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**Kingman Hospital, Inc. d/b/a Kingman Regional Medical Center and Schon Hager.** Case 28–CA–119729

March 17, 2016

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA,  
AND MCFERRAN

On February 20, 2015, Administrative Law Judge Melissa M. Olivero issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed an answering brief, and the General Counsel filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions<sup>1</sup> and briefs and has decided to affirm the judge’s rulings, findings,<sup>2</sup> and conclusions, and to adopt the recommended Order as modified.

<sup>1</sup> No exceptions were filed to the judge’s finding, in Case 28–CA–119580, that the Respondent violated Sec. 8(a)(1) of the Act by discharging Ana Calderon. After the issuance of the judge’s decision, the parties executed an informal Board settlement agreement regarding the Calderon allegation. By Order dated April 21, 2015, the Board granted the parties’ joint motion to sever Case 28–CA–119580 and remand it to the Regional Director for further processing. Accordingly, Case 28–CA–119580 is no longer before the Board. We shall modify the case caption and Order and delete the notice to reflect the settlement of that case.

<sup>2</sup> The judge relied on *Relco Locomotives*, 358 NLRB No. 37 (2012). That case was decided by a panel that included two persons whose appointments to the Board were not valid. See *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014). However, prior to the issuance of *Noel Canning*, the United States Court of Appeals for the Eighth Circuit enforced the Board’s order in *Relco Locomotives*, see 734 F.3d 764 (8th Cir. 2013), and there is no question regarding the validity of the court’s judgment. We do not rely on the judge’s citation to *Hispanics United of Buffalo*, 359 NLRB No. 37 (2012), which also was decided by a panel that included Board Members who were not validly appointed.

The complaint alleges, inter alia, that Schon Hager engaged in protected concerted activities and that the Respondent discharged her because she engaged in those activities “and to discourage employees from engaging in these and other concerted activities.” The judge found that Hager’s activities were not concerted or undertaken for employees’ mutual aid or protection. We agree that Hager’s activities were not concerted, and we adopt the judge’s dismissal on that basis. The judge did not address the allegation that Hager was discharged to discourage employees from engaging in concerted activities. The General Counsel did not except to the judge’s failure to consider that allegation, nor has he argued such a theory of violation to the Board. Accordingly, we do not pass on it. See, e.g., *Kentucky Tennessee Clay Co.*, 343 NLRB 931, 931 fn. 3 (2004), *enfd.* 179 Fed. Appx. 153 (4th Cir. 2006).

ORDER

The recommended Order of the administrative law judge, as it pertains to Case 28–CA–119729, is adopted and the complaint is dismissed.

Dated, Washington, D.C. March 17, 2016

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Philip A. Miscimarra, Member

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Kent Y. Hirozawa, Member

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Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

*Larry A. Smith, Esq.*, for the General Counsel.  
*Kerry S. Martin, Esq.*, for the Respondent.

DECISION

STATEMENT OF THE CASE

MELISSA M. OLIVERO, Administrative Law Judge. This case was tried in Kingman, Arizona, on May 20–22 and June 23–25, 2014. Charging Party Ana Calderon filed a charge in Case 28–CA–119580 on December 23, 2013,<sup>1</sup> and Charging Party Schon Hager filed a charge in Case 28–CA–119729 on December 27. The General Counsel issued an order consolidating cases, consolidated complaint, and notice of hearing on February 28, 2014. The consolidated complaint alleges that Kingman Hospital, Inc., d/b/a Kingman Regional Medical Center (Respondent), violated Section 8(a)(1) of the Act by discharging Charging Party Calderon and Charging Party Hager because they engaged in protected concerted activities. (GC Exh. 1(e)). Respondent timely filed an answer denying the alleged violations and raising five affirmative defenses. (GC Exh. 1(g)). The parties were given a full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record,<sup>2</sup> including my

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Member Miscimarra notes that the judge first found Hager’s conversations with another employee regarding discipline were “protected,” and then went on to find, correctly, that those conversations were neither “concerted” nor undertaken “for mutual aid or protection.” To be clear, conversations alleged to come within the protection of Sec. 7 on the basis that they constitute protected concerted activity are not “protected” unless Sec. 7’s statutory requirements are met. To be “protected,” they *must* constitute concerted activity for the purpose of mutual aid or protection. Member Miscimarra disavows the judge’s suggestion to the contrary.

<sup>1</sup> All dates are in 2013 unless otherwise indicated.

<sup>2</sup> The transcripts in this case are generally accurate, but I make the following corrections to the record: the “unidentified speaker” in GC

observation of the demeanor of the witnesses,<sup>3</sup> and after considering the briefs filed by the parties, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

Respondent, a hospital engaged in providing inpatient and outpatient medical care, with an office and place of business in Kingman, Arizona, annually derives gross revenues in excess of \$250,000 and receives goods valued in excess of \$50,000 directly from points outside the State of Arizona. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

##### II. ALLEGED UNFAIR LABOR PRACTICES

###### A. Overview of Respondent's Operations

###### 1. Respondent's imaging department and management structure

Respondent's main hospital building sits on its campus with other buildings, including the Medical Professional Center (sometimes referred to as the "MPC" or "MOB"). Respondent's Imaging Center is within one block of the hospital.

Respondent's imaging department has employees at the main hospital, MPC, and Imaging Center. Imaging department technicians, referred to as "techs," provide various imaging services for patients, including x-rays, CT scans, MRIs, and mammograms. Techs may perform these duties at any of Respondent's facilities, but each tech is generally assigned to one location.

Respondent admits, and I find, that the following individuals are supervisors of Respondent within the meaning of Section 2(11) of the Act and/or agents of Respondent within the meaning of Section 2(13) of the Act: Chief Operating Officer Ryan Kennedy; Human Resources Generalist Jason Hembree; Imaging Services Director Lisa Noyes, and; Imaging Services Manager Jennifer (Jenny) Campbell. (GC Exh. 1(e).)

Kennedy is responsible for 13 departments, including the imaging department. Kennedy, Hembree, Noyes, and Campbell are involved in employee discipline and termination. Noyes is Respondent's director of imaging. Campbell, the manager of Respondent's imaging department, reports to Noyes. Campbell supervises imaging department employees at the hospital, Imaging Center, and MPC. Leslie Martin is the imaging department's RN supervisor. Joy Wilson serves as Respondent's imaging supervisor.

###### 2. Respondent's behavioral expectations and disciplinary policy

Respondent's employees are provided with a copy of its be-

havioral expectations and sign a behavioral expectations agreement. (GC Exhs. 13, 14, 15.) Relevant here, Respondent advises its employees: not to participate in gossip and rumors; to address concerns with coworkers professionally and privately; to limit personal calls; to refrain from using the Internet and cell phones so as not to interfere with work duties; and to limit personal conversations with coworkers that can be overheard by patients or the public. (GC Exh. 13.)

Respondent's discipline/discharge policy states that it shall have the right to discipline, suspend, or discharge an employee for, among other reasons, engaging in unacceptable conduct or behavior. (R. Exh. 6.) The policy further states that, generally, employees who exhibit performance or conduct problems which it assesses to be less serious will be given progressive discipline, which includes at least one written warning for the first problem or offense. Recurrences or other less serious problems thereafter may subject the employee to other discipline or discharge. However, employees who engage in more serious misconduct or exhibit serious performance deficiencies, as assessed by Respondent, will be subject to discharge or other discipline as deemed appropriate by Respondent without prior warning.

The General Counsel presented 27 examples of employee discipline for violations of Respondent's behavioral expectations over an approximately 2-year period. (GC Exhs. 17-43.) These exhibits demonstrate that Respondent has issued verbal or written warnings for: discussing the discipline of a coworker (GC Exh. 18); making others feel uncomfortable (GC Exh. 17); gossiping and complaining (GC Exh. 21); discussing coworker productivity (GC Exh. 23); complaining about an assignment (GC Exh. 27); using inappropriate language and tone (GC Exh. 31); threatening violence to a coworker (GC Exh. 35); using profane and sexually explicit language (GC Exhs. 36, 37, 40, and 43); and inappropriately touching, grabbing, and rubbing coworkers (GC Exh. 39). Of those terminated for violating Respondent's behavioral expectations, the reasons given were: multiple incidences of disruptive conduct, including taunting coworkers, snapping at patients, and discussing other employees' personal lives (GC Exhs. 25 and 26); yelling and arguing with coworkers and refusing to calm down, after being disciplined three times previously (GC Exh. 29); being accusatory and negative to coworkers after being previously disciplined multiple times, then calling off from work, leaving Respondent short-staffed, and refusing to allow a supervisor to use equipment (GC Exh. 33); and, after being disciplined twice, swearing, being disrespectful to a doctor, and failing to follow radiation safety procedures (GC Exh. 34).

###### B. Charging Parties' Employment with Respondent

Charging Party Ana Calderon was employed as an x-ray tech by Respondent from April 2007 through December 18, 2013, when she discharged for alleged misconduct. (Tr. 303-304.) Calderon worked as an x-ray tech at the hospital for about 4-1/2 years before transferring to the imaging center. (Tr. 303.) In April 2013, due to a shortage of personnel, Calderon was temporarily reassigned to work at the hospital. (Tr. 1079.) She was selected for this assignment because she had previously worked

Exh. 11(a) is Jason Hembree; the speaker identified in GC Exh. 16(a) as "Ms. SCHON" is Schon Hager; Tr. 25, L. 15: "progress" should be "process"; Tr. 26, L. 9: "King" should be "Kingman" and "neighborhood" should be "neighboring"; Tr. 33, L. 1: "sense" should be "cents"; and Tr. 255, L. 13 "MR. MARTIN" should be "MR. SMITH".

<sup>3</sup> Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case. I further note that my findings of fact encompass the credible testimony and evidence presented at trial, as well as logical inferences drawn therefrom.

at the hospital and was familiar with all of the procedures performed there. (Tr. 1079–1080.)

Charging Party Schon Hager worked for Respondent in several different capacities from January 2004 until her termination on December 20, 2013, for alleged misconduct. (Tr. 646, 754.) In September 2011, Hager became the supervisor of Respondent's Imaging Center. (Tr. 646.) As the supervisor, Hager was responsible for the day-to-day operation of the Imaging Center, including scheduling, ensuring proper equipment maintenance, and some direct patient care. (Tr. 646–647.)

Hager was Calderon's supervisor from September 2011 until December 6, 2013, when Respondent relieved Hager of her supervisory position. (Tr. 499.) The parties do not dispute, and I find, that Hager was a supervisor of Respondent within the meaning of Section 2(11) of the Act until her demotion in early December 2013. Calderon and Hager were friends while working together, both when Hager was Calderon's supervisor and after Hager's demotion.<sup>4</sup> (Tr. 499–500.)

Noyes became Respondent's director of imaging on August 29. (Tr. 57.) After assuming her position, Noyes held a number of meetings ("meet and greets") with department employees. (Tr. 133.) Noyes first met Calderon at one of these meet and greets (Tr. 133). Calderon's comments to Noyes focused on the cohesiveness and of the Imaging Center and the proficiency of Hager as a leader. (Tr. 133–134.) Noyes became alarmed when Calderon began speaking about Campbell, calling her "evil." (Tr. 134.) Noyes learned that others in the department had opposite views of the environment at the Imaging Center, describing it as punitive and hostile, and of Hager, describing her tendency to discipline employees in public and belittle others (Tr. 134–135; 136–137).

At a leadership team meeting early in her tenure with Respondent, Noyes witnessed Hager state to another supervisor, Shaun Walton, "I heard two of your employees are leaving because of you and your leadership." Noyes described this interaction as inappropriate both because Hager was not Walton's supervisor and because there were other people in the room. (Tr. 137.)

#### 1. Hager is Disciplined

On October 18, while she was still a supervisor, Hager received formal discipline from Respondent in the form of a verbal written warning. (GC Exh. 5.) Prior to this date, Hager had received only informal discipline in the form of "coachings". (Tr. 156–157.) The decision to issue the October 18 discipline to Hager was made by Noyes, Campbell, and Hembree. (Tr. 257, 908.) The document given to Hager indicated that she was being disciplined for a number of reasons: (1) the above interaction with Walton; (2) failing to assist at the hospital when asked; (3) violations found at the Imaging Center during an

<sup>4</sup> Although Calderon and Hager tried to minimize the degree of their friendship, I do not credit their testimony in this regard. (Tr. 499–500; 683–684.) Hager admitted that they exchanged phone calls or text messages 1–5 times per week. (Tr. 778.) The content of their text messages further belies their testimony, and includes references to Calderon lying on Hager's behalf, unflattering statements regarding other employees and supervisors, and messages of a personal nature. (Tr. 592–641.)

MQSA<sup>5</sup> inspection; (4) complaints by Hager's subordinates regarding her management style; (5) being unapproachable; and (6) a past history of poor interactions with staff, coworkers, leaders, and managers. (GC Exh. 5.)

During the meeting at which this discipline was administered, Hager expressed surprise regarding the way in which she was perceived by others. (Tr. 261.) Hager wrote comments regarding each of the allegations made against her directly on the discipline form.<sup>6</sup> (GC Exh. 5; Tr. 857.)

#### 2. Calderon meets with Hembree

On October 21, Calderon went to Respondent's human resources department and met with HR Generalist Jason Hembree in order to "let him know things were very bad in the imaging department." (Tr. 205; 310–311). Without telling Hembree, Calderon recorded their conversation using her cell phone. (GC Exhs. 11, 11(a).) The meeting lasted almost an hour, during which Calderon painted a very unflattering image of the imaging department.<sup>7</sup>

Calderon alleged to Hembree that she was working in a hostile working environment. (GC Exh. 11(a), p. 3; Tr. 311.) By way of example, Calderon reported that Jan Thill and Patti Klinglesmith had been recording which employees went into and out of Hager's office. (GC Exh. 11(a), p. 4; Tr. 311.) Calderon also had a problem with the manner in which she had been sent to work at the hospital in April, stating that she was transferred to the hospital without being asked. (GC Exh. 11(a), pp. 10, 13.)

<sup>5</sup> MQSA is an acronym for Mammography Quality Standards Act. The MQSA is enforced by the Arizona Radiation Regulatory Agency (ARRA). (Tr. 937.)

<sup>6</sup> I did not find Hager to be a convincing witness. She sparred with Respondent's counsel on cross-examination. (Tr. 809–812). She changed her testimony under cross-examination to add points that she did not raise on direct examination. (Tr. 649–651; 814.) Furthermore, she refused to admit receiving text messages from Calderon that painted her in an unflattering light or contradicted her testimony, instead testifying that she did not remember receiving them. (Tr. 781, 784, 850, 874.) She testified that she didn't know about or didn't remember certain key points. (Tr. 747, 783, 860, 870.) In sum, I did not find Hager as credible as the other witnesses in this case and credit her testimony only when corroborated by other evidence or witnesses I have found more credible, or where it is inherently probable, or it is uncontroverted.

<sup>7</sup> I did not find Calderon to be a credible witness. Her testimony tended to be melodramatic and hyperbolic. For example, she described herself as "deathly afraid" of Campbell and described Noyes' tone of voice as malicious in a telephone conversation with Schon Hager on November 18. (Tr. 326, 341.) In listening to the recording of this conversation (R. Exh. 16), I did not find Noyes' voice to be elevated or her tone to be malicious. Calderon also contradicted her own testimony. For example, on direct examination Calderon testified that she was concerned about the "mental state" of Carter, her replacement at the imaging center in December. (Tr. 343). Later, she denied using the word "mental" in her testimony. (Tr. 463). Calderon also gave rather glib testimony, stating, "blah, blah, blah" a number of times in response to questions. (Tr. 411, 460, 462, 602.) She was further unable to give specific examples to support her testimony. (Tr. 396–399.) Therefore, except where corroborated by other evidence or witnesses I have found to be more credible, or where it is inherently probable, I generally do not credit Calderon's testimony.

Calderon further asserted that people were afraid to talk to anyone in management about patient care or about Hager. (Tr. 311–312). She claimed that employees’ words got turned around and “twisted into a lie.” (GC Exh. 11(a), p. 18; Tr. 313). Calderon further claimed that Noyes refused to speak with department employee Brittany Kosten and had “brushed off” Kosten five times.<sup>8</sup> (GC Exh. 11(a), pp. 9–10.) Calderon further described Campbell as “a snake.” (GC Exh. 11(a), pp. 13, 18, 49.)

When questioned by Hembree, however, Calderon stated that most of the problems she reported occurred from 3 months to 3 years prior to this meeting. (GC 11(a), pp. 6–7, 46–47.) She also admitted that much of what she knew was learned second, third, or fourth hand. (GC Exh. 11(a), pp. 45.)

During most of the conversation, Calderon discussed personal issues by stating, “How is that fair to me?” and “things were going great . . . for me . . . until I was attacked for something” and by giving examples of things that happened to her personally. (GC Exh. 11(a), pp. 14, 18, 22, 56–57.) However, at other points in the conversation, Calderon raised what seemed to be group concerns including the alleged lack of accessibility of Noyes, employees’ words being misconstrued and used as a basis for informal discipline, and a hostile working environment. (GC Exh. 11(a), pp. 3, 8, 9–10, 14, 18, 24.)

For his part, Hembree tried to address Calderon’s concerns by stating that he would hold managers accountable and create a new “soft skills” program for managers. (GC Exh. 11(a), pp. 29, 38.) Calderon asked Hembree to set up a meeting with Noyes, but did not want Campbell or Wilson present. (GC 11(a), p. 46.) Hembree agreed to schedule the meeting with Noyes.<sup>9</sup> (GC Exh. 11(a), p. 52.)

### 3. Calderon meets with Noyes and Hembree

The next day, Calderon met with Noyes and Hembree in Respondent’s human resources department. Calderon again recorded this conversation without the knowledge of the others present. (GC Exhs. 10, 10(a).) Calderon advised Noyes that bad things from the past were happening again in the imaging department. (GC Exh. 10(a), p. 10.)

Calderon told Noyes that employees were afraid to go to human resources or to talk to anyone in management. (GC Exh. 10(a), p. 12.) Calderon told Noyes that Campbell planned to eliminate people in the department and bring in others to replace them. (GC Exh. 10(a), p. 13.) Calderon said that she did not trust Campbell and called her “underhanded.” (Id.)

Noyes responded that she was looking for a fresh start and to reset expectations. (GC Exh. 10(a), p. 14.) Noyes further told

<sup>8</sup> The General Counsel did not ask Kosten about this and Kosten did not corroborate Calderon’s allegation.

<sup>9</sup> I did not find Hembree’s testimony compelling in this case. Much of his testimony was given in response to leading questions by Respondent’s counsel. In addition, some of his testimony lacked specificity, such as his testimony regarding the meeting where it was decided to terminate Calderon (Tr. 241–243) and regarding a meeting when Noyes and Campbell discussed “several things” that would be put into a warning given to Hager. (Tr. 258.) However, I did credit his testimony to the extent it is corroborated by the recordings in this case.

Calderon that Campbell had said really good things about her.<sup>10</sup> (GC Exh. 10(a), p. 16.) Hembree again asked Calderon to start with a clean slate. (GC Exh. 10(a), p. 17.)

During the meeting, Calderon volunteered that Hager was good at her job and Noyes asked why Calderon felt the need to justify Hager’s performance with her. (GC Exh. 10(a), p. 21–22.) Calderon replied because Hager got a bad rap. (GC Exh. 10(a), p. 22.) Noyes told Calderon that any issues with Hager were between Hager and Noyes and again questioned Calderon’s motives in justifying Hager’s performance.<sup>11</sup> (GC Exh. 10(a), p. 23.)

Calderon went on to say that “we” have a problem with Patti [Klinglesmith], and that Brittany [Kosten] and Shawn Love would like to talk to Noyes about it. (GC Exh. 10(a), p. 24.) Calderon indicated that employees at the Imaging Center were waiting to connect with Noyes without getting in trouble.<sup>12</sup> (GC Exh. 10(a), p. 26.) Noyes assured Calderon that she would be coming to spend time at the Imaging Center soon. (GC Exh. 10(a), p. 27.) At the end of the meeting, Calderon said that she was willing to reset the clock. (GC Exh. 10(a), p. 36.) Noyes asked Calderon to come to her with problems in the future and promised to listen and take action. (GC Exh. 10(a), p. 49.)

### 4. Schedule changes pertaining to Hager

In October, a decision was made to have Hager perform more patient scanning because Respondent was shorthanded in the CT department at the hospital. (Tr. 1086.) Initially, Wilson scheduled Hager to work at the Imaging Center and another employee, Stacey Gilbert, to work hospital. (Tr. 1087.) Hager and Gilbert were sent an email regarding this schedule change on October 29.<sup>13</sup> (GC Exh. 49.)

Wilson later modified this schedule because of a childcare issue on the part of Gilbert. (Tr. 1087.) Wilson notified Hager of this change by way of an email on November 7; Gilbert did not receive this email. (GC Exh. 50.) The revised schedule had

<sup>10</sup> I found Noyes to be a credible witness. She testified in a straightforward manner and was not shaken by pointed questions posed by the General Counsel. Also, her testimony is corroborated by Calderon’s recording of conversations, and other documentary evidence in the case. As such, I generally credited her testimony. However, I did not credit Noyes’ testimony which was contradicted by the documentary evidence in this case.

<sup>11</sup> Calderon denied knowing that Hager had received discipline on October 18, a few days before this meeting, although Hager admitted to telling Calderon about the discipline. (Tr. 542–543; 858–859.) Calderon did not tell Noyes that she knew about Hager’s discipline during this meeting, even when Noyes asked her why she needed to justify Hager’s performance. (Tr. 21–23.) I find that Hager told Calderon about her discipline in advance of this meeting and that Calderon’s statements to Noyes were untruthful by omission.

<sup>12</sup> None of the other employees who testified at the hearing indicated that they shared the concerns raised by Calderon in her meetings with Hembree and Noyes, except that Kosten testified that she was once called in and asked about a rumor she allegedly started. (Tr. 706.) As such, I find that the other employees at the Imaging Center did not share the concerns that Calderon raised in these meetings.

<sup>13</sup> I found Wilson to be a credible witness. She testified in a sure and direct manner. Her testimony on direct examination was not contradicted in any way on cross-examination. Furthermore, her testimony was consistent with the exhibits in this case.

Hager and Gilbert working different shifts and rotating between the hospital and Imaging Center.<sup>14</sup> (Tr. 750–751; 915–916.) The schedule was revised further to include CT Lead Tech Jason Lane. (GC Exh. 50; Tr. 916.) The final schedule had Lane, Gilbert, and Hager rotating between the Imaging Center and hospital and working rotating shifts.<sup>15</sup> (GC Exh. 50; Tr. 1087–1088.) The revised schedule remained in place until Hager’s demotion.<sup>16</sup> (Tr. 1089–1090.)

After the revised schedule was issued, Gilbert went to department management and complained that she knew nothing about it. (Tr. 911–912.) Hager testified that she advised Gilbert of the change, but I do not credit this testimony. (Tr. 783.) Gilbert testified that Hager never informed her of the schedule change and in this instance I credit Gilbert.<sup>17</sup> (Tr. 198.)

#### 5. Hager’s November 8 telephone conversation with Noyes

On November 8, while Calderon was in Hager’s office at the Imaging Center, Hager received a telephone call from Noyes. Noyes was frustrated with Hager for her failure to communicate the recent schedule change to Gilbert. According to both Calderon and Hager, Noyes was “yelling” during the call. (Tr. 338, 647.) Calderon recorded a portion of the conversation with her cell phone with tacit permission from Hager.<sup>18</sup> (R. Exhs. 16, 16(a); Tr. 379, 789.)

<sup>14</sup> Although Hager testified that this schedule change was made in retaliation for her November 8 meeting with Kennedy, I do not find this to be the case. The record evidence establishes that the initial calendar indicating that Hager would be performing direct patient care (scanning) was made prior to Hager’s conversation with Kennedy. (GC Exh. 49.) GC Exh. 50 establishes that Hager was provided a copy of the schedule change including Lane and Gilbert on the morning of November 8, prior to her phone call with Noyes and meeting with Kennedy. Additionally, even if the final schedule change had been made after the meeting with Kennedy, Hager was a supervisor as defined in Act at the time of her meeting with Kennedy and, therefore, did not enjoy the Act’s protection. See *Taos Health Systems*, 319 NLRB 1361, 1361 fn. 2 (1995) (“With only limited exceptions, supervisors do not enjoy the Act’s protection.”)

<sup>15</sup> Gilbert and Lane were both upset about the final revised schedule because of childcare issues, but resolved the problem informally by trading shifts. (Tr. 1089.)

<sup>16</sup> I do not find it material whether the schedule was changed once, as testified to by Wilson and Campbell, or twice, as testified to by Hager. I find, based on the credited evidence, that the schedule was changed and the final version provided to Hager by November 8, prior to Hager’s meeting with Kennedy. (GC Exh. 50.)

<sup>17</sup> Unlike *Kosten and Libby*, I did not find Gilbert to be a particularly credible witness. She admitted that she “is not really good with specifics.” (Tr. 193.) Her testimony was vague and she required considerable prompting from the General Counsel. As such, I credit her testimony only to the extent it is consistent with that of other witnesses and the other evidence in this case. However, I credit Gilbert over Hager in finding that Hager did not tell Gilbert about the revised schedule. I do so because this was the reason for Noyes’ November 8 call to Hager and based on a text message from Calderon to Hager in which she stated, “So I lied and said I was there when you told Stacey about the schedule.” (Tr. 602.)

<sup>18</sup> I do not credit Hager’s testimony that she never received a copy of the recording of this conversation, as a November 9 text message from Calderon to Hager attached a copy of the recording. (Tr. 596–597; 878.)

Noyes described the purpose of the conversation as to ensure that Gilbert stopped calling department management to complain about her schedule. (R. Exh. 16(a), p. 2.) Noyes stated that she wanted the schedule to be fair and that she wanted Gilbert to stop going around the appropriate hierarchy. (R. Exh. 16(a), p. 6.) Noyes ended the conversation by stating that the next time Gilbert went around proper channels, she would be held accountable. (Id.) Hager promised to convey this to Gilbert.<sup>19</sup> (Id.)

#### 6. Calderon and Hager meet with Ryan Kennedy

Hager and Calderon went to see Ryan Kennedy that same afternoon. Kennedy testified that he agreed to see them because he found it rare that a supervisor from the Imaging Center had asked to meet with him.<sup>20</sup> (Tr. 31.)

Initially, Kennedy met with Calderon and Hager together. Kennedy started by asking Calderon about her concerns. (Tr. 32.) Calderon complained about how Noyes sounded during her earlier telephone conversation with Hager.<sup>21</sup> (Tr. 32.) Calderon volunteered that Hager was doing a great job. (Tr. 32.) Calderon also stated that she was suspect of Campbell. (Id.) Kennedy then excused Calderon and spoke with Hager alone.

Kennedy coached Hager, telling her that it was inappropriate for her as a manager to bring a direct report into a meeting and disparage the director (Noyes) and a coworker (Campbell). (Tr. 33.) Kennedy told Hager that managers are not to participate in throwing other managers in front of the bus in front of staff. (Tr. 36.) Neither Calderon nor Hager was disciplined in any way as a result of this meeting with Kennedy.<sup>22</sup> (Tr. 49.)

#### 7. Hager is disciplined again

On December 6, almost a month after the meeting referenced above, Hager was summoned to Kennedy’s office, where she met with Kennedy, Noyes, and Hembree. She was provided

<sup>19</sup> Hager and Calderon contradicted each other as to what occurred next. Hager testified that she immediately announced that she was going to see Kennedy and that Calderon offered to join her. (Tr. 648.) Calderon testified that she left Hager’s office and stewed about Noyes’ conversation with Hager for a few hours. (Tr. 341.) Calderon then testified that she returned to Hager’s office and announced that she [Calderon] was going to see Kennedy and invited Hager to join her. (Tr. 341.)

<sup>20</sup> I found Kennedy to be a credible witness. He testified in a steady manner and his testimony did not waver on cross-examination.

<sup>21</sup> Neither Calderon nor Hager mentioned that Calderon had recorded a portion of this conversation.

<sup>22</sup> I did not credit either Calderon’s or Hager’s testimony regarding this meeting. Their testimony was frequently contradictory. Calderon testified on direct examination that she told Kennedy that employees were in fear for their jobs, suffered poor treatment, were being accused of things with no proof, and feared coming to work. (Tr. 342.) On direct examination, Hager said that Calderon told Kennedy she had been passed over for promotions and mentioned other issues, but that she could not remember what these other issues were. (Tr. 649.) Later, under cross-examination, Hager remembered that Calderon mentioned being disciplined for sarcastic comments. (Tr. 814.) Additionally, Calderon stated that she told Kennedy about an issue regarding Respondent’s mammography license; Hager did not remember Calderon making this statement. (Tr. 567; 641.) Given the conflicting nature of this testimony, I do not credit Hager’s or Calderon’s version of events, and instead credit Kennedy’s testimony.

with a written warning, performance improvement plan, and progress report in a single, two-page document, which stated that she had engaged in disruptive behavior since her verbal warning, including not responding to employees by saying good morning or good night, demonstrating inconsistent behavior, not responding to emails and texts, and disengaging from department leadership. (GC Exh. 7.) Hager's improvement plan advised her to foster constructive interactions without caustic commentary, consider patient care first, and to practice loyalty to the department, coworkers, and patients.

Hager was given a choice: either be demoted to a CT tech position at the hospital or be terminated. (GC Exh. 7; Tr. 657.) She was advised in writing that her failure to meet the goals in her improvement plan at any time during the next 30 days would place her at risk for termination. She was further advised that she must provide excellent customer service to patients and coworkers and support department leadership, follow verbal directives and adhere to her duties as outlined in her job description and to Respondent's code of conduct. In written comments upon the demotion document, Hager indicated that she did not agree with the allegations against her, stated that Noyes' opinion was not factual, and accused Noyes of favoritism.

The next week, Hager decided to accept the demotion and began working as a CT tech at the hospital. (Tr. 748, 863.) In the days that followed, but before accepting the demotion, Hager spoke to and exchanged text messages with employees at the Imaging Center and informed them she had been demoted and was no longer their supervisor. (Tr. 197, 659, 702-703, 746.)

#### 8. Calderon is scheduled to work at the hospital

In December, a decision was made by Noyes, Campbell, and Wilson to bring Calderon back to the hospital to work on a more regular basis. (Tr. 975; 1083.) This decision was based on a shortage of personnel at the hospital and Calderon's skill set. (Tr. 976; 979-980; 1083.) Employee Dani Carter would replace Calderon at the Imaging Center. (Tr. 343; 978; 1083.)

On December 11, Campbell and Martin announced this decision to Calderon. (Tr. 343.) Calderon immediately expressed her concern that Carter would fail at the Imaging Center. (Tr. 343.) Calderon also asked when she would be returning to the Imaging Center, to which Campbell replied that she didn't know. (Tr. 344.) Campbell told Calderon that she did not have a choice in the matter and would have to go to the hospital. (Tr. 344.) Calderon was upset with the short notice, her lack of practice in certain procedures, and the effect on her training to become a CT tech at the Imaging Center. (Tr. 344-345.) Campbell advised Calderon that she would receive training in the procedures she mentioned.<sup>23</sup> (Tr. 345.)

#### 9. Calderon's discussions with coworkers regarding the schedule change

Kosten had a conversation with Calderon prior to Calderon's

<sup>23</sup> Respondent's counsel did not ask Campbell about this exchange. Accordingly, Calderon's testimony stands uncontested and I credit it.

transfer to the hospital in December. (Tr. 696.) Calderon told Kosten that she did not think that the transfer was fair and that her replacement [Carter] was going to fail because the Imaging Center was so busy. (Tr. 696.)

Calderon also spoke to employee Denise Libby about her transfer to the hospital in December. Calderon called Libby because she was upset about going back to the hospital and was concerned about Carter because Carter had been previously relieved of her duties at the Imaging Center. (Tr. 673.) Calderon expressed concern that Carter would fail and be fired. (Tr. 674.) Libby understood Calderon's concerns because Libby knew that Carter had been previously fired from the Imaging Center. (Tr. 673.) Calderon also expressed that she was upset that management had decided to transfer her to the hospital. (Tr. 677.) Libby sympathized with Calderon not wanting to return to the hospital because working at the hospital is stressful.<sup>24</sup> (Tr. 674.)

Gilbert testified that she spoke to Calderon about her transfer at some point. (Tr. 193.) Calderon told Gilbert that she was being transferred because she was a really great tech. (Tr. 193.) Calderon said that she was willing to do whatever they needed her to do, but she wanted to be at the Imaging Center. (Tr. 194.) Calderon, however, did not mention management or Carter during this conversation.<sup>25</sup>

Calderon testified that she spoke to numerous coworkers about her transfer to the hospital in December. Calderon allegedly raised concerns about her replacement at the Imaging Center, Carter, and claimed that all of the other employees expressed concerns because Carter was slow and that management may have been trying to get rid of Carter.<sup>26</sup> (Tr. 346-350; 354.)

Other evidence establishes that Respondent was well-aware that Calderon had been talking to her coworkers about her transfer to the hospital and about Carter. At least 2 employees told Noyes and Campbell that Calderon was griping about having to help at the hospital. (Tr. 90, 981.) Noyes testified that it was okay for Calderon to complain about being transferred to the hospital, but it was not okay for Calderon to slander the reputation of a 20-year employee, by stating that Carter would

<sup>24</sup> I found Libby, a current employee of Respondent, to be a particularly credible witness. She testified in a forthright and sure manner and she did not falter on cross-examination. Current employees are likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests. *Advocate South Suburban Hospital*, supra; see also *American Wire Products, Inc.*, 313 NLRB 989, 993 (1994) (Current employee providing testimony adverse to his employer is at risk of reprisal and thus likely to be testifying truthfully). Moreover, Libby's testimony stands un rebutted in all material respects. As such, I credit Libby's testimony.

<sup>25</sup> In this instance I credit Gilbert over Calderon. Calderon's testimony about her conversations with coworkers was inconsistent and vague. Also, Gilbert's testimony about what Calderon mentioned in her conversations was consistent with that of Kosten and Libby. As such, I credit it.

<sup>26</sup> Although Calderon testified that she told other employees to contact Noyes and Campbell regarding their concerns, I do not credit this testimony. (Tr. 350.) None of the other witnesses indicated that Calderon asked them to contact management with their concerns.

fail and that there was a conspiracy to have Carter fail and be fired. (Tr. 90.)

Noyes testified that Calderon violated Respondent's behavioral standards, which require avoiding personal conversations that can be overheard by patients and the public. (Tr. 89.) Noyes characterized Calderon's comments as disruptive and defamatory. (Tr. 92-93.) She went on to testify that employees can make negative comments, as long as it doesn't cause disruption and it's not hurtful. (Tr. 93.) She stated that Calderon's comments were not welcomed by other employees and took people away from focusing on their work. (Tr. 94.)

#### 10. Calderon is Disciplined

On December 13 Calderon sent an e-mail, entitled "How This Has Affected Me," to Noyes, Campbell, Wilson, Martin, and Hembree complaining about her transfer to the hospital. (GC Exh. 2; R. Exh. 23.) As a result of this e-mail, and her complaining to others at the Imaging Center about her transfer, Calderon was disciplined on December 16.<sup>27</sup> (GC Exh. 3; Tr. 982.) According to the Notification of Warning form, Calderon was disciplined for her "negative comments" regarding her reassignment to the hospital. The form also indicated that Calderon made inappropriate comments about the tech who would be replacing her and leadership's decision to reassign her. According to Campbell and Noyes, Calderon admitted to making comments where patients could hear and being disruptive. (Tr. 89, 981, 997.) Campbell's and Noyes' testimony was contradicted by General Counsel Exhibit 2, which did not indicate that Calderon was in a patient care area when making her comments. (GC Exh. 3.)

#### 11. Hager Accepts Demotion

On the Monday following December 6, Hager decided to accept the demotion offered to her by Kennedy and she began working as a CT tech at the hospital the next day. (Tr. 748.) Hager's shift had a five hour overlap with that of another CT tech, Daryl Redman.<sup>28</sup> (Tr. 1059.) Hager and Redman worked

<sup>27</sup> The consolidated complaint did not allege that Calderon's December 16 discipline violated the Act. In fact, when specifically asked about this on May 22, 2014, the General Counsel stated, it was "not alleged in the complaint and we are not amending it in," and "we did not issue complaint because of this," and it was "just background." (Tr. 434, 435, 441.) Then, during a break in the trial after the third day, and after Calderon had concluded her testimony, the General Counsel moved to amend the complaint to include an allegation that the December 16 warning violated the Act. Respondent opposed the amendment. The Board's Rules and Regulations, specifically Sec. 102.17, allow amendments only if they are just. The Board evaluates three factors in determining if an amendment is just: (1) whether there was surprise or lack of notice; (2) whether the General Counsel offered a valid excuse for the delay in moving to amend; and (3) whether the matter was fully litigated. *Cab Associates*, 340 NLRB 1391, 1397 (2003). I did not allow the amendment, due to the lack of notice, the General Counsel's prior representation that this discipline was not violative, and because the General Counsel offered no reason for the delay in amending the complaint. I find the General Counsel's belated motion to amend inexcusably late, contrary to his prior representations, and find that it constituted unfair surprise on Respondent.

<sup>28</sup> I found Redman to be a credible witness. He testified in a forthright manner and was not shaken or discredited under cross-

together for about two weeks, from the time of Hager's demotion until her discharge on December 20.

Hager and Redman worked in a small area, requiring them to work in close quarters. According to Redman, Hager incessantly complained and spent part of each night talking about her experiences with management. (Tr. 1059.) Redman did not ask Hager about her experiences with management or her demotion and he characterized her talking as uncomfortable and disruptive. (Id.) Relevant here, in a written statement provided to Respondent, Redman stated that Hager said: (1) she was targeted by Noyes because she was not a team player and did not support management; (2) human resources told her that nothing in her file justified Respondent's position in reprimanding her; (3) she was written up for not saying good morning to an employee and for not returning a call; (4) Noyes' management style was to intimidate staff members at meetings so that ideas were repressed; (5) the radiologists wanted her for the CT Lead position, but stopped supporting her after Lane was hired; and (6) she intended to file a lawsuit for wrongful termination. (R. Exh. 22.) Redman, for his part, did not ever tell Hager to stop talking about her experiences with management or demotion. (Tr. 746, 1066.)

Hager testified that it was Redman who asked her what had happened to cause her demotion and that she "gave him a run-down" during a single conversation.<sup>29</sup> (Tr. 660; 745.) Hager said that she did not say anything negative about Respondent's management. (Tr. 866.) There is no evidence in the record that Hager sought to induce Redman to take any sort of action regarding her demotion.<sup>30</sup>

One evening, Hager called into question Redman's proficiency in performing a scan. During a case, while there were 2-3 other people in the room, Hager indicated that Redman had missed scanning the patient's liver. (Tr. 1060.) This caused Redman to have to stop his work and point out to Hager and the others present that he had, in fact, scanned the liver. (Id.) Redman stated that this disrupted his work flow and made him uncomfortable.<sup>31</sup> (Tr. 1060.)

Rather than confront Hager, Redman went to his supervisor, Lane, and told him about Hager's behavior. (Tr. 1060.) Later, Redman met with Hembree and Noyes in the human resources

examination. However, Redman's testimony regarding his conversations with Hager was somewhat vague, compelling me to rely upon his written statement, which was made closer in time to the events at issue and which he testified was accurate.

<sup>29</sup> Regarding what Hager alleges was a single conversation, I did not find her to be a credible witness because she was unable to give a detailed account of it. (Tr. 660-661; 744-745.) When pressed for more detail on cross-examination, she said only that she "gave a personal account of what happened." (Tr. 866.)

<sup>30</sup> Hager also testified that she had a single conversation with another employee, Robert Mandaville, regarding her demotion. (Tr. 745.) She did not provide any details regarding this conversation, only stating that she explained her verbal warning and demotion. (Tr. 745-746.) She denied discussing management with Mandaville. (Tr. 746.) In any event, there is no evidence that Respondent ever became aware of this conversation.

<sup>31</sup> The General Counsel did not ask Hager if she questioned Redman regarding the scan as he alleged, therefore, Redman's testimony stands undisputed.

department. (Tr. 277; 1061–1062.) Redman told Hembree and Noyes the same things as were contained in his written statement. (R. Exh. 22; Tr. 1062–1063.)

After the meeting, Noyes decided to terminate Hager's employment. Noyes testified that Hager was not discharged because she was complaining, but because she wouldn't stop. (Tr. 111.) Noyes also mentioned Hager's gossiping, making negative statements, and disrupting another employee [Redman] as the reasons for her termination. (Tr. 116.) Noyes stated that constant complaining was disruptive and not conducive to a good working environment. (Tr. 112.) Noyes decided to terminate Hager, as opposed to moving her somewhere else in the department, because she believed that Hager would have been disruptive elsewhere. (Tr. 110–111.) Noyes also noted that Hager was still on a performance improvement plan at the time of this decision. (Tr. 150.)

#### 12. Calderon's encounter with Bobbie Heine

On December 18, at a department staff meeting, Calderon approached Bobbie Heine, an MRI tech aide, at the Imaging Center. Calderon told Heine that she [Heine] was the reason that she [Calderon] was moved from the Imaging Center to the hospital, asserting that Heine had called Noyes and Campbell and told them things about her. (Tr. 1096.) Heine was surprised and upset by Calderon's statement because she had not made any such call. (Tr. 1096.) Heine told Calderon that this did not happen and it wasn't right and she would fix it or try to fix it. (Id.) Calderon told her not to worry about it and to let it go. (Tr. 1097.) Heine testified that she sat in the meeting for an hour and a half and it started to gnaw at her, because she did not think that Noyes and Campbell would do such a thing. (Tr. 1097–1098.)

After the meeting Heine returned to the Imaging Center and confided in an employee in the break room about her interaction with Calderon. (Tr. 1098.) Later, Noyes called Heine and assured her that she was not the cause of Calderon's transfer. (Tr. 1099.) Heine typed a statement about what had happened and sent it to Noyes. (R. Exh. 34.) Heine candidly testified that she did not intend for Calderon to be disciplined for her behavior.<sup>32</sup> (Tr. 1104.)

#### 13. Calderon is discharged

On December 18, Calderon was summoned to Respondent's human resources department, where she met with Noyes and Hembree. (Tr. 239, 304.) Calderon recorded this meeting using her cell phone.<sup>33</sup> (GC Exhs. 12 and 12(a).) During the meeting,

<sup>32</sup> I found Heine to be a very credible witness. Her testimony seemed truthful and she responded to all questions in a direct fashion. I have credited her version of events over the self-serving and rather nonsensical testimony given by Calderon at Tr. 391–394. Heine had no discernible reason to make a false accusation against Calderon. Furthermore, had Calderon made a general statement to the effect that people at the imaging center were talking about her, there would have been no reason for Heine to get angry or upset. As such, I credit Heine's version of this exchange over Calderon's.

<sup>33</sup> I do not credit Hembree's denial that the recording of the conversation is accurate. (Tr. 217.) Hembree admitted that everything contained in GC Exh. 12 was said during his conversation with Calderon. (Tr. 291.) Although Hembree said his notes regarding the meeting (GC

Noyes told Calderon that the decision to terminate her employment was made based on a few things that had happened that week, but specifically upon the incident with Heine. (GC Exh. 12(a), p. 2.) Noyes characterized Calderon's behavior as disruptive and undermining to leadership. (GC Exh. 12(a), p. 3.) Calderon claimed to not know what she had done. (Id.) Hembree advised Calderon that there would be no further discussion because a decision had been made. (Id.) Calderon then stated that she would be speaking to a lawyer about her termination, which she felt was a "civil rights violation." (GC Exh. 12(a), p. 5.) She began complaining that even though she had more time and experience, "white Caucasian people. . ." (Id.) Calderon was unable to finish her thought because Hembree cut Calderon off when she mentioned an attorney. (GC Exh. 12(a), p. 6.)

Calderon was presented with a notice of warning form concerning her termination. The form indicated that on December 18, Calderon approached a coworker [Heine] and falsely told her that the coworker was the reason for Calderon's transfer to the hospital. (GC Exh. 4.) Calderon's discharge paperwork also stated, "Ana continues to show a pattern of disruptive behaviors, lack of teamwork, professionalism, communication, attitude, and ownership. The number of behavioral issues involving Ana continues to increase and is causing major distractions and lowering morale in the Radiology Department." (GC Exh. 4.) On the form, Calderon responded that she felt that she was being targeted by management because she says what is on her mind, and because she is a Hispanic female, and that she was being retaliated against for speaking to Ryan Kennedy.

At the hearing, Noyes testified that Calderon was terminated for dishonesty, going up to another employee (Heine) and lying, and upsetting Heine, which resulted in disruption of the workplace for 3–4 hours. (Tr. 60–61.) Respondent did not seek out Calderon's version of events before terminating her. (Tr. 75.) In addition, Respondent gathered numerous statements from other employees about Calderon's behavior well after Calderon's discharge. (GC Exhs. 43, 44, 45, and 47.)

During the hearing, Respondent asserted other reasons for Calderon's discharge. Hembree testified that he was made aware of other incidents involving Calderon at a meeting with Campbell and Noyes prior to Calderon's termination meeting. (Tr. 241.) According to Noyes, Calderon reported that another employee was not working and coloring on work time; however, when a manager looked into the matter the other employee was found to be working. (Tr. 169–70.) Furthermore, Calderon was alleged to be using her cell phone to check Facebook at a time when she should have been working and receiving requested training on procedures at the hospital. (Tr. 169; 1111–

Exh. 16) are more accurate than the recording, I find his notes vague and, therefore, rely upon the recording. Calderon gave contradictory testimony regarding the security of the recording. Calderon initially testified that the recording was secure because her phone was password protected. (Tr. 309.) However, when Respondent's counsel asked to examine her phone, Calderon quickly backpedaled and said she had removed the password protection for the hearing that day; a qualification she did not mention earlier. (Tr. 318.) This contradiction, along with others mentioned elsewhere in this decision, have caused me to discredit parts of her testimony.

1113.) However, Noyes conceded that Calderon's discharge paperwork did not mention either of these incidents. (Tr. 181.)

#### 14. Hager is terminated

On December 20, Hager came to work as usual and was then taken to human resources, where she met with Noyes, Campbell, and Hembree. (Tr. 755.) Noyes, reading from Hager's discharge document, told Hager that she was being terminated because she made disparaging comments about imaging management and Respondent. (GC Exh. 8; Tr. 755.) The form also mentioned gossiping and making negative statements to a coworker [Redman]. Hager did not write any comments on the form.

After her discharge, Hager filed for unemployment benefits. (Tr. 758.) Her unemployment case has not been resolved and remains on appeal. (Tr. 758.) During Hager's unemployment hearing, Respondent raised Hager's taking a personal phone call among the reasons for her discharge. (Tr. 764–765.) Both Hager and Redman recalled Hager taking a personal phone call from her then-fiancée. (Tr. 1067–1068.) However, Redman testified that there was nothing wrong with Hager taking this phone call on work time. (Tr. 1070.) Redman even spoke to Hager's fiancée before Hager got on the line. (Tr. 1068–1069.) Hager's uncontroverted testimony also established that there was a second line available at their workstation and that no patients were waiting.<sup>34</sup> (Tr. 765–766.)

At the hearing, and as part of Hager's unemployment appeal, Respondent raised Hager's alleged failure to obtain a mammography license to conduct mammograms for self-referred patients at the Imaging Center.<sup>35</sup> (R. Exhs. 17, 18, 24, 25, 26, 27, 28, 29, 30, 32, 33; Tr. 758; 974–975.) Following her discharge, Calderon made an anonymous complaint to the credentialing authority regarding Respondent's failure to possess this license. (R. Exh. 19; Tr. 562–563.) Campbell testified that Respondent was unaware of Hager's alleged failure to properly obtain the license until after her discharge. (Id.) However, in a June 2013 email to Campbell and others, Hager advised the recipients of the physician name to be used ("Unlisted") when performing a self-referred mammogram.<sup>36</sup> (R. Exh. 31.) Also, although Respondent presented written statements from two employees blaming Hager for starting the self-referred mammography program, Respondent did not call either of these individuals as witnesses and I do not assign any weight to their written statements, which were not made under oath. (R. Exhs. 17, 18.)

<sup>34</sup> Therefore, I do not credit Hembree's testimony that Redman told him that he was unhappy with Hager tying up the department telephone, as this is inconsistent with Redman's and Noyes' testimony, with Redman's written statement, and with the discharge paperwork provided to Hager. (GC Exh. 8; R. Exh. 22; Tr. 278.)

<sup>35</sup> The performing of mammograms for self-referred patients (i.e. those without a referring physician or other healthcare provider) requires a special license and Respondent did not have such a license. (R. Exh. 32.)

<sup>36</sup> Therefore, I have drawn an inference that Respondent knew, or reasonably should have known, that such examinations were being performed in June 2013, prior to Hager's discharge. (R. Exh. 31.)

## Discussion and Analysis

### A. Witness Credibility

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, 335 NLRB at 622. My credibility findings and resolutions are incorporated into the findings of fact set forth above.<sup>37</sup>

### B. Legal Standards

In determining whether an employee's discharge is unlawful, the Board applies the mixed motive analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under *Wright Line*, the General Counsel must demonstrate by a preponderance of the evidence that the employee's protected conduct was a motivating factor in an employer's adverse action. The General Counsel satisfies his initial burden by showing (1) the employee's protected activity; (2) the employer's knowledge of that activity; and (3) the employer's animus. If the General Counsel meets his initial burden, the burden shifts to the employer to prove that it would have taken the adverse action even absent the employee's protected activity. See, e.g., *Mesker Door*, 357 NLRB 591, 592 (2011); *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004).

The employer cannot meet its burden merely by showing that it had a legitimate reason for its action; rather, it must demonstrate that it would have taken the same action in the absence of the protected conduct. *Bruce Packing Co.*, 357 NLRB 1084, 1086–1087 (2011), enfd. in relevant part 795 F.3d 18 (D.C. Cir. 2015); *Roure Bertrand Dupont, Inc.*, 271 NLRB 443, 443 (1984). If the employer's proffered reasons are pretextual—i.e., either false or not actually relied on—the employer fails by definition to show that it would have taken the same action for those reasons regardless of the protected conduct. *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007); *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003); *Limestone Apparel Corp.*, 255 NLRB 722, 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

### C. Did Calderon and Hager Engage in Protected

<sup>37</sup> Although not mentioned above, I did not find Jennifer Campbell's testimony compelling. She testified regarding certain key events, such as the decision to transfer Calderon to the hospital, in response to leading questions by Respondent's counsel. (Tr. 977.) She also sparred with counsel for the General Counsel on cross-examination. (Tr. 998–1000.) Additionally, much of her testimony was cumulative to that of Noyes.

### Concerted Activity?

#### 1. Discussion of concertedness and mutual aid or protection

To be protected under Section 7 of the Act, employee conduct must be both “concerted” and engaged in for the purpose of “mutual aid or protection.” *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 3 (2014). Although these elements are closely related, they are analytically distinct. Id.

As noted above, a respondent violates Section 8(a)(1) if, having knowledge of an employee’s concerted activity, it takes adverse employment action motivated by employee’s protected, concerted activity.<sup>38</sup> *Lou’s Transport*, 361 NLRB No. 158, slip op. at 2 (2014). Although Section 7 does not specifically define concerted activity, the legislative history of Section 7 reveals that Congress considered the concept in terms of “individuals united in terms of a common goal.” *Meyers Industries (Meyers I)*, 268 NLRB 493, 493 (1984). The question of whether an employee has engaged in concerted activity is a factual one based on the totality of the circumstances. *National Specialties Installations*, 344 NLRB 191, 196 (2005); and see, e.g., *Ewing v. NLRB*, 861 F.2d 353 (2d Cir. 1988). It is clear that the Act protects discussions between two or more employees concerning their terms and conditions of employment.

The Board has long found that activity is concerted where the evidence supports a finding that the concerns expressed by the individual employee are a logical outgrowth of concerns expressed by a group. *Amelio’s*, 301 NLRB 182 (1991). In certain circumstances, the Board has found that “ostensibly individual activity may in fact be concerted activity if it directly involves the furtherance of rights which inure to the benefits of fellow employees.” *Anco Insulations, Inc.*, 247 NLRB 612 (1980).

More recent Board cases have further clarified the proper analysis for determining whether activity is concerted. Whether an employee’s activity is concerted depends on the manner in which the employee’s actions may be linked to those of his or her coworkers. *Fresh & Easy Neighborhood Market*, supra at 3. The Supreme Court has observed that there is no indication that Congress intended to limit Section 7 protection to situations in which an employee’s activity and that of his fellow employees combine with one another in any particular way. Id. citing *NLRB v. City Disposal Systems*, 465 U.S. 822, 835 (1984).

Concertedness is analyzed under an objective standard. *Fresh & Easy Neighborhood Market*, supra, at 4. An employee’s subjective motivation for taking action is not relevant to whether that action was concerted. Id. Indeed, as noted by the Board, employees act in a concerted fashion for a variety of reasons, some altruistic and some selfish. Id. citing *Circle K Corp.*, 305 NLRB 932, 933 (1991), enf. mem. 989 F.2d 498 (6th Cir. 1993). Solicited employees do not have to share an interest in the matter raised by the soliciting employee for the activity to be concerted. Id. at 6, citing *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964), *Circle K*

<sup>38</sup> It is axiomatic that not all concerted activity is protected, including that which is unlawful, violent, or in breach of contract. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962).

*Corp.*, 305 NLRB at 933; *Whittaker Corp.*, 289 NLRB 933, 934 (1988); and *El Gran Combo*, 284 NLRB 1115, 1117 (1987) enf. 853 F.2d 996 (1st Cir. 1988). Further, the concerted nature of an employee’s complaint is not dependent on the merit of the complaint. Id. citing *Spinoza, Inc.*, 199 NLRB 525, 525 (1972), enf. 478 F.2d 1401 (5th Cir. 1973).

The concept of “mutual aid or protection” focuses on the goal of the concerted activity; chiefly, whether the employee or employees involved are seeking to improve terms and conditions of employment or otherwise improve their lot as employees. Id. citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). Employee motive is not relevant to whether the activity is engaged in for mutual aid or protection. *Fresh & Easy Neighborhood Market*, supra at 6. The analysis focuses on whether there is a link between employee activity and matters concerning the workplace or employees’ interests as employees. Id. Although personal vindication may be among the soliciting employee’s goals, that does not mean that the soliciting employee failed to embrace the larger purpose of drawing management’s attention to an issue for the benefit of all of his or her fellow employees. *St. Rose Dominican Hospitals*, 360 NLRB No. 126, slip op. at 4 (2014).

Furthermore, employee discussions that do not include representatives of their employer are protected. The Board has made clear that employee discussions with coworkers are indispensable initial steps along the way to possible group action and are protected regardless of whether the employees have raised their concerns with management or talked about working together to address those concerns. *Hispanics United of Buffalo*, 359 NLRB No. 37, slip op. at 3 (2012) enf. 734 F.3d 764 (8th Cir. 2013), citing *Relco Locomotives*, 358 NLRB No. 37, slip op. at 17 (2012). Protection is not denied because employees have not authorized another employee to act as their spokesperson. *NLRB v. City Disposal Systems*, 465 U.S. 822, 835 (1984).

#### 2. Calderon engaged in activities that were both concerted and for mutual aid or protection

As I have found above, Calderon discussed her December transfer to the hospital with other employees. As part of those discussions, Calderon raised both her dissatisfaction with Respondent’s schedule change resulting in her own transfer and her prediction that her replacement [Carter] would fail and be fired. Therefore, I find that under extant Board law, Calderon engaged in concerted activity for the purpose of mutual aid or protection.

An employee is engaged in concerted activity, as opposed to mere griping, if he or she is voicing concerns that pertain to working conditions affecting other employees, as well as the complaining worker. *Phoenix Processor Limited Partnership*, 348 NLRB 28, 46 (2006) affd. sub nom. *Cornelio v. NLRB*, 276 Fed. Appx. 608 (9th Cir. 2008), cert. denied 555 U.S. 994 (2008), citing *Alaska Ship & Drydock, Inc.*, 340 NLRB 874 fn. 1 (2003). See also *Tampa Tribune*, 351 NLRB 1324, 1334–1335 (2007) (employee’s complaints found concerted, not mere griping, where coworkers were also unhappy about the same issues) enf. denied on other grounds sub nom. *Media General Operations, Inc. v. NLRB*, 560 F.3d 181 (4th Cr. 2008). The

Board has held that discussions of changes in work schedules involve changes in when and where employees should work, and are as likely to spawn collective action as the discussion of wages. *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995), enf. denied on other grounds, 81 F.3d 209 (D.C. Cir. 1996). Therefore, the Board found that employee discussions of schedule changes were concerted, even though there was no suggestion that the discussions had the object of initiating group action. Id.

In this case, in Calderon's conversations with Kosten, Libby, Gilbert, Klinglesmith, and Crawford, she mentioned her dissatisfaction with the new work schedule, i.e. her reassignment to work at the hospital. She advised Campbell, one of Respondent's supervisors, that she was not happy about having to work at the hospital. At least one employee, Libby, sympathized with Calderon because working at the hospital is stressful. Furthermore, this new schedule involved moving not only Calderon, but Carter as well and Carter's proficiency as a tech would have affected the other employees at the Imaging Center. Under the authority cited above, these discussions regarding scheduling constituted concerted activity, even though I have not found that Calderon expressed an object of initiating group action.

The Board has also stated that employee conversations about job security are "inherently concerted." *Food Services of America*, 360 NLRB No. 123, slip op. at 3 (2014). The Board has found that one employee's warning to another that the latter's job was at risk constitutes protected activity under the Act. Id. at 4. Although Calderon did not convey her concern for Carter's job security directly to Carter, she did communicate it to at least four other employees, two of whom relayed the concern to department management. Additionally, others clearly shared Calderon's concerns for Carter's job security. Libby specifically testified that she was aware that Carter had been previously relieved of her duties at the Imaging Center. Consistent with *Food Services of America*, supra at slip op. 3-4, these conversations regarding the job security of a fellow employee would be considered concerted. As such, I find that Calderon was engaged in concerted activity in discussing her fears regarding the job security of her replacement at the Imaging Center.

Furthermore, I find that Calderon's statements to coworkers concerning the schedule change resulting in her transfer and her concern for Carter were undertaken for the purpose of mutual aid or protection. The Board has found that a conversation among employees in an attempt to protect one employee's employment satisfied Section 7's mutual aid or protection requirement. *Food Services of America*, 360 NLRB No. 123, slip op. at 4. Although unlike in *Food Services of America*, Calderon did not tell Carter of her concern for Carter's job security, she did advise numerous other employees of her concern. At least one (Libby) understood of the basis for Calderon's concern, i.e. that Carter had been previously fired from the imaging center. It further appears that Calderon had a reasonable basis for voicing her concerns regarding Carter's job security, as the credited evidence establishes that Carter was again relieved of her duties after only one shift replacing Calderon at the Imaging Center. Furthermore, Calderon's conversations regarding

what she deemed an unfair transfer to the hospital constituted activity undertaken for mutual aid or protection because the Board has found that discussion of work schedules with other employees constitutes concerted conduct engaged in for the purpose of mutual aid or protection. *Starrs Group Home, Inc.*, 357 NLRB 1219, 1221 (2011). Evaluating the evidence objectively, I find that Calderon's conversations with her coworkers about Respondent's schedule change and the likelihood of her replacement failing were undertaken for the purpose of mutual aid or protection.<sup>39</sup>

I do not find, however, that Calderon was engaged in concerted activity during her meetings with Hembree, Noyes, and Kennedy. None of the concerns raised by Calderon in those meetings, as I have found them above, were actually group concerns and she had not discussed them with anyone. Kosten, Libby, and Gilbert did not testify that they shared any of the same concerns, either with Noyes' and Campbell's leadership or with working conditions in the imaging department, as those expressed by Calderon in any of her meetings. Furthermore, there is no evidence that Respondent bore hostility toward Calderon's meetings with Noyes, Hembree, and Kennedy, as all of them invited her to share further concerns with them. As such, I find that the General Counsel has not established that any of Calderon's conversations with Hembree, Noyes, and Kennedy constituted concerted activity or were undertaken for the purpose of mutual aid or protection.

3. Hager did not engage in activities that were concerted or for mutual aid or protection

It is well established that employees have a Section 7 right to discuss discipline or disciplinary investigations with fellow employees. *Inova Health System*, 360 NLRB No. 135, slip op. at 9 (2014) enf. 795 F.3d 68 (D.C. Cir. 2015). As such, Hager's conversations with Redman were protected. However, the credited record evidence does not show that Hager's conversations with Redman constituted concerted activity or activity undertaken for mutual aid or protection.

Initially, it is worth noting that Hager's conversations with Redman took place while she was an employee of Respondent. In agreement with the General Counsel, I find that although Hager's discipline was issued while she was a supervisor, she remained on a performance improvement plan stemming from that discipline while she was an employee. Her performance improvement plan indicated that her actions as an employee could lead to her termination. Thus, discussions of her then-current discipline with Redman were protected under Section 7.

However, I cannot find that Hager's discussions with Redman were concerted. Hager's discussions with Redman did not mention any sort of group concern or action. Instead, Hager spoke only of her own discipline and performance improvement plan, which did not implicate other employees. Addition-

<sup>39</sup> Calderon's claims that she was expressing concerns over patient care and patient flow would not be considered as made for the purpose of mutual aid or protection. The Board has long held that employee concerns for the quality of patient care are not interests encompassed by the mutual aid or protection clause. *Summit Regional Medical Center*, 357 NLRB 1614, 1630 (2011), citing *Lutheran Social Service of Minnesota*, 250 NLRB 35, 42 (1980).

ally, Hager testified that she talked only to Redman and one other employee about her demotion and discipline while she was an employee of Respondent.<sup>40</sup>

The argument advanced by General Counsel on brief on this point is unpersuasive. The General Counsel cites the case of *Inova Health System* for the proposition that, “Hager, as an employee under the Act, had a protected concerted right to discuss her discipline with other employees.” (GC Br., p. 29.) Nowhere in *Inova Health System* does it state that employees have a “protected concerted right” to discuss discipline with other employees. Instead, the case states that, “It is well established that employees have a Section 7 right to discuss discipline or disciplinary investigations with fellow employees.” 360 NLRB No. 135, slip op. at 9 (2014). While such discussions are protected, there is no authority for the proposition that they are automatically deemed concerted without going through the analysis elucidated in *Fresh & Easy Neighborhood Market*.<sup>41</sup>

In *Fresh & Easy Neighborhood Market*, the Board stated that whether an employee’s activity is concerted depends on the manner in which the employee’s actions may be linked to those of his coworkers. 361 NLRB No. 12, slip op. at 3. The analysis focuses on whether there is a link between the activity and matters concerning the workplace or employees’ interests as employees. Id. at 4. Generally speaking, a conversation constitutes concerted activity when engaged in with the object of initiating or inducing or preparing for group action or when it has some relation to group action in the interest of employees. *Food Services of America*, supra at slip op. 3 (citations omitted). In this case, the General Counsel has not established a link between Hager’s conversations with Redman and matters concerning the workplace or employees’ interests as employees. Instead, the credited evidence shows that Hager’s conversations with Redman concerned matters unique to Hager and her situation. Therefore, I do not find that Hager engaged in concerted activity by discussing her demotion and other issues with Redman.

This case is also factually distinguishable from *Fresh & Easy Neighborhood Market*, *Food Services of America*, and *St. Rose Dominican Health Systems*. In *Fresh & Easy Neighborhood Market*, the Board found that an employee engaged in concerted activity by approaching coworkers to seek their support of her efforts regarding her complaint of sexual harassment. 361 NLRB No. 12, slip op. at 5. The employee did so by asking other employees, who were uncomfortable with the request and not in agreement with her cause, to sign a copy of her handwritten reproduction of an offensive whiteboard message. Id. at slip op. 2 and 5. The Board found that the soliciting employee’s action in seeking the support of her coworkers was concerted, even if the coworkers were annoyed and uncomfortable with the request, and the employee was acting for selfish reasons. Id.

<sup>40</sup> Hager’s conversations employees about her demotion which took place before she accepted the demotion and was still a supervisor, and not entitled to the Act’s protection, were not protected.

<sup>41</sup> Furthermore, the GC Br. did not analyze whether Hager’s conversations with Redman were concerted or engaged in for the purpose of mutual aid or protection.

at slip op. 5. However, in this case, Hager did not seek any sort of support from Redman. Instead, she was venting personal concerns regarding discipline given to her and her opinions of department management. The General Counsel has not shown how Hager’s concerns were either shared by her coworkers or could somehow affect the interests of Redman or others as employees. Therefore, I find *Fresh & Easy Neighborhood Market* factually distinguishable from the instant case.

In *Food Services of America*, the Board found that an employee was engaged in concerted activity when in instant messages and during many conversations in the preceding months, the employee told a second employee that the second employee’s job was in jeopardy. 360 NLRB No. 123, slip op. at 2. In that case, the Board found that the record established not only that the second employee’s job was in jeopardy, but that the second employee’s performance was negatively affecting a supervisor’s view of the first employee, because the first employee had recommended the second employee for hire. Id. When the second employee showed the instant messages to the supervisor, the supervisor fired the first employee. Id. at slip op. 3. The Board found that the first employee’s warning to the second that the latter’s job was at risk constituted protected conduct under the Act, even if the news upsets the latter employee. Id. at 4. In this case, however, there was no communication by Hager that Redman’s job was in danger. Hager did not even relay that her own job was in danger. Instead, Hager discussed her dissatisfaction with her discipline and other issues personal to her own interests. Therefore, I find *Food Services of America* factually distinguishable from the instant case.

In *St. Rose Dominican Hospitals*, an employee solicited a petition asking for signatures from employees who had concerns about a coworker’s attitude and conduct toward them and presented those concerns to management. 360 NLRB No. 126, slip op. at 1–2 (2014). After management advised the employee to stop collecting signatures, he continued to do so and his employer discharged him. Id. at slip op. 2. The Board found that the employee’s actions were unquestionably concerted because his petition sought to enlist the assistance of his coworkers, and 28 of them joined him in expressing concerns. Id. at slip op. 3. In this case, Hager did not seek the assistance of Redman, or anyone else, in addressing her concerns over her discipline, Noyes’ management style, or the other issues she discussed with Redman. Therefore, I find *St. Rose Dominican Hospitals* distinguishable from the instant case.

I am mindful that extant Board law has found concerted activity involving only a speaker and a listener and when no group action was induced or contemplated. See, e.g., *Salisbury Hotel*, 283 NLRB 685, 686–687 (1987) (finding employees’ complaints among themselves about a new lunch policy concerted where individual employees also protested to management); *Lou’s Transport*, 361 NLRB No. 158, slip op. at 2 (2014) (finding concerted conversations among drivers regarding shared safety concerns). However, under the facts of this case, I do not find Hager’s discussions with Redman concerted. Hager did not raise any concerns shared by Redman or any that would affect other employees’ interests. Her statements to Redman involved only her own discipline and opinions. Furthermore, there is no evidence that Redman said anything to

Hager expressing either support or disagreement with her opinions. Unlike Calderon, Hager did not raise any concerns for the job security of any employee or regarding work schedules. Therefore, I do not find that Hager engaged in concerted activity by discussing her complaints, including those surrounding her discipline and Noyes, with Redman.

Furthermore, I do not find that Hager's conversations with Redman were undertaken for employees' mutual aid or protection. Proof that an employee's action inures to the benefit of all is proof that the action comes within the mutual aid or protection clause of Section 7. *Fresh & Easy Neighborhood Market*, supra at 7, citing *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987) cert. denied 487 U.S. 1205 (1988). Indeed, the Board has found a broad range of employee activities regarding the terms and conditions of employment fall within Section 7's mutual aid and protection clause. *Fresh & Easy Neighborhood Market*, supra, at 7. See e.g., *Dreis & Krump Mfg.*, 221 NLRB 309, 314 (1975) enf. 544 F.2d 320 (7th Cir. 1976) (employees' complaints over supervisory handling of safety issue); *Tanner Motor Livery*, 148 NLRB 1402, 1404 (1964), enf. in relevant part 349 F.2d 1 (9th Cir. 1965) (employees' protest of racially discriminatory hiring practices); *Jhirmack Enterprises*, 283 NLRB 609, 609 fn. 2 (1987) (one employee's communication to another in an attempt to protect the latter's employment satisfies Sec. 7's mutual aid or protection requirement). However, in the instant case, Hager's conversations with Redman did not involve topics that inure to the benefit of all employees, such as safety, non-discriminatory hiring practices, or the protection of another employee's job. Instead, Hager's conversations dealt with Hager's personal opinions regarding her discipline, Noyes' management style, and other subjects of interest only to Hager. As such, I do not find that Hager engaged in conduct for the purpose of mutual aid or protection by repeatedly discussing her opinions with Redman.

#### D. Calderon's Discharge Violated the Act

Employers who discharge employees for engaging in protected concerted activity violate Section 8(a)(1) of the Act. The General Counsel alleges that Respondent violated Section 8(a)(1) when it discharged Calderon for engaging in protected concerted activity. Respondent argues, in its defense, that Calderon did not engage in any such protected concerted activity, but if she did, Respondent bore no animus toward it and proved that it had a legitimate business reason for her discharge. For the reasons discussed herein, I conclude that Calderon's engaging in protected concerted activity, including discussions with Libby, Kosten, Gilbert, Klingsmith, and Crawford about the schedule change in which she was transferred to the hospital and discussions with some of these same coworkers about Carter's job security, was a motivating factor in her discharge. I further find that Calderon did not, in the course of that protected activity, forfeit the Act's protection.

Having found that Calderon engaged in concerted activities for mutual aid or protection, and that Respondent was aware of her activities, I also find that Respondent bore animus toward those activities. I base this conclusion on the testimony of

Noyes and the language contained in Calderon's discipline and discharge documentation.

Noyes testified that it was not okay for Calderon to slander the reputation of a 20-year employee [Carter], and characterized Calderon's comments as disruptive and defamatory. She went on to testify that employees can make negative comments, as long as it doesn't cause disruption and it's not hurtful. She stated that Calderon's comments were not welcomed by other employees and took people away from focusing on their work. These statements evince animus against Calderon and her protected concerted activity on the part of Noyes.

I further find evidence of animus in Respondent's asserted reasons for discharging Calderon. Respondent disciplined Calderon on December 16 for making negative comments regarding her reassignment to the hospital and making inappropriate comments about the tech who would be replacing her. Although Calderon's discharge paperwork referenced her inappropriate statements to Heine, it also referenced Calderon's disruptive behavior, distractions, and lowering morale. I find that these are all veiled references to Calderon's protected concerted activity. The Board has expressed skepticism where an employer's justification for a discharge focuses on the employee's attitude. The Board has found evidence of animus where an employer cited that an employee was a "disruptive force in the workforce." *Edward's Restaurant*, 305 NLRB 1097 fn. 1 (1992), enf. subnom. *Skyline Lodge, Inc. v. NLRB* 983 F.2d 1068 (6th Cir. 1992). An employer's characterization of employee conduct as undercutting morale is often a veiled reference to protected concerted activity. See *Inova Health System*, 360 NLRB No. 135, slip op. at 5 (2014); *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 204 (2007), enf. 519 F.3d 373 (7th Cir. 2008). Analogously, in this case, I find that Respondent's references to Calderon's negative and inappropriate comments, pattern of disruptive behaviors, lack of teamwork, and lowering morale in the Radiology Department, establish Respondent's animus toward Calderon for engaging in protected concerted activity.

I find that Respondent's disparate treatment of Calderon establishes its animus toward her protected, concerted activity. Records produced by the General Counsel show that other employees of Respondent were not treated so harshly for similar behavior. For example, Respondent issued only warnings to employees for threatening violence to coworkers, using profane and sexually explicit language, and inappropriately touching, grabbing, and rubbing a coworker. (GC Exhs. 35, 36, 37, 39, 40, and 43.) In all of the discharges issued by Respondent for violations of its behavioral expectation, the discharged employees had received multiple warnings prior to discharge. (GC Exhs. 25, 26, 29, 33, and 34.) Evidence of disparate treatment supports a finding of animus. *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1186 (2011). Therefore, I find that Respondent's disparate treatment of Calderon supports an inference that animus against Calderon's protected concerted activity was a motivating factor in her discharge.

Furthermore, Respondent's multiple and shifting justifications for its termination of Calderon provide evidence of its unlawful motive. When an employer is unable to maintain a consistent explanation for its conduct, but rather resorts to shift-

ing defenses, “it raises the inference that the employer is ‘grasping for reasons to justify its unlawful conduct.’” *Meaden Screw Products Co.*, 336 NLRB 298, 302 (2001), citing *Royal Development Co. v. NLRB*, 703 F.2d 363, 372 (9th Cir. 1983). See also *Master Security Services*, 270 NLRB 543, 552 (1984) (animus demonstrated where an employer used a multiplicity of reasons to justify disciplinary action). Respondent advanced additional reasons for its discharge of Calderon at the hearing which were not included in Calderon’s discharge paperwork. For example, Noyes and Campbell testified that Calderon engaged in disruptive behavior in patient care areas; however, Calderon’s discharge paperwork does not mention patient care areas. Furthermore, Respondent asserted that Calderon was discharged for incidents in which she alleged a coworker was coloring on work time and was allegedly using her cell phone to access Facebook while patients were waiting.<sup>42</sup> Neither of these reasons appears in Calderon’s discharge paperwork or her appeal file. (R. Exh. 5.) Providing additional reasons for discharge at a hearing provides evidence of pretext. *Lucky Cab Co.*, 360 NLRB No. 43, slip op. at 6 (2014). Therefore, I find that Respondent’s multiple defenses provide evidence of its unlawful motive in terminating Calderon. Therefore, I find that the General Counsel has met his initial burden of persuasion under *Wright Line*.

Moreover, I do not find that Calderon lost the Act’s protection when discussing the schedule change resulting in her transfer to the hospital or her concerns for Carter. Employee statements are unprotected if they are shown to be maliciously untrue, i.e., if they are knowingly false or made with reckless disregard for their truth or falsity. *Food Services of America*, 360 NLRB No. 123, slip op. at 5. Employee statements are not unprotected if they upset or annoy coworkers. *Ryder Transportation Services*, 341 NLRB 761, 761 (2004) enfd. 401 F.3d 815 (7th Cir. 2005). There is no evidence of malice on the part of Calderon. Calderon posited to coworkers that management was sending Carter to the Imaging Center to be fired. The credited evidence establishes that Carter had been previously relieved of her duties at the Imaging Center. Furthermore, the evidence establishes that Carter was again relieved of her duties at the Imaging Center after working only one shift as Calderon’s replacement. There is no evidence that any other employee complained to Calderon or asked her to stop making these statements. Therefore, I do not find that Calderon’s statements regarding Carter were unprotected.

Having concluded that the General Counsel satisfied his initial burden under *Wright Line*, the burden shifts to Respondent to prove, as an affirmative defense, that it would have discharged Calderon in the absence of her protected, concerted activity. This burden may not be satisfied by reasons that are pretextual, i.e. false reasons or reasons not in fact relied upon for the discharge. Instead, the Board has held that a finding of

<sup>42</sup> Lead Employee Troy Becker testified at the hearing about these incidents. However, I found it unusual that Becker did not provide a written statement to Respondent as part of its investigation, as so many other employees did. There is no evidence in any of the exhibits in this case regarding the incidents in which Calderon allegedly complained about another employee coloring or was allegedly using Facebook on work time.

pretext defeats an employer’s attempt to meet its rebuttal burden. *Stevens Creek Chrysler Jeep Dodge*, 357 NLRB 633, 639 (2011), enfd. sub nom. *Matthew Enterprise v. NLRB*, 498 Fed. Appx. 45 (D.C. Cir. 2012).

I do not find that Respondent has carried its rebuttal burden in this case. In its defense, Respondent claimed that it discharged Calderon for dishonesty, upsetting Heine, and disrupting the workplace. However, I have found that Respondent’s references to Calderon’s disruptive behavior, distractions, and lowering morale are all veiled references to Calderon’s protected concerted activity. I have further found that Calderon was treated more harshly than other of Respondent’s employees. Additionally, I have found that Respondent’s multiple and shifting defenses belie its unlawful motive. Finally, based upon the disciplinary records submitted by the General Counsel, I do not find that Respondent would have discharged Calderon merely for her discussion with Heine. None of the termination records in General Counsel’s Exhibits 17, 25, 29, 33, 34, or 43 establish that Respondent discharged an employee for a single incident of dishonesty or upsetting a coworker. Respondent has not submitted any records demonstrating that it would have done so. Therefore, I find that Respondent’s proffered reason for discharging Calderon was pretextual, and that Respondent has failed to satisfy its *Wright Line* burden.

Respondent may have had a legitimate reason for discharging Calderon. However, under the Act, given the General Counsel’s showing of unlawful motive, that is insufficient. See *Bruce Packing Co.*, 357 NLRB 1084, 1086–1087 (2011). Instead, Respondent was required to show that it would have actually discharged Calderon absent her protected, concerted activity. As Respondent has failed to do so, I find that Calderon’s discharge violated Section 8(a)(1) of the Act as alleged.

#### *E. Hager’s Discharge did not Violate the Act*

I have found that the General Counsel failed to prove that Hager engaged in any concerted activity for the purpose of mutual aid or protection under the Act. Therefore, under *Wright Line*, the General Counsel has not established a prima facie case of discrimination and I recommend that the allegations of the consolidated complaint regarding Hager be dismissed.

#### CONCLUSIONS OF LAW

1. Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Respondent violated Section 8(a)(1) of the Act when it discharged Ana Calderon.
3. By engaging in the unlawful conduct set forth in paragraph 2 above, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Sections 8(a)(1) and Section 2(6) and (7) of the Act.
4. Respondent did not violate Section 8(a)(1) of the Act when it discharged Schon Hager.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily discharged employee Ana Calderon, must offer her reinstatement and make her whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatee for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>43</sup>

#### ORDER

The Respondent, Kingman Hospital, Inc., d/b/a Kingman Regional Medical Center, Kingman, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for engaging in protected concerted activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

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

(b) Make Ana Calderon whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of Ana Calderon, and within 3 days thereafter notify her in writing that this has been done and that the discharge will not be used against her in any way.

(d) File a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

(e) Compensate Ana Calderon for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other

<sup>43</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Kingman, Arizona copies of the attached notice marked "Appendix."<sup>44</sup> Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 18, 2013.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that paragraph 4(c) of the consolidated complaint is dismissed, as are paragraphs 4(a) and (d) as they relate to Schon Hager.

Dated, Washington, D.C. February 20, 2015

#### APPENDIX

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

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

#### FEDERAL LAW GIVES YOU THE RIGHT TO

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

<sup>44</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT discharge or otherwise discriminate against you for engaging in protected, concerted activities protected under Section 7 of the Act.

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

WE WILL, within 14 days from the date of this Order, offer Ana Calderon full reinstatement to her former job or, if that job no longer exist, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Ana Calderon whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest compounded daily.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate Ana Calderon for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Ana Calderon, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

KINGMAN HOSPITAL, INC. D/B/A KINGMAN REGIONAL  
MEDICAL CENTER