UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

HAYWARD SISTERS HOSPITAL D/B/A ST. ROSE HOSPITAL	
and	**Case 32-CA-197728**
BABITA ROOP, an Individual	**Case 32-CA-197958**
and	
JERNETTA BACKUS, an Individual	**Case 32-CA-203396**
	Case 32-CA-218138

COUNSEL FOR THE GENERAL COUNSEL'S POST-HEARING BRIEF TO THE ADMINISTRATIVE LAW JUDGE

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I. INTRODUCTION

In 2016, respiratory therapists employed by Hayward Sisters Hospital d/b/a St. Rose Hospital (Respondent) began organizing among themselves to band together to take action to confront a host of issues in their workplace—including the posting of racist and offensive photos on the walls of their department. The employees went to the Teamsters Local 853, their collective-bargaining representative, for help when Respondent changed the requirements of a position without consulting the Union and promoted employees to positions without posting for them or allowing the opportunity for other employees to apply. When the Teamsters Local 583 failed to help them, employees were forced to take matters into their own hands, acting together in good faith to protest perceived favoritism in the department, incidents of bullying, harassment, and retaliation.

Respondent did not react kindly to these protected concerted activities from its employees, and began an aggressive campaign of intimidation, coercion, threats of job loss, interrogations of employees, and retaliation against the employees' most vocal leader—respiratory therapist Babita Roop. After 17 years of employment with an untarnished record and no disciplinary history, Respondent acted quickly, without conducting any legitimate investigation, to issue Roop her first verbal warning, then demote her from her position of team lead, suspend her for three days, and issue her a final written warning, before summarily discharging her. On April 17, 2017, Respondent terminated Roop in violation of Section 8(a)(1) of the Act just days after the employees' protected concerted activities culminated in the delivery of a petition to Respondent's Chief Executive Officer (CEO), Aman Dhuper, on April 13, 2017. During the proceedings in the instant case, Respondent took further retaliatory action. It disciplined Charging Party Jernetta Backus for the first time in her employment history in violation of Sections 8(a)(1) and 8(a)(4) of the Act. Respondent moved directly to a final written

warning in retaliation for her role in drafting the April 2017 petition, filing multiple meritorious charges against Respondent, and testifying against Respondent at trial.

II. FACTS

a. Respondent's Operations

Respondent operates a hospital in Hayward, California (Respondent's facility), where it provides acute medical care to the general public. Respondent's CEO Aman Dhuper is employed by Alecto Healthcare Services, a company contracted to provide managements services to Respondent. (Tr. 1623) Respondent's Director of Nursing (DON), Rozanne O'Keefe, reports directly to Dhuper, supervises perioperative services, and oversees all the clinical departments, including the operating room, outpatient surgery, central supply, radiology, nursing, sterile processing, and cardiopulmonary. (Tr. 2263-2264). Respondent employs roughly 300 nurses and 300 other professionals in its clinical departments. (Tr. 2510-2511) Respondent's Director of Pulmonary Services (DPS), Joe Marino, manages the cardiology and pulmonary departments and reports directly to O'Keefe. (Tr. 1273, 2265)

Respondent employs roughly 35 respiratory therapists in its pulmonary or respiratory department,[1] including full-time, part-time, and per diem employees. (Tr. 1274-1275) Typically, full-time employees work 12-hour day or night shifts three days a week, for a total of 36 hours a week. (Tr. 1275) Part-time benefitted employees work two 12-hour shifts per week. (Tr. 1275) Per diem employees work varied hours and shifts, although they are required to provide nine days of availability per six-week period. (Tr. 1275) The respiratory therapists are represented by the Teamsters Local 853 (Union), who executed a collective-bargaining agreement with Respondent effective October 1, 2014 to September 30, 2017. (GC 26) Mike Gandhi is also

[1] Throughout the record employees of the respiratory department are referred to as both "respiratory therapists" and "respiratory care practitioners." For the sake of consistency, this brief will refer to them as respiratory therapists. The department in which they work is also referred to as the respiratory department for sake of consistency.

referred to as the respiratory supervisor[2] by employees or clinical team lead even though he is in the bargaining unit. (Tr. 1212) Gandhi does not care for patients, rather, he creates the schedule for respiratory therapists, assists them if they need help, and reports issues that they bring to his attention to DPS Marino if he cannot resolve them on his own. (Tr. 1409-1410)

Respondent's respiratory department is located on the first floor of the hospital, and consists of two small rooms separated by a large arched, open doorway. (Tr. 1284-1285; R 9) Employees keep their personal belongings in lockers in the department and regularly take breaks and eat their meals in this space. (Tr. 370, 1287-1288, 1296; R 9) While employees do not treat patients in the department, they perform various work assignments in this space, including giving report and charting on the two computers located in the department. (Tr. 370-372) The department can be accessed via two doors opening into a small hallway, and DPS Marino's office is directly across the hall from the department. (Tr. 1284-1285, 1287; R 9) Employees refer to the respiratory department as both the "break room" and the "department." (Tr. 1135)

Respiratory therapists are in charge of caring for patients that are suffering from lung conditions or unable to breathe. (Tr. 21-22) Respiratory therapists attend all cardiac arrests and rapid responses as they serve as the first line of defense when a patient stops breathing. (Tr. 22) Their job duties include providing patient care in emergent situations, administering breathing treatments, performing bronchoscopies, managing ventilator patients, and conducting tests of lung capacity such as six-minute walks and arterial blood gases. (Tr. 22) On any given day, a therapist can be assigned to care for patients on the floors and/or cover certain areas of the hospital such as the intensive care unit (ICU), transitional care unit (TCU), or emergency room (ER). Certain therapists serve as team leader on certain shifts and are in charge of making the daily assignments for each therapist. (Tr. 22-23) Team leads, such as Roop, also ensure there is

[2] Gandhi is not alleged as a Section 2(11) supervisor in the Fourth Amended Consolidated Complaint.

enough staff to cover the next shift based on the census levels of the patients in the hospital. (Tr. 22-23, 1284) In addition to their own assignment, team leads are required to attend all codes, rapid responses, and C-sections, in case an infant or mother stops breathing. (Tr. 22-23) The collective-bargaining agreement requires that team leads be provided with a premium pay of 5 percent. (Tr. 24; GC 26, SRH000006) Team leads also begin and end their shifts thirty minutes before the other respiratory therapists. (Tr. 21) Team leads are not statutory supervisors and are in the bargaining unit.

Students from various colleges, including Ohlone College, come to Respondent's facility to do rotations under the respiratory therapists, where students apply what they have learned in school by performing clinical duties under the license of the attending respiratory therapist. (Tr. 266-267, 1278-1279) The team leader assigns the students to a respiratory therapist based on their level of education and skill level. (Tr. 207, 1280) Respiratory therapist Marie Matuszak is the clinical site instructor for Ohlone College. (Tr. 1281) Matuszak also currently holds the position of Pulmonary Function Test (PFT) tech in Respondent's PFT lab, where she administers different tests ordered by doctors to test lung capacities, volumes, restrictions, and obstructions. (Tr. 774-775) Prior to this, she occupied the Resource position. The Resource position was implemented on a temporary basis to assist the day shift with bronchoscopies, six-minute walks, C-sections, equipment, and daily ordering, when census levels are high. (GC 6, p. 12-15)

b. Seven Respiratory Therapists Go to Human Resources in June 2017 to Protest Racist Pictures Posted in the Respiratory Department in May 2016

One of the first events that spurred the respiratory therapists to take concerted action took place on May 11, 2016, when employees Kevin Seigal and Chris Hamid posted a host of offensive and racist pictures all over the walls of the department. (Tr. 389; 542; 545-546) Most of the images contained horrendous photos of respiratory therapist Jojesmar (Joje) Pereyra's face

photo-shopped onto pictures of gorillas and monkeys, but some also included photo-shopped pictures of other respiratory therapists. (Tr. 542; GC 15) Pereyra is a dark-skinned Filipino. (Tr. 28; GC 23) Employees who found these postings offensive were fed up with this sort of racist behavior and the ongoing harassment of Pereyra in the workplace. (Tr. 397-399) Since at least 2011, Pereyra had been called "Jogilla," subjected to ape sounds and gestures, and had even had a banana thrown at him by a coworker. (Tr. 397-399)

On May 12, 2016, when Pereyra saw the postings and immediately emailed DPS Marino asking that they be taken down, Marino seemed to already know who had posted the pictures, as he replied to Pereyra, CCing employees Seigal, Hamid, and Gandhi, asking them to take them down. (Tr. 404; GC 15) Instead of simply removing the postings, Seigal further harassed Pereyra by posting to Instagram a photo of the images in the department of Pereyra that same day. (Tr. 405) On May 13, 2016, when Pereyra complained of the harassment and racist Instagram post, Respondent did not investigate his complaint in any way. (Tr. 405, 410, 1538, 1629-1636; GC 17). Despite the egregious nature of Hamid and Seigal's misconduct, it took Respondent over a month to take any action against them—reluctantly issuing them both three-day suspensions in late June 2016 for posting the derogatory photos on the walls of the respiratory department. (Tr. 545-546, 1346, 1348, 1543-1545, 1548, 1551-1552, 1625; R 13; GC 123) Seigal resigned shortly thereafter. (Tr. 1219) Seigal had held the PFT tech position.

By June 17, 2016, fed up with management's tepid response to the offensive postings in the department and on Instagram, a group of seven respiratory therapists[3] went to human resources to support Pereyra. (Tr. 27, 29, 388, 579-580, 679, 811-812, 1642) Respondent was unwilling to speak to employees as a group, and allowed only one employee to speak to Director

[3] Monique Johnson, Shilu Yogi, Christina Concepcion, Philip Duong, Amanpreet Kaur, Grant Vea, Babita Roop, and Alex Aguilar went to human resources on June 17, 2017. (Tr. 27, 29, 388, 579-580, 811-812)

of Human Resources (DHR) Joe Ambrosini. Even though the employees went to human resources as a group, they were informed that only one of them would be allowed to speak to Ambrosini. (Tr. 388-389; 580-581, 680-681, 811-812) Respiratory therapist Monique Johnson went in to speak to Ambrosini in his office on behalf of the group and explained that she felt that "nobody was listening to us," but Ambrosini did not want to talk about it. (Tr. 581-582) Ambrosini testified that these employees already knew about the suspensions of Hamid and Seigal, however, this portion of Ambrosini's testimony cannot be credited as Seigal and Hamid were not suspended until after June 17, 2016. (Tr. 1346, 1348, 1543-1545, 1551-1552, 1559-1562; R 13; GC 123)

c. June 2016 Concerted Complaints and Other Protected Concerted Activities

Meanwhile, numerous respiratory therapists—including Charging Party Roop—engaged in other simultaneous concerted action to confront perceived favoritism in the department and management's bypassing of eligible employees for promotional opportunities. Even early on, Respondent displayed its hostility towards this protected concerted conduct and the concerted complaints of its respiratory therapists.

On May 12, 2016, DPS Marino promoted respiratory therapist Matuszak to replace Seigal in the PFT Lab without posting for the position. (Tr. 1309, 1351, 1414-1415, 1563; GC 98) Around the same time, Marino also put Hamid in the Resource position Matuszak had previously occupied without posting or allowing others to apply for the position. (Tr. 387, 783, 1219, 1360, 2015, 2025) Both the PFT and Resource positions included the benefits of working day shift, not working weekends, and not doing patient care on the floors. (Tr. 779, 1360, 2015) On May 6, 2016, Marino emailed the respiratory therapists soliciting applications for a backup PFT lab tech position, stating a Certified Pulmonary Function Tech (CPFT) certificate—a state license requiring passage of an exam—was required in order to apply for the position and applications

were due by May 12, 2016. (Tr. 376, 775-776, 948, 1351-1355, 1985; GC 98) On May 13, 2016, Marino decided to give the position to Steve Ochoa, a per diem employee. (Tr. 1357-1358, 1414; GC 98) Previously, Respondent had not required lab techs working in the PFT lab to have CPFT certification (GC 6, GC 98, Tr. 778, 780, 1353-1355). This change, and the perceived favoritism towards Matuszak, caused conflict in the department as experienced and senior respiratory therapists were barred from applying for this position because of the new requirement to have a CPFT license, and the short notice did not allow enough time to get their certificate by the deadline. (Tr. 377, 776, 1356, 1954). Prior to Matuszak's promotion, she had been working as a backup to Seigal in the PFT lab although she was not certified and only went to get her certification when Marino told her to do so. (Tr. 1355)

On May 19, 2016, Respiratory therapists Nezam (Frank) Mardanzai and Alexandria (Alex) Aguilar took action over being passed over for the Resource and PFT tech positions, and called Marino to discuss the possibility of being trained to work in the PFT lab and of rotating which therapist worked in the Resource position. (Tr. 377-379, 781-782) In a blatant display of hostility towards their concerted activity, Respondent changed Aguilar's schedule to separate her from Mardanzai the very next day. (Tr. 381, 382, 789; GC 36; GC 52) Making plain his obvious animus, Marino told Aguilar he changed her schedule because she and Mardanzai were riling up the department and there was more "bullshit" than work. (Tr. 381, 382, 789; GC 52; GC 36)

On June 14, 2016, Charging Party Roop took her own turn approaching DPS Marino about issues of favoritism in the respiratory department and asking Marino why certain respiratory therapists were seemingly not required to work weekends. (Tr. 25-26; 1360) Roop told Marino, "I've been here 17 years, some people have been here 20 years, 25 years, and we feel like we've been looked over, because we follow rules, we work weekends, and there's certain individuals that don't." (Tr. 25) Respondent took no action in response to Roop's

concern, and Frank Mardanzai also complained to Marino about the issue of respiratory therapists working weekends four days later, on June 18, 2016. (Tr. 800-801; GC 62).

The following week on June 21, 2016, Matuszak confronted Roop about the seven therapists that went to human resources on June 17 as described earlier, Roop's questioning of DPS Marino regarding individuals not working weekends, and Steve Ochoa, the per diem therapist getting trained to work in the PFT lab. (Tr. 32-33) That same day respiratory therapist Amanpreet Kaur told Roop that Matuszak made a comment about Roop that Kaur perceived as a threat. (Tr. 37, 809). When Roop subsequently notified Marino of the comment, he said that DHR Ambrosini told him that seven people went to human resources to complain about his job. (Tr. 38, 1563) Roop informed Marino that she was one of the seven people that went to human resources and they went to support Pereyra. (Tr. 38) She also informed him she would be complaining to human resources, and subsequently filed two complaint forms with human resources, which Respondent did not investigate. (Tr. 39, 46-47, 1341, 1346, 1455-1457; GC 2; GC 3) Marino later emailed DHR Ambrosini and DON Rozanne O'Keefe stating that he had spoken to Matuszak and that this was "blown way out of proportion from a misguided individual," referring to Roop. (1456, GC 65)

As the situation in the department grew increasingly fraught, Roop led another effort among the respiratory therapists to try to improve conditions in the department. By this time, conflict was growing between the respiratory therapists—those who were offended by the racist postings and upset over perceived favoritism in the department—and those were not. (Tr. 647-648, 1350, 1356-1357, 1581-1582, 1954) Around June 22, 2016, Roop, together with respiratory therapist Johnson, solicited feedback from her coworkers to draft a list of concerns about the issues affecting the respiratory therapists to provide to the Union in a last-ditch appeal for help. (Tr. 59, 70, 588, 591, 596, 1301, 1565-1566; GC 6; GC 98) The list addressed issues such as:

certain employees not working weekends as required; part-time benefitted therapists being temporarily laid off more frequently since two other employees were promoted and given more hours to the detriment of others in the unit; management's failure to post for or allow employees to apply for the PFT tech position; the changing PFT tech job description now requiring a CPFT and not providing employees time to get the certificate; and, the Resource position being filled without first being posted. (Tr. 61, 64-667 1305; GC 6; GC 98) Roop's hopes were dashed when the Union did nothing whatsoever to help resolve their concerns, and instead summarily just handed over the list to Respondent's managers. (Tr. 59, 70, 588, 591, 596, 1301, 1565-1566; GC 6; GC 98) Charging Party Jernetta Backus also tried reaching out to Union Representative Matthew Mullany for help with the issues in the department, but he took no action at all except to claim that all of her concerns had already been addressed. (GC 39) The Union's inaction compelled the respiratory therapists to continue to engage in protected concerted activities and attempt to advocate for themselves.

d. Marino Presents His Rebuttal to the List of Concerns in Department Meetings in August 2016

DPS Marino prepared a rebuttal to the respiratory therapists' list of concerns, which he communicated to employees and provided in paper format at two meetings held in August 2016. (Tr. 76, 593, 1311-1315; GC 7; GC 98, SRH000622, SRH000635) Marino's prepared written response stated that the employees' claims were fabricated, bordered on "purposefully misleading," and "when a group of employees "speak on behalf" of a group, they must include the entire group and include the signatures of all employees in the group." (GC 98, quotations in original) Marino continued, writing "[o]therwise it is misleading to represent themselves as a collective when they are merely a portion." (GC 98) Marino also made known his position that contrary to the respiratory therapists' assertion, "the [U]nion does not "need" to be and will

never be consulted on policy changes now or in the future." (Tr. 83; GC 7) Marino's reaction to the list of concerns convinced employees that they would have to take it upon themselves to better their working conditions and they could not count on the Union to act on their behalf.

Indeed, at the meeting on August 17, 2016, long-time employee Erik Thom confronted Marino over the issues of favoritism in the department concerning filling the PFT lab positions and the changes to the job description[4] and Marino grew so frustrated that he swore at Thom in the presence of other employees. (Tr. 83, 595, 925-928, 944; GC 9, p. 6) As Marino was unreceptive and openly hostile to the employees' concerns, nearly all of the issues they raised were left unresolved. (Tr. 84)

e. Marino Attempts to Discipline Roop and Threaten Her With Discharge

In late July 2016, a couple weeks after seven respiratory therapists, including Charging Party Roop, confronted management with their workplace complaints, DPS Marino exhibited his open hostility towards Roop's concerted activities by overzealously trying to discipline and threaten her with discharge over an allegedly unprofessional interaction with a nurse in the ICU. (Tr. 1570-1571; GC 68; GC 69) While ultimately Roop's conduct did not result in any disciplinary action, Marino had prepared a verbal warning to issue to Roop which stated "[t]he hospital reserves the right to proceed directly to termination and/or choose any other disciplinary action it deems appropriate should any future instances such as this occur." (Tr. 1570-1571; GC 68; GC 69) At this point, Roop had never been disciplined in 17 years of employment and had consistently received positive performance appraisals. (GC 35) Indeed, Marino noted in Roop's appraisal from July 2014:

> Excellent employee! Babita is outspoken because she is passionate about what we do as a department and hospital. There are a lot of "5s" on this eval. because

[4] Despite Marino's claim that he did not change the requirements for the PFT position, this was contradicted by his own testimony on cross-examination and his written rebuttal stating that the past practice is not the current practice and it had been determined that the PFTs would be performed by someone certified. (Tr. 1310, 1355-1356; GC 98)

> she has earned them. She will adapt and overcome any situation. She is constantly monitoring our department to ensure it is running properly. I can't do this job without people like her. (GC 35, SRH000309)

Marino also stated in Roop's September 2015 appraisal:

> Babita is one of the hardest working people in this department. The physicians are constantly commenting on the great job she does with all of the patients. She keeps control over the shift answering staff questions and providing support to therapists that need help, even looking ahead to the upcoming shifts to ensure coverage is in compliance with acuity. I truly look forward to Babita being here for a long time. (GC 35, SRH000282)

After DPS Marino emailed DHR Ambrosini a copy of the verbal warning, Ambrosini told him to remove the language threatening termination because it was too heavy handed for a verbal warning. (Tr. 1572) Ambrosini replied to Marino asking, "[w]hat exactly did she do?" and "[h]ave we asked for her side of the story before deciding on the discipline?" (Tr. 1570-1571; GC 68; GC 69) Ambrosini also stated in his email "I just want to make sure we covered ourselves." (Tr. 1570-1571; GC 68; GC 69) Ambrosini's response is telling, revealing Respondent's tendency to conduct only cursory investigations when considering disciplining vocal employees.

f. Roop and Pereyra Report Receiving Harassing Text Messages From Anonymous Numbers Likely Belonging to Coworkers

In early July 2016, just two weeks after respiratory therapist Matuszak confronted Charging Party Roop about her concerted complaints, Roop began receiving text messages from various anonymous numbers with images referencing a "bitchy coworker," other vulgarities, and saying "you're fired." (Tr. 47-48; GC 4, GC 5) On this same date, just weeks after Respondent disciplined employees Seigal and Hamid, respiratory therapist Pereyra also began receiving similar text messages from anonymous numbers with images of apes referencing "Jogilla" and "monkey business." (Tr. 431, GC 19) Both Roop and Pereyra reported these text messages to Marino on multiple occasions and informed him that they suspected Matuszak, Seigal, Hamid,

and Smith were behind the messages. (Tr. 56-58, 437-439; GC 5) Indeed, in 2017, Seigal posted an image to Facebook that was identical to one of the images referencing "Jogilla" sent to Pereyra from one of the anonymous numbers. (Tr. 433-436; GC 19) In addition, after Roop was discharged in April 2017, she replied to one of the anonymous numbers with two images that Matuszak subsequently posted to her Instagram account. (Tr. 51-52; GC 4) Pereyra also received a number of packages at home, including a crying baby statue and a package addressed to "Jogilla" whose contents had a rotten smell, and had his tires slashed while his vehicle was in the parking lot at Respondent's facility. (Tr. 479-481). Aside from calling one of the anonymous numbers, Marino did not do anything to investigate the source of the messages when they were reported to him in 2016. (Tr. 57, 1316-1317) When Pereyra reported them to human resources in 2016, DHR Ambrosini did not do anything to investigate except review the phone numbers of respiratory therapists on file even though he knew the numbers sending the texts were disguised by a software program. (Tr. 1553-1558, 1646-1647)

g. Roop Runs For Shop Steward and Marino Blocks Her Access to Resource Scheduling to Keep Her From Discussing Staffing Levels With Coworkers

DPS Marino again displayed his hostility towards Charging Party Roop's efforts to organize and take concerted action when he made notes in preparation to meet with Roop in early November 2016, writing that he wanted to convey to her the "understanding that Babita does not run this department or provide union representation." (GC 95) To Marino's chagrin, when the need for an additional shop steward arose in November 2016, Roop was overwhelming elected with twenty votes compared to nine for respiratory therapist Brian Smith, the other candidate. (Tr. 442-443; GC 21; GC 54) The email announcing the results of the shop steward election went to the entire department, including Marino. (Tr. 448; GC 54)

Marino also blocked Roop's access to the Resource schedule in November 2016 to keep her from seeing what was scheduled in the PFT lab and to prevent her from discussing staffing needs with her coworkers. Indeed, the notes Marino prepared to meet with Roop stated that Roop was "[l]ooking at the Resource Scheduling program to see what is scheduled in the PFT lab" and making comments about employees being temporarily laid off when other employees are allowed to work in the PFT lab when there are no procedures scheduled. (GC 95) While Roop did discuss staffing levels in the PFT lab versus the floors with her coworkers, she also needed access to this schedule to do her job in order to know when C-sections were scheduled that she was required to attend as a team lead. (Tr. 87-88) Indeed, after Roop discovered Marino blocked her access, she discussed it with her coworkers Henry Aquino and Marco Garcia and then confronted Marino about the change in their presence. (Tr. 91) Marino told them that he blocked their access because employees were accessing information that Marino did not want them to access and he did not want Roop to see what was scheduled in the PFT lab. (Tr. 91; GC 95)

h. On November 21, 2016 Marino Issues Roop her First Discipline in 17 Years and Interrogates Her About Her Discussions With Coworkers

On November 14, 2016, Charging Party Roop, DPS Marino, DHR Ambrosini, and Union representative Mullany met in the human resources office and Roop was informed that Respondent had received a letter of complaint about her written by employees Matuszak, Hamid, and Smith. (Tr. 93) Roop was not shown the letter or given any specifics regarding the allegations against her, rather was only informed in vague terms that she was accused of looking down on people, swearing, and behaving unprofessionally. (Tr. 94) While Roop admitted that she has cursed at work, she denied that she ever cursed "at anybody unprofessionally" or in front of anyone who doesn't belong in the department. (Tr. 102) Moreover, Respondent tolerates cursing as long as it stays in the department. (Tr. 370, 1329) Following the meeting, Respondent

did not conduct any investigation into the allegations in the letter. (Tr. 1365) After this meeting, Roop was distraught and called Charging Party Jernetta Backus who confronted DPS Marino and Clinical Lead Gandhi about their employees feeling bullied and harassed. (Tr. 240, 242-243)

On November 21, 2016, Marino emailed Ambrosini with a proposed written warning to issue to Roop that contained the same language Ambrosini had asked him to remove from his July proposed verbal warning that referenced the hospital proceeding directly to termination. (GC 73). Later that day, Marino issued Roop a verbal written warning based on the letter of complaint from Matuszak, Hamid, and Smith that did not contain the language referencing termination. (Tr. 1362, GC 8) Marino did not provide Roop with any explanation as to how her language, gestures, incitement, behavior, gossip and/or hearsay justified being disciplined. (Tr. 93-94, 101-104) In that same interaction, Marino asked Roop whether she had discussed the November 14, 2016 meeting with anyone. (Tr. 1365-1366, 1458-1459; GC 91)

i. Marino Interrogated Respiratory Department Employees About Their Protected Concerted Activity in November 2016

After confronting Clinical Lead Gandhi and DPS Marino regarding the bullying and harassment in the department, Charging Party Backus got blank forms entitled "bullying/discrimination/harassment and/or retaliation complaint forms" (bullying complaint forms) and distributed them to employees. (Tr. 243-244) The purpose of the blank forms was for employees to document instances of bullying or retaliation that they experienced or witnessed.

On November 21, 2016, Marino emailed Ambrosini stating that information from the November 14, 2016 meeting with Roop had been leaked and in an email to Ambrosini later that day admitted that he hadn't had time to talk with anyone to verify that it came from Babita but would like to suspend her if it did. (Tr. 1330-1331; GC 74) Ambrosini responded that he wanted "to be careful it's not just Marie or Chris or Brian (or whoever) trying to get Babita in more

trouble." (Tr. 1646-1647; GC 74) On that same day, respiratory therapist Matuszak emailed Marino and Ambrosini stating that Marino had informed Matuszak of the meeting in human resources with Roop regarding the letter of complaint, Marino told Matuszak the results were to remain confidential, Matuszak was disappointed Roop remained a team lead, and others in the department knew Smith, Hamid, and Matuszak had written a letter to human resources about Roop. (GC 87)

Even though the leak allegation came from Matuszak, and Ambrosini was not concerned about the shared information, Marino proceeded to question six employees about whether they had discussions with Roop or whether Charging Parties Roop or Backus had handed them bullying complaint forms. (Tr. 1459, 1504, 1591; GC 88, GC 91)

DPS Marino then proceeded to question respiratory therapist Fawad Meskienyar about Roop's activities and the alleged leak. (Tr. 1459; GC 91) Matuszak reported that Roop and Backus had handed out bullying complaint forms to the staff and Marino subsequently asked respiratory therapist My-Quyen Giang whether she had seen anyone handing out such forms. (Tr. 1460; GC 91) Marino interrogated respiratory therapists Giang, Amanpreet Kaur, and Rose Rogers, regarding whether they had heard any information regarding the meeting. (Tr. 729-732, 817-818, 1459; GC 91) Marino also interrogated respiratory therapist Erik Thom about whether he had heard anything about the alleged leak from Roop. (Tr. 1462-1463) Marino interrogated respiratory therapist Grant Vea regarding the meeting as well and also asked him about the bullying complaint forms being handed out. (Tr. 1460; GC 91)

j. Respiratory Therapists' November 2016 Concerted Complaints

On November 26, 2016, following her discipline, Roop filed a bullying, discrimination, retaliation, and/or harassment complaint form with human resources that Respondent did not investigate (Tr. 107, 1337-1338, 1616-1616; GC 9) Charging Party Backus also collected

complaint forms filled out by Roop, Mardanzai, and Philip Duong, and turned them into human resources on November 28, 2016. (Tr. 243-244, 1608-1609; GC 36) Respondent did not investigate any of these complaints. (Tr. 246, 1610-1613, 1616) Pereyra also filed a complaint form and submitted it to human resources regarding receiving a text stating "vote monkey" which he viewed as retaliatory harassment relating to the shop steward election. (Tr. 449; GC 20) Respondent did not investigate Pereyra's complaint. (Tr. 449; 1645)

k. Roop is Interrogated About her Protected Activity and Threatened with Termination in a Meeting on December 5, 2016

On December 5, 2016, following DPS Marino's questioning of multiple employees about their discussions with Charging Party Roop and whether they had witnessed Roop and Charging Party Backus handing out complaint forms, Roop was called to human resources for a meeting with Marino, DON O'Keefe, DHR Ambrosini, and radiology technologist and shop steward Justin Kmetz. (Tr. 109-110) In the meeting, Ambrosini and Marino interrogated Roop about whether she breached the confidentiality of the November 2016 meeting by talking to other employees. (Tr. 110, 690-691) When Roop denied this, they told her it was pretty coincidental because several employees had submitted retaliation and bullying forms to human resources in what appeared to be part of a concerted action with Roop. (Tr. 110, 690-691) O'Keefe told Roop she was going to demote her and take her team lead away. (Tr. 111, 691-692) Roop protested that Smith is still a team lead on night shift even though many people have complained about his unprofessional conduct. (Tr. 111-113) O'Keefe decided not take Roop's team lead away during this meeting but told her that if she hears one more word of bullying, retaliation, or harassment, "people are going to get fired." (Tr. 113, 691-692) After the December 5, 2016 meeting, Roop filed a complaint with the EEOC. (Tr. 113-114; GC 10)

l. In a December 14, 2016 Mandatory Meeting CEO Aman Dhuper Makes Coercive Statements and Threats of Job Loss to Respiratory Therapists and Subsequently Removes the Respiratory Department Television

In yet another effort to improve the conditions in the department, on December 10, 2016, Charging Party Backus emailed CEO Aman Dhuper and other hospital executives regarding the issues in the respiratory department, mentioning bullying, harassment, and retaliation, even though she was concerned this would put a target on her back. (Tr. 247-248, 2286; GC 37) On December 14, 2016, Dhuper held a mandatory meeting with respiratory department employees and DHR Ambrosini, DON O'Keefe, and DPS Marino. (Tr. 115-116, 249-250, 451-452, 529, 595-597, 735-736, 814-815, 1593, 1595-1596, 2288-2289; GC 7) While employees hoped their concerns might finally be heard and taken seriously, their hopes were dashed when they attended the meeting only to be greeted with threats of termination and coercive statements about their protected concerted activities.

Towards the beginning of the meeting, CEO Dhuper held up a folder and said this was the most complaints he's seen in any department and it's the thickest file in the hospital and threatened to fire everyone—those who did something or spoke up and those who didn't. (Tr. 116-117, 253, 452, 530-531, 596-597, 736, 815, 879; GC 76) Pereyra and Roop tried to hand Dhuper copies of the anonymous text messages they had been receiving during the meeting and Dhuper stated that he was disgusted by them and would have IT look into it. (Tr. 117, 453, 530, 597, 2419) Backus told Dhuper that people may not be willing to speak up in front of everyone for fear of retaliation and Dhuper offered to meet with employees individually and directed them to schedule appointments with him through his secretary, Shawnee Davis. (Tr. 117-118, 253-254, 453, 597-598, 815)

Soon after the December 14, 2016 mandatory department meeting, CEO Dhuper had the television that was previously located in the respiratory department removed and put in storage without providing any explanation to employees. (Tr. 356, 461-462, 737, 1297, 2425-2426)

m. CEO Dhuper Interrogates Respiratory Department Employees and Makes Coercive Statements About Their Protected Concerted Activities

i. Interrogations During Individual Meetings with Employees and DON O'Keefe in December 2016

After CEO Dhuper agreed to meet with employees individually with DON O'Keefe present, he proceeded to question most of the employees they met with during meetings that took place in late December 2016. (Tr. 119-121, 256-257, 455-456, 816; GC 99) While Dhuper testified that he took notes during all of the meetings, he claimed the notes of his interview with Roop went missing, while notes of his interview of Matuszak were the only set that was formally typed up. (Tr. 2592-2593; GC 99)

On December 19, 2016, ahead of their meeting, Charging Party Backus sent Dhuper an email with nineteen issues concerning the respiratory therapists and proposed solutions. (Tr. 256-257; GC 38) When Backus met with Dhuper and O'Keefe on December 19, 2016, Dhuper had not read her email but wanted to know what had happened to her directly and she stated that she had a very big problem with the gorilla pictures and found them very offensive. (Tr. 257; GC 99) When Pereyra met with Dhuper and O'Keefe, he gave Dhuper a copy of the police report he had filed and copies of the anonymous text messages he had been receiving. (Tr. 458) During the meeting, Dhuper told Pereyra he was just as at fault as the people who have been doing the harassing because he hadn't done anything to protect himself, leaving Pereyra more desperately hopeless than ever. (Tr. 455-456)

When Roop met with CEO Dhuper and DON O'Keefe on December 22, 2016, Roop expressed her concerns over Marino reducing their staffing on the floors while increasing the

staffing in the PFT lab when there were not enough procedures scheduled to justify it. (Tr. 119-121, 2462) Roop also informed Dhuper and O'Keefe that Marino had blocked her access to the Resource schedule to prevent her from discussing the staffing levels with her coworkers. (Tr. 119-121, 2462) Rather than address Roop's legitimate group concerns during the meeting, Dhuper questioned Roop about which group she belonged to and asked her point blank, "are you the ringleader?" (Tr. 121) Roop was upset by the comment and replied that she was not the ringleader, but when she sees something that's not right she will speak up. (Tr. 121) When respiratory therapist Johnson met with Dhuper and O'Keefe, Dhuper similarly interrogated Johnson about what team she was on and she replied, "are you asking if I'm on Babita Roop's team?" (Tr. 599) Dhuper continued to press Johnson, asking her, "who are the troublemakers?" Johnson testified that Dhuper also used the term "ringleaders" during their meeting. (Tr. 660-661) Dhuper also asked respiratory therapist Amanpreet Kaur during her meeting with him and O'Keefe, which side she was on and "who did you sit next to, Babita Roop?" (Tr. 816)

CEO Dhuper and DON O'Keefe also met with respiratory therapist Marco Garcia in late December 2016, who informed Dhuper that the images posted in the department were on the department computers. (Tr. 552, 2457-2459) Dhuper had the computers removed from the department and claimed he requested IT to check them for the images but did not find anything. (Tr. 2458) However, Respondent's own manager, DPS Marino, directly contradicted Dhuper, testifying that that when the computers were checked for those images it became apparent that that's where the pictures came from. (Tr. 1348) In addition, there is evidence in the record that the images posted in the department in May 2016 were still on department computers as late as December 2016 (Tr. 410-411, 413-415, 419-427; GC 18; GC 53, video 1; GC 53, video 2) Indeed, when DHR Ambrosini testified that the IT department had searched the computers even before December 2016 and not found anything, the shock and disbelief that the IT department

couldn't find "what I think probably someone in seventh grade could find" was repeatedly noted on the record. (Tr. 1637-1639)

ii. Dhuper Makes Coercive Statements to Respiratory Department Employees in Late January 2017

To the dismay of the respiratory therapists, CEO Dhuper continued to make comments disparaging Charging Party Roop's protected concerted activities and the protected concerted activities of those who joined her. In late January 2017, Dhuper came into the respiratory department towards the end of day shift and initiated conversation with Roop, respiratory therapist Susanna Dachouk, and later respiratory therapist Chris Hamid. (Tr. 122, 128, 766) Dhuper made positive observations about the changes he had made to the department, commenting that the newly painted lockers looked clean after they had previously been covered in "WTF" stamps, which Dhuper found highly inappropriate. (Tr. 122-124, 767-768, 771, 2471-2472, 2476-2477) Roop agreed that the lockers looked clean, stated, no more WTF stamp, and explained to Dhuper that she found the stamp in an empty locker and retrieved it and gave it to Dhuper. (Tr. 122-124, 767-768, 771, 2476) Dhuper demanded to know whose locker it was and Roop said the locker didn't have a name on it. (Tr. 124) Then Hamid entered the department and Dhuper looked at Roop and said, "Babita is the ringleader, she's the troublemaker, when anything happens, she initiates things and everybody else jumps on the bandwagon" and she does that because she's been here for a long time and thinks she has a right to. (Tr. 128) Dachouk testified that Dhuper also said to Roop, you're the instigator of the drama going on. (Tr. 769)

n. February 7, 2017 Events and CEO Dhuper's Solicitation of Roop to Quit

On February 6, 2017, DPS Marino emailed respiratory department employees stating that he had been informed that the WTF stamp was found and handed over to management and warned that no other "hidden" treasures should come to light. (Tr. 1419-1421; GC 27) CEO

Dhuper was already extremely upset with Marino over the state of the department by the time the WTF stamp was given to Dhuper. (Tr. 2427) As respiratory therapist Monique Johnson testified, respiratory therapist Brian Smith was the individual using the WTF stamp in the department, and she later reported this to Dhuper. (Tr. 602-604)

The very next morning after Marino sent his email to department employees, on February 7, 2017, Charging Party Roop initiated conversation with Smith, the night shift team lead at the time, in the respiratory department about an assignment sheet and Smith quickly caused the situation to escalate into a confrontation. (Tr. 131) Roop testified that Smith quickly became hostile, telling her she needed to stop this madness and then accused Roop of using profanity in the parking lot the day before. (Tr. 134) Since Roop was concerned that there were students present for Smith's outburst, Roop took Smith to go speak to security. (Tr. 134-135) Roop testified that the security guard they spoke to said he was not on duty at the time and this looked like a department matter. (Tr. 135) Roop testified that she then walked away while Smith yelled at her from down the hall. (Tr. 135-136)

Following her confrontation with Smith, Roop immediately called DPS Marino and left a voicemail. (Tr. 136) When Marino called Roop back 15-20 minutes later, Roop told him she was tired of people picking on her, started crying, and hung up on Marino. (Tr. 136-138) Roop took a minute, went back to the department, picked up her assignment, and took a nursing student that was shadowing her that day. (Tr. 143) Roop also called Shawnee Davis, CEO Dhuper's secretary, to schedule a meeting with Dhuper. (Tr. 142-143)

Roop was called to human resources later that morning to meet with DPS Marino, DHR Ambrosini, radiology technologist and Union shop steward Kmetz, and Clinical Lead Gandhi. (Tr. 145-147) During the meeting Marino accused Roop of yelling at him on the phone and hanging up on him. (Tr. 146, 697) While Roop apologized for hanging up on Marino, she denied

yelling at him on the phone, but said that she had reached a breaking point and started crying. (Tr. 146, 697, 700) In the meeting Roop also said that after the call, she took a break, put herself together, and went back to the department like nothing happened. (Tr. 143, 147) Roop also discussed the incident with Smith in the morning and explained that she had not been on the phone using profanity the day before, rather she had been outside the building and off the clock when she was on the phone with Union representative Mullany. (Tr. 146-147) Marino asked Roop if she was talking to Mullany about the staffing issue, and Roop said no. (Tr. 147) Marino also asked Roop about the meeting she had scheduled with Dhuper for later that day. (Tr. 147)

Later that same day, on February 7, 2017, Roop met with Dhuper one-on-one to explain that after she gave him the WTF stamp she was being picked on more than before. (Tr. 149) Dhuper told Roop that if these people are picking on you "why don't you just quit." (Tr. 149)

o. February 13, 2017 Marino Suspended Roop, Issued her a Final Written Warning, and Demoted her from Team Lead

On February 13, 2017, Charging Party Roop met with DPS Marino, DHR Ambrosini and respiratory therapist and shop steward Pereyra, and Marino gave Roop a letter stating she was being suspended for three days, removed from her position as team lead, and given a final written warning. (Tr. 151; GC 11) The letter stated that the reason for such severe discipline was because Roop participated in a verbal altercation in front of staff and students and supposedly made an angry and emotional phone call to Marino, during which she berated him in an accusatory manner and hung up. (GC 11) Marino again showed his hostility towards Roop by issuing her three severe disciplines all at once—when Roop had been team lead for five years and her only previous discipline in 17 years of employment was just a verbal warning. (Tr. 154; GC 8) On February 14, 2017, Roop filed charges against Respondent with the EEOC alleging Respondent had discriminated against Roop and other employees, and created a hostile work

environment by allowing the ongoing racist harassment of Filipino employees Aquino and Pereyra. (Tr. 155-156; GC 29)

p. March 14, 2017 Incident with Marie Matuszak

On March 14, 2017, respiratory therapist Rose Rogers and Charging Party Roop were walking into the department through one of the two access doors when respiratory therapist Matuszak held open one of the doors to let two students exit the department. (Tr. 156-157, 741) Rogers then walked through the door that Matsuzak held open for her and entered the department. (Tr. 156-157, 741) While still holding the door open, Matuszak asked Roop if she was too good to walk through this door. (Tr. 156-157, 741) To avoid any confrontation with Matuszak, Roop went around and entered the department through the other door. (Tr. 156-157, 741) Matuszak, however, also went to the other door where Roop had entered and proceeded to call her childish. (Tr. 741) Roop did not say anything. (Tr. 156-157, 741-742) Respiratory therapist Erik Thom was already in the department and witnessed Matuszak make further comments about Roop, such as "some people aren't mature enough to go through a held door." (Tr. 2174-2175; GC 93)

Following the incident, new DHR Stephanie Jones met with Rogers on March 18, 2017, and asked Rogers who she thought was the aggressor in the incident. Rogers answered Matuszak. (Tr. 743-745; GC 82) Jones also interviewed Thom in connection with the incident, who reported that Matuszak had made mocking and disparaging comments about Roop that made him uncomfortable. (Tr. 2174-2175; GC 93) Jones also called Roop to human resources to discuss the incident and told her that she aggravated the problem by not going through the door, despite the reports from other witnesses that Matuszak was the aggressor (Tr. 159). During this meeting Roop also told Jones that Matuszak had made offensive Facebook posts about her and Jones said there was nothing she could do about social media (Tr. 164, 2108; GC 30; GC 31)

q. CEO Aman Dhuper's March 2017 Coercive Statements and Threats

On a Monday in March 2017, Charging Party Roop and respiratory therapist Pereyra left the respiratory department to respond to an overhead stat call[5] to the ER. (Tr. 161, 464) As they approached a set of automatic double doors, they saw CEO Dhuper walking behind them. (Tr. 161, 464) The automatic doors were not functioning properly and failed to open when they approached. (Tr. 161, 464-465) Roop was ahead of Pereyra trying to go through the doors when Dhuper said to her, don't let the door hit you, because that's the only thing left to be done. (Tr. 161, 465) Even when Roop was rushing to respond to an emergent situation requiring critical care, Dhuper couldn't help but express his open hostility towards Roop.

Similarly, in late March 2017, CEO Dhuper made coercive and threatening statements to respiratory therapists in the midst of a power outage that could have compromised patients on ventilators. (Tr. 602, 793, 2467-2471) The night the power went out at Respondent's facility, Dhuper went to the respiratory department during his rounds to speak with some of the respiratory therapists working that night, including Monique Johnson, Philip Duong, Israel Oliviolo, and Frank Mardanzai. (Tr. 602, 793, 2467-2471) In the course of the conversation, Dhuper asked about the WTF stamp and Johnson said that Matuszak brought it and Smith ended up with it. (Tr. 602-604) Johnson also asked Dhuper if it was true that he hated the respiratory department and he confirmed that he did because of all the problems that they cause him. (Tr. 603, 793) Dhuper became angry, asked who the ringleaders were, threatened to close the PFT lab, and pointing his finger at the employees, threatened to fire them and told them if they wanted to sue him, to get in line. (Tr. 603-605, 660, 793-796) Dhuper also mentioned that if employees really wanted something done, they should do a petition. (Tr. 603-604) This was clearly an offhand comment because Respondent showed great animus towards the respiratory

[5] Stat calls indicate a crisis situation and all respiratory therapists are required to respond. (Tr. 1014-1015)

therapist petition ultimately delivered to Dhuper, and Dhuper did not testify that he made this statement. (Tr. 2469-2471) However, Johnson apparently took this comment in earnest, as she quickly relayed it to Charging Party Backus. (Tr. 605) While employees had discussed the prospect of a petition before, no one was willing to do it until Johnson told employees about Dhuper's comment. (Tr. 616)

r. April 13, 2017 Respiratory Therapist Petition Delivered to CEO Dhuper

Around that same time, Charging Party Backus had already begun drafting a petition and soliciting feedback from other employees regarding what to include or remove from the petition. (Tr. 261-264, 606-607; GC 40) Backus called Charging Party Roop and told her that she had spoken to a number of respiratory therapists about what they would like to include in the petition, and asked Roop if she had any concerns she wanted addressed. (Tr. 207) Roop asked Backus to include language addressing what she perceived as respiratory therapist Matuszak's abuse of her position as clinical instructor of Ohlone College. (Tr. 207-209; GC 83) Other respiratory therapists shared Roop's concerns that Matuszak was abusing her authority by asking her students to spy on other employees and by intervening in students' clinical rotations in order to get other employees in trouble. (Tr. 524-526, 746-747, 755-756; GC 101) Matuszak's unprofessional conduct also caused growing concern among the respiratory therapists that they could risk their licenses if something were to happen because of a disruption from Matuszak while a student was working under them. (Tr. 217, 322-325) Due to these group concerns, Backus included a provision in the petition stating that the signatories would no longer be working with Ohlone students while Matuszak remained clinical instructor in order to protect their licenses. (Tr. 217, 322-325, 526, 746-747, 755-756; GC 34) The petition also asked Respondent to reprimand or remove Matuszak, Smith, Hamid and DPS Marino, and stating that the signatories were open to discussing these issues but as a collective group only. (GC 34)

At the beginning of April 2017, Roop began circulating the petition among the respiratory therapists and collecting signatures. (Tr. 170, 172, 176-180, 362, 390, 467-468, 554, 748, 797, 820-821) On April 13, 2017, Backus dropped off a copy of the petition with the signatures at CEO Dhuper's office, and provided a copy of the petition without the signatures to human resources, Ohlone College, and the Union. (Tr. 269-270, 336; GC 34; GC 41; GC 42) However, Respondent had apparently already been notified of the petition effort as early as April 4, 2017, when Respiratory Therapist Hamid informed DHR Jones that Backus and Roop were asking employees to sign paperwork saying several individuals were creating a hostile work environment. (Tr. 2039-2043, 2203-2204; GC 85)

s. April 17, 2017 Respondent Fires Babita Roop

Respondent terminated Charging Party Roop the following Monday after receiving the April 13, 2017 petition signed by 17 respiratory therapists. (Tr. 361; GC 34; GC 38) After only receiving positive performance reviews and not one discipline in 17 years until November 21, 2016, Roop was terminated four days after the respiratory therapists gave Respondent the petition. (GC 12; GC 35) Roop met with DHR Jones, DPS Marino, and shop steward and radiology technologist Kmetz on April 17, 2017, and Jones informed Roop that they were meeting regarding an incident on March 19, 2017. (Tr. 185-186) This was the first Roop was hearing of the incident as when she had previously been contacted by Jones, she was only asked if she worked on March 19, 2017 and "if anything out of the ordinary happened" because "there was a concern from an employee." (Tr. 186, 189) Jones informed Roop that Respondent was terminating her employment based on her previous discipline and because of an incident on March 19, 2017, when Roop abruptly snatched a phone from a coworker. (Tr. 188) This was the first time Roop was informed of the allegations against her that led to her termination. (Tr. 189) The notice of termination of employment issued to Roop listed the November 21, 2016 verbal

warning, the February 13, 2017 final warning and suspension, and the March 14, 2017 door incident with Matuszak, in addition to the March 19, 2017 phone incident. (GC 12)

Respondent never gave Roop a chance to tell her side of the story. (Tr. 189) On the morning of March 19, 2017 during shift change, Roop was in the respiratory department with Shilu Yogi, Rose Rogers, and Erik Thom, when respiratory therapist My-Quyen Giang asked Roop if she was covering the ER. (Tr. 225-226, 228) Giang then handed Roop the ER phone, which she placed on the table, and then two medications for a specific patient, which Roop also took from Giang. (Tr. 225-226) There was immediately a respiratory stat call overhead and Roop grabbed the phone and ran to ER. (Tr. 225-226) Respiratory therapist Shilu Yogi was sitting next to Roop at the time and corroborated Roop's testimony that there was nothing out of the ordinary in the handoff, Roop didn't throw anything on the table, and she was not aggressive in any way. (Tr. 669-672, 675)

Giang ultimately reported the incident by email to DPS Marino on March 22, 2017, waiting nearly four days to report the incident. (GC 84) Even though Giang reported to DHR Jones that respiratory therapists Rogers and Yogi were present for this incident, Jones did not speak to either of these employees, nor Thom, about what they may have witnessed. (Tr. 673-679, 709-710)

t. Threats and Interrogations After the April 2017 Petition

In the same week that Charging Party Roop was fired, DPS Marino interrogated and threatened employees with termination for signing the petition and DON O'Keefe made coercive statements about the petition and employee protected concerted activity. One morning after the petition was given to CEO Dhuper on April 13, but before Roop was discharged on April 17, 2017, Respiratory therapist Nancy Mardanzai was in the department when Marino approached her to ask her to sign something from human resources about the petition. (Tr. 363) Marino then

told Mardanzai that according to the CEO, whoever signed the petition will be fired. (Tr. 363) Marino told Mardanzai that since a majority of the department signed it, a majority of the department might be fired. (Tr. 363) Marino asked Mardanzai if she signed the petition, and she denied signing the petition because she was scared. (Tr. 364)

Around that same time, respiratory therapists Garcia and Thom were leaving the department when they saw DPS Marino walking towards his office in the hallway and Garcia approached Marino to initiate conversation. (Tr. 555, 931-932) Marino told Garcia that he was stressed because he might have to be at work 24 hours a day, 7 days a week because people that signed the petition might lose their jobs and he might have to get rid of half his department. (Tr. 556, 931-932)

Garcia was understandably concerned for his job since he signed the petition and was leaving work that same day with Thom when they saw DON O'Keefe in the parking lot. (Tr. 558, 934-937) Garcia approached O'Keefe and told her they signed the petition and asked if they were going to lose their jobs. (Tr. 558-559, 937) O'Keefe said that management was upset that employees signed the petition, but if they kept their noses clean and stayed out of trouble they wouldn't lose their jobs. (Tr. 559, 937)

u. Other Respiratory Therapists Begin Receiving Harassing Text Messages After the Petition

After April 17, 2017, Charging Party Backus started receiving text messages from anonymous numbers, which she reported to human resources and explained to DHR Jones that she suspected were from Matuszak. (Tr. 280-281, 291-292, 332-333, 344, GC 44, GC 45, GC 50) Backus also reported social media posts to Jones that contained statements from Matuszak about "Termination #1" and an employee who underwent chemotherapy who doesn't "deserve to be healthy" and only deserves to be fired. (Tr. 291-292; GC 44, GC 45, GC 46, GC 47) When

she reported the messages to human resources and said they referred to Charging Party Roop, Jones told her there was nothing she could do. (Tr. 291-292, 349, 2188-2189)

In April and May 2017, respiratory therapist Garcia also received two text messages from anonymous numbers threatening that someone was going to get fired. (Tr. 560-561, 751; GC 58) When he went with respiratory therapist Rogers to report them to DHR Jones, she told him that as far as she was concerned he could have sent that text to himself and that she couldn't do anything about social media. (Tr. 560-561, 751-752)

v. Attorney Hired by Respondent Interrogates Johnson in May 2017

Respondent hired an attorney to interview employees after it received the respiratory therapists' April 13, 2017 petition. (Tr. 279; GC 43) Attorney Collin Cook contacted respiratory therapist Johnson in May 2017 by phone after she indicated to DHR Jones that she was willing to speak to a third-party investigator. (Tr. 611-612, 617) Cook told Johnson that he was an attorney who worked for Fisher & Phillips and that he was hired by the hospital to collect information regarding the petition. (Tr. 612, 615) Cook asked Johnson if she "knew what he was calling in regards to," and Johnson replied, "are you calling in regards to the petition?" (Tr. 615) Cook then said, "that's one area," and "I'm just here to collect information." (Tr. 615) During the phone conversation, Johnson told Cook that her tire had been punctured when it was parked at Respondent's facility and that it had happened to two other employees. (Tr. 613-616) Towards the end of the conversation, Cook asked Johnson who drafted the petition, a question which upset her. (Tr. 615-616) Cook did not tell Johnson that she did not have to talk to him, nor did he say that she wouldn't face any repercussions for refusing to speak to him or answer any of his questions. (Tr. 616) Cook also did not explain to Johnson that she could not be retaliated against in any way. (Tr. 616)

w. After Trial Begins in Instant Case Marino Issues Backus a Final Written Warning on April 9, 2018

Respondent's hostility towards protected conduct did not cease when the litigation of the instant charges began. After Charging Party Backus delivered the petition to CEO Dhuper on April 13, 2017, she immediately came into focus on Respondent's radar. Backus drew even more attention to herself when she filed multiple meritorious charges against Respondent with the National Labor Relations Board. (GC 1(e)-(i)) Indeed, when asked if she knew Backus, DON O'Keefe replied, "I do now." (Tr. 2268) On March 27, 2018, Backus provided key testimony against Respondent in the instant proceeding, testifying in front of her own manager, DPS Marino, who remained in the hearing room during her testimony and throughout the proceeding. (Tr. 1282) Just seven days after Backus' testimony, Marino contacted her in order to schedule a meeting to issue her a final written warning, even though Backus had never been disciplined in her five years of employment with Respondent. (Tr. 239) On April 9, 2018, Marino issued Backus a final written warning over an incident regarding medication administration that allegedly occurred a full four weeks earlier, on March 12, 2018. (GC 127) Marino failed to even ask Backus about the March 12, 2018 incident until their meeting on April 9, 2018, when he issued her the disciplinary action. (Tr. 1029-1030, 1053-1054)

i. Respondent's Best Practices for Medication Administration

The Pyxis is a machine located on each floor of the hospital that dispenses medication by allowing employees to login, using their username and thumbprint, select a patient, and pull available medications for that patient out of a drawer that clicks open. (Tr. 966-968, 985, 995-996, 1017, 1127, 1152) When respiratory therapists need to administer medication to a patient, the best practice is to get the medication for the specific patient out of the Pyxis. (Tr. 966-967, 1055-1056, 1688) Respondent's preferred method of documenting medication administration is

by scanning the patient's wristband at the bedside, administering the medication, and scanning the medication packaging using a computer on wheels with a handheld scanner, or workstation on wheels (WOW). (Tr. 1018, 1127-1128, 1153)

At least one WOW is supposed to be available for respiratory on each floor of the hospital, but sometimes these machines are tied up by nurses or are in short supply if the census is high. (Tr. 1000-1001, 1018, 1020, 1127-1129, 1138, 1153, 1157) Instead of scanning, respiratory therapists often administer the medication to the patient first and then chart it later by making a manual entry, also referred to as retro-charting. (Tr. 1020-1021, 1129-1130; Joint Exh. 1) While ideally this should be done close in time to when the medication is administered, at times this isn't possible as employees get called away to emergency or critical situations. (Tr. 1010, 1014-1015) To make a manual entry, respiratory therapists use a hospital computer to input the date and time they gave a particular medication to a patient in that patient's medication administration record (MAR), essentially an electronic medical chart. (Tr. 1019, 1129-1130, 1142-1143, 1153, 1156) However, "[b]arcode scanning is the *preferred* method of validation." (GC 127, emphasis added) Validation essentially means verifying that the right medication is being given to the right patient. (Tr. 1116) Indeed, Marino advised respiratory therapists that they had "dropped in the scanning percentage" and he knew WOWs "have been in short supply but do your best to scan all of your medications during rounds." (GC 135)

ii. Respondent's Medication Administration Policies in Practice

There are a number of circumstances where a respiratory therapist may not be able to scan the medication, for example if a respiratory therapist can't locate a WOW, the medication packaging rips so it can't be scanned, there are concerns of cross-contamination because the patient is in isolation, or the employee is rushing to treat all their patients on time and forgets to scan. (Tr. 1021-1023, 1138, 1146, 1153-1154).

If for some reason the medication isn't administered to the patient, the best practice is to return the medication to the Pyxis. (Tr. 969, 1003, 1136, 2259) However, in practice, this does not always occur. Sometimes employees get so busy responding to emergent and critical situations that they are not able to return the medication to the Pyxis. At times employees forget to return a medication and either leave it in their personal lockers in the respiratory department or simply leave it in the department for another therapist to use. (Tr. 1159) For example, respiratory therapist Shilu Yogi testified that when a patient was discharged before she administered a medication, she just left the medication in the department so another therapist could use it since she had seen other employees do the same. (Tr. 1136)

Indeed, other than from the Pyxis, respiratory therapists get medications in the course of handoffs from coworkers or by picking up loose medications left in the respiratory department. (Tr. 1001-1002, 1023, 1135, 1055) Medications frequently used by respiratory therapists, such as Albuterol, Atrovent, and DuoNeb, are commonly left in various places in the department, including in empty lockers, on top of the lockers, in pencil holders, on the break room table, or on the ledge of the whiteboard. (Tr. 961-963, 1001, 1024, 1135, 1157-1159) Respondent tolerates this practice, as DPS Marino has witnessed respiratory therapists picking up loose medications left in the department and has never commented on this practice. (Tr. 1002) Marino has also been in the presence of loose medications in the department without taking any action to remove them or determine how they got there. (Tr. 961-963, 1002, 1135; GC 126; R 9, p. 8)

The record evidence reveals that no respiratory therapists have ever been disciplined for not getting a medication out of the Pyxis or for not returning a medication to the Pyxis. (Tr. 1005, 1056, 1136, 1159, 1160) In addition, employee witnesses testified that they have gotten medication without taking it out of the Pyxis and have seen other employees do the same and they have never been disciplined for doing so. (Tr. 999-1000, 1023) Since Albuterol, Atrovent,

and DuoNeb are used very frequently by respiratory therapists, they sometimes pick up loose medications in the department to have on hand to administer to patients. (Tr. 961-963, 1001-1002, 1008, 1023, 1135) If a respiratory therapist does not get a medication from a Pyxis, they may also get a medication during a handoff from another employee. (Tr. 965-966, 971, 1023, 1055, 1133-1134, 1157-1158) Indeed, Giang was not disciplined for handing off medication to Roop on March 19, 2018, and not returning it to the Pyxis even though Respondent was aware of this conduct.

Moreover, Respondent declined to discipline Hamid when he was reported twice for failing to administer medications to patients while documenting that he did so, even though he was issued a letter in February 2015 for similarly violating Respondent's medication administration policies by treating a number of patients with medications without doing any charting whatsoever. (GC 136) In June 2016, Hamid was reported for failing to administer 1-2 treatments of DuoNeb to a patient when he documented in the MAR that he did. (Tr. 954-855, 972, 1162-1165) When Marino was later confronted about the incident, he said "I can't do anything about it because I have to catch him in the act." (Tr. 1171-1173) Again in March 2017, Hamid was reported for a medication administration incident. (Tr. 1175-1176) When Roop took report for a specific patient, Hamid told Roop he had administered a breathing treatment to the patient. (Tr. 1174-1175) Roop checked the patient's orders and the patient's MAR, and saw that there was no charting done showing that Hamid had given any treatment to the patient. (Tr. 1175) Roop then went to the ICU to begin her rounds and saw Hamid in the patient's room after his shift had ended. (Tr. 1175-1176) Roop checked the patient's MAR again and saw that Hamid had just scanned the medication for the treatment three separate times only one-minute apart, without doing any retro-charting indicating he had actually given the treatments at the times ti was due. (Tr. 1175-1176) When Roop informed Marino that Hamid said he gave the treatment

when there was no charting in the MAR, then Hamid was seen in the patient's room minutes later, and then the MAR showed he scanned three medications at once, Marino just shrugged. (Tr. 1175-1182)

iii. Events of March 12, 2018 and April 9, 2018 Final Written Warning

However, Marino's only asserted justification for issuing Backus such a harsh discipline for her first disciplinary offense is because he claimed that on March 12, 2018, Backus both (1) falsified a medical record by reporting that she administered medication to Patient ML[6] when she did not in fact give the medication; *and,* (2) gave medication to Patient ML without removing it from the Medication Pyxis. (GC 127) However, Backus gave the medication to the patient in question, and documented that she did so in both the medication administration record and the ventilator flow sheet as required by Respondent's policies. (Tr. 1051-1052; GC 128; GC 129; GC 141, SRH0002511) If a patient is on a ventilator or has a ventilator on standby, respiratory therapists are supposed to note when they administer a medication on both the ventilator flow sheet, a paper record kept in the patient's room, and the MAR. (Tr. 985, 992-993, 1014, 1019-1020, 1030-1031)

On March 11, 2018, Dr. Shawshank Jolly ordered that Patient ML begin receiving regular treatments of DuoNeb, which means the medication must be administered via a nebulizer that mists the dose into a breathing treatment, at four designated times throughout the day. (Tr. 1039, 1686-1687; GC 129; R15, SRH002342; R16) When breathing treatments are ordered for four times a day, they are supposed to be administered within an hour before or after of the scheduled times, at 8am[7], 12pm, 4pm, and 8pm. (Tr. 1052, 1160, 1687-1688; R15, SRH002342; R16) Respondent's ventilator protocols allow respiratory therapists to administer medications to

[6] The patient referenced in Backus' final written warning is referred to throughout the record by his initials as Patient ML, Patient LM, or by his medical record number. This patient will be referred to as Patient ML.
[7] Throughout the record military time is used to refer to the times medications were administered or manually entered into MARs, however to prevent confusion times will be in non-military time.

patients as needed when they are either on the vent or the vent is on standby, and are on standing "as needed" orders also referred to as a PRN. (Tr. 993, 1081) When Backus began her night shift at 6:30pm on March 12, 2018, she was assigned the 4th floor, ER, and TCU. (Tr. 1033) At the time, Backus did not know about the four daily treatments that had been ordered for Patient ML, but when she went to check on the patient at 8:30pm, he was in discomfort and had a vent on standby so Backus gave him a breathing treatment of DuoNeb. (Tr. 1034-1035, 1038, 1081) When Backus administered the medication to Patient ML, she noted this in the ventilator flow sheet where she also made other notes of her initial assessment. (Tr. 1041-1043GC 128; GC 141, SRH0002511) Backus got called away from the patient's room and was in the ER when she was notified Patient ML was being moved from his room to TCU. (Tr. 1036)

Before Backus returned to Patient ML, another respiratory therapist referred to as Mack, who mentioned she had gotten a call from a nurse about a treatment showing up as red in the computer. (Tr. 1036-1037) When four daily treatments are ordered for a patient, a red bubble will appear in the MAR each time a treatment is due and not timely given. (Tr. 1010, 1139-1140, 1160) Sometimes if a nurse notices a missed treatment they call the respiratory therapist assigned to the patient to find out if the treatment was given so the therapist can clear the red bubble so it turns green. (Tr. 1006, 1015, 1140, 1161) Backus replied to Mack that she didn't know the patient had scheduled treatments, but she would go up and check. (Tr. 1037) Backus then went to the patient's old room and pushed the vent over to TCU 4, where Patient ML had been moved. (Tr. 1037) When Backus got to the bedside at about 11:30pm, she helped Patient ML find his remote control and put him back on his tracheotomy collar referred to as a T-piece, which allows medication administration via tubing through a hole in the patient's throat. (Tr. 1037-1038, 1044-1045) While Backus was standing outside the room at the WOW, a nurse approached her and said there's a treatment that's still showing red, and Backus replied that she gave him one, so

she'd clear it. (Tr. 1037) Backus then manually entered at 11:31pm that she gave the earlier DuoNeb treatment to Patient ML at 8:30pm. (Tr. 1037, 1050-1051; GC 129) The ventilator flow sheet notes the medication was administered at 8:30pm. (GC 141, SRH002511)

After Backus testified in this proceeding on March 27, 2018, DPS Marino contacted her on April 4, 2018, in order to schedule an appointment to discipline her. (Tr. 1025) During her meeting with Marino and shop steward and radiology technologist Kmetz on April 9, 2018, Backus admitted that without reviewing records from the month before, she did not know where she got the medication that she administered to Patient ML, but that if she did not get it from the Pyxis she got it from another therapist during report or picked it up in the department. (Tr. 1026-1027) Indeed, during her testimony Backus did not deny that she didn't follow Respondent's preferred best practice when she gave the medication to Patient ML on March 12, 2018 without getting the DuoNeb out of the Pyxis. (Tr. 1110-1111, 1026-1027, 1055) However, Backus insisted that she administered the medication to Patient ML as she documented that she gave the treatment in both the patient's MAR and ventilator flow sheet. (Tr. 1027, 1055) Backus got upset during the meeting since she felt her integrity was being attacked as Marino accused her of false documentation and refused to sign the final written warning. (Tr. 1028-1029, 1032; GC 127)

III. ARGUMENT

a. From November 21 to December 5, 2016 Managers Marino and Ambrosini Interrogated Employees About Their Protected Concerted Activities in Violation of Section 8(a)(1) of the Act

General Counsel has met its burden under the totality of the circumstances test to establish that Respondent's questioning by Marino[8] and Ambrosini[9] reasonably restrained,

[8] General Counsel alleged Marino to be a supervisor within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act in paragraph 4(a) of the Fourth Amended Consolidated Complaint; and, Respondent admitted this in its Answer to the Fourth Amended Consolidated Complaint and in its to Answer to Complaint and Notice of Hearing in Case 32-CA-218138.

coerced, and interfered with employees' protected concerted activities in violation of Section 8(a)(1) of the Act.[10]

An employer's questions to employees about their protected concerted activities can be unlawfully coercive "because of its natural tendency to instill in the minds of employees fear of discrimination on the basis of the information the employer has obtained." *NLRB v. West Coast Casket Co.*, 205 F.3d 902, 904 (9th Cir. 1953). Such questioning is not a protected expression of views or opinion under Section 8(c) because "the purpose of an inquiry is not to express views but to ascertain those of the persons questioned." *Struksnes Construction Co.*, 165 NLRB 1062, 1062 n. 8 (1967). How*ever, interroga*tion is not unlawful per se, and the Board applies a totality of the circumstances test to the interactions between employer agents and employees to determine whether the employer agents' actions would reasonably tend to restrain, coerce, or interfere with rights guaranteed to employees under the Act. *Shen Automotive*, 320 NLRB 586, 592 (1996); *Emery Worldwide*, 309 NLRB 185, 187 (1992). The Board considers several factors in evaluating the totality of the circumstances of an interrogation, including (1) background, i.e. whether the employer has a history of hostility or discrimination against protected concerted activity; (2) the nature of the information sought, e.g. whether the interrogator appeared to be seeking information on which to base taking action against individual employees; (3) the identity of the interrogator, i.e. their placement in the employer's hierarchy; (4) the place and method of the interrogation, e.g. whether an employee was called from work to the boss's office; and (5) the truthfulness of the interrogated employee's reply, i.e. whether the interrogated employee's

[9] General Counsel alleged Ambrosini to be a supervisor within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act at all material times until at least February 13, 2017, in paragraph 4(a) of the Fourth Amended Consolidated Complaint; and, Respondent admitted this in its Answer to the Fourth Amended Consolidated Complaint and in its to Answer to Complaint and Notice of Hearing in Case 32-CA-218138.

[10] General Counsel alleged these violations of the Act in paragraphs 6(c)(i)-(ii) and 6(d) of the Fourth Amended Consolidated Complaint.

reply was inspired by fear. *Bourne v. NLRB*, 332 F.2d 47, 48 (2nd Cir. 1964); see also *Sproule Construction Co.*, 350 NLRB 774, 774 fn. 2 (2007); *Grass Valley Grocery Outlet*, 338 NLRB 877, 877 fn. 1 (2003), affd. mem. 121 Fed. Appx. 720 (9th Cir. 2005). The Board notes that these factors are not to be mechanically applied in each case, rather are areas of inquiry to consider in weighing the totality of the circumstances of an interrogation. *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), affd. sub nom. *Here Local 11 v. NLRB*, F.2d 1006 (9th Cir. 1985).

The Board also considers the timing of the interrogation and whether the interrogated employees are open participants in protected concerted activity, whether the employer provided the employee adequate assurances against reprisals, and whether there was any legitimate purpose to the questioning. See *Gardner Engineering*, 313 NLRB 755, 755 (1994), enfd. as modified on other grounds 115 F.3d 636 (9th Cir. 1997); *Blue Flash Express*, 109 NLRB 591 (1954); *John W. Hancock Jr., Inc.*, 337 NLRB 1223, 1223-1224 (2002). See also *Dealers Mfg. Co.*, 320 NLRB 947, 948 (1996) (finding a plant manager's interrogation of employee about his union sympathies was inherently coercive in nature and unlawful since the questioning was by a high-level company official, without legitimate purpose, with no assurances against reprisals, and in the plant manager's office).

In the present case, DPS Marino freely admitted to interrogating Charging Party Roop and six other respiratory therapists in late November 2016 about whether Roop had discussed an earlier November 2016 meeting with any of her coworkers and whether Roop and Backus were distributing complaint forms to employees to file with human resources. (Tr. 1365-1366, 1458-1461; GC 91) Marino asked Roop whether she leaked any information from the November 14, 2016 meeting; asked respiratory therapist Meskienyar about the leak and whether he knew who leaked the information; told respiratory therapist Rogers that he needed to know whether Roop discussed anything with her about a meeting in human resources; asked respiratory therapist

Kaur whether she knew about a confidential meeting that took place in human resources; asked respiratory therapist Giang if she had seen anyone handing out bullying complaint forms; asked respiratory therapist Vea if he had witnessed anyone handing out bullying complaint forms and whether he knew anything about a meeting on November 14, 2016 in human resources; and, asked respiratory therapist Thom about whether he had heard about the leak (Tr. 1459-1464; GC 91) Despite other areas of Marino's testimony that are not credible, Marino's testimony admitting that he interrogated Roop, Meskienyar, Giang, Kaur, Rogers, Thom, and Vea should be credited and is corroborated by his own contemporaneous notes as well as the credible testimony of Roop, Kaur, and Rogers. (Tr. 1458-1461, 1463; GC 91) In making credibility resolutions, it is well established that the trier of fact may believe some, but not all, of a witness's testimony. *NLRB v. Universal Camera Corp.*, 179 F.2d 749 (2 Cir. 1950).

DPS Marino only changed his testimony in response to Judge Giannopoulous' follow-up question as to why he asked employees about bullying forms being handed out. (Tr. 1460-1461) Marino became evasive in response to the judge's questioning, stating only that Giang offered the information to him—directly contradicting his testimony just moments before when he admitted that he asked Giang if she had seen anyone handing out bullying forms. (Tr. 1460-1461) Notably, Marino could not explain to the judge why he asked about bullying forms being disseminated. Without an explanation, it is appropriate to conclude that the only possible reason was to find out information about concerted activity because Respondent harbored animus towards such conduct. Moreover, Charging Party Roop credibly testified—and her testimony stands unrebutted—that Marino questioned Roop on November 21, 2016, in the very same transaction in which she received her first discipline in 17 years, and Marino and DHR Ambrosini both questioned Roop on December 5, 2016, regarding her discussions with other employees and the concerted complaints filed against Respondent. (Tr. 110, 690-691)

Weighing the totality of the circumstances, such questioning is inherently coercive and unlawful. Indeed, DPS Marino's questioning of employees was directly motivated by the protected concerted activities in the department, targeted employees engaged in such protected conduct, and sought to find out which employees were engaged in such conduct. In late November 2016, Marino, the department's highest ranking manager, initiated the questioning of employees, and called, at least, respiratory therapists Roop, Rogers, and Kaur into his office to find out whether Roop had discussed the contents of an earlier meeting with other employees and/or whether Roop and Backus were circulating forms among employees who wanted to file concerted complaints. . Moreover, Marino initiated the interrogations of Giang, Rogers, Thom, Vea, and Kaur, directly after he received information that Roop and Backus were handing out complaint forms to staff. Upon questioning by Judge Giannopoulos, Marino could not provide any legitimate reason or explanation for such questioning. Based on the timing and nature of the questions, Marino clearly sought this information in order to take further disciplinary action against Roop and coerce employees into halting their concerted conduct. Indeed, when Marino and Ambrosini interrogated Roop again about her discussions with coworkers in a December 5, 2016 meeting, Roop was also threatened with further discipline by DON O'Keefe if the concerted complaints continued, as described further directly below. Marino's interrogations were unquestionably coercive as they implied that employees did not have the right to file concerted complaints against Respondent, nor to discuss the subject of the November 14, 2016 meeting and whether Roop was being targeted for retaliation for speaking out on their behalf. Even if Roop had discussed the November 14, 2016 meeting with her coworkers, such discussions are protected by Section 7 of the Act

Thus, Respondent violated Section 8(a)(1) because its supervisor and agent, DPS Marino, and former agent and supervisor, DHR Ambrosini, interrogated employees about their protected

conduct and the protected conduct of other employees, which would reasonably tend to coerce employees in the exercise of their rights protected by the Act.

b. On December 5, 2016 O'Keefe Threatened Roop with Demotion, Discipline, and Termination in Violation of Section 8(a)(1) of the Act

The record evidence has established that Respondent violated Section 8(a)(1) of the Act when its supervisor and agent, Director of Nursing (DON) Rozanne O'Keefe,[11] threatened to demote and remove Roop as team lead, and threatened Roop and other employees with termination, which reasonably coerced and restrained employees in the exercise of their Section 7 rights.[12]

Statements by employers that reasonably tend to interfere with, restrain or coerce employees in the exercise of their Section 7 rights are unlawful under Section 8(a)(1), regardless of the employer's motive or whether or not the coercion was successful. *American Freightways Co.*, 124 NLRB 146, 147 (1959). See also *Yoshi's Japanese Rest., Inc.*, 330 NLRB 1339 (2000); *Westwood Health Care Ctr.*, 330 NLRB 935 (2000); *Roadway Express*, 250 NLRB 393 (1980); *Cooper Thermometer Co.*, 154 NLRB 502,503 n.2 (1965).

Here, Charging Party Roop credibly testified that on December 5, 2016, DON O'Keefe told her she was going to demote her, take her team lead away, and if she heard one more word of bullying, retaliation, or harassment, "people are going to get fired." (Tr. 111-113) Roop's testimony was corroborated by the testimony of radiology technologist and shop steward Justin Kmetz, and stands unrebutted. (Tr. 692-693) Although called to the stand, O'Keefe did not deny threatening to demote Roop, threatening to remove her from her position of team lead, or

[11] General Counsel alleged DON O'Keefe to be a supervisor within the meaning of Section 2(11) of the Act and agent of Respondent within the meaning of Section 2(13) of the Act in paragraph 4(a) of the Fourth Amended Consolidated Complaint; and, Respondent admitted this in its Answer to the Fourth Amended Consolidated Complaint and in its to Answer to Complaint and Notice of Hearing in Case 32-CA-218138.

[12] General Counsel alleged these violations of the Act in paragraph 6(a)(i) of the Fourth Amended Consolidated Complaint.

threatening to terminate employees if concerted complaints continued. As such, an adverse inference should be drawn that O'Keefe made these threats since she failed to testify regarding the statements in question. See *International Automated Machines*, 285 NLRB 1122, 1123 (1987). Moreover, in threatening to terminate employees, O'Keefe directly referenced the concerted complaints of Respondent's employees—some of which Respondent received only the previous week—exposing Respondent's animus towards the protected concerted activities of its employees and coercing employees in the exercise of their rights. (Tr. 107, 405, 449, 1337-1338, 2266; GC 9, GC 17, GC 20, GC 88, GC 91) Thus, Respondent violated Section 8(a)(1) when its supervisor and agent, DON O'Keefe, threatened Roop with demotion and removal from her position of team lead, and threatened Roop and other employees with discharge for making concerted complaints.

c. On December 14, 2016 Dhuper Threatened Employees With Job Loss at a Captive Audience Meeting in Violation of Section 8(a)(1) of the Act

General Counsel established that Respondent's supervisor and agent, CEO Aman Dhuper,[13] threatened employees with job loss at a captive audience meeting on December 14, 2016, in violation of Section 8(a)(1) of the Act.[14]

Threats of job loss are unlawful, whether the threats are express or implied. *Jupiter Medical Center Pavilion*, 346 NLRB 650 (2006). Employers are liable for all threats that could reasonably tend to be coercive, even if such statements are "oblique, ambiguous, or nonsensical." *Aladdin Gaming LLC*, 345 NLRB 585, 597 (2005) (internal citations omitted). Evaluating employer statements requires taking "into account the economic dependence of employees on

[13] General Counsel alleged Dhuper to be a supervisor within the meaning of Section 2(11) of the Act and agent of Respondent within the meaning of Section 2(13) of the Act in paragraph 4(a) of the Fourth Amended Consolidated Complaint; and, Respondent admitted this in its Answer to the Fourth Amended Consolidated Complaint and in its to Answer to Complaint and Notice of Hearing in Case 32-CA-218138.

[14] General Counsel alleged these violations of the Act in paragraph 6(b)(i)-(ii) of the Fourth Amended Consolidated Complaint.

their employers with special awareness of an employee's attentiveness to the intended implication of his or her employer's statements, which might be more readily dismissed by a disinterested party." *Yoshi's Japanese Restaurant*, supra, at 1341.

Here, the record evidence establishes that during a mandatory meeting with employees on December 14, 2016, CEO Dhuper held up a folder, stating this is the thickest file in the hospital and the most complaints he'd seen in any department, and threatened to fire everyone—employees who spoke up and did something about it and those who didn't. (Tr. 116-117, 253, 452, 530-531, 596-597, 736, 815, 879; GC 76) Dhuper did not deny making these statements, and testified only that he could not remember whether he made the statement about the folder of complaints even though his statement was transcribed in quotation marks in the minutes from the meeting. (Tr. 2431; GC 76) In contrast, a number of Respondent's current employees, including Johnson, Rogers, Pereyra, Backus, and Kaur, testified that they recalled Dhuper threatening to fire employees during the December 14, 2016 meeting. These witnesses should be credited as employees testifying against their current employer are "likely more credible than not, as they risk significant pecuniary damage in testifying against their employer." *Wilshire Plaza Hotel*, 353 NLRB 304, 336 (2008); see also *Jewish Home for the Elderly of Fairfield County*, 343 NLRB 1069, fn. 2 (2004), enfd. 174 Fed. Appx. 631 (2d Cir. 2006); *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978); *Federal Stainless Sink Div. of Unarco*, 197 NLRB 489, 491 (1972); *Georgia Rug Mill*, 131 NLRB 1304, fn. 2 (1961); *Bloomington-Normal Seating Co.*, 339 NLRB 191, 193 (2003).

Moreover, the threats of job loss came from Respondent's highest ranking manager and CEO at a captive audience meeting supposedly held to address the concerted complaints of respiratory department employees. The nature and context of CEO Dhuper's threats of job loss make such statements inherently coercive, even if Dhuper's statements were somewhat

ambiguous or nonsensical. Thus, Respondent violated Section 8(a)(1) when it supervisor and agent, CEO Dhuper, threatened, either expressly or impliedly, to terminate respiratory department employees in retaliation for their concerted complaints.

d. In Late December 2016 Dhuper Interrogated Employees During Individual Meetings in Violation of Section 8(a)(1) of the Act

General Counsel met its burden to prove that Respondent violated 8(a)(1) of the Act when CEO Dhuper, its agent and supervisor, interrogated employees about their protected conduct and that of other employees during meetings in December 2016.[15] In late December 2016, in the presence of DON O'Keefe, Dhuper asked a number of employees about who was behind the concerted complaints in the department, using the term "ringleader" and "troublemaker." (Tr. 121, 559, 661, 816) Dhuper asked Charging Party Roop directly which team she was on and if she was the ringleader. (Tr. 121) Dhuper asked respiratory therapist Johnson who the troublemakers were and interrogated her about what team she was on, which she perceived as a question about her connection to Roop. (Tr. 599, 661) Dhuper similarly asked respiratory therapist Kaur about her affiliation with Roop. (Tr. 816) Although called to the stand, Dhuper did not deny asking employees these questions and admitted to asking employees what team they were on. (Tr. 2594)

Such questioning is coercive and unlawful. CEO Dhuper, Respondent's highest ranking official, questioned employees about the identity of the ringleader and troublemaker in the presence of O'Keefe, another high-ranking manager at the facility who works above Marino, the respiratory care practitioners' direct supervisor. While there is evidence in the record that two groups may have developed in the department, there is also evidence in the record that Dhuper viewed Charging Party Roop as the leader of one of the groups and her leadership role was

[15] General Counsel alleged these violations of the Act in paragraph 6(b)(i)-(ii) of the Fourth Amended Consolidated Complaint.

directly related to motivating or "instigating" that group of employees to "jump on the bandwagon" and take concerted actions about their working conditions. (Tr. 128, 769) Indeed, Dhuper had no legitimate basis for questioning employees about whether they were affiliated with Roop or on her team. Dhuper held these individual meetings to supposedly address employees' concerns, many which had been brought to his attention by concerted complaints DPS Marino attributed to Roop. The fact that Dhuper never got back to any of the respiratory therapists about any of their questions or concerns is telling. It shows that Dhuper's questioning during these meetings was not to resolve divisions in the department, rather it was driven by his animus towards Roop's protected concerted activities and his motivation to stop them. Dhuper's questioning of employees about whether they are on Roop's team is therefore coercive, as it was simply a way to interrogate them about whether they were involved in or supported any of the protected concerted activities in the workplace led by Roop.

Thus, given the totality of the circumstances, CEO Dhuper's interrogations of individual employees violated Section 8(a)(1) of the Act.

e. In Late January 2017 Dhuper Made Coercive and Disparaging Statements to Employees About Their Protected Concerted Activities in Violation of Section 8(a)(1) of the Act

General Counsel met its burden to show that CEO Dhuper made coercive and disparaging statements to respiratory department employees about their protected concerted activity.[16] The proper analysis is whether from the employees' perspective and irrespective of the speaker's intent, a statement could reasonably be expected to chill employees' Section 7 rights. *Chinese Daily News*, 346 NLRB 906, 932 (2006), enfd. 224 Fed. Appx. 6 (D.C. Cir. 2007).

[16] General Counsel alleged these violations of the Act in paragraph 6(b)(iv) of the Fourth Amended Consolidated Complaint.

Here, in late January 2017, CEO Dhuper came to the respiratory department and initiated conversation with several employees, telling them that Charging Party Roop was the "ringleader" and "troublemaker" that instigates and "everyone jumps on the bandwagon." (Tr. 128; 769) Again, as CEO, Dhuper is the highest-ranking manager at Respondent's facility. Regardless of whether Dhuper was joking or serious, his statements were disparaging of Roop's protected concerted activities and therefore it would reasonably tend to coerce employees in the exercise of their rights protected by Section 7 of the Act. See *American Freightways Co.*, supra. Thus, Respondent violated Section 8(a)(1) of the Act when its agent and supervisor, CEO Dhuper, made coercive and disparaging statements to respiratory department employees about their protected concerted activity.

f. On February 7, 2017 Marino Interrogated Roop About Her Union Activity

Respondent violated Section 8(a)(1) of the Act when DPS Marino, its agent and supervisor, interrogated Charging Party Roop about her union activity during a meeting on February 7, 2017, regarding an incident for which she was disciplined.[17]

Charging Party Roop testified that on February 7, 2017, DPS Marino demanded she attend a meeting in human resources to discuss events from earlier that day, for which she was ultimately issued a final written warning, demoted from her position as team leader, and suspended for 3 days. Roop testified that during this meeting, Marino asked her if she was talking to Matthew Mullaney, her Union representative for Teamsters Local 856, about their staffing issues. Although called to the stand, Marino did not deny, rebut, or contradict Roop's testimony in any way regarding his question about whether she was discussing staffing issues with Mullaney. Roop's testimony is consistent with other evidence in the record that Roop had

[17] General Counsel alleged these violations of the Act in paragraph 6(c)(iii) of the Fourth Amended Consolidated Complaint.

previously discussed inadequate staffing levels in the department with both Marino and CEO Dhuper on more than one occasion. Thus, Roop's unrebutted testimony regarding Marino's questioning of her during a meeting in human resources in February 2017 should be credited. Further, an adverse inference should be drawn that Marino made the statement interrogating Roop about her union activity since Marino failed to testify regarding the statement in question. *International Automated Machines*, supra, at 1123.

DPS Marino's question to Charging Party Roop constitutes an unlawful interrogation because Marino, her direct supervisor and highest ranking manager in the department, had previously interrogated her regarding her protected concerted activities, and his boss, DON O'Keefe, had previously threatened Roop with demotion and termination. Moreover, the interrogation took place during a meeting where Roop was called to human resources and accused of engaging in misconduct for which she would ultimately be severely disciplined. Further, Marino had no good faith basis to seek this information since Respondent has no legitimate reason to need to know whether Roop had discussed the staffing issue with her Union representative. Thus, given the totality of the circumstances, Respondent violated Section 8(a)(1) of the Act when its supervisor and agent interrogated Roop regarding her discussions with her Union representative during a meeting in human resources on February 7, 2017.

g. On February 7, 2017 Dhuper Solicited Roop to Quit in Violation of Section 8(a)(1) of the Act

Respondent violated Section 8(a)(1) of the Act when CEO Dhuper solicited Charging Party Roop to quit on February 7, 2017.[18] The Board has found statements soliciting employees to quit to be unlawful as they constitute implied threats of discharge and tend to coerce employees in the exercise of their Section 7 rights. Solicitations to quit convey the message that

[18] General Counsel alleged these violations of the Act in paragraph 6(b)(v) of the Fourth Amended Consolidated Complaint.

protected concerted complaints about working conditions and continued employment are incompatible, and implicitly threaten discharge to those who would voice them. *Stoody Co.*, 312 NLRB 1175, 1181 (1993) (statement to employee that those who were "so nitpicking" as to complain about detrimental action unilaterally taken by the employer should seek other employment); see also *Medco Health Solutions Of Las Vegas, Inc.*, 357 No. 25 (2011) (statement that if employee could not support employer's policies there were other jobs out there and perhaps "this wasn't the place for him" was an implied threat in violation of 8(a)(1)); see also *McDaniel Ford, Inc.*, 322 NLRB 956 (1997) (statement to employees engaged in protected concerted activities that if they were unhappy, they should look for jobs elsewhere, is an implied threat that violates 8(a)(1)); see also *French Paper Co. d/b/a Paper Mart*, 319 NLRB 9 (1995).

Here, during a one-on-one meeting with Charging Party Roop in the boardroom near CEO Dhuper's office on February 7, 2017, Dhuper told Roop "why don't you just quit." (Tr. 149) Throughout her testimony Roop was able to recall the details of the relevant events and context of conversations, and answered questions from the judge and Respondent's counsel openly and directly without any evasiveness. See, e.g., *Precision Plating*, 243 NLRB 230 (1979), enfd. 648 F.2d 1076 (6th Cir. 1991) (Board upheld ALJ's credibility findings for General Counsel witnesses based on "naturalness of exposition, certitude as to substance, forcefulness of conviction, spontaneity of direct testimony, responsiveness, coherence, consistency on cross-examination, ability to provide details and context of conversations, and external consistencies.") Indeed, it was observed on the record that Roop's credibility (or that of any of General Counsel's witnesses) had not been attacked so far, even after her cross-examination. (Tr. 472)

Moreover, CEO Dhuper did not directly deny asking Charging Party Roop to quit but evasively answered, "[t]hat's not how I said it." Given the opportunity to explain his answer through questioning from Judge Giannopoulos, Dhuper stated, "We all have options. That's what

I said." (Tr. 2619) Dhuper's answers did not exhibit forceful conviction, substantial certainty, nor an ability to recall details and contexts of conversations, and his testimony overall was speculative and conclusory. Moreover, Dhuper's interests lie squarely in protecting Respondent from liability, especially since Dhuper is employed by a third-party company contracted to provide management services to Respondent.[19] As such, Dhuper's testimony should not be credited. See, e.g., *NLRB v. Walton Mfg. Co.*, 369 (U.S. 4040, 408); see also *Precision Plating*, supra; see also *Champion Rivet Co.*, 314 NLRB 1097, 1099 (1994) (conclusory testimony is entitled to little weight).

Thus, Respondent violated Section 8(a)(1) of the Act when its supervisor and agent, CEO Dhuper, solicited Charging Party Roop to quit.

h. In March 2017 Dhuper Made an Implied Threat to Terminate Roop in Violation of Section 8(a)(1) of the Act

Respondent violated the Act when CEO Dhuper impliedly threatened Roop with discharge in March 2017.[20] Implied threats of job loss are unlawful. *Jupiter Medical Pavilion*, supra. Moreover, whether a communication will be restraining or coercive turns on "whether the words could reasonably be construed as coercive" even if that is not the "only reasonable construction." *Pomona Valley Hosp.*, 355 NLRB 324, 235 (2010).

Here, near the entrance to the emergency room and in the presence of respiratory therapist Jojesmar Pereyra, CEO Dhuper, Respondent's highest ranking official, told Roop not to let the door hit her because that's the only thing left to be done. Dhuper admitted that he had spoken with Roop near the doors to the emergency room in March 2017 and that he oftentimes

[19] Dhuper's testimony regarding why there are no notes preserved from his interview with Roop and Garcia as there are from his interviews with Johnson, Aguilar, Pereyra, Kaur, Backus, and Matszak, is not believable or credible and "seems odd" as observed on the record. (Tr. 2592-2593; GC 99) Dhuper's testimony on this point shows his willingness to obscure the truth when he believes it is in Respondent's best interest.

[20] General Counsel alleged these violations of the Act in paragraph 6(b)(vi) of the Fourth Amended Consolidated Complaint.

told employees to be careful of the door not hitting them. (Tr. 2490-2491). In response to questioning from Judge Giannopoulos, Dhuper attempted to explain that he didn't want staff standing right next to the door as "the door is opening right on your face." Such nonsensical testimony should be discredited. Moreover, Dhuper often testified in narrative form with nonresponsive and incoherent answers even when there was no question pending before him. (Tr. 2428-2429, 2436-2438, 2444-24446, 2458, 2491-2492) Dhuper's testimony should be afforded little weight as he was also unable to recall details and contexts of conversations, and often answered in only general and conclusory terms. See *Bronx Metal Polishing Co.*, 268 NLRB 887, 888 (1984); *Staco, Inc.*, 244 NLRB 461, 472 (1979).

By contrast, the testimony of respiratory therapist Pereyra was consistent, credible, and corroborated Charging Party Roop's testimony about CEO Dhuper's statement. Pereyra openly answered questions from the judge and Respondent's counsel, recalled details of relevant events and contexts of conversations, and provided internally and externally consistent answers throughout his testimony. See *Precision Plating*, supra. For example, Pereyra recalled that he only worked with Roop on Mondays during that period of time, they were responding to an overhead stat call to the ER when they encountered Dhuper, Dhuper was walking behind them when he approached, and Roop responded to Dhuper stating that wasn't nice to say. (Tr. 465) Indeed, during Pereyra's testimony it was noted on the record that the credibility of all of General Counsel's witnesses had not been attacked thus far, and Respondent declined to question Pereyra about Dhuper's statement on cross-examination. (Tr. 472)

CEO Dhuper's statement to Charging Party Roop to not let the door hit her because that's the only thing left to be done was coercive as it implied that Roop was on her way out. Indeed,

unbeknownst to Roop, Respondent was already using events from this same time period[21] as a pretext to terminate Roop, and Dhuper's statement only further highlighted his animus towards her protected conduct. Moreover, even if Dhuper's statement was oblique or vague, his words were reasonably construed as coercive and as a threat of job loss. See *Aladdin Gaming LLC*, supra, at 597. Roop and Pereyra were especially aware of the intended implication of Dhuper's statement—coming from the highest ranking official at the facility—as they were economically dependent on their employer and more likely to construe it as a threat. See *Yoshi's Japanese Restaurant*, supra, at 1341. Thus, Respondent violated Section 8(a)(1) of the Act when Dhuper, its supervisor and agent, made an implied threat to discharge Roop.

i. In Late March 2017 Dhuper Interrogated Employees, Made Coercive Statements, Impliedly Threatened to Discharge Employees and Impliedly Threatened to Close the PFT Lab in Violation of Section 8(a)(1)

General Counsel met its burden to prove that CEO Dhuper interrogated employees, made coercive statements to employees, impliedly threatened to discharge employees, and impliedly threatened to close the PFT lab to coerce employees in the exercise of their Section 7 rights.[22]

Here, Dhuper acknowledged he interacted with respiratory therapists the night the power went out at the facility in late March 2017, and did not deny making any coercive statements or threats nor rebut the testimony of General Counsel's witnesses in any way. (Tr. 2468-2471) Further, General Counsel's witnesses should be credited as long-time employees testifying against their current employer and as individuals with no stake in the outcome of the case. See *Wilshire Plaza Hotel*, supra, at 336; see also *Jewish Home for the Elderly of Fairfield County*, 343 NLRB 1069, fn. 2 (2004), enfd. 174 Fed. Appx. 631 (2d Cir. 2006); *Gold Standard*

[21] Events from March 14 and 19, 2017 led to Charging Party Roop's termination.
[22] General Counsel alleged these violations of the Act in paragraph 6(b)(vii)(1)-(3) of the Fourth Amended Consolidated Complaint.

Enterprises, 234 NLRB 618, 619 (1978); *Federal Stainless Sink Div. of Unarco*, 197 NLRB 489, 491 (1972); *Georgia Rug Mill*, 131 NLRB 1304, fn. 2 (1961).

Current employee Johnson's testimony that during the night of the power outage in March 2017, CEO Dhuper interrogated employees in the respiratory department by asking them who the ringleaders were should be credited and was corroborated by current employee Frank Mardanzai. (Tr. 603, 608) Both Johnson and Mardanzai testified that Dhuper stated he hated the respiratory department and indicated that he was sick and tired of the respiratory department for causing him so many problems. (Tr. 603, 793) Even if there are minor discrepancies between Mardanzai and Johnson's respective accounts, their testimony is consistent, believable, and credible, given the passage of time and their ability to recall precise details of consequence to them. In addition, minor differences in witnesses' recollections of certain events tend to enhance rather than detract from witness credibility, as they are a consequence of different perspectives and the varying impact different issues may have on individuals. *H.B. Zachry Co.*, 319 NLRB 967 (1995); *Gerig's Dump Trucking, Inc.*, 320 NLRB 1017 (1996); *Lott's Elec. Co.*, 293 NLRB 297 (1989). Indeed, Johnson testified that Dhuper said he hated the respiratory department because of all the issues and problems they cause, while Mardanzai testified that Dhuper jokingly said he hated the department and then proceeded to angrily rant about how sick and tired he was of the respiratory department. (Tr. 603, 793) Both of these accounts are consistent and show Dhuper made a coercive statement to employees regarding their protected concerted activities regardless of whether or not he was joking. See *American Freightways Co.*, supra.

In addition, respiratory therapists Mardanzai and Johnson both testified credibly that during this same interaction, CEO Dhuper threatened to fire employees and threatened to close the PFT lab at any moment. (Tr. 605, 795-796) Mardanzai testified credibly and believably, answering questions from the judge openly and honestly, and exhibiting a humble yet confident

demeanor throughout his testimony. Mardanzai answered with especially forceful conviction when he testified that Dhuper pointed his finger at several employees and said even if they thought they were not involved, they would be "fired as well and if you want to sue me, get in line." (Tr. 795-796) Such statements threatening job loss and closure of a facility are coercive and unlawful. Indeed, an employer may not interfere with the organizational or protected concerted activities of employees by threatening to close a business or part thereof. *Textile Workers Union of America v. Darlington Mfg. Co.*, 380 U.S. 263 (1965) *Dlubak Corp.*, 307 NLRB 1138, 1143, 1152 (1992) In addition, threats of job loss and adverse consequences violate Section 8(a)(1) whether they are express or implied. *Jupiter Medical Center Pavilion*, supra.

Thus, Respondent violated Section 8(a)(1) of the Act when CEO Dhuper interrogated employees about the protected concerted activities of other employees, made an implied threat to discharge employees, and made an implied threat to close the PFT lab, which reasonably tend to coerce employees in the exercise of their Section 7 rights.

j. In April 2017 Marino Interrogated Employees About Signing the Petition and Threatened to Terminate Employees that Signed the Petition

Respondent violated Section 8(a)(1) of the Act when Manager Marino, its agent and supervisor, interrogated employees about signing the petition and threatened to terminate employees that signed the petition in April 2017.[23]

Respiratory therapist Nancy Mardanzai testified that after the signed petition was given to CEO Dhuper on April 13, 2017, DPS Marino approached Mardanzai one morning in the department break room to ask her about the petition. (Tr. 363) Mardanzai testified that Marino told her to sign a paper from human resources and said that according to the CEO whoever signed the petition will be fired, and since a majority of the department signed it a majority of the

[23] General Counsel alleged these violations of the Act in paragraph 6(c)(iv)-(v) of the Fourth Amended Consolidated Complaint.

department might be fired. (Tr. 363) Mardanzai also testified that Marino asked her if she signed the petition and she said no even though she signed it because she was scared she would be terminated. (Tr. 364) Mardanzai spoke quietly and appeared visibly nervous throughout her testimony, clearly scared to testify against her current manager regarding the threats he made in April 2017. Mardanzai's testimony should be credited, as she had nothing to gain from testifying and risked retaliation for doing so. See *Wilshire Plaza Hotel*, supra, at 336; see also *Jewish Home for the Elderly of Fairfield County*, supra; *Gold Standard Enterprises*, supra, at 619; *Federal Stainless Sink Div. of Unarco*, supra, at 491; *Georgia Rug Mill*, supra. Further, as stated on the record, Mardanzai's demeanor during her testimony was made note of, observed, and assessed (Tr. 713), and "there is no reason … to disbelieve that … Mr. Marino went to her with that letter and made those statements to her." (Tr. 471)

Moreover, 25-year employee and respiratory therapist Marco Garcia (Tr. 541) testified that a few days after the petition was given to CEO Dhuper, he approached DPS Marino in the hallway near the department with respiratory therapist Erik Thom. Marino told them he was stressed because he might have to work 24 hours a day, seven days a week, because people that signed the petition might lose their jobs. (Tr. 556) Thom corroborated Garcia's testimony, stating that Marino told them "he may have to get rid of half his department" because of the petition. (Tr. 913-932) Both Garcia, a 25-year current employee, and Thom, a 14-year current employee (Tr. 541, 925), should be credited. Further, minor differences in witnesses' recollections of certain events tend to enhance rather than detract from witness credibility, as they are a consequence of different perspectives and the varying impact different issues may have on individuals. *H.B. Zachry Co.*, supra; *Gerig's Dump Trucking, Inc.*, supra; *Lott's Elec. Co.*, supra. Respiratory therapist Monique Johnson further corroborated Garcia's account when she testified that when she asked Marino if he said that anyone who signed the petition is going to get fired,

Marino didn't simply deny it, but instead asked her if Garcia was the one that told her that. (Tr. 609)

While DPS Marino denies he interrogated and threatened respiratory therapist Nancy Mardanzai, this testimony cannot be credited as it was elicited through leading questions and consisted of general denials. See *Bronx Metal Polishing Co.*, 268 NLRB 887, 888, supra (1984); *Staco, Inc.*, 244 NLRB 461, 472 (1979). It was only when the judge asked follow-up questions, which Respondent's counsel failed to ask, about this conversation that Marino claimed he told Mardanzai he had no idea if they were going to get fired for signing the petition and he was not involved in the decision making. (Tr. 1388-1389) Marino similarly claimed he told respiratory therapist Garcia the exact same thing. (Tr. 1390) Reviewing the apparent interests of the witnesses, corroboration or lack thereof, consistencies and inconsistencies within the testimony of witnesses and between witnesses testifying about the same event, Marino's testimony here cannot be credited. See, e.g., *NLRB v. Walton Mfg. Co.*, supra. Marino clearly had an interest in helping Respondent avoid liability, in part caused directly by Marino's own actions. For example, while both CEO Dhuper and DON O'Keefe admitted Dhuper was involved in the decisions to suspend and terminate Roop, Marino nonsensically and inexplicably tried to shield Dhuper by denying his involvement. (Tr. 1379, 1384) As noted elsewhere, even though Marino had the advantage, which no other witness enjoyed, of viewing all of the testimony throughout this proceeding, Marino's answers were still often nonresponsive and incoherent, and both internally and externally inconsistent. As such, Marino's testimony must be discredited.

DPS Marino unlawfully interrogated respiratory therapist Nancy Mardanzai when he asked her whether she signed the petition as he was her direct manager and the highest ranking supervisor in the department; Marino approached Mardanzai and asked her to sign a statement from human resources about the petition; the interrogation took place in a context of hostility and

discrimination against protected concerted activity as Respondent had already violated Section 8(a)(1) through numerous coercive statements, threats, and disciplines; and, Mardanzai's response to Marino was unquestionably motivated by fear. Indeed, as noted on the record, "anytime any group of people sign a petition, there's probably some fear." (Tr. 471) Further, as Mardanzai stated in response to questions from the judge, she falsely told Marino she did not sign the petition because she was scared after he told her that the CEO said people who signed the petition would be terminated. (Tr. 364) The fact that Marino later denied making these statements when asked directly by respiratory therapist Johnson (Tr. 610) does not cure the violation because Respondent did not admit wrongdoing, Respondent's repudiation of the threat was not publicized adequately to employees, and Respondent did not give assurances to employees that in the future their employer would not interfere with their Section 7 rights. See *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978); see also *Pride Ambulance Co.*, 356 NLRB No. 128 (2011).

Further, DPS Marino's threats to employees Mardanzai, Garcia, and Thom, that those who signed the petition would be fired, directly tied the protected concerted activities of the respiratory therapists to the threat of job loss. Thus, Respondent violated Section 8(a)(1) of the Act when its agent and supervisor, Marino, interrogated Mardanzai about whether she signed the petition and stated to Mardanzai, Garcia, and Thom that employees who signed the petition would be terminated.

k. In April 2017 O'Keefe Made Coercive and Disparaging Statements to Employees About Their Protected Concerted Activity and the Protected Concerted Activity of Other Employees

DON O'Keefe made coercive statements to employees regarding signing the respiratory therapist petition in April 2017 in violation of Section 8(a)(1) of the Act.[24]

25-year employee and respiratory therapist Garcia testified that a few days after the April 13, 2017 petition was given to CEO Dhuper, he walked out to the parking lot with respiratory therapist Thom after clocking out, and approached O'Keefe and asked her if they were going to lose their jobs because they signed the petition. (Tr. 555, 558-559, 937) Garcia and Thom testified that O'Keefe said that management was upset that employees signed the petition, but if they kept their noses clean and stayed out of trouble they wouldn't lose their jobs.[25] (Tr. 559, 937) DON O'Keefe denied knowledge of the petition at the time of this conversation, but admitted to telling Garcia and Thom in response to questions about being fired for signing the petition, that she told them to "keep your nose clean, go to work, do a good job, you'll be fine." (Tr. 2318) Thus, O'Keefe's own testimony largely corroborates that of Garcia and Thom.

DON O'Keefe's testimony about *when* she acquired knowledge of the petition must be discredited. O'Keefe contradicted herself and changed her answers regarding when she first saw the petition. On direct, O'Keefe testified that she had never seen a copy of the petition "until last night" (Tr. 3216), referring to her preparation in order to give testimony, but on cross-examination O'Keefe completely changed her answer to say she first "saw it from HR" on April 17 or 18, 2017. (Tr. 2329) It's dubious that O'Keefe would not have knowledge of the petition—

[24] General Counsel alleged these violations of the Act in paragraph 6(a)(vi) of the Fourth Amended Consolidated Complaint.

[25] The very minor differences in Garcia and Thom's testimony enhance rather than detract from their credibility, as they are the natural consequence of two different perspectives and their varying impact on these individuals. See *H.B. Zachry Co.*, supra; *Gerig's Dump Trucking, Inc.*, supra; *Lott's Elec. Co.*, supra. For example, Garcia was more scared for his job than Thom at the time of these events and was also visibly nervous to be testifying in front of his direct supervisor and manager Marino at hearing. (Tr. 545)

even if she had not actually seen it at the time—close in time to April 13, 2017, as the petition explicitly named DPS Marino, whom O'Keefe directly supervises, as a manager engaging in misconduct in a letter addressed directly to CEO Dhuper, O'Keefe's boss and direct supervisor. Indeed, Marino directly contradicted O'Keefe's testimony, testifying on cross-examination that he spoke to O'Keefe about the petition after work on April 13, and again on April 14, 2017. (Tr. 1483, 1488) Further, in addition to her testimony being contradictory and inconsistent, O'Keefe's answers throughout, but especially on cross-examination, were evasive, contrived, and appeared calculated to protect the interests of Respondent. To be sure, O'Keefe answered "I don't recall" no less than 35 times in the course of her testimony.

Both DON O'Keefe's statement that management was upset about the petition and her comment that employees should keep their nose clean and stay out of trouble are coercive and unlawful. Statements disparaging an employee's protected Section 7 activity are unlawful as they reasonably tend to coerce employees in the exercise of their rights. See *Sundance Construction*, 325 NLRB No. 188 (1998) (supervisor's statement that he was "disappointed" in employee and thought he "knew better" regarding his union activities are unlawfully coercive). O'Keefe's statement explicitly referenced the protected concerted activities in the respiratory department—specifically, the petition given to Dhuper on April 13, 2017—and disparaged such conduct by indicating that management was upset about this petition. O'Keefe's comments warning employees to stay out of trouble and keep their nose clean further coerced employees as they implied that if employees did not disengage from conduct such as signing a petition, they would not be staying "out of trouble" and could even face discipline or discharge.

As such, Respondent violated Section 8(a)(1) of the Act when O'Keefe—its agent and supervisor—made coercive statements to employees disparaging their protected concerted

activities in mid to late April 2017. Indeed, her statement to keep their noses clean equates their protected concerted activities as unclean activity that could get them fired.

l. In May 2018 Respondent's Agent Attorney Collin Cook Interrogated Johnson About Her Protected Concerted Activities and the Protected Concerted Activities of Other Employees

The record evidence establishes that Respondent violated Section 8(a)(1) of the Act when its agent, Attorney Collin Cook,[26] interrogated Johnson about who drafted the petition that was given to CEO Dhuper on April 13, 2017.[27]

The Board has carved out an exception to allow employers to interrogate employees regarding their Section 7 rights where an employer has a legitimate cause to inquire, either (1) to verify a union's claimed majority status to determine whether recognition should be extended; or, (2) to investigate facts concerning issues raised in a complaint where such interrogation is necessary in preparing the employer's defense for trial. *Johnnie's Poultry*, 146 NLRB No. 98, 774-775 (1964). To conduct such an interrogation, the employer must communicate to the employee the purpose of the questioning, assure them that no reprisal will take place, and obtain their participation on a voluntary basis. *Id.* at 775. In addition, "the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees." *Johnnie's Poultry*, supra at 775. Examples of impermissible questioning include inquiries related to statements given to a Board Agent, where union meetings were held, and who was present. *Id.* at 776.

[26] General Counsel alleged Cook to be employed by Respondent to investigate complaints made by employees concerning workplace issues and in that capacity was an agent of Respondent within the meaning of Section 2(13) of the Act and Respondent admitted this in its Answer to the Fourth Amended Consolidated Complaint.
[27] General Counsel alleged these violations of the Act in paragraph 6(e) of the Fourth Amended Consolidated Complaint.

The Board extended the privilege established in *Johnnie's Poultry* to collection of evidence in support of an employer's objections to an election in *Avondale Industries, Inc.*, 329 NLRB 1064 (1999), *Adair Standish Corp.*, 290 NLRB No. 43 (1988), and *Woodcrest Health Care Center*, 360 NLRB No. 58 (2014). In *Avondale*, supra, the Board found a violation where the employer's attorney did not provide an employee with the *Johnnie's Poultry* safeguards prior to the interrogation. By contrast, in *Woodcrest*, the Board found a violation even though the employer's attorney provided the *Johnnie's Poultry* assurances before interrogating employees in preparation for a postelection hearing on objections. *Woodcrest Health Care*, supra, at 11. The Board panel unanimously affirmed the ALJ's finding that the employer violated the Act when its attorney exceeded the permissible scope of inquiry by interrogating employees about their union activities, membership, and sympathies, as well as the union activities, membership, and sympathies of other employees. *Id.* The Board held that even though the attorney's initial purpose for meeting with the employee may have been for permissible reasons and the attorney provided written and verbal *Johnnie's Poultry* assurances, the attorney went beyond the permissible scope into unlawful interrogation of the employee. *Woodcrest Health Care*, supra, at 11. The Board found that the attorney had no valid justification or permissible basis for asking the employee about his personal union activities or the union activities of other unit employees. *Id.* Similarly, in *Adair Standish Corp.*, supra at 331, the Board found that the employee questioning was unlawful in part because it exceeded the necessities of the legitimate purpose of preparation for the hearing on objections by prying into other union matters.

Here, respiratory therapist Johnson testified that after she told DHR Stephanie Jones[28] that she'd be willing to speak to a third-party investigator, Attorney Collin Cook called her one

[28] General Counsel alleged Jones to be a supervisor within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act at all material times since at least March 1, 2017, in

afternoon in May 2017 while she was out on medical leave. (Tr. 611-612, 617) Johnson testified that at the outset of the conversation, Cook asked Johnson if she "knew what he was calling in regards to," and Johnson replied, "are you calling in regards to the petition?" (Tr. 615) Cook responded "that's one area," but did not explain the purpose of his questioning except to say "I'm just here to collect information." (Tr. 615) Towards the end of the conversation, and without giving any specific assurances, Cook asked Johnson who drafted the petition. (Tr. 615-616) While Jones asked Johnson if she would be "willing" to speak to a third party investigator, and Johnson expressed that she would be willing to cooperate if it would lead to a resolution (Tr. 612), neither Jones nor Cook informed Johnson that she would not face any repercussions nor be retaliated against in any way for refusing to speak with Cook or refusing to answer his questions.[29]

Thus, Cook's question to Johnson regarding who drafted the petition was an unlawful interrogation. The questioning took place against a backdrop of hostility and discrimination against protected concerted activity, including numerous coercive and threatening statements from Respondent's CEO and managers, retaliatory disciplines, and the termination of Charging Party Roop on the heels of the respiratory therapist petition. Moreover, Respondent had no legitimate basis to seek information regarding *who* drafted the petition, and this information could only be used for an unlawful purpose such as taking adverse action against individual employees. Indeed, Respondent later retaliated against respiratory therapist and Charging Party Jernetta Backus during the instant proceedings in part, for drafting the petition. Further,

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paragraph 4(c) of the Fourth Amended Consolidated Complaint; and, Respondent admitted this in its Answer to the Fourth Amended Consolidated Complaint and in its to Answer to Complaint and Notice of Hearing in Case 32-CA-218138.

[29] Johnson's testimony stands unrebutted and should be credited. When a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. In particular, it may be inferred that the witness, if called, would have testified adversely to the party on that issue. *International Automated Machines*, supra at 1123.

Johnson's refusal to answer Cook's question indicates she was fearful of Respondent finding out who drafted the petition and she noted in her testimony that this question upset her. (Tr. 615-616)

Respondent has the burden to show that the limited exception carved out in *Johnnie's Poultry*, supra, applies to the interrogation at hand, as this exception is an affirmative defense to an employer's questioning employees about their Section 7 activities. The Board has declined to extend the employer protections from *Johnnie's Poultry*, supra, and its progeny, to interrogations in contexts similar to in the matter at hand. Even if the exception set forth in *Johnnie's Poultry*, supra, for employer interrogations applied to investigations into allegations brought by employee petition such as here, Respondent still unlawfully interrogated Johnson about her protected concerted activities and the protected concerted activities of other employees by asking her who drafted the petition. Respondent did not assure Johnson that no reprisal would take place in connection with her conversation with Cook as required by *Johnnie's Poultry*, supra. Moreover, even assuming Respondent had a legitimate cause to inquire as set forth in *Johnnie's Poultry* and its progeny, similar to *Woodcrest Health Center*, supra, Cook exceeded the permissible scope of inquiry by delving into Johnson's personal protected concerted activities and those of other employees. Thus, even if Respondent argues *Johnnie's Poultry* applies to Cook's interrogation of Johnson, it cannot establish that it provided all the proper safeguards as required by Board law, nor that it did not exceed the permissible scope of inquiry by prying into employees' Section 7 activity. Therefore, Respondent violated Section 8(a)(1) of the Act when its agent, Attorney Cook, interrogated Johnson about who signed the respiratory therapist petition given to CEO Dhuper on April 13, 2017.

m. Respondent Disciplined and Discharged Roop in Retaliation for Her Protected Concerted Activities in Violation of Section 8(a)(1) of the Act

As will be shown below, General Counsel has demonstrated by a preponderance of the evidence that Respondent violated Section 8(a)(1) of the Act by disciplining and firing Charging Party Babita Roop based on ample record evidence that Roop was engaged in protected activity, Respondent had knowledge of that activity, and Respondent's hostility to that activity contributed to its decision to take an adverse action against Roop. See *Director, Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 278 (1994), clarifying *NLRB v. Transportation Management*, 462 U.S. 393, 395, 403 n.7 (1983); *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

The record evidence establishes that a discriminatory motive contributed to Respondent's decision to take an adverse employment action against Roop. Discriminatory motive can take a variety of forms, including: (1) statements of animus directed to the employee or about the employee's protected activities (see, e.g. *Austal USA, LLC*, 356 NLRB No. 65, slip op. at 1 (2010) (unlawful motivation found where human resources director interrogated and threatened union activist and supervisors told activist that management was "after her" because of her union activities)); (2) statements by the employer that are specific as to the consequences of protected activities and are consistent with the actions taken against the employee (see, e.g., *Wells Fargo Armored Services Corp.*, 322 NLRB 616 (1996) (unlawful motivation found where employer unlawfully threatened to discharge employees who were still out in support of a strike and then disciplined an employee who remained out on strike following threat); (3) close timing between discovery of the employee's protected activities and the discipline (see, e.g., *Traction Wholesale Center Co. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000) (immediately after employer learned that

union had obtained authorization cards from a majority of employees, it fired an employee who had signed a card); see also *MJ Metal Products, Inc. v. NLRB*, 267 F.3d 1059 (10th Cir. 2001)); (4) the existence of other unfair labor practices that demonstrate that the employer's animus has led to unlawful actions (see, e.g., *Mid-Mountain Foods*, 332 NLRB 215, 215 n.2, passim (2000), enfd. mem. 11 Fed. Appx. 372 (4th Cir. 2001)); (5) evidence that the employer's asserted reason for the employee's discipline was pretextual, e.g., disparate treatment of the employee, shifting explanations for the adverse action, failure to investigate or inadequate investigation into whether the employee engaged in the alleged misconduct, or providing a non-discriminatory explanation that defies logic or is clearly baseless (see, e.g., *Lucky Cab Company*, 3360 NLRB No. 43 (2014); *MarCare Health Services – Easton*, 356 NLRB No. 39, slip op. at 3 (2010); *Greco & Haines, Inc.*, 306 NLRB 634 (1992); *Wright Line*, supra, at 1088, n.12; *Cincinnati Truck Center*, 315 NLRB 554, 556-557 (1994), enfd. sub nom. *NLRB v. Transmart, Inc.*, 117 F.3d 1421 (6th Cir. 1997).

Because the General Counsel has established that Charging Party Roop's protected activity was a motivating factor in Respondent's decision, there is a violation of the Act unless Respondent meets its burden to show that it would have taken the same adverse action even in the absence of the protected activity. See *NLRB v. Transportation Management*, 462 U.S. 393, 401 (1983) ("the Board's construction of the statute permits an employer to avoid being adjudged a violator by showing what his actions would have been regardless of his forbidden motivation"). To establish such an affirmative defense, Respondent cannot simply present a legitimate reason for its action but must persuade the Board, by a preponderance of the evidence, that the same action would have taken place even in the absence of Roop's protected activity. *Id.*; *Rock Valley Trucking Co.*, 350 NLRB 69, 69 n.8 (2007), citing *W.F. Bolin*, 311 NLRB 1118, 1119 (1993). It cannot.

Accordingly, as more fully discussed below, Respondent must be found to have violated the Act when it disciplined and fired Roop, a 17-year veteran employee who had an unblemished record up until these events.

i. Respondent Issued a Verbal Warning on November 21, 2016 to Roop in Retaliation for her Protected Concerted Activities

The record is replete with evidence—some admitted by Respondent—that Charging Party Roop engaged in extensive protected concerted activities over a nearly 12-month span, Respondent had knowledge of Roop's activities, Respondent harbored animus towards those activities, and Respondent issued a verbal written warning to Roop on November 21, 2016.[30]

1. Roop engaged in extensive protected concerted activities

Beginning in at least June 2016, Roop engaged in extensive concerted activities on behalf of herself and her coworkers in an effort to get Respondent's management to address issues affecting the working conditions of employees in the respiratory department.

In *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*), the Board defined "concerted activity" broadly, holding it "encompasses those circumstances where individual employees seek to initiate or induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." Moreover, "[t]he fact that an employee may act alone during some phase of concerted presentation of employee grievances does not mean he is thereby outside the protection of the Act." *Compuware Corp.*, 320 NLRB No. 18, at 103 (1995). Indeed, "the guarantees of Section 7 of the Act extend to concerted activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization." *Meyers II*, supra, at 887, citing *Root-Carlin, Inc.*, 92 NLRB 1313, 1314 (1951). However, the Board has recognized that

[30] General Counsel alleged these violations of the Act in paragraph 7(b) of the Fourth Amended Consolidated Complaint.

"concerted activity" within the meaning of Section 7 of the Act encompasses conduct "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Five Star Transportation, Inc.*, 349 NLRB No. 8, 43 (2007), enfd. 522 F.3d 46 (1st Cir. 2008), citing *Salisbury Hotel, Inc.*, 283 NLRB 685, 685 (1987). The question of whether an employee has engaged in concerted activity is a factual one based on the totality of the record evidence. *Meyers II*, supra, at 886.

Further, "[w]here an employee in the presence of other employees, complains to management concerning wages, or other terms and conditions of employment, such complaints constitute protected concerted activity, even though the employee purports to speak on behalf of himself or herself." *Avery Leasing*, 315 NLRB 576, 580 fn. 5 (1994); *American Red Cross Blood Services*, 322 NLRB 590 (1996). In addition, employees do not forfeit the protection of the Act if, in voicing their dissatisfaction with matters of common concern, they give currency to inaccurate information, provided they acted in good faith. *Walls Mfg. Co., Inc.*, 137 NLRB No. 134, supra at 1319 (1962); *Marlin Firearms Company*, 116 NLRB 1834; *El Mundo Broadcasting Corp.*, 108 NLRB 1270. Indeed, "[w]hether the protected working condition was actually as objectionable as the employees believed it to be, or whether their objection could have been pressed in a more efficacious or reasonable manner, is irrelevant to whether their concerted activity is protected by the Act." *Tamara Foods, Inc.*, 258 NLRB 1307, 1308 (1981), citing *International Van Lines*, 177 NLRB 353, 354 (1969); *Du-Tri Displays, Inc.*, 231 NLRB 1261 (1977); *Modern Carpet Industries, Inc.*, 236 NLRB 1014 (1977), enfd. 611 F.2d 811 (10th Cir. 1979); *Ben Pekin Corporation*, 181 NLRB 1025 (1970), enfd. 452 F.2d 205 (7th Cir. 1970).

Concerted activity is protected when employees seek "to improve the terms and conditions of their employment or otherwise improve their lot as employees." *Eastex, Inc. v. N.L.R.B.*, 437 U.S. 556, 565 (1978). As Section 7 of the Act makes clear, employees are

protected when engaged in concerted activities for the broader purpose of "mutual aid or protection" as well as the narrower purpose of "self-organization." *Id.* For concerted activity to be protected, it must bear a relationship to employees' interests as employees *Id.* at 567. In other words, protected concerted activity must be related to "legitimate employee concerns about employment-related matters." *Kysor/Cadillac*, 309 NLRB 237, 237 n. 3 (1992).

Here, Charging Party Roop engaged in protected concerted activities by seeking to initiate group action among her coworkers, bringing numerous group complaints to management concerning workplace conditions, and taking group actions with her coworkers to improve their terms and conditions of employment. On June 17, 2016, Roop, together with six other respiratory therapists, went to human resources to complain about offensive postings in the department and management's response. (Tr. 27, 29, 388, 579-580, 679, 811-812) This conduct is protected and concerted, as the employees acted together in good faith in an attempt to get Respondent to take serious action to ensure that such racist and horrendous misconduct didn't occur again. Indeed, concerted activity to protest perceived racial discrimination is protected.[31] *CGLM, Inc.*, 350 NLRB 974 (2007), enfd. 280 Fed. Appx. 366 (5th Cir. 2008).

Moreover, Charging Party Roop engaged in protected concerted activity when she approached DPS Marino, her manager, alone on June 14, 2016, to voice her opinion about certain employees not working weekends as required by Respondent's policy. (Tr. 25-26, 1360) Even though this conversation involved only a speaker and listener, Roop's conduct was

[31] It is well-settled law that monkey and gorilla references are racist and discriminatory under the Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000, et seq., including use of monkey and gorilla gestures, see *Fuller v. Fiber Glass Systems, LP*, 618 F.3d 858 (8th Cir. 2010); calling a coworker "monkey," see *Green v. Franklin Nat. Bank of Minneapolis*, 459 F.3d 903, (8th Cir. 2006); taping monkey drawings to a coworker's locker, see *Thomas v. Ametech*, 262 F. Supp. 2d 688 (N.D. Ohio 2006); comparing African-American employees to gorillas, see *Henry v. CorpCar Services Houston, Ltd.*, 625 Fed. Appx. 607 (5th Cir. 2015); and, a supervisor prominently displaying a stuffed toy monkey in the workplace, see *Burkes v. Holder*, 953 F. Supp. 2d 167 (D.C. Cir. 2013). Indeed, given the history of racial stereotypes, it is reasonable, perhaps even obvious, that use of monkey imagery is intended as "racial insult" for the purposes of hostile work environment analysis under Title VII, where no benign explanation for imagery appears. *Jones v. UPS Ground Freight*, 683 F.3d 1283 (11th Cir. 2012).

protected and concerted as she was raising a group concern about whether every respiratory therapist was required to work weekends. See *Meyers II*, supra, at 877. The issue of employees working weekends was a true group concern, as evidenced by the email respiratory therapist Frank Mardanzai sent to Marino just four days later concerning the very same topic. (GC 62) This concern was raised yet again by a group of respiratory therapists via the list of concerns drafted by Roop and Johnson in June 2016. (GC 6; GC 98) Indeed, the list of concerns constituted further protected concerted conduct as Roop and Johnson solicited feedback from their coworkers, including Thuc Ho, Grant Vea, Joje Pereyra, Amanpreet Kaur, Shilu Yogi, and Philip Dong, and drafted a list regarding a host of issues affecting their workplace, including employees working weekends, the changing requirements of the PFT lab, benefitted employees being canceled or temporarily laid off, scheduling per diem employees, and other concerns touching on the climate of perceived favoritism in the department. (Tr. 59, 70, 588, 591, 596, 1301, 1565-1566; GC 6; GC 98). In drafting the list of concerns, Roop was clearly acting in concert with her coworkers in an attempt to improve specific conditions in their workplace. Even though some of these concerns touched on the perceived favoritism in the department, Roop took these actions in good faith, without any malicious intent, solely to attempt to improve working conditions in the department.

In addition, Roop engaged in protected concerted activity when she discussed Marino blocking her access to the Resource schedules with Henry Aquino and Marco Garcia, and then in their presence, confronted Marino about blocking their access in November 2016. (Tr. 87-88; 91) See *Avery Leasing*, supra, at 580 fn. 5; *American Red Cross Blood Services*, supra. This access affected their ability to do their jobs as they needed to know when they needed to attend certain scheduled procedures, such as C-sections. (Tr. 87-88) Roop also engaged in concerted activity in November 2016, by running and being elected shop steward (Tr. 442-443); and, filing concerted

complaints with Respondent's office of human resources with her coworkers, respiratory therapists Backus, Mardanzai, and Duong. (Tr. 107, 243-244, 1337-1338).

2. Respondent had knowledge of Roop's protected concerted activities

Respondent had knowledge of Charging Party Roop's protected concerted activities and viewed her as a leader in the concerted action in the department. Roop did not engage in these activities in secret, rather her protected conduct was open and visible to employees and supervisors alike, as early on Roop was unaware of Respondent's hostility towards such protected activity.

Many of these activities directly involved Respondent's managers and agents, and thus they had direct knowledge of Roop's conduct as it was unfolding. For example, Roop went to DPS Marino directly to complain about the issue of working weekends and access to the Resource schedule. Indeed, in preparing notes to meet with Roop in November 2016, Marino wrote that Roop was looking at the Resource schedule to see what was scheduled in the PFT lab, reflecting Marino's knowledge of Roop's concerted conduct regarding employee staffing levels being cut. (GC 95) The issues Roop had previously raised directly with Marino, such as employees working weekends, the changing requirements for the PFT lab tech position, and the PFT lab position never being posted, came up again in the list of concerns addressed by Marino at department meetings. (GC 6; GC 98) Given the inclusion of the working weekends issue and Roop's tendency to voice workplace concerns, Marino likely inferred Roop's role in drafting the list of concerns. Whatever his suspicions were, they were confirmed when Roop explicitly identified herself to Marino as one of the seven employees who had gone to human resources the week before. (Tr. 38) Indeed, Marino admitted he knew a group of employees went to human resources and knew Roop was one of them. (Tr. 1386) Moreover, Marino came to suspect that

Roop was sharing information with other employees in November 2016, when he heard about Roop and Charging Party Backus handing out blank complaint forms to employees, which were later filed with Respondent's human resources office. (Tr. 1365-1366; 1458-1461; GC 91)

3. Respondent harbored animus towards Roop's protected concerted activity, which motivated Respondent's decision to issue Roop a verbal written warning on November 21, 2016

There is ample evidence in the record that Respondent harbored animus towards Roop's protected concerted activities and those of other employees, which contributed to its decision to discipline Roop on November 21, 2016.

Animus Statements

DPS Marino took a very adversarial approach to the list of concerns for which Roop solicited feedback, drafted, and presented to the Union, which was summarily handed over to Respondent. Marino exhibited his animus towards the drafters of the list in his argumentative rebuttal he drafted and presented at two meetings in August 2016. (Tr. 76, 593, 1311-1315; GC 98) Marino wrote that it is misleading for employees to represent themselves as speaking on behalf of a group if they are merely a portion of the group, and without including the signatures and identities of all the employees in the group. (GC 98, SRH000622) Marino's written statements in response to the list of concerns reflect his animus towards employees purporting to "speak on behalf" of a group and his disparagement of their concerted complaints as falsified and misleading. (GC 98) Roop acted in good faith in drafting this list of concerns, and even if there were inaccuracies in the list, this does not cause Roop to lose protection of the Act. *Meyers II*, supra. Indeed there is no evidence in the record that Roop acted with any ill-will, hatred, or hostility toward another, with a positive desire or intention to annoy or injure that person. See *El Mundo Broadcasting Corp.*, supra, at fn. 9, citing 34 Amer. Juris 681, sec. 2. Rather, the record evidence shows that Roop acted in good faith to induce her coworkers to take group action to

better their workplace conditions. Thus, Marino's statement would reasonably be construed as coercive and exhibits his animus towards employees' exercising their rights to act collectively—essentially denigrating any effort that isn't proven to be unanimous.

Timing Supports a Discriminatory Motive

In addition, on the heels of Charging Party Roop's June 2016 protected concerted activity, DPS Marino was already referring to Roop as a "misguided individual" to other managers as early as June 28, 2016. (GC 65) Marino's notes he drafted to prepare to meet with Roop in November 2016 stated his desire to let her know in no uncertain terms that she "does not run the department or provide union representation," further reflecting his animus towards Roop's protected concerted activity.[32] (GC 95)

Marino also attempted to take steps setting Roop up for termination as early as July 2016, even though Roop had never once been disciplined in her 17 years of employment and had consistently received positive appraisals. (Tr. 154; GC 35) Without consulting human resources or even speaking with Roop about her conduct, Marino proposed to issue her a verbal warning in July 2016 that contained language threatening that in any future incident the hospital reserved "the right to proceed directly to termination." (Tr. 1570-1571; GC 68; GC 69) While the discipline did not ultimately issue, the timing and severity of the proposed discipline provide further evidence of animus. Moreover, attempting to include a threat of termination in a verbal warning is clear evidence of disparate treatment. None of the verbal warnings produced by Respondent referenced "the right to proceed directly to termination," rather, if they referenced termination at all, they stated that "failure to improve may result in further disciplinary action, up to and including termination of employment." (GC 102-105) However, Marino again tried to

[32] Marino also retaliated against respiratory therapist Alex Aguilar in May 2016 in response to her protected concerted complaints by changing her schedule to separate her from respiratory therapist Frank Mardanzai, stating that they were riling up the department. (Tr. 381, 382, 789; GC 36; GC 52)

include such severe language in the draft of the November 21, 2016 discipline he sent to Ambrosini for review before issuing to Roop. (GC 73) Given that Roop was disciplined for such minor supposed infractions such as rolling her eyes and use of profanity, Marino's attempt to include this threatening language reflects his animus towards Roop and her protected conduct. Marino's desire to issue more severe discipline to Roop is reflected in Marino's November 2016 notes where he proposed removing Roop from her position as team leader[33] as well. (GC 95)

In addition, DPS Marino disciplined Roop directly following his effort to prevent her from discussing her terms and conditions of employment with her coworkers by blocking her access to the Resource schedule. Indeed, Marino blocked Roop's access to the Resource schedule in November 2016, shortly before disciplining her, to prevent her from discussing with her coworkers the staffing levels in the PFT lab and on the floors. (Tr. 91; GC 95) Marino's animus towards Roop's protected concerted activity was also evident from his notes from November 2016 stating that Roop was "[l]ooking at the Resource Scheduling program to see what is scheduled in the PFT lab" and "[m]aking comments" to her coworkers about staffing and temporary layoffs. (GC 95) Marino also disciplined Roop soon after she ran for shop steward in November 2016 and Marino noted that he wanted to convey to Roop the understanding that she "does not run this department or provide union representation." (Tr. 442-443; GC 95) Thus, the timing of Roop's discipline—close in time to her protected concerted activity—supports a finding that it was motivated by animus.

[33] Respondent's repeated assertions that team leader is not a "position" but rather a "role" must be dismissed. Respondent's own disciplinary documents refer to team lead as a "position" (Tr. 2348; GC 11), and the position of team lead comes with a premium pay bonus of 5 percent (GC 26). Further, Respondent maintained a list of employees who regularly hold the position of team lead versus employees who only occasionally fill in. (GC 75)

Disparate Treatment Shows Discriminatory Motive[34]

Respondent treated Charging Party Roop disparately in issuing her the November 21, 2016 verbal written warning because Respondent's managers failed to investigate whether Roop engaged in the alleged misconduct. Rather, Respondent simply took the letter of complaint from respiratory therapists Matuszak, Hamid, and Smith at face value and as a legitimate basis to discipline Roop, even though Respondent's own Director of Human Resources acknowledged that these three employees were trying to get Roop in trouble. (GC 74) Indeed, unlike Roop's concerted conduct, these employees acted from a place of bias and malice in an effort to injure and cause ill-will to Roop.[35] Moreover, Marino has shown his bias in support of Matuszak by voluntarily showing up to support her at a court hearing regarding the restraining order Charging Party Backus filed against her even though the dispute concerns two current employees whom he directly supervises. (Tr. 1054-1055) Marino showed further bias in favor of Matuszak when he admitted he promoted her to the primary PFT tech position on May 12, 2016, without posting for the position. (Tr. 1414-1415) In addition, in the past three years, no complaints from any other respiratory therapists were investigated whatsoever, with the exception of the complaint of racist postings in the department of which there was undeniable photographic proof. Even then, Respondent conducted only a perfunctory and cursory investigation and waited six weeks to take any action against the offending employees. Even complaints of the most heinous conduct that caused lasting conflict and discord in the department did not cause Respondent to investigate. (Tr. 246, 405, 410, 1538, 1610-1613, 1629-1636)

[34] General Counsel alleged these violations of the Act in paragraph 5(b) of the Fourth Amended Consolidated Complaint.

[35] Protection of the Act is lost where an employee engages in deliberate or malicious untruths. *Owens-Corning Fiberglas Corp.*, 172 NLRB 148, 155 (1968); see, e.g., *Schnell Tool and Die Corp.* v. *N.L.R.B.*, 359 F.2d 39, 44 (C.A. 6), enfg. 144 NLRB 385, 404-406; *Walls Manufacturing Company* v. *N.L.R.B.*, 321 F.2d 753, 754 (C.A.D.C.), cert. denied 375 U.S. 923, enfg. 137 NLRB 1317, 1318-19; *N.L.R.B.* v. *Illinois Tool Works*, 153 F.2d 811, 815, 817 (C.A. 7); *Marlin Firearms Company*, 116 NLRB 1834; *El Mundo Broadcasting Corp.*, 108 NLRB 1270.

Respondent also treated Roop disparately by selectively enforcing its rules and disciplining her more harshly than other employees who did not engage in protected concerted activity.[36] In disciplining Roop on November 21, 2016, DPS Marino accused her of using profanity and making gestures such as rolling her eyes and looking down on people. Respondent did not even-handedly enforce these policies. For example, Roop was allegedly disciplined for using profanity, even though Marino admitted that Respondent tolerates profanity as long as it stays within the respiratory department and further admitted to swearing in front of employees. (Tr. 83, 370, 595, 621, 625-626, 655, 925-928, 944, 1256 1328-1329) There is no evidence in the record that Roop ever swore in the presence of patients or their families or outside the department while on duty. Moreover, Respondent failed to discipline Hamid when he was reported using profanity, and multiple current employees testified that use of profanity is common. (Tr. 370, 625-626; GC 32; GC 77)

Indeed, the record evidence contains only two incidences of Respondent ever disciplining anyone other than Roop for use of profanity. Respondent disciplined a Chief Engineer who was first warned about using foul language and attacking a subordinate in February 2017, then suspended for 3-days in April 2017, for verbally abusing and threatening a coworker by using profanity and derogatory comments, before being issued a final written warning for similar verbal abuse of a subordinate in January 2018. (GC 111) Respondent also disciplined a Charge Nurse who cursed at an EMT, resulting in him filing a complaint, and in a separate incident, made derogatory and humiliating comments to a coworker in front of a police officer. (GC 102) Even though this employee was already placed on a performance improvement plan previously

[36] In light of the General Counsel's position as set forth in Memorandum GC 18-04 from June 8, 2018, Counsel for the General Counsel is withdrawing the allegations in paragraph 8 of the Fourth Amended Consolidated Complaint.

over several complaints of her being very rude and unprofessional to a paramedic and patient, this employee was still only issued a verbal warning for her use of profanity. (GC 102)

Roop was treated disparately since she was not given a final written warning following her February 13, 2017 suspension, nor placed on a performance improvement plan following her first verbal warning. Rather Respondent moved directly to more severe discipline even though Roop's conduct was much less serious than that of the Chief Engineer, who verbally abused subordinates using profanity and threatening and derogatory comments multiple times in less than 12 months, or the Charge Nurse who made rude and derogatory comments on numerous occasions in front of paramedics, patients, and police officers. Moreover, as someone working with subordinates, the Chief Engineer and Charge Nurse arguably should have been held to a higher standard. Roop was the only unit employee singled out for discipline by Respondent because of her protected concerted activities. Indeed, the record evidence shows that Respondent did not consistently or impartially enforce its rules, and often failed to follow its own policies and procedures. In addition, unlike Roop's verbal written warning which was extremely vague, the comparative disciplines produced by Respondent specified the dates of each incident and provided details regarding the individuals involved. (GC 8; GC 102; GC 111) Thus, Respondent treated Roop disparately, which supports a finding of unlawful motive.

Pretext

Charging Party Roop was written up for misconduct so minor and vague that the warning she was issued is essentially meaningless. Respondent did not provide Roop with any specifics regarding any unprofessional conduct she had engaged in except rolling her eyes, looking down on people, and using profanity. The verbal warning issued to Roop stated only that she was being disciplined for unprofessional behavior in the workplace and stated there would be no further incidents of language, gestures, incitement, behavior, gossip and/or hearsay. (GC 8) In response

to questions from the judge, Roop credibly answered that Marino did not explain how her conduct was incitement, behavior, gossip or hearsay, or what that even meant. (Tr. 104-105) Moreover, the mention of "incitement" in the warning is a direct reference to Roop's Section 7 activity. Further, when Marino issued Roop the written warning, he interrogated her about her protected concerted activity because he suspected Roop was circulating bullying complaint forms to employees in the respiratory department. (Tr. 1330-1331; GC 74)

The description of the conduct for which Roop was disciplined was so vague and without foundation that it is clearly baseless. No other disciplinary documents produced by Respondent were so vague as to not provide such basic details as the dates of the alleged misconduct, a description of the conduct, or information about the individuals involved. (GC 101-125) The disciplinary document issued to Roop on its face does not provide any coherent basis for discipline such that no reasonable employee would understand why they were being disciplined. In addition, none of Respondent's witnesses could recall any specific reasons or incidents that led to Roop's November 21, 2016 discipline other than vague allegations of unprofessionalism. Consequently, Respondent has not met its burden to prove that it would have issued Roop the November 21, 2016 verbal written warning in the absence of her protected concerted activities, and the asserted reasons for issuing the discipline to Roop were pretext.

Thus, General Counsel established by a preponderance of the evidence that Roop engaged in extensive protected concerted activities, Respondent had knowledge of her activities, Respondent harbored animus towards those activities, and the decision to discipline Roop was motivated by that animus. Respondent was not able to meet its burden to establish its affirmative defense that it would have disciplined Roop in the absence of her protected concerted activity. As such, Respondent issued the November 21, 2016 discipline to Roop in retaliation for her protected concerted activities in violation of Section 8(a)(1) of the Act.

ii. On February 13, 2017 Respondent Issued Roop a Final Written Warning, Suspension, and Demotion in Retaliation for her Protected Concerted Activities

The evidence in the record shows that Charging Party Roop continued to engage in protected concerted activities with her coworkers to better their terms and conditions of employment, Respondent had knowledge of those activities, and Respondent's animus towards Roop's protected conduct was a motivating factor in its decision to issue her three disciplines simultaneously on February 13, 2017—a final written warning, 3-day suspension, and demotion.[37] The initial incident over which she was disciplined was reported and caused by the very employee, Smith, who likely had malicious intent because Roop had handed to CEO Dhuper the WTF stamp that Smith used. Even though Respondent knew the inherent bias in Smith's complaint, Respondent nonetheless seized upon it because they wanted to get rid of the ringleader. Filled with animus, DPS Marino conveniently interpreted Roop's subsequent cries of desperation and frustration as misconduct.

1. Roop continued to engage in protected concerted activities and Respondent had direct knowledge of those activities

Roop engaged in further protected concerted activity when she filed a complaint with Respondent's human resources office on November 26, 2016, about favoritism, disparate treatment, bullying, and retaliation for speaking up and for going to human resources to support Pereyra with seven of her workers. (GC 9) Roop's complaint touched on a number of workplace issues she had brought to Respondent's attention previously, such as having her access blocked to the Resource scheduling. (GC 9) Roop's conduct was concerted due to the nature of her complaints and the fact it was also filed with human resources on November 28, 2016, together with complaint forms from employees Jernetta Backus, Frank Mardanzai, and Philip Duong,

[37] General Counsel alleged these violations of the Act in paragraph 7(d) of the Fourth Amended Consolidated Complaint.

who also complained of favoritism, discrimination, and retaliation. (GC 36) Mardanzai complained about being told that they were "inciting the department into an uproar" when he and Alex Aguliar confronted management about not assigning the Resource position based on seniority. (GC 36) Duong complained that management was trying to send a message that they are not to be trifled with by targeting Roop for discipline for obscure reasons and retaliated against Roop for becoming a Union rep and standing up to favoritism in the department. (GC 36) Pereyra also filed a complaint around this same time, on November 30, 2016, complaining of bullying and harassment in connection with the shop steward election. (GC 20)

Respondent had knowledge of these concerted complaints as DPS Marino interrogated employees Roop, Giang, Rogers, McGlown, Meskienyar, Thom, Vea, and Kaur regarding their discussions with Roop and whether they had witnessed Roop and Backus circulating bullying complaint forms. (Tr. 729-732, 817-818, 1459-1460; GC 91) CEO Dhuper, and DON O'Keefe, Marino's boss, both made statements about Roop's role in these activities during meetings held with employees to supposedly address these concerted complaints about department conditions. Moreover, in late December 2016, Dhuper asked Roop directly whether she was the ringleader, to which she replied that if she sees something that's not right she speaks up. (Tr. 121) This underscores his knowledge of, and animus towards, her protected concerted activity. Thus, the knowledge of Roop's protected conduct spread to the very highest levels of management.

2. Respondent harbored animus towards Roop's protected concerted activity that motivated its decision to discipline Roop

The evidence in the record reflects that Respondent's animus spanned from its lowest level managers to its highest ranking executives. After DPS Marino and DHR Ambrosini unlawfully interrogated employees about the complaint forms that were handed out, DON O'Keefe threatened Roop with demotion and discharge if the complaints continued. (Tr. 111-

113, 691-692) Such threats are not only coercive, independent violations of Section 8(a)(1), but also establish Respondent's animus towards the protected concerted activities of Roop and other employees. See *Mid-Mountain Foods*, supra. In addition, as in *Wells Fargo Armored Services Corp.*, supra, O'Keefe's threats to demote and then discharge Roop were entirely consistent with the adverse actions taken against Roop, which establishes discriminatory motive.

Animus Statements

Respondent's highest ranking executive, CEO Dhuper, made numerous statements in violation of Section 8(a)(1) directed at Roop's protected concerted activities, further establishing Respondent's animus. See *Austal USA, LLC*, supra. For instance, Dhuper disparaged the respiratory department for filing so many complaints and threatened employees with termination in a captive audience meeting held to supposedly address issues in the department. (Tr. 116-117, 253, 452, 530-531, 596-597, 736, 815, 879; GC 76) Similarly, Dhuper interrogated employees regarding whether they were on Roop's side or whether Roop was the ringleader; and, made explicit statements calling Roop the ringleader and disparaging her protected concerted activity in the presence of other employees. (Tr. 121, 128, 599, 603-605, 608, 660-661, 769, 793-796)

On February 6, 2017, a week prior to her discipline, DPS Marino emailed the department about the WTF stamp being handed over to CEO Dhuper, warning that no other "treasures" should come to light, implying that things that might get Marino in trouble should stay hidden. (Tr. 1419-1421; GC 27) Dhuper was already extremely upset with Marino over the state of the department. (Tr. 2427) The very next morning after Marino's email, employee Smith[38] confronted Roop in the respiratory department, setting in motion the events that led to her discipline. When Roop complained to Dhuper that evening that she was being picked on for

[38] Johnson testified that Smith was the individual using the WTF stamp in the department and she reported this to Dhuper. (Tr. 602-604)

turning over the stamp, rather than take any action to improve the situation, Dhuper solicited Roop to quit, which constitutes an additional violation of Section 8(a)(1) and further evidence of animus. (Tr. 149)

In addition, CEO Dhuper, DON O'Keefe, and DPS Marino, the individuals who made these animus statements, were the very individuals who made the decision to issue severe discipline to Roop, even over DHR Ambrosini's objections. (Tr. 1379, 1384, 2373, 2376-2377) CEO Dhuper was not involved in the decision to discipline any other employees other than Roop, further establishing that Roop was treated disparately. (Tr. 2380) However, in Roop's case alone, Dhuper ultimately made the final decision to issue Roop such a harsh level of discipline—only her second discipline in 17 years. (Tr. 2483) Moreover, even DON O'Keefe admitted she has never been involved in the discipline of any respiratory therapists except Roop, even though she oversees cardiopulmonary. (Tr. 2402) Roop was singled out as the only employee to have both the CEO and the DON involved in the decision to discipline her. In addition, none of the disciplinary documents produced by Respondent reflected three distinct forms of disciplines being issued to the same employee simultaneously, even in the case of egregious employee misconduct. (GC 102-125)

Disparate Treatment Supports Discriminatory Motive[39]

Moreover, Respondent treated Roop disparately by selectively enforcing its rules set forth in its Standards of Conduct Policy to discipline Roop for engaging in protected concerted activities. Respondent alleged that Roop violated its policies prohibiting: "[a]busive treatment, or discourteous conduct or inappropriate language directed toward co-employees, members of the Management Team, visitors, physicians or others;" "[d]isorderly, immoral, or inappropriate

[39] The facts in this section also prove Respondent violated the Act as alleged in paragraph 5(c) of the Fourth Amended Consolidated Complaint. Thus, not only do these facts rebut any *Wright Line* defense proffered by Respondent, the Respondent enforced their Standards of Conduct on Roop in response to her engaging in protected concerted activities.

conduct on any of the organization's property, examples of which are fighting, assault, horseplay, gambling, or use of loud, abusive or threatening language or behavior;" "[i]ncompatibility or inability to work in harmony including, but not limited to, gossip or criticism with employees, members of the management team, physicians or others;" and, "insubordination." (GC 64)

The record evidence establishes that Respondent enforced these rules selectively and disparately when disciplining Roop on February 13, 2017, because of her protected concerted activities. Of all the comparative disciplinary documents produced by Respondent, Roop's discipline was the only one that piled on three separate disciplinary actions at once, demonstrating Respondent enforced these rules against Roop in retaliation for her engaging in Section 7 activities. Moreover, employees who engaged in more serious misconduct than Roop were issued lesser disciplinary actions. Indeed, two employees who became argumentative, raised their voices, and threatened each other with physical violence, were allowed to continue working, and an argument again broke out later that day between the two employees and escalated into threats of physical violence. (Tr. 706; GC 109; GC 120) Both altercations took place in front of many witnesses, including coworkers, patients, and physicians. (Tr. 706; GC 109; GC 120). Yet these employees received just a final written warning and 3-day suspension, a lesser discipline than Roop's even though the misconduct at issue was much more egregious.

Further, Roop was treated more harshly than employees with longer disciplinary histories. For example, an employee was first counseled for rudely yelling at coworkers, then issued only a final written warning for two separate incidents when he rudely and angrily interrupted a hospital executive during a meeting with fifty other staff members, and accused numerous managers and supervisors of lying, and angrily interrupted the former CEO and President of the hospital at a different staff meeting. (GC 110) This same employee in a separate

incident yet again raised his voice and became argumentative towards a supervisor, but was only issued a verbal warning despite his lengthy history of engaging in similar misconduct. (GC 110) Similarly, another employee was issued a 1st written warning for not following a doctor's orders and not getting a patient's consent for a procedure, risking patient care and safety. (GC 104) This same employee was then issued a 2nd written warning for performing an exam on the wrong patient without doctor's orders and exposing the patient to unnecessary radiation. (GC 104) Finally, this employee used inappropriate gestures, slammed cabinet doors, and angrily raised his voice at coworkers, yet was only issued a verbal warning, despite the fact that the verbal warning mentioned that this was not the first complaint of his conduct towards coworkers. (GC 104) Thus, Respondent discriminatorily enforced its rules since it treated Roop disparately from other employees with more serious histories of discourteous conduct.

Roop was also issued harsher discipline than employees who engaged in more egregious misconduct. While the February 7, 2017 verbal altercation between Roop and Smith allegedly took place in front of staff and students, she was issued harsher discipline than an employee who disparaged students and engaged in physical altercations in front of patients. (GC 119) At a patient's bedside, the employee told a respiratory student "you're the student, you don't matter," then told a respiratory therapist to "get out" while pushing her on the shoulder, and the employee admitted to pushing her on two separate occasions. (GC 119) A week later, a respiratory student was taking vital signs at the bedside, and this same employee told the patient that the student was molesting them, making the student uncomfortable. (GC 119) Despite these numerous instances of violating Respondent's policies, this employee was only issued a final written warning. (GC 119) Similarly, when another employee engaged in more egregious misconduct than Roop, instigating multiple disruptive altercations and disagreements with coworkers, that employee was only issued a final warning. (GC 122)

Thus, there is ample evidence in the record that Respondent treated Roop disparately and harbored animus towards Roop for being a leader in the respiratory therapists' efforts to engage in protected concerted activities to better their terms and conditions of employment.

3. Respondent cannot meet its burden to prove it would have disciplined Roop in the absence of her protected conduct

The evidence presented establishes that Charging Party Roop engaged in protected concerted activities, Respondent had knowledge of those activities, and Respondent's animus towards Roop's protected concerted activities contributed to its decision to issue her a final written warning, 3-day suspension, and demotion from her position as team lead. Respondent cannot carry its burden to prove it would have made the same decision to pile on multiple disciplines on Roop in the absence of her protected concerted activity.

Respondent's asserted defense is that it disciplined Roop for participating in a verbal altercation with Smith in front of staff and students and berating DPS Marino in an accusatory manner and hanging up on him on February 7, 2017. However, Respondent did not investigate the incident leading to Roop's discipline, because even a cursory investigation would have shown that Smith instigated the "altercation" and was biased in reporting it, and treated Roop disparately in issuing her such a high level of discipline for her conduct. Indeed, none of the other disciplinary documents produced by Respondent reflected three forms of disciplines being issued to the same employee at once even if the misconduct was egregious. (GC 102-125) The evidence in the record shows that Respondent often gives employees up to three warnings before proceeding to a final written, adhering to a system of progressive discipline with seemingly all of its employees, except in the cases of Roop and Charging Party Backus. (Tr. 102-125) Such disproportionate disciplines have been found to establish unlawful motive. See *Keokuk Gas Serv. Co. v. NLRB*, 580 F.2d 328, 335 (8th Cir. 1978) (unfair labor practice where employee "would

have received milder punishment but for his threat to file a grievance"); *Neptune Water Meter Co. v. NLRB*, 551 F.2d 568, 570 (4th Cir. 1977 (discharged employee would have received "milder form of punishment" but for union activity).

In deciding to discipline Roop, Respondent relied entirely on DPS Marino's account of his phone call with Roop and on respiratory therapist Smith's account of the verbal altercation with Roop. Neither of these witnesses' testimony can be credited. Indeed, Marino has shown a tendency to lie under oath over even the most minor and peripheral issues. For example, when Marino could not answer what "A" meant, which is typewritten next to his own name on a department schedule, denying that it stood for "administration," the frustration with Marino's lack of candor was repeatedly noted on the record. (Tr. 1408-1409) Consequently, areas of Marino's testimony should clearly not be credited, including Marino's account of the events of his call with Roop on February 7, 2017. Marino's testimony was inconsistent and contradictory, both stating that Roop was yelling at him that this was all his fault and that the speaker on his phone "was so distorted that you couldn't really understand what was being said." (Tr. 1372) Roop was issued a 3-day suspension, demotion from her position as team lead, and final written warning, in part, because of what she said to Marino during this call, even though Marino admits he could not even hear what she said.

In contrast, Roop's testimony that she called Marino to tell him she was tired of being picked on, began crying uncontrollably, and hung up on Marino, is consistent and credible. Indeed, it was noted on the record that there was no reason not to believe Roop's testimony that she was crying during the phone call and not yelling. (Tr. 141) Further, Roop testified openly and honestly, freely admitting she hung up on Marino and expressed remorse for doing so directly after the fact.

Marino has shown a propensity to attempt to discipline Roop for minor infractions, relying entirely on statements from Smith, Matuszak, and Hamid as a basis to discipline her. In contrast, Marino has accused other employees engaged in protected conduct of being untruthful, even when their accounts of certain events are consistent and corroborated by other witnesses. (Tr. 1457, 1467; GC 83) Yet Marino relied entirely on Smith's account and discredited Roop's in recommending such a harsh level of discipline be issued to Roop, revealing his bias against Roop and animus towards her protected concerted activities.

Indeed, the disparate treatment of Roop—especially when compared to Smith—is staggering. Marino admitted on the record that Smith lied to him in the course of an investigation into Smith sending a harassing gorilla text message to respiratory therapist Pereyra in December 2017, in what Smith glibly and incredibly described as a "heartfelt Kris Kringle moment for me." (Tr. 1960-1961) Despite Smith having numerous disciplines involving various forms of harassment and other unprofessional conduct on at least November 14 and December 18, 2017 (GC 103; GC 143)—around the same time he sent the text to Pereyra—Marino could not provide even a cursory explanation in response to the open-ended question as to why Smith was not disciplined for sending a gorilla image to Pereyra. (Tr. 1438-1440) In addition to his recent disciplines, Smith had a long history of misconduct, and has reportedly opened another employee's pay statements, been caught on camera sleeping while on the job, thrown a work phone so hard it shattered, and repeatedly called his coworker a "pussy" in front of other employees. (Tr. 617-618, 621-622, 639, 655; GC 59; GC 156) Moreover, given his recent disciplinary history, Marino also could not explain why Smith was not disciplined for lying to him and Jones in January 2018 in the course of an investigation. (Tr. 1438-1440) Smith was also demoted from his position as team lead and returned to his position shortly after, whereas Roop

was demoted from her position of team lead indefinitely even though she had a much more limited disciplinary history than Smith. (GC 11; GC 56)

Yet, Respondent inexplicably relied entirely on Smith's account in disciplining Roop for the verbal altercation on February 7, 2017, and did not do any independent investigation into the incident. Marino could not even recall any details or basis for the verbal altercation discipline issued to Roop, stating only vaguely "she displayed less than professional behavior." (Tr. 1369) DON O'Keefe even admitted that DHR Jones explained to her that the alleged verbal altercation was a "back and forth" where Smith and Roop were "very loud, very disrespectful *to each other*." (Tr. 2373-2374 (emphasis added)). However, only Roop was singled out for discipline in connection with the incident. O'Keefe was not the least bit concerned that no other witnesses were interviewed in the investigation that led to Roop's suspension, demotion, and final written warning, even though Jones expressed misgivings about issuing such a serious discipline to Roop at the time. (Tr. 2373-2376) Moreover, Smith was never even interviewed in connection with this incident. (Tr. 1941)

Lastly, Smith's testimony in this proceeding must be discredited in its entirety as nothing more than hyperbole and outright falsehoods. Smith showed a disturbing propensity to lie under oath, changing his answers in dramatic fashion after being confronted with documentary evidence impeaching him. (Tr. 1963-1964) A mere moments after multiple vehement denials of ever having had an Instagram account, Smith did a complete 180, admitting he had an Instagram account after essentially being caught in a lie and saying to the judge, "Well, I swore to tell the truth, right?" (Tr. 1964) Smith's statement casts doubt on the veracity of all of his previous testimony up until that point. Moreover, this was not an issue of poor memory, as Smith admitted to having posted on Instagram within the last month. (Tr. 1967) Smith also showed incredible bias against, and malice towards, Roop, admitting he wrote on Instagram that Roop, a cancer

survivor, "should've died from the cancer and did us all a favor!" (Tr. 1964; GC 145) Smith also wrote on Instagram in reference to Roop that she should have been left to die and "[f]uck her and her stupid ass shit talking co-workers." (Tr. 1967-1968; GC 148) Without a question pending, Smith attempted to explain himself, offering only that he was very angry, and his comment didn't mean that he actually wanted Roop to die. (Tr. 1968) Regardless, Smith is clearly biased against Roop and would say just about anything to cause her harm—including stating outright lies while under oath.

Thus, General Counsel has shown that Roop engaged in protected concerted activities, Respondent had knowledge of Roop's protected concerted activities, Respondent harbored animus towards Roop's protected concerted activities, and its decision to discipline Roop on February 13, 2017, was motivated by that animus. In addition, Respondent cannot carry its burden to show that it would have issued Roop the same discipline even in the absence of Roop's protected concerted activities. Moreover, Roop's demotion was explicitly threatened previously by O'Keefe in connection with her concerted complaints, further demonstrating it was motivated by animus. See, e.g., *Wells Fargo Armored Services Corp.*, supra. Thus, Respondent violated Section 8(a)(1) of the Act when it issued Roop a final written warning, suspended her for three days, and demoted her from her position of team lead on February 13, 2017.

iii. Respondent Terminated Roop In Retaliation for her Protected Concerted Activities

General Counsel established by a preponderance of the evidence that Charging Party Roop engaged in additional protected concerted activities, Respondent had knowledge of those protected concerted activities and her prior protected concerted activities, and Respondent's animus towards Roop's protected concerted activities was a motivating factor in its decision to

terminate her employment on April 17, 2017.[40] It is ludicrous that Roop not walking through a door held open for her and/or allegedly snatching a phone, even if true, are reasonable grounds for termination. They were clearly pretextual reasons to rid themselves of the ringleader of protected concerted activities they despised.

1. Roop continued to engage in protected concerted activities and Respondent had direct knowledge of those activities

The record evidence established that Charging Party Roop continued to engage in protected concerted activities by providing Charging Party Jernetta Backus with input for the purposes of drafting a petition, assisting in circulating the petition, signing the petition, and collecting signatures for the petition that Backus delivered to CEO Dhuper on April 13, 2017. Roop contributed content to the petition by asking Backus to include language asking respiratory therapist Matuszak to be reprimanded or removed from her position as clinical instructor for Ohlone College students after Matuszak used her position to try to have Roop disciplined.[41] (Tr. 207-209; GC 83) The respiratory therapists agreed that Matuszak was abusing her position as clinical instructor by asking her students to spy on other employees and by intervening in students' rotations to try to get other employees in trouble. (Tr. 323-325, 526, 746-747, 755-756) Moreover, on at least one occasion Matuszak interrupted patient care at the bedside when a student was working under the license of a respiratory therapist in the ICU. (Tr. 217, 323-325) This caused growing concern among the respiratory therapists that they could risk their licenses if something were to happen because of a disruption from Matuszak while a student was working under their license. (Tr. 217, 322-325) Further, Roop was the second employee after Backus to sign the petition and took on a leadership role in circulating the petition, collecting signatures

[40] General Counsel alleged these violations of the Act in paragraph 7(e) of the Fourth Amended Consolidated Complaint.

[41] Both Marino and Matuszak tried to have Roop disciplined over a March 2017 incident involving a student going with Garcia instead of Roop. Even DHR Stephanie Jones admitted that Roop did not engage in any form of misconduct or unprofessional behavior in how she handled taking a student on the day in question. (GC 101)

from most of the 17 employees who signed the petition. (Tr. 170, 172, 176-180, 362, 390, 467-468, 554, 748, 797, 820-821) Regardless of whether their licenses were indeed at risk, the employees who signed the petition had a good faith belief that they were, and thus, their concerted activity is protected. See *Walls Mfg. Co., Inc.*, supra, at 1319; *Marlin Firearms Company*, supra; *El Mundo Broadcasting Corp.*, supra.

Moreover, while Respondent had already threatened Roop with termination over her protected concerted activities even prior to the petition, when Respondent caught wind of the petition circulating among the respiratory therapists it redoubled its efforts to terminate Roop. Respondent received the respiratory therapists' petition on April 13, 2017, and thus, clearly had knowledge of it by that date. However, there is also evidence in the record that Respondent knew the petition was being circulated even before April 13, 2017. Indeed, respiratory therapist Hamid reported to Respondent's DHR Stephanie Jones as early as April 4, 2017, that Roop and Backus, specifically, were circulating paperwork among employees in the respiratory department alleging that several individuals were causing a hostile work environment in the department. (Tr. 2010, 2038-2043, 2203-2204; GC 85) This was clearly of interest to Respondent as Jones memorialized Hamid's report to her in writing on April 4, 2017, in notes she prepared as a summary of events that occurred that served as the basis for Roop's termination. (GC 85)

2. Respondent harbored animus towards Roop's protected concerted activity that motivated its decision to terminate Roop

Respondent harbored animus towards Roop protected concerted activities and that animus motivated its decision to discharge her.

Animus Statements

Threats of job loss and other coercive statements from Respondent's CEO and DON provide strong evidence that Respondent harbored animus towards Roop and her protected

concerted activities. In March 2017, CEO Dhuper, the highest ranking executive at Respondent's facility, made an implied threat to discharge Roop in the presence of another employee, violating Section 8(a)(1) of the Act, and demonstrating his animus towards Roop and her protected concerted conduct. (Tr. 161, 465) Moreover, DON O'Keefe also previously threatened Roop with discharge if the concerted complaints from employees continued. (Tr. 113, 691-692) Dhuper's coercive statements made to employees in March 2017 further establish his animus and hostility towards the protected concerted activities in the respiratory department. The night the power went out at Respondent's facility in about late March 2017, Dhuper told employees he hated the respiratory department for causing him so many problems, questioned employees who the ringleaders were, threatened to fire employees, and threatened to close the PFT lab. Soon after, Dhuper proceeded to fire the individual he pegged as the ringleader—Roop—who had initiated and participated in a number of concerted complaints concerning the PFT lab. Such threats to discharge Roop—coming from Respondent's high level managers and executives who ultimately made the decision to terminate Roop—constitute strong evidence of animus. (Tr. 1384, 2126, 2314, 2486) Indeed, statements by an employer that are specific as to the consequences of protected activities and are consistent with the actions taken against the employee establish animus. See, e.g., *Wells Fargo Armored Services Corp.*, supra.

Timing Supports a Discriminatory Motive

Roop was terminated on April 17, 2017, only a matter of days after the petition was given to Respondent's CEO on April 13, 2017, and the timing of her discharge establishes animus. Respondent claims it terminated Roop due to her conduct in connection with two incidents that took place on March 14 and March 19, 2017. However, even though these incidents were supposedly so serious as to warrant terminating a 17-year employee, Respondent waited over four weeks to ultimately terminate Roop. The only way to explain this delay is that Respondent

found out that Roop was circulating a petition on April 4, 2017, which was the last straw for Respondent as it began taking steps to discharge her. Indeed, Respondent's investigation into the events leading to Roop's discharge seemingly ended as early as March 23, 2017, after Jones interviewed Rogers, Thom, Matuszak, and Giang regarding events leading to Roop's discharge. However, Jones inexplicably waited until April 4, 2017, to speak to Hamid over the phone about what he witnessed on March 19, 2017. (Tr. 2207-2208) After she took note of the fact that Roop and Backus were asking employees to sign paperwork alleging a hostile work environment, she also contacted Hamid for a written statement on April 11, 2017.[42] (Tr. 2203; GC 85) Thus, even though Roop engaged in conduct supposedly so serious as to require her discharge, Respondent waited over four weeks to terminate her, just days after receiving a petition signed by most of the respiratory therapists in the department. Respondent's termination of Roop close in time to her protected concerted activity demonstrates strong evidence of animus.

Disparate Treatment Establishes Discriminatory Motive and Pretext[43]

Respondent treated Roop disparately in deciding to discipline her because of her protected concerted activities, establishing discriminatory motive. Indeed, DON O'Keefe admitted she had never been involved in the decision to discipline any respiratory therapists except Roop, even though she directly supervises DPS Marino and his department. (Tr. 2402)

[42] The testimony from Respondent's managers DON O'Keefe and DHR Jones that the decision to terminate Roop was made on April 11, 2017 must be discredited. (Tr. 2125, 2205, 2381) It is highly unlikely that these witnesses recalled the exact date of the meeting as they could not recall any important details from the meeting whatsoever, such as what investigation findings were presented and by whom. For example, Jones testified that she could not recall whether Marino said to move forward with the termination or her recommendation of a final, final last chance in lieu of termination. (Tr. 2181) O'Keefe also directly contradicted Jones during her direct testimony, stating that Jones recommended Roop be discharged instead of being offered a last chance agreement. (Tr. 2314) O'Keefe changed her answer completely, however, on cross-examination. (Tr. 2382) In addition, the documentary evidence showing Jones did not have Hamid's written statement about the events until April 12, 2017 is irrefutable. (GC 85) If Respondent's witnesses were to be credited, it would actually further support the finding of unlawful motive as they supposedly decided to terminate Roop before completing even the most cursory investigation into the incident on March 19, 2017.

[43] The evidence in this section also proves the violations of the Act alleged in paragraph 5(d) of the Fourth Amended Consolidated Complaint.

Yet O'Keefe was not only involved in the decision to discipline Roop on February 13, 2017, but also in the decision to terminate her. (Tr. 2381, 2373) O'Keefe admitted that Marino had made many disciplinary decisions without O'Keefe's involvement—just not when it came to Roop.[44] (Tr. 2400) Similarly, CEO Dhuper was involved in both the decision to issue Roop a final written warning, 3-day suspension, and demotion from her position as team lead, and the decision to terminate her. (Tr. 2382, 2483, 2485, 2530) Dhuper admitted that he had never been involved in any decisions to discipline any respiratory therapists besides Roop. (Tr. 2529) Moreover, when pressed by Judge Giannopoulos to answer why Dhuper was drawn into the decision to discharge Roop as opposed to anybody else at the hospital, Dhuper could not provide a credible answer. (Tr. 2578-2580) Rather, Dhuper expounded on the importance of patient care even though there is zero evidence in the record that any patient care was compromised at any time because of the events leading to Roop's discharge. (Tr. 2578-2580) Dhuper's testimony cannot be credited, as his answers were clearly calculated to defend Respondent from liability. See, e.g., *NLRB v. Walton Mfg. Co.*, supra. Moreover, instead of answering a clear "no," Dhuper was evasive when asked point blank, "since you've been a CEO, have you been drawn into anyone else's decision to discipline someone else, anyone else?" (Tr. 2580)

Moreover, radiology technologist Justin Kmetz credibly testified that in his twelve years as a shop steward, he has never seen an employee terminated over such an allegedly minor offense as in Roop's case. (Tr. 688, 706) Kmetz testified that he witnessed two employees fighting and threatening to cause each other physical harm in front of patients and staff, and those employees were not terminated. (Tr. 706; GC 109; GC 120) Indeed, Respondent issued

[44] For example, O'Keefe was not involved in the disciplinary decisions involving Smith despite his long history of unprofessional conduct. (Tr. 2397-2399) Indeed, while Marino felt the need to inform O'Keefe that Roop allegedly refused to take a student even though Respondent's own investigation showed that this did not occur, Marino failed to even inform O'Keefe about the harassing text message Smith sent to Pereyra in December 2017—even though he had been on medical leave for months because of similar harassment from coworkers. (Tr. 2390-2391, 2398-2399)

these two employees a lesser discipline than Roop's despite the fact that they engaged in much more egregious misconduct by yelling at each other and threatening each other with violence in front of staff and patients in two separate incidents on the same day. (GC 109; GC 120) In addition, the only other termination documents in the record also demonstrate Respondent enforced its policies disparately. One employee was terminated for angrily threatening to hit a coworker in the head with a radio and again threatening to hit the coworker when he was late returning from break. (GC 125) Despite this conduct being more egregious than Roop's, Respondent issued them the same levels of discipline. Respondent also terminated a supervisor for having an inappropriate sexual relationship with a subordinate, threatening to kill her boyfriend with a gun he kept in his van, and lying about the relationship during the investigation before ultimately admitting it. (GC 124) This conduct is unquestionably more severe than Roop's alleged misconduct, but Respondent issued them the same levels of discipline.

Moreover, Respondent gave employees with longer disciplinary histories than Roop more opportunities to improve their behavior before being terminated. For example, Respondent issued a certified nursing assistant (CNA) a 5-day suspension for arguing and yelling at a nurse, saying that nurse was flirting with ICU staff, and then standing up, yelling, and angrily denying this when meeting with supervisors. (GC 108) Respondent also issued the 5-day suspension because of two prior incidents when the CNA was counseled for being argumentative and refusing to take an assignment from the Charge Nurse, and also counseled for refusing to take a work assignment and being sent home by the Nursing Supervisor. (GC 108) Following that 5-day suspension, the CNA was issued a 10-day suspension for again refusing to do work assignments, calling a coworker lazy, and because she was "out of control" and "screaming in the hallway and in front of patients." (GC 108) When this same CNA engaged in similar misconduct yet again, yelling at nurses, being rude to nurses, refusing to perform work

assignments, belittling a patient, and confronting nurses she suspected reported her to managers, Respondent still failed to terminate her and instead issued her only a final written warning and 3-day suspension. (GC 108) Only after three separate lengthy suspensions did Respondent ultimately terminate the CNA for refusing to feed a patient as instructed and then lying about it saying the patient refused—upsetting the patient and her husband—and, for claiming seven patients refused baths that same day and not reporting this to the Charge Nurse, and later denying that she did not complete the seven baths during the investigation. (GC 107) Roop allegedly engaged in conduct so minor by comparison, and with a much more minor disciplinary history, but Respondent still moved to terminate Roop on April 17, 2017.

Thus, the fact that Roop was singled out for harsher treatment than other employees and as the only employee whose disciplinary decisions demanded the involvement of Respondent's highest-ranking managers and executives establishes that their decisions were motivated by animus.

3. Respondent cannot meet its burden to prove it would have terminated Roop in the absence of her protected conduct

The record evidence demonstrates that Charging Party Roop engaged in protected concerted activities, Respondent had knowledge of those activities, and Respondent's animus towards Roop's protected concerted activities contributed to its decision to terminate her. Respondent cannot meet its burden to prove it would have made the same decision to discharge Roop in the absence of her protected concerted activity.

Shifting Defenses Establish Pretext

Respondent's asserted reasons for terminating Roop are pretext. Mere days after issuing Roop her termination, Respondent shifted its defenses, changing its stated reasons for terminating Roop—apparently over concern that the explanation provided was not credible.

Shifting defenses are strong evidence of discriminatory motive in discharging employees and establish that an employer's stated reasons for discharging employees are pretext. *Howard Elec. Co.*, 285 NLRB No. 109, 913 (1987); *Taft Broad. Co.*, 238 NLRB 588, 598 (1978), citing *Stoll Industries, Inc.*, 223 NLRB 51 (1976); see also *George J. Roberts & Sons, Inc., d/b/a The Roberts Press*, 188 NLRB 454 (1971) (reasons given at the time of the discharge were not the same as those utilized at the hearing). Indeed, Roop's termination paperwork stated she was terminated for two reasons: (1) not walking through a door a coworker held open for her and entering the department through an alternate door on March 14, 2017; and, (2) not taking the ER phone from a coworker during report and snatching medication from the coworker and throwing it on the table, saying "I know what I'm doing" on March 19, 2017. (GC 12) However, Respondent changed its story when it sent the Union a letter regarding Roop's discharge only a week later, on April 24, 2017, stating that Roop was not, in fact, terminated over the March 14, 2017 incident, but "this incident was referenced on the "termination paperwork" as a point of reference." (GC 14) Clearly Respondent realized discharging a 17-year employee because she did not walk through a door appeared to be pretextual—because that's what it was—and thus, would not hold up to scrutiny.

Indeed, Respondent's investigation into the door incident on March 14, 2017, revealed that those who witnessed the event considered respiratory therapist Matuszak to be the aggressor, Matuszak's comments about Roop had made at least one other employee uncomfortable, and Matuszak had mocked Roop on at least one other occasion that same day. (Tr. 2174-2175; GC 82; GC 93) Despite these statements from two long-time employees, inconceivably, Roop was terminated in part because of her conduct during this incident. Given that Respondent's investigation revealed no evidence that Roop had engaged in misconduct or behaved

unprofessionally in this situation, this stated reason for Roop's termination is clearly pretext.[45] (Tr. 2179) Moreover, Respondent later reversed its position, stating this incident was only a "point of reference" on Roop's termination paperwork and not a reason for her discharge, shifting its defenses and further demonstrating that Respondent acted based on a discriminatory motive. See *Howard Elec. Co.*, supra; *Taft Broad. Co.*, supra; see also *George J. Roberts & Sons, Inc., d/b/a The Roberts Press*, supra.

Failure to Conduct a Meaningful Investigation Supports Unlawful Motive

Respondent revealed that its decision to terminate Charging Party Roop was motivated by animus when failed to conduct a legitimate investigation into the March 19, 2017 incident that led to her termination. Indeed, at no point prior to her termination did Roop understand she was being investigated in connection with events that could lead to her discipline. DHR Jones never informed Roop of the allegations leveled against her, nor explained to Roop in any way that she was facing potential discipline prior to the day she was actually fired. (Tr. 186, 189) Jones also never interviewed Roop in person regarding the events leading to her termination, never questioned Roop in any disciplinary context whatsoever, nor did she provide Roop with an opportunity to have a Weingarten representative present in the course of any questioning related to the events that supposedly led to her discharge. It's hard to believe Respondent was attempting to conduct a legitimate investigation in good faith when it failed to even explain the allegations to the accused employee or give her an opportunity to tell her side of the story. Respondent's failure to conduct a meaningful investigation into the alleged misconduct, which according to Respondent, was the primary reason for Roop's discharge, supports the inference that her discharge was motivated by some other unlawful, pretextual reason. *Sociedad Espanola De*

[45] Indeed, the fact that Matuszak was in the building on Day 10 of this hearing (Tr. 2070) and Respondent failed to call her to the stand supports the inference that her testimony regarding any of the events involving Roop would be either unfavorable to Respondent or not credible. *International Automated Machines*, supra, at 1123.

Auxilio Mutuo Y Beneficencia De P.R. a/k/a Hosp. Espanol Auxilio Mutuo De Puerto Rico, Inc. & Unidad Laboral De Enfermeras(os) Y Empleados De La Salud, 342 NLRB 458, 477 (2004), enfd. 414 F.3d 158 (1st Cir. 2005), citing *Freeman Decorating Co.*, 336 NLRB 1 (2001), *Handicabs, Inc.*, 318 NLRB 890, 897 (1995). Moreover, Respondent's willingness to accept these complaints against Roop at face value without affording her the opportunity to refute the allegations against her lends further support to a finding that Respondent's stated reasons for the discharge are pretextual. *Id.*; see also *Casa San Miguel*, 320 NLRB 534, 557 (1995).

In addition, this sort of cursory investigation is antithetical and inconsistent with Respondent's other investigations leading to employee discharges. (716-718). Radiology technologist Kmetz credibly testified based on his twelve years as a shop steward, that in the course of Respondent's disciplinary investigations, Respondent usually gets both sides of the story, affording the accused employee an opportunity to respond to the allegations against them. (Tr. 716-718). By contrast, DHR Jones did not speak to a single witness to the incident on March 19, 2017 in person, and only spoke to two employees by phone about what they supposedly observed. Jones spoke via phone only to My-Quyen Giang, the employee who accused Roop of unprofessional conduct, and Chris Hamid, despite his long history of bias against Roop and reputation for harassing his coworkers.[46] (Tr. 642, 800, 1531, 2046; GC 60, GC 61)

Even though Giang herself informed Jones during the phone interview that respiratory therapists Rose Rogers and Shilu Yogi had likely witnessed the incident, Jones declined to interview Yogi or even contact Rogers in connection with the incident (Tr. 745, 2198-2199). Casting doubt on the motivation for reporting the incident, when Giang emailed Marino she

[46] DHR Ambrosini explained that "Chris Hamid had kind of had interpersonal issues I think with several people in the department" since "he was kind of one of these guys that just didn't get along too well with a lot of his coworkers." (Tr. 1531)

urged him to call Hamid about the incident when he had time but did not say the same for Yogi and Rogers, who she indicated also witnessed the incident. (GC 84; GC 86) If Roop's conduct was really so egregious as to warrant termination, Respondent would have interviewed all of the employees who witnessed the events, and the fact that it did not further demonstrates it acted based on an unlawful motive.

It was Unreasonable for Respondent to Rely on Hamid as a Witness

Further, the only other employee DHR Jones interviewed about the incident, Hamid, was never interviewed in person, and was not questioned close in time to March 19, 2017, when he would be more likely to remember the events in question accurately. (Tr. 2028) Hamid was only questioned a full 15 days later. Indeed, Hamid's April 12, 2017 statement to Jones, provided a full 23 days later, contained a number of exaggerations and hyperboles such as "you could cut the tension with a knife." (GC 85) Hamid repeated this hyperbole in his direct testimony, which must be discredited. (Tr. 1999) Moreover, Respondent knew Hamid harbored hostility towards Roop as this was reported to Respondent numerous times since September 2015. (Tr. 642; GC 60; GC 61) In addition, Hamid's bias against Roop was apparent in numerous disparaging comments he made recently about Roop on Instagram.[47]

Moreover, Hamid's testimony must be discredited due to the record evidence of his bias against Roop and because his testimony was often generalized, conclusory, and hyperbolic, requiring that he be instructed not to "salt and pepper it with your impression." (Tr. 2005) Moreover, areas of Hamid's testimony were entirely inconsistent with corroborated evidence in the record. For example, Hamid asserted that the Resource position was announced via email, given out by seniority, and he was the only employee interested in the position, even though this

[47] Hamid admitted posting comments referring to Roop as a "damn monster," stating that there is "a special place in hell" for Roop but not before she sees her "share of misery in this lifetime first," and that she is a "loser in life and at work" and "will never amount to anything more than the puke stain she is…" (Tr. 2048; GC 145; GC 150)

contradicts Marino's own admission that he gave the Resource position to Hamid without posting the position. (Tr. 1471-1472, 2016) Hamid's testimony is also contradicted by the credible testimony of respiratory therapists Frank Mardanzai and Alex Aguilar, which is corroborated by documentary evidence, that they were interested in the position, the position wasn't posted, they were more senior than Hamid, but Marino still gave it to Hamid without posting the position. (Tr. 377-379, 781-782; GC 36; GC 52)

Moreover, Hamid often testified in narrative form with no question pending and his answers were often nonresponsive. This continued so much so that Respondent's own counsel had to instruct the witness, "Let me ask the questions, and then you respond." (Tr. 2019) At one point the witness even asked Marino to refresh his memory, cutting against his ability to spontaneously testify about the events in question and indicating that when he couldn't recall certain events he wanted his answers to be consistent with Marino's. (Tr. 2022)

Respondent Declined to Interview Witnesses Despite Contradictory Accounts

It is even more strikingly inexplicable that Respondent failed to interview additional witnesses to the events of March 19, 2017, given the inconsistencies and discrepancies in the accounts of Giang and Hamid. Indeed, Respondent failed to even conduct follow-up interviews *in person* in order to assess the credibility and demeanor of the witnesses even after the discrepancies in their accounts came to light. For example, first Giang reported to Marino that she "handed [Roop] the phone" and similarly reported to Jones that she handed the ER phone to Roop and she "picked up the phone and put it insider her pocket." (Tr. 2059; GC 84; GC 86) By contrast, Hamid told Jones that Roop refused to take the ER phone. (GC 85) Even though Giang herself did not report this to Respondent, Roop was still terminated supposedly in part because she "did not take the phone," with Respondent apparently relying entirely on Hamid's statements made weeks after the events in question. Indeed, Hamid's testimony during this proceeding

contradicted his earlier assertions, as he did not testify that Roop refused to take the ER phone. (Tr. 1992-1996) Rather, he testified that Giang placed the phone on the table. (Tr. 2035)

Similarly, Respondent purportedly terminated Roop because she said "I know what I'm doing," even though Giang never reported that Roop made this statement. Rather, Giang consistently reported to both Marino and Jones that Roop asked her what time she needed to administer the medication to the patient. Yet again, Respondent relied entirely on Hamid's assertion—made weeks after the fact—that Roop made the statement listed on her termination document. Indeed, Hamid's own account of the events were inconsistent—as he only told Marino that Roop made the statement over three weeks later, and never mentioned this alleged comment to Jones when he spoke to her closer in time to the events. Moreover, Giang's own statements were inconsistent insofar as she insisted that Roop ignored her and did not want to listen to her, yet also stated that Roop asked her a follow-up question about what time to administer the medication. (GC 84; GC 86) In addition, Hamid explicitly contradicted Giang's account by repeatedly asserting that he was giving report to Roop when Giang approached Roop to give report (Tr. 2030-2033), whereas Giang stated consistently, both close in time to the events and during her testimony, that Roop was talking to Yogi when Giang approached her. (Tr. 2059, 2074; GC 84; GC 86) Yet despite these discrepancies Respondent relied entirely on only these contradictory accounts from Hamid and Giang as a basis to discharge Roop.

Moreover, DHR Jones' testimony attempting to explain why she did not interview other employees who witnessed the handoff between Roop and Giang is not believable and must be discredited. Throughout her testimony Jones was evasive and contradicted her answers from just moments before when she was confronted with documentary evidence, usually in the form of her own notes. (Tr. 2169-2172) Jones displayed her clear interest in defending Respondent's decision to terminate Roop and protect Respondent from liability, and provided calculated

answers to that end. Indeed, when Jones insisted that she believed Smith when he claimed he truly missed Pereyra after sending him a text of a stuffed gorilla in December 2017, the incredulity of the veracity of her answer was evident in the record, especially given the history of what was going on at the hospital. (Tr. 2223) In addition, Jones insisted during her direct testimony that she did not know Pereyra's face had been photo-shopped on photos of apes until the end of 2017, but changed her answer when she was confronted with her own notes from March 2017 that directly contradicted her testimony. (Tr. 2172) Similarly, in response to questioning from the judge, Jones could not explain why she had a practice of completing very formalized investigation questionnaires when interviewing employees, but with respect to Roop there were no forms. (Tr. 2177-2178)

By contrast, Yogi's testimony that Roop did not snatch anything from Giang and the March 19, 2017 handoff she witnessed between Roop and Giang was "just the regular report process" was credible, consistent, and corroborated. (Tr. 670, 682) Consistent with the record evidence, Yogi confirmed that Rogers and Thom were present for the handoff, and testified that Giang handed off the ER phone, gave a brief report, during which Roop's volume of voice was normal, Roop did not throw anything on the table, there was nothing out of the ordinary in the physical handoff of the ER phone, and nothing stood out to her during the handoff. (Tr. 669-672, 675) Moreover, Yogi's testimony that Jones never spoke to her about what Yogi witnessed was corroborated by Jones herself. (Tr. 673-677). Yogi testified openly and honestly that Roop did not say, "I know what I'm doing" in response to questioning from Judge Giannopoulos. (Tr. 675) Moreover, Rogers testified credibly that Jones never contacted her about the handoff between Giang and Roop and that this was essentially a non-incident as she did not recall the handoff between Roop and Giang. (Tr. 745-746) Based on the record evidence, this is due to the fact that there was nothing about the handoff in question that was out of the ordinary. Based on the above,

Respondent cannot establish that it investigated the events leading to Roop's termination in good faith, nor can it show it would have terminated Roop even in the absence of its unlawful motive.

Accordingly, Respondent has not rebutted General Counsel's prima facie showing that Roop's discharge was motivated by her protected concerted activities, and thus, Respondent violated Section 8(a)(1) of the Act when it discharged Roop.

iv. Respondent Removed the Respiratory Department Television to Retaliate Against Respiratory Therapists and to Discourage Their Protected Concerted Activities

General Counsel established by a preponderance of the evidence that Respondent, in December 2016, removed the television from the respiratory department in retaliation for, and in order to, discourage employees from engaging in protected concerted activities.[48]

As described more fully above, the respiratory therapists engaged in numerous protected concerted activities since at least May 2016, by discussing workplace conditions with DPS Marino and DHR Ambrosini, drafting a list of concerns they wanted addressed concerning their workplace, discussing their workplace conditions at several meetings with Respondent's managers and supervisors, and making concerted complaints about the ongoing harassment, retaliation, and perceived favoritism in the department. Respondent had knowledge of these activities as the respiratory therapists were earnestly seeking solutions to these issues in good faith, and part of their protected concerted activity involved advocating for themselves regarding these issues and discussing them directly with Respondent's managers and supervisors.

Lastly, there is ample evidence that Respondent harbored animus towards the respiratory therapists' protected concerted activities. Indeed, CEO Dhuper decided to remove the television from the respiratory department almost immediately after he received an email on December 10,

[48] General Counsel alleged these violations of the Act in paragraph 7(c) of the Fourth Amended Consolidated Complaint.

2016, from respiratory therapist and Charging Party Jernetta Backus that listed a host of problems in the department affecting workplace conditions. (GC 37) The timing of the removal of the department television establishes unlawful motive and indicates that Dhuper essentially wanted to punish the respiratory department for causing him so many problems. Indeed, Dhuper essentially said as much at the mandatory department meeting held on December 14, 2016, at least in part, in response to Backus' email. During that meeting, Dhuper was not shy about voicing his hostility towards the protected concerted activities taking place in the respiratory department, stating that it had the most complaints of any department in the hospital and threatening that he could fire everyone in the department. (Tr. 116-117, 253, 452, 530-531, 596-597, 736, 815, 879; GC 76) Indeed, Dhuper received Backus' email complaining of workplace issues on December 10, 2016, threatened employees about their concerted complaints and other protected concerted activities at a captive-audience meeting on December 14, 2016 when Dhuper also announced he would be removing the respiratory department television, and in quick succession, removed the television from the department break room immediately after to retaliate against employees for their protected concerted activities. The timing of this sequence of events supports a finding of unlawful motive.

In addition to the timing and animus statements made by CEO Dhuper, Respondent's highest ranking official, Respondent treated the respiratory department disparately in removing the television from the department and break room. The evidence in the record established that numerous break rooms throughout Respondent's facility have televisions and the respiratory department is the only one that had their television removed. (Tr. 2321-2326)

Moreover, Respondent shifted its stated reasons for removing the department television, which are clearly pretext. Respondent first argued that the television was removed because it does not allow personal items in the department and the electrical was not approved. Respondent

then argued that if there's a break room at the facility that employees don't perform work in, there's a television, but since employees perform work in the respiratory department break room there is no television. A review of the record makes plain that all of these stated reasons are pretext. Dhuper stated during his testimony that "we don't allow TVs in our – in a department, and so I requested that that be removed." (Tr. 2425-2426) Dhuper never actually stated why it was removed, nor did any of Respondent's witnesses clarify this whatsoever. Dhuper tried to explain by distinguishing the respiratory department as a "working department" when pressed on cross-examination, but could not point to any written policy stating this and admitted that he has not inspected all the break rooms in the hospital. (Tr. 2547-2548) When pressed on cross-examination as to whether this so-called policy of not allowing televisions in working departments existed, Dhuper contradicted himself, offering that "[i]t's not really a policy about the TV," rather the policy forbids "having personal electronics or personal belongings, because they have to be healthcare grade." (Tr. 2548). However, in response to the very next question, Dhuper admitted that he didn't know whether the television located in a non-working department break room is of electrical healthcare grade or not and has never had it inspected. (Tr. 2548-2549) In addition, Dhuper admitted a microwave that was not healthcare grade was currently in the department, as well as a Mr. Coffee and Keurig machine that were not inspected for their electrical grade. (Tr. 1287, 2555) Thus, the respiratory department was treated disparately and Respondent's asserted reasons for its removal are pretext.

Moreover, Dhuper's testimony denying that the respiratory department is also a break room for respiratory therapists must be discredited. (Tr. 2550-2551) This area of testimony showed Dhuper's willingness to lie under oath telling the truth could otherwise directly harm Respondent's interests. Nearly all twelve current employees testified that this is a space where they take their breaks or referred to the department as the break room. Indeed, in reference to the

two spaces in the respiratory department, it was astutely observed on the record that "it's clear to me that the respiratory therapists are using both rooms as a break room." (Tr. 1553) Further, CEO Dhuper freely admitted employees eat their food in the department. (Tr. 2551)

As such, Respondent cannot carry its burden to show by a preponderance of the evidence that it would have removed the respiratory department's television from the department and break room in the absence of the respiratory therapists' protected concerted activities. Thus, Respondent violated Section 8(a)(1) of the Act when it removed the television that was in the respiratory department in December 2016.

v. Respondent Violated Section 8(a)(1) and 8(a)(4) of the Act by Issuing Jernetta Backus a Final Written Warning in Retaliation for her Protected Concerted Activities and Participation in Board Proceedings

General Counsel has established by a preponderance of the evidence that Charging Party Jernetta Backus engaged in protected concerted activities and participated in Board proceedings, Respondent had knowledge of Backus' protected concerted activities and participation in Board proceedings, Respondent harbored animus towards her protected conduct, and its animus motivated Respondent's decision to issue Backus a final written warning in violation of Sections 8(a)(1) and 8(a)(4) of the Act.[49] Although Respondent's *Wright Line* defense is that Backus violated its medication administration policies, this defense is completely rebutted by a preponderance of the evidence showing similar conduct does not generally warrant a final written warning; and, further, her conduct was of the variety that was usually tolerated by Respondent. In fact, the evidence shows Marino looked for a reason to punish Backus for continuing to engage in protected concerted activities and participate in Board proceedings.

[49] General Counsel alleged these violations of the Act in paragraph 5(g) of the Complaint and Notice of Hearing in Case 32-CA-218138, which was consolidated with the allegations in cases 32-CA-197728, 32-CA-197958, and 32-CA-203396, pursuant to Judge Giannopoulos' April 24, 2018 Order.

1. Backus engaged in protected concerted activities and participated in Board proceedings and Respondent had knowledge of her protected concerted activities and participation in Board proceedings

The purpose of Section 8(a)(4) is to ensure effective administration of the Act by providing immunity to individuals who initiate unfair labor practice charges or assist the Board in proceedings under the Act. *General Services, Inc.*, 229 NLRB 940 (1977). Indeed, the Board's "approach to Section 8(a)(4) generally has been a liberal one in order to fully effectuate the section's remedial purpose." *Id.* The Supreme Court held in *NLRB v. Robert Scrivener d/b/a AA Electric Co.*, 405 U.S. 117 (1972) that Section 8(a)(4) applied not only to filing charges and testifying at a formal hearing, but also to giving affidavits in the course of an investigation, being subpoenaed, and appearing, but not testifying, at a Board hearing. Moreover, the analysis set forth by the Board in *Wright Line*, supra, applies to 8(a)(4) allegations. *American Gardens Management Co.*, 338 NLRB 644, 645 (2002), citing *Taylor & Gaskin, Inc.*, 277 NLRB 562 fn. 2 (1985).

Here, Backus engaged in a number of protected concerted activities of which Respondent had knowledge. As early as November 2016, Backus began vocalizing her concerns to her manager, DPS Marino, about bullying, harassment, and retaliation in the department. (Tr. 242-243) Backus also distributed blank bullying, harassment, and retaliation complaint forms to employees, collected filled out forms from several employees, and turned them in as a group to human resources in an effort to confront the some of the issues in the department. (Tr. 243-244, 1608-1609; GC 36) Backus again vocalized her concerns about bullying and retaliation in the respiratory department by emailing Respondent's senior executives, speaking out at a mandatory department meeting in front of four of Respondent's managers, emailing CEO Dhuper directly listing 19 issues and proposed solutions, and complaining about management's response to the

racist photos posted in the department in an individual meeting with Dhuper and DON O'Keefe (Tr. 117-118, 247-248, 253-254, 256-257, 2286; GC 37; GC 38; GC 99). Notably, Backus also drafted the respiratory therapist petition, solicited feedback from her coworkers about what to include, and delivered the petition to CEO Dhuper on April 13, 2017. In addition, when contacted by DHR Jones, Backus was vocal about her insistence that the respiratory therapists had already voiced their concerns directly to Dhuper and the mediator was chosen without their input. (Tr. 280)

Respondent had knowledge of Backus' protected concerted activities as Backus' actions involved directly engaging with Respondent's managers, such as her comments addressed directly to DPS Marino, DON O'Keefe, and CEO Dhuper, and the petition delivered to Dhuper's office. Marino also had knowledge of Backus' distribution and collection of the bullying, harassment, and retaliation forms, since Marino interrogated numerous employees about Backus' protected concerted activity and distribution of the forms. (Tr. 1459-1460; GC 91) In case there was any doubt, the April 13, 2017 petition clearly listed Backus as the first signatory and Roop as the second, and Backus sent an email directly to CEO Dhuper confirming that he had received it. (GC 34; GC 41) Moreover, there is evidence in the record that Respondent had knowledge of Backus' leadership role regarding the April 13, 2017 petition when its managers came into possession of her group text messages she was using to communicate with sixteen other employees who signed the petition. (Tr. 264-265, 2039-2042; GC 40)

In addition, Respondent had knowledge of Backus' participation in Board proceedings, including filing meritorious unfair labor practice charges against Respondent, providing sworn statements to the Board during the investigation of those charges, and testifying against Respondent at hearing. Undoubtedly, Respondent had knowledge of Backus' participation in these Board proceedings as Respondent received notice of the unfair labor practice charges

Backus filed against it; on March 27, 2018, Respondent reviewed copies of Backus' sworn affidavits provided to the Board during the investigation; and, DPS Marino was present throughout the duration of Backus' testimony in this hearing against Respondent on March 27, 2018.

2. Respondent harbored animus towards Backus' protected concerted activities and participation in Board proceedings, which motivated Respondent's decision to issue Backus a final written warning

The record evidence establishes that Respondent harbored animus towards Charging Party Backus' protected concerted activities, the protected concerted activities of other employees, and Backus' participation in Board proceedings, which contributed to Respondent's decision to issue Backus a final written warning on April 9, 2018.

Animus Statements and Timing

Respondent exposed its animus towards Backus' concerted activities when its managers DPS Marino and DON O'Keefe made threatening and coercive statements to employees regarding the April 13, 2017 respiratory therapist petition that Backus drafted. Moreover, Respondent's agent, Attorney Collin Cook, interrogated respiratory therapist Monique Johnson about whether Backus drafted the petition, demonstrating Respondent's knowledge of, and animus towards, Backus' protected concerted activities. Respondent's unlawful motive is also evident in the timing of its decision to issue Backus a final written warning—just seven days after her testimony in this proceeding on March 27, 2018, even though the discipline concerned events from March 12, 2018, a full four weeks prior.

Disparate Treatment Establishes Discriminatory Motive

Respondent's disparate treatment of Backus also establishes discriminatory motive. Respondent moved straight to issuing Backus a final written warning even though she had no prior discipline in five years of employment. (Tr. 1030) Moreover, Backus had received an

excellent performance appraisal from DPS Marino prior to her protected concerted activities, averaging a score of 4.6 out of 5. (GC 133) But her performance appraisal from May 2017, the month after she delivered the respiratory therapist petition to CEO Dhuper on April 13, 2017, dropped drastically from an average of 4.6 to 3 out of 5. (GC 134) Indeed, DPS Marino filled in "3"s across the board in Backus' appraisal form—in literally all of the 24 categories of key performance elements listed. (GC 134)

Further, Respondent's own disciplinary documents show that it afforded other employees more opportunities to improve their conduct before issuing them a final written warning, even if they already had a disciplinary history. (GC 102-125; GC 137). In addition, the record evidence shows that none of Respondent's employees have ever been disciplined for administering medication that they did not get from the Pyxis. Unlike Backus' case, the only discipline issued to any of Respondent's employees regarding the Pyxis involved multiple occurrences of violating Respondent's policies. (Tr. 1203-1204; GC 137) Moreover, the comparative discipline was also a *second* written warning, demonstrating that—unlike Backus—the employee in question had been given other opportunities to correct their behavior and even still was issued a lesser discipline than Backus. (GC 137)

Indeed, the disciplines issued to respiratory therapists in connection with medication administration were much less severe than what was issued to Backus, for arguably more serious violations of Respondent's policies. The letters issued to these employees did not appear to be disciplines, resulted from a regular audit rather than an effort to target just one employee, and stated that the employees had violated Respondent's policy by administering medications to multiple patients without any doing charting whatsoever. (GC 136) Moreover, those letters clearly limited any future discipline to similar conduct—essentially distinguishing between more severe misconduct and simple charting errors—whereas' Backus' discipline did not. (GC 127;

GC 136) For example, respiratory therapist Smith was issued one of these letters in February 2015, and has since received two written warnings, been demoted as team lead, returned to his position as team lead, and counseled for sending a racist text to respiratory therapist Pereyra. (GC 103; GC 143; GC 144) He engaged in many separate and distinct incidences of misconduct and was never once disciplined as harshly as Backus was for a first offense.

Moreover, the record evidence shows that Respondent tolerated employees leaving medications in the respiratory department and picking up loose medications. In other words, Respondent allowed respiratory therapists to engage in the practice of getting medications to treat patients from sources other than the Pyxis. Indeed, Respondent did not counsel, investigate, or discipline respiratory therapist Giang in connection with her handoff of medication to Charging Party Roop, which she could have returned to the Pyxis in accordance with Respondent's best practices. In addition, DPS Marino has been in the department in the presence of loose medications as recently as May 2018, and has observed respiratory therapists pick up loose medications in the department without comment. (Tr. 1002; R 9)

Thus, Respondent's animus towards Backus' protected concerted activities and participation in Board proceedings motivated Respondent's decision to issue her a final written warning on April 9, 2018.

3. Respondent cannot meet its burden to prove it would have issued Backus a final written warning in the absence of her protected concerted activities and participation in Board proceedings

General Counsel established that Backus engaged in protected concerted activities and participated in Board proceedings, Respondent had knowledge of Backus' protected concerted activities and participation in Board proceedings, and Respondent's animus towards this conduct contributed to its decision to issue Backus a final written warning. Respondent cannot carry its

burden to prove it would have made the same decision to issue Backus a final written warning in the absence of her protected concerted activity and participation in Board proceedings.

Failure to Conduct Meaningful Investigation Supports Unlawful Motive

Respondent's failure to conduct any meaningful investigation into the events on March 12, 2018 that led to Backus' discipline supports a finding of unlawful motive. See *Sociedad Espanola De Auxilio Mutuo Y Beneficencia De P.R. a/k/a Hosp. Espanol Auxilio Mutuo De Puerto Rico, Inc. & Unidad Laboral De Enfermeras(os) Y Empleados De La Salud*, supra. Moreover, Respondent failed to even ask Backus about the events in question until DPS Marino issued Backus the discipline. (Tr. 1818) See *Id.*; see also *Casa San Miguel*, supra. Indeed, Respondent's investigation into the events of March 12, 2018, targeted Backus in an effort to find some reason, however slight, to justify disciplining her. For example, prior to this incident, Marino did not even know that reports could be generated from the Pyxis, had never asked to review a report from the Pyxis, and was not at all familiar with how to actually read such reports—establishing that Marino had never once reviewed an employee's medication administration records as closely as he did in Backus' case. (Tr. 1827, 1828, 2253)

Indeed DPS Marino's asserted reason for beginning his investigation into the events on March 12, 2018—that Nurse Maria Pena informed him that Dr. Shawshank Jolly was concerned his orders for Patient ML had been changed—is not credible. (Tr. 1825-1826) An inference should be drawn that Marino did not actually have conversations with Dr. Jolly and Nurse Pena as he testified, and if called, Jolly and Pena would have provided testimony adverse to Respondent since Respondent failed to call these witnesses to the stand. See *International Automated Machines*, supra. However, even assuming Marino's asserted reasons for looking into the medication administered to Patient ML the night of March 12, 2018 are true, had Marino proceeded to actually investigate in good faith he would have pulled records beginning at noon

on March 11, 2018 when Dr. Jolly issued his orders for the patient. (Tr. 1827-1828) Instead, Marino *only* pulled records from Backus' shift. (Tr. 2254)

Respondent's Cursory Investigation Revealed Further Disparate Treatment

Moreover, when pulling records to determine whether Backus had violated any of Respondent's policies, Marino seemingly overlooked any incidents related to any employee other than Backus. (Tr. 1828) Indeed, even after reviewing documentation showing respiratory therapist Thuc Ho had not retrieved any DuoNeb medications during the time she was assigned to give treatments to Patient ML every four hours, Marino only asked to review reports for Backus' shift only. (Tr. 1828-1829) In addition, Marino admitted he reviewed documentation showing a number of missed treatments for Patient ML between 3:24pm on March 12 and 3:14pm on March 13, but did nothing to investigate. (Tr. 1831)

Indeed, Respondent's own documents related to this cursory investigation establish that many respiratory therapists committed serious medication administration errors, Marino reviewed the documents revealing those errors, but Marino failed to take any action whatsoever to follow up or investigate those errors. If Marino wasn't so focused on targeting Backus, he would have also taken similar action to review the records related to errors committed by other respiratory therapists. Instead, Marino willfully ignored the fact that the records he reviewed, for example, showed that Thuc Ho missed at least three separate treatments for Patient ML on March 13, 2018, and did not even pull medications for these treatments from the Pyxis. (Tr. 1840-1842; GC 142, SRH0002511). In addition, Marino also ignored the fact that Ho did not document in the vent flow sheet that she gave any treatment to the patient even when the patient was on the vent, in violation of Respondent's policies and protocols. (Tr. 1835; GC 142, SRH0002511) Moreover, Marino did not investigate the fact that Ho retro-charted one of these

treatments as not given after two red bubbles popped up showing two missed treatments,[50] the retro-charting was done nearly seven hours after the treatment was due, when Ho never even pulled these treatments from the Pyxis for the patient in the first place. (Tr. 1835; GC 142, SRH0002537).Yet when Backus retro-charted that she gave a treatment after only a 3-hour delay, and after only one red bubble appeared in Patient ML's chart, Marino issued her a final written warning. (GC 127) Marino did not even question Ho about these events and seemed unconcerned that she violated Respondent's policies requiring respiratory therapists to pull the medication for the patient from the Pyxis, take the medication to the bedside, and if the patient refuses, return the medication to the Pyxis, and only then document it as "not given" after actually offering the medication to the patient. (Tr. 1841-1842) Thus, Respondent treated Backus disparately by disciplining her for a medication administration error that was less serious than other errors brought to Respondent's attention that Respondent did not even bother to investigate. Such facts only lead to two conclusions. Either Backus' purported error wasn't serious enough to merit a discipline, which shows pretext, or she was treated disparately because of Respondent's hostility towards protected concerted activities.

In addition, Respondent's claims that the way Backus wrote the number seven on the vent flow sheet is reason to suspect that she committed fraud are simply ridiculous. Indeed, Respondent's own documents show at least one other instance of a number seven written on a vent flow sheet with a vertical line down the middle where the employee was not disciplined or even investigated whatsoever. (Tr. 1821-1822; R 5) Smith's entry into a vent flow sheet for Patient ML is perhaps even more questionable, as he made two back-to-back entries on March 13, 2018, one without indicating that any medication was administered, and one that didn't

[50] Marino repeatedly testified that he did nothing to investigate records he reviewed showing missed treatments. For example, Marino did nothing to investigate missed treatments for Patient ML on March 14, 2018 when two red bubbles popped up showing missed treatments and there was no documentation charting why the treatments were missed even though Dr. Jolly's orders were still in effect. (Tr. 1841-1846)

provide any information except the supposed administration of medication—with a long vertical line running through all other entries. Yet Marino still did nothing to investigate. (Tr. 1844)

On its Face, the Final Written Warning Reflects Pretext

Perhaps most compelling, the discipline issued to Backus, on its face, demonstrates Respondent's unlawful motivation. DPS Marino's only justification for issuing Backus such a harsh discipline for a first offense was because she "falsified" a medical document. However, the final written warning, on its face, shows that Respondent cannot prove Backus falsified a medical document and thus, this reason for disciplining her is pretext. This is because Respondent alleges that Backus *both* falsified a medical document by charting that she gave medication to Patient ML when she did not, *and*, Backus *did*, in fact, give the medication, but did not get the medication she administered to Patient ML out of the Pyxis. Thus, the very nature of the discipline establishes Respondent's stated reasons for giving the discipline are pretextual, as Respondent's shifting reasons show that it was not at all certain what misconduct Backus engaged in, if any. Indeed, Respondent cannot have it both ways—either Backus administered the medication to the patient without getting it from the Pyxis *or* Backus did not administer the medication and falsified a medical report. However, Respondent cannot prove Backus falsified a medical document because she didn't. The record evidence establishes that she gave the medication to Patient ML at 8:30pm when she charted that she did so in both the ventilator flow sheet and the patient's medication administration record, in accordance with Respondent's policies. (Tr. 1835; GC 142, SRH002531; GC 141, SRH002511) Moreover, as explained above, Respondent cannot justify issuing Backus a final written warning for failing to get medication out of the Pyxis when the record evidence shows Respondent did not enforce this policy and had never disciplined an employee for this conduct.

As such, Respondent has not rebutted General Counsel's prima facie showing that Backus' final written warning was motivated by her protected concerted activities and participation in Board proceedings. Thus, Respondent violated Sections 8(a)(1) and 8(a)(4) of the Act when it issued Backus a final written warning on April 9, 2018.

IV. REMEDIES

Respondent's discharge of Charging Party Babita Roop in violation of Section 8(a)(1) of the Act resulted in lost wages and other expenses. Roop should be made whole, including compensation for search-for-work and interim employment expenses, and her personnel record expunged of any reference to the verbal warning, final written warning, 3-day suspension, demotion from her position as team leader, and discharge due to her protected concerted activities. See *King Soopers*, 364 NLRB No. 93 (2016) (Board modified traditional make-whole remedy to award search-for-work and interim employment expenses regardless of discriminatees' interim earnings and separately from taxable net backpay with interest). Respondent's issuance of a final written warning to Charging Party Jernetta Backus in violation of Sections 8(a)(1) and 8(a)(4) of the Act should also be expunged from her personnel record.

General Counsel also seeks an order requiring Respondent to hold a meeting or meetings with Respondent's employees at its Hayward facility, scheduled to ensure the widest possible attendance, at which Respondent's CEO Dhuper will read the Notice to Employees on working time in the presence of a Board Agent; or, alternatively, a Board Agent will read the Notice to Employees in the presence of CEO Dhuper, DON O'Keefe, and DPS Marino. The Board will require a notice to be read aloud to employees "where an employer's misconduct has been sufficiently serious and widespread that reading of the notice will be necessary to enable employees to exercise their Section 7 rights free of coercion." *Jason Lopez' Planet Earth Landscape, Inc.*, 358 NLRB 383 (2012) (quoting *HTH Corp.*, 356 NLRB 1397 (2011)). "The

purpose of requiring a manager to read a notice aloud to employees is to better impress upon the employees the fact that the employer and its officials are bound by the Act." *Voith Industrial Services, Inc.*, 363 NLRB No. 116 (2016), citing *Marquez Bros. Enterprises, Inc.*, 358 NLRB 509 (2012) (citing *Federated Logistics & Operations*, 340 NLRB 355, 358 (2003), enfd. 400 F.3d 920 (D.C. Cir. 2005).

In this case the unfair labor practices occurred on a large scale, with over 25 distinct and separate violations alleged, including serious "hallmark violations" including threats of job loss and threats to close the pulmonary function lab. See *Garvey Marine Inc.*, 328 NLRB 991, 994 (1999); *General Fabricators Corp.*, 328 NLRB 1114 fn. 7 (1999); *Garney Morris, Inc.*, 313 NLRB 101, 103 (1993), enfd. mem. 47 F.3d 1161 (3d Cir. 1995). In addition, this case involved a retaliatory discharge only four days after the delivery of a signed petition to Respondent's CEO, amidst numerous threats to terminate the petition signers. In addition, Respondent committed additional 8(a)(1) and 8(a)(4) violations of the Act during the instant proceedings, interfering with the Board's processes by retaliating against a second discriminatee and Charging Party who authored the respiratory therapist petition, filed multiple meritorious charges against Respondent, and testified against Respondent at hearing.

V. CONCLUSION

Based on the foregoing, it is respectfully submitted that Respondent violated Sections 8(a)(1) and 8(a)(4) of the Act as alleged, and should be ordered to remedy all violations as requested and all other relief that may be just and proper.

DATED AT Oakland, California, this 31st day of July, 2018.

Respectfully submitted,

/s/Coreen Kopper

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Region 32
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PROPOSED ORDER

Respondent, Hayward Sisters Hospital d/b/a St. Rose Hospital, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

   (a) Interrogating employees about whether they have engaged in activity with other employees regarding their wages, hours, and working conditions or whether their coworkers have engaged in such activity;

   (b) Interrogating employees about their union activities;

   (c) Implying that employees cannot engage in union activity and cannot engage in activity with other employees regarding their wages, hours and working conditions;

   (d) Implying that employees cannot complaint with other employees about their wages, hours, and working conditions;

   (e) Threatening employees with discharge for exercising their right to bring issues and complaints to the Employer on behalf of themselves and other employees;

   (f) Threatening employees with discharge for engaging in activity with other employees regarding their wages, hours, and working conditions;

   (g) Threatening employees with closure of the pulmonary function lab for engaging in activity with other employees regarding their wages, hours, and working conditions;

   (h) Threatening employees with unspecified reprisals for engaging in activity with other employees regarding their wages, hours, and working conditions;

   (i) Interrogating employees about whether they signed a petition regarding their terms and conditions of employment;

   (j) Threatening employees with discharge for signing a petition regarding their terms and conditions of employment;

   (k) Soliciting employees to quit for complaining with other employees about their wages, hours, and working conditions;

   (l) Removing the respiratory department television from the break room and imposing a rule that there cannot be a television in the respiratory department break room because employees engaged in activity with other employees regarding their wages, hours, and working conditions;

   (m) Disciplining, suspending, demoting, and discharging employees because they exercise their right to discuss wages, hours and working conditions with other

employees or because they exercise their right to bring issues and complaints to the Employer on behalf of themselves and other employees;

(n) Disciplining employees because they participate in Board proceedings, including filing charges with the Board, providing sworn statements to the Board, and testifying in Board proceedings;

(o) Selectively and disparately enforcing portions of rules listed in the Employer's Standards of Conduct;

(p) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act;

2. Take the following affirmative action:

(a) Within 14 days from the date of this Order, offer immediate reinstatement to employee Babita Roop at Hayward Sisters Hospital d/b/a St. Rose Hospital;

(b) Make Babita Roop whole for any loss of earnings and other benefits suffered and search-for-work and interim employment expenses;

(c) Expunge the discipline issued to Babita Roop on November 21, 2016, February 13, 2017, and April 17, 2017, from her personnel file;

(d) Expunge the discipline issued to Jernetta Backus on April 9, 2018 from her personnel file;

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order;

(f) Within 14 days of service by the Region, post at its facility in Hayward copies of the attached notice marked "Appendix."[51] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet site, and/or by other electronic means, as Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and

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

mail, at its own expense, a copy of the notice to all current and former employees employed by Respondent at any time since April 2017;

(g) Within 30 days of service by the Region, Respondent will hold a meeting or meeting(s) for employees at its Hayward facility, scheduled to ensure the widest possible attendance on each shift, at which Respondent's Chief Executive Officer Aman Dhuper will read the Notice to Employees on working time in the presence of a Board Agent. Alternatively, a Board Agent will read the notice marked "Appendix," at such meetings in the presence of a CEO Dhuper, Director of Nursing Rozanne O'Keefe, and Director of Pulmonary Services Joe Marino. The date(s) and time(s) of the reading must be approved by the Regional Director. The announcement of the meeting(s) will be in the same manner Respondent normally announces meetings and must be approved by the Regional Director.

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

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO:

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

More specifically, **YOU HAVE THE RIGHT** to freely bring complaints regarding bullying, harassment, retaliation, discrimination, and hostile work environment to us on behalf of yourself and other employees, and **YOU HAVE THE RIGHT** to discuss your wages, hours, and working conditions with other employees.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT ask you about your union activity or imply that you cannot engage in union activity; ask you if you have engaged in activity with other employees regarding your wages, hours, and working conditions or imply that you cannot engage in such activity; or ask you if your coworkers have engaged in such activity.

WE WILL NOT threaten you with discharge because you exercise your right to bring issues and complaints to us on behalf of yourself and other employees; or threaten you with closure of the pulmonary function lab, unspecified reprisals, or discharge because you choose to engage in or not engage in activity with other employees regarding your wages, hours, and working conditions.

WE WILL NOT ask you if you signed a petition regarding your terms and conditions of employment or threaten you with discharge for signing a petition regarding your terms and conditions of employment.

WE WILL NOT solicit you to quit your employment because you have complained with other employees about your wages, hours, and working conditions.

WE WILL NOT remove the television from the respiratory department break room or impose a rule that there cannot be a television in that break room because you engaged in activity with other employees regarding your wages, hours, and working conditions.

WE WILL NOT issue you a write-up, verbal warning, final written warning, suspend you, remove you from your position as team leader or otherwise demote you, or discharge you because you exercise your right to discuss wages, hours, and working conditions with other employees or because you exercise your right to bring issues and complaints to us on behalf of yourself and other employees.

WE WILL NOT selectively and discriminatorily enforce portions of our rules listed in our Standards of Conduct.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL bring back the television that we removed from the respiratory department break room in December 2016, or a substantially similar television, and rescind any rule prohibiting a television in that break room.

WE WILL offer Babita Roop immediate and full reinstatement to her former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights and/or privileges previously enjoyed.

WE WILL pay Babita Roop for the wages and other benefits she lost because we issued her a verbal written warning and final written warning, suspended her, removed her from her position as team leader, and terminated her in retaliation for her engaging in activity with other employees regarding their terms and conditions of employment.

WE WILL, within 14 days from the date of the approval of this agreement, remove from our files all references to the verbal written warning, final written warning, suspension, removal from her position as team leader, and discharge of Babita Roop; and **WE WILL** within 3 days thereafter notify her in writing that this has been done and that the write-up, suspension, removal from her position as team leader, and discharge will not be used against her in any way.

WE WILL, within 14 days from the date of the approval of this agreement, remove from our files all references to the final written warning issued to Jernetta Backus; and **WE WILL** within 3 days thereafter notify her in writing that this has been done and that final written warning will not be used against her in any way.