

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

**HAYWARD SISTERS HOSPITAL
D/B/A ST. ROSE HOSPITAL, Respondent**

and

Case No.: 32-CA-197728

BABITA ROOP, an Individual

Case No.: 32-CA-197958

and

Case No.: 32-CA-203396

JERNETTA BACKUS, an Individual

Case No.: 32-CA-218138

**RESPONDENT'S BRIEF TO THE HONORABLE JOHN T. GIANNOPOULOS,
ADMINISTRATIVE LAW JUDGE**

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Respondent, Hayward Sisters Hospital d/b/a St. Rose Hospital (hereinafter “Respondent”, “St. Rose” or “Hospital”), through undersigned counsel, files this post-hearing Brief to the Honorable John T. Giannopoulos, Administrative Law Judge.

I. INTRODUCTION/BACKGROUND

St. Rose Hospital is a 217-bed community-based, safety-net hospital providing emergency, acute care and outpatient services to residents of South Alameda County, California. The Hospital employs approximately 900 employees. (Tr. 2407-2408). Employees at the Hospital are represented by four different unions: Teamsters Local 856, Operating Engineers Local 39, the California Nurses Association, and ESC Local 20. (Tr. 1514; 1516; 2089-2090). The two Charging Parties, Babita Roop (hereinafter “Roop”) and Jernetta Backus (hereinafter “Backus”),

at all times material herein were represented by Teamsters Local 856. (Tr. 24; 239). The employees of the respiratory therapy department have been represented by Teamsters Local 856 since approximately 1999. (Tr. 1276). The wages, benefits and terms and conditions of employment of all respiratory therapy department employees are set forth in a collective bargaining agreement negotiated by the Hospital and Teamsters Local 856 (hereinafter “Teamsters”). The collective bargaining agreement includes provisions on pay, benefits, hours of work, lay off, discipline, filing grievances and resolution of grievances by final and binding arbitration. (GC-26).

The disciplinary provisions of the parties’ collective bargaining agreement (hereinafter “CBA”) establish that the Hospital “may discharge, suspend or demote an employee only for just cause.” (GC-26, Section 25.1, p. 18). While progressive discipline is acknowledged, the Hospital is *not* required to follow a fixed-step progressive disciplinary process:

Suspension or discharge *may* be preceded by verbal and written warnings unless the offense is so serious it requires more severe discipline.

(GC-26, Section 25.1, p. 18).

Roop was a full-time respiratory therapist at St. Rose. After receiving progressive discipline which provided notice and an opportunity for Roop to correct her behavior or face further discipline (GC-8; 11), Roop was terminated effective April 17, 2017, for violations of the Hospital’s Standards of Conduct, discourteous conduct and unprofessional behavior which jeopardized patient care. (GC-12). Roop and the Teamsters filed grievances challenging the Final Written Warning and Suspension and her termination of employment. (Tr. 2137-2138; GC-13; 14). Those grievances have been processed through the grievance procedure and have been moved to arbitration. (Tr. 2137-2138).

Backus is a per-diem respiratory therapist at St. Rose. (Tr. 239). After a thorough investigation revealed that Backus had made a medication administration error on March 12, 2018 (failure to administer a medication) and falsified a patient's medical record (falsely noting in 2 parts of a patient's record that a medication was administered when it was not), Backus received a final written warning on April 9, 2018. (GC-127). The level of discipline issued to Backus (final written warning) was consistent with discipline issued to four (4) respiratory therapists who engaged in similar (but somewhat less egregious) conduct in 2015. (GC-136) Backus and the Teamsters have filed a grievance challenging the discipline and that grievance is being processed under the terms of the parties' collective bargaining agreement.

Respondent submits that, contrary to the position taken by the government, this case is not about employees exercising their Section 7 rights. Respondent avers that the record makes clear that the Hospital has a history of *encouraging* employees to raise issues or concerns, individually and/or collectively, and that employees have raised concerns related to working conditions which have been resolved by the Hospital. (Tr. 1521-1522; 1525-1526; R-10; 11; 12).

Indeed, the record shows that employees in the respiratory therapy department *regularly* raised work-related concerns without any adverse consequences. Backus, among other activities, sent an email to Hospital CEO Aman Dhuper and other Hospital officials claiming the employees in the respiratory therapy department were victims of harassment and discrimination. (Tr. 246-247; GC-37). Backus drafted and filed the Petition (GC-34), drafted a summary of employee concerns which she sent to Dhuper (GC-38), solicited employees to file bullying and harassment forms (Tr. 243-245; GC-36) and spoke on behalf of other employees in meetings with Dhuper. (Tr. 253; 2301). Frank Mardanzai drafted and sent Marino a complaint about scheduling weekend work. (Tr. 801-802; GC-62). Monique Johnson led respiratory therapy department employees to

HR on behalf of Joje Pereyra. (Tr. 30). The Fourth Amended Consolidated Complaint does not allege that any of these employees suffered any adverse consequences for engaging in protected concerted activity. There are reasons Roop was disciplined/terminated, but it has nothing to do with protected concerted activity.

This case arises out of *personal* issues between Roop and a coworker, Marie Matuszak. Many of the Hospital's respiratory department employees are long-term employees of St. Rose Hospital. For many years, the respiratory therapy department employees were friends, socialized together, and took care of one another in bad times. Indeed, the department was viewed by other employees in the Hospital as the premier department at St. Rose. (Tr. 551-552; 567). However, by 2016, the employees in the respiratory therapy department began to split into two distinct factions/camps. While witnesses at the hearing provided various reasons for the split, as a consequence of the split in the department, former friends became enemies, employees chose sides and the department became dysfunctional. Employees in each faction filed complaints about employees in the other faction with their department manager, each side filed harassment and bullying complaints with Human Resources, legal actions were initiated, protective orders were sought, and crude, hurtful comments were directed to employees, often anonymously, via social media and text messages¹. It is *not* an exaggeration to say that battle lines were drawn between the two factions.

¹ A great deal of testimony and a number of exhibits in this proceeding involve social media postings and text messages (many of which were sent from anonymous numbers) containing crude and disgusting comments about respiratory therapists employed at Respondent's hospital. For example, there was testimony and exhibits about anonymous texts and social media posts directed to Pererya and a text message that Backus sent to an anonymous number she believed would get to Matuszak. (Tr. 330-332, R-1). Respondent was and is disgusted by these social media posts and anonymous texts. With the benefit of hindsight, Respondent now wishes that it had been more aggressive in its response to these postings and text messages. Respondent now believes that it should have taken more steps to investigate the postings and text messages and, assuming it could determine who made the posts or sent the messages, disciplined employees for the posts and texts. However, St. Rose's failure to do so is not alleged in the Fourth Amended Consolidated Complaint or the Backus Complaint as a violation of the Act, cannot be a violation of the Act, and cannot form a basis for the

When asked about the catalyst for the fracture in the department, respiratory therapist Marco Garcia, a long-time (25-year) respiratory therapist at St. Rose, said:

JUDGE GIANNOPOULOS: I believe you when you said you wanted the department to be like it was, where people used to get along and everybody – was there something, in your mind, that was, like, the catalyst for this?

THE WITNESS: Well, people were just *attacking* each other.

(Tr. 568, emphasis added). Garcia continued:

JUDGE GIANNOPOULOS: Not you personally, but bickering. Was there bickering between these two supposed factions?

THE WITNESS: Yes.

. . . .

Q BY MR. SISK: And how often? Is that a daily thing, the bickering, the back and forth?

A It appeared that it was *daily*.

Q And when did it begin, if you know?

A Well, 20 – sometime in 2016. It’s been a couple of – it’s been a while –

Q Now –

(Tr. 571, emphasis added).

While some employees attempted to remain neutral, many chose a side – those who supported Roop and those who supported Matuszak. The “leaders” of the two factions (Roop and Matuszak) were well-known to the respiratory therapy department employees. Rose Rogers, a 25-year respiratory therapist at St. Rose was asked:

JUDGE GIANNOPOULOS: Were there groups, had groups form –

General Counsel’s claims because Respondent treated all employees the same with respect to the social media posts and texts. For example, Respondent did not discipline Backus when it learned that she had sent a horrific text message to Matuszak and did not discipline Matuszak when she made derogatory posts that were directed at Roop. In other words, Respondent treated everyone the same regardless of whether they engaged in protected concerted activity or did not.

THE WITNESS: Yes.

JUDGE GIANNOPOULOS: -- like one group didn't get along with the other group?

THE WITNESS: Uh-huh.

JUDGE GIANNOPOULOS: And how would you describe those groups at the -- and this is in November 2016?

THE WITNESS: Uh-huh.

JUDGE GIANNOPOULOS: How would you describe the groups? Like who were the groups?

THE WITNESS: You want names? You want --

JUDGE GIANNOPOULOS: Yes, yes.

THE WITNESS: Well, two people, Babita and Marie.

JUDGE GIANNOPOULOS: Matuszak?

THE WITNESS: Yes.

JUDGE GIANNOPOULOS: Those were the separate sides of the groups?

THE WITNESS: Yes.

(Tr. 733-734).

Monique Johnson told the Hospital's Chief Executive Officer, Aman Dhuper, that employees in the department had come to the aid of their "leader," Marie Matuszak:

Q And in that same meeting did you tell Mr. Dhuper that Marie had these minions and now she's *using them* to her own advantage?

A Yes, I did tell him that.

Q What did you mean by, these minions?

A They -- they all didn't like each other at first. They didn't like each other. So I couldn't understand why they now -- *it seemed that they had a common enemy. Now they -- they've come together.* So that's why I called them minions.

Q And the them that you're speaking of are the people that you identified as -- as --

A Chris Hamid and Brian Smith. I'm not talking about Joe Marino or Mike Gandhi.

Q And these people you identified which were on this --

A Right.

Q -- Matuszak's team?

A That's correct.

Q And previously they had not been friendly but now they were?

A Right.

(Tr. 653-654, emphasis added). As will be more fully developed *infra*, while Roop was the leader of her "faction," it was Backus and Monique Johnson who were the "drivers" of group action in the respiratory therapy department, not Roop.

In **October 2016**, Matuszak and respiratory therapists Chris Hamid and Brian Smith filed a Hostile Work Environment complaint against Roop. (GC-25). If Matuszak used her "minions," Roop did, too. Backus testified that she was contacted by Roop during the week of **Thanksgiving, 2016**. According to Backus, Roop was crying, "saying they won't leave her alone." (Tr. 240). When asked who was attacking her, Roop identified Marie Matuszak. (Tr. 240). Backus told Roop, "there's things that we can do and there's places out there that can help **us** and I will talk to you about it." (Tr. 241, emphasis added). Thereafter, Backus obtained BULLYING/DISCRIMINATION HARASSMENT AND/OR RETALIATION COMPLAINT FORMS which she and Roop filed on November 28, 2016. Backus (**not Roop**) solicited other employees to complete forms, which **she** then collected and filed with Human Resources. (Tr. 243-245; GC-36). Backus (not Roop) sent an email to executives listed on the Hospital's website. The email, which Backus claimed to send on behalf of a "large group" of respiratory therapists,

alleged, among other things, racial discrimination, bullying and harassment by coworkers, and a hostile work environment. (Tr. 246-247; GC-37).

Joe Ambrosini, the Hospital's former Human Resources Manager, testified that he created the BULLYING/DISCRIMINATION HARASSMENT AND/OR RETALIATION COMPLAINT FORM which was available to all employees on the Hospital's intranet system and policy database portal. (Tr. 1607). Ambrosini testified that he received a disproportionate number of complaint forms from respiratory therapy department employees. While there were only **30-40** respiratory therapy department employees at St. Rose, the volume of complaint forms (including emails) filed by respiratory therapy department employees far exceeded the number from all other **900** Hospital employees. (Tr. 1617). While Ambrosini did his best to investigate all complaints² and advise Union Representative Mullany of the issues, Ambrosini soon realized there were several "categories" of complaints. (Tr. 1618). Ambrosini said:

Q What was your reaction to all these problems they were having in the respiratory therapy department?

A That's tough to answer, because there were so many of them. The problem -

JUDGE GIANNOPOULOS: I was going to say other than finding a new job.

THE WITNESS: Yeah. The – I kind of try to put them into categories in my mind. For example, when you read a lot of these complaint forms or you take a lot of their complaints in person or you're involved in meetings, a lot of them were misunderstanding, like misunderstanding on how seniority works, misunderstanding how job postings for the CBA works.

So that I had to – I was up against a battle, because even though I tried to – myself and Joe, we tried to – Joe Marino, we tried to clarify things like that, it still wasn't to their liking. And then there was other problems that I put in a category of like inner personal problems, where I really didn't truly believe that they were

² Ambrosini had a staff of 3 to assist with all human resource functions. (Tr. 1643). For a time, he also split his duties between St. Rose in Hayward, California and Olympia Medical Center in Los Angeles. (Tr. 1517-1518). Ambrosini was the only HR employee on his staff qualified to conduct investigations. (Tr. 1643). When Stephanie Jones replaced Ambrosini in March 2017, she maintained the same number of HR staff. (Tr. 2088-2089). As was the case with Ambrosini, Jones simply did not have a sufficient staff to deal with the number of complaints filed with HR.

harassment or hostile. *It was two – it was a group of coworkers that didn't get along. And it kind of escalated from there.*

And then I also had the other category of completely inappropriate and pervasive behavior. Like the pictures in the text messaging that was – you know, they didn't happen too often. Like the pictures was a one-time incident. The text messages were ongoing. But those I thought were like nature (sic) problems. So I – it was tough because there – like we talked about earlier, there was multiple camps, *and it was tough to rely on the testimony of any one person, because there was competing forms, you know.* Somebody submitted a complaint form. And then then next day another person submits another complaint form. And so, *you have dual competing forms.* And somebody thought it was harassment because somebody went to HR to complain about them. So there was a lot of I'd say unfounded claims, a lot of misunderstanding, and a lot of really severe and perverse things that went on. And it was – yeah, it was just a crazy time there.

(Tr. 1618-1619, emphasis added).

Ambrosini's characterization of receiving *dueling* complaint forms is not an exaggeration. Dueling complaints between the two factions continued and may be best illustrated by the competing claims filed by Backus and Matuszak over an alleged incident as they *passed* each other in a hallway at the Hospital.

On November 7, 2017, Backus filed a BULLYING/DISCRIMINATION HARASSMENT AND/OR RETALIATION COMPLAINT FORM against Matuszak as a *preemptive* strike against Matuszak using “an incident to try and get me in trouble.” (Tr. 294). The “incident” took place in a hallway near a time clock as Matuszak was clocking in. Backus testified that after Matuszak clocked in, she [Matuszak] walked around to Backus' left side and “bumped me really hard.” (Tr. 294). In the formal complaint submitted to Human Resources, Backus wrote:

I perceived Marie Matuszak to go out of her way to cross my path *and push me with her bag.*

(GC-48, p. 3; Tr. 319, emphasis added).

Human Resources Manager Stephanie Jones³ received Backus' bullying/harassment complaint form and met with Backus. (Tr. 2153). While Backus characterized her filing of the complaint as a "preemptive" strike, by the time Backus filed her complaint with HR, Matuszak had *already* lodged her *complaint* against Backus over the same incident. (Tr. 2153). While Matuszak did not file a bullying/harassment form, she reported that Backus "assaulted" her. (Tr. 2153). In her interview with Matuszak, Jones asked her to demonstrate (using one of her HR assistants as a stand-in) what happened. Matuszak claimed she was "body slammed" on her left side by Backus. (Tr. 2155). As with Matuszak, in her meeting with Backus, Jones asked Backus to demonstrate what happened. Backus recreated the event by hitting Jones' HR assistant "very hard with her elbow." (Tr. 2155-2156).

The hallway "incident" had been recorded by the Hospital's security cameras and Jones reviewed the security tapes in separate meetings with Backus and Matuszak. (Tr. 2154). After reviewing the security footage and speaking with both Matuszak and Backus, Jones concluded that "nothing happened." (Tr. 2156). Jones said, "I did not find that they may have even touched each other." (Tr. 2156). Jones met with Backus and Shop Steward Justin Kmetz to review the video footage. After reviewing the videotape, Jones told Backus, "it didn't look like you hit her. It didn't look like she bumped you. It looked like you guys passed in the hallway." (Tr. 297).

The videotape was played numerous times during the hearing. (GC-49). In the videotape, Matuszak can be seen talking on a cell phone. After clocking in, Matuszak (still on the phone) leaves the time clock and *passes* Backus in the hallway. Respondent submits that the videotape shows *at most* a slight touching as Matuszak and Backus pass each other. The videotape does not

³ Stephanie Jones replaced Ambrosini as the Human Resources Manager in March 2017. (Tr. 2088; 2092).

show, as Backus claimed, that Matuszak went out of her way to push Backus with her “bag” or that she “bumped me [Backus] really hard.”

On cross-examination, Backus acknowledged that she was seeking a restraining order against Matuszak. When asked at the NLRB hearing about the documents she provided under oath to the Superior Court, Backus testified that she advised the court that Matuszak “lied and said I hit her And that there was video surveillance that showed I did not hit her.” (Tr. 320). Backus was asked whether she told the Superior Court *she* had been caused great pain and injured by the incident captured on the video. Backus testified,

I did not say I was injured, no.

(Tr. 320). As shown below, this was not true.

In Case Number HG18887724 before the Superior Court of California, County of Alameda (the “State Court Proceedings”), Backus filed for a Temporary Restraining Order against Matuszak. In her submissions to the court, Backus cited the November 7, 2017, incident to support her request for a restraining order. Backus declared under penalty of perjury that in the November 7, 2017, incident in the hallway, Matuszak “forcefully bumped into me, and called me a “pig” and “ni**a.”⁴ Further, in response to a question as to whether the individual used or threatened to use “a gun or any other weapon,” Backus answered, “Yes.” Backus wrote:

In retaliation, Respondent [Matuszak] passed by me and hit me on my left shoulder. Work cameras caught this which is the 2nd time she has done this.

At the NLRB hearing, no evidence was presented to support Backus’ claim that the November 7 incident was the second time Matuszak physically bumped or hit Backus, nor did

⁴ The alleged racial slurs were not reported in the bullying/harassment form or stated to Jones during any of her investigatory meetings with Backus. Can there be any doubt that had those racial slurs actually been said by Matuszak, Backus would have reported them to HR Manager Jones and listed them in the bullying/harassment complaint she filed?

Backus testify as to any other physical altercation between her and Matuszak. When asked on the form, “Were you harmed or injured because of the harassment,” Backus wrote, “Besides causing excessive emotional/mental distress, she [Matuszak] hit my body so hard my shoulder ached for a few days.” (R-2, p. 000057).

Simply said, as shown, Backus’ testimony at the NLRB hearing was not truthful. Moreover, any objective review of the videotape (GC-49) of the incident demonstrates that Backus’ statement in the State Court Proceeding, which was made under penalty of perjury, that Matuszak “hit my body so hard my shoulder ached for a few days” was not truthful. (GC-49; R-2, p. 000057). Backus’ willingness to make false statements under penalty of perjury in the State Court Proceedings further strains the credibility of her testimony in this matter.

No disciplinary action was taken against either Matuszak or Backus. Counsel for the General Counsel seems to suggest that by *not* issuing counseling to Matuszak for filing a false report, the Hospital treated Backus disparately. The evidence shows, just as Jones found, there was no hitting with a bag and no assault. **Both** Matuszak **and** Backus exaggerated their claims, and both were treated equally in not receiving discipline.⁵

Rogers testified that the bickering between Roop and Matuszak had become so bad that it was adversely affecting the morale in the department. (Tr. 759). Rogers testified she observed an incident when Roop refused to walk through a door held open by Matuszak. Rogers said as she and Roop were walking down a corridor in the Hospital and were approaching a door, Matuszak was approaching from the other side of the door with two students. Matuszak held the door open

⁵ Jones explained why she did not impose discipline on Backus and Matuszak:

I felt these were two individuals that were shocked at seeing each other. They already had issues with each other. They were shocked at seeing each other in the hallway, and it was their perception that they basically hit each other. I felt that. I didn’t feel they were deliberately, willfully lying.
(Tr. 2157).

and Rogers passed through. Roop would not walk through the door still being held open by Matuszak. Matuszak asked Roop if she thought she was “too good to come through the door.” (Tr. 744). Roop entered through a different door, Matuszak called her “childish, and then she [Matuszak] walked out.” (Tr. 744). The incident was reported to Human Resources by Matuszak and Roop.⁶ (Tr. 2097). Jones investigated the complaints, and **Matuszak** was issued a verbal warning for violation of the Hospital’s Standards of Conduct #2, discourteous conduct to a coworker. (Tr. 2098-2099; GC-82; GC-94; GC-116).

Jones presented Matuszak with the discipline form which Matuszak refused to sign. (GC-116). According to Jones, Matuszak became “very angry and said that it’s not fair that something was happening *to her* and *not Babita*, when Babita was the one who refused to go through the door.” (Tr. 2106, emphasis added). Jones told Matuszak that you were the one who said “some people think they’re too good to go through the door.” (Tr. 2106). Matuszak protested saying, “this is something she would have said to her children.” (Tr. 2106). Jones replied, “but this is not your child.” This is a coworker, who should be respected.” (Tr. 2106).

ALJ Giannopoulos asked Jones when she first received this complaint from Matuszak, what was her [Jones’] initial thought. Jones, who had been in her position for less than a month, said, “I felt that these were two people who, for some reason, just didn’t get along.” (Tr. 2099). ALJ Giannopoulos said, “You didn’t think, you got to be kidding me?” (Tr. 2099). It *is* a “you’ve got to be kidding me” moment in a *typical* work environment. But, by this time, the respiratory therapy department at St. Rose was *not* a typical work environment. **Both** Roop and Matuszak

⁶ Matuszak reported that she had been “disrespected” by Roop. (Tr. 2099). When interviewed by Jones, Roop said she saw Matuszak holding the door and saw Rose Rogers pass through. But, she would not go through the door because “she felt Matuszak would say something to her if she walked through the door.” (Tr. 2103).

(and their minions) were childish,⁷ petty and cruel to each other and the level of animosity between the two groups adversely affected the entire department.

Rogers, while being interviewed by Jones about the alleged hallway bumping/assault summed it up best:

Q And do you remember telling her [Jones] that it hurts my heart that this is happening in the department?

A Yes.

Q And that it affects me and it's affecting people in our department?

A Yes.

Q And how is it affecting the people in the department?

A Affecting the morale in the department.

Q Had there been a time when there was a sense of camaraderie and working together in the department?

A Yes.

Q And had that been affected by this conflict between Ms. Matuszak and Ms. Roop?

A Yes.

Q And was it the case that certain people, I think the judge asked if you – there were factions, but was it the case that certain people just didn't work together as well anymore because of --

A Yes, I think so.

(Tr. 759).

Monique Johnson, a 13-year respiratory therapist at St. Rose was asked about the "teams" in the department:

⁷ Childish behavior in the department was not necessarily limited to Roop and Matuszak. Testimony revealed that at some point an unknown respiratory therapy department employee (or employees) used a stamp to deface lockers with the notation "WTF." While Roop's testimony on how she came to have the WTF stamp is not clear, Roop testified she gave the stamp to CEO Dhuper when he happened to be in the department. (Tr. 123-124).

JUDGE GIANNOPOULOS: Yeah, at the time did you perceive that pulmonary department to be separated into two, quote, teams or into two, quote, groups? Or more than two groups or teams? Not officially, but –

THE WITNESS: Yeah.

JUDGE GIANNOPOULOS: -- unofficially. That employees --

THE WITNESS: Yeah.

JUDGE GIANNOPOULOS: -- had segregated themselves?

THE WITNESS: Yes, I do.

JUDGE GIANNOPOULOS: Okay. And which – what were the teams? If there was going to be *team captain* of each – of each unofficial team, who would that – who would that have been?

THE WITNESS: Marie and Babita.

JUDGE GIANNOPOULOS: All right.

(Tr. 645, emphasis added).

While all employees watched and/or participated in the bickering between the two sides, some employees initially believed that reconciliation was possible. Ultimately, as the bickering continued, when asked about how to deal with the issues in the department, employees advised the Hospital that to restore order in the department, *both* Roop and Matuszak should be fired.

Frank Mardanzai, an 8-year respiratory therapist at St. Rose, told CEO Dhuper:

JUDGE GIANNOPOULOS: And when you told Mr. Dhuper – when you mentioned the two people involved, why don't you just fire the two people involved, why don't you just fire the two people involved or take care of the two people involved –

THE WITNESS: Yes.

JUDGE GIANNOPOULOS: Who were the two people that you were referring to in your mind?

THE WITNESS: Babita Roop and Marie Matuszak.

JUDGE GIANNOPOULOS: All right. And was it well known within the department that those were the two people that were causing all these problems?

THE WITNESS: Yes.

(Tr. 796).

Faced with a dysfunctional group of employees (led by Roop and Matuszak) and with a constant stream of gripes, complaints and dueling allegations of harassment, bullying and discrimination, the Hospital did take action to try to restore order in the department.⁸

Upon notice of inappropriate photoshopped photographs having been posted in the department, Manager of Cardio-Pulmonary Services, Joe Marino, had the photos removed.⁹ (GC-15; GC-16). Two employees were disciplined, Kevin Seigal and Ahmad “Chris” Hamid. Both were issued disciplinary suspensions. (Tr. 1543-1544; 1551-1552; R-13; GC-123). Seigal never worked at St. Rose again after his suspension. (Tr. 1553). Hamid and the Teamsters grieved Hamid’s discipline.¹⁰ During the grievance process, the length of Hamid’s disciplinary suspension was reduced. (Tr. 1547-1550). After the photos were removed in May 2016, there is no evidence of further similar inappropriate postings in the respiratory therapy department.

Employees Roop, Pererya, and Backus testified they each received anonymous text messages which they reported to Marino and Human Resources. (GC-4; GC-5; GC-19). The messages were, in the words of CEO Dhuper, “disgusting.” (Tr. 2532). No one disputes that description. The messages were sent anonymously by use of a fake phone number/account. Roop testified she started receiving the texts in July 2016. She said the messages came from a “fake

⁸ While the ALJ may believe that more or different actions should have been taken, the question in this case, as relates to the allegations in the Fourth Amended Consolidated Complaint, is whether the Hospital’s actions violated Section 8(a)(1). More skilled HR professionals may have taken different actions. Clearly, Ambrosini and Jones were overwhelmed with the volume of the complaints and their HR support staff was not sufficient to deal with the volume of complaints filed. Equally concerning is the complete indifference shown by the Teamsters.

⁹ While the photoshopped images were of several employees including Marino and a prior respiratory department manager, most of the photos were directed at respiratory therapist Joje Pereyra. (Tr. 401; 503-505; 512-515; 2522-2523; GC-15).

¹⁰ Hamid maintained that he did not post the photos in the department. (Tr. 2021).

phone number” and that she had hired a forensics company to try to determine who sent the messages. (Tr. 48). By the date of the hearing in this case, Roop still did not know who sent the messages. (Tr. 208).

Backus testified she received text messages from an anonymous number in April 2017, which she reported to HR. (Tr. 280-281; 284-286; GC-45). Backus acknowledged she had no proof of who sent the text messages but that she had sent a crude text message to an anonymous number which she believed was directed to Matuszak and Siegel. (Tr. 286, 330-332, `R-1). Pereyra testified he began receiving anonymous text messages in July 2016. (Tr. 430-431; GC-19). Pereyra also hired a “digital forensic” company to attempt to determine the identity of the person(s) sending the text messages. He also filed a police report. (Tr. 441-442). Pereyra had told Marino he suspected Kevin Seigal was sending the anonymous texts. At that time, Seigal was a *former* employee of St. Rose. (Tr. 1317-1318). While Roop, Backus and Pereyra all had opinions about who was sending the texts, no evidence was ever presented to establish the identity of the sender(s). As of the date of his hearing, Pereyra acknowledged he still had no proof of who sent the anonymous text messages. (Tr. 431).

In early July 2016, a meeting was held for all respiratory therapy department employees. The meeting was conducted by Rozanne O’Keefe,¹¹ Joe Ambrosini and Joe Marino. (Tr. 2267). O’Keefe said that at the time of the meeting the department was “so disgruntled” and she had been advised that the department was splitting into “two camps.” (Tr. 2267). Seeking to address these issues, O’Keefe told the employees:

How profoundly disappointed I was in the employees of this department, that it had come to my attention numerous, numerous bullying forms were being submitted to HR. They were not – they were investigated, yet not found valid. And there seems to be really a sixth-grade mentality of the staff in this department fighting with each

¹¹ Rozanne O’Keefe is the Director of Nursing at St. Rose. O’Keefe has been in the position since 2013 and has been an employee of St. Rose for approximately 24 years. (Tr. 2263).

other. . . . And I basically pretty much got on a soapbox and said, if you so choose to stay and work at St. Rose, the expectation is you will have professional behavior at work with your co-workers, with the patients, families, physicians, et cetera.

(Tr. 2269).

As the camps continued to attack each other, and drawing upon her own personal experience in dealing with a dispute with a coworker, O'Keefe urged Roop and Matuszak to meet, with O'Keefe as a mediator, in an effort to resolve their issues and restore a peaceful work environment. (Tr. 2280-2281; R-28). While Roop initially indicated willingness to meet, Roop changed her mind and the "mediation" was never held. Roop stated she could not meet with Matuszak on advice of her physician. (Tr. 2284). No doubt a meeting would have been stressful for all concerned. However, it is hard to believe the meeting would have been more stressful than what had been occurring in the department. Certainly, refusing to meet, virtually ensured that the bickering would continue.

Joe Marino is the Manager of the Cardio-Pulmonary Department at St. Rose Hospital. Marino has held that position since 2014 and has been employed in the respiratory department at St. Rose for twenty-three years. (Tr. 1273). While working as a respiratory therapist at St. Rose, Marino served as shop steward for approximately 12 years. (Tr. 1276). Thus, Marino was well acquainted with the Teamsters, Roop, Matuszak, and all the other respiratory therapists.

Shortly after O'Keefe's meeting with the employees, Marino held department meetings in August 2016 during which he addressed a number of operational concerns identified by employees in the respiratory department. (Tr. 1301-1311; GC-98). At the meetings, Marino specifically addressed the issue of employees reporting that they had received offensive, inappropriate, anonymous text messages. Marino told the respiratory department employees if the texts were coming from the respiratory therapy department, they need to stop, and that sending these type

texts puts an employee's job at risk as the texts "were a form of harassment and the department will not tolerate it." (Tr. 1314-1315; GC-7).

As the complaints continued, Human Resources Manager Ambrosini testified he was in constant, almost daily, contact with the Teamsters representative, Matthew Mullany. (Tr. 1618). Despite being advised of these significant issues in the respiratory therapy department, the Teamsters, for whatever reason, chose not to get involved. (Tr. 1618). The Teamsters absence did not go unnoticed. Backus sent a scathing email to Union Representative Mullany on January 5, 2017, accusing the Union of failing to represent the "dues-paying" union members of the respiratory therapy department. (GC-39). Backus wrote:

In previous weeks, I have been made aware that my coworkers have come to our union for assistance with contract breaching and other forms of unjust acts and they have yet to get the union's FULL attention and assistance even after filing a grievance. Some even faced retaliation after contacting the union. I told them surely not. Our union would NOT allow such unfairness to persist.

(GC-39, p. 1, emphasis in the original).

Union Representative Mullany responded to Backus as follows:

First, as I'm sure you know this good union has had many meetings (5) in the past three months concerning the goings on in your department and all issues that were brought up have been addressed and no one from your department (save one) has contacted me with any claims as outlined in your email since those meetings occurred.

Most of the issues in your department have been because of "in fighting" of which I have met with those involved including your HR, Department Manager, Leads, Shop Stewards, Mark Dierking and have been informed your CEO has met with you and your group on five separate occasions in order to try and calm things down.

Since your email seems to ask if these issues have been addressed, I can assure you they have been.

(GC-39, p. 2, emphasis added).

Union Representative Mullany's response is significant in that he, like the managers and employees of St. Rose, viewed the issues in the respiratory therapy department to be a direct result of "*in fighting*" between the employees/groups.

Aman Dhuper ("Dhuper") became Chief Executive Officer at St. Rose in August 2016. (Tr. 2406). Dhuper was made aware of issues in the respiratory therapy department when he received an email on or about December 10, 2016, from Backus. (Tr. 2408-2409; GC-37). Within days after receiving the email, Dhuper conducted a department meeting with all respiratory therapy department employees. When employees indicated some reluctance to speak openly in the department meeting, Dhuper offered to have "one-on-one" meetings with employees. In an effort to understand and *resolve* the issues, Dhuper asked each employee to come to the one-on-one meeting prepared to discuss the issues *and* potential solutions. (Tr. 254).

On April 13, 2017, a Petition of Right to Protect License and Workplace (hereinafter "Petition") was filed with the Hospital's CEO. An unsigned copy of the Petition was served on Human Resources and a representative at Ohlone College. (Tr. 269; 271; GC-34; GC-42). Among other things, the Petition, purportedly signed by a majority of respiratory therapists, called for the reprimand or the removal of four respiratory therapy department employees and the respiratory therapy department manager. (GC-34, p. 2). The Petition was filed by employees who supported "team Roop" and sought discipline or removal of "team Matuszak" and department manager Marino. Backus (not Roop) took the lead in drafting the Petition. (Tr. 261-262). While Backus initially testified all respiratory department employees were shown and given the opportunity to sign the Petition, on cross-examination she acknowledged that the employees identified as supporters of Matuszak were not shown or asked to sign the Petition. (Tr. 315-317).

Upon receipt of the Petition, the Hospital's counsel, Michael Sarrao, drafted a letter to the respiratory therapy department employees and the Teamsters. (GC-51). Among other things, the letter advised that the Hospital would conduct an investigation into the allegations set out in the Petition. The Hospital retained Collin D. Cook, an attorney with Fisher & Phillips, to investigate the issues identified in the Petition and to make recommendations as to resolution of those issues. (Tr. 2145-2146). At the time Cook was retained, the Hospital advised the Teamsters of its intention to investigate the issues identified in the complaint and *invited* the Union to participate in that investigation, including being present for any interviews with employees. (Tr. 2146-2147; GC-43). Additionally, Human Resources Manager Jones advised all employees that participation in the interviews with Cook would be voluntary. (Tr. 2148). The Teamsters Union refused to participate in Cook's investigation of the issues.

It is with this backdrop of a dysfunctional department split into two separate camps/factions, an AWOL union and constant personal bickering and in-fighting between employees, that the allegations set forth in the Fourth Amended Consolidated Complaint (GC-1(ff)) and the Complaint issued in Case No. 32-CA-218138 (GC-1(II)) must be judged.

The Fourth Amended Consolidated Complaint alleges that Respondent violated Section 8(a)(1) of the Act by maintaining unlawful rules in its Standards of Conduct, enforcing those rules selectively and disparately against Roop; threatening, disparaging and interrogating employees; soliciting employees to quit; threatening to close the pulmonary function lab; removing a television from a breakroom and disciplining/discharging Roop for engaging in acts protected by Section 7.

The Complaint in 32-CA-218138 alleges that Respondent violated Sections 8(a)(1) and (4) of the Act by issuing Backus a final written warning for filing charges or providing testimony in Board proceedings. Each of the allegations are addressed below.

II. RESPONDENTS STANDARDS OF CONDUCT

A. The Four Standards of Conduct Under Review

Paragraphs 5(a) and 8 of the Fourth Amended Consolidated Complaint allege that the mere maintenance of four (4) of Respondent's thirty-nine (39) Standards of Conduct are unlawful under Section 8(a)(1).¹² The four Standards of Conduct at issue are:

15. Incompatibility or inability to work in harmony including, but not limited to, gossip or criticism with employees, members of the management team, physicians or others.

....

17. Off-duty conduct which tends to prejudice the interests, reputation or community standing of the Hospital.

....

26. Unauthorized personal activities while on duty.

....

28. Discussing personal problems or issues with members, patients, or their families.

(GC-64, p. 2).

B. The Hospital had a Contractual Privilege to Draft and Revise Its Standards of Conduct

The Hospital's Standards of Conduct originated in March 2001 and were last approved/revised in April 2014. (GC-64, p. 1). Teamsters Local 856 has represented the respiratory therapy department employees for approximately 18 years. (Tr. 1276). At all times material herein, the respiratory department employees have been covered by a collective bargaining agreement negotiated by the Teamsters and the Hospital. (GC-26). Thus, the Standards

¹² During the hearing, Counsel for the General Counsel orally amended the Fourth Amended Consolidated Complaint and withdrew the government's challenge to the Standards of Conduct originally listed in paragraphs 5(i), (ii) and (vii). (Tr. 9-10).

of Conduct were in place and known to the Teamsters during the course of collective bargaining with the Hospital and during the full term of its representation of the respiratory therapy department employees.

The Management Rights provision in the parties' collective bargaining agreement provides that the Hospital has, among other things, the sole and exclusive "right to manage and direct its business and its personnel the right to direct the work force maintain the discipline and efficiency of its employees, to establish work standards revise existing human resources policies and discharge employees subject only to the conditions set forth herein." (GC-26, Management Rights, p. 1). The Hospital was contractually privileged to establish work standards to maintain discipline of its employees and to revise existing human resources policies.

While an employee cannot waive Section 7 rights, it is well established that a union, in its representational capacity, can waive the Section 7 rights of the employees it represents. See, *Metropolitan Edison Co., v. NLRB*, 460 U.S. 693 (1983).¹³ The Hospital successfully bargained for the right to establish its Standards of Conduct, including the four at issue herein. There is no evidence in the record indicating that the Teamsters ever filed an unfair labor practice charge, grievance or otherwise challenged the reasonableness, lawfulness or the application of *any* of the Hospital's Standards of Conduct, including the four set forth above. To the extent any of the four challenged rules infringes on an employee's Section 7 rights, the Teamsters waived those rights in bargaining with the Hospital. Accordingly, the maintenance of these four Standards of Conduct cannot violate Section 8(a)(1) of the Act.

¹³ Compare, *NLRB v. Magnavox Company of Tennessee*, 415 U.S. 322 (1974). *Magnavox* dealt with a general prohibition on the distribution of literature and stands for the proposition that a union may not waive its members' rights related to their choice of a bargaining representative (i.e., whether to have no representative, retain the current representative, or choose a new representative). The rules under review in the matter before ALJ Giannopoulos have no such restrictions.

C. **The Challenged Standards of Conduct are Lawful Under Boeing**

Respondent submits that the four challenged Standards of Conduct are lawful under the Board's decision in *The Boeing Company*, 365 NLRB No. 154 (2017).

In *Boeing*, the Board overruled *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), holding:

We have decided to overrule the *Lutheran Heritage* “reasonably construed” standard. The Board will no longer find unlawful the mere maintenance of facially neutral employment policies, work rules and handbook provisions based on a single inquiry, which made legality turn on whether an employee “would reasonably construe” a rule to prohibit some type of potential Section 7 activity that might (or might not) occur in the future.

Boeing, 365 NLRB No. 154, slip op at 2.

After *Boeing*, ambiguities in rules are no longer interpreted against the drafter and generalized provisions may not be interpreted as banning all activity that ***could conceivably*** be included. *Id.*, slip op at 9-10. The four challenged rules fit within the Category 1 designation under *Boeing*, and are lawful because, ***when reasonably interpreted***, the rules do not interfere with Section 7 rights. As such, no balancing of rights and justification is required.

The Hospital's Standard of Conduct number 15 fits squarely within the “harmonious interactions” and “civility” rules found to be lawful under *Boeing*. In *Boeing*, the Board found the “harmonious interactions and relationships” rule that was at issue in *William Beaumont Hospital*, 363 NLRB No. 162 (2016) and other rules requiring employees to abide by basic standards of civility, fit within lawful Category 1 rules. The Board held:

To the extent the Board in past cases has held that it violates the Act to maintain rules requiring employees to foster “harmonious interactions and relationships” or to maintain basic standards of civility in the workplace, those cases are hereby overruled. As then-Member Miscimarra observed in his dissent in *William Beaumont Hospital*, such rules reflect common-sense standards of conduct that advance substantial employee and employer interests, including the employer's legal responsibility to maintain a work environment free of unlawful harassment based on sex, race or other protected characteristics, its substantial interests in

preventing workplace violence, and its interest in avoiding unnecessary conflict that interferes with patient care (in a hospital), productivity and other legitimate business goals; and nearly every employee would desire and expect his or her employer to foster harmony and civility in the workplace.

Boeing, 365 NLRB No. 154, slip op. at 4, fn. 15.

Standard of Conduct numbers 26 and 28 call out “*personal* activities” and “*personal* problems or issues.” The term “personal” cannot be ignored in any reasonable interpretation of the rule. The word “personal” as used in both rules suggest issues unrelated to “work” and/or “working conditions.” Thus, a reasonable interpretation of each Standard of Conduct would not implicate Section 7 rights.

Standard of Conduct numbers 26 and 28 recognize the principle that “work time is for work.” The rule in no way limits an employee’s personal activities while off duty. When reasonably interpreted, the rule would be seen to restrict the performance of *individual, private* errands/tasks completely *disconnected* from work and working conditions while on duty. Without the qualifier “personal,” the rule could be reasonably interpreted to encompass Section 7 rights. However, by adding the qualifier “personal,” the rule is clear.

As noted in *Boeing*, the Board may differentiate among different types of NLRA-protected activities (some of which might be deemed central to the Act and others more peripheral) and may make “reasonable distinctions between or among different industries and work settings.” *Boeing*, 365 NLRB No. 154, slip op. at 15. The courts and Board have recognized the unique environment and special needs found in a hospital environment. The Supreme Court has recognized the public interest in protecting patients and families from needless conflict in hospital work settings:

Hospitals, after all, are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike are often under emotional strain and worry, where pleasing and comforting patients are principle facets of the day’s activity, and where the patient and his family – irrespective of whether that patient and that family are labor or management oriented – need a restful, uncluttered, relaxing and helpful atmosphere, rather than

one remindful of the tensions of the marketplace in addition to the tensions of the sick bed.

NLRB v. Baptist Hospital, 442 U.S. 773, 783, fn. 12 (internal quotation marks omitted) (1979).

In *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 505 (1978), the Supreme Court noted:

. . . in the context of health-care facilities, the importance of the employer's interest in protecting patients from disturbance cannot be gain-said.

Likewise, the courts and Board have recognized that the primary function of a hospital is patient care and a tranquil atmosphere is essential to the carrying out of that function. *Id.* at 495; *St. John's Hospital*, 222 NLRB 1150 (1976).

To ensure that patients are protected from the tensions in the workplace, the Board has long provided hospitals leeway in restricting the exercise of Section 7 rights by recognizing as lawful rules which restrict solicitation in immediate patient care areas in a hospital. In striking a balance between Section 7 rights of employees and the need for patients to have a quiet, tranquil setting for recovery, the patient's needs are favored. *NLRB v. Baptist Hospital*, 442 U.S. 773, at 789-781; *St. John's Hospital*, 222 NLRB 1150 (1976). It would hardly be reassuring or tranquil for a patient or family member, concerned about his/her own recovery and healing, to be confronted by an employee grousing about his/her spouse, children, financial concerns, or other *personal* issues of the employee. An objectively reasonable employee would view the rule as protecting a patient's right to recover in peace and quiet without being burdened with hearing about the employee's *personal* (i.e., individual, private) problems.

Even if Standards of Conduct 26 and 28 had an impact on Section 7 rights, any such impact is slight and outweighed by the legitimate justifications of protecting patients from disturbance and providing the tranquil atmosphere essential to healing and recovery.

Standard of Conduct number 17 does not restrict Section 7 rights. See, *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999). In *Flamingo Hilton-Laughlin*, the Board found the employer's

handbook rule prohibiting “off duty misconduct that materially and adversely affects job performance or tends to bring discredit to the hotel” not to violate Section 8(a)(1). The administrative law judge found that since the rule did not define areas of permissible and impermissible conduct, employees might reasonably refrain from Section 7 activity. The Board disagreed. Noting the similarity of the hotel’s rules to a rule found lawful in *Lafayette Park Hotel*, 326 NLRB 824 (1998), the Board found that the rule could not “reasonably be read as encompassing Section 7 activity and that employees would not reasonably fear that the Respondent would use this rule to punish them for engaging in protected activity.” *Flamingo Hilton-Laughlin* at 289.

In *Lafayette Park Hotel*, 326 NLRB 824, 826-827 (1998), the hotel had a rule in an employee handbook that stated the following conduct was unacceptable:

Unlawful or improper conduct off the hotel’s premises or during non-working hours which affects the employee’s relationship with the job, fellow employees, supervisors, or the hotel’s reputation’s reputation or good will in the community.

The Board concluded:

We do not believe that this rule can be reasonably be read as encompassing Section 7 activity. In our view, employees would not reasonably fear that the respondent would use this rule for engaging in protected activity that the Respondent may deem to be “improper.” To ascribe such a meaning to these words is, quite simply, far-fetched. Employees reasonably would believe that the rule was intended to reach serious misconduct, not conduct protected by the Act.

Lafayette Park Hotel, at 827. Similar to the rule found lawful above, Respondent’s rule restricts off-duty conduct which “tends to prejudice the interests, reputation or community standing of the Hospital.” Employees would reasonably believe the rule was intended to reach serious misconduct, not conduct protected by Section 7.

Respondent submits that the four challenged standards of conduct fit within the Category 1 designation as set forth in *Boeing*. An objectively reasonable employee, aware of his/her legal

rights and interpreting the hospital's work rules as they apply to the everyday nature of his/her job, and in a work environment with almost twenty years of union representation, would not view the rules as prohibiting or interfering with the exercise of Section 7 rights. Thus, when reasonably interpreted, the four standards of conduct have no tendency to interfere with Section 7 rights. Accordingly, paragraph 8 of the Fourth Amended Consolidated Complaint should be dismissed.

III. RESPONDENT DID NOT APPLY THE STANDARDS OF CONDUCT SELECTIVELY AND/OR DISPARATELY AGAINST ROOP

Paragraphs 5(b)-(d) and 9 of the Fourth Amended Consolidated Complaint allege that Respondent, through specifically named supervisors, enforced the four allegedly unlawful Standards of Conduct selectively and disparately against Roop by issuing her a written verbal warning on November 21, 2016, a final written warning on February 13, 2017, and by terminating her employment on April 17, 2017, for engaging in protected concerted activities.

Respondent notes that of the four challenged Standards of Conduct, only Standard of Conduct No. 15 is specifically cited in the discipline issued to Roop. (GC-11).

These paragraphs make very specific allegations with regard to the application of the Hospital's Standards of Conduct. Paragraph 5(b) names only Marino and Ambrosini in relation to the issuance of Roop's verbal warning. (GC-8). Paragraph 5(c) names only Marino and Ambrosini in relation to Roop's removal from the team lead assignment and the issuance of Roop's final warning and suspension. (GC-11). Paragraph 5(d) names only Marino and Jones in relation to Roop's termination. (GC-12).

As discussed in detail *infra*, the record establishes that Marino was the sole decision maker on issuing the verbal warning. (Tr. 1362). While Dhuper received recommendations on the level of discipline to impose, Dhuper was the decision-maker on the final warning, suspension and removal of the team lead assignment and Roop's termination. (GC-12).

Thus, since Marino was the decision-maker in the action described in paragraph 5(b), the paragraph allegations must be dismissed as to Ambrosini. As Dhuper was the decision-maker in the actions described in paragraphs 5(c) and (d), and is not named in either paragraph, those paragraphs of the Fourth Amended Consolidated Complaint must be dismissed.

As noted, the allegations set forth in paragraphs 5(b), (c), and (d) are specific. As relates to a violation of Section 8(a)(1), in order to make a *prima facie* case, the government must show that Roop engaged in protected concerted activity, that Marino, Ambrosini and Jones knew of that activity and that the protected activity was a motivating factor in the decision to apply, or not apply, the Standard of Conduct to discipline Roop.

Respondent will further address the allegations of Complaint paragraph 5(b)-(d), in the section of this brief related to discipline of Roop and the application of the *Wright Line* standard.

IV. ALLEGATIONS OF VIOLATION OF SECTION 8(a)(1) NOT RELATED TO DISCIPLINE

A. Allegations Relating to Rozanne O’Keefe

Paragraphs 6(a) and 9 of the Fourth Amended Consolidated Complaint allege that Respondent, by Director of Nursing Rozanne O’Keefe, unlawfully threatened employees and made coercive and disparaging statements to employees. These acts are alleged to have occurred on December 5, 2016, and April 18, 2017.

1. December 5, 2016

Section 8(a)(1) of the Act provides that it shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their statutory right to engage in or refrain from engaging in concerted activity. This provision is modified by Section 8(c) of the Act, which defines and implements the first amendment right of free speech in the context of labor relations. Section 8(c) permits employers to express “any views, arguments or opinions” without

running afoul of Section 8(a)(1) if the expression “contains no threat of reprisal or force or promise of benefit.” In determining whether questioned statements are permissible, the statements must be considered in the context in which they were made and in view of the totality of the employer’s conduct. The test for evaluating whether an employer’s conduct or statement violate Section 8(a)(1) is whether the statements or conduct have a reasonable tendency to interfere with, restrain, or coerce union or protected activities. *KenMore Electric Co.*, 355 NLRB 1024, 1027 (2010).

Statements conveyed in one conversation may contribute to the impact of the next. Thus, to properly consider the allegations alleged to have occurred on December 5, 2016, it is necessary to first take a step back and review what O’Keefe said to employees in meetings prior to December 5.

In July 2016 a meeting was held with the respiratory therapy department employees to address inappropriate conduct and behavior occurring in the department. The purpose of the meeting was to put employees on notice of the Hospital’s expectation that inappropriate conduct would not be tolerated. (Tr. 2267). At the meeting, O’Keefe expressed “how profoundly disappointed I was in the employees of this department, that it had to come my attention numerous, numerous bullying forms were being submitted to HR. They were not – they were investigated, yet not found valid. And there seems to be really a sixth-grade mentality of the staff in this department *fighting* with each other. . . . And I basically pretty much got on a soapbox and said, if you so choose to stay and work at St. Rose, the expectation is that you will have *professional behavior* at work with your coworkers, with the patients, families, physicians, et cetera.” (Tr. 2269, emphasis added).

According to Roop, on November 14, 2016, she attended a meeting in Human Resources with union representative Matt Mullany, Human Resources Director Joe Ambrosini, and Joe

Marino. (Tr. 94). At the meeting, Joe Ambrosini stated he had received a letter of complaint from three of Roop's co-employees: Marie Matuszak, Chris Hamid, and Brian Smith. Ambrosini stated that the Hospital had "some concerns" based on the information listed in the letter of complaint.¹⁴ (Tr. 94). During the meeting, there was discussion and agreement that while the issues were under investigation the parties would keep the information discussed in the meeting *confidential*.¹⁵ With that background, we move to the December 5, 2016, meeting cited in the Fourth Amended Consolidated Complaint.

Roop testified that she was called to a meeting in Human Resources on *December 5, 2016*. Roop identified the following people in attendance at the meeting: Joe Marino, Shop Steward Justin Kmetz, Human Resources Manager Joe Ambrosini and Rozanne O'Keefe. (Tr. 108-109). According to Roop, Human Resources Manager Ambrosini started the meeting by saying there had been a breach of confidentiality in regard to a prior meeting held on November 14, 2016. (Tr. 110). Roop denied that she breached confidentiality and said she discussed the meeting only with Union Representative Mullany. (Tr. 110). Roop claimed that O'Keefe, speaking in the meeting for the first time, said, "she's going to take my team leader away and demote me to being a regular therapist."¹⁶ (Tr. 111). Thereupon, Roop defended herself and her work record, saying she had not called in sick for eight years and was now being *picked on by other employees*. Roop said she was under a lot of pressure and tried to "avoid the people that are causing trouble." (Tr. 111-112). O'Keefe replied, "you have to talk to everybody; I don't care what the circumstances are, you have to sit down with Joe Ambrosini, Marie Matuszak, and sort this out." (Tr. 113). O'Keefe allegedly

¹⁴ The letter is identified in the record as GC-25.

¹⁵ The department had fractured into two camps. The reason for confidentiality was simple – to avoid compromising the integrity of the investigation (i.e., to avoid the investigation becoming a contest of dueling complaints filed by members of each camp and further dividing the department).

¹⁶ It is undisputed that Roop's team leader position was not taken away as a consequence of any breach of confidentiality. Indeed, as the record makes clear, while the Hospital investigated whether or not there had been a breach of confidentiality, no discipline was ever issued to Roop for breach of confidentiality.

then said, “If I hear one more word of bullying, retaliation, or harassment, people are going to get fired.” (Tr. 113).

Shop Steward Kmetz testified he attended the meeting in Human Resources on December 5, 2016, with Roop, Joe Ambrosini, Joe Marino and Rozanne O’Keefe. (Tr. 688-689). Kmetz said Ambrosini announced that the Hospital was investigating a breach of confidentiality regarding a previous meeting. (Tr. 689). According to Kmetz, Ambrosini said discussions in the prior meeting were supposed to be confidential and word had “gotten out there that you [Roop] have broken that confidentiality and talked about the meeting we had.” (Tr. 690). Kmetz testified that O’Keefe said, “One of the purposes of the meeting was to demote you and take away your leave pay, and, but, we’re going to hold off on that today and look further into this. But then she said, you know, if things don’t start changing where you guys – if I keep hearing more talks about bullying or harassment period, I’m going to start firing all of you.” (Tr. 692).

O’Keefe testified that when she met with Roop on December 5 in the Human Resources Department, she asked Roop to explain what was going on in the department. O’Keefe stated, “I’m really so – so disappointed in the *behavior* that I’m hearing about is happening in the department. (Tr. 2283, emphasis added). O’Keefe confirmed that Roop’s team leader assignment was not taken away at this meeting. O’Keefe explained, “I specifically remember hearing her story and, at that point, I made the statement I don’t know who’s telling the truth, not telling the truth here anymore whether it’s between Babita Roop or Marie Matuszak.” (Tr. 2350).

The December 5 meeting was an *investigatory* meeting which Roop attended *with* her union representative. The Hospital had the right to investigate whether there had been a breach of confidentiality subject to recognizing Roop’s right to have a union representative attend the meeting on her behalf. Taking Roop’s and Kmetz’s version of what O’Keefe said as true, it is

clear that O’Keefe’s comments regarding action she would take relate to the *acts* of harassment and bullying not the *reporting* of that conduct. In *Station Casinos, Inc.*, 358 NLRB 637 (2012), a supervisor told a known union leader “*to be quiet* about work conditions and staffing shortage *complaints* or he might end up being discharged.” *Id.* at 643 (emphasis added). In *Station Casinos, Inc.*, there is a direct, specific warning to the employee to “be quiet” about Section 7 rights which is, in turn, connected to the clear threat “or else” you (employee) will be fired. *Station Casinos* illustrates why O’Keefe’s comments in the December 5 meeting do not constitute a threat: unlike the remarks in *Station Casinos*, O’Keefe’s remarks are *not* linked to Section 7 activity. When O’Keefe uses the word “hear” or “hearing,” it is clearly not tied to reporting of complaints about bullying or harassment – it is the *acts* of bullying and harassment which may get someone fired.

In prior meetings, O’Keefe had made clear the Hospital expected the employees to *act professionally* and that inappropriate *conduct* (i.e., harassment, bullying) would not be tolerated. Likewise, in the December 5 meeting, it isn’t the *reporting* of the conduct which O’Keefe says she won’t abide, it is the underlying *conduct* which O’Keefe says will no longer be tolerated and which will cause discipline to be imposed. To suggest that O’Keefe’s comment in the December 5 meeting was directed at the *reporting* of such conduct is a leap which is not supported by the record.

2. April 18, 2017 Conversation in the Parking Lot

Marco Garcia testified as he was walking to his car at the end of his shift, he and Erik Thom saw O’Keefe walking to her car. (Tr. 558). Garcia *initiated* a conversation with O’Keefe, asking if they could talk to her “for a second.” (Tr. 558). Garcia *volunteered* that he and Thom had signed a “Petition,” said Joe Marino said, “people who signed the petition *might* lose their job,” and asked O’Keefe, “are we going to lose our jobs?” (Tr. 559, emphasis added). According to

Garcia, O’Keefe replied, “Administration was a little upset that people signed the Petition, *but not to worry about it*. That if you keep your noses clean and you stay out of trouble, that nobody was going to lose their job.” (Tr. 559, emphasis added). According to Garcia, nothing further was said. (Tr. 559).

Thom testified that he and Garcia had an “accidental or coincidental meeting” with O’Keefe as they were all leaving work. (Tr. 933). Thom said Garcia asked O’Keefe, “If anyone was going to be disciplined or terminated due to the signing of the Petition.” (Tr. 936). Before O’Keefe replied, Thom *interjected*, and said, “Marco, I think if we just come to work, keep our noses clean, do our jobs, go home, we’ll probably be okay.” (Tr. 937). Thom testified O’Keefe then *affirmed* what he said to Garcia, “Come to work, keep your nose clean, do your job and you’ll probably be okay.” (Tr. 937).¹⁷

Thom did not corroborate Garcia’s testimony about Joe Marino allegedly saying people who signed the petition might lose their jobs.

O’Keefe testified she has known Garcia for twenty years and Thom for a couple of years. (Tr. 2316). At about 6:30 or a quarter to seven, as she was in the parking lot, O’Keefe was approached by Garcia. O’Keefe recalled they exchanged pleasantries, and “he [Garcia] asked me if he was going to get fired.” (Tr. 2318). O’Keefe testified that she was “taken back.” She said, “Have you done something to get fired for?” And, he said, “I signed the Petition.” O’Keefe said she did not know about a Petition. (Tr. 2318). O’Keefe then said, “My best suggestion, keep your nose clean, go to work, do a good job, you’ll be fine.” (Tr. 2318). O’Keefe stated the entire conversation lasted only a few minutes. There was no further discussion at that time, or any other time, between O’Keefe or Garcia or Thom about their conversation.

¹⁷ On cross-examination, Thom said O’Keefe made some response to Garcia before he [Thom] interjected, “do your job, keep your nose clean.” Thom was not sure what O’Keefe said. (Tr. 949).

O'Keefe's statement does not violate Section 8(a)(1). As Thom said, this was an impromptu/chance meeting in the parking lot. O'Keefe had not seen the Petition and told Garcia and Thom she had no knowledge of it. Knowing nothing about what they were asking, O'Keefe gave simple, good and general advice: keep your nose clean, go to work, do a good job, you'll be fine. Or, O'Keefe simply *repeated* what Thom has said *first*, if Thom's testimony is credited.

Respondent avers that contrary to the allegations in Paragraphs 6(a)(i)(ii) and 9 of the Fourth Amended Consolidated Complaint, O'Keefe did not threaten employees with demotion, discipline and job loss for encouraging employees to file concerted complaints and did not make coercive and disparaging statements to employees about their protected concerted activity or the protected concerted activity of other employees and those paragraphs should be dismissed in their entirety.

B. Allegations Relating to Aman Dhuper

Paragraphs 6(b) and 9 of the Fourth Amended Consolidated Complaint allege that Aman Dhuper unlawfully threatened employees, interrogated employees, made coercive and disparaging statements to employees, solicited employees to quit, impliedly threatened to terminate employees and impliedly threatened to close the pulmonary function lab because employees had engaged in protected concerted activities. Each of the allegations are addressed in the order in which they appear in the Fourth Amended Consolidated Complaint.

1. December 14, 2016

A number of employees testified about a mandatory department meeting held on or about December 14, 2016. Prior to calling the meeting, CEO Aman Dhuper had received an email from respiratory therapist Jernetta Backus in which she made a number of allegations about issues in the respiratory therapy department. (GC-37). Within days of receipt of Backus' email, Dhuper

scheduled a mandatory department meeting for all respiratory therapy employees in order to discuss the allegations contained in the email which he had received.

Not surprisingly, each attendee had a different recollection of what was said in the meeting.

According to Roop, the meeting *began* with Dhuper taking a folder, lifting it up and saying, “This is the most complaints and issues I’ve seen in any department.” (Tr. 116). According to Roop, Dhuper then said, “People who did something about this should be fired and the people who didn’t do anything about this should be fired, too.” (Tr. 117). According to Roop, Dhuper then said, “He was really disgusted with the text messages that me and Joje Pereyra were getting.” (Tr. 117).

According to Backus, the meeting began “with Mr. Dhuper telling us he called the meeting to talk. And, then he began to tell us about everything he had done for the Hospital, everything he had planned to do for the Hospital. He told us that he had kept his word with everything. And, he asked us what did we want of him.” (Tr. 252). Backus replied, “We thank you for everything that you’ve done but this particular problem has nothing do with that, this has to do with the problem that’s going on inside our department.” (Tr. 252). Backus testified Dhuper then “asked people to speak up to talk to him and nobody said anything.” (Tr. 253). Backus said she spoke up and stated, “Nobody is going to speak to you in this open forum because people are afraid of retaliation and those people are retaliating and intimidating them are in this room and the minute they speak up they get a target on their back and I told him I’m not afraid to speak up because this is not my full-time job, this is my per diem job, I can afford to lose this job. They can’t.” (Tr. 253). Dhuper then, according to Backus, “chastised us, basically, for not speaking up before this and said if he had to fire anybody, he would have to fire us all because nobody spoke up.” (Tr. 253). According to Backus, several people spoke up to identify issues. Pereyra spoke about text messages he had

been receiving and approached Dhuper to give him text messages he had received. Dhuper said the messages were “grotesque” and that “he already had copies of them and that he was going to find out who was sending those text messages even if he had to spend his own money to do so and when he found out that they would be fired.” (Tr. 254). Backus stated that the meeting came to an end by Dhuper reiterating the opportunity for all employees to come speak to him individually telling the group, “If you come talk, then you need to come with your problem and a solution.” (Tr. 254).

Joje Pereyra testified that the meeting began with Dhuper saying, “[h]ow he was disgusted about what’s happening in the RT department, and that everybody in that room should be fired.” (Tr. 452). Pereyra said that Dhuper did not clarify his remarks and he [Pereyra] believed Dhuper was expressing “that he was disgusted and that we should all be fired *from what’s happening in the RT department.*” (Tr. 452, emphasis added).

According to Monique Johnson, Dhuper “started the meeting by introducing himself and talking about why he decided to be the CEO of like a hospital. Explain what he was doing for the Hospital.” (Tr. 596). Johnson said after making those remarks, Dhuper said, “*He couldn’t believe that a group of people that take care of patients would behave like this.* He had a stack of papers, like a folder that he was showing that he held in his hand.” (Tr. 596, emphasis added). According to Johnson, Pereyra attempted to hand Dhuper “a stack of papers.” (Tr. 597). Dhuper stated he did not “want to see anything else, and he tapped the stack of paper.” (Tr. 597). According to Johnson, Dhuper said, “What’s in here [the stack of paper] is disgusting and I don’t want to see anymore [sic].” (Tr. 597). Johnson stated that Dhuper said, “he would fire any people, because we didn’t do anything.” (Tr. 597). Johnson said she spoke up to say she did “do something, I said I told Joe Marino.” (Tr. 597). Dhuper then asked what did *Joe Marino* do? Johnson replied that

“he [Joe Marino] *didn’t do anything* and he said I could fire people that did something *and the people that didn’t do anything.*” (Tr. 597, emphasis added). When asked if Dhuper clarified those remarks, Johnson said that, “If he did, I don’t remember.” (Tr. 597).

According to Rose Rogers, the meeting began by Dhuper saying, “I would fire all of you, those of who spoke up and those of you who did not.” (Tr. 736). According to Rogers, Dhuper did not clarify his statement. Rogers recalled very little about the meeting, other than her testimony quoted above. She did recall Dhuper “mentioned that he was appalled that some of the things that were going on in our department, and he said that he would try to come up with some solutions. And then, he wanted us to come up with solutions.” (Tr.736).

According to Amanpreet Kaur, “Mr. Dhuper was quite upset that he had to hold a meeting for our department because of all the stuff that’s been going on. So, he said he just fire everybody and hire new people. So, that’s something I remember. And, that’s mainly what I remember from that.” (Tr. 815).

Rozanne O’Keefe attended the department meeting. CEO Dhuper started the meeting. O’Keefe recalled:

Aman Dhuper was the – in control of the meeting. He introduced himself to those – the employees who didn’t know who he was. He had recently become the CEO within a few months prior to that, talked about the hospital, what we had done, the improvements we had done. He also expressed a very profound disappointment that the behaviors that he had been hearing about was that he has a firm belief that where you work, you should enjoy where you work, we’re here, and he does everything in his best to make that happen. So he was very disappointed in the behaviors he was told about. He talked about the respiratory department itself and asked employees if they had any concerns, questions about the operations. This was their time to have an open forum and he was there for them.

(Tr. 2290-2291). O’Keefe said the meeting ended with Dhuper inviting employees to meet with him, if they so wished. Dhuper told the employees, “He was more than willing to meet with an employee, but don’t just bring your problem, bring a solution. He was more than willing to meet

with all of them. One of the employees, and I don't remember who, said they would – they would meet with Aman, but not if Joe Marino was present or Joe Ambrosini was present. And Aman stated I will meet, but I will not meet alone, that Rosanne O'Keefe, as a director of nursing, would be present. Call his secretary, Shawnee Davis, make an appointment.” (Tr. 2293).

Aman Dhuper said when he received the email from Backus (GC-37), he was “shocked.” (Tr. 2409). Dhuper said, “**I** come from a minority background, I – I was shocked. It was – it had bullying, harassment, origin, race, retaliation. I mean, it had a lot written in it. And I just needed to understand what was going on.” (Tr. 2409-2410, emphasis added). After speaking briefly with O'Keefe and Ambrosini, Dhuper immediately scheduled a department meeting. (Tr. 2413). Dhuper started the meeting by introducing himself as the new CEO and providing a brief history of St. Rose. (Tr. 2416). Dhuper told the employees, “I am the new incoming CEO, but I had been associated with the hospital for several years before that, some of the improvements that we had made in the hospital. And I recently was advised – and I didn't take any names that I remember. But I was recently made aware that there are concerns and I wished to hear them and see if I can bring any solution to their problems.” (Tr. 2416-2417).

Dhuper testified that initially he kept his remarks general. Dhuper recalled, he “thanked the staff for all their support and for years of their service. I did bring up a concern that if anybody wished that they would like to see things done differently or any improvements, that I would be open to listening to it. And I – then I – when I said that I received – received an anonymous complaint or anonymous concern, I would like to know what is going on in the department and I wanted to hear from the staff.” (Tr. 2417).

Dhuper recalled that a few of the employees spoke. Pereyra raised concerns about text messages he had received. Dhuper recalled that, “there were other employees who brought up

concerns about, you know, just overall that they had issues in the department. And when I realized that it was becoming a little bit much longer and much more deeper, I encouraged staff to schedule a one on one meeting with me because I didn't want, you know, for the sake of, you know, professional etiquette, I didn't want a lot of, you know, dirt to come out. Because I was feeling the – from few employees that there were – *there were issues that were highly unacceptable.*” (Tr. 2418, emphasis added).

Dhuper said Pereyra had “a folder with – you know, there were – there were pictures. There were text messages. There were some printouts. And I felt there were men in the room and women in the room and I didn't want to dig deep in front of a room full of people.” (Tr. 2419). Dhuper recalled other employees talked about scheduling and phones not working and other general concerns. (Tr. 2420; 2421). Dhuper identified GC-76 as an accurate “synopsis” of the meeting. (Tr. 2422). During the meeting, Dhuper asked the assembled employees, “are they happy working here? Are they satisfied? You know, Why am I – Why are we having this meeting? I often asked the staff about this as I do my rounds and when I meet with staff, so . . . so I'm sure I made – I – I said this to make sure that the staff understands that I care about them and you know, I care about their happiness. I care about their well-being --.” (Tr. 2431-2432).

According to Dhuper, the meeting “ended normal.” (Tr. 2437). He recalled, “The staff brought up their concerns. . . . I'm going to personalize it to myself that I understand that when the meeting is ended, even though everyone has spoken, I would try to go around the room and see if anybody had any last comments before I adjourned the meeting. . . . I had requested the staff that they schedule a one-on-one meeting with me, call Shawnee Davis in my office in administration, and I wish to hear from each one of them who wished to come talk openly, and I'll be happy to listen to them one on one, because it came to me that in this meeting quite a few people

had a lot to say. Some had opinions, some had facts, some were suffering, some were – you know, so.” (Tr. 2437-2438).

It is not surprising that Roop, Backus, Pereyra, Johnson and Rogers would recall statements from the December department meeting differently. Ambrosini described the meeting as “tense.” (Tr. 1597). How could it not be? The meeting was held only a few days after Backus sent her email alleging racial and other harassment in the department. Dhuper was a new CEO and this was the first time he had ever addressed the respiratory therapy department as a group. Many of the respiratory therapy department employees had never met him. Everyone in the room was listening to Dhuper through the filter of their own experiences and concerns. Of the employees who testified, Backus, Pereyra and Johnson were the most consistent in their description of what Dhuper said:

Backus: Dhuper chastised the group for *not* speaking up and said *if* he had to fire anybody, he would have to fire us all because *nobody spoke up*. (Tr. 253).¹⁸

Johnson: Dhuper said he could not believe that a group of people that take care of patients would behave like this and he would fire any people because *we didn't do anything*.¹⁹ (Tr. 597).

Pereyra: Dhuper said he was disgusted about what's happening in the RT department²⁰ and that everybody in that room should be fired. (Tr. 452).

Dhuper's remarks, in the context of the meeting, do not constitute an unlawful threat. Dhuper's remarks cannot be reasonably interpreted to mean that he was threatening employees for *raising* issues (collectively or individually). Dhuper was, by all accounts, appalled and disgusted by the inappropriate conduct reported to have occurred in the department. Dhuper's remarks are not directed as a threat to any employee engaging in Section 7 activity. To the contrary, the

¹⁸ This is a call from Dhuper for employees to *speak up*, not a threat to keep silent.

¹⁹ Clearly, a call to engage – take action – *report* inappropriate conduct.

²⁰ A reference to inappropriate conduct, not Section 7 activity.

remarks are directed at the underlying inappropriate behavior which caused employees (like Backus and Pereyra) *to speak out*.

Dhuper is saying (albeit nicely) what the hell is going on, how has this behavior gone on so long, *and* stop it before everybody gets fired. Honestly, given the toxic nature of the department, one wonders why he didn't fire everybody and just start over. Instead, Dhuper *invites* all employees to talk to him, bring your problem *and* bring solutions. Dhuper's comments simply do not threaten adverse action *for engaging in Section 7 activity* – the theme of the entire meeting is: I'm here, you wanted to tell me, so, talk to me. If you don't want to talk here, see me one-on-one. Dhuper's remarks do not violate Section 8(a)(1).

2. December 18, 2016

True to his word, Dhuper met with all employees who expressed an interest in meeting with him. Roop testified she met with Dhuper on December 18 in the board room near Dhuper's office. According to Roop, Rozanne O'Keefe was present at the meeting. (Tr. 119). Roop stated the meeting began by her introducing herself and telling Dhuper how long she had been working at the Hospital. Dhuper asked Roop, "What are your concerns?" (Tr. 119).

O'Keefe recalled that Roop expressed that she felt "disrespected in the department." (Tr. 2300). Dhuper recalled the meeting with Roop. He said the entire conversation "was around Marie pretty much. You know, Marie this, Marie that, Marie this." (Tr. 2461). Dhuper suggested Roop speak to her *union representative* and try to put "personality" issues aside. (Tr. 2461). Dhuper said, "Can we really, you know, honestly just act like adults and, you know, kind of let go of a few things here and there that were bothering you?" (Tr. 2461).

According to Roop, during the course of the conversation, Dhuper asked her if "there are two groups and *which group do I belong to.*" (Tr. 121, emphasis added). Roop said she did not

belong to any group and that she is “one of the individuals. If I don’t feel that something is right and I’m not treated right and people are not following rules, I’m going to speak up.” (Tr. 121). According to Roop, Dhuper then said, “Are you the ring leader?” Roop told Dhuper that, “I take that very personally. *I’m not the ring leader.* . . . And, I said I’m not the ring leader. Like I said, when they something [sic] that’s not right, I will speak up.” (Tr. 121, emphasis added).

In *Rossmore House*, 269 NLRB 1176 (1984), affd. 760 F.2d 1006 (9th Cir. 1985), the Board reiterated the basic test for evaluating whether interrogations violate Section 8(a)(1) of the Act: whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act. It is well established that interrogation of employees is not illegal per se. Section 8(a)(1) of the Act prohibits employers only from activity which in some manner tends to restrain, coerce or interfere with employee rights. To fall within the ambit of Section 8(a)(1), either the words themselves or the context in which they are used must suggest an element of coercion or interference. Thus, the circumstances of the questioning determines its unlawfulness.

The Board seeks to determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it was directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act. *Westwood Health Care Center*, 330 NLRB 935, 940 (2000).

It was no secret that Roop and Matuszak did not, would not, or could not coexist without attacking each other. Their petty bickering took place on an almost daily basis. As virtually every witness at the hearing said, their actions caused the department to split into two camps and made dysfunctional a department which was once the envy of all employees in the Hospital.

Dhuper, the *newly* appointed CEO, knew, in general terms, that the department was split into two factions. At the time of the meeting with Roop, he does not have the history others had about the level of animosity between Roop and Matuszak. That he would ask Roop about “teams” is not surprising. It would be more surprising if he *didn’t* ask. There *were* two teams. The department *was* split. There *were* issues between Roop and Matuszak. Roop and Matuszak *were identified* as the leaders or captains of the teams. These are not secrets.

Context is important. Review the sequence of what Roop said she was asked by Dhuper. Logically, Dhuper first asked if there were two groups. He then asks Roop which group she belonged to. Roop says she said she wasn’t a part of any group. Dhuper may not have the historical knowledge of some of the long-term employees, but he certainly knew there were two “groups” in the department. Roop had just told Dhuper, “if I don’t feel that something is right and I’m not treated right and people are not following rules, *I’m going to speak up.*” (Tr. 121, emphasis added). He then asks, according to Roop, are you the ring leader? She just said *she will speak up* if she feels something is not right. His question is, ok, are you speaking for others? There is no evidence Dhuper had any concern with issues being *reported*. To the contrary, he is soliciting employees *to report* their issues directly to him.²¹ The record evidence supports the finding that the he encouraged the reporting of issues relating to the working conditions in the department.²²

²¹O’Keefe testified about the one-on-one meeting with Backus and Dhuper. At the beginning of the meeting, since O’Keefe had never met Backus, she introduced herself and stuck her hand out to shake Backus’ hand. Backus “blew past me [O’Keefe] and said I know who you are and sat down. (Tr. 1201). O’Keefe stated that the meeting began with Backus making allegations with regard to Matuszak. Backus “talked about discrimination, retaliation. Aman stopped her and asked her if she *personally* had been involved in any altercations, any discrimination, any retaliation, any harassment. She responded no. He said I want to be very clear, you have not been involved directly with any harassment, discrimination, retaliation? And she said that is correct.” (Tr. 2301, emphasis added). O’Keefe said Dhuper then responded to Backus by saying, “so you are the speaker of the house for the group? And, she said, *yes*. Dhuper said I’m really only interested in what has happened *to you personally that you have experienced.*” (Tr. 2301, emphasis added).

²² This is not to suggest asking if an employee is the “ringleader” can never violate Section 8(a)(1). In some other context, asking that question may well be an unlawful interrogation.

For an interrogation to be unlawful, “either the words themselves or the context in which they are used . . . [must] suggest an element of coercion or interference.” *Midwest Stock Exchange, Inc. v. NLRB*, 635 F.2d 1255, 1267 (7th Cir. 1980). The words used by Dhuper in the context of the conversation in no way suggest that Dhuper may take action against Roop for engaging in protected activities. *See, Graham Architectural Prods. Corp. v. NLRB*, 697 F.2d 534, 537 (3rd Cir. 1983) (an employer’s questioning becomes coercive and runs afoul of section 8(a)(1) when it ‘suggests to the employees that the employer may take action against them because of their pro-Union sympathies’). The meeting was initiated by Roop, the conversation was casual and amicable in a non-threatening environment designed specifically for Roop (like the other employees who so desired) to speak freely to Dhuper. In that context, Dhuper’s questions, if asked exactly as alleged by Roop, do not violate Section 8(a)(1).

3. Late December 2016, During Separate One-on-One Meetings with Employees

Backus testified that she met with Dhuper in a one-on-one meeting. Prior to the meeting, Backus emailed a list of issues and concerns to Dhuper. (Tr. 256; GC-38). Dhuper began the meeting by asking Backus to tell him something about herself. Backus said Dhuper also asked her to explain the papers (GC-38) that she had sent to him. Backus asked if Dhuper had read the information and he indicated he had not. Dhuper stated, “Right now, I want you to talk to me about what happened to *you*.” (Tr. 257, emphasis added). Backus said she told Dhuper, “She had a very big problem, very big issues with the gorilla pictures.” (Tr. 257). Backus said that she told Dhuper, “They weren’t nice pictures at all.” (Tr. 259). Dhuper said he would investigate and would get back to her. (Tr. 259). Backus said she did not speak to him about anything else in the meeting. (Tr. 259).

Pereyra testified that he scheduled a one-on-one meeting with Dhuper. Pereyra stated that Dhuper began the meeting by asking questions about how long Pereyra had been at St. Rose and what his title was. (Tr. 454). According to Pereyra, Dhuper then said, “Something like, I should be just at fault as the other people who’s doing all the harassing.” (Tr. 454). ALJ Giannopoulos interjected, “He just blurted that out?” Pereyra responded, “Yes, Your Honor. He said to me, that you’re just at fault as the other people doing this to you. You haven’t done enough to protect yourself.” (Tr. 454). Dhuper did not “blurt out” any such thing. Dhuper testified extensively on direct and cross-examination about his meeting with Pereyra. Dhuper called it “one of the most disturbing meetings I had.” (Tr. 2442). During the meeting, Pereyra *asked* for Dhuper’s *help*:

. . . He asked for my help from a perspective of, you know, Look at all this. . . .
How should I deal with it? What should I do?

(Tr. 2443). Dhuper gave him practical advice – e.g., shut down you Facebook account, block the phone number. (Tr. 2444; 2567). Dhuper told him as CEO he was responsible for what happened on the Hospital’s campus. But, “outside of this building, you have issues or concerns, you must seek some help – whatever you need to do.” (Tr. 2445).

Marco Garcia testified that he met with Dhuper in December 2016 after the department meeting. (Tr. 551). Garcia said the meeting began with him expressing his “concerns about our department having a lot of issues and wanted to, maybe, you know, anything that we can do to go back to the way we were. Because we used to be a really good department. Everybody got along really well. We were probably the envy of the whole hospital, the respiratory department. So just to express my views on the things that are going on, inappropriate behaviors.” (Tr. 551-552).

Monique Johnson testified that she had a one-on-one meeting with Dhuper in December 2016. Johnson stated the meeting began with Dhuper introducing himself and asking her to tell him her name, her position and how long she had worked at St. Rose. (Tr. 598-599). She said she

recalled Dhuper asking her, “What team I’m on.” (Tr. 599). In response, Johnson said, “Are you asking if I’m on the Babita Roop’s team and he said, *no, that’s not what I’m asking you*, and I said that’s what you want to know.” (Tr. 599, emphasis added). At some point during the meeting, Johnson said Dhuper said, “Who are the people causing the problems, *and I said its – the troublemakers are*, maybe he said who are the troublemakers – either he asked who.” (Tr. 600, emphasis added). When asked by Counsel for General Counsel to “take a second and try to remember what you recall,” Johnson stated, “Okay, he said who are the troublemakers, I said it’s Marie, Marie is the queen, she is the one that controls everything. I said if you get the people who are sending these text message, then you’ll take care of the whole problem, you won’t have any more problem.” (Tr. 600). Dhuper thanked Johnson for coming to speak with him and said if she had anything else to add to come back and let him know. (Tr. 600).

Amanpreet Kaur testified that she attended one-on-one meeting with Dhuper in December 2016 or January 2017. (Tr. 115). According to Kaur, Dhuper started the meeting by asking her if she was a full-time employee and how long she had been working at St. Rose. (Tr. 816). Kaur stated that Dhuper asked if she did “PFTs at Kaiser.” Kaur responded that she did and Dhuper asked her if she were to get certified and was offered a job at St. Rose, would she take it. Kaur said she would have to think about that when the offer came. (Tr. 816). Kaur testified that Dhuper then asked her, “Which side I was on, am I on Babita’s side or Marie’s? So, I said, I’m neutral. I just want to come to work to do my job and not have to deal with the department issues. I just want to take care of my patients. And, that’s really it.” (Tr. 816). Kaur recalled nothing else from the meeting.

Respondent submits that the record does not support any finding that Dhuper unlawfully interrogated employees in any separate one-on-one meetings in December 2016.

The “troublemaker” comments attributed to Dhuper by Johnson and the question about “which side” are you on to Kaur, do not constitute unlawful interrogation. Johnson initially testified that Dhuper asked, “who are the people causing the problems,” to which *she* answered by saying, “the troublemakers are “. . .” (Tr. 600). Johnson then said, “*maybe* he said who are the troublemakers.” (Tr. 600, emphasis added).

Dhuper said in the one-on-one meetings with employees he asked the employees if there *was* a camp. If they answered yes, and acknowledged the division in the department, he asked what “team” they were on. (Tr. 2585).

Respondent submits that while Johnson’s testimony is unclear as to whether Dhuper used the word “troublemaker,” even if he did, there is nothing unlawful about Dhuper asking who the “troublemakers” were. Whether Dhuper used the word or not, it is clear he is not tying the word “troublemakers” to those employees raising Section 7 issues. Likewise, Dhuper asking which “side are you on” is not an unlawful interrogation. As is clear, there were two sides. *It was not a secret*. Dhuper is not asking about Section 7 activities of any employee. He simply wanted to know what the problems are and who is causing them. The whole concept of the meeting was to allow employees, if they wished, to talk *freely* to Dhuper without the presence of Marino and Ambrosini. Each of the meetings was set only after the employee initiated it by scheduling an appointment. Prior to the meetings, Dhuper told all the employees: Bring your problem, but also bring a solution.

The department was in disarray. Dhuper had been advised there was racial discrimination, bullying and acts of harassment in the department. An employer has a legitimate business interest in investigating complaints of employee misconduct, including claims of harassment and threats.

Information was shared, voluntarily, by the employees who met with Dhuper. The evidence does not support a finding of a violation of Section 8(a)(1).

4. Late January 2017 in the Breakroom

Babita Roop testified that Dhuper came to the department toward the end of January 2017, during the evening. (Tr. 122-123). Roop testified that Susan Dashouk was present as was Chris Hamid. According to Roop, Hamid was not present in the department for the entire time that Dhuper was there. Hamid came in and out. (Tr. 123). Roop said Dhuper asked her how she was and said, “Is there anything else going on in this department?” (Tr. 123). Roop indicated, “Not that I know.” (Tr. 123). Dhuper casually pulled up a chair and sat with Roop, Chris Hamid and Susan Dashouk. (Tr. 126-127). According to Roop, Dhuper “said to Chris Hamid that this department has too many issues and he said that last week I sent one of my lawyer to sit in a case that Joje Pereyra was in. It was a restraining order case against Kevin Seigal. And he said that was just a waste of time. (Tr. 127). Hamid did not respond. (Tr. 127). Roop testified that Dhuper then looked at her and said, “Babita is the ring leader; she’s the troublemaker; when anything happens, she initiates things and everybody else jumps on the bandwagon and she does that because she thinks she’s been here for a long time and she has a right to and then he looked at me [Roop] and he smiled he said, you know, I’m joking.” (Tr. 128). Allegedly, Dhuper then looked at Hamid and said he had, “Fifteen pages of complaints about you [Hamid].” (Tr. 128). Roop said there was a stat call to the emergency room and the meeting broke up. (Tr. 128).

Susan Dashouk testified that Dhuper came to the respiratory therapy department at the end of her shift. Babita Roop and Chris Hamid were also present. When Dhuper came to the department he asked, “Is there any drama going on, any pictures or anything I need to know?” (Tr. 768). After Dhuper’s comment, Roop “went into the locker and she gave him [Mr. Dhuper] a

stamp.” (Tr. 768). The stamp was the WTF stamp. After Dhuper took the stamp he thanked Roop for giving it to him. (Tr. 768). On direct examination Counsel for the General Counsel asked Dashouk whether Dhuper said anything *about Roop*. Dashouk testified Dhuper said, “In a *jokingly way*, like, oh, you’re the instigator of, like, the drama going on.” (Tr. 769, emphasis added). *Dashouk specifically remembered that this conversation occurred at the time Roop gave Dhuper the WTF stamp.* (Tr. 770). Dhuper asked Dashouk her name because this was the first time they had met. When she replied, Dhuper said, “I don’t have anything against you, and then, but he was, like, but with Chris he was like, he was, like, I have, like, twenty pages of complaints or something along those lines.” (Tr. 770). When asked whether Roop said anything in response to Dhuper’s comments, Dashouk said, “She kind of *laughed* it off.” (Tr. 771). Dhuper left the department with the WTF stamp. (Tr. 771).

Dashouk’s testimony puts Dhuper’s remarks in the proper context. He now has the WTF stamp. He “jokingly” *says to Roop who had just given him the stamp*, “Oh, you’re the instigator of, like, the drama going on.” (Tr. 769).

Dashouk was subpoenaed to appear at the hearing by the government. (Tr. 765). This allegation is the *only* thing she was asked about on her direct testimony. Dashouk was a disinterested witness – she had no reason to favor any party in this proceeding. Obviously, Roop, as a Charging Party, has an interest to shade her testimony in a way she believed best served her interests. To the extent Roop’s testimony on the event alleged in this paragraph is contradicted by Dashouk’s testimony, Dashouk’s testimony should be credited. Crediting Dashouk’s testimony, and reviewing Dhuper’s remarks in proper context, the comments are not coercive or disparaging and the ALJ should so find.

5. February 7, 2017, Alleged Solicitation of Employees to Quit

Roop testified that she sought out Dhuper in the board room near his office. No one else was present. According to Roop, when she met with Dhuper she told him, “I’m under a lot of pressure and I think I gave you the WTF stamp and now I’m being picked on more than before.” Roop testified, Dhuper asked her, “How do they know that you gave me the WTF stamp?” (Tr. 149). Roop said Mike Ghandi asked about it but said she did not know how he found out. (Tr. 149). According to Roop, Dhuper then said, “So, if these people [employees] are picking on you, why don’t you just quit?” (Tr. 150). Roop responded by saying she, “started in 1999 working here and after a year, I got – when I started I was on-call and then I became benefitted which means I had benefits. I was like a regular staff. I said after a year, St. Rose was having financial problems and they took away a couple of position and mine was one of them. So, they gave me a choice either I become on-call, be still a staff or go find another job. So, I told him, I said, I didn’t quit because I work a very hard; I continued to work hard and got my position back. And then I told him five years ago, since five years we have not got a raise in this hospital. We have – our pension has been taken away and I still didn’t quit. *So, I’m not going to quit because people want me to quit.* I’m going to quit on my own terms.”²³ (Tr. 150, emphasis added). Dhuper responded, “*Well, just ignore those people and keep doing your job.*” (Tr. 150, emphasis added).

Dhuper testified that he never suggested Roop should quit. To the contrary, he *encouraged* Roop not to quit. Dhuper said he told Roop, “if you are so unhappy, what is it that I can do to help you be happy? *If people are picking on you, you must ignore the topic. Come to work, perform your duty, go home. Don’t let people care about it.* There are many things that I don’t like in my

²³ The words Roop uses in reply to Dhuper are significant. She says I’m not going to quit because *people* want me to quit. (Tr. 150, emphasis added). Roop’s answer does not support she viewed Dhuper’s question to her that *he* was soliciting her to quit.

portfolio of duties, and it was really a very brief, private, you know, one-to-one, two mature people talking conversation. It was not a scheduled meeting. I happened to work – I usually work pretty late in the office until 6, 7:00 in the evening. *She walked into my office.* I politely opened up the conference room. As I do with everyone, *I offered her a cup of tea or water.* And what I remember, from a very brief section of that meeting was if there was no encouragement of resigning or, you know, what you're asking, but it was really, you know, just ignore it.” (Tr. 2609-2610, emphasis added).

It is well settled that *soliciting an employee to quit* when motivated by their union or other protected activities is coercive and threatening, because it conveys to employees the clear message that engaging in Section 7 activity and continued employment are not compatible. *See, e.g., L.A. Baker Electric*, 265 NLRB 1579, 1580 (1982). Simply stated, Dhuper did not *invite* Roop to quit. To the contrary, in Roop's own words, he encouraged her to “ignore those people [picking on you] *and keep doing your job.*” (Tr. 150, emphasis added). Dhuper's comments do not violate Section 8(a)(1).

6. Mid to Late March 2017

Roop testified that in March 2017 she had another interaction with Dhuper. Roop testified that there was a stat call to the ER and that she and Pereyra left the department to respond to the call. As they were walking toward an automatic door designed to open on its own, she saw Dhuper. (Tr. 160-161). Roop said she said hello to Dhuper and then the automatic door would not open. She said that she and Pereyra were in a rush and Dhuper allegedly said, “Don't let the door hit you, that's the only thing left to be done.” (Tr. 161). Pereyra testified that in March or April of 2017 he interacted with Dhuper as he and Roop were responding to a call to the ER. (Tr. 464). Pereyra said Roop was ahead of him as they were “going through the double door.” (Tr. 465). Pereyra

said there was some “temperamental issues or mechanical issues” with the door. Dhuper was walking behind Roop and Pereyra. According to Pereyra, Dhuper allegedly commented, “Don’t let the door hit you, because that’s the only thing you got left.” (Tr. 465).

Dhuper said he saw Roop near the emergency department doors on or about March 30, 2017. Dhuper stated the doors had recently been replaced to automatically open and close. The doors were sensitive, and the Hospital had workers’ compensation claims due to employees being hit by the doors. (Tr. 2490-2491). Dhuper explained, the doors:

. . . opened very fast, and they closed very fast. And so oftentimes, I would tell the staff that be careful of the door, you know, just don’t stand right next to the door, and the door is opening right on your face. Just be careful with it.

JUDGE GIANNOPOULOS: Okay.

THE WITNESS: And so oftentimes, we would tell people that, you know, be careful of the door not hitting you or anything like that. But I did not make any derogatory comment like this.

(Tr. 2491). Frankly, the testimony of Roop and Pereyra, on these specific allegations, seems rehearsed and a bit like “piling on.” Other than this claim, the record contains *no* evidence that Dhuper made any *personal* attack against *any* employee. Dhuper was sincere in his testimony about how he felt (and reacted) to the postings and email attack on Pereyra and Roop – he was disgusted. He was embarrassed to view the emails in the presence of O’Keefe. (Tr. 2443). He always made time to speak with Roop even when she had made no prior appointment. Dhuper took his role as CEO seriously. It is just not in Dhuper’s character to make a statement like the one attributed to him. Dhuper’s testimony should be credited and this allegation should be dismissed.

7. Late March 2017 in the Respiratory Department

Monique Johnson testified that there was a power outage in March of 2017. (Tr. 601). During the power outage she saw Dhuper in the hallway and they had a discussion about the fact

that the power in the respiratory therapy department had not yet come back on. (Tr. 601-602). Dhuper said he would return to the department, but that he had something else to do at that time. (Tr. 602). Dhuper subsequently returned to the respiratory therapy department and discussed the reason the respiratory therapy department was not on a generator. (Tr. 602). According to Johnson, Frank Mardanzai, Phillip Wong and Israel Oliviolo were also present. (Tr. 602). While in the department, Dhuper asked, “Doesn’t it look much better in here?” Johnson agreed that the department did look much better. (Tr. 602). Dhuper said, “there’s nothing on the lockers,” and the WTF stamp “came up.” (Tr. 602). Johnson told Dhuper that, “none of us in the group that he was talking to, none of us would ever do that to anybody’s property and I told him that I was very upset when that stamp ended up on the lockers, and I told Joe Marino that I better not have a WTF stamp on my locker, or there’s going to be more problems. I was really upset about the stamp. I told Aman Dhuper, “You’re talking to the wrong people, we do not destroy people’s property.” (Tr. 602). Johnson *asked* Dhuper, “Is it true that he said he hated the respiratory department.” (Tr. 603). According to Johnson, Dhuper replied, “That’s true, he did say that, he said I don’t hate *you*, but I hate the respiratory *department* for all the *issues* that they cause, all the *problems* that they cause me.” (Tr. 603, emphasis added). Johnson said she told Dhuper, “*We’re* not causing these problems.” (Tr. 603, emphasis added). Dhuper then asked, “Well, then who are the ring leaders?” He said, “you need – if you want something done then maybe you guys should do a petition.” (Tr. 603). Johnson volunteered, “*we know who’s doing these things.*” (Tr. 604, emphasis added). Johnson then *volunteered* to Dhuper that Matuszak had the WTF stamp initially, then it went to Kevin Seigal and then on to Brian Smith. (Tr. 604). Johnson testified that Mardanzai said something, but she could not recall what he said. (Tr. 604). In response to a leading question about whether Dhuper mentioned the PFT lab, Johnson said Dhuper said, “I could close this PFT

lab in a second, he said, but I don't want to do that." (Tr. 604). Johnson said, "we appreciate that." (Tr. 604). Continuing, Johnson asked Dhuper, "why have you taken so long to address what's going on, things have gotten worse." Dhuper said, "I'm giving Babita and Marie, I was giving them a cooling off period." (Tr. 604). Johnson said, "well, nothing's cooled off, its gotten worse." (Tr. 604). According to Johnson, Dhuper said, "If we wanted to take care of the people that are causing the problem, then we should do a petition." (Tr. 604). In response to another leading question from the Counsel for the General Counsel about whether Dhuper said anyone would get "fired," Johnson said that Dhuper stated, "He could fire everyone." (Tr. 605). Out of this entire exchange with Dhuper, Johnson said she sought out Backus (not Roop) to tell her *one* thing: that Dhuper had suggested "doing a petition." (Tr. 605). She said nothing to Backus about Dhuper allegedly saying he could close the PFT lab or "fire everyone" – *not a single word*.

Johnson's testimony on the alleged threat to "fire everyone" is a result of being led to that issue by Counsel for the General Counsel. The "threat" does not make sense in the context of Johnson's testimony about her exchange with Dhuper. Johnson (not Dhuper) is fixed on taking action – she asks him, why haven't *you* taken action, what's taking *you* so long? Clearly, Johnson wants action taken. Dhuper says he is giving Matuszak and Roop a cooling off period. Johnson still wants action from Dhuper and replies – that isn't working. Dhuper then puts the *onus* on the employees to take *concerted* action – get together, do a petition.

Mardanzai testified that he had several interactions with Dhuper during the power outage. (Tr. 792). Mardanzai said that as he was going to different floors he saw Dhuper a number of times in the hallway. On these occasions Dhuper was directing employees as far as what to do and thanking employees for their hard work. According to Mardanzai, these interactions were "pleasant conversation with him [Dhuper]." (Tr. 793). Mardanzai said Dhuper returned to the

respiratory therapy department. At that time, Monique Johnson, Israel Oliviolo and Phillip Wong were present. Mardanzai said Dhuper returned to the respiratory therapy department to “check up on the group and to thank them for all of their work.” (Tr. 793). According to Mardanzai, Monique Johnson said, “*jokingly*, that you hate the respiratory department and he, *jokingly*, replied back, yes, I hate you all, *jokingly*.” (Tr. 794, emphasis added). Mardanzai continued by saying that this was at a time “where a lot of the HR stuff was going on and write-ups and a lot of just *bad hostility in the department*. And, so he was aware of all of it. And, he just kind of went on this rant that, you know, I’m sick of you guys, I’m tired of this. *And, I didn’t take any of that seriously*. But, he became more and more – more and more angry it seemed like.” (Tr. 794, emphasis added). Mardanzai said Dhuper “was angry about the *situation*. He pointed at me. He pointed at Phillip. And, he used his finger and he pointed it at Israel. And, he said, just because you three think that you’re not involved in the *drama* that’s going on, you’ll be fired as well and if you want to sue me, get in line.” (Tr. 795, emphasis added). Mardanzai replied, “Why don’t you just fire *the two people that are causing all this*? And, he said, I’m well aware of the ring leaders. I’m well aware of the two people causing all the *drama*, but because they’ve been here 15, 20 years, *I want to give them the respect to try to work it out on their own*.” (Tr. 795, emphasis added). Mardanzai said Dhuper said, “*you guys as a department should come together, get a petition going, come to HR, come talk to me. . . . If you guys see something going on that’s wrong, you guys need to fix this*.” (Tr. 795, emphasis added).

According to Mardanzai, Johnson said, “Well, why don’t you just – why don’t you just handle the two people that are causing all this? And, he said, I know *what’s* causing all this, it’s

the PFT lab. And, he's like, I can close the PFT lab tomorrow. I can close it tomorrow."²⁴ (Tr. 795, emphasis added). Mardanzai said there was additional conversation that he could not recall. (Tr. 796).

ALJ Giannopoulos interjected:

JUDGE GIANNOPOULOS: And, when you told Mr. Dhuper – when you mentioned the two people involved, why don't just fire the two people involved or take care of the two people involved?

THE WITNESS: Yes.

JUDGE GIANNOPOULOS: Who were the two people that you were referring to in your mind?

THE WITNESS: Babita Roop and Marie Matuszak.

JUDGE GIANNOPOULOS: All right. And, was it well known within the department that those were the two people that were causing all these problems?

THE WITNESS: Yes.

(Tr. 796).

There was no interrogation or implied threat to close the pulmonary function lab *because* employees had engaged in protected concerted activities. This was a candid, frank conversation about issues which had been widely discussed on a number of occasions. The conversation, based on *Dhuper's* statements, is actually about *not* terminating the two known "ring leaders" causing all the *drama* that was happening in the respiratory therapy department. Johnson and Mardanzai both encouraged Dhuper to fire or take action against Roop and Matuszak. *Dhuper said, "no."*

The other message sent by Dhuper was equally clear and it was *not* to stop all this protected concerted activity or else, as the government contends. Rather, it was just the opposite. Dhuper's

²⁴ The PFT lab, specifically the manner in which a position had been filled in the PFT lab, was something that had been identified by some employees as a reason the department split into "teams." (Tr. 1353; 1356-1358).

message was: *as a department, come together, get a petition going, come to HR, come talk to me*. Dhuper, contrary to what the government contends, was supporting, if not actively, soliciting protected *concerted* activity.

Dhuper's comments, in the context of the entire conversation, in this particular work environment,²⁵ do not violate Section 8(a)(1).

C. Allegations Relating to Joe Marino

Paragraph 6(c) of the Fourth Amended Consolidated Complaint alleges that Joe Marino unlawfully interrogated, polled and threatened employees.

1. November 2016 Alleged Interrogation

Rose Rogers testified that Joe Marino called her to his office in November 2016. According to Rogers, Marino told her that their conversation was strictly confidential. Thereafter, Marino allegedly asked Rogers if Roop discussed anything with you in regards to a meeting that she had with HR. (Tr. 730). Rogers told Marino that she would not answer the question and that Marino said nothing further. (Tr. 730). Rogers told Marino, "You know where I stand in this department. I'm friends with everybody and I will not answer that question." (Tr. 730). There was nothing else said in the conversation between Rogers and Marino. (Tr. 731).

Rogers spoke to Marino the next day in his office. She initiated the conversation with Marino and she told him she was very disappointed and asked why he would "attempt to put me in the middle of the situation?" (Tr. 731). Marino apologized. (Tr. 732; 1464).

Marino had been advised that information from a November 14 investigatory meeting – specifically the names of the individuals who submitted a hostile work environment claim against Roop (Matuszak, Hamid and Smith) had been disclosed to others in the department. Marino

²⁵ The respiratory department at St. Rose was not a typical work environment. In a different work setting, these same comments might violate Section 8(a)(1).

advised Ambrosini and sought advice. (GC-74). Believing a violation had occurred, Marino sought to investigate. Marino spoke to Rogers. Marino also spoke to Amanpreet Kaur.²⁶

Amanpreet Kaur testified that Marino asked her if she knew about “a confidential meeting” in HR. (Tr. 817). When she said she had not, Marino said, “good, because it was confidential.” (Tr. 817-818). Kaur never mentioned the conversation to any other employee. (Tr. 818). During this conversation Marino never mentioned Roop. (Tr. 818). Marino also asked other employees about the leak and whether they had “seen anyone” handing out bullying and harassment forms. (Tr. 1460-1464). Respondent submits that the Hospital had the right to investigate whether there had been a breach of confidentiality. Marino believed that Roop had violated hospital policy and that discipline may be warranted. (GC-79). Marino conducted his investigation in a manner consistent with the purpose of the investigation. Marino limited his questions to the conduct he believed established a breach of confidentiality by Roop (i.e., did you hear about a confidential meeting in HR; did you see anyone handing out forms). Had anyone answered in the affirmative, Marino may well have inquired further. But, that did not happen. Marino’s questions were tailored to his investigation, were brief and non-threatening, were not followed up and were unaccompanied by coercive statements.²⁷ Under all the circumstances noted, Marino’s questioning was not coercive.

2. December 5, 2016

Roop testified that she was called to Human Resources on December 5, 2016. Roop contacted Shop Steward Kmetz and he accompanied her to the meeting. (Tr. 109). In addition to Kmetz, Ambrosini, Marino and O’Keefe attended the meeting. (Tr. 109). Ambrosini started the

²⁶ Rogers and Kaur were the only witnesses called by the government to testify on this issue.

²⁷ Rogers certainly did not feel compelled to answer or provide a false answer. She said, I’m not answering that question and other than an apology from Marino, that ended it.

meeting and indicated that the meeting had been called because there was a breach of confidentiality in regard to a prior investigatory meeting held on November 14, 2016. Ambrosini asked if Roop breached their confidentiality agreement by disclosing information from the November 14, 2016, meeting to other people. Roop said she did not talk to anyone other than her union representative, Matt Mullany. (Tr. 110). Ambrosini said that it was “pretty coincidental” because respiratory therapists had submitted retaliation and bullying forms to HR. Roop testified that *Ambrosini* said Marino said she had breached the confidentiality agreement and it was “coincidental.”²⁸ (Tr. 110). Roop repeated that she had not discussed the meeting and had no control over what other people do. (Tr. 110). According to Roop’s testimony, Marino made *no* comments during the meeting.

Shop Steward Kmetz testified about the December 5 meeting. Kmetz said that after Roop denied breaching the confidentiality agreement, Roop said perhaps it was Joe Marino that disclosed the information from the prior meeting to others. (Tr. 690). Marino, according to Kmetz, said he did not disclose any information. (Tr. 690). Marino said it was “very coincidental that things we talked about at the meeting – that other people are hearing about it and you were there and its – its just all, you know, it’s a coincidence.” (Tr. 690).

As for the December 5 meeting, the evidence does not establish any interrogation by Marino. According to Roop, during the meeting, Marino did not ask any questions of her. Kmetz testified the only comment Marino made, was in response to Roop saying that maybe he (Marino) leaked the information. Marino replied, he had not, and it must be a “coincidence.” (Tr. 690). The evidence does not support a finding that Marino interrogated any employee in the December 5 meeting in Human Resources.

²⁸ Roop’s testimony on this event is far from clear.

3. February 7, 2017, Human Resources Meeting

Roop testified that she was advised by Marino that there was to be a meeting in Human Resources on February 7, 2017. Roop contacted Shop Steward Kmetz and he attended on her behalf. (Tr. 144). Roop said when she arrived at the meeting with Kmetz, Ambrosini was present as well as employee Mike Gandhi. (Tr. 144). Roop asked Ambrosini why Gandhi was present since “he’s a union member.” (Tr. 145). Gandhi said he was present at the meeting because he had issues with Roop. (Tr. 145). Shop Steward Kmetz said there was discussion about why Ghandi was present. According to Kmetz, Roop said, “this should be a confidential meeting just between us. Why is he [Ghandi] here?” (Tr. 696). After Marino joined the meeting, Roop explained her version of the events with Brian Smith and her subsequent call with Marino.²⁹ In explaining her side of the story, Roop claimed she was outside the department on a phone call with Union Representative Matt Mullany because she was supposed to represent another employee for a hearing in HR. Roop said Marino asked if she was talking to Mullany about “our” staffing issue. Roop said she was not. (Tr. 147). Roop was represented in the meeting by union steward Kmetz. Roop, in describing a phone call she said was between her and Union Representative Mullany, volunteered that she was to represent an employee in a hearing in HR and invited Marino to follow-up or verify that with Mullany. Instead, Marino simply asked her if the call was in regard to “our” staffing issue and Roop said no. (Tr. 147). Apparently, based on this single, isolated comment, the government claims Marino interrogated Roop about her activities on behalf of the Teamsters. Roop brought up her “activities.” Marino followed up by asking only if the issue related to a respiratory department issue. The record does not support a finding that Marino unlawfully

²⁹ The meeting in HR on February 7 was an investigatory meeting to discuss the events which preceded the issuance of Roop’s discipline on February 13. (GC-11).

interrogated Roop about her activities on behalf of Teamsters Local 856 and this allegation should be dismissed.

4. April 18, 2017

Marco Garcia testified that while walking out of the respiratory therapy department with Erik Thom, they saw Marino. (Tr. 555). Garcia said, “And, Joe being, also my – manager, but also, you know, *seemed to be a good friend of mine*, I was, you know, a little concerned because he looked worried. So, I asked him, you know, how’s your day, how you doing today? And he – he – he looked a little stressed out. And, he just said he was stressed out because he might have to be at work, you know, twenty-four hours a day, seven days a week because *some* people that signed a petition *might* lose their jobs. (Tr. 556, emphasis added). Garcia then *volunteered* that he and Thom signed the petition. Garcia *voluntarily* told Marino that they had signed the petition to “try to get things back to normal. . . . We just want things to be back to normal with everybody getting along and – respecting each other.” (Tr. 556). *Marino did not say anything else*. Garcia described it as “just a short conversation.” (Tr. 556).

Erik Thom testified that he was present in the hallway during a conversation between Marino and Garcia. Thom testified that, “[t]he main thing I’m remembering was Marco was concerned and asking Joe about – about job security with regard to this petition, if there was going to be any backlash or whatnot. At some point, Joe commented, not in a hostile way or anything, but – that he may have to get rid of half his department, *seemingly* that he was going to have to be compelled to do so or whatnot.” (Tr. 933, emphasis added).

Monique Johnson testified that she came to work early to speak with Marino and that as he was on his way out of the facility she asked him, “Is it true that you said that we were – anyone that signed the petition is going to get fired? And, he asked me if Marco Garcia is the one that told

me that, and I said, no, that's not who told me. And, he said, you know, is it okay if I talk to you later on, I have someplace to be and I'll come back tonight." (Tr. 609). Marino returned and spoke to Johnson that evening. Johnson asked Marino if he "said that we are going to get fired if we signed the petition? He said, *no*, he had been talking to the hospital lawyer, the hospital lawyer all day." (Tr. 610). Marino recalled that while in the hallway of the respiratory therapy department as they were walking toward the doors, Garcia asked Marino if we "are going to get in trouble in relation to the petition." (Tr. 1389-1390). Marino told Garcia, "I have no idea; I'm not in the decision-making on that." (Tr. 1390). At the time this conversation took place, Marino had not seen or read the petition. (Tr. 1390). Marino did not recall anyone else being present during the brief conversation with Garcia. Marino has known Marco Garcia for twenty-three (23) years. (Tr. 1389).

Marino did not tell employees that employees who signed the petition would be terminated as is alleged in paragraph 6(c)(iv). The evidence reflects that there was only one person (Monique Johnson) who actually asked Marino if those who signed the petition would be terminated. When Johnson asked Marino that question, Marino said, "*no*." (Tr. 610). The record does not support the allegation that Marino threatened employees who signed the petition with termination.

5. April 20, 2017

Nancy Mardanzai testified that she had a conversation with Joe Marino in the department break room a week or two after the petition was presented to the Hospital. Mardanzai said no one else was present. According to Mardanzai, Marino approached her and asked her to sign a document from HR concerning the petition. (Tr. 363). Mardanzai said Marino said, "according to our CEO, whoever signed the petition they will be fired. And, the majority of the department signed it, so majority of department might be fired." (Tr. 363). According to Mardanzai, Marino

asked if she signed the petition and she said she did not. (Tr. 364). Mardanzai identified General Counsel Exhibit 51 as the document Marino was distributing and had asked her to sign. According to Mardanzai, everyone in the department had to initial that he/she had read and understood the document.

Marino testified that on the 21st or 22nd of April 2017, Mardanzai initiated a conversation with him while in the respiratory therapy department. Mardanzai asked Garcia, “if he knew about the petition; I said I did, and she asked did I read it, and I said no, I hadn’t.” (Tr. 1388-1389). Mardanzai continued the conversation asking Marino, “if they were going to get in trouble, and I said I had no idea; that I was not involved in the decision-making; and to that point, I didn’t know who had the petition.” (Tr. 1389). Mardanzai asked Garcia, “are we going to get fired, and I said I have no idea.” (Tr. 1389).

GC-51, the letter drafted by Hospital Counsel Sarrao, makes clear that Respondent encourages employees to raise complaints and concerns with management. Thus, it defies logic that Marino would tell Mardanzai, *while distributing Sarrao’s letter*, that the CEO would terminate whoever signed the petition. Mardanzai said her conversation with Marino took place a week or two after the petition was filed. (Tr. 363). The petition was filed on April 13. (GC-34). Mardanzai also said the conversation took place before Roop was terminated. Roop was terminated effective April 17. (GC-12). Mardanzai’s memory (and testimony) on this event is faulty. Mardanzai’s testimony on this conversation should not be credited.

Marino did not poll employees about signing the petition nor tell employees that employees who signed the petition would be terminated, and the ALJ should so find.

D. Allegations Relating to Joe Ambrosini

Paragraph 6(d) of the Fourth Amended Consolidated Complaint alleges that on December 5, 2016, Joe Ambrosini interrogated employees regarding their protected concerted activities and the protected concerted activities of others.

Roop testified she attended a meeting in the Human Resources Department on December 5, 2016, and Shop Steward Kmetz accompanied her to the meeting, at her request. Roop testified that when she got to the meeting, Ambrosini stated that the meeting had been called because there may have been a “breach of confidentiality” in regards to the meeting we had on November 14, 2016.” (Tr. 109-110). Ambrosini asked Roop if she had breached confidentiality by “talking to other people.” (Tr. 110). Roop said, “No, absolutely not. I did not talk to anybody other than Matt Mullany because he’s my union rep.” (Tr. 110). According to Roop, Ambrosini said that it was pretty coincidental that the Hospital had received retaliation and bullying forms from a handful of respiratory therapists. Roop replied, “Well, a lot of things are coincidental; I said what’s that got to do with my meeting on November 14, 2016.” (Tr. 110). Roop continued by repeating that she did not discuss the meeting with other employees and “what other people do that file forms or submit to HR is supposed to be confidential and how would I know. I don’t have control over what other people say or do.” (Tr. 110-111).

As has been noted, at the November 14 meeting (at which Teamsters was present), information was shared about a hostile work environment complaint filed against Roop by co-employees Matuszak, Smith and Hamid. At the meeting it was agreed that the information discussed would be held in confidence. Despite the agreement to keep the complaint confidential so as not to compromise the investigation, it had been reported that employees in the department had heard about the hostile environment complaint. (GC-25). This concept of confidentiality was not uncommon for the parties. Recall, Roop’s protest (i.e., this should be a confidential meeting

between us) when a respiratory department employee (Ghandi) attended an investigatory meeting. (Tr. 696). The Hospital notified Roop, set an investigatory meeting for December 5, and at that meeting Roop was asked, without objection or comment from Roop or her Union representative, whether she had breached the agreement to keep the meeting confidential. Roop denied that she breached the agreement and that, as they say, was that. Roop was not disciplined in any way. The Hospital had the right to investigate whether Roop had breached the agreement on confidentiality and Ambrosini's question to Roop does not violate Section 8(a)(1).

E. Alleged Violation of *Johnnie's Poultry*

Paragraphs 6(e) and 9 of the Fourth Amended Consolidated Complaint allege that on May 18, 2017, attorney John Doe unlawfully interrogated employees by phone about their protected concerted activities and the protected concerted activities of other employees.

Human Resources Manager Stephanie Jones testified that after the Hospital received the Petition of Right to Protect License and Workplace ("Petition") (GC-34), Dhuper and the Hospital's legal counsel, Mike Sarrao, retained Collin Cook to investigate the issues listed in the Petition. (Tr. 2145-2146). After Cook was retained, Jones introduced Cook (via email) to Union Representative Mullany. (Tr. 2146). Jones advised Union Representative Mullany that the Hospital had retained Cook to investigate the issues outlined in the Petition and the Hospital requested assistance from the Union in scheduling employee interviews. (Tr. 2147). The Union was invited to participate in all interviews with employees and was advised that all employee meetings with Cook were voluntary. (GC-43). Jones also reached out to employees asking if they would participate in an interview with Cook. Jones advised each employee that his/her participation in any interview with Cook was voluntary on the part of the employee. (Tr. 2148).

Monique Johnson confirmed she was contacted by phone by Cook. (Tr. 612). Johnson was aware that Cook would be calling as Human Resources Manager Jones had asked her if she would be willing to speak to a third-party investigator. (Tr. 612). Jones told Johnson that the investigator “was going to be investigating both side, all sides, the Hospital and she just said all side, all side of the story. She said that it wasn’t for – it wasn’t for the Hospital or for us, he’s an investigator, third-party investigator for all the side.” (Tr. 612). Johnson, in response to questions from ALJ Giannopoulos, said that she understood from Jones that the investigator was investigating issues regarding what had been going on in the respiratory department. (Tr. 613). Johnson told Jones that she would be willing to discuss the issues with the investigator. (Tr. 613).

Cook called Johnson and, “introduced himself, he said that he worked for, I think it was Fisher & Phillips. He said that – he asked me if I knew what he was calling in regards to, and I said are you calling in regards to the Petition? And, he said that’s one area, but I’m here to talk to all parties involved, he’s like I’m not on the side of the Hospital or anyone, I’m just here to collect information.” (Tr. 615). Johnson testified that Cook made it clear she was under no obligation to speak to him. Cook specifically told Johnson she “didn’t have to talk to him.” (Tr. 616). After sharing some information with Cook, the conversation ended with Cook telling Johnson if she “thought of anything else, to give him a call, and that he appreciated me being honest with him.” (Tr. 617).

The government contends that attorney Collin Cook, in this phone conversation on May 18, 2017, unlawfully interrogated Monique Johnson about her protected concerted activities and the protected concerted activities of other employees. Respondent submits that there was no violation of the Act and the allegation should be dismissed.

Counsel for the General Counsel contends that Cook was required to comply with the safeguards set forth in *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), *enf. denied*, 344 F.2d 617 (8th Cir., 1965). *Johnnie's Poultry* set out safeguards that an employer must observe in interrogating employees in two, and only **two** instances: with regard to verification of a union's majority status to determine whether recognition should be extended and/or in investigation of issues raised in a complaint where such interrogation is necessary in preparing the employer's defense for trial of the case. *Johnnie's Poultry* does not apply to **all** employer interviews of employees. *Delta Gas, Inc.*, 282 NLRB 1315, 1325 (1987); *Pacific Southwest Airlines, Inc.*, 242 NLRB 1169 (1979).

The longstanding **exception** in *Johnnie's Poultry* to the Board's usual treatment of interrogations reflects the difference between the nature and circumstances of an employer's interviewing of employees **in preparation for litigation** and other interrogations generally. In *Bill Scott Oldsmobile*, 282 NLRB 1073 (1987), the Board held:

Thus, in *Johnnie's Poultry* the Board recognized that an employer's interviewing of employees in preparation for litigation has a pronounced inhibitory effect on the exercise of Section 7 rights, which includes protection in seeking vindication of those rights from employer interference, restraint, or coercion. Despite the inherent danger of coercion in such interviews, the Board permitted an employer to exercise the privilege of interrogating employees in limited situations without incurring 8(a)(1) liability, but established specific safeguards designed to minimize the coercive impact of such interrogations. Accordingly, ***we find that the nature and circumstances of employer interviews in preparation for litigation justify a more formal standard for ensuring that employees' rights are protected***, and that the exception in *Johnnie's Poultry* from the Board's usual treatment of interrogations is fully warranted.

Id. at 1075 (emphasis added).³⁰

³⁰ Courts have criticized the Board's inflexible approach in applying *Johnnie's Poultry*. See, e.g., *NLRB v. Midwest Hanger Co. & Liberty Eng. Corp.*, 474 F.2d 1155, 1161 7.5 (8th Cir. 1973); *Answerphone, Inc. v. NLRB*, 632 F.2d 4 (6th Cir. 1980), denying enf. 236 NLRB 931 (1978); *Dayton Typographical Service v. NLRB*, 778 F.2d 1188 (6th Cir. 1985), denying enf. 273 NLRB 1205 (1984). See, also, former Chairman Dodson's dissent in *Bill Scott Oldsmobile*, 1073, 1076-1077 (1987) wherein he advocated abandoning the

Cook was not interrogating employees in preparation of litigation. *Cook was investigating the allegations* set forth in the Petition. He was not engaged in preparing the Respondent’s defense to an unfair labor practice charge. Simply stated, *Johnnie’s Poultry* does not apply. Cook’s conversation with Johnson must be reviewed under the totality of circumstances test adopted in *Rossmore House*, 269 NLRB 1176 (1984), which involves a case-by-case analysis of various factors, including those set out in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964). These factors “are not to be mechanically applied.” Rather, the factors represent “some areas of inquiry” for consideration in evaluating an interrogation’s legality. *Rossmore House, supra*, 269 NLRB at 1178 fn. 20.

Johnson knew from Jones that Cook would call her and she knew that her participation in the interview was purely voluntary. Cook was an outside attorney, not an employee of the Hospital, with no supervisory authority over Johnson. The interview was conducted by phone. When Cook called, he identified himself, explained the nature of the call, expressed that he was not “for the Hospital or the employees.” He was – as Johnson testified – investigating “all sides.” Cook told Johnson she did not have an obligation to speak to him. Cook’s interview of Johnson was not an unlawful interrogation and Respondent submits that this allegation should be dismissed.

V. RESPONDENT DID NOT VIOLATE SECTION 8(A)(1) OF THE ACT BY DISCIPLINING AND DISCHARGING ROOP

A. General Legal Principles

Paragraphs 7 and 9 allege that Roop was disciplined/discharged for exercising rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1).

Board’s rigid application of *Johnnie’s Poultry* in favor of adopting a “totality of circumstances” test similar to *Rossmore House*, 269 NLRB 1176 (1984) and *Sunnyvale Medical Center*, 277 NLRB 1217 (1985).

Under Section 8(a)(1) of the Act, an employer may not interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by Section 7. In order to determine whether an employee's discharge (or discipline) violates the Act, the Board utilizes the analysis articulated in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393 (1983). To establish an unlawful discharge under *Wright Line*, the General Counsel must first prove, by a preponderance of the evidence, that the employee's protected conduct was a motivating factor in the employer's decision to take action against them. *Manno Electric, Inc.*, 321 NLRB 278, 280 (1996). The General Counsel makes a showing of discriminatory motivation by proving the employee's protected activity, employer knowledge of that activity, and animus against the employee's protected conduct. *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999). If the General Counsel is successful, the burden of persuasion then shifts to the employer to show that it would have taken the same action even in the absence of the protected conduct. *Wright Line*, 251 NLRB at 1089; *Septix Waste, Inc.*, 346 NLRB 494, 496 (2006); *Williamette Industries*, 341 NLRB 560, 563 (2004). Under *Wright Line*:

It is the General Counsel's threshold burden to "make a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." Accordingly, lacking such a "prima facie" showing, the complaint can be dismissed on this basis alone; likewise, it is only when such a showing can be found in the credible record that it may become necessary to the ultimate decision to determine whether the employer has nevertheless made out a defense under *Wright Line*, i.e., to determine whether the employer has, nevertheless, "demonstrated that the same action would have taken place even in the absence of the protected conduct." Moreover, although the Board's phrase, prima facie showing, might imply, standing alone, that the General Counsel's burden is merely one of "coming forward" in its case-in-chief with some evidence pointing in the direction of bad motive. . . . the Board elsewhere made it clear in *Wright Line* itself that the General Counsel's burden is actually one that remains with the prosecution throughout the trial, and does not shift. (The Supreme Court likewise so held in its approval of *Wright Line*'s analytical scheme in *Transportation Management*, observing in the process that the General Counsel's

burden requires proof of the “motivating-factor” element by a “preponderance” of the evidence in the record as a whole.) In short, the General Counsel’s burden in these cases is an ultimate burden of “persuasion” as to the “motivating-factor” element, not merely a burden of “coming forward.”

The New Otani Hotel & Garden, 325 NLRB 928, 938 (1998) (internal footnotes omitted).

Any review of an employer’s decision to discipline or discharge an employee must begin with the recognition that under the Act, “management can discharge for good cause, bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but one specific, definite qualification: it may not discharge [or discipline] when the real motivating purpose is to do that which [the Act] forbids.” *Anheuser-Busch*, 351 NLRB 644, 647 (2007); *Taracorp*, 273 NLRB 221, 222 fn. 8 (1984) (quoting *NLRB v. Columbus Marble Works*, 233 F.2d 406 (5th Cir. 1956)). See, *Manimark Corp. v. NLRB*, 7 F.3d 547, 552 (6th Cir. 1993) (employer may discharge employee for any reason, whether or not it is just, as long as it is not for protected activity (citing *NLRB v. Ogle Protection Serv.*, 375 F.2d 497, 505 (6th Cir. 1967), cert. denied 389 U.S. 843 (1967)). The ALJ could therefore conclude that the discipline or discharge of Roop, while “not just,” is not a violation of the Act.

The Act provides a remedy for actions that violate its terms but not for every discharge that is unrelated to Sections 7 or 8(a). As the Board stated in *Meyers Industries (Meyers II)*, 281 NLRB 882, 888 (1986), enfd. 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988), “The Board was not intended to be a forum in which to rectify all the injustices of the workplace.”

The Board’s statement in *Meyers II* is particularly applicable here as the record shows that Roop and the Teamsters have filed grievances on her written warning/suspension and termination. An arbitrator will, therefore, have the opportunity to decide whether the discipline and/or discharge met the “just cause” standard as stated in the parties’ CBA. Additionally, Roop filed charges with the EEOC challenging her discipline (and treatment) as having been imposed for discriminatory

reasons. The EEOC and/or federal courts will thus determine whether Roop has stated a claim under any applicable discrimination standard.

Finally, Board law does not direct or permit the trier of fact to substitute his business judgment, which is not a fact of record, for that of Respondent. An employer's business conduct is not to be judged by any standard other than that which it has set for itself. *FPC Advertising, Inc.*, 231 NLRB 1135, 1136 (1977).

Roop was issued a verbal warning on November 21, 2016, for unprofessional behavior in the workplace. Thus, under *Wright Line*, an initial review must be made to determine whether Roop *engaged* in protected concerted activity *prior* to November 21, 2016; whether Respondent *knew* of that activity; and the government must prove a connection or nexus between the animus and the discipline – i.e., that the discriminatory animus toward the employee's protected conduct was a substantial or motivating factor in the Respondent's decision to discipline Roop.³¹

B. Protected Concerted Activity

To be protected under the Section 7 of the Act, the employee's conduct must be both "concerted" and for the purpose of "mutual aid or protection." *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 153 (2014). The Board has held that activity is concerted if it is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries (Meyers I)*, 268 NLRB 493, 497 (1984), *revd. sub nom Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), *cert. denied* 474 U.S. 948 (1985), *on remand Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), *affd. sub nom Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied* 487 U.S. 1205 (1988).

³¹ *Nichols Aluminum, LLC v. NLRB*, 797 F.3d 548, 554 (8th Cir. 2015), quoting *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393, 401 (1983).

Three points emerged from the *Meyers II* decision. First, the Board held that a single employee, though not a “designated spokesman” of the employees, could engage in “concerted” activity if he or she “brings truly group complaints” to the attention of management. (*Id.* at 886-887). However, such activity can only be “concerted,” according to the Board, “when the record evidence demonstrates group activities” whether “specifically authorized” in a formal agency sense, or otherwise. *Id.* Relevant considerations include: (a) whether other employees authorized or instructed the individual to speak for them; (b) whether other employees “were aware of and supported” the individual’s presentation to management; and, (c) whether the individual previously discussed a “common . . . complaint” with other employees who, in turn, “refrained from making their own . . . complaint.” *Id.* The Board has emphasized that the question of whether an employee engaged in concerted activities is a factual one which must be determined based on the record evidence.

In *Alex R. Thomas & Co., Inc.*, 333 NLRB 153 (2001), the Board noted that for conversations to be found protected concerted activity, they must look toward group action and that mere “griping” is not protected. *See also, Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3rd Cir. 1964).

The Board quoted with approval in *Meyers II*, the Third Circuit decision in *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3rd Cir. 1964) wherein the court indicated the Act’s protection was unwarranted “when it appears from the conversations themselves that no group action of any kind is intended, contemplated or even referred to.” *Id.* at 685. The Third Circuit concluded:

Activity which consists of mere talk must, in order to be protected, be talk looking toward group action. If its only purpose is to advise an individual as to what he could or should do without involving fellow workers or union representation to protect or improve his own status or working position, *it is an individual, not a*

concerted, activity, and if it looks forward to no action at all, it is more than likely to be mere “*gripping*.”

Id. 330 F.2d at 685 (emphasis added). Concerted activity does not include activities of a purely personal nature that do not envision group action. The Board does not presume that an individual employee’s activity is concerted simply because the matter complained about is of interest to other employees. *Hospital of St. Raphael*, 277 NLRB 46, 47 (1984).

1. Protected Concerted Activity Prior to November 21, 2016

We start this analysis mindful of the Board’s direction that the determination of protected concerted activity is a factual one and ALJ Giannopoulos’ observations on hearsay. Thus, we examine *Roop*’s testimony about her “activities.” Indeed, who would know better than Roop about the activities in which she participated. Roop testified that she spoke up on things that the Hospital did not like; thus, becoming a target. She identified the things about which she “spoke up” as follows:

First was that I went to Human Resources, which was back in June 17, 2016, so support Joje Pereyra about the postings. That was one of it. The other one was June 14, 2016, when I addressed that why some people are not working weekends. And then on the – when Joe Marino blocked my access, I asked – I asked him, because a team leader, I have to schedule procedures and see what’s going on whether its inpatient or outpatient. And if I question him, he’s someone – if someone in PFT’s available, he didn’t want me asking him that.

(Tr. 214). Those events, and others, are set forth below.

Counsel for the General Counsel introduced a document (GC-97)³² representing Marino’s notes of a conversation with Roop in *May 2016*. The notes reflect a personal gripe Roop lodged about Marino’s decision to schedule Chris Hamid in a temporary position as backup PFT tech. When Kevin Seigal resigned, Matuszak (who had been his fill-in) was moved up to Seigal’s old slot. Steve Ochoa was selected by Marino to replace Matuszak. While Ochoa was in training,

³² Roop did not testify about this meeting.

Marino selected Chris Hamid to move into the position temporarily. (Tr. 1356-1360). Roop, acting on her own, complained to Marino about his selection of Hamid. Marino noted his views of Roop's complaint. (GC-97). In Marino's view, since **Roop** did not like Hamid, Marino was supposed to change the schedule to appease Roop. There is no record evidence that Roop met with any employee before or after her meeting with Marino. She did not claim a violation of the CBA. Simply put, she did not like that Hamid was scheduled, went to tell Marino she did not like it and wanted him to change his decision. Marino refused.³³ The record does not support a finding that Roop's conversation with Marino in May 2016, was protected concerted activity.

Roop testified she discussed an issue of working weekends with Marino sometime during the second week of **June 2016**. (Tr. 25). Roop went to speak to Marino on her own. She said she told Marino that there were a couple of people who were not scheduled to work weekends and that **she** had been at the Hospital for 17 years and others working at the Hospital (not named) had been at St. Rose for 20-25 years. (Tr. 25). She said, "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). Marino told Roop, some jobs don't require weekend work and "that's the way it is and we're going to continue doing that." (Tr. 26). Roop testified she told Marino, "You're the manager, I mean you are going to make the decision, but I'm just voicing **my opinion**. **I** just feel like" (Tr. 26, emphasis added). At the hearing, Roop caught herself mid-answer and she editorialized by adding, "and that wasn't just my opinion, a lot of people, like I said, were there for long years and we were all voicing opinions." (Tr. 26). Roop then concludes her initial answer, "but **I** went personally to him." (Tr. 26, emphasis added).

³³ Marino testified that Roop let him know "in no uncertain terms" that she was not happy. (Tr. 1360). Marino testified that he believed his decision to place Hamid in the position, even on a temporary basis, while not the root cause, contributed to the divide in the department. (Tr. 1361).

It was a brief conversation to be sure. Marino did not seem much bothered by Roop's opinion. She did not describe Marino as upset or irritated by the point she addressed. Marino simply told her some jobs required weekend work. The testimony shows Roop expressed her *gripe* to Marino. Roop did not identify any other employee who had a similar concern about working weekends. There was no evidence that any other employees authorized Roop to speak for them or were aware of and supported her "gripe" and no evidence any employee refrained from making their own complaint. Roop said Matuszak confronted her about going to HR to complain about her. Roop corrected Matuszak and said she and the other 6 employees went to HR to support Pereyra. Matuszak said she knew Roop had complained about some people not working weekends, and asked Roop what did you get out of it? Roop said, "nothing, but I'm an employee here for 17 years and I'm sure *I have a right to voice my opinion.*" (Tr. 32, emphasis added).

Nezam "Frank" Mardanzai testified he met with employees and was the one authorized to speak to Marino about a schedule issue. Mardanzai emailed Marino "on behalf of a few of us" seeking "clarification" about per diem employees not being scheduled to work weekends. (GC-62). Mardanzai's email is dated June 18, 2016. Thus, it appears to have been sent after Roop's conversation with Marino. Mardanzai testified he was designated by other employees (including Monique Johnson and Babita Roop) as the spokesperson on bringing their issue to Marino. (Tr. 801-802). It is undisputed that Mardanzai was *not* disciplined for raising this "group" concern.

Respondent submits that *Roop's initial June 2016* conversation with Marino was an individual, not a concerted activity, and was simply her "gripe." As such, the conversation does not constitute protected concerted activity and the ALJ should so find.

Roop testified that on *June 17, 2016*, she went with a group of six other employees to Human Resources to support Pereyra. Pereyra told other employees that he was going to Human

Resources on that day, and, to support him, the employees went with Pereyra to the Human Resources Department. (Tr. 27-29). It is undisputed that Monique Johnson was designated as the spokesperson for the group and it was Johnson who actually met with Human Resources Director Ambrosini. The other employees waited in a separate area while Johnson met with Ambrosini. (Tr. 30). There is no dispute Roop was in the group.

On or around **June 27, 2016**, Roop saw a copy of Steve Ochoa's pulmonary function certificate posted on a bulletin board. Roop testified that she sent a notice to Ambrosini about the posting. (Tr. 39; GC-2). Roop noted on the document: "it did bother a lot of people in our department but ***I cant speak for other people.***" (GC-2, emphasis added). As with her conversation with Marino, Roop's note to Ambrosini does not constitute protected concerted activity – it is a personal gripe of hers.

Roop filed a bullying/discrimination/harassment complaint with Human Resources on June 28, 2016. (Tr. 42; GC-3). In her complaint she cites retaliation and unprofessionalism of co-employee Marie Matuszak. (GC-3). The complaint concludes, "please help me resolve this issue." (GC-3, p. 5). Roop said that after filing the complaint, Marino told her that he had looked at the complaint and that it was all based on "hearsay."³⁴ (Tr. 47). Respondent submits this internal complaint about Roop's issue with another coworker is not protected concerted activity. Whether an employee's activity is "concerted" depends on the manner in which the employee's actions may be linked to her coworkers. In *Fresh & Easy Neighborhood Market, Inc.*, the Board found an employee to be engaged in concerted activity based on her actions in asking three coworkers to

³⁴ The complaint was based on hearsay – Roop had talked to Kaur who repeated a comment allegedly made by Matuszak. (GC-3, p. 5). Marino spoke directly with Matuszak, who told Marino what she said. (GC-65). The government suggests that the Hospital did not investigate or take seriously complaints made by Roop and/or favored Matuszak. HR received the complaint and Ambrosini followed up with Marino to ensure he had spoken to Roop. (GC-67). As shown, Marino did investigate. He simply did not agree the reported incident constituted bullying/harassment. (GC-65).

assist her in bringing a harassment claim to management *by signing* a document she prepared memorializing an incident she considered offensive. Under the specific facts before it, the Board found that the employee's *solicitation* of her coworkers' assistance was concerted and for the purpose of mutual aid or protection. Here, there is no evidence that Roop sought assistance from any other employee – she acted alone and thus, she did not engage in concerted activity.

Roop testified that she and Monique Johnson drafted a list of concerns about department issues to be sent to the *Teamsters*. (Tr. 59; GC-6). GC-6 was drafted on *June 22, 2016*. (Tr. 60). Monique Johnson testified that she drafted the list of issues in GC-6 with the input of several employees, including Roop. (Tr. 586). Marino conducted a meeting to address the concerns. (Tr. 74; GC-7; GC-98).³⁵ Here, assuming that Roop was engaged in protected and concerted activity, there is no evidence that *Marino* (or any other manager at St. Rose) was aware that Roop had any involvement in drafting the list of concerns. The employees did not submit the list of concerns to the Hospital. (Tr. 204).

C. The Government has not Proven that Protected Activity was a Motivating Factor in Respondent's Decision to Issue the Verbal Warning

The only protected concerted activity identified in the record which took place *prior* to the issuance of the verbal warning, and of which Respondent was *aware*, was when Roop went to Human Resources with six other employees on June 17, 2016, to support Pereyra. That event was

³⁵ During the meeting, Roop made one suggestion about scheduling per diem employees. (Tr. 79). As ALJ Giannopoulos noted at hearing, the employees were represented by the Teamsters. While many of the items were discussed by a number of different employees, the Hospital could not make unilateral changes (even if it approved of the suggestion by an employee) without running afoul of Section 8(a)(5). (Tr. 80). If Roop's single statement constituted protected concerted activity, which Respondent does not concede, it took place more than three months prior to the November verbal warning. No other employee who spoke in the meeting was disciplined. The Fourth Amended Consolidated Complaint does not allege that any other respiratory therapy department employee was disciplined in violation of Section 8(a)(1). In any event, Respondent submits the government has not met its burden under *Wright Line*. See, *Snap-On Tools, Inc.*, 342 NLRB 5 (2004) (discipline issued two months after protected activity was not unlawful as it was remote in time from employee's union activity and was issued proximate to the events for which employee was purportedly disciplined).

too remote in time to be a motivating factor in the issuance of the verbal warning.³⁶ The verbal warning was issued five months *after* Roop's alleged protected concerted activity (employee group meeting in HR) and proximate to the event for which Roop was disciplined. *See, Snap-On Tools, Inc.*, 342 NLRB 5, 9 (2004) (discipline issued two months after protected activity was not unlawful as it was remote in time from employee's union activity and was issued proximate to the events for which employee was purportedly disciplined). As such, the government has not met its burden under *Wright Line*.

D. The Government has not Met Its Burden in *Wright Line* by Establishing that Discriminatory Animus Toward the Employee's Protected Conduct was a Motivating Factor in the Respondent's Decision to Issue the Verbal Warning

The Counsel for the General Counsel subpoenaed disciplinary records of employees, which Respondent produced. At the hearing, the government introduced a number of disciplinary records without testimony as to the underlying facts giving rise to the discipline.

Thus, for each disciplinary document, this record is not clear as to whether the individual was covered by a collective bargaining agreement (there were three unions representing employees at St. Rose during the relevant time period) or not, whether the individual had prior active discipline,³⁷ whether, if the employee was represented by a union, the discipline was subsequently

³⁶ In fact, most of Roop's conduct, however it is characterized, occurred in June 2016, *five* months before the issuance of the verbal warning.

³⁷ While the exhibit may refer to prior discipline, or have prior discipline appended to it, that does not, without more, prove progressive discipline was, or was not, followed. For example, the Teamster CBA set a limit on how long discipline remains "active" in an employee's file. (GC-26, Section 25 – Discipline, p. 15-16). Obviously, in that case, only "active" discipline could be considered in determining the progression of discipline. Thus, without knowing if there is a limitation on the time period a discipline is active, which will not necessarily be known by reference only the GC discipline record, the ALJ cannot determine whether the level of subsequent discipline was influenced by "active" prior discipline. In short, the records provided do show a disciplinary history (a history of discipline issued to the employee in the time period covered by the subpoena); but, the records do not necessarily reflect whether the prior discipline was "active" and a factor used to set the level of subsequent discipline.

grieved and/or adjusted,³⁸ whether there were mitigating factors which impacted whether discipline would issue or the level of discipline to be applied, the identity of the ultimate decision-maker is not known, etc. In short, there is no way to determine whether the discipline is a true “apples to apples” comparator with Roop.

In *The New Otani Hotel & Garden*, 325 NLRB 928 (1998), the Board, finding that the record as a whole did not warrant any inference of anti-union motivation for the discharges, upheld the administrative law judge’s dismissal of complaint allegations that the employer violated the Act by discharging three housekeepers because of their activities on behalf of Hotel employees and Restaurant Employees Local 11. In his decision, the administrative law judge wrote a detailed analysis about arguable disparity in treatment in unfair labor practice cases requiring a *Wright Line* analysis. Several of the ALJ’s points have application to this case.

In *The New Otani Hotel & Gardens*, the government placed “heavy reliance” on the claim that the alleged discriminatees were the victims of disparate treatment. The administrative law judge noted, absent some direct, independent and convincing proof that an employer harbored significant anti-union animus, the existence of arguably uneven treatment by different supervisors in their handling of alleged violations of rules cannot reasonably be relied on alone to supply an “inference” that protected concerted activities were a “motivating” factor in the employer’s discipline and dismissal of a discriminatee. *Id.* at 941.

In many cases, “evidence that an employer has applied and enforced a rule against a known union activist, while overlooking instances of identical or substantially comparable misconduct by employees who are known to be antiunion . . . can serve to reinforce an ultimate conclusion that

³⁸ An example of why this is an issue, is that a disciplinary document was produced on respiratory therapist Chris Hamid. (R-13). Yet, we know, by his *testimony* that the discipline was grieved and subsequently reduced.

the employer committed unlawful discrimination. *Id.* at 941. However, in those cases where disparate treatment is cited to support the ultimate conclusion, there is independent proof of the “elements” necessary” for the government to carry its *prima facie* burden under *Wright Line*. *Id.* Thus, generally speaking, disparate treatment evidence is regarded as rebuttal evidence, and not as evidence that will, by itself, sustain the government’s threshold burden.

Further, disparate treatment is defined to include only those situations where the proffered evidence is true by a “apples to apples” comparison. In practical effect, employees may not be similarly situated when the employees have different work responsibilities, different supervisors, work in different departments, or were subject to adverse employment actions too removed in time or for violations too dissimilar in type.

Even where blatant disparities and treatment can be found to exist, the disparity can often be explained in terms that do not necessarily implicate concerns under the National Labor Relations Act, even if they might in certain cases implicate other laws (Title VII, ADEA, etc.) or standards (“just cause.”) Different treatment could be caused by “ignorance of the employer’s rules or policies, through situations where the supervisor or a higher manager is aware of and attentive to the rules but believes, rightly or not, that they don’t apply in a given instance to situations, where the [supervisor], although quite conscious of the rules. . . . chooses to ignore them in a given instance to serve some interest deemed to be overriding in the circumstances.” *Id.* at 942.

Thus, concludes the administrative law judge, “absent independent proof of the employer’s anti-union animus, even evidence of actual, conscious disparity of treatment by an employer when it comes to rule-enforcement is generally not a reasonable basis for inferring that the employer’s enforcement of the rule in a given instance against an employee who has engaged in union

activities known to the employer was motivated in any way by the employee's union activities. There are simply too many other explanations for such phenomena that do not raise concerns under the Act." *Id.*

Whatever value the records provide, Respondent submits that the records, standing alone, cannot support a finding that protected concerted activities were a motivating factor in the Respondent's discipline and termination of Roop.

The General Counsel must make a showing sufficient to support a conclusion that animus toward the protected conduct was a motivating factor in the employer's decision to suspend or discharge. See *Club Monte Carlo Corp.*, 280 NLRB 257, 261-262 (1986). In *ManorCare Health Services-Easton*, the Board relied on the following five factors to divine the employer's animus: (1) the proximity of discipline to the employee's alleged protected activities; (2) unlawful interrogation and threats toward the employee; (3) failure to repudiate the employee's assertion that discipline was motivated by animus; (4) failure to investigate the employee's alleged conduct; and (5) deviation from its typical policy in disciplining the employee. *ManorCare Health Services-Easton*, 356 NLRB 202, 204 (2010).

Even if Roop engaged in protected concerted activity, and Respondent had knowledge of that activity, the General Counsel has not met its additional burden of demonstrating that such activity was a motivating factor in the decision to discipline/discharge Roop.

Marino was the decision-maker on issuing the verbal warning. While there are several 8(a)(1) allegations in the Fourth Amended Consolidated Complaint, there are none addressed against Marino which *pre-date* the November 21, 2016, verbal discipline to Roop.

Respondent submits there is no evidence, as of the issuance of the verbal warning, of animus by Marino toward any alleged protected concerted activity of Roop. To the contrary, the

record evidence establishes that Marino considered discipline of Roop for events before November 21, but chose to not go forward.³⁹ (Tr. 1334; 1336; GC-69). The government may assert that Roop had her access to the schedule for C-sections “taken away” by Marino. The record shows that the access was not denied, the manner in which the information was provided to employees was *changed*. Instead of access via computer, the schedule was *posted* in the department. (Tr. 91).

In the five months between *June* and *November*, much had happened. The record evidence shows that there had been a division in the department. As the record establishes, the division was created by bickering and griping between Matuszak and Roop, and their supporters. On October 10, Marino received a complaint drafted by Matuszak, Smith and Hamid alleging a hostile work environment created by Roop. (Tr. 1330-1331; GC-25). Ambrosini and Marino testified they met with Matuszak, Hamid and Smith to discuss the allegations contained in the complaint. (Tr. 1331; 1576). Ambrosini also advised union representative Mullany, who chalked it up to in-fighting between Roop and Matuszak. (Tr. 1578). After reviewing the complaint, Marino contacted Ambrosini to schedule a meeting with Roop to get her side of the story. (Tr. 1362-1363). A meeting was held and Roop was advised of the nature of the complaint and was told it had been filed by Matuszak, Hamid and Smith. (Tr. 94). Roop was represented in the meeting by union representative Mullany. (Tr. 94). Marino told Roop issues had been raised about professionalism, failure to perform her job, and cursing at people. (Tr. 94). Roop defended her performance. (Tr. 95). Marino, based on the information provided, proceeded with the verbal warning.

As noted, the government introduced a number of documents involving employee discipline. Respondent submits that review of the disciplinary documents establish that other

³⁹ The event concerned an alleged verbal altercation on July 24 and July 26, 2016, between Roop and an ICU nurse. Marino considered and discussed issuing Roop a verbal warning but did not go forward with the discipline. (Tr. 1334-1336; GC-69).

employees received the same level of discipline (or higher) for engaging in conduct similar to Roop. See, GC-121, p. 1 (verbal warning issued on May 22, 2014, to Claudine Bainer, nursing assistant, noting employees tone of voice, body language, and other actions perceived as disrespectful, unprofessional, by coworker); GC-115 (written warning issued on March 15, 2017, to Carmen Laver, certified surgical tech, for unprofessional behavior (rude, blunt sarcasm, condescending tone of voice and disrespectful behavior toward staff) and customer service (creating an unwelcoming environment); GC-113 (written warning issued on December 7, 2016, to Damaris Tejada for disruptive behavior (coworker complaints of negative and unprofessional attitude towards them including constant complaints and rumor spreading); GC-114 (verbal warning issued on February 28, 2017, directing employee Hoa Ly to show respect to coworkers during handoff and maintain professionalism in the workplace); GC-112, p. 2 (verbal warning issued on July 17, 2015, to Abdul Wahab for cursing at a coemployee).

The government may suggest that Marino should have disciplined Matuszak for “gossip” related to an event which allegedly took place in *June* 2016. The evidence establishes that Amanpreet Kaur had a conversation with Matuszak. After that conversation, *Kaur* told Roop about Matuszak’s comments. Roop complained about what was *reportedly* said by Matuszak. Marino investigated the complaint and verbally counseled Kaur by asking her to read the Hospital policy on gossiping. Kaur read the policy. Marino told her to comply with the policy. (Tr. 808-809; GC-65). No written disciplinary document was issued to Kaur. Kaur *did* gossip. The fact that Kaur was verbally told to follow the policy and Matuszak was not,⁴⁰ does not support the allegation in paragraph 5(b) of the Fourth Amended Consolidated Complaint that Marino applied

⁴⁰ Matuszak received a written verbal warning on April 11, 2017, for the “door incident” which was documented as a violation of Standard of Conduct No. 2 (i.e., all employees should be treated with courtesy and respect). (GC-116).

the Hospital's rules selectively and disparately by issuing a written verbal warning to Roop for engaging in concerted activities, and the ALJ should so find.

Respondent submits that there has been no showing that the employee meeting in HR in *June* to support Pererya had any impact at all on the issuance of the verbal warning to Roop in November. In addition to the timing, Roop was one of six other employees who participated in the meeting in HR. The record is clear that *none* of the other employees received discipline. So why was Roop disciplined, and not anyone else? Because other employees had come forward to lodge a hostile work environment claim against Roop in October. Employees had been told to act professionally and put on notice by O'Keefe in her "soapbox" speech to the respiratory department employees in July 2016. Allegations were brought forward about Roop's inappropriate conduct toward her coworkers. Marino, having spoken to Roop, Matuszak, Smith, and Hamid, ultimately determined that Roop's conduct, as reported to him, was sufficient to issue a verbal warning. (Tr. 1362).

While Roop and the government may think the issuance of a verbal warning was "unfair," it was not unlawful under the Act.

E. Removal of TV

There was a great deal of testimony (including diagrams and photographs) showing the physical layout of the respiratory therapy department. There is an area in the department which employees use regularly for break purposes. The area contains a coffee-maker, condiments for food, and other such items. However, due to space constraints, that same area is also regularly used as a work area with computers, desks and other work equipment utilized by the respiratory therapy department employees. For example, employees testified that this area is routinely used

for giving report at the end of the work shift. It is not unusual for some employees to be in the area while on non-work time with other employees in the same area on working time.

It is undisputed that at one time the respiratory therapy department break room/workroom had a TV which had been purchased by the employees. It is also not disputed that the TV (and other items) were removed at the sole direction of Dhuper. While the TV may have been removed to make a statement, it was not the statement put forth by the government in paragraphs 7(c) and 9; and, the government has not proved that removal of the TV was a violation of Section 8(a)(1).

After Dhuper became aware of issues in the respiratory therapy department, he toured the department. Dhuper's first trip to the respiratory therapy department was a memorable one. He testified that he was "quite disappointed" with what he observed. (Tr. 2424). As Dhuper "walked into the department . . . I saw underneath the countertop there was a lot of empty soda bottles and some fruit flies and I questioned that. I saw a TV with a bunch of DVD's right next to it, and I questioned that. And . . . there's was a wall clock not working and just the overall condition of the department was not very good." (Tr. 2424). Dhuper recalled that when he toured the break room/department, he "actually saw one of the techs putting their legs up, crisscrossed on another chair, watching TV." (Tr. 2425-2426).

When asked why on cross-examination he was upset seeing an employee with his legs crossed watching TV, Dhuper replied: "Counsel, I – I don't mean to be derogatory in any way, but if you'll see – if you'll see somebody having a leg like this crossed [which Dhuper demonstrated], watching the DVD, because there is no cable connection coming in, watching DVD in the department, it's not a break room. First of all, the – the – the posture is incorrect, but it's a – it's a department. It's a respiratory department. It's a tech room." (Tr. 2541). The tour of the department occurred approximately two days before Dhuper's scheduled meeting with the

respiratory therapy department employees on December 14, 2016. (Tr. 2425). All Dhuper knew at that time was that he had received an email from Backus claiming the employees in the department had been subjected to, among other things, a hostile work environment. There is no evidence that Dhuper knew Backus or Roop or had ever even been in the respiratory therapy department.

When Dhuper met with the employees in the department meeting, he told them that he had observed property in the break area which must be removed. Among other things, he advised the group that the TV would be removed. (Tr. 2425).

Dhuper's concern as to the condition of the department is certainly understandable. He had just received information stating that there were numerous problems in the department. Naturally, he decides a visit to the department is in order. He sees a department in disarray and directs that a number of things be corrected, including removing a TV.

Dhuper also had a conversation with Marino after his tour. Dhuper explained that he was "extremely upset" with Marino. (Tr. 2427). Dhuper told Marino that the condition of the department was unacceptable and that certain concerns needed to be addressed immediately. (Tr. 2427). Dhuper requested that a lockable bulletin board be installed to replace the bulletin board in the department. He requested that the department be painted, the floors be replaced, and that the clock be fixed. (Tr. 2428).

At the hearing, ALJ Giannopoulos asked Dhuper to review R-9, photographs of the department taken during the course of hearing. Specifically, Dhuper testified that in addition to the TV being removed, he had instructed that a microwave be removed as well. Dhuper testified that he made the engineering department aware of his concerns but did not "go into the particulars." (Tr. 2545). Dhuper explained, "there is a protocol in our accreditation called Environment of Care

which basically is a protocol or a committee that makes sure that electrical safety testing is done on electrical equipment and stuff like that.” (Tr. 2546).

ALJ Giannopoulos interjected and asked Dhuper whether it would surprise him to learn that a microwave was back in the respiratory room. Dhuper replied:

THE WITNESS: Yes. It would, but –
(Tr. 2546). ALJ Giannopoulos continued, asking Dhuper to review R-9, page 9, pointing to a microwave in the respiratory room. ALJ Giannopoulos asked Dhuper whether seeing that surprised him. Dhuper responded:

THE WITNESS: Does that – sorry, Your Honor.

JUDGE GIANNOPOULOS: That’s okay.

THE WITNESS: Nothing surprises me in that department anymore.
(Tr. 2546).

While it is unclear why the government inserted this allegation in a paragraph otherwise connected to Roop’s discipline, it is clear that the removal of the TV was not done in retaliation for employees exercising their Section 7 rights or to send a message to employees that they should not speak up on issues of concern. Simply stated, Dhuper visited the respiratory therapy department and was not impressed with what he saw. He directed that certain things be changed and removed. The record does not establish that Dhuper knew of the employee meeting in HR or any other alleged protected concerted activity at the time he made the decision to remove the TV. *Ryder Distribution Resources, Inc.*, 311 NLRB 814, 816-817 (1993). The Board considers the factors known to the employer at the time the decision was made and decides whether the employer’s business strategy [decision] was chosen for discriminatory reasons. The removal of the TV, not connected to any protected concerted activity, does not violate the Act and the ALJ should so find. *See, Ryder Distribution Resources, Inc.*, 311 NLRB 814, 816 (1993); *NLRB v.*

Savoy Laundry, 327 F.2d 370, 371 (2nd Cir. 1964), enfd. in part 137 NLRB 306 (1962) (the crucial factor is not whether the business reasons cited by [the employer] were good or bad, but whether they were honestly invoked and were, in fact, the cause of the change).

F. Roop's February 13, 2017, Disciplinary Action – Final Written Warning and Suspension

1. Alleged Protected Concerted Activity of Roop

At the end of *November 2016*, Roop was elected as a shop steward. The election result was announced on December 1, 2016. (GC-54). Roop served as shop steward until the end of March 2017. (Tr. 106-107). On March 30, 2017, the Teamsters placed all shop stewards on “hold” and appointed Mark Dierking (a non-employee of St. Rose) as interim steward. (GC-22). During her brief term as a shop steward, Roop filed no grievances and took no action in her capacity as shop steward on behalf of any employee at St. Rose. (Tr. 1385). Other than being elected as a new shop steward, the record does not show Roop ever took any action in that capacity.⁴¹

On *November 26, 2016*, Roop filed a bullying/discrimination/harassment form with Human Resources. (Tr. 107; GC-9). The bullying/discrimination/harassment form filed by Roop contained an attachment identifying a list of gripes Roop had with, among others, Marie Matuszak, Chris Hamid and Brian Smith.⁴² (GC-9, p. 5). As with the prior complaint, there is no evidence Roop sought assistance or support from any employee in the filing of her complaint. Roop acted alone and she was not engaged in concerted activity. *See, Fresh & Easy*, 361 NLRB 151 (2014).

On *December 5, 2016*, Roop was called to an investigatory meeting in Human Resources which she attended with Shop Steward Kmetz. (Tr. 108-109). Roop testified that at the meeting,

⁴¹ There were other employees in the respiratory department who served as shop stewards, namely Matuszak and Pererya. (Tr. 1385). While Roop's status as a union steward was undoubtedly significant to her, it had no impact (positively or negatively) on Respondent.

⁴² These two (Hamid and Smith), along with Mehul “Mike” Gandhi – comprise the group typically identified as team Matuszak.

Ambrosini advised her that they were investigating whether Roop had disclosed confidential information from a prior meeting. (Tr. 109-110). Roop denied having breached any confidentiality agreement.⁴³ Ambrosini advised Roop that the Hospital had received retaliation and bullying forms from a “handful” of respiratory therapists. (Tr. 110).⁴⁴ Roop said what employees file with HR is supposed to be confidential and she did not know anything about what people may say or do. (Tr. 110-111).

On *December 5, 2016*, Roop filed an intake questionnaire with the Equal Employment Opportunity Commission. (GC-10; Tr. 114). The record does not contain any evidence that the Hospital was aware that an intake form had been submitted. Nor is there any evidence Roop acted in concert with any employee in filing the questionnaire. Even if the filing of an intake form or an EEOC charge was considered protected concerted activity (a point Respondent does not concede), there is no record evidence that Respondent had knowledge of the action at the time Roop was disciplined.

Roop attended a department meeting on December 14, 2016. (Tr. 116). This was a mandatory meeting scheduled by the Hospital for all respiratory department employees. Several employees spoke during the meeting to address concerns. Roop said she gave Dhuper a copy of anonymous text messages she had received. (Tr. 117). Roop said she mentioned that *she* had *her access* blocked to schedules relating to C-sections. (Tr. 118). Roop did not say anything else at

⁴³ The government has not alleged a violation of the Act regarding any Hospital policy or Standard of Conduct on confidentiality. There is also no allegation that Roop (or any other employee) was unlawfully disciplined for breach of a confidentiality agreement.

⁴⁴ Backus filed a bullying/discrimination complaint with HR on November 28, 2016. (GC-36). *Backus'* complaint attached a copy of Roop's bullying/discrimination form dated November 26, 2016, and complaint forms filed by Nezam Mardanzai and Philip Duong. (GC-36). Unlike Roop, Backus appears to have solicited employees to join together by filing bullying/harassment forms. Thus, Backus' conduct appears to be activity protected by the Act. Marino was specifically made aware of Backus' activity (distributing the forms to employees) by My-Quyen. (Tr. 1460). No disciplinary action was taken against Backus.

the meeting.⁴⁵ Roop raised an *old* gripe. In November 2016, Marino changed the way all team leaders accessed information on the scheduling of C-sections. Rather than each team leader logging in on a computer to access the schedule, the schedule was printed and posted on a bulletin board in the department. (Tr.90-91). While this was a complaint Roop had, there is no evidence she was authorized to speak on this issue for other employees, that other employees were aware of and supported her raising the issue and/or refrained from making their own complaint. As with other issues raised by Roop, this was a personal gripe. She did not approve of Marino's actions. There is no allegation in the Fourth Amended Consolidated Complaint that this minor change was implemented in retaliation for having engaged in protected concerted activity. Roop's actions were not concerted. *Fresh & Easy Neighborhood Market*, 361 NLRB 151 (2014).

Roop met with Dhuper in a one-on-one follow-up meeting on or about **December 18, 2016**. Dhuper asked Roop, "what are your concerns." (Tr. 119). Roop told him about having her access blocked restricting her ability to get the schedule of C-sections. (Tr. 119-120). Roop mentioned that the respiratory therapy department's minimum staff had been reduced from 4 employees to 3 employees. Dhuper explained that the reduction was due to financial considerations. (Tr. 120). Roop mentioned a staffing concern in the PFT lab. (Tr. 120-121). When an opening was created in the PFT lab after Kevin Seigal quit, Marino posted the position with the requirement that the individual have a certification. This, according to some employees, had caused the department to split into factions. Indeed, Marino stated that looking back he believed this caused a "ripple" which turned into a divided department when Marino put Chris Hamid in the position on an interim basis. (Tr.1353-1361). However, Roop's comments to Dhuper had nothing to do with the posting

⁴⁵ Backus was quite vocal at the meeting and raised a number of issues on behalf of other employees. After the meeting, Backus provided Dhuper with a multi-page list of issues she was raising on behalf of other employees. (Tr. 255-256; GC-38). Backus was not disciplined.

or the selection of the individual to fill the PFT position. Roop said, “sometimes in PFT lab, we have two people there and – the Pulmonary Function Lab – and we have somebody training or we have the actual therapist and that’s not enough work and he said he’ll look into that too.” (Tr. 120). Again, Roop raised a much different point. The evidence does not support that she was engaged in protected concerted activity.

Thus, based on the record, there was no additional protected concerted activity by Roop between her participation with the group of employees going to the HR on **June 17, 2016**, and the issuance of the Final Warning and Suspension on February 13, 2017. (GC-11). The government has not established a *prima facie* case under *Wright Line*.

2. Conduct Leading to Roop’s Disciplinary Action – Final Warning and Suspension

On February 13, 2017, Roop was issued a final written warning and suspension for violation of the Hospital’s Standards of Conduct.

Roop testified about the events leading to her discipline. According to Roop, on February 7, 2017, she was working as a team leader and she saw an assignment sheet which had been highlighted. Brian Smith was the team leader on the off-going night shift and Roop said she approached him to ask him about the highlighted items in the document. (Tr. 129-130). Roop claimed, “Smith came to me and he was very aggressive and he approached me very aggressively and he said you need to stop this madness; you need to stop this madness. And I’m like what are you talking about?” (Tr. 130). Roop said Smith, “started raising his voice and I said we are not going to talk in here. We need to step out because there was students coming in . . . and it could be unprofessional.” (Tr. 131). According to Roop, as Smith became aggressive, other students entered the area. (Tr. 133).

In Roop's version of this event, she is calm, cool and collected and Smith is the aggressor. She testified that she simply asked a question about highlights on an assignment sheet and Smith immediately "became very angry and hostile." (Tr. 134). Roop claimed Smith told her that he had been approached by a security guard the day before saying that she had been using profanity in the parking lot. Again, according to Roop, she told Smith, "we're not going to talk about this, there are other people in the department; we're going to step out and we are going to go talk to the security." (Tr. 134). Roop said she chose to "step out," just to get Smith out of the department. (Tr. 134).

Roop said as she stepped out, Smith followed her, and they proceeded to the security office. (Tr. 134). At the security office, Roop said, "what is this, he's [Smith] saying that I was cursing on the phone outside, using profanity." (Tr. 135). According to Roop, the security officer said, "I wasn't the security; I just came in." (Tr. 135). Roop claimed *Smith* said it must have been Thuc Ho who works the night shift.⁴⁶ (Tr. 135). Continuing the conversation with Smith and the security guard, Roop stated she was off the clock, outside of the building and what I do is none of your business and I was not cussing. (Tr. 135).

As Roop left the security office she claimed that Smith proceeded down the hallway behind her *yelling*, "you are the troublemaker, you are dumb, you're going down." (Tr. 135). Roop said she told Smith, "thank you," and went back to the department. (Tr. 135).

After the event, Roop testified that she called Marino to let him know what had occurred. Roop said she left a voicemail and Marino returned her call approximately fifteen or twenty minutes later. (Tr. 135-136). According to Roop, she then *calmly* explained to Marino what had occurred, telling Marino she had asked Smith "nicely" about the assignment sheet and that Smith

⁴⁶ Roop's claim is patently false. Smith testified he spoke to Seyed Boushehri. Boushehri said the same – he spoke to Smith. Thuc Ho was not called as a witness by the government.

had become aggressive. Roop told Marino since there were students present, she told Smith they needed to step out because she knew they should not talk in front of the students. (Tr. 136). Roop said Marino acknowledged that he had received a call earlier that morning about the matter. Roop said she told Marino “everybody is just picking on me and I’m just so tired of it and I started crying.” (Tr. 137). As she was crying, Roop said she hung up on Marino. (Tr. 138).

Roop’s testimony paints her as the voice of reason in her conversations with Smith, the security guard, and Marino. *If* that were true, the discipline imposed on Roop would certainly be suspect. As a Charging Party, Roop has an obvious interest in shading her testimony to best serve her case. Respondent submits she has done exactly that in her description of this event. It is not possible to reconcile any of Roop’s testimony with that of other witnesses. Roop’s testimony is, frankly, so far from the truth it taints *all* her testimony during the hearing. To the extent other witnesses’ testimony contradicts Roop’s version of the events, Roop testimony should not be credited.

3. What Really Happened

Seyed Boushehri testified that he is a security officer at St. Rose and has been security officer for about five years. Boushehri worked the graveyard shift in February 2017. (Tr. 1857). Boushehri was subpoenaed as a witness, has no interest in the outcome of this case and has no reason to shade or color his testimony in any particular way. Boushehri was calm and clear in his testimony at the hearing. Boushehri’s testimony was straightforward and responsive to each question asked by the ALJ and on direct and cross-examination.

Boushehri testified that, as a security officer, he makes rounds both in and outside the Hospital. (Tr. 1858). Boushehri explained while on patrol in February 2017, he heard someone engaged in a loud conversation. The disturbance was *so loud* that Boushehri changed his route to go toward the disturbance. Boushehri described the disturbance as *so loud* it sounded like

“somebody’s getting hurt or fighting.” (Tr. 1860). Boushehri said it took him less than a minute to get to the area. He observed a female employee on the phone “yelling” and “screaming and using profanities.” (Tr. 1863). Boushehri said:

So she was so upset, usually I tell them can you lower your voice, you know, or calm down, *but she was so out of control*. I said, well if I confront her right now she’s going to go off *on me*, you know, so I just showed my presence, you know, just walk by her and then came back and walk again. She didn’t acknowledge me at all, you know.

(Tr. 1863). Boushehri said she was “so focused on the fight, he thought maybe she did not see him and so he approached one more time.” (Tr. 1863). Boushehri testified he could hear her using “F words so many profanities I was shocked.” (Tr. 1863). Boushehri left the area to report what he had observed. (Tr. 1864).

Boushehri saw Brian Smith and told him what he had seen and heard.⁴⁷ After he reported the event to Smith, Boushehri reported to the security office. (Tr. 1865). While in the security office, Smith and the employee he had observed outside, entered the security office. (Tr. 1867). When they showed up, Smith asked Boushehri to confirm what he had observed. Additionally, Roop⁴⁸ asked Boushehri “did you see me?” Boushehri answered, “Yes.” (Tr. 1868). Upon answering that he had seen her outside engaged in the loud disturbance, she got in Smith’s face and according to Boushehri said, “She just, you know, told him, you know, well what are you going to do about it? And then, you know, she was motioning her hands like that.” Boushehri testified that she was shaking her hands like “I’m scared.” (Tr. 1869-1870). According to Boushehri, Smith began to walk away and “she kept fighting with him as he was just walking

⁴⁷ In response to a question from ALJ Giannopoulos as to why he reported the incident to Brian Smith, Boushehri said, “Well, at that time, he was available. He was the first one, you know, I saw. . . . Otherwise, . . . I would go to Joe or somebody else . . . from the department.” (Tr. 1887).

⁴⁸ At the time, Boushehri did not know Roop’s name. He only knew that she worked in the respiratory therapy department. (Tr. 1872).

away.” (Tr. 1870). Boushehri said *she* (not Smith) continued arguing as she went down the hallway. (Tr. 1870-1871).

Brian Smith is a respiratory therapist and has worked at St. Rose Hospital for approximately six years. (Tr. 1900-1901). Smith testified that in February 2017 he received a report from security guard Seyed Boushehri concerning a respiratory therapy department employee Boushehri had observed in a loud and profanity laced verbal disturbance. (Tr. 1904). On that same day, Smith engaged Roop at shift change. He was going off the evening shift and she was reporting for duty. (Tr. 1905-1906). Smith testified that at shift change Roop removed a document (assignment sheet) and “slammed it on the – on the desk and asked me who did this. And I told her I did.” (Tr. 1908). The document was the daily assignment sheet with entries highlighted by Smith. (Tr. 1908). Smith told Roop that he had highlighted the document because he had been asked by Marino to highlight anything “that was in question.” (Tr. 1908). According to Smith, if he saw anything unusual on the assignment sheet, he was to highlight it and slide it under Marino’s office door. (Tr. 1908-1909). On this day, before he had a chance to slide the assignment under Marino’s door, Roop picked it up. (Tr. 1909).

Smith said Roop confronted him about the assignment sheet while they were in the break room. Roop was sitting at the computer used by the team lead and Smith was standing. According to Smith, there was arguing between the two of them and Roop said we are not going to do this “in front of the students.” (Tr. 1912). Smith said Roop just “kept going and going. And then I told her it was too late. You already started . . . students are already in here. They’re not leaving.” (Tr. 1912). During this conversation, Smith told Roop that she had been reported by security for using profanities and that the security officer asked him to tell Roop not to do that again. (Tr. 1912-1913). At that point, according to Smith, while still in the break room, Roop “just started

going crazy. Like, I don't have to do what you tell me to do. I don't have to listen to you. You're not my boss. And I don't believe you. You're just making this all up." (Tr. 1913). Smith said he told Roop, if you don't believe me, we can go talk to security. So, they did. (Tr. 1913). Smith said after the conversation with security guard Boushehri, Roop "started waiving her arms up in the air and started saying, fine. You know, how does that make you feel? You win. You know, you won. You caught me. Ok, you caught me. You got me. You win. How does that make you feel? You know, you people think you're so smart. You know you think – you think you're so smart. You know, you – you don't know what you're in for. I'm out of her anyway. She kept saying I'm out of here anyway." (Tr. 1918). Smith said the only thing he said to her at that time was, "Stop. This is enough. This is enough. Please stop. Please stop with your madness. That's enough madness. Please stop." (Tr. 1917).

When Smith returned to the respiratory therapy department, he attempted to give report to Roop. She told Smith, "I don't want to listen to you. I don't have to listen to you anymore. It's time for you to go. You can just shut up and leave. It's time for you to go. Why don't you just leave?" (Tr. 1919). Smith left the Hospital and called Marino to report what happened. (Tr. 1920). Smith said he was so upset that he "started bawling." (Tr. 1921).

4. Marino Gets a Wake-Up Call

Marino confirmed that at 6:35 a.m. he received a call at his home from Smith. Smith was upset and very emotional. Marino thought he was crying or on the verge of crying. (Tr. 1370). After hearing the events, Marino told Smith to "go home and relax, go to sleep and I will get to work as soon as possible and see if I can talk to the security guard." (Tr. 1371).

As with Boushehri's testimony, Marino paints a much different picture than Roop. Marino testified, that a few minutes after speaking with Smith, Roop called Marino. Marino said that "what occurred over the next, roughly, six minutes, was just one long stream of someone yelling

at me, blaming me for the situation – not being specific, but just “this is all your fault. This is – I mean it was just one long stream and I tried to – I tried to calm her down. I called out her name a couple of times and eventually, I screamed her name. I couldn’t get through. To the point where my fiancé got up and asked me who I was yelling at. And she can hear. I mean, I didn’t even have to have the phone to my ear. It was just one long barrage. And really, the speaker on my phone was so distorted that you couldn’t really understand what was being said. So and then that was followed by a hang up.” (Tr. 1372).

After Roop hung up on him, Marino immediately called the nursing supervisor because he believed that Roop was in such a fragile emotional state that she would not be able to handle a stressful situation at work, should one arise. Marino instructed the lead nursing supervisor that if a code was called, not to let Roop respond. (Tr. 1372). After calling the nursing supervisor, Marino immediately dressed and reported to the Hospital. (Tr. 1373). Marino called Ambrosini around 7:30 and left a message. He then started looking for Roop. Marino said that he expected to find Roop “to be a complete emotional mess.” (Tr. 1373). However, when he saw Roop, she seemed fine.

5. Discipline Is Issued

Upon seeing Roop at the Hospital, Marino told Roop he would need to speak to her and she indicated she did not want to talk at that time. Marino told Roop they would need to have a conversation in HR sometime that day. (Tr. 1373). Thereafter, Roop and Shop Steward Kmetz met with Marino, and Ambrosini. (Tr. 1374). Ambrosini led the meeting and asked Roop to explain what happened. Roop apologized for her language and behavior, and said she was very emotional and communicated her version of what had happened. (Tr. 1375). There were not a lot of moving parts on this – the number of individuals who were involved, was small. Boushehri was interviewed. Marino, obviously, had been on the phone with Roop and Smith.

O’Keefe testified that she had a meeting with Marino wherein he related the incident with Roop. (Tr. 2305). O’Keefe suggested that Marino talk to Joe Ambrosini in HR. (Tr. 2305). O’Keefe met with Marino and Ambrosini to discuss potential discipline for Roop. O’Keefe recommended a suspension and final written warning be issued. (Tr. 2308). O’Keefe said she based her recommendation of a final warning and suspension on what she described as “an egregious attack on a manager of the department” the altercation between Roop and the team lead and security guard. (Tr. 2308; 2310). There is one 8(a)(1) allegation listed in the Fourth Amended Consolidated Complaint relating to O’Keefe which pre-dates this discipline to Roop. On December 5, two months prior to the discipline, O’Keefe attended an investigatory interview with Roop and her union steward. Recall, it was alleged O’Keefe said she would fire employees if she continued to “hear” about bullying/harassment. Respondent argues that O’Keefe’s comments, if made, related to the *acts* of bullying/harassment and *not the reporting* of that activity.

Dhuper was the ultimate decision-maker on the level of discipline to be issued to Roop. Dhuper met with Ambrosini, Marino and O’Keefe. (Tr. 2478-2479). Dhuper said at the meeting he “listened to the team, and what the recommendations were.” (Tr. 2479). Dhuper recalled that O’Keefe strongly felt that discipline was warranted and recommended a final written warning with suspension and removal of the team lead assignment. (Tr. 2482). Ambrosini recommended discipline, but not a suspension. Ambrosini explained:

Well, although I didn’t agree with her actions, I thought that that certainly warranted discipline. I just – I felt that a suspension, final written warning was a little bit strong. In that situation, I thought it was unprofessional and, like I said, I didn’t agree with it; but she had had a verbal on her file before that and then just jumped right to a suspension without pay. I thought would have been an appropriate for just party to just – to do a written warning instead.

(Tr. 1657). Ambrosini said it was not unusual to discuss and consider different levels of discipline.

He stated, “oftentimes my recommendation is accepted. Sometimes it wasn’t accepted. But I

don't believe that I got like a, you know, like a list of reasons or here's a why or anything. . . . they disagreed with my interpretation." (Tr. 1657-1658). By all accounts, it was a fair and thorough discussion of what level of discipline to impose. There was no rush to judgment. The conduct occurred. Discipline was appropriate.

Dhuper, having listened to the recommendations, made the determination to issue Roop a final warning, suspension and remove her team lead assignment. (Tr. 1658; 2483). Marino and Ambrosini presented the discipline to Roop. (Tr. 1376-1377). The Teamsters filed a grievance challenging the discipline which was submitted to arbitration. (Tr. 1377; GC-13).

While Dhuper is listed in the Fourth Amended Consolidated Complaint as having violated 8(a)(1) primarily by remarks made in December when he initially was made aware of the issues in the department, Dhuper had no animus against Roop's protected concerted activities. Dhuper had solicited employees to come forward with concerns and encouraged Roop *not* to quit prior to her discipline. When asked by employees to take action against Roop and Matuszak, he said, "no." Dhuper told Roop's coworkers he wanted to give Matuszak and Roop a chance to work out their differences and referred to their long seniority at the Hospital.

The government failed to prove a nexus between protected concerted activity and the discipline issued on February 13.

In addition, even if the government met its burden under *Wright Line* (which it did not), Respondent has proven it would have taken the same action even in the absence of the protected conduct. Respondent has shown that the discipline was based on conduct by Roop found to violate the Hospital's Standards of Conduct. The Hospital has consistently enforced its rules and the level of discipline is consistent with the conduct. The record contains disciplinary records of other employees who engaged in conduct similar to Roop and who received similar discipline.

Employee Patti Smith received a Final Warning and Suspension (3-day) for engaging in two verbal altercations/arguments with a security guard and the family of a patient. (GC-107). On April 22 2017, Owen Wilkerson was issued a three-day suspension for abusive treatment, discourteous comments, verbal abuse of a coworker, including use of profanity and other derogatory comments. (GC-111, p. 2). Wilkerson also received a Final Written Warning on January 23, 2018, for verbal abuse of a subordinate. (GC-111, p. 3). On August 4, 2014, a Final Warning was issued to Oscar Silva after a verbal altercation with an employee. (GC-122).

Roop engaged in a verbal disturbance sufficiently loud enough to lead Boushehri to believe she was being *attacked*. Boushehri described her conduct as *out of control*. Roop's attack continued with a verbal altercation with Smith during shift change, extended to the security office and hospital corridor and ended with a verbal tirade against her manager. Discipline was appropriate. Dhuper had defended Roop (and Matuszak) when employees in the department encouraged him to take action/fire both. It defies logic to think that any employee, regardless of protected activity, could engage in such flagrantly disruptive and disrespectful conduct without suffering some consequence. The conduct (all of which Roop denied) occurred. Roop's behavior was out of control. A final warning, suspension and removal of the team lead assignment were appropriate for the conduct displayed by Roop. The discipline had everything to do with Roop's conduct (in the parking lot and toward Smith and Marino) and nothing to do with her (infrequent and minor) protected concerted activities.

There is no evidence that the discipline was issued based in any way upon Roop's protected concerted activity. Dhuper had a reasonable belief that Roop engaged in conduct which violated the Hospital's Standards, and acted on that belief in issuing the discipline. Discriminatory animus

toward Roop's protected conduct was *not* a substantial or motivating factor in Respondent's decision to discipline Roop, and the ALJ should so find.

G. The Decision to Terminate Roop was Made on April 11, 2017

1. Alleged Protected Concerted Activity Prior to April 11, 2017

On February 14, 2017, Roop filed a charge of discrimination with the EEOC. (GC-29). There is no record evidence if or when the Hospital received a copy of the charge. Roop filed a second charge with the EEOC on April 18, 2017, after her termination. (GC-29).

Roop did not testify about any meetings with HR Director Jones. Jones testified she met with Roop on a couple of occasions shortly after Jones was hired on March 6, 2017. In their first meeting, Roop met with Jones alone. She complained about Matuszak. (Tr. 2094). Several weeks later Roop and Pererya met with Jones. (Tr. 2094). Jones' notes reflect that she met with Roop and Pererya on March 16, 2017. (Tr. 2170; GC-81). At that meeting, they shared information concerning events going back as far as May 2016, up to the door incident with Matuszak which occurred on March 14.⁴⁹ (Tr. 2170-2172; GC-81).

Roop testified that toward the end of March 2017 she spoke to Backus about a petition. (Tr. 169). Backus told Roop that a petition has been "put up and everybody is aware of it, and I'm calling you to see is there something that you want to address." (Tr. 170). Roop said she gave input but did not see the petition at that time. (Tr. 170). Roop acknowledged that she was not involved in the decision to create the petition. (Tr. 206). On or about April 2, 2017, Roop was first shown a copy of the petition which had been completed by Backus. Backus told her if you agree, sign it and then the petition should be provided to other employees to read. (Tr. 170). Roop took the petition and showed it to other respiratory therapists including Erik Thom and Marco

⁴⁹ Jones's investigated the dueling complaints filed by Roop and Matuszak about the door incident. Matuszak was issued a verbal warning for violation of Standard of Conduct No. 2 – discourteous conduct. (GC-116).

Garcia. She explained that the petition was dropped off by Backus and they should read it and “sign it or not.” (Tr. 171). Roop also showed the petition to other employees for them to read and sign. (Tr. 172). At the hearing, Roop identified her signature on the petition (GC-34) and identified employees who signed the petition in her presence. (Tr. 176; 178-180).

There is no evidence that the petition was shown to any manager or supervisor of the Hospital until it was delivered to Aman Dhuper on April 13, 2017. (GC-41; Tr. 337). Roop confirmed that she did not deliver the petition to Dhuper or Stephanie Jones. (Tr. 200). Roop only has knowledge that the petition was delivered to Dhuper because Backus told her that had been done. (Tr. 200).

While Roop may have engaged in protected concerted activity in connection with the Petition, there is no record evidence to show that Respondent was *aware* of her activity at the time the discharge decision was made. Respondent made the decision to discharge Roop on *April 11, 2017*, such that the filing of the Petition cannot be a motivating factor in the discharge of Roop. (Tr. 2136). It is undisputed that the Petition was received on *April 13, 2017*. (GC-41).

2. Events Leading to Discharge

Ahmad “Chris” Hamid is a respiratory therapist and has been employed at St. Rose for approximately six years. (Tr. 1989). Hamid was working the night shift on March 19, 2017, and observed the “shift change” interaction between respiratory therapist My-Quyen Giang and Roop. (Tr. 1992). Hamid explained that at the end of each shift as a respiratory therapist is leaving and another respiratory therapist is reporting for work, there is an exchange of information from the off-going therapist to the on-coming therapist (“report”). Thirty minutes is built into the schedule at the end of shift in order for the outgoing respiratory therapists to pass on vital information to the

therapist reporting for work so that the on-coming therapist is prepared to provide uninterrupted care. (Tr. 1991). The report occurs every day at shift change, without exception. (Tr. 1991).

Respiratory therapists care for patients in different locations in the Hospital and are not assigned to any one specific unit or department. As Roop was coming on shift, she was accepting responsibility for some patients who had been cared for by Hamid and she was taking responsibility for patients in the ER who had been cared for by My-Quyen. (Tr. 1992; 1994). On March 19 Hamid began giving report to Roop. Toward the end of his report, My-Quyen approached in order to provide report to Roop. (Tr. 1992). My-Quyen had patients in the emergency room and carries a special "ER" phone. The phone is utilized so that an ER nurse can quickly contact the respiratory therapist in an emergency situation. As part of the report, My-Quyen is required to hand off the ER phone to the on-coming therapist assigned to care for patients in the ER. On this day, the on-coming therapist was Roop. Thus, My-Quyen sought to hand the phone to Roop, which would then be part of Roop's responsibilities as she was coming on her shift. (Tr. 1992-1993).

Hamid recalled that during report by My-Quyen, Roop refused to acknowledge anything that My-Quyen was saying. My-Quyen took out medication and told Roop that the medication was due to be administered to a patient in the ER. (Tr. 1995). Roop was sitting with her back to My-Quyen and reached over with her left hand, grabbed the medication out of My-Quyen's hand, threw it on the table and said, "I don't need your help. I know what I'm doing." (Tr. 1996). At the time, Hamid was standing approximately 2-3 feet from Roop. (Tr. 1998). Hamid demonstrated what he observed. (Tr. 1996). Hamid said when My-Quyen reached over to hand the medication to Roop, Roop looked over, grabbed the medication and threw it on the table saying, "I know what I'm doing. I don't need help from you." (Tr. 1998). Hamid said there were other people present

and that the atmosphere in the room was “tense.” (Tr. 1999). Hamid described Roop’s tone of voice in speaking to My-Quyen as “loud.” (Tr. 1999). Hamid said the room went quiet. (Tr. 1999). Hamid referenced Respondent Exhibit 9 and identified others who were present at the handoff. Roop was stationed directly under the clock. Hamid was standing next to Roop. Roop was seated facing the whiteboard. (Tr. 2003; R-9, p. 7). Hamid was standing and giving report to Roop while she was sitting in the chair under the clock. (Tr. 2003). Initially, while Hamid was giving his report, My-Quyen was standing near the water bottle in the adjacent room. When My-Quyen came up to give report, she stood directly between Hamid and Roop, literally standing over Roop’s shoulder, within a foot. (Tr. 2004). After Roop’s actions, Hamid testified that My-Quyen started to shake and was not able to speak. There was still report to be provided, Hamid approached My-Quyen, patted on her right shoulder and tried to comfort her. (Tr. 2006). Hamid and My-Quyen spoke. Hamid told her, “It’s – that’s ok, you know, don’t worry about it. Just go ahead and go in the other room.” (Tr. 2006). Hamid told My-Quyen, “If Ms. Roop doesn’t want report from you, you can’t force it on her.” (Tr. 2006). Hamid and My-Quyen moved to the adjacent room near the water bottle where they remained until it was time to clock out and exit the facility. (Tr. 2006; R-9, p. 7).

Hamid described that there are times when a respiratory therapist would be required to respond to a code blue. In a code blue, the patient does not have a heartbeat and is not breathing. An announcement is called overhead and the rapid response team will report to the patient’s room and provide lifesaving measures. (Tr. 2007). Additionally, there are times when respiratory therapists will receive what is called a “stat” call. In that situation, the respiratory therapist is trained as part of the team to respond as quickly as possible. (Tr. 2008). A “stat” call is not the same as a code blue. (Tr. 2008). In either case, a “stat” call or a code blue, an announcement is

made through an overhead page. (Tr. 2008). Hamid said while he was waiting with My-Quyen to clock out, there was no code blue nor was there a “stat” call. (Tr. 2009). Hamid was interviewed by Human Resources Director Stephanie Jones concerning the incident. (Tr. 2010). Hamid also provided a written report to Human Resources documenting what he observed. (GC-85).

My-Quyen Giang is a per diem respiratory therapist employed at St. Rose Hospital. (Tr. 2053-2054). My-Quyen has worked at St. Rose for approximately four years in per diem status. My-Quyen explained the protocol that applies when one respiratory therapist is going off shift and another respiratory therapist is reporting to work. There is a report/handoff wherein the outgoing respiratory therapist provides information about patients under his or her care, gives a status report on how the patient is doing and provides other general information so as to provide continuity of care. (Tr. 2054-2055). My-Quyen has known Roop since approximately 2008 and testified about her attempt to provide report to Roop on March 19, 2017. (Tr. 2055).

My-Quyen had the night shift ER assignment and at approximately 6:30 to 6:45 a.m. the oncoming respiratory therapist will take over the ER assignment and take custody of the ER phone. (Tr. 2055). Roop came in early. She did not talk to My-Quyen and My-Quyen said Roop normally does not talk to her. (Tr. 2056). Looking at RX-9, p. 5, My-Quyen stated that Roop was sitting at the table facing the wall below the whiteboard. (Tr. 2057-2058). At approximately 6:45 My-Quyen approached from the adjacent room (where the blue water bottle is shown on R-9, pp. 5, 7) to the table underneath the whiteboard. Roop was sitting facing the wall, talking to Shilu Yogi. My-Quyen said, “Babita, I have your phone, I have ER assignment. I think you have ER assignment in the morning. So, this is the phone.” (Tr. 2059). Before Roop accepted the phone, she looked at the clock. My-Quyen looked at the clock also and noticed it was 6:43 a.m. Roop took the phone and put it in her pocket. My-Quyen began explaining that she had started a

treatment, “a continuous nebulizer treatment at 6:15 for a patient.” (Tr. 2059). My-Quyen attempted to hand medication to Roop, who took it and threw it on the table, “she literally – she threw it on the mat.” (Tr. 2060). Up to this point, Roop had not looked at My-Quyen. Roop turned and asked, “What time did you start it?” My-Quyen repeated 6:15 and said that at 7:15 “you have to go up and give the patient the other half of the treatment.” (Tr. 2061). Roop did not say anything to My-Quyen and turned and began a conversation with Shilu. (Tr. 2061). Ignoring My-Quyen, Roop continued her conversation with Shilu. My-Quyen had not finished giving report and wanted to provide more information about the patient. Specifically, My-Quyen knew it was important to tell Roop about the patient’s treatment, how the patient was doing, why the patient was receiving the breathing treatment, and how he’s responding to the treatment. My-Quyen stated Roop did not “bother listen to me.” (Tr. 2062). At that point, My-Quyen stopped giving report. She said she was shaking because she felt “very disrespected.” (Tr. 2062). Describing her condition, My-Quyen said, “Why does she do that to *me*? ***Because I know she had a lot of problem with my friend which is Marie -- But for the whole year, I was staying out of it.*** (Tr. 2063, emphasis added). ALJ Giannopoulos will recall that at this point My-Quyen broke down while she was testifying and began to cry. (Tr. 2063). Composing herself, My-Quyen said Hamid was present on her left side, close to her. Hamid put his hand on her shoulder. Roop and Shilu continued their conversation and My-Quyen walked away and waited until it was time to clock out. (Tr. 2064-2065).

My-Quyen said she was unable to complete report to Roop and had to walk away as Roop did not want to listen to her report. (Tr. 2066). While My-Quyen was in the department waiting to leave, there was no code blue called. My-Quyen recalled there was no “stat” call either. (Tr. 2067).

My-Quyen said that initially she did not want to report what had happened. The events bothered her “for days.” (Tr. 2065). *My-Quyen* reported the incident to Joe Marino via an email on March 22. (Tr. 2067; GC-84).

My-Quyen was contacted by Stephanie Jones in HR. Jones asked her to provide information about what had occurred, which she did. (Tr. 2068; GC-86).

Shilu Yogi is employed as a respiratory therapist at St. Rose. She has been a respiratory therapist since approximately July 2014. (Tr. 664). Yogi was asked if she recalled a handoff between My-Quyen and Roop in early 2017. Tellingly, Yogi said that she recalled the event because she had been questioned about it prior to the hearing. In fact, Yogi asks Counsel for the General Counsel if that is the incident to which she is referring. (Tr. 668). With that backdrop, Yogi said she recalled observing a handoff around March 2017. (Tr. 669). Yogi said My-Quyen had worked the night shift with her and that My-Quyen gave report to Roop. When asked by ALJ Giannopoulos what do you remember happening, Yogi said, "Just giving the phone, maybe talking a little bit about the patient, like why that — I don't remember a whole lot." (Tr. 670). When asked whether she remembered "anything out of the ordinary about the handoff," Yogi said she did not. (Tr. 670). Yogi testified that Erik Thom and Rose Rogers were present, but that Chris Hamid was not present⁵⁰. (Tr. 672). Yogi acknowledged that My-Quyen works as a per diem and has variable shifts. Yogi did not know how many days My-Quyen worked during the month of March and stated there could have been days My-Quyen worked when Yogi did not. (Tr. 683).

⁵⁰ Erik Thom and Rose Rogers were both called as witnesses by the government. Neither Thom nor Rogers testified about observing the handoff between Roop and My-Quyen. Rogers was asked if she recalled an incident with My-Quyen handing off a phone to Roop. Rogers said, “no.” (Tr. 746). Hamid was present at the handoff between Roop and My-Quyen and testified extensively about what he observed.

3. Roop's Version of the Handoff

Roop was asked about the incident by ALJ Giannopoulos. Roop testified that she was coming on shift and My-Quyen was going off shift. Roop testified, “she handed me the [ER] phone and I took the phone and I put it on the table.” (Tr. 224). Roop continued, “then she took out two medications.” (Tr. 224). Roop claimed My-Quyen gave the medications to her and, “I said, I know about this medication.” (Tr. 224). Roop claims she “took the medicine and I put it where my phone was So, then they call respiratory stat, and then I grab my phone and I ran because I was the ER person.” (Tr. 225).

Roop testified that she and union representative Mullany went to speak to HR Manager Jones about reversing her suspension. In that meeting, according to Roop, Jones asked her general questions about Roop working on March 19. (Tr. 186). Roop testified that she next heard about the incident of March 19 at the time she was advised of her termination. (Tr. 186; 188-189). HR Manager Jones' notes contradict Roop's testimony and document that Jones conducted a telephone interview on **March 23, 2017**, about the report/handoff with My-Quyen. (GC-92). Jones notes are brief, but important. According to Jones' notes, Roop said she did not remember the handoff yet tells Jones she recalls My-Quyen talking to her about a patient, that she had responsibility for in the ER and that she (Roop) would need to “drop another Albuterol.” (GC-92). Roop says “ok” and then was called for a “*code blue.*” (GC-92).

According to Roop, it was all nice and easy – routine. The only problem with her testimony, is it is not true. Roop says she was not interviewed by Jones. So, if she was not interviewed by Jones, why do Jones' notes refer to Albuterol and state Roop was called “for a code blue so she ran down there.” (GC-92). Roop's version of events cannot be reconciled with the testimony of My-Quyen and Hamid. In Roop's version, Chris Hamid was not even present at the

handoff. (Tr. 227). Roop testified, “I didn’t do anything wrong” (Tr. 227) which is, of course, the story of her case – I never did anything wrong – everyone was picking on me. Roop’s testimony on the handoff with My-Quyen is false, and the ALJ should so find.

4. Jones’ Investigation

HR Manager Stephanie Jones testified she was first made aware of the shift change incident when she received an email from Marino. Marino forwarded an email he had been provided from My-Quyen. (Tr. 2112; GC-84). Jones told Marino she would investigate. Jones interviewed My-Quyen and took her statement. (Tr. 2112; GC-84; GC-86). When Jones interviewed My-Quyen, she identified Chris Hamid and Shilu Yogi as potential witnesses to the event. (Tr. 2117). Jones contacted Chris Hamid by phone and took his statement. She also asked Hamid to put his statement in writing, which he did. (Tr. 2117; GC-85). Jones interviewed Roop about the incident by phone on March 23. March 23 was the same day Jones interviewed My-Quyen. (GC-86). Jones attempted to reach Shilu Yogi.⁵¹ Jones placed several calls to Shilu. (Tr. 2119). After several calls, Jones was finally able to speak to Shilu. However, Shilu was driving, and Jones did not want to distract her. Jones asked her if she would come in to meet with her and Shilu said she was not available. Jones asked if Shilu could come into meet with her the next day. Ultimately, when it did not appear that Shilu would be available, Jones offered to schedule an appointment to meet. Shilu agreed that they would set a *phone call* to speak the *next day*. Jones testified that she “waited and waited” for Shilu to call and she never did. Jones called her, and it went to voicemail. Jones left a message. Jones also informed her staff that if Shilu called in she was to be interrupted. Eventually Shilu called in later that evening and left a voicemail. Jones returned the call, but was not able to connect. Frustrated, Jones went to Marino to see when Shilu was next scheduled to

⁵¹ Shilu was not interviewed by Jones. However, the failure to speak with Shilu was not some plot to frame Roop. Jones *tried* to connect with Shilu – multiple times.

work. Jones learned that Shilu was scheduled to work the next day. When Jones went to the department to meet with Shilu, she was informed that Shilu had called in sick. (Tr. 2120-2121).

Clearly, Jones made a great effort to reach Shilu. Jones spoke with My-Quyen, Hamid and Roop. She conducted a thorough investigation and the fact that Shilu was not interviewed does not taint the investigation.⁵²

5. The Decision to Terminate Roop is Made on April 11

Jones contacted Dhuper, O’Keefe and Marino to let them know she had finished the investigation and wished to speak with them. A meeting was conducted with Jones, Dhuper, O’Keefe and Marino. (Tr. 2125). The meeting took place *April 11* in the afternoon. Jones led the meeting by describing the findings of her investigation and set out her recommendations. Jones made alternate recommendations, one of which was issuing a “final final warning” – a last chance agreement in lieu of termination. (Tr. 2125). Dhuper and O’Keefe expressed their frustration and stated that they felt termination was appropriate. On April 11, Dhuper gave Jones the direction to move forward with termination. (Tr. 2126).

Dhuper testified that he met with Jones, Marino and O’Keefe prior to the decision to discipline Roop regarding the incident at shift change with My-Quyen. Dhuper said that information was presented and those present at the meeting shared recommendations regarding discipline. Dhuper characterized the meeting as the participants presenting information, “but they expected me to evaluate it, evaluate it in a sense that they wanted me to hear out their – the trend and everything that was going on and make a decision.” (Tr. 2485). Dhuper explained, “I wanted

⁵² Jones was not compelled to conduct her investigation in any particular way. While the government made much of the fact that Shilu Yogi was not interviewed, Jones did make an effort to speak to her. Could it have been handled differently? Certainly. However, Yogi’s testimony was bereft of facts. Yogi did not recall the code blue or stat call which Roop claimed took her out of the handoff on a run. (Tr. 225). Thus, it does not appear anything material would have been uncovered had Jones and Shilu spoken.

to hear it to the deepest extent, because I knew, after meeting with all these employees, and I had gotten a little bit familiar with them, I knew that the employee had been at the Hospital for a you know, significant period of time.” (Tr. 2485). Dhuper readily acknowledged that he did not conduct an independent investigation of the events which led to Roop’s discipline. After hearing, and evaluating the information presented, Dhuper made the decision that termination was appropriate. (Tr. 2485). ALJ Giannopoulos asked Dhuper how he was “drawn into the decision to discharge Ms. Roop.” (Tr. 2569). Dhuper answered, “Your Honor, Ms. Roop’s discharge had a significant issue related to a clinic – a clinical certified person coming in the shift and as we need to ensure the continuity of the care of a patient in the emergency department and that was the primary concern that was brought up to me, so when all this is going on, and the pictures, the drama, the – the – the two camps, and that’s being investigated . . . nothing from anybody that I heard, even that I met with each individual respiratory therapist, or if I met with, you know, Mr. Ambrosini or Joe Marino or Roseanne (sic) for that sake, told me that there was an issue related to my patients. That had not been brought up to me until that moment of time.” (Tr. 2570). Dhuper continued, “When the safety or the continuity of the care of my patient came up, is when it became a little bit alarming. . . . If you talk about the discharge of – of – of, you know, you know, Ms. Roop, primarily it was very serious concern, somebody coming in to start their shift in the morning, you know, taking over in the continuity – right in the middle of the care of a patient from an outgoing tech, incoming tech coming in, and, you know, someone not giving enough attention to that matter is a pretty serious concern.” (Tr. 2570). Dhuper added, that he had been drawn into issues in the respiratory therapy department based on all that had been reported. Initially, of course, Dhuper is drawn in by Backus’ email describing a department with significant issues. Significantly, however, Dhuper’s initial reaction to receipt of Backus’s email was a concern about

whether patient care had been compromised. Dhuper testified that upon receipt of Backus' email he immediately requested a meeting with O'Keefe, given that it's a clinical department. (Tr. 2409). Dhuper explained that when he received the email, he was "shocked." (Tr. 2409). Dhuper said he "was actually primarily more concerned initially after reading the email that was there anything clinically or competency wise from a perspective of a licensed professional working in the hospital. So I was not made aware of any issues related to the competency of the employees but I was made well aware of that there were essentially two camps, or two people that the department sort of got split picking sides. And there was an issue related to personalities. And you know, somebody really needed to intervene and address that issue." (Tr. 2410).

Dhuper's analysis and evaluation of the event leading to Roop's termination was centered on the issue related to patient care. Dhuper, throughout of the course of his dealings (i.e., meetings, interviews, rounding) with the respiratory therapy department, was always primarily concerned that patient care had not been compromised. That is not to suggest in any way that the issues between the two camps were not significant. Respondent acknowledges that the department was severely flawed. However, the issues raised in this proceeding relate to actions allegedly taken due to Roop engaging in protected concerted activity. The question is, was protected concerted activity a motivating factor in the discharge of Roop? Dhuper answers that question definitively – no. Dhuper's decision is based on his evaluation of Roop's conduct and good faith belief that continuity of patient care was compromised and that termination was appropriate. Simply put, the record evidence established that protected concerted activities, even if known, were not a motivating factor in the discipline and/or discharge of Roop and the ALJ should so find. An employer who holds, and acts upon, a reasonable belief that an employee engaged in the misconduct in question has met its burden under *Wright Line*. See *Midnight Rose Hotel & Casino*,

343 NLRB 1003, 1005 (2004), *enfd.* 198 Fed.Appx. 752 (10th Cir. 2006); See, *DTR Indus., Inc.*, 350 NLRB 1132, 1137 (2007). Respondent has met its burden because Dhuper had, and acted upon, a reasonable belief that Roop engaged in misconduct.

6. Jones' Attempt to Reach Roop to Advise Her of Her Termination

Roop's testimony on when she was contacted by Jones prior to her termination is as equally false as her testimony about the handoff with My-Quyen. Roop testified that she was contacted by Stephanie Jones on April 12 (a Wednesday) by phone. According to Roop, Jones said she had more questions about the door incident that happened with Matuszak. (Tr. 182). The date is correct, the *reason* is false. Roop told Jones that her husband was in ICU and was very sick. Roop said, "I can't talk to you and I can't come see you." (Tr. 182). Jones asked Roop to come in the following day. (Tr. 182). Jones called Roop again on Thursday and asked her if she could report to the Hospital on Friday, the 14th. Roop said she was not able to meet, that her husband was very sick. (Tr. 182-183). According to Roop, she asked Jones if she was "going to get fired or something?" (Tr. 183). Again, according to Roop, Jones *laughed* and said, "no." (Tr. 183). Roop says she proposed that they meet on Saturday, the 15th. Roop testified that Jones called her on the 15th, left a voicemail, and that Roop called her back. (Tr. 183). Roop claims that Jones told her she just need to clarify an incident with Matuszak, Roop said she would get a shop steward and would contact Jones. Roop testified that she attempted to get a shop steward and was told by union representative Mullany that it was not "urgent" and that no shop steward was available.⁵³ Thereafter, Roop received another call from Jones and Roop told her that she was not able to meet and asked if they could meet on Monday, the 17th. Jones agreed. (Tr. 184).

⁵³ Union representative Mullany was not called as a witness by the government. Shop Steward Kmetz was called as a witness by the government to testify on a number of allegations. It is significant that Mullany was not called even though his name is invoked by a number of the government's witnesses.

According to Roop, on Monday, Jones called her, but Roop was not available to meet. Roop contacted Jones around 9 o'clock and told Jones that she would attempt to come for the meeting after she finished rounding with her patients. (Tr. 185). Around 10:30 or so, Roop and Shop Steward Kmetz went to Human Resources and met with Marino and Jones. (Tr. 185). According to Roop, Jones began the meeting saying it was "in regards to the incident that happened on 19th of March, 2017." (Tr. 186). Roop testified that Jones told her that she was being terminated based on the incident from March 19, 2017. (Tr. 186). Roop was given the termination documents, which she refused to sign. (GC-12).

At the conclusion of the meeting on April 11, Jones started the process for termination by contacting the payroll department to obtain Roop's final check and to put together the legal paperwork for termination. (Tr. 2127). Jones left a message for Roop to report to HR on the 12th. Jones also communicated with her on the morning of the 12th. (Tr. 2127). Jones spoke to Roop on the phone and Roop said she was unable to attend the meeting because her husband was in the hospital. Jones asked if she would be available on the 13th. Roop said she would have to check. (Tr. 2128). On the 13th Jones had received no call, so she contacted Roop again. She was unable to reach her by phone and left a voicemail. (Tr. 2129). Jones left a voicemail on the 14th and Roop called back to say that her husband had been discharged on the 13th and that she was working on the upcoming Saturday and would be available to meet at that time. (Tr. 2129). Marino and Jones met at the Hospital on Saturday the 15th at 7:00 a.m. They remained until approximately 10:30 or 11:00 a.m. Roop was a no show, no call. Marino returned to the department and learned that Roop had called in sick. Jones contacted Roop again and an arrangement was made to meet on Monday the 17th. (Tr. 2130). The meeting occurred on the 17th. Roop attended the meeting on the 17th

with Shop Steward Kmetz. Marino and Jones were present. Jones reviewed the termination document.⁵⁴ (Tr. 2133; GC-12).

Jones' testimony, to the extent it contradicts Roop, should be credited. The decision to terminate Roop was made by Dhuper on April 11.

Respondent submits that it is clearly established by the record that the decision to discharge Roop was made on April 11. Therefore, to the extent the government contends that Roop's discharge was motivated in any way by the Petition, that argument must fail. While the decision to discharge Roop was made on April 11, Respondent was not able to implement that decision until April 17. The record is clear that having been directed to proceed with the termination of Roop, Jones began to put the necessary legal paperwork together to implement that decision. Additionally, Jones immediately reached out to Roop to schedule a meeting. As the record reflects, there were a multitude of issues as to why that meeting was delayed. What is clear, however, is that the decision was made on April 11. Thus, since the decision to terminate Roop was made before the Respondent was made aware of the protected conduct (filing of the Petition) that protected conduct played no role in Respondent's decision to terminate Roop. *See, Allianza Domicana*, 325 NLRB 987, 996-997 (1998)

To the extent the government contends that the record contains prior evidence that Roop engaged in other protected concerted activity (e.g., the group of employees going to HR in June 2016), and that Respondent was aware of such activities, that conduct is too remote in time from the discharge to provide any basis for a finding of unlawful motivation. *Lampi L.L.C.*, 322 NLRB 502, 508 (1996).

⁵⁴ A grievance was filed by the Teamsters challenging the termination. (Tr. 2136). Both grievances are pending arbitration. (Tr. 2138).

Dhuper had a reasonable belief that Roop engaged in conduct which violated the Hospital's Standards and jeopardized patient care. Dhuper acted on that belief in making the decision to terminate Roop. Discriminatory animus toward Roop's protected conduct was *not* a substantial or motivating factor in Respondent's decision to terminate Roop, and the ALJ should so find.

VI. RESPONDENT DID NOT VIOLATE SECTIONS 8(a)(1) OR 8(a)(4) OF THE ACT BY ISSUING A FINAL WRITTEN WARNING TO BACKUS

Paragraphs 6 and 7 of the Backus Complaint allege that Respondent violated Sections 8(a)(1) and 8(a)(4) of the Act by issuing a final written warning to Backus on April 9, 2018. These allegations should be dismissed because (a) the General Counsel has not proven that Backus' protected activity was a motivating factor in Respondent issuing the final written warning on April 9, 2018; and (b) even if the General Counsel had proven that Backus' protected activity was a motivating factor, Respondent has met its burden of providing that it would have issued a final written warning even if Backus had not engaged in protected activity.

A. The Events Giving Rise to Final Written Warning

1. Concerns Expressed About Respiratory Care Provided to Patient ML

After participating in a regularly scheduled bed meeting on the morning on March 13, 2018, Marino went to the Intensive Care Unit on the 4th floor of the hospital to follow-up with respect to matters raised during the hospitalist meeting. (Tr. 1673, 1676, and 1678). While in the ICU, Marino spoke with Maria Pena, an ICU nurse. (Tr. 1678). During this conversation, Pena told Marino that Dr. Jolly, a cardio-thoracic surgeon who was treating Patient ML, had complained about his respiratory care orders being changed and that the night shift ICU nurse had mentioned something about a medication for one of the respiratory therapy patients. (Tr. 1678, 1681-1682). At this time, Marino did not know that Backus has been assigned to care for Patient ML during

the night shift on March 12, 2018 which began at 6:30 p.m. on March 12, 2018 and ended at 7:00 a.m. on March 13, 2018. (Tr. 1736).

2. Concerns Expressed About Respiratory Care Provided to Patient ML

After hearing that Dr. Jolly had expressed concerns about his orders being changed and that there may have been an issue with medications for Patient ML on March 12, 2018, Marino began to investigate the concerns. (Tr. 1682, 1684-1685). Marino reviewed the order management system and determined that Dr. Jolly's respiratory care orders for Patient ML had not been changed. (Tr. 1685).

On March 15, 2018⁵⁵, after confirming that Dr. Jolly's orders were still active, Marino looked for information in Pyxis to see if medications were pulled for Patient ML. (Tr. 1684, 1689-1690). Pyxis is an automated dispensing machine for medications where a code is required to access medications. (Tr. 2238). Upon reviewing the information from Pyxis, Marino discovered that DuoNeb was ordered four times per day by Dr. Jolly. (Tr. 1686-1687, R-15 at p. 3). The order for four times per day meant that DuoNeb was to be administered within one (1) hour of 08:00, 12:00, 16:00, and 20:00. (Tr. 1687-1688). Marino also discovered that there was a series of missed medications at 20:00 on March 12, 2018, and at 08:00 and 12:00 on March 13, 2018⁵⁶ as the medications were not pulled from Pyxis. (Tr. 1688-1689, R-15 at p.3).

⁵⁵ Respondent anticipates that the General Counsel will argue that it took too long for Respondent to investigate the incident giving rise to Backus' discipline because the incident occurred on March 12, 2018 and Backus was not disciplined until April 9, 2018. This argument should be rejected because Respondent diligently investigated the incident and Respondent's investigative efforts were consistent with the standard set by the Teamsters CBA. In particular, the Teamsters CBA does not provide a time limit as to when an investigation must be completed but instead only requires that the investigation be commenced within 15 days of when Respondent knew or should have known about the incident. (GC – 26 at § 25.1 at p. SRH000018). Respondent learned of concerns about whether Backus administered DuoNeb on March 13, 2018 and began its investigation on March 15, 2018, which is well within the 15-day time limit set forth by the Teamsters CBA.

⁵⁶ Thuc Ho documented in the Medication Administration Record that DuoNeb was not given to Patient ML at 08:00 and 12:00 on March 13, 2018. (Tr. 17631764; GC-142 at p. SRH 002537). This explains why there were no DuoNeb pulls by Thuc Ho for Patient ML on March 13, 2018.

Once he discovered that medications were not pulled from Pyxis, Marino reviewed the Ventilator Flow Sheet for Patient ML. (Tr. 1689, 1704-1705, GC-128). Marino reviewed the Ventilator Flow Sheet to see if the medications were documented as given. (Tr. 1705). When he reviewed the Ventilator Flow Sheet, Backus' entry of the number "7" at 20:30 on March 12, 2018 caught his eye because it was entered oddly in that there was a line through it and then the number "7" was written next to the line. (Tr. 1710, 1711, GC-128).

After he reviewed the Ventilator Flow Sheet, Marino reviewed the Medication Administration Record ("MAR") for Patient ML. (Tr. 1714-1715). The MAR for Patient ML showed that there was a manual entry by Backus at 23:31 on March 12, 2018 for the DuoNeb that was scheduled to be given at 20:00. (Tr. 1712, 1739).

Once he reviewed the MAR, Marino contacted Brenda Brethauer, an Informatics Pharmacist at the hospital, to see pulls and returns from Pyxis. (Tr. 1717-1719, 1719). Because he had some questions on the ventilator flow sheet, some things that were missing or irregular, and Dr. Jolly had expressed concerns, Marino told Brethauer that he needed to see pulls and returns for Patient ML on March 12, 2018 and March 13, 2018. (Tr. 1721). In response to Marino's request, Brethauer generated a report for pulls and returns of DuoNeb for Patient ML on March 12, 2018 and March 13, 2018. (Tr. 1722-1724, 1748, R-18, R-26). When reviewing the report, Marino did not see any medication pulled for Patient ML for the scheduled administration of DuoNeb to Patient ML at 20:00 on March 12, 2018. (Tr. 1722-1724, 1748, R-18, R-26). Although the report did not show any DuoNeb being pulled from Pyxis for Patient ML by Backus, it did show that other respiratory therapists had pulled DuoNeb from Pyxis for treatments they were required to provide to Patient ML. (Tr. 1742-1744, R-18, R-26, GC-138, Ex. E). The report also showed that Backus pulled DuoNeb from Pyxis for other patients at least 8 different times during

her March 12, 2018 night shift and returned DuoNeb to Pyxis at least 2 different times during her March 12, 2018 night shift. (Tr. 1756-1761, 2240-2041, R-18, R-26, R-27).

After reviewing the Pyxis reports with Brethauer, Marino spoke with Brian Smith, the Lead Respiratory Therapist for the night shift on March 12, 2018, about whether anything unusual occurred during the night shift. (Tr. 1769). Smith reported to Marino that there was a question about a medication delivery at 8:00 p.m. (20:00) and that one of the therapists had mentioned an ICU nurse called and said there was a missed medication. (Tr. 1769-1770). Backus testified that Mehakjot Kahlon, a respiratory therapist who goes by the nickname “Mak,” reported to her that she received a call from an ICU Nurse about a missing treatment for Patient ML and that she had questioned Mak as to why the ICU Nurse was calling Mak and not her and stated to Mak that she did not know he was on treatments.⁵⁷ (Tr. 1036-1037).

In addition to speaking with Brian Smith, Marino also spoke with Steve Ochoa, the respiratory therapist who cared for Patient ML at the end of the day shift on March 12, 2018 and would have given report on Patient ML to Backus. (Tr. 1784). In response to questions from Marino, Ochoa confirmed that he did not handoff any medications to Backus during the report/handoff. (Tr. 1784).

3. Arrangements Made for Meeting with Backus

After he spoke with Brian Smith, Marino reviewed the results of his investigation with Jones. (Tr. 1770-1771).

On April 4, 2018, Marino called Backus to arrange for a meeting but was required to leave a voicemail message as Backus did not pick up. (Tr. 1728-1729-, R-20). In response to Marino’s message, Backus sent Marino an e-mail inquiring about the purpose of the call. (Tr. 1778, R20).

⁵⁷ Since Patient ML was transferred to the ICU at 22:00 on March 12, 2018, this interaction between Backus and Mak likely took place sometime after 22:00.

Thereafter, Marino and Backus exchanged calls and/or e-mails until a meeting was scheduled for April 9, 2018. (Tr. 1780-1783, R-20, R-21).

4. Meeting with Marino, Backus, and Shop Steward

On April 9, 2018, Marino met with Backus and Justin Kmetz, a shop steward, to discuss the incident relating to Patient ML. (Tr. 1791-1792). Marino began the meeting by explaining the discrepancy with respect to the administration of DuoNeb to Patient ML on March 12, 2018 and asked Backus where she got the medication to treat Patient ML on March 12, 2018. (Tr. 1792). In response, Backus stated she could have gotten it during report or found it on the table in the department. (Tr. 1793). Marino asked for further clarification and Backus became combative, never told Marino where she got the medication and accused Marino of half-assing the whole thing. (Tr. 1793). Marino explained that he had received Pyxis reports that showed that Backus had not pulled DuoNeb from Pyxis for Patient ML. (Tr. 1794). Marino once again asked Backus where she obtained the DuoNeb for Patient ML and Backus stated that she did not know. (Tr. 1793). During this meeting, Backus never identified any witnesses, did not tell Marino that she did not check the physician orders for Patient ML before providing care, did not tell Marino about asking Patient ML if he wanted a breathing treatment, did not tell Marino about her decision to provide Patient ML a breathing treatment without checking for physician orders based on erroneous belief that there were PRN orders for DuoNeb, did not tell Marino about her interaction with Mak on March 12, 2018, and did not tell Marino that she had been on the 3rd floor returning DuoNeb to Pyxis just 4 minutes before she claimed to administer DuoNeb to Patient ML. (Tr. 1792-1794).

5. Final Written Warning Issued to Backus

At the end of the April 9, 2018 meeting, Marino issued a final written warning to Backus because Backus documented a medication in the medical record without evidence of actually

having the medication and dispensing it and Backus never provided Marino with information as to where she got the medication. (Tr. 1796-1797, GC-127). In this regard, Backus did not provide Marino with definitive information about where she received the medication and all she would say definitively is “I don’t know.” (Tr. 1796-1797). Marino issued a final written warning as opposed to a lesser level of discipline because Respondent had issued a final written warning to Brian Smith, Chris Hamid, Thuc Ho, and Frank Mardanzai in 2015 for similar conduct. (Tr. 1798-1803, GC-136). Smith, Hamid, Ho, and Mardanzai received a final written warning because they dispensed medication and did not chart the pre and post medication assessment. (Tr. 1799, GC-136).

B. The General Counsel Has Not Proven That Backus’ Protected Activity Was a Motivating Factor in Respondent’s Decision to Issue the Final Written Warning to Backus

As noted above, in order to determine whether an adverse employment action violated Section 8(a)(1) of the Act, the Board utilizes the analysis articulated in *Wright Line*. The Board also uses the *Wright Line* analysis when determining whether an adverse employment action violated Section 8(a)(4) of the Act. *See Overseas Motors, Inc.*, 721 F.2d 570, 571 (6th Cir. 1983) (applying *Wright Line* in connection with a violation of Section 8(a)(4)); *Verizon*, 350 NLRB 542, 546-547 (2007). Under *Wright Line*, the General Counsel must prove, by a preponderance of the evidence, that Backus engaged in protected activity prior to April 9, 2018, that Respondent had knowledge of the protected activity, and that Backus’ protected activity was a substantial or motivating factor in Respondent’s decision to issue a final written warning to Backus on April 9, 2018. *Nichols Aluminum*, 797 F.3d at 549, quoting *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. at 401.

To meet his burden under *Wright Line*, the General Counsel alleged and sought to prove that Backus engaged in the conduct described below, that Respondent was aware of such conduct,

and that such conduct was a substantial or motivating factor in Respondent's decision to issue a final written warning to Backus on April 9, 2018. In particular, the General Counsel alleged that (a) Backus engaged in concerted activity since at least November 25, 2016 (Paragraph 5(a)); (b) Backus filed a charge in Case No. 32-CA-197958 on May 2, 2017 (Paragraph 5(b)); (c) Backus filed a charge in Case No. 32-CA-203396 on July 26, 2017 (Paragraph 5(c)); (d) the hearing on the Fourth Amended Consolidated Complaint commenced on March 26, 2018 (Paragraph 5(d)); (e) Backus testified on March 27, 2018 (Paragraph 5(e)); (f) Respondent reviewed Backus' sworn statements, which were provided to the Board on June 5, 2017 and July 31, 2017, on March 27, 2018 (Paragraph 5(f)), and that (g) the conduct described in Paragraphs (a) to (f) was a substantial and motivating factor in Respondent's decision to issue a final written warning to Backus on April 9, 2018. While the General Counsel has proved that the conduct alleged in Paragraphs (a) to (f) occurred⁵⁸, the General Counsel has not met his burden of proving, by a preponderance of the evidence that such conduct was a substantial or motivating factor in Respondent's decision to discipline Backus on April 9, 2018 because: (a) the conduct alleged in Paragraphs 5(a) to (c) is too remote in time to be a substantial or motivating factor in Respondent's decision to discipline Backus and (b) the conduct alleged in paragraphs 5(d) to 5(f) was not a motivating factor in Respondent's decision to issue the final written warning.

⁵⁸ Respondent does not dispute that Backus engaged in the conduct that the General Counsel describes as concerted activity but does dispute whether such conduct constitutes protected concerted activity. Respondent also does not dispute that Backus filed the charges as alleged in Paragraphs 5(b) and 5(c), that the hearing commenced on March 26, 2018, that Backus testified (albeit untruthfully) on March 27, 2018, or that Respondent's counsel was afforded the opportunity to review Backus' June 5, 2017 and July 31, 2017 statements on March 27, 2018.

1. **The Conduct Alleged in Paragraphs 5(a) to 5(c) Is Too Remote in Time to Be a Motivating Factor in Respondent's Decision to Discipline Backus on April 9, 2018.**

The conduct alleged in Paragraphs 5(a) to 5(c) is too remote in time to be a substantial or motivating factor in Respondent's decision to issue a final written warning to Backus because the conduct occurred between ten (10) to sixteen (16) months before Respondent's decision to issue the final written warning on April 9, 2018. First, the concerted activity alleged in Paragraph 5(a) occurred no later than April 30, 2017, almost twelve (12) months before the final written warning was issued. Backus spoke to Roop about Matuszak picking on Roop, distributed bullying and discrimination forms, and encouraged others to submit bullying and discrimination forms in November 2016, some sixteen (16) months before Respondent disciplined Backus. (Tr. 240-241, GC-36). Backus sent an e-mail to Dhuper on December 10, 2016, attended a group meeting with Dhuper on December 14, 2016, sent an e-mail to Dhuper in advance of an individual meeting with Dhuper, and attended an individual meeting with Dhuper and O'Keefe shortly after the December 14, 2016 meeting. (Tr. 245, 252-254, 257-259, GC-37). This activity all occurred more than fifteen (15) months before Respondent disciplined Backus. Backus also spoke to her co-workers about a petition, drafted portions of a petition, circulated a petition, submitted a petition to Dhuper and HR, and provided Ohlone College with a copy of the petition submitted to Dhuper and HR. (Tr. 269, 271, GC-34, GC-42). The petition was submitted to Dhuper, HR, and Ohlone College on April 13, 2017, almost twelve (12) months before Respondent disciplined Backus. (Tr. 269, 271, GC-34, GC-42). There is no record evidence that Backus engaged in concerted activity after April 13, 2017. In other words, the conduct which forms the basis for the allegations of Paragraph 5(a) and the alleged violation of Section 8(a)(1) all took place before April 30, 2017, or more than ten (10) months before Marino learned of the March 12, 2018 incident and more than eleven (11) months before Respondent issued a final written warning to Backus. As such, the conduct is too

remote in time to be a motivating factor in Respondent's decision to issue the final written warning. *Snap-On Tools, Inc.*, 342 NLRB *9 (2014) (finding that activity which occurred two months before the challenged discipline was too remote in time). This is especially true since the General Counsel has offered no evidence that Respondent took any adverse action against Backus as a result of the activity alleged in paragraphs 5(a).

In addition, Backus filed charges alleged in Paragraphs 5(b) and 5(c) at least seven (7) and months before Marino learned of the March 12, 2018 incident and at least eight months before Respondent issued the final written warning to Backus on April 9, 2018. In particular, Backus filed a charge in Case No. 32-CA-197958 on May 2, 2017, more than ten (10) months after Marino learned of the March 12, 2018 incident and more than eleven (11) months before the final written warning was issued. Backus filed a charge in Case No. 32-CA-203396 on July 26, 2017, more than seven (7) months before Marino learned of the March 12, 2018 incident and more than eight months before the final written warning was issued. Conduct which occurred more than seven (7) and as much as eleven (11) months before the decision to discipline Backus is too remote in time to be a motivating factor in Respondent's decision to issue the final written warning. *Snap-On Tools, Inc.*, 342 NLRB *9.

2. The Conduct Alleged in Paragraphs 5(d) to 5(f) Was Not a Motivating Factor in Respondent's Decision to Issue the Final Written Warning

There is no dispute that the hearing on the Fourth Amended Consolidated Complaint commenced on March 26, 2018 (Paragraph 5(d)), that Backus testified on March 27, 2018 (Paragraph 5(e)), and that Respondent's counsel reviewed Backus' June 5, 2017 and July 31, 2017 statements to the Board on March 27, 2018 (Paragraph 5(f)). However, a consideration and weighing of all the relevant evidence demonstrates that this activity was not a motivating factor in Respondent's decision to issue the final written warning to Backus on April 9, 2018. *See Charles*

Batchelder Company, Inc., 250 NLRB 89. 89-90 (1990) (the question of motivation is to be resolved by a determination based on consideration and weighing of all relevant evidence).

The conduct which gave to Backus' discipline (i.e., Backus failure to give DuoNeb to Patient ML on March 12, 2018 and Backus' false entries in the Ventilator Flow Sheet and the MAR) occurred at least two (2) weeks **before** the conduct alleged in Paragraphs 5(d) to 5(f) occurred. It was this conduct and Backus' failure to provide any credible evidence to challenge Marino's findings, not the commencement of the hearing, Backus' testimony on March 27, 2018, or the statements Backus gave to the Board on June 5, 2017 and July 31, 2017, that was the motivating factor for Respondent issuing a final written warning to Backus.⁵⁹ In this regard, it is important to note that Marino learned of Dr. Jolly's concerns and the statement about medications for Patient ML on March 13, 2018, thirteen (13) days before the hearing commenced and fourteen (14) days before Backus testified. (Tr. 1673, 1676, 1678, 1681-1682). Marino also commenced an investigation on March 15, 2018, eleven (11) days before hearing commenced and ten (10) days before Backus testified. Before March 26, 2018, Marino had reviewed the Pyxis information, reviewed the Ventilator Flow Sheet for Patient ML, reviewed the MAR for Patient ML, spoke to and reviewed reports from Brethauer, and spoke to Smith about whether anything unusual happened during the night shift on March 12, 2018. ((Tr. 1684, 1689:-1690, 1688-1689, 1689, 1704-1705, 1714-1715, 1717-1719, R-15 at p, 3, and GC-128).

⁵⁹ To accept the General Counsel's theory would require one to believe that Respondent would take no adverse actions against Backus during this 15-month period but was then motivated to take adverse action immediately after the hearing finally commenced and knowing that the hearing would resume before the same judge in less than six (6) weeks. This defies logic and should be rejected accordingly.

C. **Respondent Has Proven That It Would Have Issued a Final Written Warning Even if Backus Had Not Engaged in Protected Activity**

If the General Counsel is successful in meeting his burden (which he was not as it relates to the Backus Complaint), the burden shifts to the employer to prove, by a preponderance of the evidence, that it would have taken the same action even in the absence of the protected conduct. *Wright Line*, 251 NLRB at 1089; *Septix Waste, Inc.*, 346 NLRB at 496; *Williamette Industries*, 341 NLRB at 563. To meet its burden, the employer must persuade by a preponderance of the evidence that it would have taken the same action in the absence of the protected conduct. *Manno Electric, Inc.*, 321 NLRB at 280 fn. 12. The employer is not required to prove the incident occurred as reported, but instead that it had a good faith belief that the incident occurred as reported. *See Midnight Rose Hotel & Casino*, 343 NLRB 1003, 1005 (2004), *enfd.* 198 Fed.Appx. 752 (10th Cir. 2006); *National Dance Institute – New Mexico, Inc.*, 364 NLRB No. 35, * 11 (2016) (holding that the employer need not affirmatively prove that an incident occurred as reported but merely that it had good faith belief it did); *Fresno Bee*, 337 NLRB 1161, 1182 (2002). In addition, the question is whether the Respondent established that it would have disciplined the employee absent her protected conduct, not whether the Board thinks it should have done so. *Windsor Redding Care Center, LLC*, 366 NLRB No. 127 *1 at fn. 3 (2018).

In this case, Respondent has proven, by a preponderance of the evidence, that it would have issued the final written warning to Backus even in the absence of Backus' protected conduct because Respondent has proven that: (1) Respondent conducted an adequate investigation; (2) Respondent had a good faith belief that Backus had made a medication administration error and falsified Patient ML's medical record; (3) the discipline imposed on Backus was consistent with discipline imposed on other respiratory therapists who engaged in similar conduct; (4) Backus, and her new story, are not credible; and (5) the evidence does not support a finding of pretext.

1. Marino Conducted an Adequate Investigation

Marino learned of Dr. Jolly's concerns and the night shift nurse's statement about medication during a routine visit to the ICU on March 13, 2018. (Tr. 1673, 1676, 1678, 1681-1682, 1686). Marino did not go looking for issues or concerns about Backus' performance and did not even know Backus had been assigned to Patient ML the night before when he spoke to Pena on March 13, 2018. (Tr. 1736). After he learned of Dr. Jolly's concerns and the statement about a medication, Marino conducted an adequate investigation regarding the concerns.

First, Marino reviewed the Pyxis information to determine what medications had been scheduled for Patient ML. (Tr. 1684, 1689-1690). When reviewing the Pyxis information, Marino discovered that DuoNeb was not pulled from Pyxis for Patient ML's scheduled treatments at 20:00 on March 12, 2018 and 08:00 and 12:00 on March 13, 2018. (Tr. 1688-1689, R-15 at p. 3).

Second, after he discovered that DuoNeb had not been pulled from Pyxis for Patient ML's scheduled treatments at 20:00 on March 12, 2018 and 08:00 and 12:00 on March 13, 2018, Marino reviewed the Ventilator Flow Sheet for Patient ML. (Tr. 1689, 1704-1705, GC-128). The Ventilator Flow Sheet included a medication entry by Backus at 20:30 on March 12, 2018, which Marino thought was entered oddly, but did not include a medication entry for the scheduled treatments at 08:00 and 12:00 on March 13, 2018. (Tr. 1705, GC-128). Backus' entry at 20:30 on March 12, 2018 caught Marino's eye because it appeared as if there was a vertical line drawn through the box, which would indicate that no medication was given, and that a "7" was written next to the line. (Tr. 1710-1711, GC-128).

Third, after he reviewed the Ventilator Flow Sheet, Marino reviewed the MAR for Patient ML. (Tr. 1714-1715). The MAR included a manual entry by Backus at 23:31, a full three hours after she claims to have administered DuoNeb to Patient ML. (Tr. 1712, 1739, GC-142). The MAR also indicates that Thuc Ho, a respiratory therapist, indicated in the MAR that DuoNeb was

not given to Patient ML at 08:00 and 12:00 on March 13, 2018. (Tr. 1763:-1764; GC-142 at p. SRH 002537). This explains why no medication was pulled from Pyxis for 08:00 and 12:00 on March 13, 2018.

Fourth, after he reviewed the MAR, Marino met with Brethauer, Respondent's Informatics Pharmacist, to see pulls and returns from Pyxis. (Tr. 1717-1719). Marino asked Brethauer for a report that showed the pulls and returns of DuoNeb on March 12, 2018 and March 13, 2018. (Tr. 1721). Brethauer generated the reports from the Pyxis server and reviewed them with Marino. (Tr. 1722-1724, 1748, R-26, R-27). The reports showed that DuoNeb was not pulled from Pyxis for Patient ML's scheduled treatment at 20:00 on March 12, 2018 and that Backus did not pull any DuoNeb from Pyxis on March 12, 2018 for Patient ML. (Tr. 1742-1744, R-18, R-26, R-27, GC-138 at Ex. E). However, the reports also showed that Backus had pulled DuoNeb from Pyxis for patients other than Patient ML eight (8) different times during her shift on March 12, 2018 and that she had returned DuoNeb to Pyxis two (2) different times during the same shift. (Tr. 1756-1761, 2240-2241, R-18, R-26, R-27) .

Fifth, after reviewing the reports generated by Brethauer, Marino spoke with Smith, the Lead Respiratory Therapist for the night shift on March 12, 2018, about whether anything unusual occurred during the night shift. (Tr. 1769). Smith reported that there was a question about a medication delivery at 8:00 p.m. (20:00) and that one of the therapists had mentioned that an ICU nurse called and said there was a missed medication. (Tr. 1769-1770). During her testimony, Backus confirmed that Mehakjat Kahlon, a respiratory therapist who goes by the nickname "Mak", informed Backus during her shift on March 12, 2018 that Mak had received a call from the ICU

nurse about a missed medication for Patient ML and that Backus told Mal that she did not know he was on scheduled treatments.⁶⁰ (Tr. 1036-1037).

Sixth, after he spoke to Smith, Marino contacted Backus on April 4, 2018 to arrange a meeting to discuss the incident. (Tr. 1728-1729, R-20). After an exchange of e-mails, Marino and Backus agreed to meet on April 9, 2018. (Tr. 1780-1783, R-20, R-21).

Seventh, after contacting Backus to arrange a meeting but before the meeting with Backus, Marino spoke to Steve Ochoa, the respiratory therapist who would have handed off Patient ML to Backus on March 12, 2018. (Tr. 1784). In response to questions from Marino, Ochoa stated that he did not handoff any medications to Backus during the handoff/report for Patient ML on March 12, 2018. (Tr. 1784).

Eighth, Marino met with Backus and Justin Kmetz, a shop steward on April 9, 2018. (Tr. 1791-1792). Marino began the meeting by explaining the discrepancy with respect to the administration of DuoNeb to Patient ML on March 12, 2018 and asked Backus where she got the medication to treat Patient ML on March 12, 2018. (Tr. 1792). In response, Backus stated she could have gotten it during report or found it on the table in the department. (Tr. 1793). Marino asked for further clarification and Backus became combative, never told Marino where she got the medication, and accused Marino of half-assing the whole thing. (Tr. 1793). Marino explained that he had received Pyxis reports that showed that Backus had not pulled DuoNeb from Pyxis for Patient ML. (Tr. 1794). Marino once again asked Backus where she obtained the DuoNeb for Patient ML and Backus stated that she did not know. (Tr. 1793). During this meeting, Backus never identified any witnesses, did not tell Marino that she did not check the physician orders for Patient ML before providing care, did not tell Marino about asking Patient ML if he wanted a

⁶⁰ Backus did not mention her conversation with Mak during her meeting with Marino on April 9, 2018.

breathing treatment, did not tell Marino about her decision to provide Patient ML a breathing treatment without checking for physician orders based on erroneous belief that there were PRN orders for DuoNeb, did not tell Marino about her interaction with Mak on March 12, 2018, and did not tell Marino that she had been on the 3rd floor returning DuoNeb to Pyxis just 4 minutes before she claimed to administer DuoNeb to Patient ML. (Tr. 1792-1794).

The investigation outlined above was more than adequate and is distinguishable from investigations that have been found to be pretextual. *See, e.g., ManorCare Health Services – Easton*, 356 NLRB 202, 227 (2010), *enfd.* 661 F.3d 1139 (D.C. Cir. 2001) (discipline pretextual where employer’s “frenzy of activity involved zero investigation or interest in the underlying events” of employee’s alleged misconduct); *North Hills Office Services*, 344 NLRB 1083, 1097-1098 (2005) (manager only investigated and determined that employee’s conduct had been explicitly approved by supervisor after employee’s discharge); *New Orleans Cold Storage Co.*, 326 NLRB 1471, 1477 (1998), *enfd.* 201 F.3d 592 (5th Cir. 2000). First, Marino conducted a thorough investigation which relied on objective evidence (i.e., Pyxis information, the Ventilator Flow Sheet, and the MAR), sought the assistance from a disinterested individual (Brethauer), and spoke with several different witnesses before issuing the final written warning on April 9, 2018. In addition, Marino apprised Backus of the allegations and provided her with an opportunity to respond and would have continued investigating if Backus had provided him with evidence as to where she received the DuoNeb.⁶¹ (Tr. 1795)

⁶¹ Respondent anticipates that the General Counsel will argue that Respondent should have allowed Backus more time to respond to the allegations before issuing the final written warning. This argument should be rejected because any such time would have been futile as evidenced by the implausible story told by Backus on May 7 and 8, 2018, almost 30 days after the April 9, 2018 meeting.

2. Respondent Had A Good Faith Belief That Backus Had Made A Medication Error and Falsified Patient ML's Medical Record

After completing his investigation, Marino had a good faith belief that Backus had made a medication error (not given DuoNeb to Patient ML) and falsified Patient ML's medical record (documented that she had given DuoNeb at 20:30 when she did not)⁶². Marino's good faith belief was based on the following undisputed evidence:

- An ICU Nurse had called about a missed medication for Patient ML on March 12, 2018 (Tr. 1036-1037);
- The Pyxis information showed that Patient ML was scheduled to receive a treatment with DuoNeb at 20:00 on March 12, 2018 and that no DuoNeb was pulled for this treatment (Tr. 1688-1689, R-15 at p. 3);
- Backus' entry on the Ventilator Flow Sheet caught Marino's eye because it included a vertical line (which would indicate no medication was administered) and a "7" written next to it (Tr. 1705, 1710-1711, GC-128);
- The MAR showed a manual entry by Backus at 23:31, 3 hours after Backus claims to have administered the DuoNeb to Patient ML and Backus never offered an explanation as to why she did not use medication barcode scanning when she allegedly administered the medication at 20:30 (Tr. 1712, 1739, GC-142);
- The reports generated by Brethauer showed that Backus had pulled and returned DuoNeb for other patients throughout her shift on March 12, 2018 which demonstrates that she knew how to use Pyxis, used Pyxis, and had no reason to grab DuoNeb "off the table (Tr. 1756-1761, 2240-2241, R-18, R-26, R-27);"
- As confirmed by Backus, Mak had received a call from an ICU Nurse complaining about a missed medication, Mak relayed this information to Backus, and Backus responded that she did not know Patient ML was on scheduled treatments (Tr. 1037);

⁶² During General Counsel's opening statement on the Backus Complaint, counsel for the General Counsel suggested that Respondent had admitted in its position statement that it did not know whether Backus had administered the medication. There is no evidence to support such a claim. A review of the position statement clearly demonstrates that it is Respondent's belief that Backus made a medication error and falsified the medical record and was disciplined for such conduct. Respondent also pointed out that even Backus had given the medication, there were multiple other basis upon which to issue discipline. Respondent's efforts in this regard are not an admission.

- Ochoa did not provide any medication to Backus during the handoff/report for Patient ML (Tr. 1784); and
 - Backus did not have an adequate response as to where she received the DuoNeb. Rather, Backus suggested that she may have gotten it during the report or from the table and her only definitive response was “I don’t know” (Tr. 1793) and
 - Backus did identify any witnesses who may have information about the incident (Tr. 1792-1794).
3. **The Discipline Issued to Backus Was Consistent with Discipline Issued to Other Respiratory Therapists**

Marino issued a final written warning to Backus as opposed to some other discipline because he believed it to be the appropriate level of discipline based on discipline that had been issued to four (4) other respiratory therapists that had dispensed medications but not charted pre and post medication assessments. (Tr. 1798-1803, GC-136). In particular, after an audit performed by Marino revealed that they had dispensed medications but not charged the pre and post-medication assessment, Respondent issued final written warnings to Smith, Chris Hamid, Thuc Ho, and Frank Mardanzai in January 2015. (Tr. 1799, GC-136). Marino used this discipline as the basis for the level of discipline issued to Backus (a final written warning) because they involved similar circumstances. (Tr. 1798-1803, GC-136). That is, Smith, Hamid, Ho, and Mardanzai received a final written warning due to false documentation (not documenting the pre and post medication assessment) and Backus had also engaged in false documentation (documenting that he administered a medication when she did not).⁶³

⁶³ Respondent anticipates that the General Counsel will argue that Backus was treated disparately because Thom and Roop believe that there were two occasions on which they believe Hamid entered in a patient’s medical record that he had given a medication when he had not and that they reported the incidents and no discipline was issued to Hamid. This argument should be rejected because there is no credible evidence to support this testimony. First, Thom does not even know whether the incident he testified about occurred in 2016 or 2017. (Tr. 951-959, 977-979). Second, Roop cannot even remember if the second incident she testified about occurred before or after the “door incident” with Matuszak, a relatively significant event. (Tr. 1190). Third, as evidenced by their demand that Hamid be terminated, both Roop and Thom are biased against Hamid. (GC-34).

4. Backus, and Her New Story, Are Not Credible

Backus, and her new story, are not credible because (a) Backus has made false statements in this proceeding and in the State Court Proceedings; and (b) Backus' new story is contradicted by the undisputed evidence.

a. Backus Made False Statements in This Proceeding and the State Court Proceedings

Backus is not credible because she made false statements in this proceeding and in the State Court Proceedings. First, before the videotape of the incident was introduced, Backus testified in this proceeding that Matuszak "walked around by left side and bumped me really hard." (Tr. 294). After this testimony, Respondent's counsel noted that there was a video of the incident and the video was introduced into evidence and reviewed as part of Backus' testimony. (Tr. 299, GC-49). The videotape of the incident shows that either Backus and Matuszak did not touch each other or, most favorably to Backus, if they did touch each other, it was a slight touch that could never be described or perceived as a really hard bump. (GC-49). In other words, Backus' testimony that Matuszak "walked around by left side and bumped me really hard" was false. Second, as discussed above, Backus testified in this proceeding that she did not claim in state court proceedings that she was injured as a result of the incident between her and Matuszak that was captured on video. (Tr. 320, GC-49). This testimony was also false because Backus stated under penalty of perjury in the State Court Proceedings that "she [Matuszak] hit my body so hard my shoulder ached for a few days." (R-2 at p. 000057). Third, Backus stated under penalty of perjury in the State Court Proceedings that "she [Matuszak] hit my body so hard my shoulder ached for a few days" was false. (GC-49, R-2 at p. 000057). The videotape (GC-49) demonstrates that there is no possible way that Backus' shoulder ached for a few days based on the incident in the hallway. In other words, Backus, like she has in this proceeding, lied in tin the State Court Proceedings.

b. Backus' New Story is not Credible

During her testimony on May 7 and 8, 2018, Backus created a new story (which she never told Marino) about the March 12, 2018 incident that is simply not credible. First, Backus testified that she does not check a patient's orders before administering treatment but instead relies on the report and the assignment sheet. This testimony is not credible. Marino ***and*** Roop both testified that respiratory therapists are required to check a physician's order after receiving report and before administering treatments. (Tr. 1676-1677). In this regard, Roop testified as follows:

Q Now, when you come on to a shift and you get patients assigned to you, you get report from the other respiratory therapists, right?

A Yes.

Q After you get the report, you also check the orders for the patient, correct?

A Yes, I do.

Q You don't rely just on what the – the person giving you the report told you, do you?

A No. we have to check the orders.

(Tr. 1190-1191).

Second, Backus testified that she saw Patient ML at 20:30 on March 12, 2018, that he had one of the worst cases of subcutaneous emphysema⁶⁴ she had seen (Tr. 1033-1034), that she decided to issue a breathing treatment using DuoNeb to Patient ML and communicated this to Patient ML and received his consent (Tr. 1033-1035), that she decided to issue a breathing treatment using DuoNeb because the standard ventilator orders for a patient on a vent includes a PRN (as needed) order for the use of DuoNeb (Tr. 1100, 1117-1118). This testimony is not credible because:

⁶⁴ Backus referred to the condition as subcu emphysema. The full name of the condition is subcutaneous emphysema.

- Respiratory therapists may only administer medications that have been ordered by a physician and the standard orders for ventilator patients do not include a standard PRN (as needed) order for DuoNeb. Rather, the standard orders for ventilator orders do not include a standard order for the use of DuoNeb or even a box for a physician to check off regarding the use of DuoNeb. (Tr. 1807-1809, R-22). More importantly, , the ventilator orders for Patient ML do not include a PRN order for DuoNeb. (Tr. 1980-1981, R-24);
- Patient ML did not have a PRN Order for DuoNeb. (Tr. 1980-1981, R-24). Rather, Dr. Jolly had ordered the administration of DuoNeb four (4) times per day. (Tr. 1686-1687, R-15 at p. 3); and
- If Patient ML had one of the worse cases of subcutaneous emphysema that Backus had ever seen, one would expect her to remember much more about Patient ML when she met with Marino on April 9, 2018.

Third, Backus testified that she administered a breathing treatment using DuoNeb that she got from the table in the break room (as opposed to Pyxis) and pulled the DuoNeb from her pocket (Tr. 1035, 1096). This testimony is not credible because:

- The Pyxis reports for March 12, 2018 show that Backus pulled and returned DuoNeb to Pyxis units at the hospital at least 10 different times during her shift on March 12, 2018 such that there is no logical reason why Backus would not have retrieved DuoNeb from the Pyxis unit if she had in fact administered it to Patient ML. Backus did not retrieve DuoNeb from Pyxis for Patient ML because she never administered DuoNeb to Patient ML as she did not know he was on scheduled treatments. (Tr. 1756-1761, 2240-2041, R-18, R-26, and R-27);
- The Pyxis reports indicate that Backus returned DuoNeb to a Pyxis Unit on 3East, which is located on the 3rd floor of the hospital, at 20:26 on March 12, 2018. (Tr. 1757, 1758, R-18, R-26). This means that Backus would have had to return DuoNeb on 3West, travel to Patient ML's room on the 4th floor, assess Patient ML, communicate with Patient ML about his condition and a breathing treatment, and begin administration of a breathing treatment using DuoNeb within 4 minutes. This is simply not believable; and
- The General Counsel offered no testimony from any witnesses who saw Backus retrieve DuoNeb from the table or that DuoNeb was present on the table on March 12, 2018. In addition, Rose Rogers, who has been a respiratory therapist at St. Rose for more than 25 years testified that she has never seen someone pick up DuoNeb from the table (Tr. 1005-1006).

Fourth, Backus testified that she noted the treatment on the Ventilator Flow Record but did not use medication barcode scanning, that she wrote a “7” in the box used to identify medication administration on the Ventilator Flow Record, that she wrote the “7” and not a straight line when she administered the DuoNeb at 20:30 (Tr. 1042-1043), and that she did not turn a straight line on the Ventilator Flow Sheet into a “7” at the same time she made the manual entry in the MAR (Tr. 1033-1035). This testimony is not credible because:

- Backus’ entry on Patient ML’s Ventilator Flow Sheet includes a straight vertical line, which indicates that no medication was administered, and a “7” squeezed into the box next to the straight vertical line. (GC-128); and
- When Backus has administered a medication, she notes it with a “7” that is preceded by a “#” sign but does not include a vertical line after the “#7” like she did on March 12, 2018. For example, Backus’ entries on R-5 include “#7” without a second vertical line and Backus’ entries on R-8 include “#7” without a second vertical line. Backus’ entry on R-6 includes a vertical line without a number which means that no medication was given. Backus’ entries on R-7 include “#1” with no vertical line following the number. (Tr. 1086-1093, R-5, R-6, R-7, and R-8). The logical conclusion from these facts is that Backus inserted a vertical line at 20:30 on March 12, 2018 in Patient ML’s Ventilator Flow Sheet because she did not administer the medication and then later squeezed a “#7” into the box when she was trying to cover up her mistake. Had Backus provided the medication and made the entry in the Ventilator Flow Sheet at 20:30 as she claims, the entry would be like her other entries and only include “#7” not a vertical line after the “#7”.

Fifth, Backus testified that she had very little recollection of Patient ML when she met with Marino on April 9, 2018 and at the hearing on May 7 and 8, 2018. This testimony is not credible. If Patient ML had one of the worse cases of subcutaneous emphysema Backus had seen, she certainly would have remembered more details regarding her treatment of Patient ML when she met with Marino on April 9, 2018 and when she testified on May 7, 2018 and May 8, 2018. (Tr. 1033:22-1034:9).

5. The Evidence Does Not Support a Finding of Pretext.

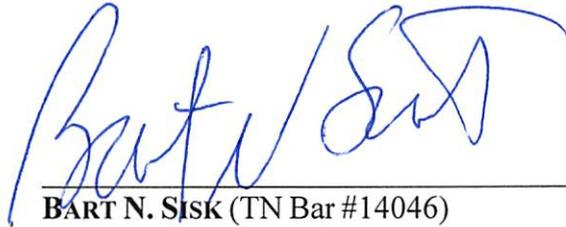
The evidence does not support a finding of pretext because there is no evidence of a cursory investigation, shifting defenses, or disparate treatment. *See Gaylord Hospital*, 359 NLRB 1266, 1279 (2013). First, as discussed above, Respondent conducted a thorough investigation into Backus' alleged misconduct. Second, Respondent has not offered shifting defenses. Rather, Respondent has consistently argued that Backus made a medication error (not administering DuoNeb to Patient ML as scheduled) and falsified Patient ML's medical record (falsely stating in the medical record that she had administered DuoNeb when she had not).⁶⁵ Third, as discussed above, Respondent issued a final written warning to Backus because Respondent had issued final written warnings to four (4) other respiratory therapists who engaged in similar conduct.

VII. CONCLUSION

Based upon the above and foregoing, Respondent avers that the government has not established that Respondent engaged in any conduct in violation of Sections 8(a)(1) and (4) of the Act and specifically requests that the Fourth Amended Consolidated Complaint and the Complaint in the 32-CA-218138 be dismissed in their entirety.

⁶⁵ During General Counsel's opening statement on the Backus Complaint, counsel for the General Counsel suggested that Respondent had admitted in its position statement that it did not know whether Backus had administered the statement. There is no evidence to support such a claim. A review of the position statement clearly demonstrates that it is Respondent's belief that Backus made a medication error and falsified the medical record and was disciplined for such conduct. Respondent also pointed out that even Backus had given the medication, there were multiple other basis upon which to issue discipline. Respondent's efforts in this regard are not an admission.

Respectfully submitted this 31st day of July, 2018.



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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of July, 2018, the foregoing was electronically filed with the Division of Judges using the National Labor Relations Board's electronic filing system and was served upon the following by electronic mail and Federal Express:

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