 18-25; Tr. 91: 1-6.

On August 8, 2014, Union organizers Massara and Robin Ringwood met CNA Stewart and parked in the parking lot of Lot 2 ("Rosicki & Rosicki"), 200 to 250 feet from the Wingate facility. Tr. 66: 1-9, Tr. 67: 4-5, Tr. 67: 9-16. Shortly after they arrived, Unit Manager Patty D'Amicantonio, DON Nelson, and LPN Unit Manager Martha Lewis, approached the organizers' car and stood on Summit Court near the entrance to the Lot 2 parking lot where they remained throughout the duration of the shift change. Tr. 67: 24-25; Tr. 170: 14-15. In Stewart's presence, supervisor D'Amicantonio told the union organizers, ". . . we need no union here. We don't want union people here." Tr. 74: 2-6. D'Amicantonio²³ said "fuck you," Tr. 578:21-23, gave the group the middle finger and took pictures of the occupants of the car, including Stewart. Tr. 79: 15-17 (*see* GC-13); Tr. 85-86. As they stood there, Wingate employees who had arranged to meet the group did not pull over. Tr. 80: 16-18; Tr. 81: 17-19.

²¹ During the trial, to identify the parties referred to Exhibit GC-8, an aerial Google Map photograph of the Dutchess facility, Summit Court, and the two adjoining properties.

²² Lot 1 is the building with the "black roof" on the left side of Summit Court. Tr. 262: 4-8. Lot 2 is the building with the "white roof" or "Rosicki & Rosicki." Tr. 160: 8-12.

²³ D'Amicantonio did not testify at trial.

DON Nelson called the police later that morning and reported that union organizers “accessed” Wingate property. Tr. 1948: 5-14; *see* R-77. She acknowledged to the policewoman who arrived on the scene that she never saw the group on Wingate property. Tr. 1948: 23-25.²⁴ The policewoman advised Nelson to call only if she observed trespassers travelling through Wingate property or stopping traffic. Tr. 1948: 21-25, Tr. 1949: 1-5. There is no evidence that the property owners of Lot 2, “Rosicki & Rosicki,” ever called the police or that the group ever disrupted traffic.

After August 8, union organizers usually parked at a church lot across Route 52 (which is not visible on GC8). Tr. 159: 19-25; Tr. 743: 12-18. On occasion they also parked in Lots 1 and 2. Tr. 160: 3-25; *see also* GC8.

On the morning of August 13, 2014, two union organizers and five off duty employees stood at the Summit Court entrance to Lot 2 (“Rosicki and Rosicki”). Tr. 87: 1-6; Tr. 88: 17-21; Tr. 1608: 17-17. They stood behind a stop sign. Tr. 896: 17-20; Tr. 937: 1-6; *see also* GC34(a) and GC34(b). Four Wingate supervisors, Unit Manager D’Amicantonio, DON Nelson, Unit Manager Lewis, and RN Night Supervisor Theresa Vignola approached the group and told them to leave because they were on Wingate property. Tr. 89: 10-13; Tr. 896: 21-22; *see also* GC34(a) and 34(b). They were not in fact on Wingate property, they were on Lot 2. Tr. 1609. D’Amicantonio and Lewis took pictures with their cell phones of the employees and organizers. Tr. 648: 2-9; Tr. 755: 5-7; Tr. 801: 18-21; Tr. 899: 12-16. Lewis approached CNA Marcella Burns, and said, “. . . you know you’re not supposed to be out here. And you know that when you were hired this was a non-union facility. So if you didn’t like it here you can find a different job.” Tr. 91:9-11; Tr. 897:6-11. DON Nelson and D’Amicantonio told CNA Allen, “Georgeann,

²⁴ Nelson also testified that she only observed a blonde woman, a woman with brown hair, and a black man in the back seat; and Nelson denied seeing Sandra Stewart in the car. Tr. 1946: 11-18.

you should be grateful you have a job” and “I hope you know what you are doing”. *Id.*; Tr. 755: 5-6. Prior to this date, Wingate supervisors had never convened on Summit Court. Tr. 652: 20-25.

Unit Manager Lewis also called the police on August 13, claiming that the group was trespassing on Wingate property. Tr. 1613: 13-19.²⁵ When the police officer arrived, he asked the group to move off of Lot 2 to Route 52 and the group complied. Tr. 91: 24-25; Tr. 92: 1-2; Tr. 92: 6-10. That morning, Wingate employees who were travelling on Summit Court did not stop to speak to their co-workers when supervisors and the police were present. Tr. 653: 1-10; Tr. 382: 22-25.

During shift changes thereafter, employees and organizers remained at the corner of Route 52 and Summit Court, as instructed by the Police.²⁶ Tr. 158: 15-18; Tr. 162: 3-9; Tr. 181: 9-18. When a car stopped, the cars behind it had space to move around and proceed on Summit Court. Tr. 163: 8-21; Tr. 179: 1-4.²⁷

Administrator Harbby contacted the police again on August 20. *See* GC52. On that day, a group of off-duty employees and Union organizers gathered at the intersection of Summit Court and Route 52. Tr. 583: 17-21; Tr. 177: 16-20; Tr. 181: 11-18; Tr. 588: 20-25; Tr. 589: 1-25; Tr. 560: 1-3. *See* GC8. This time, the responding officer told the group that he saw no traffic problems and knew that it was just union activity, but instructed the group to move even further from Summit Court towards a grassy section along Route 52. Tr. 585: 4-7; Tr. 388: 10-14; *see also* GC52; Tr. 590: 9-12. During the ten to fifteen minutes that the officers remained,

²⁵ Lewis admitted that: the Rosicki property was not part of Wingate property, she did not know if the group had permission from Rosicki & Rosicki to be on their property, and she never witnessed the group drive on Summit Court. Tr. 1610: 17-25; Tr. 1625, 17-25; Tr. 1626: 1-7.

²⁶ The evidence is unclear as to whether union organizers and employees stood on the median on Summit Court. Tr. 1953: 4-7, 22-25; Tr. 1954: 1-3; Tr. 93: 14-20; Tr. 741: 13-25; Tr. 742: 1-12; Tr. 857: 10-14.

²⁷ Summit Court is wide enough for a person to stand on the roadway while a car passed. Tr. 187: 11-15.

Wingate employees travelling on Summit Court did not stop to speak with the Union supporters. Tr. 584: 18-20; Tr. 586: 4-8.

After August 20, organizers and employees continued to convene at the intersection of Summit Court and Route 52 for shift changes without police intervention. Tr. 2108: 12-19. Wingate's interference with employees' union activity continued however. On September 17 at or about 6:30 a.m., Harbby stood with Union organizers Sharone Brown, Lori Massara and employee Sandra Stewart as they were conducting a shift change on Route 52 and Summit Court. Tr. 2108: 12-19. Video recordings submitted in evidence, GC21(a) and GC21(b), show Harbby leaving his car parked in the middle of the exit lane of Summit Court (where there is no discernible parking area) and approaching the group at the intersection of Summit Court and Route 52 (below the white entrance line, an estimated four feet from Route 52). *See* GC21(a). Harbby approaches Stewart, who is standing only two to three feet from Route 52 and states, "Seriously, I just don't understand why you want to bring in the union. There are facilities all over the place with 1199. I don't get it. I don't get it. Why do you want to bring it in this environment?" *See* GC21(a); *see also* Tr. 2084: 1-13. Harbby is recorded standing next to Stewart waving to cars as they enter the facility while Stewart calls out greetings to her co-workers. *Id.* Later, after a heated exchange with Massara, Harbby tells Stewart, "How can you associate with people like this? It's pathetic." *See* GC22(b). The video establishes clearly that no one was trespassing or obstructing traffic. *See* GC22(a) and (b).

ARGUMENT

1. The Record Supports an Inference of Actual Knowledge By July 13.

While touting its "open-door" policies and asserting its right to stay one step ahead of the union, Respondent and each of its agents denied knowledge of any "union organizing" at

Dutchess before July 25 (when employees began distributing union authorization cards). Respondent similarly asserts in its brief that it could not possibly have known about organizing at Dutchess until after Administrator Harbby and DON Nelson conducted round-the-clock meetings on July 23. Respondent claims that it was not until July 23 “that most employees even became aware there was union activity at Wingate’s Ulster facility.” Respondent’s Brief In Support of Exceptions at 63. Based on this claim, Respondent urges reversal of the ALJ’s finding that during the week of July 7, employees discussed organizing among themselves and called the union. Respondent’s Brief does not acknowledge Stewart’s collection of 35 signatures after such call.

Respondent contends that the ALJ made “unsupported assertions that since a petition was filed on June 12, 2014 at Wingate’s Ulster facility, it can be inferred that by June 13, 2014, Wingate suspected union activity was being conducted at the Dutchess facility.” Respondent’s Brief In Support of Exceptions at 59. However, the ALJ did not infer Respondent’s knowledge on June 13. He found that “by July 13, the Respondent obviously knew that there was a union campaign being conducted at the Ulster facility and also knew that some of the Dutchess employees were sympathetic to that effort.” ALJD 26, lines 9-12. Based on that finding, the ALJ inferred that on July 13 Respondent *suspected*, but did not know for certain, that union activity was going on at the Dutchess facility. ALJD 26, lines 12-14.

In fact, it would have been reasonable for the ALJ to infer that Respondent *suspected* that union activity was being conducted at the Dutchess facility on *June* 13, as Respondent mistakenly argues. Respondent’s owner, Scott Schuster, testified that after he received word of the Ulster petition on June 12, “I had just assumed that if there were concerns in Ulster maybe

there were concerns in other facilities because we operate as a team of facilities in a region.” Tr. 1458-59.

Respondent’s Administrator at Dutchess, Clayton Harbby, testified that he was instructed to solicit volunteers to campaign at Ulster in June and that he complied with those instructions by combing personnel files to determine which employees had previously worked in unionized facilities. It is certainly reasonable to infer that that is not all he did to ascertain whether “there were concerns” at Dutchess. Schuster and Ianiro both testified that they increased the frequency of their visits to and meetings with employees at Dutchess beginning in June, along with Danuta Budzyna. Tr. 1458-1459, Tr. 1191-1192.

Harbby acknowledged that after canvassing possible volunteers to campaign at Ulster, he reconvened with them before a date was set. Tr. 2058:4. He testified that he was aware there were “lots of rumors” about the campaign at Ulster. Tr. 2061: 5-9. At Harbby’s request, Heather Lucas, an LPN at Dutchess, campaigned at Ulster on July 18. Tr. 1281-1282. Although Harbby denied telling CNA Georgann Allen he would not allow a union in his facility, he acknowledged that she raised concerns about campaigning at Ulster. The ALJ credited Allen’s testimony that she explained to Harbby that she *and others* felt they were in the same boat as the employees at Ulster. ALJD 6, fn.12.

Stewart testified that Harbby also held small-group meetings about two weeks before the July 24 Ulster election, *i.e.* the week of July 7. She testified that after she participated in such a meeting she and other employees, including CNA Allen, discussed their interest in organizing. CNA Allen agreed that this gathering took place after her second meeting with Harbby, in which she refused to campaign at Ulster. Stewart and Allen corroborated each other’s testimony that

Stewart spoke with a union representative a day or two later during a break and that Stewart was told to collect signatures. Stewart testified that she collected 35 signatures.

On this record, the ALJ should have inferred *actual* knowledge by July 13. Certainly, the record supports the ALJ's finding that by July 13, Wingate strongly *suspected* that organizing was taking place at its Ulster facility and prepared to interfere with such organizing.²⁸

2. The Record Supports an Inference of Unlawful Motive Based on the Timing of Wingate's Decisions to Improve Compensation and Benefits for the Dutchess Employees.

It is well established that “[a]bsent a showing of a legitimate business reason for the timing of a grant of benefits during an organizing campaign, the Board will infer improper motive and interference with employee rights under the Act.” *Latino Express, Inc.*, 361 NLRB No. 137 (2014), *ManorCare Health Services–Easton*, 356 NLRB No. 39, slip op. at 21 (2010), *enfd.* 661 F.3d 1139 (D.C. Cir. 2011) (citations omitted). When an inference of unlawful motive is applied the burden shifts to the employer to establish a legitimate business justification for the timing of the benefit. *Latino Express, Inc.*, 361 NLRB No. 137 (2014); *ManorCare Health Servs.-Easton*, 356 NLRB No. 39, slip op. at 21.

Based on his finding that Wingate suspected organizing activity at its Dutchess facility by July 13 and Respondent's admission of knowledge by July 25, the ALJ applied an inference of unlawful motive to the timing of various benefits Respondent rolled-out or promised, beginning with the offer of an attendance bonus. The ALJ reasoned that an employer's suspicion of union activity is sufficient to establish discriminatory motive in § 8(a)(3) cases. ALJD 26, lines 15-16.

Respondent asserts that suspicion of union activity is not sufficient to establish a violation and any other conclusion treads on its asserted right to stay one step ahead of the union.

²⁸ It is not mere coincidence that on July 18, Respondent issued a retroactive raise to Allen, included the announcement of an attendance bonus in employees' paychecks, inquired about how quickly Respondent could change back to a weekly payroll, and planned to review the cost of possible wage increases. See pages 12-13 above.

The right to stay one step ahead of the union, Respondent contends, was established by the Supreme Court in *Exchange Parts*, 375 U.S. 405, 409 (1964), and acknowledged by the Board in *Hampton Inn NY—JFK Airport*, 348 NLRB 16, 17 (2006). Respondent’s Brief in Support of Exceptions at 58.²⁹ Respondent relies on the Supreme Court’s use of the phrase “while a representation election is pending” in *Exchange Parts* for its conclusion that wage and benefit changes made before a representation petition is filed are not unlawful. 375 U.S. at 409.

Simultaneously, however, Respondent seems to concede that a violation can be found based on conduct that precedes the filing of a representation petition. Respondent asserts that “that until employees’ organizing activity has ‘sufficiently crystallized’ an employer is free to make changes in the hopes of diminishing the appeal of unionization generally.”³⁰ Respondent contends that employees’ organizing activity in this case did not “crystallize” until July 25, when employees met with the Union and obtained authorization cards. In fact, even that concession is based on too narrow a definition of “organizing activity.” Well before July 25, Sandra Stewart solicited 35 signatures on a paper that she faxed to the union.

More importantly, Respondent’s argument fails to acknowledge that the Act does not just prohibit interference after employees have met with a prospective bargaining agent. It prohibits interference after employees have talked about organizing, threatened to organize or otherwise engaged in concerted activities. See 29 U.S.C. §§ 7, 8(a)(1). In *Exchange Parts*, the Supreme Court held that conduct “immediately favorable to employees which is undertaken with the express purpose of impinging upon their freedom of choice for or against unionization and is

²⁹ In *Hampton Inn*, the Board dismissed an allegation involving a conferral of benefits based on its finding that the ALJ’s speculation that the employer “probably knew” about employees’ organizing activities was not borne out by the record. Specifically, the Board found that organizing activities had taken place off company property and there was no evidence to support a conclusion that the employer monitored employees’ off-hour movements. The Board did not hold that knowledge can never be inferred in a conferral of benefits case. 348 NLRB at 17.

³⁰ Respondent relied on *NLRB v. Gotham Industries*, 406 F.2d 1306, 1310 (1st Cir. 1999) for this proposition.

reasonably calculated to have that effect” is unlawful. 375 U.S. at 409 (emphasis added).³¹ The point at which immediately favorable conduct becomes unlawful is not when employees’ concerted activities “crystallize” into “union organizing,” but when the employer acts with the desire to interfere with Section 7 rights.

Respondent acknowledged in this case that employees’ concerted complaints about the bi-weekly paychecks and wage rates long before the Ulster petition was filed. Had Respondent acted on those complaints, this might have been a harder case. However, in this case, Respondent did not even think about improving compensation and benefits at Dutchess until the Ulster petition was filed and it did not commit to improving compensation and benefits until the Dutchess employees themselves expressed an interest in unionization. Indeed, the timing of Respondent’s August 12th decision to grant a wage increase post-dates its admission of knowledge and coincides remarkably with the Union’s achievement of majority status.

3. Respondent Failed to Prove Its Announcement of An Attendance Bonus Was Consistent With Past Practice or Based on Staffing Concerns.

Respondent claims that the ALJ improperly applied a presumption of knowledge with respect to the attendance bonus, which Respondent claims was approved in June 2014, well before there was any expression of interest in organizing at the Dutchess facility. Respondent’s Brief in Support of Exceptions at 62. To support its claim that the bonus was approved in June, Respondent cites transcript page 1934, the testimony of DON Nelson. There, Nelson testified “I ask [sic] for a bonus for a perfect attendance, and I had *requested* it in June.” Tr. 1934:18-20 (emphasis added). Her testimony continues:

Q Who did you make that request of?

A I requested it to Clayton Harbby, the administrator.

Q And what came of that?

A We eventually got the approval. He took it to our regional operations person.

³¹ The Act itself recognizes that a “promise of benefit” is coercive. 29 U.S.C. § 158(c).

Q When did you get the approval?

A It was mid-July. So we ran it through September, so that we at least had a time period to accomplish.

Tr. 1934-35.³² Thus, the ALJ properly concluded that the timing of Respondent's decision to grant the attendance bonus, "mid-July," raised an inference of unlawful motive.³³

Applying a burden shifting analysis, the ALJ found that Respondent failed to establish that the attendance bonus was offered pursuant to an established practice. ALJD at 26, lines 19-29. The only prior mention of an attendance bonus was in an email from the Administrator at Ulster proposing to offer an attendance bonus in response to employees' protected, concerted complaints about wage rates. *See* R34A. A week later, the Ulster employees filed their petition for representation. The ALJ also relied on the fact that the bonus was not implemented until July and not at any of Respondent's other facilities, except Beacon, for his conclusion that Respondent's announcement of the attendance bonus was reasonably calculated to interfere with Section 7 activity. ALJD at 26, lines 32-35. Such conclusion was further supported by Respondent's messaging, not seen in any other bonuses offered by Wingate, that the bonus was being offered in appreciation of employees' "loyalty."

4. Respondent Failed to Establish a "Legitimate" Business Justification For the Timing of Its Announcement and Implementation of Weekly Paychecks.

Respondent announced its decision to change to a weekly payroll on July 23. For the reasons already discussed, the ALJ inferred Respondent's knowledge and found that this well-timed benefit created an inference of unlawful motive. ALJD at 24, lines 34-41. It should also be noted that Respondent delivered its announcement of this benefit in round-the-clock meetings it

³² Respondent offered no documentary proof of these alleged requests or approvals. Nor did it offer any proof of staffing issues or discussions of staffing issues.

³³ As noted in footnote 11 above, the Charging Party has excepted to the ALJ's conclusion that the attendance bonus was announced on July 14. ALJD at 24; lines 7-8. Rather, the weight of the evidence supports a conclusion that it was announced on July 18.

planned to address “rumors” about the organizing drive at Ulster. Respondent also reminded employees that it had recently changed to a weekly payroll in its 25th hour pre-election captive audience meetings. These facts provide ample support for a conclusion that Respondent’s decision to change to a weekly payroll was “reasonably calculated” to interfere with organizing activity.

Respondent admits that it changed to a weekly payroll in response to employees’ longstanding complaints about the bi-weekly payroll, but denies knowledge of any “organizing” before July 25. As discussed above, the ALJ properly discredited that defense. *See* pages 32-34. Respondent also offered in evidence email correspondence showing that it first considered changing back to a weekly payroll on July 18. Such evidence fails to explain the timing of its decision and further establishes Respondent’s knowledge and unlawful motive. On July 18, Respondent stuffed employees’ paychecks with notice of an attendance bonus, issued a retroactive pay increase to CNA Georgann Allen, and made plans to calculate possible wage increases.

In concluding that Respondent’s change to weekly payroll was reasonably calculated to interfere with organizing, the ALJ also relied on the fact Respondent did not make the same change at Ulster or any of its Massachusetts facilities. ALJD at 24, lines 41-43. Based on the all of the above, the ALJ’s finding of a violation should be affirmed.

5. Respondent Failed to Prove That It Would Have Increased Wages In the Absence of Union Organizing.

The Ulster employees voted in favor of unionization on July 24.

After surveying the Dutchess employees about their top three concerns in late July, early August, and proposing a child care program in mid-August, GC1, Respondent’s owner, Scott Schuster, distributed a letter on August 22 advising employees of his intent to increase wages for

a majority of the Dutchess bargaining unit effective September 1 and promising to consider reinstating a 401(k) match. Respondent's letter was distributed shortly after the Union achieved majority status but before it filed a petition for representation. In explaining the benefit, Schuster thanked "each and every one of you for having taken the time to meet with me, Kim [Ianiro], Danuta [Budzyna] and your leadership teams, and for sharing your honest comments and suggestions." GC 17. Notably, Schuster did not attribute the increase to Respondent's financial successes. Rather, Schuster advised employees, "We believe that this one-time additional wage increase adjustment of 2% will effectively bring our hourly rates into a more competitive level when compared with other facilities in our markets and, . . . is an important step in addressing concerns raised by a number of you. . . ." *Id.*

It is undisputed that employees had never received a wage increase that did not correspond to their annual performance review, Tr. 1061:18-25, and that the last regional wage adjustment for facilities in the New York region was in 2009. R. 43A. Consistent with its announcement, Respondent implemented this well-timed benefit on September 1 at Dutchess and Beacon, but not at Ulster or any of Wingate's Massachusetts facilities.

In concluding that Respondent failed to rebut the inference of unlawful motive, the ALJ relied on the above facts and on the fact that Respondent had conducted a survey in late July or early August soliciting employees' top three concerns. ALJD at 30. The number one concern listed in response was wages. R 37, R 39. The ALJD reviewed all of Respondent's correspondence concerning possible wage increases, beginning June 12, when Wingate learned of the Ulster petition. ALJD at 31. The ALJ discredited Respondent's self-serving testimony that it began considering wage increases back in May. In particular, the ALJ noted that Respondent

had not substantiated any of its claims of new-found financial successes with documentary evidence. ALJD at 32-34.

The ALJ's findings in this regard should be affirmed for all of the reasons he stated and because (1) Schuster's letter made no attempt to communicate that the increase was independent of employees' ongoing union organizing campaign; (2) Respondent re-issued the August 22 letter on October 4, after the Dutchess petition was filed, as part of its post-petition anti-union campaign; and (3) Respondent referenced the 2% wage increase in its 25th hour pre-election captive audience speeches; (4) Respondent's 25th hour speech also referenced the Union's failure to keep its promises to the Ulster employees. These facts eliminate any doubt that Respondent's motive in granting the 2% increase was illegitimate.

6. The General Counsel Made a Strong *Prima Facie* Showing That Stewart Was Disciplined, Harassed and Discharged for Her Union Activities.

Respondent asserts that the General Counsel failed to meet its *prima facie* burden under *Wright Line* because it failed to prove that each decision vis-à-vis Stewart was motivated by animus or that the final decision-maker, VP Ianiro, harbored any personal animus toward Stewart or her union activities. Respondent's Brief in Support of Exceptions at 42-44; 48-49. However, the General Counsel proved Respondent's union animus through direct and circumstantial evidence including Respondent's anti-union campaign and unfair labor practices; the timing of Stewart's discharge; the Administrator's threat to Stewart; the fact that Respondent itself linked Stewart's union activities to her alleged misconduct, *see* CP16, CP24; the fact that Respondent's alleged decision-makers overlooked substantial flaws in the investigation of Stewart, including unresolved inconsistencies in statements made by the resident about when and who made the alleged "Great Reporter" comment; the fact that Respondent concluded its investigation and reported Stewart to the Department of Health for abuse before having interviewed Stewart or any

other CNAs³⁴; and the fact that Respondent imposed lesser forms of discipline in response to similar or more severe allegations involving CNAs who had not participated in organizing activities.

The fact that only Administrator Harbby directly threatened Stewart is not grounds for negating the above evidence. Respondent also forgets that VP Ianiro admitted that she was involved early on in Stewart's discipline because the Union had filed a charge on behalf of Chanel Kelly. Tr. 1104-1105:1-15; 1526-1527. Even without such admission, no presumption of objectivity should be applied to any of Respondent's agents who were charged with responsibility for winning the election. The record also establishes that as part of her involvement, VP Ianiro reviewed the timeline of Stewart's union activities. CP-16; Tr. 1075-1076; 1530-31. There is no evidence that she conducted her own investigation or interviewed any witnesses, but rather relied on information conveyed to her by DON Nelson, against whom Stewart had lodged a harassment complaint.

Notwithstanding the facts, Respondent asserts that as a matter of law a supervisor's direct statement of animus cannot be attributed to decision-makers. Respondent's Brief In Support of Exceptions at 48-49. In the real world, however, the pressure to win an election usually comes from above. None of the cases cited by Respondent stand for the proposition that higher ups are entitled to a presumption of objectivity. In *Randell Mfg of Arizona, Inc.*, 345 NLRB 209, 216-17 (2005), an ALJ found that the employer violated § 8(a)(1) by discharging an employee because of her concerted activities, but dismissed an § 8(a)(3) allegation that she was also discharged for her union activities. The Board upheld the § 8(a)(1) finding but, because no exceptions were filed to the ALJ's dismissal of the § 8(a)(3) allegation, the Board never considered the ALJ's

³⁴ In its report to the Department of Health, Respondent represents that Stewart had already been suspended. CP18-WING156.

rationale underlying dismissal of the § 8(a)(3). *Id.* at n. 2. The ALJ dismissed the § 8(a)(3) allegation based on the conclusion that the employer did not know about the employee’s union activities, and alternatively, there was no proof of “union animus” because the supervisor who threatened to replace strikers was not involved in the discriminatee’s discharge.

In *Sunrise Health Care Corp.*, 334 NLRB 903 (2001), the Board actually disagreed with an ALJ’s refusal to rely on the employer’s anti-union campaign as proof of animus, stating, “The judge’s finding directly contravenes well-established Board precedent holding that while protected speech, such as an employer’s expression of its views or opinions against a union, cannot be deemed a violation in and of itself, it can nonetheless be used as background evidence of antiunion animus on the part of the employer.” *Id.* (*citations omitted*). Ultimately, the Board affirmed dismissal of the § 8(a)(3) because it concluded the employer met its *Wright Line* burden of showing that it would have taken the same actions even in the absence of union activity. *Id.*

Finally, in *Alexian Bros. Med. Ctr.*, 307 NLRB 389 (1992), the Board upheld an ALJ’s finding that a high-ranking officer who asked that a visible union supporter be re-evaluated under a new system had not been told, and did not know, that the employee was a union supporter and therefore no animus could be attributed to his request. In this case, to the extent VP Ianiro was the decision-maker, there is no question that she knew Stewart was a vocal and effective union organizer.

7. Respondent Did Not Reasonably Believe Stewart Had Engaged In Dischargeable Misconduct.

Respondent all but concedes that it did not prove Stewart engaged in dischargeable misconduct on October 3—“retaliating” against a resident by calling him “the great reporter.”³⁵

³⁵ Although Respondent repeatedly asserts in its Brief that Stewart gave resident S.M. a rough shave, it is undisputed that she was not terminated or reported to the Department of Health for that reason. Indeed,

There were no witnesses to the alleged name-calling and the resident did not testify. Although double-hearsay from the resident's daughter was offered in evidence, the daughter also did not testify at the hearing.

Notwithstanding the absence of reliable proof, Respondent claims that it met its *Wright Line* burden because its agents testified that they believed the offensive comment was made and that Stewart made it. However, the ALJ discredited such belief as having no reasonable basis in fact.³⁶ Among the many facts to support the ALJ's conclusion are: (1) the resident gave inconsistent accounts of when the alleged statement was made and who made it and Respondent made no effort to resolve such inconsistencies³⁷; (2) the resident made other allegations that could not be validated, including an allegation that he had been placed in a closet and that he had asked an aide to be changed and the aide had refused; (3) Respondent deviated from its policy of

Respondent's own witnesses (DON Nelson, MacDonald) testified that they did not observe nicks on resident S.M.'s face and that nicks are not uncommon.

³⁶ The "reasonable belief" defense is inconsistent with the Supreme Court's holding in *NLRB v. Burnup and Sims, Inc.*, 379 U.S. 21, 23 (1964). In that case, the Court held that regardless of motive, the employer violated §8(a)(1) of the Act by discharging striking employees based on alleged acts of misconduct, where the employees were not, in fact, guilty of that misconduct. The Supreme Court explained, "a protected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith. It is the tendency of those discharges to weaken or destroy the §8(a)(1) right that is controlling." 379 NLRB at 23-24.

The Charging Party acknowledges that the Board recognizes the validity of a "reasonable belief" defense. See e.g. *Midnight Rose Hotel & Casino*, 343 NLRB 1003, 1005 (2004), *enfd.* 198 Fed. App. 752 (10th Cir. 2006). However, an employer who asserts such defense bears the risk that the ALJ will discredit its witnesses. Moreover, such employer still bears the burden of proof by a preponderance of the evidence. Respondent's complaint here that the ALJ "misapplied the reasonable belief" test is tantamount to an exception based on credibility.

³⁷ At page 32 of its Brief In Support of Exceptions, Respondent insists that "S.M. clearly communicated that the CNA who had taken care of him that day (October 3), and whom he previously reported for failing [as opposed to refusing] to change him, referred to him as the 'the Great Reporter.'" Such representation ignores the fact that S.M. told the social worker, Burke, that the "comment had occurred 'a few days earlier'" and was made by a Puerto Rican staff member. Stewart is not "reasonably" confused as Puerto Rican. Respondent's representation that S.M. "clearly" identified Stewart as the aide who called him the "the great reporter" also ignores Nelson's leading questions to S.M., which she volunteered on direct. Tr. 1833:23-24. It was Nelson who concluded that Stewart had "failed" to change S.M. on September 20, not S.M. S.M.'s complaint was that an aide had "refused" to change him. Respondent never validated this allegation or S.M.'s allegation that an aide had put him in a closet on September 21.

conducting three resident interviews during investigations of alleged abuse³⁸; (4) Respondent did not call the resident or the resident's daughter as a witness; (5) Respondent did not call the social worker who interviewed the resident as a witness; (6) Respondent's theory--that Stewart was upset by the resident's refusal-to-change allegation--is inconsistent with Stewart's confidence that she fulfilled her duties and CNA Tardella's admission that she responded to the resident's call bell immediately before he was observed soiled and complaining that an aide refused to change him; (7) Respondent never informed Stewart that she was in trouble because of the resident's complaint.

Not only did the ALJ discredit Respondent's belief that Stewart must have made the alleged comment, he credited Stewart's testimony that she did not make it, that she had fulfilled her duties to the resident on September 20 and that she believed Respondent, not the resident, was harassing her because of her union activities. The ALJ reached these conclusions based on his own assessment witnesses' credibility, including the credibility of Respondent's decision-makers.

Before considering Respondent's arguments that Stewart was a bad employee whose performance and behavior only deteriorated after July, it is important to remember that Stewart was not just an open union supporter. She was a compelling organizer and ringleader. Even before meeting with 1199 SEIU, Stewart singlehandedly solicited 35 signatures from her co-workers to show their interest in organizing. She alone collected 56 signed cards between July 25 and her suspension on October 4, 2014--58% of the cards collected throughout the campaign. By suspending Stewart 3 days after the filing of the petition for representation, Respondent removed *the* most prominent and effective union persuader from inside its facility throughout the

³⁸ The ALJ's decision makes clear that he relied on this factor *because* "there were clearly substantial discrepancies and implausible assertions in [the resident's] reports regarding the care he received from CNAs in September and October 2014." ALJD 61, lines 30-32.

critical period.³⁹ Stewart's removal not only gave Respondent's persuaders and consultants a competitive advantage, it also sent a clear message to other employees. The timing of Stewart's suspension and termination alone is grounds for discrediting Respondent's asserted belief that Stewart made the alleged "great reporter" comment or that such comment constituted "retaliation."

Respondent's asserted belief rests entirely on the premise that Stewart neglected resident S.M. on September 20, by failing to toilet him. According to Respondent, this independent act of patient neglect led Stewart to lie to Respondent, refuse to prepare or sign a written statement, bully CNA Tardella, and retaliate against resident S.M. by calling him "the great reporter."

The problem with this narrative is that Respondent did not prove that Stewart neglected resident S.M. on September 20. As reported by LPN Benedict, the September 20 complaint was made at 2:55 p.m. by a family member who said that S.M. told his aide he was wet and she "refused" to change him. The family member, who was not present when the aide refused to change S.M., did not know who the aide was. On page 24 of Respondent's Brief, Respondent claims that "S.M. pointed at [Stewart] and identified her as the aide who had refused to change him." However, the transcript pages Respondent cites do not support such a conclusion. Benedict testified on direct that S.M. identified Stewart as "his aide" by pointing. Tr. 1303-04. On cross-examination Benedict acknowledged that S.M. did not identify Stewart as the aide who refused to change him. Tr. 1327, 1338. Later on cross-examination, she stated only that he said his aide refused to change him. Tr. 1351.⁴⁰ According to Respondent, no one else interviewed S.M. in connection with this allegation.

³⁹ Another prominent supporter, Chanel Kelly, was also absent from the facility for most of the critical period.

⁴⁰ Given this record, the ALJ properly concluded that the resident did not say that Stewart was the person who refused change him. ALJD at 47, lines 7-8.

Notwithstanding the above, the record reflects an admission by Respondent, and Nelson in particular, that it was not Stewart who refused to change the resident. Nelson testified that she concluded only that Stewart had neglected to change the resident during her shift. Tr. 1823:15-16; 1825:21-22. On October 3, Regional HR Manager Budzyna emailed revised documents to various individuals, stating that she had removed the allegation that Stewart did not respond to the resident's request for help because Nelson's review showed that the claim "could not be validated." R10b. These admissions are inconsistent with Respondent's new-found confidence that Stewart refused to change the resident. Respondent's claim to that effect is also inconsistent with CNA Tardella's statement that she responded to S.M.'s call bell at 2:50 p.m. The ALJ discredited Tardella's testimony that S.M. was not wet and he only asked who his aide was on the next shift as implausible. ALJD at 50, lines 10-39. He credited the corroborative testimony of Stewart and LPN Benedict that Stewart explained that she did not change S.M. in the afternoon because he had been in an activity, bingo. ALJD at 47, fn.36. DON Nelson did not deny that S.M. had participated in bingo the afternoon of September 20.

The ALJ also credited LPN Benedict's testimony that she did not voluntarily prepare a written report regarding S.M.'s complaint. Rather, on Monday or Tuesday DON Nelson asked her what had transpired and instructed her to write a report. He discredited DON Nelson's claim that she found Benedict's report on her desk.

Given the reasonableness of Stewart's explanation for not toileting S.M. after 1:30 p.m., her continued assignment to S.M. from September 21 through October 3, and the fact that Respondent never disciplined Stewart or told her that she would be disciplined, there is no basis for Respondent's asserted belief that Stewart was angry at the resident for complaining.

The ALJ's ultimate conclusion, that Respondent terminated Stewart for discriminatory reasons, rested on all of the above and his assessment of the level of discipline Respondent would have imposed, assuming she made the offensive comment, in the absence of her organizing activities. For the reasons stated by the ALJ, the record establishes that Respondent failed to prove that it applied its disciplinary policy in a consistent and even manner. ALJ D at 63, lines 11-19. In fact, based on the record before him, the ALJD found that Respondent treated other employees more leniently than Stewart in similar instances. ALJD at 63, lines 25-27. Such findings were properly based on consideration of each employee's entire record, as compared to Stewart, who had "outstanding" performance ratings until July.

8. Respondent's Asserted Property Interest in Summit Court Does Not Justify Its Surveillance and Eviction of Employees and Non-Employee Union Organizers on Adjacent Lots.

The law is well established that, absent unusual or special circumstances, an employer may not prohibit employees from distributing union literature on its property during nonwork time in nonwork areas, such as parking lots. *Republic Aviation Co. v. NLRB*, 324 U.S. 793, 803-804 (1945). An employer may prohibit non-employee solicitation/distribution, but only if the union has other channels of communication and the employer's prohibition is non-discriminatory. *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992); *NLRB v. Babcock & Wilcox*, 351 U.S. 105, 110-111 (1956).

The Board has also stated that in cases in which the exercise of Section 7 rights by nonemployee union representatives is assertedly in conflict with a respondent's private property rights, there is a threshold burden on the respondent to establish that it had, *at the time* it expelled the union representatives, an interest which entitled it to exclude individuals from the property."

Indio Grocery Outlet, 323 NLRB 1138, 1142 (1997), *enfd.* 187 F.3d 1080 (9th Cir. 1999), quoting *Food for Less*, 318 NLRB 646, 649 (1995).

It is undisputed in this case that employee and non-employee organizers' solicitation activities took place on property that did not belong to Respondent—Lot 2. Initially, their activities were confined to the entrance of the Lot 2 parking lot where it intersected with Summit Court. Respondent twice called the police asserting that a trespass was in progress even though its real claim was that an unauthorized vehicle had used Summit Court to gain access to Lot 2. After Respondent's second call, the police asked employee and non-employee organizers to relocate from Lot 2 to Route 52 at the intersection of Summit Court. After Respondent's third call, the police asked organizers to move further down Route 52, away from the intersection with Summit Court.

The ALJ found that because Respondent's property (Summit Court) was subject to an easement, Respondent had no reasonable basis to believe that organizers had trespassed, even assuming they traveled on Summit Court to gain access to Lots 1 and 2, property that did not belong to Respondent. The ALJ found that Respondent failed to meet its burden of proving that it had a right to exclude organizers from Lots 1 and 2 or Summit Court and Respondent failed to offer any evidence that union supporters were blocking traffic.

Respondent argues that because the Summit Court easement was solely for the benefit of Lot 1 and Lot 2, it was the General Counsel's burden to prove that organizers were invited to use Lot 2. Respondent has offered no case law to support its burden shifting analysis or its asserted right to enforce the easement against alleged uninvited guests of Lot 1 and Lot 2.

In fact, Respondent's alleged property interest is a distraction. Respondent knew no trespass was occurring at the time it called the police and that it had no property interest in Lot 1

or Lot 2 allowing it to seek removal of organizers from such properties; and Respondent's managers did not know what interest the owners of Lot 1 had in evicting the alleged trespassers. Tr. 10: 1610, 17-25; Tr. 10: 1625, 17-25; Tr. 10: 1626, 1-7; Tr. 12: 1948, 23-25. In fact, union organizers mostly used a church parking lot across the street on the other side of Route 52. Tr. 2: 158, 19-25.⁴¹ Inasmuch as Respondent did not limit its requests for police assistance to ongoing acts of trespass and it succeeded in removing organizers from the entire area, its conduct violated § 8(a)(1) of the Act. *See Harco Asphalt Paving, Inc.*, 353 NLRB 661, 665 (2008) (ALJ Decision). Respondent also made no effort whatsoever to limit its enforcement actions to non-employee union organizers or to assure employees of their right to remain on company property. For this reason, Respondent's conduct also violated § 8(a)(1) of the Act. *See Republic Aviation Co. v. NLRB*, 324 U.S. 793, 803–804 (1945).

9. Even If Respondent Had A Property Interest Allowing It to Exclude Non-Employee Organizers, Respondent Discriminatorily Enforced Such Right In Violation of § 8(a)(1).

Irrespective of Respondent's alleged property interest, the evidence in this case also establishes that Respondent's sole motivation in calling the police was to interfere with and prevent organizing activity. Respondent's managers admitted that they were instructed by the corporate office to be on the lookout for union organizers who might be trespassing and to call the police. In fact, the evidence establishes that Respondent had no history of enforcing its alleged property rights and that it cared little about trespassers before July 2014. Nelson was employed for over a decade and acknowledged that the summer of 2014 was the first time she ever observed Respondent attempt to enforce its property rights.⁴² Respondent's unlawful

⁴¹ They also accessed Lots 1 and 2 from another roadway. Tr. 2: 160, 3-25.

⁴² Wingate president, Scott Schuster, claimed that it was a yearly occurrence for the union to solicit employees at the facility. *See* Tr. 10:1467, 23-25; Vol 10:1468, 1-15.

motivation is sufficient to establish that its broad enforcement of property rights in this case was discriminatory and violated § 8(a)(1).

10. The ALJ's Rulings on the Union's Objections Should be Affirmed.

Respondent argues in Exceptions 258 through 269 that the ALJ erred by sustaining Union Objections 2 (discharge of employee Sandra Stewart in retaliation for her protected, concerted activity), 3 (threats to reduce hours if employees voted for the Union), 6 (threats to make employees' working conditions more onerous if they voted for the Union), 8 (threats of loss of workplace flexibility), 12 (informing employees it would be futile to select the Union), 14 (polling employees by forcing them to make an observable choice regarding their union support), 23 (improperly altering longstanding policy of charging employees \$2 to wear jeans to encourage employees to vote against the Union) and 24 (conditioning the waiver of the \$2 customary jeans fee on employees wearing a "Wingate Proud" (aka Vote No) T-Shirt). Each of these objections corresponds to ULP rulings by the ALJ, which are discussed at length in the Decision. The ALJ's rulings on each of these Objections should be affirmed, and Respondent's Exceptions overruled, because the ALJ's determination to sustain these Objections was based on the testimonial and documentary evidence presented at trial, the ALJ's credibility determinations regarding the witnesses who testified before him, and the case law the ALJ cited in the respective portions of the decision wherein the ALJ determined the unlawfulness of each of the corresponding ULPs.

11. The ALJ's Determination that a Bargaining Order Is An Appropriate Remedy Should be Affirmed.

Respondent excepts to the ALJ's determination that a *Gissel* bargaining order is an appropriate remedy (No. 317), and specifically, to the ALJ's conclusion that the cases relied upon by Respondent to show that a *Gissel* bargaining order is inappropriate were factually

distinguishable from the instant matter (No. 318). *See* Respondent’s Br. at 96 (“this complete lack of consideration is insufficient to find the extraordinary remedy of a bargaining order warranted”). Notwithstanding Respondent’s claims to the contrary, the ALJ *did* consider the cases Respondent cited, as evidenced by his ruling that Respondent’s cases were “factually distinguishable from the instant case,” and that “the unfair labor practices committed by the Respondent [are] generally more extensive and repetitive than the unfair labor practices that were committed in those cases.” *See* ALJD, at 70 (citing cases in fn. 46). Furthermore, one of Respondent’s cited cases, *Jewish Home for the Elderly of Fairfield County*, 343 NLRB 1069 (2004), the Judge addressed at length. *See* ALJD 70-71.

The ALJ’s conclusion that a bargaining order is appropriate here, based on the factually distinguishable circumstances present in this case, *see* ALJD, 70, is consistent with the rationale expressed by the Board in one of Respondent’s own cases. In *High Point Construction Group, LLC*, the Board explained, “Although the appropriateness of a bargaining order depends on the nature and extent of the Respondent’s misconduct, there are no mechanical or per se rules. Rather, each case must be fully examined for the ‘infinitely various circumstances which will influence employee perceptions of such prohibited conduct.’” 342 NLRB 406, 407 (2004).

Here, the ALJ did just that: over five full pages of the Decision (ALJD, 66-71), the ALJ fully examined the facts of this case to explain his conclusion that a rerun election was inadequate. The ALJ then recounted his findings pertaining to the two hallmark violations as well as the “other numerous and serious unfair labor practices” that were committed from the outset of the Union’s campaign, up through the critical period and continuing on election day. *See* ALJD, 68-71. Given the above, the ALJ’s determination that the unlawful conduct by the

Respondent in the circumstances in this case render a bargaining order appropriate should not be disturbed.

Finally, a close review of Respondent's cases that were not discussed at length by the ALJ demonstrates that, indeed, all are distinguishable for the simple fact that in each of those cases the Board determined that the underlying unlawful conduct did not impact a significant portion of the bargaining unit *and* the Board's traditional remedies were adequate to remedy the unlawful conduct. Unlike this case, there were no unlawful wage increases at issue in *Abramson LLC*, 345 NLRB No. 8 (2005) (Member Liebman, dissenting), *Hialeah Hospital*, 343 NLRB 391 (2004) (Member Liebman, dissenting), *Desert Aggregates*, 340 NLRB 289 (2003) (Member Liebman disagreeing as to impropriety of bargaining order, fn. 12), *High Point Construction Group, LLC*, 342 NLRB 406 (2004), or *Aqua Cool*, 332 NLRB 95 (2000), and in *Yoshi's Japanese Restaurant*, 330 NLRB 1339 (2000), only select employees received wage increases, not the entire putative bargaining unit.⁴³ Likewise, there were no section 8(a)(3) unlawful retaliatory discharges in *Aqua Cool*, *High Point Construction Group*, or *Yoshi's Japanese Restaurant*. While *Abramson* involved one violation of section 8(a)(3) for failure to return one worker to work following a (lawful) layoff, and *Desert Aggregates* involved two instances of unlawful section 8(a)(3) layoffs, and *Hialeah Hospital* involved a discriminatory discharge of a leading union supporter, the Board nonetheless determined in each of these cases that *overall* the ULPs committed by the respective employers were not so numerous or severe that traditional remedies were inadequate to redress the violations therein.

⁴³ In her dissent in *Abramson*, Board Member Liebman challenges the majority's conclusion that the *Gissel* bargaining order was inappropriate given that (1) an impact on a significant portion of the bargaining unit was reflected objectively by the Union's wholesale loss of support between obtaining majority support and the election and, (2) threats of plant closing and discharge are among the most flagrant violations unlikely to be eradicated by passage of time or traditional Board remedies.

There can be no dispute that, contrary to the cases cited above, in the instant matter the unprecedented wage increase, the 8(a)(3) discharge of the most visible union supporter, and the myriad widespread other unfair labor practices in this case affected the *entire* bargaining unit. Further, many of the other non-hallmark unfair labor practices (*e.g.*, the posting of the coercive “Straight Talk” memo, the change in the payroll period, the attendance bonus, and the surveillance and summoning of police to interfere with employees engaged in protected activity during shift changes) affected substantial numbers of employees who were either affected directly by those ULPs, personally engaged in protected, concerted activities, or witnesses to the coercive unlawful acts (*e.g.*, while arriving or departing the workplace during the shift changes). Thus, unlike the cases relied upon by Respondent, the Board’s traditional remedies (which would not include rescission of the wage increase), would be wholly inadequate to remedy the unlawful conduct at issue herein, and the bargaining order should be affirmed.

CONCLUSION

With limited exceptions set forth above and in Charging Party's Brief in Support of Cross-Exceptions, Charging Party respectfully requests that the Board adopt and affirm the ALJ's decision in its entirety.

Dated: New York, New York
February 10, 2016

Respectfully submitted,

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ATTACHMENT A

<u>Exhibit</u>					<u>Cumulative</u>
<u>Number</u>	<u>Card Signer</u>	<u>Authenticator</u>	<u>Tr. Page</u>	<u>Date</u>	<u>Cards</u>
22-89	Brandon Rodulfo	Newkirk	828	6/26/2014	1
22-35	Phillipa Morris	Stewart	306	6/30/2014	2
22-30	JoAnn Marshall	Stewart	350	7/24/2014	3
22-58	Alicia Bland	Allen	674	7/25/2014	4
22-85	Asha Nooks	Newkirk	822	7/25/2014	5
22-13	Bridget Cordero	Stewart	313	7/25/2014	6
22-65	Channel Kelly	Stewart	294	7/25/2014	7
22-38	Christina Palermo	Stewart	354	7/25/2014	8
22-86	Donna Phillips	Newkirk	822	7/25/2014	9
22-14	Ellamarie Cservak	Stewart	339	7/25/2014	10
22-56	Everton Wilson	Stewart	331	7/25/2014	11
22-06	Farrrah Baker	Stewart	331	7/25/2014	12
22-57	Georgann Allen	Massara/Allen	125	7/25/2014	13
22-44	Jackie Preti	Stewart	300	7/25/2014	14
22-48	Maxine Sproul	Stewart	296	7/25/2014	15
22-05	Michelle Angot	Stewart	298	7/25/2014	16
22-60	Patricia Clark	Newkirk	832	7/25/2014	17
22-01	Sandra Stewart	Massara/Stewart	124, 281	7/25/2014	18
22-20	Savara Green	Stewart	307	7/25/2014	19
22-97	Verdal Lewis	Signature	955	7/25/2014	20
22-59	Abegail Bopela	Allen	675	7/26/2014	21
22-70	Annemarie Perri	Signature	953	7/26/2014	22
22-37	Beatrice Ortsin	Stewart	353	7/26/2014	23
22-72	Belinda Newkirk	Stewart	371	7/26/2014	24
22-80	Jaclyn Langert	Newkirk	817	7/26/2014	25
22-78	Jayniece Gordon	Newkirk	815	7/26/2014	26
22-07	Jazmin Balcazar	Stewart	315	7/26/2014	27
22-12	Joan Conklin	Stewart	311	7/26/2014	28
22-40	Kheshana Pennant	Stewart	316	7/26/2014	29
22-62	Lynne Garnot	Allen	677	7/26/2014	30
22-49	Nanci Strang	Stewart	380	7/26/2014	31
22-55	Tanisha Williams	Stewart	367	7/26/2014	32
22-54	Aniya Williams	Stewart	299	7/27/2014	33
22-53	Lakeisha Whitted	Stewart	366	7/27/2014	34
22-63	Linda Gaetaniello	Allen	678	7/27/2014	35
22-08	Sharon Balgobin	Stewart	321	7/27/2014	36
22-15	Susan DeVonzo	Stewart	340	7/27/2014	37
22-19	Juanita Graham	Stewart	297	7/28/2014	38
22-71	Madeline Torino	Allen	683	7/28/2014	39
22-04	Mariamanna Alexander	Stewart	334	7/28/2014	40
22-92	Denise Viana	Newkirk	830	7/29/2014	41
22-81	Essence Majurie	Newkirk	818	7/29/2014	42

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22-11	Marcella Burns	Stewart	338	7/29/2014	43
22-77	Marissa Every	Newkirk	815	7/29/2014	44
22-90	Maura Shelan	Newkirk	828	7/29/2014	45
22-75	Roni Codett	Newkirk	813	7/29/2014	46
22-61	Barinder Dhaliwal	Allen	676	7/30/2014	47
22-31	Dina Martelli	Stewart	309	7/30/2014	48
22-64	Myrtle Gordon	Allen	679	7/30/2014	49
22-46	Diandra Riley	Stewart	319	7/31/2014	50
22-16	Nashema Douglas	Stewart	331	8/1/2014	51
22-22	Irelina Haley	Stewart	344	8/2/2014	52
22-24	Patricia Hines	Stewart	345	8/2/2014	53
22-69	Susy Oommen	Allen	682	8/2/2014	54
22-09	John Bermudez	Stewart	335	8/4/2014	55
22-28	Krisken Lewis	Stewart	349	8/4/2014	56
22-67	Emma McMullen	Signature	953	8/5/2014	57
22-33	Alexandria Medina	Stewart	371	8/6/2014	58
22-91	Leslie Tompkins	Newkirk	829	8/7/2014	59
22-03	Anvin Alexander	Stewart	331	8/8/2014	60
22-26	Gladybell Kieser	Stewart	347	8/9/2014	61
22-83	Felicia Mclean	Newkirk	820	8/10/2014	62
22-68	Jamaya Melvin	Allen	681	8/10/2014	63
22-82	Lakeisha Mccann	Newkirk	819	8/12/2014	64
22-73	Faith Adoyo	Newkirk	812	8/14/2014	65
22-50	Maria Tardella	Stewart	365	8/14/2014	66
22-94	Sable Romero	Ringwood	573	8/14/2014	67
22-25	Sharnay Jenkins	Stewart	346	8/14/2014	68
22-34	Zulma Miranda	Stewart	352	8/14/2014	69
22-47	Luzivette Santiago	Stewart	364	8/15/2014	70
22-41	Ashley Petty	Signature	953	8/16/2014	71
22-23	Fanny Herrera-Correa	Stewart	318	8/16/2014	72
22-29	Doris Little	Stewart	304	8/16/2012 (sic)	73
22-39	Olive Parker	Stewart	357	8/19/2014	74
22-87	Christine Rodriguez	Newkirk	824	8/20/2014	75
22-45	Zelma Pusey	Stewart	363	8/20/2014	76
22-88	Clariza Sidamon	Newkirk	825	8/23/2014	77
22-36	Hannah Niamke	Stewart	372	8/23/2014	78
22-84	Taylor Moseley	Newkirk	822	8/23/2014	79
22-66	Alma Kronaj	Allen	680	8/25/2014	80
22-52	Daisy Varghese	Stewart	381	8/28/2014	81
22-32	Jorge Matias	Stewart	308	8/28/2014	82
22-10	Ramajit Bhangoo	Stewart	336	8/29/2014	83
22-18	Niji George	Stewart	342	9/1/2014	84
22-93	Kelly Warren	Newkirk	831	9/3/2014	85
22-21	Piedad Guzman	Stewart	344	9/5/2014	86

Attachment A

22-98	Tyiesha Smith	Signature	957	9/5/2014	87
22-17	Emily Gabriele	Stewart	341	9/9/2014	88
22-74	Meghan Blomquist	Newkirk	813	9/12/2014	89
22-43	Keisha Phoenix	Stewart	378	9/22/2014	90
22-42	Joanne Pierce	Stewart	301	9/23/2014	91
22-27	Patricia Legister	Stewart	347	9/24/2014	92
22-79	Kemesha Guthrie	Newkirk	816	9/25/2014	93
22-02	Gladys Acuna	Stewart	288	9/26/2014	94
22-51	Allison Thornton	Stewart	310	9/27/2014	95
22-76	Jamie Dingman	Newkirk	814	No date	96
22-96	Maritza Anderson	Signature	954	7/26/2014	*
22-95	Brandon Rodulfo	Holland	619	5/12/2014	*dupe, not counted

CERTIFICATE OF SERVICE

This is to certify that I have served a true and correct copy of the CHARGING PARTY'S BRIEF IN OPPOSITION TO EXCEPTIONS in Case No. 03-CA-140576, 03-CA-145659 via electronic filing through the National Labor Relations Board's website, www.NLRB.gov, upon:

Rhonda P. Ley, Regional Director
National Labor Relations Board, Region 3
Leo W. O'Brien Federal Building
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Albany, NY 12207-2350

The CHARGING PARTY'S BRIEF IN OPPOSITION TO EXCEPTIONS was also served, via electronic mail, upon counsel of record for the Charging Party as follows:

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Dated: New York, New York
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