

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PRUITTHEALTH VETERAN SERVICES –
NORTH CAROLINA, INC.

and

RICKY EDWARD HENTZ, An Individual

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Case 10-CA-191492

THE CHARGING PARTY’S ANSWERING BRIEF TO THE
RESPONDENT’S EXCEPTIONS AND SUPPORTING BRIEF TO
THE ADMINISTRATIVE LAW JUDGE’S DECISION

Glen C. Shults
Attorney at Law
Law Offices of Glen C. Shults
959 Merrimon Avenue, Suite 204
P.O. Box 18687
Asheville, North Carolina 28814
Telephone: (828) 251-9676
Facsimile: (828) 251-0648
E-Mail: shultslaw@bellsouth.net

Attorneys for Charging Party
Ricky Edward Hentz

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I. PRELIMINARY STATEMENT

The Charging Party, Ricky Edward Hentz (herein “Charging Party” or “Hentz”), submits this Answering Brief to Respondent’s exceptions and supporting brief. Respondent has failed to raise any serious issue with Administrative Law Judge Keltner W. Locke’s (herein “Judge Locke” or “ALJ”) Decision. For the most part, Respondent seeks to overturn Judge Locke’s credibility resolutions, which are amply supported by the evidence. Respondent also argues that the Board should change the law regarding what it means for employees to engage in “concerted activities for . . . mutual aid or protection” under Section 7 of the Act. But Judge Locke’s legal analysis comports with the legal standards that have existed for many years, and the Board need not reconsider any previous decisions.

This brief has the following structure. Part II addresses the standard of review. Part III is a chronological recitation of the facts, which is largely drawn from the Charging Party’s post-hearing brief to the ALJ. Part IV addresses Respondent’s exceptions. Part V sets forth the conclusion.

II. STANDARD OF REVIEW

In its exceptions and supporting brief, Respondent repeatedly argues that the ALJ made erroneous credibility determinations that were unsupported by a preponderance of the evidence. See, e.g., Respondent’s Exception Nos. 1, 7, 12, 14 – 23, 25, 31, and 33 – 36. Respondent’s arguments are tantamount to a claim that the ALJ should have believed its witnesses over the General Counsel’s witnesses, or simply disbelieved the General Counsel’s witnesses at various points in their testimony. However, Judge Locke made carefully detailed findings as to the credibility – or lack of credibility – of the witnesses, based upon his evaluation of their demeanor and the credibility of their testimony. These findings covered the Charging Party (see, e.g.,

Administrative Law Judge’s Decision (herein “ALJD”), at page 15, lines 7-10; page 23, lines 6-9; page 27, lines 36-38); Jennifer Horton (see, e.g., ALJD, at page 16, line 31, fn. 11; page 29, lines 24-25; page 30, lines 22-23); Justin Morrison (see, e.g., ALJD, at page 17, line 35 – page 19, line 11; page 36, lines 10-13; page 45, lines 25-29; page 49, line 36 – page 50, line 21); Tammy Ellis (see, e.g., ALJD, at page 27, lines 36-38); Crysta Dickens (see, e.g., ALJD, at page 30, lines 22-23); Tonya Gray (see, e.g., ALJD, at page 36, lines 18 – page 40, line 4-19); and Della Mervyn (see, e.g., ALJD, at page 14, line 34 – page 15, line 19; page 42, line 14 – page 43, line 20). In making these credibility resolutions, the ALJ made clear that he was evaluating the witnesses based upon their demeanor and the credibility of their testimony. The Board “does not customarily overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces [the Board] that they are incorrect[.]” Samsung Electronics America, Inc., 363 NLRB No. 105, slip op. at 2 (2016). Thus, the traditional standard of review from Standard Dry Wall Products, 91 NLRB 544 (1950), enf’d, 188 F.2d 362 (3d Cir. 1951) is applicable to the ALJ’s credibility resolutions.

III. STATEMENT OF RELEVANT FACTS

A. The Charging Party’s Duties As The Scheduler

The Charging Party applied for work as a Certified Nursing Assistant (herein “CNA”) at the North Carolina State Veterans Home (herein “Veterans Home”) in Black Mountain, North Carolina on September 9, 2016.¹ (TR, 100-01)² During his job interview, the Director of Health Services, Mary Ellen Shepherd, asked Hentz about working as a Scheduler, after learning

¹ All dates hereafter refer to 2016 unless otherwise noted.

² References to the transcript of the testimony at the hearing are “TR” followed by the page number(s) at which the cited facts may be found. References to the General Counsel’s exhibits are “G.C. Exh. No.” followed by the exhibit number. References to the Respondent’s exhibits are “Resp. Exh. No.” followed by the exhibit number.

of his computer skills. Hentz expressed an interest in the position, and the following day, Shepherd offered him the job. Hentz accepted the position, and started work on September 20. Over his employment, Hentz worked primarily as the facility's Scheduler, but also as a CNA on an as-needed basis. (TR, 92, 103-06) It is undisputed that the Scheduler was not a supervisor under Section 2(11) of the Act.

The Charging Party worked Monday through Friday, from 8:00 a.m. to 4:00 p.m. (TR, 96). Hentz testified that the facility's administrator, Justin Morrison, told him that he was not concerned about what time he arrived at work, so long as he completed his scheduling duties, and did not work overtime. (TR, 200) Hentz's time records show that he regularly clocked into work after 8:00 a.m. for the entire time that he worked as the Scheduler, from September 20 to December 5, when he was unlawfully demoted to a full-time CNA position. (Resp. Exh. No. 7)

B. The Charging Party's Discussions With Co-Workers About Working Conditions

The Scheduler position provided the Charging Party with a platform for communicating with staff employees about scheduling matters and their dissatisfaction with their jobs, primarily staffing shortages and racial bias against African-American workers. The record shows that Hentz had conversations with hourly staff about issues ranging from staffing shortages (e.g., Tonya Fleming (TR, 113-14); Lucinda Geter (TR, 114-15); Tiffanie Robinson (TR, 115-16)); to unfair job assignments (e.g., Rick Luce (TR, 117-19)); to scheduling problems (e.g., Brandi Sigmund (TR, 121-23)); to racial bias against African-American workers (e.g., Marie Williams (TR, 111-12); Jennifer Horton; Danisa Taylor; Tracy Johnson; Stephanie Robinson; Toya Fleming; Jimisha Black; Kristen Davis; and Heaven-Leigh Davis

(TR, 139-40)).³

The Charging Party relayed these concerns to Justin Morrison, who was dismissive of them. (TR, 123-27, 143-44) At times, Morrison said that he was “working on it” when Hentz notified him about the employees’ concerns with staffing levels. (TR, 115) At other times, Morrison lashed out at Hentz in an annoyed, even angry manner. Thus, when Hentz relayed Brandi Sigmund’s complaints about scheduling, Morrison told him to “stay out of it, stay in your lane, those are Brandi’s problems” (TR, 125-26) This statement was held to be an unlawful threat against Hentz for engaging in protected concerted activity, to which no exception was filed. See ALJD, at pages 21, line 6 – page 25, line 4. When Hentz relayed Rick Luce’s complaints about newly-hired CNAs getting preferable job assignments over senior CNAs, Morrison threw down his pen, and exclaimed to Hentz, that “this is my f---ing building, and I’ll do what the f--- I want.” (TR, 119-21) Although the ALJ did not find the statement to be a

³ In its exceptions, Respondent challenges the ALJ’s factual findings as to Hentz’s testimony regarding his conversations with these individuals as based upon erroneous credibility determinations and unsupported by the preponderance of the evidence. Additionally, Respondent challenges the factual findings on the grounds that that ALJ failed to make any findings as to whether the employees’ alleged concerns were based upon an “honest and reasonable belief” under NLRB v. City Disposal Systems, 465 U.S. 822, 840 (1984). See, e.g., Respondent’s Exception Nos. 4-5, 8, 10, 14, 17, 21, 23, and 28-29. Respondent argues that the General Counsel or Charging Party should have called these witnesses to testify in person. See, e.g., Respondent’s Brief In Support Of Exceptions (herein “Respondent’s Brief”), at pages 16-17 (regarding Rick Luce); page 19 (regarding Brandi Sigmund); and pages 27-28 and 30 (regarding Linda Brinson, Danielle Jeter and Marie Williams). At the same time, Respondent acknowledges that such testimony, specifically regarding Rick Luce, was appropriately allowed as part of the General Counsel’s effort to establish that the adverse employment actions against Hentz were in retaliation for his protected activities. See Respondent’s Brief, at page 17, fn. 2. These arguments are without merit for the following reasons: first, Hentz’s testimony was not hearsay because it was not offered to prove the truth of the matter asserted, but to establish protected activity, and the factual basis for Hentz’s later complaints to Respondent’s local and corporate management, and second, Respondent never objected to this testimony as hearsay, so any such objections have been waived. See Rule 103(a), Fed. Rules Evid.

violation of Section 8(a)(1) of the Act, he did acknowledge that it was “an emphatic proclamation that Morrison felt free to do as he pleased.” See ALJD, at page 19, lines 28-29.

C. The Ice Cream Incident And The Charging Party’s Challenge To Racial Bias Against African-American Employees

The Charging Party received a written “coaching” from a low-level supervisor named Amy Ferguson on or about Friday, November 4. The occasion for the disciplinary action was an ice cream social for the facility’s residents. Ice cream was served to both residents and staff in a common area. Hentz got a bowl of ice cream, and started walking back to his office, stopping by Administrative Assistant Diane Clark’s office to answer a question. Amy Ferguson, who was the Activities Director, spotted Hentz in Clark’s office. A few minutes later, Ferguson called Hentz into her office, and read to him a “verbal coaching” for eating ice cream in a common area, rather than a designated eating area. Hentz refused to sign the document because employees regularly consumed food in non-designated eating areas. The ice cream social took place in a common area that was not designated for food consumption. (TR, 127-34)

Later that day, Hentz had a conversation with two African-American employees named Danielle Jeter and Linda Brinson about the coaching from Ferguson. Hentz expressed his belief that Ferguson acted in a racially biased manner. Jeter and Brinson told Hentz that they had received write-ups from Ferguson that same day. They further expressed their opinions that Ferguson was biased against African-American employees based upon her general behavior towards black employees, and their own write-ups. (TR, 136-41)

That evening, at about 6:00 – 6:30 p.m., Hentz called Justin Morrison about the coaching. At the time, Morrison was away from the facility, on business. Hentz told Morrison about the coaching, and his belief, and the observations of other African-American employees, that Ferguson was biased against black employees. Hentz told Morrison that he intended to call

Respondent's corporate offices. Morrison replied, "You can call corporate if you feel like that's what you need to do. I'm not telling you not to call corporate." (TR, 134-35, 141) From this remark, it is reasonable to assume that Morrison was apprehensive about Hentz's intentions.

On Monday, November 7, Hentz called the corporate offices, and spoke with Genice Campbell about the write-up from Ferguson, and the concerns with racial bias against African-American workers. According to Campbell's summary, Hentz described his own disciplinary action, the reprimand that Ferguson issued to Danielle Jeter, the willingness of Danielle Jeter and Linda Brinson to attest to their experience with racial discrimination, and Ferguson's "history of nitpicking African-American employees." (TR, 135-36, 145-46; G.C. Exh. No. 6)⁴ Respondent did not call Genice Campbell as a witness at the hearing.

Campbell transmitted her summary to Tammy Ellis, who was a Regional Partner Services manager with responsibility for the Veterans Home. After reviewing the summary, Ellis called the Charging Party. The purpose of Ellis' call was to discuss the complaint that Hentz submitted to corporate. Hentz and Ellis testified about the conversation. Judge Locke noted that both witnesses did not disagree about the substance of their conversation. Ellis admitted that Hentz complained generally about racial bias at the facility, and specifically, the racial bias of Ferguson in issuing the coaching over the ice cream incident, and the racially-motivated conduct of another supervisor toward black workers. Ellis was dismissive of Hentz's claims of racial bias, but said that she would conduct an investigation at the facility. (TR, 146-47, 235-36) Ellis testified that she was unable to investigate Hentz's complaint because of illness, so she asked an African-American human-resources manager named Della Mervyn to conduct the investigation. (TR, 353, 423-24)

⁴ The summary made of Hentz's telephone call indicates that it was received on Wednesday, November 9. (G.C. Exh. No. 6)

The conversation between Hentz and Ellis became heated over the issue of racial bias. Hentz testified about his frustration with Tammy Ellis' dismissive response to his racial bias claims. Respondent faulted Hentz for telling Ellis that he was sorry that he could not tell her that they just called me a "n-----" to make it easy for her. (TR, 146-47, 234-35, 420-24) As Judge Locke observed, Hentz made this remark in response to Ellis' negative attitude, and to make clear that racial discrimination "should not have to be that open and unmistakable for management to recognize it." See ALJD, at page 27, lines 28-29.⁵

D. Della Mervyn's Investigation

On November 21, Della Mervyn came to the Veterans Home for the investigation of the Charging Party's complaint. Mervyn notified Justin Morrison that she would be coming. (TR, 354) Morrison was plainly anxious about the investigation, which he knew involved issues of racial bias. Hentz testified that Morrison came to his office that morning; said that he heard that someone was coming to the building to do an investigation; and asked Hentz whether he wanted to tell him what this was about. Concerned about his job security, Hentz gave a guarded answer, stating that there were staff who had concerns. The ALJ credited Hentz's testimony, and found that Morrison became visibly upset at his response, and left the office. (TR, 148-49; ALJD, page 28, line 35 – page 29, line 1)

Jennifer Horton, an African-American woman who previously worked as the facility's Senior Care Partner, provided even more compelling testimony about Morrison's anxiety. Horton testified that during a management meeting, Morrison stated that a corporate official

⁵ On November 7, Justin Morrison issued Hentz a second-step disciplinary warning. (G.C. Exh. No. 4) Although Respondent had a four-step progressive discipline procedure, Morrison skipped the first step, and went immediately to a second-step written warning. There was a significant amount of testimony and documentation at the hearing regarding the legitimacy of the warning; however, the General Counsel did not allege that the warning violated the Act, and the ALJ did not discuss it in his decision.

would be at the Veterans Home the next day. The following morning, Morrison came to Horton's office and asked if Horton knew what the hell was going on. Horton replied that she did not. Morrison then asked Horton if she thought that he was racist. Horton thought that Morrison was racially biased, but told him no. Morrison then said that Hentz apparently thought that he was racist. Horton responded by stating that people will sometimes say things out of a feeling that they are not being heard, and suggested that Morrison speak to Hentz. Morrison said that he had spoken to Hentz, but that Hentz wouldn't tell him anything. (TR, 277-83, 301-03)

The Charging Party testified about the interview with Della Mervyn, and the issues of racial bias that he raised. (TR, 149-51, 153-56) Della Mervyn made notes of her interview with Hentz, about which she testified at trial. Respondent focuses on Hentz's alleged statement that he was there to talk about himself, and not the other employees. But Mervyn testified that Hentz recounted a variety of complaints about racial bias against himself and other black workers at the facility, and the racially hostile atmosphere in the work environment. (TR, 356-58, 369-72)

Thus, Mervyn admitted that Hentz addressed the following matters at the meeting:

- (a) Hentz addressed his perception of institutional racism at the Veterans Home. (TR, 374-76; Resp. Exh. No. 9)
- (b) Hentz stated that the Veterans Home was filled with "negative energy," although Mervyn claimed that she did not understand the comment to be a reference to racial bias. (TR, 376)
- (c) Hentz described the incident with Amy Ferguson, and the fact that two other African-American employees, Danielle Jeter and Linda Brinson, received write-ups from Ferguson on the same day as the ice cream incident. It was only after the meeting that Mervyn investigated the race of Danielle Jeter, and determined that the employees identified by Hentz were both black. With respect to Danielle Jeter, Hentz told Mervyn that she had been disciplined for wearing certain clothing for which Caucasian employees wearing similar clothing had not been disciplined. (TR, 377-85)
- (d) Hentz told Mervyn that he had discussed the issues about Amy Ferguson with Morrison, but that Morrison had not addressed them. (TR, 385)

- (e) Hentz raised the issue of staffing shortages with Mervyn, who acknowledged that the Veterans Home had staffing challenges, and that it was an issue throughout the assisted-care industry. (TR, 385)
- (f) Hentz raised an issue as to why he had been counseled in the ice cream incident while Caucasian employees did not receive disciplinary action for eating in non-designated areas. (TR, 385-86)
- (g) Hentz told Mervyn that African-American workers had a particularly difficult time dealing with a Caucasian supervisor named Karen Shook, and that nearly all of them who worked under Shook had quit. (TR, 388-90)
- (h) Hentz also told Mervyn that the friendship between Karen Shook and Missy, the business office manager, caused an adverse impact on the working conditions at the Veterans Home. (TR, 390-93)
- (i) Hentz mentioned that he understood from other employees that the Veterans Home had received a number of complaints on the corporate hotline, some of which involved racial discrimination at the facility. Mervyn acknowledged that in fact, there had been several such complaints, and that there was “a tenor in a couple of the complaints that had to do with race[.]” (TR, 393-95)
- (j) Hentz referenced an incident in which there had been inappropriate interactions between CNAs involving African-American workers Toya Fleming and Keytonia Cartledge. (TR, 396-99)
- (k) Hentz also discussed the disciplinary action regarding the manner in which he conducted his scheduling duties. Mervyn acknowledged that she investigated the matter, and found no documentation indicating any shortcomings in the manner in which Hentz was performing his work duties. (TR, 399-02)
- (l) Hentz informed Mervyn that employees were fearful that their licensing and certifications as health care workers could be adversely affected by untruthful accusations from their co-workers. (TR, 406-07)
- (m) Hentz told Mervyn that certain residents displayed racially biased behavior toward African-American employees. (TR, 407-09)

Judge Locke found that Della Mervyn acknowledged that Hentz raised the concerns of other black employees about racial discrimination, and not just his own, during the interview.

See ALJD, at page 15, lines 11-19. Judge Locke further found that Mervyn’s investigation was a sham, and intended to protect the employer’s interests rather than to conduct a bona fide

investigation into employee complaints of racial bias. See ALJD, at page 42, line 14 – page 43, line 15. Respondent did not file exceptions to any of the ALJ’s factual conclusions about this aspect of Mervyn’s investigation.

In sum, Hentz’s protected concerted activity had the following trajectory: (a) Hentz had a number of conversations with his co-workers about various personnel issues at the Veterans Home; (b) Hentz relayed these complaints to Justin Morrison, who was dismissive of them; (c) Hentz also had conversations with a number of black employees about racial discrimination at the Veterans Home; (d) Amy Ferguson issued a written coaching to Hentz, which he believed was racially motivated; (e) Hentz spoke with Danielle Jeter and Linda Brinson later that same day, both of whom had received written discipline from Ferguson on the same day; (f) Jeter and Brinson expressed their opinions that their disciplinary actions were racially motivated, and their observations about Ferguson’s racial behavior toward black employees; (g) Hentz called Justin Morrison that evening, and relayed his concerns about Ferguson’s racially-motivated discipline issued to Jeter and Brinson, and him; (h) Hentz submitted a complaint to the employer’s corporate offices the following Monday, again relaying the same issues that he, and Jeter and Brinson, had with Ferguson’s racial conduct; (i) Hentz’s complaint was passed on to Tammy Ellis, who had a combative telephone conversation with Hentz about his complaint; (j) Hentz was interviewed by Della Mervyn in which he presented the same complaints, and those from other black employees, regarding racial bias at the Veterans Home, and other personnel issues. Thus, the undisputed evidence shows that Hentz made complaints about racial discrimination against himself and other identified black workers, and other personnel issues affecting the staff to his immediate supervisor, and then to higher management, to no avail.

Justin Morrison's response to the Charging Party's complaints of racial discrimination and other personnel issues, and the ensuing investigation, was swift and vengeful. After finishing her investigation, Mervyn met with Morrison and asked him some "very general questions, nothing too specific[.]" although other evidence demonstrates that he was fully aware of Hentz's complaints about the management of the facility, and what he intended to do about it. Jennifer Horton testified that one or two days after Della Mervyn's visit, she went to Morrison's office on a work-related matter. Upon arrival, Horton found Morrison there with Crysta Dickens. Morrison's face was red, his forehead was wrinkled, and his fist was clenched. Morrison said that he was "tired of Ricky's shit. It's always something with him." Horton then left the office with Crysta Dickens. As they were walking down the hallway, Dickens told Horton that "corporate had told them to let [Hentz] go slowly because he can be dangerous and to document appropriately." Dickens said that they were going to use Hentz's attendance to get rid of him. Dickens further stated that "[Morrison] had to be careful because this was the second complaint about race." The first complaint had been filed by an African-American employee named Danisa Taylor who had found a cotton ball stuffed into a flower in her office. Dickens cautioned Horton not to "say anything . . . especially with this." (TR, 285-88, 305-06)

Notably, Respondent did not file any exceptions to the ALJ's factual findings regarding Jennifer Horton's testimony regarding her encounter with Morrison in his office one or two days after Della Mervyn's investigation, or Horton's account of her conversation with Crysta Dickens after leaving Morrison's office. See ALJD, at page 29, line 3 – page 30, line 38; page 33, line 27 – page 33, line 36; page 43, lines 35-39.

E. The Charging Party's Final Warning

Respondent wasted no time in setting about to terminate the Charging Party based upon the pretext of his attendance. On November 28, Justin Morrison issued a final written warning, dated November 21, for missed punches. (G.C. Exh. No. 7) Attached to the warning was a copy of Hentz's Time Card Report, which had been printed on November 21, at 6:30 p.m. (TR, 52-58; G.C. Exh. No. 7) This was the same day that Della Mervyn appeared at the Veterans Home for her investigation. After receiving the warning, Hentz contacted Della Mervyn, Tammy Ellis, and Genice Campbell, and complained that the write-up was in retaliation for his previous call to corporate. Mervyn and Ellis agreed to "check on it," but Hentz never received any follow-up from either of them. (TR, 166-68, 170)

Respondent argued that the disciplinary action was legitimate because of Hentz's poor attendance. There are a number of problems with this argument, which were identified in the AJLD, and to none of which Respondent filed exceptions. See ALJD, at page 30, line 34 – page 31, line 17; page 34, line 42 – page 35, line 24. First, Morrison testified after becoming Hentz's direct supervisor, he spoke to Hentz on a number of occasions about his various attendance infractions, but never produced any documentation confirming these communications. (TR, 468; 498-501; 586-90) Second, Morrison testified that the final warning was intended to discipline Hentz for all of his previous attendance infractions, although the document only identified a few missed punches. (TR, 514-15; 591-92) According to Morrison, the identified dates established a "pattern" of attendance infractions. Morrison testified that he received information about Hentz's attendance infractions "multiple times a week for a period of a couple of months." (TR, 513-16; G.C. Exh. No. 7) But if so, Morrison never explained why he waited so long to issue any disciplinary action to Hentz for his attendance. Third, Morrison never explained why he

printed Hentz's time record on November 21, the same day that Della Mervyn conducted her interview of Hentz. Fourth, Morrison never explained why he waited until November 28, to issue the final warning if Hentz's attendance had been so unacceptable for so long, or why there was no written or electronic documentation confirming these alleged conversations about his attendance, or why he failed to follow the progressive discipline procedure for Hentz's attendance infractions. (TR, 611-618) Fifth, Morrison never adequately explained why he skipped steps in its progressive discipline procedure when he issued Hentz a final warning for attendance on November 28. Morrison testified that the attendance policy allowed management the discretion to be "flexible" with progressive discipline. (TR, 474-75, 613-14) But the attendance records introduced at the hearing indicated that the progressive discipline was typically followed. Respondent did issue an initial, first-step verbal warning to the majority of employees for attendance infractions.⁶ In fact, Morrison admitted that an employee could expect that Respondent would follow the progressive discipline procedure contained in the attendance policy. (TR, 618) Respondent did not file exceptions to any of the factual findings made by the

⁶ Respondent presented a large number of disciplinary actions against employees for attendance infractions. It should be noted, however, that Respondent did issue an initial first-step, verbal warning to the following employees for attendance infractions: Michelle Robinson; Brianna Smith; Paul Poore; Chad Harper; Suzanna Jolinski; Jimisha Black; Stephanie Gibbs; Brittany Cutshall; Barbara Millwood; Virginia Sparks; Tina Quinn; Jania Wilson; Vickie Cole; Frank McElrath; Celia Crosby; Bernice Harston; Heaven-Leigh Davis; David Creasman; Samatha Anderson; Mary Shelton; Amy Conrad; Hallie Evans; Kristen Davis; Michael LaPlante; Vickie Reynolds; Judy Dockery; Chandra Gardner; Shannon Kelly; Tiffanie Wells-Robinson; Corney Kirl; Gambrell Williams; Ahmad Gaines; Nancy Taylor; Brittany Kirby; Hala Kahlil; Rasalia Marett; Linda Brinson; Shamioka Franklin; Dakota Snyder; James King; Debra King; Horace Wells; Robert Reed; Shelby Ballard; Shirley Dalton; Stephanie Harris; Meghan Bergmann; Jessica Penland; Tamara Ray; Tyson Holloway; Kendall Jenkins; and Nancy Taylor.

Respondent skipped steps in its progressive discipline procedure when it issued Hentz the final warning for attendance on November 28. Morrison testified that the attendance policy allowed management the discretion to be "flexible" with the progressive discipline (TR, 474-75; 613-14), but the attendance records indicate that it was typically followed. Morrison admitted that an employee could expect that Respondent would follow the progressive discipline procedure contained in the attendance policy. (TR, 618)

ALJ regarding the timing of the final warning, Morrison's delay in issuing disciplinary action, or Hentz's alleged attendance problems. See ALJD, at page 34, line 41 – page 35, line 7.

Judge Locke also noted the discrepancies in Morrison's own testimony as evidence of pretext. Morrison attempted to bolster his criticism of Hentz's job performance by alleging a number of complaints about his job performance, none of which were corroborated by a single document. In that regard, Morrison claimed that he received complaints on a weekly basis from RN supervisors, nurses, and CNAs about Hentz's performance of his scheduling duties. (TR, 485-86) Morrison further claimed that he received four (4) to five (5) letters per day from staff complaining about Hentz. Yet, Morrison admitted that he did not have a single one of these documents to corroborate this assertion, and none were submitted into evidence. (TR, 494, 580) See ALJD, at page 17, line 35 – page 19, line 11; page 35, lines 9 – 24. Respondent did not file exceptions to any of these factual findings.

The exaggerations about the Charging Party were not limited to Justin Morrison. Morrison testified that he received verbal complaints from the nursing staff, to the point that they requested a meeting with Morrison. However, only one of the identified complainers testified, a registered nurse named Tonya Gray. Gray testified that Hentz had ordered her not to make any changes to his schedule, and that she feared that this put her nursing license in jeopardy because as a registered nurse, she could not take orders from a CNA, and that Hentz was threatening her job. However, on cross-examination, Gray admitted that the facility's policy did not allow her to make changes to the schedule, and that she knew that Hentz had no authority to take any adverse employment action against her. Gray further admitted that she got along well with Hentz, except for the one conversation in which he disputed the schedule that she sought to change. (TR, 663-65) Judge Locke incorporated these facts into his factual findings rejecting Gray's testimony.

See ALJD, at page 36, line 17 – page 40, line 22. Respondent did not file exceptions to any of these factual findings.

F. The Charging Party’s Demotion

Respondent demoted the Charging Party from Scheduler to a position as CNA performing patient care on a full-time basis at a meeting on December 5. Hentz testified that Morrison told him that there was “too much stuff going on with the schedule,” and that he couldn’t keep having conversations with him every day about the schedule. The following day, Hentz accepted the demotion to the CNA position, as he had no other option in order to maintain his employment. (TR, 163-68, 171-72, 183-84, 528-34, 579-80, 608-08) The ALJ made a number of factual findings in support of his conclusion that Respondent’s asserted reasons for demoting Hentz were pretextual. See ALJD, at page 44, line 34 – page 46, line 1.

G. The Events On December 9

The Charging Party was terminated on December 13. But there was a dispute in the record as to the events leading up to the Charging Party’s termination, and specifically what did, or did not happen on December 9. Hentz testified that on December 9, he reported to work; clocked in; and discovered that he was not on the schedule. Hentz then clocked out, and went home. (TR 239-41) The time records show that Hentz clocked in at 2:26 p.m., and clocked out four (4) minutes later, at 2:30 p.m. (G.C. Exh. No. 12)

Justin Morrison gave a different, and completely uncorroborated account. Morrison testified that he received a call from a nursing supervisor named Mary Bosenberry who said that Hentz failed to appear for his shift at 2:00 p.m. Morrison waited a few minutes, and walked from his office in the facility’s administration area to the Alpha unit, where he found Hentz standing in the hallway, charting information into a computer. Thus, by Morrison’s own

admission, Hentz had already clocked into work, and walked to the Alpha unit to begin his shift. Morrison did not say anything to Hentz, but walked on down the hall, and noticed a call light was illuminated at a resident's room. Morrison walked into the room, and asked if the resident needed assistance. The resident allegedly pointed out Hentz, and stated that he did not want Hentz to attend to him. The resident allegedly stated that when Hentz responded to a call light, he just entered the room, and cut off the light without providing service. At that point, Morrison walked out of the room, and confronted Hentz as to why he was late to work, and why he failed to respond to the resident's call light. Hentz allegedly became upset; lifted his arms; said that he was done; and walked off the job, although it is undisputed that he walked from the Alpha unit to the time clock, and clocked out at 2:30 p.m. (TR, 534-37) According to Morrison, all of this activity took place in the space of four (4) minutes, from 2:26 p.m. to 2:30 p.m. (TR, 570-71) Morrison testified that he spoke with Tammy Ellis, Missy Ellege, and Crysta Dickens about the incident, and all of them agreed that the Charging Party should be terminated for attendance and performance. (TR, 537-41)

There are several points to note about Morrison's account which undermine its credibility. First, Morrison prepared the termination notice, which states only that the reason for Hentz's termination was attendance. Nothing was said about the alleged incident, even though it allegedly precipitated Hentz's discharge. (TR, 580-81; G.C. Exh. No. 11) Second, Missy Ellege was not called as a witness at the hearing even though she allegedly conferred with Morrison about the incident. Third, although Tammy Ellis was a witness at the hearing, she did not testify about any communications with Morrison about the incident on December 9. Fourth, Crysta Dickens gave hearsay testimony that she believed that Morrison had told her that Hentz had walked out on a shift. She had no personal knowledge about the incident. (TR, 691) Fifth,

Respondent did not call Mary Bosenberry, or any other percipient witnesses on the Alpha unit, to testify about the incident. Sixth, there was no written or electronic documentation prepared about the incident. (TR, 581-82) Seventh, Respondent's position statement to the NLRB does not mention the incident. (G.C. Exh. No. 15) Eighth, Morrison sent an e-mail to Tammy Ellis on December 13, advising that Hentz had accepted the CNA position without any mention of the incident, or his suspension on December 9. (TR, 581-85; G.C. Exh. No. 16) Ninth, although Morrison testified that Hentz was on suspension as of December 9, the time records show that Hentz worked his regular shift, without incident, on Monday, December 12, from 2:01 p.m. to 10:00 p.m., with a lunch break from 8:00 p.m. through 8:30 p.m. Then, on Tuesday, December 13, Hentz worked from 2:01 p.m. until he was sent home by Morrison at 7:21 p.m. Finally, Jennifer Horton, whose job duties involved dealing with complaints from residents and family members about inadequate care, testified that she never received any complaints from residents or family members about Hentz. (TR, 271-72, 291-92, 304)

Noting some of these discrepancies, Judge Locke found that Morrison's account of the events on December 9 was fabricated, and that he had committed perjury in concocting his account. See ALJD, at page 46, lines 36 – 41; page 47, line 40 – page 50, line 21. Respondent did not except to the factual findings made by Judge Locke regarding the events on December 9, including his conclusion that Morrison had committed perjury.

H. The Charging Party's Termination

The Charging Party was terminated following the events on December 13. On that date, Hentz appeared for work at 2:01 p.m., and worked without incident until the early evening. At that time, Hentz engaged in a conversation with Lucinda Geter, Nicky Bartlett, and Heather Long in the dining room area about insufficient staffing. (There may have been several residents

in the dining room, although neither Hentz nor Lucinda Geter could recall any being in the area.) This conversation was corroborated by testimony from Heather Long and Lucinda Geter. (TR, 173-80, 264-69, 317-21) While they were discussing insufficient staffing, a supervisor named Jackie Walker approached, and rebuked them for discussing staffing issues. Walker sternly told them, “[Y]ou guys are not short staffed; two is plenty on the floor.” Hentz replied, “[n]o, there is not enough on the floor and the residents feel differently. (TR, 176-77)

After Jackie Walker delivered her rebuke, she had the employees sign an in-service memorandum unrelated to this case, and walked away. Hentz and Heather Long observed Walker going in the direction of the administrative offices. About one hour later, Justin Morrison approached Hentz, and told him that he had been disruptive all day, and to clock out and go home. The time records show that Hentz clocked out at 7:21 p.m. that evening. The following day, Morrison called Hentz, and fired him for attendance. No other reason was given for the termination during the conversation, or in the termination notice. (TR, 173-82, 264-69, 610-11; G.C. Exh. No. 12)

Jennifer Horton testified about an encounter with Justin Morrison on the day of the Charging Party’s termination. Horton went to a small conference room to let her managers know that she was leaving work for the day. Horton found Justin Morrison, Crysta Dickens, and a corporate nurse name Kathleen Banks there. Morrison was upset; his face was red; and he was rubbing his head. Horton asked him if he was okay, and Morrison replied that “he was tired of Ricky’s shit[;]” “that he had called corporate[;]” and that he was “causing trouble with CNAs, the RNs, and now patients. He’s got to go. I’m firing him.” It is clear from Morrison’s statement – especially his reference to Hentz calling corporate – that a primary motive for the termination decision was Hentz’s protected concerted activity in presenting the complaints of

racial bias against him and fellow black workers to Morrison and successive levels of management. Horton testified that she had never heard of complaints against Hentz by the staff or residents. Crysta Dickens told Morrison that *he* (that is, Morrison, and not Dickens) was going to do the paperwork on Hentz. (TR, 288-91, 304-05)

Morrison prepared the termination notice for Hentz, which gave the following explanation for his discharge: “Partner was given final warning on 11/21/16 (sic) regarding attendance. On 12/8/16, 12/9/16, 12/12/16, 12/13/16 partner was late. Partner is in violation of attendance policy.” (G.C. Exh. No. 11) Morrison testified that the dates were listed only as examples of occasions on which Hentz was late, and not the specific dates of irregular attendance for which he was fired. (TR, 540-41; G.C. Exh. No. 11) However, the following points should be noted regarding the termination notice. First, the termination notice says nothing about Hentz’s alleged performance issues, although Respondent’s witnesses testified that this was a reason for his discharge, or that it was at least discussed in the discussions about his discharge. (TR, 430-34, 537-40, 710) Tammy Ellis testified that Hentz’s performance was discussed, although she was unable to recall any specifics about that discussion. (TR, 432) Second, on December 12 and 13, which were two of the dates identified in the termination notice, Hentz clocked in at 2:01 p.m., one minute after his starting time of 2:00 p.m. Third, Morrison never explained why he listed December 12 and 13 as examples of Hentz’s tardiness if he had been suspended, pending a termination decision, on December 9. (G.C. Exh. No. 12)

IV. LEGAL ARGUMENT

Respondent filed a number of exceptions that essentially challenge the Administrative Law Judge’s credibility resolution and understanding of an employee’s Section 7 right to engage

in “concerted activities for the purpose of . . . mutual aid or protection[]” 29 U.S.C. § 157.

These exceptions are considered in the same order presented in Respondent’s Brief.

A. The ALJ Relied On Credible Testimony And Documentary Evidence In Concluding That Justin Morrison And Higher Management Were Aware Of The Charging Party’s Protected Concerted Activities.
(Exception Nos. 1, 7, 31, 36 – Respondent’s Brief, Section IV(A)(1))

Respondent argues that the ALJ erroneously found that a preponderance of the evidence supported a conclusion that Hentz adequately advised Justin Morrison of the employees’ complaints about personnel issues and racial bias. See Respondent’s Brief, at pages 15 – 16. Initially, it should be noted that the ALJ discussed in detail why he found Morrison and other defense witnesses to be unreliable and not credible. There is extensive evidence in the record that Morrison was aware of Hentz’s protected activities. First, Hentz testified extensively about his communications with Morrison regarding staff complaints from employees generally (TR, 111-23, 139-40), and from Brandi Sigmund (TR, 125-26) and Rick Luce (TR, 119-21) specifically. Second, Hentz testified that he called Morrison on the evening after receiving the written counseling from Amy Ferguson about her racial bias toward him and other black employees. (TR, 134-35, 141, 461) Third, the memorandum prepared by Genice Campbell establishes that Hentz called the corporate hotline and submitted a verbal complaint about Ferguson’s racial conduct toward him and his co-workers. (TR, 135-36, 145-46; G.C. Exh. No. 6) Fourth, the testimony from Hentz and Tammy Ellis regarding his corporate hotline call confirms his efforts to raise the problem of racial bias against fellow black workers and himself.⁷

⁷ Respondent makes much over the fact that Hentz misspoke when he stated at one point that he spoke with Linda Brinson and Danielle Jeter about Ferguson’s racial bias after he called the corporate hotline. See Respondent’s Brief, at pages 15, 35. But when the entire record is considered, Hentz obviously spoke with Brinson and Jeter before calling the corporate hotline, a fact which is also confirmed by Genice Campbell’s note referencing Hentz’s statements about

Fifth, Hentz testified that on the morning of Della Mervyn's investigation, Morrison came into his office, and said that he heard that someone was coming to the Veterans Homes to do an investigation, and asked whether Hentz wanted to tell him what it was about. When Hentz demurred, and simply replied that some of the staff had concerns, Morrison left the office visibly upset. (TR, 148-49) Fifth, Morrison's comments to Jennifer Horton on the morning of Della Mervyn's investigation confirm that Morrison knew that Hentz had made complaints of racial bias against him. (TR, 277-83, 301-03) Sixth, it is undisputed that Della Mervyn met with Morrison following her investigation, and it would be naïve to believe that she did not discuss Hentz's interview, and the statements that Hentz made regarding racial bias at the Veterans Home. (TR, 365) Seventh, Morrison admitted that he received a call from Hentz, who stated that Amy Ferguson had unfairly singled him out in issuing the verbal coaching. (TR, 622-23) Eighth, Horton testified that after she met with Morrison and Crysta Dickens after Della Mervyn left the Veterans Home, Dickens told her that corporate told them to "let him go slowly[,] and that Morrison had to be careful because this was the second complaint about race. (TR, 287) Finally, on the day that Hentz was fired, Horton testified that she observed Morrison state that he was "tired of Ricky's shit[,] and complain about Hentz calling corporate. Horton further testified that Morrison stated, "it's always something with him. He is causing trouble with the CNAs, the RNs, and now the patients. He's got to go. I'm firing him." (TR, 290) Thus, there was evidence from multiple witnesses and documentation proving that Hentz communicated with Morrison and higher management about the employees' complaints about racial bias, understaffing, and other personnel issues; that they were aware of Hentz's protected activities; and that they fired Hentz in retaliation for those protected activities. In light of this evidence,

the availability of Brinson and Jeter to attest to their own experience with racial bias. (G.C. Exh. No. 6)

Respondent has failed to present enough evidence to rebut the imputation of knowledge of Hentz's protected activities to Morrison, and specifically Hentz's complaints about racial bias, and to other members of Respondent's management involved in the matter. Respondent has plainly failed to present sufficient evidence to negate Morrison's knowledge of Hentz's complaints about racial bias, and other work place issues. See, e.g., G4S Secure Solutions (USA), Inc., 364 NLRB No. 92, slip op. at 3, enfd, 707 Fed. Appx. 610 (11th Cir. 2017) (noting that "it is well established that the Board imputes a manager's or supervisor's knowledge of an employee's protected concerted activities to the decisionmaker, unless the employer affirmatively establishes a basis for negating such imputation (cited cases omitted)")

B. The ALJ Was Correct In Finding That Rick Luce's Comments To The Charging Party Constituted Protected Concerted Activity.
(Exception Nos. 4, 5, 8 – Respondent's Brief, Section IV(A)(2))

Respondent challenges Judge Locke's factual findings regarding Rick Luce on the grounds that: (a) the Charging Party's testimony about Luce's complaints regarding staffing was hearsay, and that Luce should have been called as a witness; (b) the ALJ failed to make factual findings that Luce's concerns were based on an "honest and reasonable belief" under NLRB v. City Disposal Systems, supra; and (c) Hentz did not identify Luce as the CNA who complained about the staffing assignments of the recently-hired CNAs. See Respondent's Brief, at pages 16 – 18.

Respondent's hearsay argument is unavailing because it never objected to Hentz's testimony about Luce's statements.⁸ (TR, 118-19) See Rule 103(a). Paradoxically, Respondent

⁸ With respect to a number of its exceptions, Respondent argues that the General Counsel or Charging Party should have called as witnesses the employees with whom Hentz spoke regarding work place issues. See Respondent's Brief, at pages 16-19, 24, 27-28, 30 (addressing, inter alia, Exception Nos. 4, 8, 11, 12, 14-18, 21, 23, 28-29, 31-34). This is tantamount to making a belated hearsay objection that was never made at the hearing, and has been waived.

acknowledged that it was proper for the General Counsel to elicit this testimony to establish the employees' protected concerted activity, and the employer's retaliation against Hentz for his protected conduct. See Respondent's Brief, at page 17, fn. 2. It is irrelevant that Hentz did not identify Luce by name as the source of the concern; what mattered was that Hentz addressed Justin Morrison with the staffing concerns that Luce raised. Respondent's citation to the City Disposal decision is unpersuasive. The "honest and reasonable belief" language from that decision refers to whether an employee covered by a collective bargaining agreement reasonably believes that he/she is asserting a right covered by the agreement. Id. To the Charging Party's knowledge, the Board does not require that an employee in a non-unionized workplace know whether, or anticipate that his/her activity is within the ambit of protected concerted activity under the Act. Moreover, Respondent's argument is essentially an affirmative defense on which it had the burden of proof and persuasion, and on which it presented no evidence at the hearing.⁹

C. The ALJ Was Correct In Concluding That Brandi Sigmund Was Denied PRN Status By The Director of Health Services.

(Exception Nos. 28, 29, and 30 – Respondent's Brief, Section IV(A)(3))

Respondent challenges Judge Locke's factual findings about Brandi Sigmund on the grounds that: (a) the Charging Party's testimony about Brandi Sigmund was hearsay; and (b) the General Counsel failed to show that Sigmund honestly and reasonably wanted to work on a PRN

See Rule 103(a), Fed. R. Evid. Moreover, Hentz's testimony about his conversations with co-workers regarding work place issues was not offered for the truth of the matter asserted, but to establish that Hentz engaged in protected conduct for which he was retaliated against, in violation of the Act. The Charging Party will not repeat this argument at every point in Respondent's Brief at which it advances this argument.

⁹ Respondent repeats the argument at several points in its brief that the General Counsel failed to show that the concerns expressed by Hentz and his co-workers were "based upon an honest and reasonable belief" per the City Disposal decision. See Respondent's Exceptions Nos. 5, 10, 15, and 17. The Charging Party will not repeat his argument regarding Respondent's misapplication of the City Disposal decision in response to each of those exceptions, but refers the Board to the above discussion of the case.

status per City Disposal; and (c) Hentz allegedly miscommunicated to Sigmund the difference between a PRN worker and a part-time employee, and thus was responsible for creating the confusion in Sigmund's mind. See Respondent's Brief, at pages 18 – 21. As with Luce, the hearsay objection is unavailing because Respondent never objected to the testimony, and in any event, it was not offered for the truth of the matter asserted, and so was not hearsay in the first place. The City Disposal objection is unfounded because it is a misapplication of the decision, and Respondent failed to satisfy its burden of presenting any evidence that Sigmund's scheduling complaints were not honestly and reasonably made. Finally, it is irrelevant whether Hentz erroneously described to Sigmund the difference between PRN and part-time status; what matters is that Hentz engaged in protected concerted activity by discussing Sigmund's scheduling concerns and then presenting those concerns to management on her behalf.

D. The ALJ Correctly Concluded That The Charging Party's Transmission Of Employee Complaints To Justin Morrison Constituted Protected Concerted Activity.

(Exception Nos. 6, 9, 10, 11, 27, 34-38 – Respondent's Brief, Section IV(A)(4))

Respondent argues that the evidence regarding the Charging Party's actions in transmitting his co-workers' concerns about staffing as he walked along and spoke with Justin Morrison did not constitute protected activity under Section 7. Respondent challenges Judge Locke's conclusions on the grounds that: (a) the ALJ never identified whose concerns were reported by Hentz to Morrison; (b) there was purportedly no showing that the employees honestly and reasonably held these concerns per City Disposal; (c) there was no evidence that the employees were planning to take any action on those complaints; and (d) the ALJ was wrong on the law in finding that an individual employee acting on behalf of other workers is engaged in protected activity under Section 7. See Respondent's Brief, at pages 21 – 27.

Although this issue is addressed more fully infra, these objections are plainly without merit. First, it is not correct that Board precedent requires that employees know that a colleague intends to report their work concerns to management, or that employees have authorized a colleague to do so. See, e.g., Consumers Power Company, 282 NLRB 130, 131-32 (1986) (an individual employee’s complaint to management concerning safety that had been raised in a prior group meeting was concerted without regard to whether he was joined by other employees in making the complaint or was specifically authorized by other employees to make the complaint). Second, it is also not correct that Board precedent requires the General Counsel to show that the employees were preparing to take undertake “group action.” A conversation involving only a speaker and listener may constitute concerted activity, and the “lone act of a single employee is concerted if it ‘stems from’ or ‘logically grew’ out of prior concerted activity.” NLRB v. Mike Yurosek & Son, Inc., 53 F.3d 261, 265 (9th Cir. 1995)). Moreover, there is no requirement that the employees with whom Hentz spoke intended to collectively present their concerns as a group; it is sufficient that one employee speaks to management on behalf of another employee regarding terms and conditions of employee. See, e.g., Tex-Togs, Inc., 112 NLRB 968, 973 (1955), enf’d, 231F.2d 310 (5th Cir. 1956) (employees’ complaints to management regarding various complaints about the wage structure were concerted regardless of whether their fellow workers had authorized their complaint, or whether they were acting for anyone in the group except themselves). This is precisely what happened here: Hentz’s communications with Morrison relayed the work issues that multiple co-workers raised with him, irrespective of whether any employee expressly authorized Hentz to pass along their complaints. See, e.g., Every Woman’s Place, Inc., 282 NLRB 413 (1986), enf’d, 833 F.2d 1012 (6th 1987) (where the record shows the existence of a group complaint, the Board would not

require evidence of formal authorization in order to find that steps taken by individuals in furtherance of the group's goals are a continuation of activity protected by Section 7).

Respondent also argues that it is significant that Hentz did not specifically identify the employees who raised staffing and other personnel matters. See Respondent's Brief, at pages 25-26. Respondent does not cite any Board precedent requiring any such identification of employees as a condition for conduct to be protected under Section 7, nor is such identification of employees by name required. See, e.g., Mitsubishi Hitachi Power Systems Americas, Inc., 366 NLRB, No. 108 (2018) , slip op., at page 18, fn. 32 (noting that it was irrelevant to a finding of concerted activity that the employee failed to provide names of employees who shared his concerns or experienced similar management mistreatment, as long as the employee relayed truly group complaints about a manager's practices). Although Tammy Ellis and Della Mervyn asked Hentz to provide these names, Hentz testified that he declined to do so to protect the employees, and because he had been advised by a higher level individual not to do so to avoid "putting a target on their backs." (TR, 251-52) Moreover, it was entirely reasonable, in light of the evidence of Morrison's vindictive character, for Hentz to withhold the names of the co-workers who spoke to him about their work concerns.¹⁰

¹⁰ Respondent unpersuasively attempts to distinguish cases cited in the ALJD regarding protected concerted activity. In Compuware Corp., 320 NLRB 101 (1995), enfd., 134 F.3d 1285, 1289 (6th Cir.), cert. denied, 523 U.S. 1123 (1998), the Board adopted the recommended order of the administrative law judge finding that the charging party had been discharged for his protected concerted activities. In that case, the charging party communicated with a number of co-workers regarding various work place problems, and then during a meeting with management, became agitated, and stated that he would present the concerns at a meeting that afternoon with representatives of the State of Michigan, for which the employer was performing work. The employer did not dispute that the charging party's discussions with his co-workers were for mutual aid and protection, but that he would have been acting alone in presenting the employee complaints to the state representatives. Although a number of the employees stated that they did not authorize the charging party to present the concerns, the Board found that he was engaged in concerted activity in his discussions with his co-workers, and that the employer fired him as a

E. The Evidence Establishes That The Charging Party Called Respondent's Corporate Offices To File His Complaint About Racial Bias After His Conversations With Danielle Jeter And Linda Brinson.
(Exception No. 13 – Respondent's Brief, Section IV(A)(5))

Respondent argues that Judge Locke's conclusion that the Charging Party called the corporate hotline after speaking with Danielle Jeter and Linda Brinson is unsupported by a preponderance of the evidence. See Respondent's Brief, at pages 27-28. Hentz testified that on the same day that he received the verbal coaching from Amy Ferguson, he spoke with Jeter and Brinson about their experiences with racially-motivated disciplinary action from Ferguson. (TR, 136-39). That night, Hentz called Justin Morrison and spoke to him about the discriminatory disciplinary action from Ferguson, and the concerns that he and other employees had with her

preemptive strike to avoid further protected activity. There is compelling evidence that Respondent fired Hentz to prevent any further protected activity when on the day of his termination, Jennifer Horton heard Morrison state that "he was tired of Ricky's shit[:]" that he had called corporate, and that he was "causing trouble with CNAs, the RNs, and now patients. He's got to go. I'm firing him." (TR, 288-91). Respondent is similarly unpersuasive in its effort to distinguish Kvaerner Philadelphia Shipyard, 347 NLRB 390 (2006). Respondent admits that the case states that an employee engages in protected concerted activity in bringing group complaints to management's attention, which is exactly what Hentz did in transmitting the various concerns of his co-workers' to successive levels management. Respondent also cites two federal court of appeals cases, NLRB v. Datapoint Corporation, 642 F.2d 123 (5th Cir. 1981) and Indiana Gear Works v. NLRB, 371 F.2d 273, 276 (7th Cir. 1967), both of which were discredited in Prill v. NLRB, 755 F.2d 941, 953-56 (D.C. Cir.), cert. denied, 474 U.S. 948 (1985). Prill specifically noted that "both the Board and the courts have long held that an individual who brings a group complaint to the attention of management is engaged in concerted activity even though he was not designated or authorized to be a spokesman by the group." Id., at 954. Finally, Respondent cites Manimark Corp. v. NLRB, 7 F.3d 547 (6th Cir. 1993), which denied enforcement of a Board order, finding that there was insufficient evidence that an employee was discharged for protected activity under Section 7. The Manimark court held that under Myers Industries, Inc., 281 NLRB 882 (1986) (Myers II), aff'd, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied, 487 U.S. 1205 (1988), the General Counsel must show more than an individual employee was bringing truly group complaints to the attention of management, but that the employee was acting "with or on the authority of" other employees, or at least on their behalf. Id., at 551. The Charging Party submits that this is an incorrect interpretation of Myers II, but the instant case would nevertheless satisfy Manimark's interpretation because Hentz was plainly acting on behalf of his co-workers in bringing the complaints about racial bias and other personnel issues to management's attention.

racial conduct toward black workers. (TR, 134-36) Hentz later called corporate about the verbal coaching and identified Jeter and Brinson as witnesses to Ferguson’s discriminatory conduct. (TR,135-36, 145-46; G.C. Exh. No. 6) It is true that at one point, Hentz testified that he called corporate before speaking with Jeter and Brinson (TR, 139:9-10), but this appears to have been an inadvertent misstatement, in light of the other credible evidence in the record, specifically his recounting of the order of events on that day. (TR, 127-39)

F. The ALJ Properly Found That The Charging Party’s Testimony Concerning The Employees’ Belief That They Were Not Being Heard By Their Supervisors Was Protected Concerted Activity.
(Exception Nos. 24 and 25 – Respondent’s Brief, Section IV(A)(6))

Respondent disputes Judge Locke’s finding that Hentz’s statements to Della Mervyn that the employees did not “feel” that they were heard by management constituted protected concerted activity. See Respondent’s Brief, at pages 28. But it is a common complaint among workers that management ignores their work place concerns, and there was ample evidence of that in this case. The Veterans Home employees complained about various matters, ranging from staffing to racial bias, and when Hentz took their concerns to management, he was fired.

Respondent does not cite any case law supporting its argument on this point; it simply points to Morrison’s testimony about his “open door” policy as persuasive evidence that the ALJ should have credited. See Respondent’s Brief, at page 29. It was clear, however, that the employees did not believe that Morrison listened to their concerns, and in any event, the Act does not require employees to bring their concerns to management pursuant to some undefined “open door” policy; they can engage in concerted activities for mutual aid and protection, which is exactly what they tried to do. Finally, Respondent challenges the ALJ’s conclusion because no employees were called as witnesses to corroborate Hentz’s testimony. If this is a hearsay objection, Respondent waived it by failing to make the objection at the hearing. Moreover, the

evidence was not offered for the truth of the matter asserted but to establish that Hentz informed Della Mervyn about the concerns of the employees with whom he had communicated, and not the truth of what the employees had expressed.

G. The ALJ Properly Considered The Evidence That Danielle Jeter, Linda Brinson, And Marie Williams Discussed With The Charging Party Their Mutual Concerns About Amy Ferguson's Racial Bias.

(Exception Nos. 14, 15, 16, 17, 18, 20 21, 23 – Respondent's Brief, Section IV(A)(7))

Respondent argues that there is insufficient evidence that the Danielle Jeter, Linda Brinson, and Marie Williams shared with the Charging Party their concerns about racial bias at the Veterans Home. See Respondent's Brief, at pages 30-33. Respondent's argument is unpersuasive for several reasons. First, it starts out with a hearsay objection to Hentz's testimony regarding his conversations with co-workers regarding racial bias toward black workers, and asserting the evidence should be disregarded because neither the General Counsel nor Charging Party called these individuals as witnesses. See Respondent's Brief, at page 30. This argument fails because Respondent never made a hearsay objection at the hearing, and the testimony was offered to establish Hentz's protected activity, and not for the truth of the matter asserted.

Second, Respondent's argument ignores Hentz's telephone call to Justin Morrison in the evening after he received the verbal coaching from Amy Ferguson. In that conversation, Hentz told Morrison about his coaching, and the observation of other black employees that Ferguson was biased against African-American workers. (TR, 134-35, 141)

Third, Respondent misleadingly argues that the memorandum prepared by Genice Campbell only addressed Hentz's reprimand. But the document specifically alludes to Ferguson's "history of nitpicking African-American employees"; the racially discriminatory

reprimand that Ferguson issued Danielle Jeter for allegedly wearing tight yoga pants; and the fact that Danielle Jeter and Linda Brinson could attest to her racist behavior. (TR, 44; G.C. Exh. No. 6)

Fourth, Respondent ignores Della Mervyn's testimony about her interview with Hentz. From her notes and testimony about the meeting, it is indisputable that Hentz raised a number of issues that he and other black employees (i.e., Danielle Jeter, Linda Brinson, Toya Fleming, and Keytonia Cartledge) had with various supervisors (i.e., Amy Ferguson and Karen Shook), and the previous race discrimination complaints at the facility. Respondent attempts to dodge this evidence by arguing that Linda Brinson allegedly denied that Ferguson discriminated against black employees, and that Danielle Jeter failed to respond to her voice mails. This argument is undermined by the fact that African-American employees were hesitant to state their true views about race, as demonstrated by Jennifer Horton's testimony that she told Morrison that she did not believe that he was racist, although she obviously did. (TR, 281-83, 301-03)

Finally, Respondent attempts to rebut Hentz's testimony about his conversations with Marie Williams about race discrimination, arguing that it was hearsay, and that there was no evidence that her beliefs were "honestly and reasonably held" per the City Disposal decision. These arguments have been previously addressed in the brief: there was no hearsay objection lodged to Hentz's testimony about Williams, which was offered to establish his protected concerted activity, and the City Disposal decision is inapplicable, and in any event, Respondent never presented any evidence that these individuals were being dishonest in their communication with Hentz about racial bias at the Veterans Home.

H. The ALJ's Finding That The Charging Party Communicated Black Employees' Concerns About Race Discrimination At The Veterans Home Was Amply Supported By The Evidence.
(Exception No. 23 – Respondent's Brief, Section IV(A)(8))

Respondent challenges that aspect of Judge Locke's decision crediting Della Mervyn's admission that the Charging Party told her that other black workers had observed racial discrimination at the Veterans Home. See ALJD, at page 15, lines 4-8. This comment was only one of the many statements that Hentz made to Mervyn about race discrimination at the Veterans Home during his interview. (TR, 374-409) Moreover, the ALJ provided detailed reasons as to why he found that Mervyn was not a credible witness. See ALJD, at page 14, line 34 – page 15, line 19; page 42, line 14 – page 43, line 20). Respondent attempts to isolate this comment, and assert that it does not constitute protected conduct under Section 7. But Hentz's statement has to be considered in the context of all that he said to Mervyn about race discrimination during his interview. (TR, 374-409)

Instead of taking this common sense approach, Respondent attempts to tie the comment to Hentz's testimony about a conversation with Jennifer Horton about race problems at the Veterans Home. In any event, Respondent mischaracterizes the evidence because Hentz actually testified that he frequently spoke with Horton in the lunch room about race discrimination, and that he told her about the verbal coaching from Ferguson, which Horton agreed was unwarranted. (TR, 139-41) Moreover, Hentz testified about a number of black employees with whom he spoke at the Veterans Home regarding racial bias, including Marie Williams (TR, 111-13), Jennifer Horton, Danisa Taylor, Tracy Johnson, Stephanie Robinson, Toya Fleming, Jimisha Black, Kristen Davis, and Heaven-Leigh Davis (TR, 139-40).

Respondent also mischaracterizes Hentz's testimony about his conversations with Jennifer Horton about racial bias. Hentz testified that he had "discussed a lot with Jennifer"

about racial bias at the Veterans Home. (TR, 139-40) Hentz further testified that he had “told her about [his] conversations with some of the other employees and how they felt about it.” (TR, 140) Hentz told Horton about the verbal counseling from Amy Ferguson, and Horton agreed that it was excessive. (TR, 140-41) Horton also told Hentz that he should keep her informed about his complaint to corporate, and “let [her] know if he needed anything.” (TR, 140) It is clear from Hentz’s testimony that he spoke with Horton about racial bias; that Horton believed that the verbal counseling was excessive; and that Horton encouraged him to communicate with her about his complaint. This testimony very strongly indicates that Horton believed that the verbal counseling was inappropriate, if not racially motivated. In any event, Hentz’s testimony establishes that these conversations with Horton about racial bias and his complaint to corporate constitute protected activity under Section 7.

I. The ALJ Correctly Evaluated The Charging Party’s Statements During The Interview With Della Mervyn As Protected Concerted Activity Under Section 7.
(Exception Nos. 12, 19, 20, 22 – Respondent’s Brief, Section IV(A)(9))

Della Mervyn testified that during their interview, the Charging Party stated, “I’m not here to talk about them. I’m here to talk about me, but these (sic) are other people that you can talk to because they’ve seen things that have happened.” (TR, 364) Judge Locke apparently rejected Marvyn’s testimony as unreliable based upon his evaluation of Mervyn’s demeanor and candor. See ALJD, at page 14, lines 19-37. Respondent nevertheless argues that there was insufficient evidence that Hentz engaged in protected activity in his interview with Mervyn. See Respondent’s Brief, at pages 35-36. But the record shows otherwise.

The record shows that prior to the interview, Hentz had spoken to Danielle Jeter and Linda Brinson about Amy Ferguson’s racial bias; had contacted the corporate offices to complain about the verbal counseling; and had spoken to Tammy Ellis about racial bias at the

Veterans Home. Actually, the cited testimony does not support Respondent's argument because it shows that Hentz urged Mervyn to speak with other employees about racial bias. Further, Mervyn's interview notes and her testimony conclusively establish that Hentz spoke to her about a range of concerns that he and his co-workers, some of whom were identified by name, had about racial bias and other personnel issues. See supra, at pages 8-9. Judge Locke was plainly correct in his finding that Hentz was engaged in protected activity under Section 7 in his statements to Mervyn during the interview, regardless of whether he said, "I'm not here to talk about them. I'm here to talk about me. . . ." See ALJD, at page 14, line 24 – page 15, line 26.

Respondent is also wrong in arguing that Judge Locke incorrectly concluded that the Charging Party's action in passing along his co-workers' complaints of racial bias was not protected activity. Initially, it should be noted that Respondent mischaracterizes the ALJ's conclusion by stating the "[t]he ALJ found Hentz had engaged in protected activities because some employees assisted him and he turned around and assisted them" See Respondent's Brief, at page 35 (citing the ALJD, at page 13, lines 35-37). In fact, the ALJ stated the following:

"Respondent's argument assumes that Hentz must seek the assistance of his co-workers in submitting a group complaint. In fact, Hentz'[s] co-workers were assisting him by providing him with information about instances of apparent racial prejudice. In turn, he assisted them by voicing their complaint to corporate-level management. The assistance was mutual, and falls within Section 7's description of employees' activities for their 'mutual aid or protection.' 29 U.S.C. § 157"

The evidence shows that Hentz communicated the employees' concerns about racial bias at several points, including his telephone call to Justin Morrison following the verbal counseling from Amy Ferguson; his complaint to Genice Campbell on the corporate hotline; his telephone conversation with Tammy Ellis; and his interview with Della Mervyn. The Board has recently held that an employee's transmittal of co-workers' concerns about management, and the

employee's observations about the effect of management conduct on his co-workers is protected activity under Section 7. See, e.g., Mitsubishi Hitachi Power Systems Americas, Inc., supra, slip op., at pages 17-19. Moreover, even assuming that Hentz made the statement, "I'm not here to talk about them. I'm here to talk about me[.]" this in no way diminishes the evidence of his protected activity during the Mervyn interview, most of which came from Mervyn's notes of the meeting, and her testimony about those notes.

J. The ALJ Correctly Concluded That The Charging Party's Testimony About His Telephone Conversation With Tammy Ellis Should Be Credited.
(Exception No. 33 – Respondent's Brief, Section IV(A)(10))

Respondent argues that Judge Locke inappropriately credited the Charging Party's testimony about his telephone conversation with Tammy Ellis. See Respondent's Brief, at pages 37-38. This argument fails because Respondent mischaracterizes the evidence which, when described accurately, shows that Ellis was aware of the protected nature of Hentz's complaints.

Respondent argues that there is no evidence that Tammy Ellis ever took any notes of her conversation, or reviewed Della Mervyn's interview notes prior to Hentz's termination, suggesting that Ellis never reviewed any documentation in which reference was made to the work place concerns of other employees. See Respondent's Brief, at pages 37-38. But Ellis admitted that she reviewed the intake note prepared by Genice Campbell about Hentz's call to the corporate hotline in which he specifically referred to discriminatory conduct against other employees. (TR, 420, 422-23; G.C. Exh. No. 6) Second, Respondent argues that Hentz only referred to two instances of disciplinary behavior by Amy Ferguson in the conversation with Ellis. See Respondent's Brief, at page 37. In fact, Ellis testified that Hentz specifically referred to the discriminatory application of a dress code, which was apparently a reference to Ferguson's discipline of Danielle Jeter. (TR, 424-25) Thus, even if it had been credited, Ellis' testimony

would have supported a finding that Ellis was aware of Hentz's protected conduct in his dealings with her. As matters stand, however, Respondent presents no persuasive argument for overturning Judge's Locke's factual findings and legal conclusions regarding the interaction between Tammy Ellis and Hentz.

K. Respondent Fails To Acknowledge The Correct Legal Standard For Evaluating Protected Concerted Activity, And That The ALJ Correctly Applied Traditional Legal Principles.
(Exception Nos. 19, 27, 32, and 34-38 – Respondent's Brief, Section IV(A)(11))

Respondent argues that Judge Locke erroneously found that the Charging Party engaged in protected concerted activity in his communications with the corporate offices, specifically in his call to the corporate hotline and the telephone conversation with Tammy Ellis, and during his interview with Della Mervyn. See Respondent's Brief, at page 38. Respondent focuses on Hentz's complaints about racial bias, although it is undisputed that during the interview with Mervyn, he addressed issues other than racial bias (e.g., understaffing at the Veterans Home (TR, 385); the adverse impact created by the close-knit relationship of two supervisors named Karen Shook and Missy (TR, 390-93); Hentz's efforts to assist a fellow worker named Karen Penland (TR, 403-06); and employees' fears that their licensing and certifications could be placed at risk as a result of untruthful accusations by co-workers (TR, 406-07)).

With respect to his racial bias complaints, the evidence shows that following the verbal counseling, Hentz relayed to management, at increasingly higher reporting levels, the concerns that he and his co-workers had with racial bias:

1. Hentz spoke with a number of black employees about racial bias at the Veterans Home, including Tracy Johnson, Stephanie Robinson, Toya Fleming, Jimisha Black, Kristen Davis, Heaven-Leigh Davis, and perhaps most importantly, Jennifer Horton and Danisa Taylor,

the last of whom had previously filed a race discrimination complaint after she discovered an anonymous employee had stuffed a cotton ball into a flower in her office. (TR, 11-12, 139-40)

2. After his counseling by Amy Ferguson during the ice cream incident, Hentz met with Danielle Jeter and Linda Brinson, both of whom were African-American, about the write-ups they received from Ferguson that same day, and their perceptions that Ferguson was racially biased against black workers. (TR, 136-40)

3. Following the encounter with Ferguson and after his meeting with Jeter and Brinson, Hentz called Respondent's corporate hotline about the employees' concerns with racial bias, specifically his own verbal counseling and the discriminatory discipline against Danielle Jeter, and listing Jeter and Linda Brinson, as witnesses to the racial bias. (TR, 135-36, 145-46; G.C.Exh. No. 6)

4. Following his call to the corporate hotline, Hentz had a telephone conversation with Tammy Ellis in which he emphatically relayed his concerns about racial bias, and discriminatory disciplinary action taken against Danielle Jeter. (TR, 146-47, 234-36, 420-22)

5. During the interview with Della Mervyn, Hentz described a range of concerns regarding racial bias, which included the following: (a) institutional racism at the Veterans Home; (b) the ice cream incident, and the racial concerns expressed by Danielle Jeter and Linda Brinson, Justin Morrison's failure to address the incident, and the disparate counseling of black workers; (c) the problems that African-American workers had with a racist supervisor named Karen Shook; (d) previous complaints of racial bias made through the corporate hotline; (e) inappropriate interactions between CNAs involving two African-American workers named Toya Fleming and Keytonia Cartledge; and (f) racially biased behavior by residents towards African-American employees. (TR, 369-72, 374-409)

6. Following Della Mervyn's visit, Crysta Dickens told Jennifer Horton that Respondent would terminate Hentz based upon his attendance, but that it had to be careful because this was the second instance of an employee complaint about race discrimination. Dickens' statement was tantamount to an admission that management was aware that the issue of racial bias was a concern to the black workers, to the point that they would file internal complaints about the issue. It is reasonable to infer that management intended to terminate Hentz to avoid any further protected behavior by Hentz about this issue. (TR, 285-88, 305-06)

According to Judge Locke, Hentz made the complaint of racial prejudice "not only on his own behalf but also voicing the work-related complaints of other employees." ALJD, at page 16, lines 19-22. He further concluded that his complaints constituted concerted activity protected by Section 7 of the Act. This conclusion was consistent with years of agency and court precedent.¹¹

The Supreme Court has held that the protection of Section 7 is not limited to circumstances "in which an employee's activity and that of his fellow employees combine with one another in any particular way." NLRB v. City Disposal Systems, 465 U.S. 822, 835 (1984).¹² The concept of "mutual aid or protection" under Section 7 focuses on the goal of the

¹¹ Respondent does not argue that race discrimination is not a proper matter for concerted activity requiring protection under Section 7, nor could it. See, e.g., Dearborn Big Boy No. 3, Inc., 328 NLRB 705, 710 (1999) (employees' concerted conduct protesting racial discrimination in employment protected under Section 7); Vought Corp., 273 NLRB 1290, 1294 (1984), enf'd., 788 F.2d 1378 (8th Cir. 1986) (white employee's remarks to black employees regarding rumored promotion of another white employee, and suggestion that the matter be taken up at next management meeting was protected concerted activity); and Tanner Motor Livery, 148 NLRB 1402, 1404 (1964), enf'd. in relevant part, 349 F.2d 1 (9th Cir. 1965) (employees' protest of racially discriminatory hiring practices protected under the Act).

¹² Consistent with this principle, the Board has held that various actions by individual employees who seek to secure a personal benefit that could result in a benefit affecting all employees are engaged in protected activity under Section 7. See, e.g., El Gran Combo, 284 NLRB 1115, 1116-17 (1986), enf'd., 853 F.2d 996 (1st Cir. 1988) (employee who, unlike his co-workers, did not receive a share of band's album sales, acted for mutual aid and protection in soliciting fellow

concerted activity, specifically whether the employees are seeking to “improve their terms and conditions of employment or otherwise improve their lot as employees.” Eastex, Inc. v. NLRB, 437 U.S. 556, 565 (1978). In Meyers II, supra, the Board held that concerted activity:

“encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, *as well as individual employees bringing truly group complaints to the attention of management.*” *Id.*, at 887 (emphasis added)

Accordingly, the preliminary discussions of employees concerning their terms and conditions of employees are protected under Section 7:

“In this regard, ‘inasmuch as almost any concerted activity for mutual aid or protection has to start with some kind of communication between individuals, it would come very near to nullifying the rights of organization and collective bargaining guaranteed by Section 7 of the Act if such communications are denied protection because of their lack of fruition.’ Fresh & Easy Neighborhood Market, Inc., 361 NLRB 151, 153 (2014) (quoting Mushroom Transportation Co. v. NLRB, 330 F.2d 683, 685 (3d Cir. 1964)).

Individual conversations among employees about their working conditions that are intended to “improve [their] terms and conditions of employment or otherwise improve their lot as employees[,]” are protected under Section 7 of the Act. Fresh & Easy Neighborhood Market, Inc., supra (quoting Eastex, Inc. v. NLRB, 437 U.S. 556, 565 (1978)). See also, Citizens Investment Services Corp., 342 NLRB 316, 326 (2004), enf’d, 430 F.3d 1195 (D.C. Cir. 2005) (actions of individual employee in complaining about the company’s handling of compensation

band members to support his individual demand for a larger share of the earnings); Rock Valley Trucking, 350 NLRB 69, 83-84 (2007) (truck driver who sought to improve his individual circumstances by raising disparities in his working conditions with his co-workers and his manager, and asked a co-worker to bring the issue to management was engaged in protected concerted activity) Even before Meyers II, the Board held that an employee’s disclosing a hospital committee report of staffing shortages in a hospital to an outside agency constituted protected activity under Section 7. See Misericordia Hospital Medical Center, 246 NLRB 351 (1979), enf’d, 623 F.2d 808 (2d Cir. 1980).

issues were protected as they were intended to bring management's attention to the issue and advance group interests).

Regarding racial bias, the Charging Party communicated with a number of black workers, who agreed that the work environment at the Veterans Homes was infected with racial bias. Hentz brought to the company's attention, at successive levels of management, the problems that he, specifically-identified employees, and other unidentified black workers, had with racial bias at the Veterans Home. It was unnecessary for other black workers to have formally or informally authorized the actions taken by Hentz. See, e.g., Every Woman's Place, Inc., 282 NLRB 413 (1986), enfd., 833 F.2d 1012 (6th Cir. 1987) ("It was specifically noted in [Myers II] that, where the record showed the existence of a group complaint, the Board would not require evidence of formal authorization in order to find that the steps taken by individuals in furtherance of the group's goals are a continuation of activity protected by Section 7 of the Act"). Hentz's actions were a textbook example of an individual employee bringing truly group complaints to the attention of management.

Respondent does not challenge Judge Locke's factual findings and legal conclusions regarding the events leading up to the Charging Party's termination on December 13. On that date, Hentz was engaged in conversations with co-workers about staffing issues, when a supervisor named Jackie Walker approached them, and rebuked them for discussing staffing issues, to which Hentz replied "no, there is not enough [staff] on the floor and the residents feel differently." Approximately one hour later, Morrison sent him home for being "disruptive[.]" and fired him the next day. Judge Locke found that Hentz was engaged in protected concerted activity on this occasion as well ("Hentz clearly engaged in protected terms and conditions of

employment with other employees and then expressing their concerns to management.” ALJD, at page 50, lines 32-34).

Even more significant is the fact that on the day of Hentz’s termination, Morrison admitted that he fired Hentz because of his complaints of racial bias. Jennifer Horton testified on the day of Hentz’s termination, she had a brief meeting with Morrison in which Morrison said that “he was tired of Ricky’s shit[;]” “that he had called corporate[;]” and that he was “causing trouble with CNAs, the RNs, and now patients. He’s got to go. I’m firing him.” (TR, 288-89) This was a clear reference to Hentz’s complaints about racial bias as being a primary reason for the discharge.

Respondent undertakes a criticism of the decision in Fresh & Easy Neighborhood Market, Inc., *supra*, essentially arguing that the record fails to show that the employees were engaged in conduct that looked toward group action, and that the Board should overrule the decision based upon Member Miscimarra’s partial dissenting opinion. *See* Respondent’s Brief, at pages 42-43. The problem with this argument is that Myers II expressly found that such group conduct falls within the definition of concerted activity. Protected activity under Section 7 encompasses an individual employee’s presenting the work-related concerns of a group of employees to management. *See, e.g., Phillips Petroleum Company*, 339 NLRB 916, 918 (2003) (“Although [the employee’s] efforts to secure sick leave originated because of this need to care for his wife and children, the record clearly establishes that [the employee’s] efforts embraced the larger purpose of obtaining a benefit for all of his fellow employees”); Allstate Insurance Company, 332 NLRB 759, 760, fn. 3 (2000) (employee’s discussion of working conditions with newspaper reporter found to be protected concerted activity where it was intended to notify other employees of the problems with a sales program, and was thus intended to initiate or induce

group action).¹³ It is similarly unlawful for an employer to discharge an employee based upon an assumption that the employee may engage in further protected activity in the future. See, e.g., Compuware Corporation, supra (holding that [the Charging Party] was terminated based upon a perception that he may express the concerns at a meeting to be attended by representatives of the State of Michigan).

It is, however, unnecessary for the Board to reconsider its decision in Fresh & Easy for this case because it recently issued a decision that is analogous to the facts of this case, holding that an employee was discharged in retaliation for his protected activities under Section 7, and therefore, in violation of Section 8(a)(1). See Mitsubishi Hitachi Power Systems Americas, Inc., supra. In Mitsubishi, the Board agreed with the administrative law judge's holding that an employee named Mohamed Shahat was discharged for his protected activities. The record showed that Shahat had communicated with his co-workers about the abusive management style of a manager named Arash Mohajeri. This abusive treatment included discriminatory treatment of employees with different Middle East ethnicity and religion. Id., slip op. at 5. In turn, Shahat communicated to management the stress that Mohajeri was causing to his fellow employees and him. Id., slip op. at 5-6. Several weeks later, Shahat submitted two complaint letters to management in which Shahat asserted that Mohajeri had subjected him to abusive behavior, and other employees in his work group to similar misconduct. Id., slip op. at 8-9. Shahat was later terminated; filed an unfair labor practice charge; and a complaint was issued on the termination, and other matters.

¹³ Respondent relies extensively on Pelton Casteel, Inc. v. NLRB, 627 F.2d 23 (7th Cir. 1980) for its argument. However, Pelton Casteel was discredited in Prill v. NLRB, supra, at 953, fn. 72, and thus, is of no help to Respondent in this case.

The administrative law judge initially found that “Shahat had engaged in concerted activity by showing that Shahat spoke periodically with some of his coworkers about their view that Mohajeri was mistreating them and creating an abusive and stressful environment in the piping group.” The administrative law judge rejected the employer’s argument that Shahat’s complaints were only personal based upon the fact that he relayed the other co-workers’ concerns, which were a logical outgrowth of Shahat’s discussions with them. Id., slip op. at 18. Next, the administrative law judge found that the employer was aware of Shahat’s concerted activities because of his complaints and letters to other managers regarding Mohajeri’s abuse. Id. Third, the administrative law judge determined that Shahat’s concerted activities were for the purpose of mutual aid and protection because he engaged in conduct that would benefit his co-workers even though he had a personal stake in addressing his working relationship with Mohajeri. Finally, the administrative law judge found, based upon other evidence that Shahat’s discharge was in retaliation for his protected activities. Id. The administrative law judge’s decision in Mitsubishi was affirmed by Chairman Ring and Members McFerran and Emanuel. In the decision, Chairman Ring and Member Emanuel stated that they found it unnecessary to rely on the judge’s citation to Fresh & Easy, and expressed no opinion on whether Fresh & Easy was correctly decided; however, they otherwise joined in the administrative law judge’s legal analysis without any modification or correction.

The facts of the unlawful termination in Mitsubishi are analogous to the instant case insofar as Shahat discussed with his co-workers their concerns about work place issues, including ethnic discrimination, and then related those concerns to higher management. The Board found that Shahat’s complaints to higher management “were a logical outgrowth of the concerns that Shahat previously discussed with some of his coworkers.” Id. An analogous

scenario occurred here in that Hentz engaged in extensive discussions with his co-workers about their working conditions, and later passed on their concerns to higher management. As in Mitsubishi, Hentz's conduct was well within traditional concepts of concerted activities for mutual aid and protection under Section 7.

L. The Evidentiary Record Is Clear That Justin Morrison Was Aware Of The Charging Party's Protected Concerted Activities.
(Exception Nos. 34-38 – Respondent's Brief, Section IV(B))

Finally, Respondent argues that the preponderance of the evidence fails to show that Justin Morrison was aware of the Charging Party's protected concerted activities. See Respondent's Brief, at pages 46-50. With this argument, Respondent asks the Board to ignore the obvious.

The General Counsel presented evidence from multiple witnesses that Respondent was aware of the Charging Party's protected concerted activities. First, the Charging Party himself testified in detail about the many conversations that he had with Justin Morrison about employees' complaints regarding staffing shortages, unfair job assignments, scheduling problems, and bias against African-American workers. Second, Morrison was aware of Hentz's intention to call the corporate hotline about the ice cream incident, and the concerns that he and other employees had regarding the racial bias of Amy Ferguson. Third, Hentz told Tammy Ellis about the African-American employees' concerns regarding racial bias, and about certain supervisors such as Karen Shook, who were racist. (TR, 146-47) Fourth, Della Mervyn testified about the many concerns that Hentz raised on behalf of himself and his co-workers regarding work place issues during her interview, most prominently, racial bias. Mervyn attempted to minimize the amount of information that she provided to Morrison about her interview with Hentz by claiming that she only spoke generally with him about the investigation. However, the

testimony from Hentz and Jennifer Horton made clear that Morrison was aware that Hentz had accused him of racism, and that Mervyn was there to investigate that matter. And, in light of Horton's testimony about Morrison's anger toward Hentz shortly after Mervyn's visit, and her conversation with Crysta Dickens about the plan to fire Hentz, it is reasonable to infer that he was fully aware of what Hentz had told Mervyn during the interview. Finally, the timing of the events on December 13 strongly suggests that Jackie Walker immediately notified Morrison about Hentz's conversations with Nicky Bartlett, Lucinda Jeter, and Heather Long regarding staffing shortages.

Respondent's witnesses testified to being unaware of the Charging Party's protected concerted activities, or that Hentz only raised issues about his individual circumstances to support an argument that his activities were not "concerted" under the Act. For example, Tammy Ellis attempted to testify that Hentz only complained about Amy Ferguson's conduct toward him individually. But when her testimony is read closely, Ellis admitted that Hentz complained about other employees' concerns with Ferguson's racial behavior toward other black workers. Thus, Ellis testified:

During that conversation, he raised concerns. He felt that there had been some racial discrimination at the facility by another partner. *When we spoke about what his concerns were, and the issues that had happened, the issues he gave me didn't lead me to believe that it was racial discrimination, and when I asked him for more information, he got slightly upset during the conversation.* (TR, 420 (emphasis added))

Tammy Ellis' testimony that she did not speak with Morrison about Hentz's communications with the corporate office or Della Mervyn is simply not credible given that Ellis was consulted about the termination of Hentz.

Justin Morrison testified that he was unaware of any protected concerted activities by Hentz. In that regard, Morrison claimed (a) that he was unaware that Hentz had ever raised any

work place concerns on behalf of any employee other than himself, prior to his termination (TR, 556-57); (b) that he believed that Hentz was only calling the corporate hotline on behalf of himself (TR, 621-22); (c) that he was unaware of any information that Hentz, or anyone else had provided to Della Mervyn during her investigation (TR, 556); and (d) that Jackie Walker never told him about the conversation Hentz and his co-workers had about staffing shortages on December 13. (TR, 566-67) This testimony is simply not credible in light of the extensive and detailed testimony from Hentz about his conversations with Morrison about employee concerns; the testimony from Jennifer Horton about Morrison's hostility toward Hentz a couple of days after Della Mervyn's investigation, and on the day of Hentz's discharge; and Morrison's sending Hentz home, saying that he had been "disruptive," within an hour after Jackie Walker overheard Hentz and other employees discussing staffing shortages. Morrison's credibility was further undermined by his summary denial of the unlawful statements that Hentz attributed to him; his denial of the statements that Jennifer Horton attributed to him; and his glib explanations for his "stay in your lane" admonition to Hentz. (TR, 557-61, 565-66) The ALJ found Morrison was an unreliable witness for a host of reasons.

Respondent's argument boils down to the implicit claims that absent an admission of knowledge by the defense witnesses, the General Counsel is unable to prove the knowledge element of its case. But in light of the direct and circumstantial evidence of Morrison's knowledge of Hentz protected activities, and Judge Locke's negative findings about Morrison's credibility, Respondent has plainly failed to affirmatively establish a basis for negating Morrison's knowledge of Hentz's protected activities, and particularly his knowledge of Hentz's complaints of racial bias. See G4S Secure Solutions (USA), Inc., *supra*, slip op. at 3. Moreover, it is a basic principle of the Board's jurisprudence that the fact finder can base his findings upon

inferences drawn from the totality of circumstances. The ALJ's findings regarding Morrison's knowledge were based upon his evaluation of the entire record, and were clearly sound. See, e.g., Windsor Convalescent Center of North Long Beach, 351 NLRB 975, 986, fn. 48 (2007), enforcement denied on other grounds, 570 F.3d 354 (D.C. Cir. 2009) (noting that it was reasonable for the administrative law judge to infer the employer's knowledge of individual's union sympathies from the totality of the circumstances, absent evidence of direct evidence of such knowledge).

V. CONCLUSION

The Charging Party observed racial bias against black employees, and other work place problems, at the Veterans Home, and communicated with his co-workers about those issues. Hentz regularly spoke with Justin Morrison about staffing shortages, scheduling problems, and other workplace problems on behalf of his co-workers. When he was subjected to racially-motivated disciplinary action, Hentz again spoke with black co-workers, and confronted management on behalf of himself and them. Respondent then disciplined, demoted, and fired him. In a detailed and well-reasoned decision, the AJL carefully analyzed the evidence; rejected the prevarications of Respondent's witnesses; and correctly applied well-established legal principles in finding that the adverse actions against Hentz were taken because of his Section 7 activities. The Board should adopt the ALJ's decision in full.

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Respectfully submitted,

LAW OFFICES OF GLEN C. SHULTS

By: Glen C. Shults

Attorneys for Charging Party
RICKY EDWARD HENTZ

959 Merrimon Avenue, Suite 204
P.O. Box 18687
Asheville, North Carolina 28814
Telephone: (828) 251-9676
Facsimile: (828) 251-0648
E-Mail: shultslaw@bellsouth.net

CERTIFICATE OF SERVICE

I certify that on June 29, 2018, I served the foregoing Charging Party's Answering Brief by electronically serving a copy of the same through the NLRB's website <http://www.nlr.gov>, and that a true and correct copy of the same was served by e-mail and first-class United States mail, upon the following:

Gary Shinnors
Executive Secretary
National Labor Relations Board
1015 Half Street, SE
Washington, D.C. 20570-0001

Joel R. White
Counsel for the General Counsel
National Labor Relations Board, Subregion 11
4035 University Parkway, Suite 200
Winston-Salem, North Carolina 27106-3275
Joel.White@nlrb.gov

Jana L. Korhonen
Attorney at Law
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
919 Peachtree Street, N.E., Suite 4800
Atlanta, Georgia 30303
jana.korhonen@ogletreedeakins.com

/s/ Glen C. Shults