

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

MAINE COAST REGIONAL HEALTH
FACILITIES d/b/a MAINE COAST
MEMORIAL HOSPITAL, the sole member
of which is EASTERN MAINE
HEALTHCARE SYSTEMS

Respondent

and

KAREN-JO YOUNG, an Individual

Charging Party

Cases 01-CA-209105
01-CA-212276

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO
RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S
DECISION AND RECOMMENDED ORDER**

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I. INTRODUCTION

This case concerns Respondent's unlawful decision to summarily discharge its employee, Karen-Jo Young, because she wrote a letter to the editor of a local newspaper concerning ongoing labor disputes involving Respondent and its physicians and nurses, that had been previously reported in the newspaper, in violation of an unlawful work rule that bans all employee contact with the news media without Respondent's involvement and which requires employees to forward media inquiries to Respondent. The Administrative Law Judge (ALJ) correctly found Respondent independently violated Sections 8(a)(1) and (3) when it discharged Young and it further violated Section 8(a)(1) by maintaining its media policy both before and after it was amended.

Pursuant to Section 102.46(b) of the Rules and Regulations of the National Labor Relations Board, Counsel for the General Counsel hereby files this Answering Brief to Respondent's Exceptions of the ALJ's Decision and Recommended Order in this matter.¹

Respondent filed 39 Exceptions to the ALJ's Decision.² In its Brief, Respondent identified four questions raised by its Exceptions that it is presenting to the Board – listing the Exceptions that were related to each of these questions. The four questions Respondent argues its Exceptions present are as follows:

¹ Hereinafter, the following abbreviations will be used: references to the Respondent's Brief in Support of Exceptions will be designated as Brief; references to the ALJ's Decision will be called ALJD; Transcript references will be designated as TR (number) with line numbers of the page of the transcript appearing after the colon; General Counsel Exhibits will be designated GCX (number); Respondent's Exhibits will be designated RX (number) ; and Joint Exhibits will be designated as JTX (number).

² Along with its Exceptions and Brief, Respondent filed a Request for Oral Argument before the Board. Respondent did not offer anything to support this request. A total of 6 witnesses testified over the course of this two day trial. There is nothing novel or complex about the issues presented in Respondent's Exceptions. Therefore, Respondent's request should be denied.

1. Whether the ALJ erred in concluding that the Policy that went into effect on January 15, 2018, unlawfully interferes with employees' exercise of Section 7 rights in violation of Section 8(a)(1).³
2. Whether the ALJ erred in concluding that Ms. Young engaged in concerted activity within the meaning of the Act and thus erred in his conclusion that Respondent violated Section 8(a)(1) by discharging Ms. Young for concerted activity with one or more of her co-workers protected by the Act.⁴
3. Whether the ALJ erred in concluding that Respondent violated Section 8(a)(3) when he did not find any antiunion animus or antiunion purpose, and when he did not find any worker was discouraged from joining the Union by Respondent's actions.⁵
4. Whether the ALJ erred in recommending a remedy that goes beyond merely requiring the Respondent in this matter to take certain affirmative actions, and instead extends to non-party Eastern Maine Healthcare Systems and/or its other non-party member organizations.⁶

Respondent's Exceptions lack merit and should be rejected. With respect to Young's discharge, as fully discussed below, Judge Bogas, made the appropriate findings and correctly concluded that Young's discharge violated Sections 8(a)(1) and (3) of the Act because she was engaged in protected concerted and Union activity when she submitted a letter to the Editor of *The Ellsworth American* Newspaper (*The American*) and nothing she did caused her to lose the protection of the Act.⁷ ALJD at 11. In reaching his conclusion, Judge Bogas appropriately followed well established Board jurisprudence recognizing that employees engage in concerted activity protected by Section 7 when they use a letter to the editor of a newspaper or another third party in an effort to obtain assistance where that communication relates to a legitimate labor

³ Respondent listed Exceptions 30, 31, 32, 33, 34, 35, 36 and 39 for this question.

⁴ Respondent listed Exceptions 1-29, 31, 34, and 39 for this question.

⁵ Respondent listed Exceptions 9, 10, 18, 19, 22, 24, 26, 31, 34, 39 for this question.

⁶ Respondent listed Exceptions 37 and 38 for this question.

⁷ The facts presented at trial, which were largely undisputed, are fully set forth in Counsel for the General Counsel's post-hearing brief and will not be repeated here except where necessary to rebut Respondent's Exceptions.

dispute between the employees and their employer, provided said communication does not constitute a disparagement or vilification of the employer's product or reputation. ALJD at 11-12. As Judge Bogas found, Young's letter clearly met these requirements. The record clearly establishes that in writing the letter, Young was making common cause with Respondent's physicians and nurses, who themselves were involved in a labor dispute with Respondent. ALJD at 6-8. The stories and the editorial that appeared in the newspaper leading up to the publication of Young's letter reported how there had been disaffection among Respondent's physicians that was exacerbated by recent changes Respondent was making to their contracts, and how Respondent's nurses had collectively filed a petition with Respondent seeking a resolution to ongoing staffing issues. *Id.* Young's letter noted how losing doctors was causing unrest, uncertainty and concern among the staff. ALJD at 8-10. Young openly expressed her sympathy for the collective actions of the Unionized nurses to improve staffing and she called on management to make the necessary changes to address these issues. *Id.* As the ALJ determined, Young's support for the protected concerted and Union activities of the nurses is itself protected concerted activity, as well as an expression of support for a labor organization for fellow employees – activities for which she cannot be discharged without violating Sections 8(a)(1) and (3) of the Act. ALJD at 11-12. The record also supports the ALJ's conclusion that Young's letter was the logical outgrowth of communications she had with coworkers about staffing and the departure of Respondent's physicians. ALJD at 4 - 5.

To justify Young's discharge, Respondent relied on its media contact policy which bans employees from releasing any information about Respondent to the news media without Respondent's involvement and which requires employees to forward to Respondent any news media inquiries they may receive. ALJD at 5-6. Judge Bogas appropriately applied the analysis

set forth in the Board's recent decision in *The Boeing Co.*, 365 NLRB No. 154 (Dec. 14, 2017), reconsideration denied 366 NLRB No. 128 (Jul. 17, 2018) and correctly concluded that Respondent's media contact policy unlawfully interferes with employees' exercise of Section 7 rights in violation of Section 8(a)(1) of the Act. ALJD at 18-20. Employees have a Section 7 right to communicate with the news media about a labor dispute. Such protected concerted communications for mutual aid and protection are at the core of Section 7 of the Act.

Respondent's stated business justification for the rule - that it serves to protect its brand and reputation - does not outweigh the significant impact this rule has on core Section 7 rights and, therefore, the rule is unlawful. The unlawfulness of the rule is further demonstrated by Respondent applying it to justify Young's discharge. Judge Bogas also correctly determined that Respondent's subsequent attempt to "clarify" the rule by adding a legalistic savings clause failed to cure the unlawful rule or Respondent's violation of the Act by maintaining the prior version. ALJD at 20-21.

Finally, Judge Bogas recommended the appropriate remedial order in this case. ALJD at 22-23. With respect to the Section 8(a)(1) and (3) discharge of Young, it is appropriate to require Respondent to offer her reinstatement and full back pay. With respect to the media policy which Respondent maintains it on a system wide basis, it is appropriate to require Respondent to rescind it in all locations where it is maintained and post of a Notice to Employees system wide.

II. THE GENERAL COUNSEL'S RESPONSE TO THE QUESTIONS RAISED BY RESPONDENT'S EXCEPTIONS AND BRIEF IN SUPPORT

1. **Respondent's Exceptions No. 30, 31, 32, 33, 34, 35, 36 and 39 should be denied because the ALJ Correctly Concluded that Respondent's Media contact policy that went into effect on January 15, 2018 unlawfully interferes with employees' exercise of Section 7 rights in violation of Section 8(a)(1).**

When Eastern Maine Health Systems (EMHS) affiliated with Maine Coast Memorial Hospital (Maine Coast) it began imposing on the Maine Coast employees system rules and policies that are applicable to the employees of the EMHS member organizations. TR 205:4-11, 209:18-211:1, RX 7, 8. Employees were notified by email dated March 31, 2016 that those EMHS policies would become effective at Maine Coast on April 1, 2016. RX 7. Among these policies was EMHS-System Policy 12-000, “News Release, External Publication and Media Contact.”(media contact policy or media policy) JTX 1. This policy, which was in effect at the time of Young’s employment and that Respondent relied upon to discharge her (GCX 1(l), TR 10:12-24), provides, in relevant part, that:

No EMHS employee may contact or release to news media information about EMHS, its member organizations or their subsidiaries without direct involvement of the EMHS Community Relations Department or of the chief executive officer responsible for that organization. Any employee receiving an inquiry from the media will direct that inquiry to the EMHS Community Relations Department, or the Community Relations staff at that organization for appropriate handling.

JTX 1, 2.

The policy states that its purpose is to “present EMHS and its various member organizations in a manner consistent with the brand and supporting the mission statement of EMHS.” JTX1. At the trial, EMHS Chief Communications Officer Suzanne Spruce testified that the policy is necessary to protect Respondent’s brand and reputation. TR 384:19-21. Spruce explained that “brand” is how Respondent represents itself to the community and to others, whereas “reputation” is how the community and others perceive Respondent. TR 284:21-24. She testified that brand and reputation are particularly important in the healthcare setting because providers “want people to trust [them and] . . . know it’s safe to get services” from them. TR 385:22-25. Spruce testified that she also intended the policy to be a “safety net for employees”

(TR 384:25-385:2) and she suggested that requiring employees to go through Respondent's press office gives Respondent the opportunity to prepare employees for interviews and avoid privacy violations. TR 386:15-18, 387:15-18. Spruce also testified that the policy helped Respondent comply with privacy rules and regulations. TR 386:19-387:18.

Respondent revised EMHS-System Policy 12-000, effective January 15, 2018, after Young filed the charge in Case 01-CA-209105 alleging that her discharge was unlawful, to add the following in a section entitled Exceptions: "This policy does not apply to communications by employees, not made on behalf of EMHS or a Member Organization, concerning a labor dispute or other concerted communications for the purpose of mutual aid or protection protected by the National Labor Relations Act." JTX 2. Spruce testified that the revision was a "clarification" rather than "a substantive change in the policy." TR 393:6-13. Respondent's department heads were notified of this change in an email dated January 17, 2018. RX9. The email simply instructs the recipients to share the changed policy as appropriate within their organization and team - the same protocol Respondent follows whenever disseminating any other policy or policy change. TR 401:8-10, 406:1-6. The email did not provide any explanation for the changes that were made and, based on the testimony of Douglas Keith, the Manager of the Rehabilitation Department where Young had worked prior to her discharge, Respondent did not otherwise explain the reasons for the changes that were made to the policy. TR 306:14-21, 318:5-9. In discussing the policy change with employees in his department, Keith testified that he simply advised the employees that the policy had been changed and that they should review it and be aware of it, without getting into specifics. TR 310 -311. There is no evidence that Respondent otherwise disseminated the actual revised policy directly to its employees. There is no dispute

that as of the date of the hearing, EMHS-System Policy 12-000 had never been applied to discipline anyone other than Young. TR 8:13-21.

EMHS-System Policy 12-000 is one of approximately 263 policies maintained by EMHS. TR 211:5-213:5. It is not a policy that Respondent highlights in any way or specifically requires its employees to acknowledge. TR 91:13-92:5. This is best evidenced by the fact that, in a managers' memo circulated on September 20, 2017, Maine Coast Communications Director Kelley Columber acknowledged that, "some of [the managers] may have never seen th[e] policy." GCX 18.

a. Exceptions 30 and 35 should be dismissed because they are unsupported and not properly referenced in Respondent's Brief.

Initially, the ALJ concluded that from June 28, 2017 until January 14, 2018, Respondent's media contact policy interfered with employee exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act. ALJD at 20. In so finding, the ALJ properly considered and applied the balancing test set forth in the Board's recent decision in *The Boeing Co.*, 365 NLRB No. 154 (Dec. 14, 2017), reconsideration denied 366 NLRB No. 128 (Jul. 17, 2018) in analyzing whether it was unlawful for Respondent to have maintained this facially neutral rule. In applying the *Boeing* test to the Respondent's media policy, the ALJ correctly concluded that that the burdens Respondent's media policy imposes on Section 7 activity far outweighs any legitimate business justification that Respondent offered for the policy. ALJD at 19.

Exceptions 30 and 35 go to the ALJ's conclusion that Respondent's maintenance of the media contact policy that was in effect from June 28, 2017 until January 14, 2018 violated Section 8(a)(1) of the Act. Yet, in its Brief, Respondent lists these Exceptions as among those that are related to Respondent's first question presented which exclusively concerns the ALJ's

findings and conclusions with respect to the **amended** media contact policy that went into effect on January 15, 2018. Brief at p. 10. Then, in an unrelated Section of the Brief, without any specific reference to these two Exceptions, and without even presenting a question on the issue, Respondent argues that whether Respondent's maintenance of the media contact policy that was in effect prior to January 15, 2018 was unlawful is moot, while also arguing "in the abstract" and as "purely an academic matter" the maintenance of the policy would not be unlawful under *Boeing*. Brief at p. 27-28

The Board's Rules with respect to the filing of exceptions are clear. Section 102.46(a)(1)(d) requires the Respondent to concisely state the grounds for each exception. Where a Brief in Support of Exceptions is filed, Section 102.46(a)(2) requires Respondent to include a specification of the questions involved and to be argued together with reference to the specific exceptions to which they relate, and an argument presenting clearly the points of fact and law relied on in support of the position taken on each question.

Exceptions 30 and 35 do not meet the requirements of Section 102.46 and, as such those Exceptions should be disregarded. Although Respondent filed an exception to the ALJ's conclusion that the burdens the pre-January 15, 2018 policy imposed on NLRA activity outweighed any legitimate justification that Respondent offered for maintaining the policy (Exception 30) and to his conclusion that maintenance of the pre-January 15, 2018 policy violated Section 8(a)(1) (Exception 35), Respondent failed to state the grounds for these Exceptions, did not specify them as a question or questions to be resolved by the Board in its Brief, and did not make a specific argument in support of such questions. Instead, the arguments it made pertaining to the ALJ's findings and conclusion with respect to the pre-January 15, 2018 version of the rule were made, to quote Respondent, "in the abstract" and as an "academic

matter.” *Id.* Under these circumstances, Respondent has failed to meet the requirements of Section 102.46 with respect to these two exceptions and, consequently, they should be disregarded.

- b. Alternatively, Exceptions 30 and 35 should be dismissed because the ALJ correctly concluded that Respondent violated Section 8(a)(1) by maintaining the media policy that was in effect prior to January 15, 2018 and the unlawfulness of Respondent’s maintenance of that policy is not moot.**

Should the Board decide to consider Exception 30 and 35, those exceptions should be dismissed because the ALJ correctly concluded that Respondent’s maintenance of the media contact policy from June 27, 2017 until January 14, 2018 violated Section 8(a)(1) of the Act. As stated above, in reaching that conclusion the ALJ properly considered and applied the balancing test set forth in the Board’s recent decision in *Boeing Co.*, *supra*.

In its “purely academic” appeal of the ALJ’s determination with respect to the media policy that Respondent maintained prior to January 15, 2018, Respondent asserts that the principle reason that the ALJ found it to be unlawful was that Respondent applied the policy to Young to interfere with her Section 7 rights. This was far from a false premise as Respondent asserts. Brief at p. 28. There is no doubt that Respondent relied on its media contact policy when it discharged Young for writing the Letter to the Editor that was published in the September 21, 2017 edition of *The American*. Young’s discharge letter referenced her violation of the policy (GCX 11), she was orally advised by Respondent that her letter violated the policy (TR 66:24-67:4), and Respondent admitted in its Answer to the Amended Consolidated Complaint that it terminated Young for violating the policy. GCX1(l). The record also clearly establishes, as the parties stipulated, that the policy had never been applied to discipline anyone other than Young.

Applying the policy to Young clearly interfered with her Section 7 right to communicate with a third party (the media) about labor disputes. As the Board explained in *Valley Hospital Medical Center, Inc.*, 351 NLRB 1250, 1252 (2007):

The protection afforded by Section 7 extends to employee efforts to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship. See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). Thus, Section 7 protects employee communications to the public that are part of and related to an ongoing labor dispute. See, e.g., *Allied Aviation Service Co. of New Jersey, Inc.*, 248 NLRB 229, 231 (1980), enfd. mem. 636 F.2d 1210 (3d Cir. 1980). This includes communications about labor disputes to newspaper reporters. See, e.g., *Hacienda de Salud Espanola*, 317 NLRB 962, 966 (1995).

Thus, Respondent's application of the media policy to Young warrants a finding that Respondent maintenance of the media policy through January 14, 2018 violates Section 8(a)(1) of the Act. *Cayuga Medical Center at Ithaca, Inc.*, 365 NLRB No. 170, slip op. at 2 (Dec. 16, 2017)(The Board ordered the employer to rescind Customer Service rules where said rules were not unlawful on their face but unlawfully applied).

But the ALJ did not simply rely on Respondent's application of the media policy to Young's protected activity in finding Respondent's maintenance of the policy through January 14, 2018 to be unlawful as Respondent suggests. Rather, the ALJ thoughtfully and carefully applied the balancing test the Board recently established in *Boeing* to judge the lawfulness of facially neutral rules that do not explicitly implicate Section 7 rights.

Under *Boeing*, in cases where a facially-neutral employer work rule, if reasonably interpreted, would potentially interfere with Section 7 rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on Section 7 rights; and (ii) the legitimate business justifications associated with the requirements of the rule. *Boeing*, 365 NLRB No. 154, slip op. at 2-3 (2017) (expressly overruling the "reasonable construe" standard set forth in

Lutheran Heritage Village-Livonia, 343 NLRB 646, 647 (2004)). The Board conducts this evaluation “consistent with its ‘duty to strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy,’ focusing on the perspective of employees, which is consistent with Section 8 (a)(1) of the Act” *Id.*, slip op at 3 , quoting *Great Dane Trailers, Inc.*, 388 U.S.26, 33-34 (1967).⁸ In so doing, “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 “draw reasonable distinctions between or among industries and settings.” *Id.* slip op at 15. The Board may also take into consideration “particular events that may shed light on the purposes or purposes to be served by the challenged rule or on the impact of its maintenance on protected rights.” *Id.* slip op. 15-16.

Respondent’s media contact policy is facially neutral in that it does not explicitly implicate Section 7 rights but, in banning all employee communications with the media, has a potential impact on Section 7 rights. Consequently, the balancing test set forth in *Boeing* applies. The ALJ properly applied this analytical framework to the Respondent’s media contact policy in determining Respondent’s maintenance of this policy violated Section 8(a)(1) of the Act because Respondent’s business justification for maintaining the rule does not outweigh the potential significant impact it has on core Section 7 rights.

Thus, the ALJ correctly concluded that Respondent’s media contact policy significantly interferes with the employee exercise of Section 7 rights to communicate with the news media

⁸ In its Brief, Respondent takes issue with the fact that there is no evidence that any employee understood or was at all concerned that the media policy would be used to chill Section 7 rights. Brief at p. 28. The standard employed by *Boeing* is not a subjective one, but rather an objective one. Thus, the Board majority in *Boeing* held that the threshold inquiry of whether a particular policy is one that employees would reasonably interpret as potentially interfering with the exercise of NLRA rights, is resolved from the perspective of an *objectively* reasonable employee. *Boeing*, 365 NLRB No. 154 slip op. at 3, fn. 14, and at 16, fn. 80.

about labor disputes. ALJD at 18. Indeed, the Board has repeatedly held that policies forbidding employees from communicating with the media concerning their wages, hours, and other terms and conditions of employment interfere with employees' rights under the Act.⁹

Like the policies the Board found to be unlawful in the cases cited above, here, Respondent's media policy flatly prohibited employees from contacting or releasing to news media *any* "information about EMHS, its member organizations or their subsidiaries without the direct involvement EMHS Community Relations Department or the chief operating officer responsible for that organization" and further requires employees to direct all media inquiries to its media offices. There were no exceptions to the policy, nor did its vague purpose statement - "To present EMHS and its various member organizations to the general public in a manner consistent with the brand and supporting the mission statement of EMHS." - suggest any

⁹ *Gunderson Rail Services, LLC*, 364 NLRB No. 30, slip op. at 46-47 (Jun. 23, 2016)(A policy stating that employees should "refrain from communication with the media" violated of Section 8(a)(1) of the Act because such rules are an unlawful impediment on Section 7 rights); *Long Island Association for AIDS Care, Inc.*, 364 NLRB No. 28, slip op. at 1, 4 (Jun. 14, 2016)(The maintenance of a rule prohibiting employees from being "interviewed by any media source, or answer questions from any media source regarding their employment. . . ." violates Section 8(a)(1) of the Act); *Flamingo Hilton-Laughlin*, 330 NLRB 287, 291-292 (1999)(a policy stating that "[q]uestions or calls from the news media should be immediately transferred and responded to by the Marketing Department or the president of the Hotel. At no time should you talk to the media about Hotel operations" could be interpreted as limiting employee discussion of wages, hours and other terms and conditions of employment and, therefore, were violative of Section 8(a)(1) of the Act); see also, *Schwan's Home Services, Inc.*, 364 NLRB No. 20, slip op. at 2, 4 (Jun. 10, 2016) (rules that "Schwan's business shall not be discussed with anyone who does not work for Schwan or with anyone who does not have a direct association with the transaction" and "Any articles, speeches, records of operation, pictures or other material for publication, in which the company name is mentioned or indicated, must be submitted, through your supervisor, for approval or disapproval by the Corporate Communications and Law Departments prior to release" found unlawful) Schwan, the Board indicated that second rule would be lawful if "employees would reasonably conclude that this part of the rule merely prohibits them from speaking on the Respondent's behalf." *Id.* at 4, see also *Id.* at 16 (Member Miscimarra concurring) ("I agree that Respondent has a legitimate and substantial interest in ensuring that only those individuals it has authorized to speak on its behalf do so. But [the rule] sweeps much more broadly than is necessary to achieve this limited purpose.").

limitations on the policy's scope. This broad prohibition far exceeds the safe harbor recognized in *Schwan's*, as Young made no pretense of speaking for the Respondent in her commentary of the ongoing labor dispute embroiling her coworkers. Accordingly, as the ALJ properly concluded, by completely banning employees from communicating with the news media about Respondent, without any limitation, the media contact policy places a heavy burden on core Section 7 rights that employees have to improve their terms and conditions of employment or otherwise improve their lot as employees by publicly discussing ongoing labor disputes.¹⁰ ALJD at 19.

Contrary to Respondent's assertion, the ALJ also properly concluded that the burden Respondent's media policy imposes on the exercise of Section 7 rights is outweighed by any legitimate justification Respondent offered for the policy. ALJD at 19. Respondent defends the policy as necessary to protect Respondent's "brand and reputation," arguing that the seriousness with which most people approach their choice of healthcare provider gives Respondent a heightened interest in maintaining its reputation. General reputational concerns alone are not adequate to justify a blanket prohibition on communicating with third parties. See *Allied Aviation Service Co. of New Jersey, Inc.*, 248 NLRB 229, 231 (1980) enfd. in relevant part 695

¹⁰ As the ALJ properly observed, Respondent's media policy significantly burdens the exercise of Section 7 rights by also requiring employees to involve its Community Relations Department or the chief operating officer responsible to the member organization before contacting the news media about EMHS, its member organization (i.e. Maine Coast) or its subsidiaries and by requiring employees to direct all media inquiries they receive to those individuals. ALJD at 18. In effect, this requires employees to first take their workplace complaints to management, something the Board has said has tendency to "inhibit employees from banding together. . . . Faced with such a requirement, some employees may never invoke the right to act in concert with other employees . . . because they are unwilling first to run the risk of confronting the [employer] on an individual basis." *Kinder-Care Learning Centers, Inc.* 299 NLRB 1171, 1171-1172 (1990). There is no legitimate business interest in preventing employees from discussing grievances amongst themselves or with a union or other third parties before going to management.

F.2d 634 (1st Cir. 1982) (An employee’s right to appeal to the public is not subject to the sensitivity of the employer to the employee’s choice of forum). It is well established that “concerted activity that is otherwise proper does not lose its protected status simply because (it is) prejudicial to the employer.’ To hold otherwise would be to render meaningless the rights guaranteed to employees by § 7.” *Misericordia Hospital Medical Ctr. v. NLRB*, 623 F.2d 808, 815 (2d Cir. 1980), quoting *NLRB v. Circle Bindery, Inc.*, 536 F.2d 447, 452 (1st Cir. 1976). As the Board has consistently held, employees may engage in third party communications about a labor dispute unless the communication is “so disloyal, reckless, or maliciously untrue as to lose the Act’s protection.” *MassTec Advanced Technologies, a Division of MassTec, Inc.*, 357 NLRB 103, 107 (2011) enfd. sub. nom. *DirectTV, Inc. v. NLRB*, 837 F.3d 25 (D.C. Cir. 2016). As the ALJ observed “one may reasonably question whether a hospital’s desire to keep potential customers in the dark about even accurate negative reports regarding hospital safety is a ‘legitimate’ justification for purposes of the *Boeing* analysis.” ALJD at 19, lines 30-32. Moreover, Respondent’s failure to highlight or publicize the policy among the vast number of policies that it maintains – “the laxity of the Respondent’s efforts to communicate and explain it”- undercuts the notion that maintaining the policy was necessary to protect its business interests. ALJD 19, lines 49-50.

The fact that Respondent revised the media policy on January 15, 2018 does not cure Respondent’s violation of the Act by its maintenance of the policy before that revision became effective. The unlawfulness of maintaining the prior policy is not moot as Respondent asserts. To that end, even assuming, *arguendo*, that the **amended** version of the media policy is lawful (which, as explained below, it is not), as the ALJ concluded, said revision does not cure the violation committed by Respondent by maintaining the earlier version. ALJD at 21 fn18. The

Board requires that certain criteria must be met for a Respondent to show that its repudiation of unlawful conduct is legally effective. Thus, for a repudiation to serve as a defense to an unfair labor practice finding it must be timely, unambiguous, specific in nature to the coercive conduct, and untainted by other unlawful conduct. *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). In addition, there must be adequate publication of the repudiation to the employees involved, there must be no proscribed conduct on the employer's part after the publication, and the repudiation or disavowal of coercive conduct must include an assurance to employees that going forward the employer will not interfere with the exercise of their Section 7 rights. *Id.* at 138-139. To effectively repudiate an unlawful work rule under *Passavant*, an employer must explain its reasons for rescinding or revising the unlawful rule. *Lily Transportation Corp.*, 362 NLRB No. 54, slip op. at 9 (Mar. 30, 2015). Respondent failed to meet its burden under *Passavant*, primarily because, as the ALJ pointed out, "Respondent has not repudiated, nor claimed to have repudiated the violation." ALJD at 21 fn 18. Rather Respondent asserts that the policy has always been lawful, that it was lawfully applied to Young and that it was simply clarified – not changed.¹¹

¹¹ Even if one were to conclude that Respondent was attempting to repudiate its violation of the Act by adding the savings clause, Respondent nevertheless failed to meet its burden under *Passavant*. Thus, the addition of the savings clause to the media contact policy would be untimely since the rule has been in effect for EMHS's member organizations since at least February 2014, and at Maine Coast since at least April 1, 2016, when Maine Coast adopted all of the EMHS-System HR policies. Then, Respondent only added the savings clause on January 15, 2018 – some 18 days after the Charge in Case 01-CA-212276 (which alleged the policy was unlawful), was filed and some two and half months after the charge in Case 01-CA-29105 was filed alleging Young's discharge pursuant to the rule was unlawful. Compare *Passavant*, 237 NLRB 138-39 (disavowal untimely where it issued 7 weeks after the offending conduct, three days after the charge was filed and two days before the complaint issued). Second, Respondent's attempt to cure the policy is neither unambiguous, nor specific. Respondent never explained to its employees why it was clarifying the policy. It simply distributed the revised policy to its managers with instructions for them to share it within their organization and/or among their teams "as appropriate." As Keith testified, Respondent left it up to the employees to read and

c. Exceptions 31, 32, 33, 34, 36 and 39 should be dismissed because the ALJ correctly concluded that Respondent media policy as amended violates Section 8(a)(1) of the Act.

As noted above, effective January 15, 2018, Respondent attempted to “clarify” its media policy by adding a provision entitled Exception which states “This policy does not apply to communications by employees, not made on behalf of EMHS or a Member Organization, concerning a labor dispute or other concerted communications for the purpose of mutual aid or protection protected by the National Labor Relations Act.” TR. 393:6-13 (Testimony of Suzanne Spruce that the revision to the policy was a “clarification” rather than “a substantive change”). Respondent argues that by adding this clarifying language, the media policy is lawful under *Boeing* as a Category 1 rule because when reasonably interpreted it has no tendency to interfere with Section 7 rights and therefore, no balancing of rights and justifications is warranted. Brief at 11.

The Board has recognized that “an employer’s express notice to employees advising them of their rights under the Act may, in certain circumstances, clarify the scope of an otherwise ambiguous and unlawful rule.” *First Transit, Inc.*, 360 NLRB 619, 621–622 (2014). To be an effective remedy to an otherwise unlawful rule, the Board has stated that the savings clause must “adequately address the panolply of rights protected by Section 7” and sufficiently apprise employees of their right to engage in the type of protected activity that the rule associated with it implicitly bans. *Id.*

become familiar with the policy. Respondent never admitted any wrongdoing, instead arguing that the revision was simply a clarification. Nor has Respondent established that the revision was adequately published to its employees. As noted above, the only evidence that it offered regarding the distribution of the revision was that the revision was issued to managers with instructions to share as appropriate. Respondent only offered evidence to show one such manager, Keith, shared the fact that the policy was revised with the rehabilitation services employees. There is no evidence that any other employee received notification of the revision. Finally, Respondent made no assurances that the original policy would not be applied in the future.

Here, Respondent's legalistic disclaimer fails to do that. Although the disclaimer appears immediately after the offending language of the rule, the disclaimer does not indicate what it means by "labor dispute," nor does it give examples of what "concerted communications for mutual aid or protection protected by the National Labor Relations Act" entail. As the ALJ observed, the savings clause is also deficient because it does not reference union activity. ALJD at 21. The Board has regularly refused to give effect to so-called clarifying language where ambiguities would prevent an ordinary employee from understanding its scope. *Ingraham Book Co.*, 315 NLRB 515, 516 (1994). But ultimately, the "clarification" must fail because the conduct for which Young was terminated falls squarely within the literal language of the exception. As the ALJ properly observed, "[a]lthough the Respondent discharged Young for her NLRA-protected activity prior to adding the new language Respondent continues to maintain that Young was properly discharged pursuant to the Media Policy and that the savings clause has not substantively changed the policy." ALJD at 20. Indeed, Respondent never repudiated the prior policy. Knowing that Young was fired for writing in support of the doctors and nurses in their labor disputes with Respondent, employees would be hopelessly confused as to what the savings clause protects – that is, employees would be at a loss to know what conduct they could or could not engage in with the news media under this legalistic exception. Under these circumstances, as the ALJ correctly observed, Respondent's employees once they were aware of Young's unlawful discharge "would not reasonably read the policy as a safeguard of their Section 7 rights." *Id.* As such, the ALJ correctly determined that notwithstanding Respondent's clarification, the media policy "would still be 'reasonably interpreted' by employees as 'potentially interferr[ring] [sic] with the exercise of NLRA rights' and the circumstances surrounding the *Boeing* balancing test are not meaningfully changed." ALJD at 20 ll. 24-26.

2. Respondent's Exceptions 1-29, 31, 34, and 39 should be dismissed because the ALJ correctly concluded that Young engaged in protected concerted activity within the meaning of the Act and that her discharge for that activity violated Section 8(a)(1) of the Act.

Respondent excepts to the ALJ's conclusion that it violated Section 8(a)(1) of the Act when it discharged Young for having submitted her September 17, 2017 letter to the editor which was published in the September 21, 2017 edition of *The American*. In that regard, Respondent asserts that neither the record evidence nor the Board's case law supports such a finding. Contrary to Respondent's assertions the ALJ's conclusion that Respondent violated Section 8(a)(1) of the Act by discharging Young for submitting her letter to the editor of *The American* is fully supported by the record and well settled Board law.

It is well established that Section 7 of the Act protects "employee efforts to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee Employer relationship." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). The Board has held that "an employee may properly engage in communications with a third party in an effort to obtain a third party's assistance in circumstances where the communication was related to a legitimate ongoing labor dispute between the employees and their employer, and where the communication does not constitute a disparagement or vilification of the Employer's product or its reputation." *Allied Aviation Service Co. of New Jersey*, 248 NLRB at 230. Specifically, the Board has found that employee communications with the news media, including letters to the editor written to newspapers about labor disputes involving an employer and their employees, is conduct protected by Section 7 of the Act. *Mount Desert Island Hospital*, 259 NLRB 589 (1981), remanded on other grounds 695 F.2d 634 (1st Cir. 1982) (Letter to the editor of the *Bar Harbor Times* protected); *Dougherty*

Lumber Co., 299 NLRB 295 (1990), enfd. 941 F.2d 1209 (6th Cir. 1991)(Letter to the editor of the *Akron Beacon Journal* protected). As the ALJ properly observed, “the Board has repeatedly held that health care facility employees engage in concerted activity protected by Section 7 of the NLRA when, like Young did here, they use a letter to the editor or another 3rd party channel to protest deficiencies in staffing and other working conditions that have an effect on patient care.” ALJD at 11 citing *Manor Care of Eaton, PA* 356 NLRB 202, 232-233 (2010), enfd. 661 F.3d 1139 (D.C. Cir. 2011)(employee letter to State representative regarding inadequate staffing is protected by the Act and not so disloyal as to forfeit protection); *Valley Hospital Medical Center, Inc.*, 351 NLRB 1250, 1252-1253 (2007)(employee letter to newspaper criticizing nurse workloads is protected and not so disloyal, reckless or maliciously false as to forfeit that protection); *Mount Desert Island Hospital*, 259 NLRB 589 at fn.1 and 593 (employee letter to newspaper in which he “attacked the hospital’s safety levels and administration” is protected activity and not so extreme as to forfeit that protection”); *Eastex v. NLRB*, 437 U.S. at 565 (the right to “seek to improve terms and conditions of employment . . . through channels outside the immediate employee-employer relationship” is essential to the guarantees of the NLRA); *Hacienda de Salud Espanola*, 317 NLRB 962, 996 (1995)(NLRA protects employees’ communications to newspapers about labor disputes.).¹²

¹² In its Brief, Respondent asserts that the above cases that the ALJ cited are distinguishable and do not support his conclusion that Young was engaged in concerted activity protected by the Act when she submitted her letter to the editor, essentially arguing that the facts presented in those cases do not precisely line up with the facts in this case. The common thread that runs through the cases mentioned above is that employees have a protected right to communicate with third parties, including the news media, about labor disputes involving their employer in an effort to seek improvements to their wages, hours and other conditions of employment, and employers that take action against an employee for doing so, violate the Act. That is precisely what happened in this case when Respondent terminated Young for submitting her letter to the editor of *The American*.

Young's letter to the editor of *The American* was plainly related to ongoing labor disputes at the Hospital involving Respondent's doctors and nurses that were of mutual concern to her and her co-workers. The letter was expressly directed at, and written in response to, the reports and editorials that appeared in *The American* about how there had been disaffection among Respondent's physicians that was exacerbated by recent changes Respondent was making to their contracts, and how Respondent's nurses had collectively filed a petition with Respondent seeking a resolution to ongoing staffing issues, that were having, as referenced in the petition, an "emotional and physical toll" on them. Contrary to Respondent's assertions, the record clearly establishes that these disputes were real, legitimate, and ongoing at the time Young submitted her letter to *The American*. The disputes were not simply unreliable hearsay accounts reported in the newspaper as Respondent argues in its Exceptions. Thus, Respondent's President John Ronan, verified that, in fact, Respondent was seeking to renegotiate the terms and conditions of its physicians employment and that this process, at least with respect to the renegotiation of the emergency department physicians contracts , four of whom left their employment as a result, did not unfold smoothly, observing how one meeting got particularly heated and the physicians had been very vocal on the floors about how that meeting had gone. (TR. 168, 226-227, 260-265). Ronan specifically acknowledged that this was one of the things that *The American* reported in its August 31, 2017 article. (TR. 260-261). The parties also specifically stipulated that, "in 2017 Respondent proposed changes to contracts of some physicians then employed by Respondent, including emergency rooms department physicians and anesthesiologists and that changes to physician contracts proposed by Respondent related to wages, hours, benefits and/or other conditions of employment. TR. 9:2- 10:12.¹³

¹³ Contrary to Respondent's Exceptions 5-8, the material findings made by the ALJ concerning

Similarly, Union Labor Representative Todd Ricker verified what had been reported in *The American* about the nurses' petition. Ricker testified that the understaffing of nurses had been a key issue of concern, particularly on the medical/surgical floor, during the negotiations of the 2016-2019 contract, at which he was the Union's lead spokesperson. TR 140:18-20, 147:20. Ricker testified that to address the problem, the parties negotiated a new contract provision, that was included in Article 32, which called for the filling of vacant nurse shifts when certain thresholds were not met. TR 149:21-150:21. According to Ricker, this provision did not solve the problem. He testified that the nurses were telling him and Union leadership that staffing continued to be unsafe and they were concerned not only for the safety of their patients, but also the safety of their licenses. TR 147:29-148:4. After internally discussing the matter, the Union and the employees decided to draw up a petition to be signed by hospital staff making a public representation of the concerns people had and taking them directly to management and the Board of Directors. TR148:5-13, GCX 16. Ricker further testified that that he, Bruce Becque, chief steward, Susan Dugas, chair of the professional practice committee, and two or three other nurses presented the petition to Respondent on August 28, 2017, in a meeting with Lundy and Chief Nursing Officer Ardelle Bigos. TR 155:2-3156:7-18. According to Riker, at this meeting, the nurses told Lundy and Bigos how they had repeatedly told them that staffing had been an issue, that they had hoped the language they had negotiated would be followed and that it would

Respondent's renegotiation of its physician contracts, as discussed on page 3 lines 2-11 of his decision, generally find support in the record. In addition to the testimony discussed above, Ronan testified that the Hospital cancelled 50 of 54 physician contracts, meaning that those contracts would no longer be in effect. TR 226:9-11. Ronan testified that Respondent initially notified 5 physicians that their contracts were terminated and then it notified an additional 6 physicians that their contracts were terminated. TR 225:8-226:4. Ronan acknowledged that some physicians chose not to renegotiate their contracts and those physicians left the hospital. TR. 226:19-23; 227:15-17. Finally, Ronan testified that about 1/3 of the contracts Respondent wanted to renegotiate, the issues it wanted to discuss concerned the wages, hours, benefits and other terms and conditions of the physician's employment. TR 227:2-15

alleviate the situation but that it hadn't, that they were still having the same problems and receiving the same complaints from the nurses, and that they were demanding that Respondent take action to improve the staffing situation. TR 155: 11-23. Ricker testified that Respondent did not provide a response to the petition.¹⁴ TR 155:24-156:3.

In arguing that the ALJ erred in finding that Young was engaged in protected concerted activity in submitting her letter to the editor of *The American*, as it did before the ALJ, Respondent relies principally on the fact that Young did not have any work place discussions with her co-workers about writing the letter prior to doing so. The ALJ correctly rejected that argument for two reasons.

First, the ALJ determined that because Young was in fact a party to prior discussions with other employees regarding their mutual concerns over the physicians' resignations and staffing shortages, the submission of her letter constituted concerted activity because it was logical outgrowth of those discussions. ALJD at 13, lines 9-13 citing *Hitachi Capital America Corp.* 361 NLRB 123, 138-139 (2014), citing *Mike Yurosek & Son, Inc.* 306 NLRB 1037 (1992);

¹⁴ As it did in its Closing Argument to the ALJ, Respondent asserts that the staffing concerns that the nurses raised in their petition, were no longer the subject of a labor dispute at the time Young submitted her letter to the editor. In its Brief, Respondent characterizes the nurses' petition as a publicity stunt, asserting that the concerns raised in the petition came out of the blue and vanished just as quickly. Brief at 8. The ALJ, however, correctly determined Respondent's argument in this regard to be frivolous, noting that even if the only evidence of the dispute was the submission of the petition, there is "no basis to condemn the labor dispute to so premature a death" where "Respondent had not even made a response to the petition." ALJD at 18 fn. 15. The ALJ correctly observed that the evidence of the dispute over the staffing levels of nurses went well beyond the petition. In that regard the ALJ correctly noted how staffing levels had been a bone of contention during the last round of contract negotiations, that nurses the continued to raise concerns about staffing after those negotiations concluded (as established by the testimony of Ricker cited above), that Young herself notified Respondent of her concerns regarding the staffing levels of nurses in her emails of June 23, 2017 (GCX 14) wherein she stated that "nurses feel they have more patients than they can manage", and that Ronan conceded there were staffing shortages during this period. TR. 171:3-6.

Salisbury Hotel, Inc. 283 NLRB 685, 687 (1987); and *Mount Desert Island Hospital* 259 NLRB at 589 fn. 1.¹⁵

Respondent asserts that the record does not support the ALJ's conclusion that "Young was, in fact a party to prior discussions with other employees regarding their concerns over staffing shortages and physician resignations discussed in her letter." Brief at 16. Contrary to Respondent's Exceptions the record **does** support the ALJ's findings. Thus, regarding the resignations of the physicians, in connection with her first unpublished letter to the editor that she submitted on September 3, 2017 (GCX 3), in response to what *The American* had reported about the renegotiation of doctor contracts in its August 31, 2017 edition (GCX 2), Young offered the following testimony:

Q. So did you have any conversation with any other hospital employee before you wrote this letter [GCX3] to the editor?

A. Well, of course, there was just general talk about the doctors leaving, and, you know it was upsetting for everybody. But I did not say that I was going to write a letter.

¹⁵ Again, Respondent asserts that these cases are distinguishable and do not support the ALJ's conclusion that Young's letter to the Editor was concerted essentially because the facts of those cases do not precisely line up with the facts of the instant case. The common thread that runs through these cases is that where there is evidence that employees share common workplace concerns related to their wages hours and working conditions, individual actions taken to advance that common interest constitutes concerted activity protected by the Act even if that individual action was not authorized or agreed to by the group. See also *Every Women's Place, Inc.*, 282 NLRB 413 (1986), *enfd.* 833 F.2d 1012 (6th Cir. 1987) where the Board observed that "where the record showed the existence of a common of a group complaint, the Board would not require evidence of formal authorization in order to find steps taken by individual in furtherance of the groups goals are a continuation of activity protected by Section 7 of the Act." In this case, as discussed above and below, the record clearly supports the ALJ's conclusion that Young and her coworkers shared common concerns regarding the departure of the Hospital's experienced physicians and about unsafe staffing levels and that her letter to the editor advances those common interests.

TR. 39:24- 40:5.¹⁶ With respect to the staffing issues, Young testified how in working with CNAs she knew that “CNAs every day would say, you know, they had way too many patients. to care for.” TR. 49:5-8. Similarly, the record includes an email Young wrote to Human Resource Director Noah Lundy on June 23, 2017 (GCX 14) wherein Young reported that the “M/S [medical surgical unit] is very short staffed ---nurses feel they have more patients than they can manage” All of this evidence supports the ALJ’s finding that Young was a party to conversations with her co-workers about the issues she raised in her letter to the editor.¹⁷

Second, even absent the above referenced discussions Young had with her coworkers, the ALJ correctly concluded that a finding of concerted activity was compelled by the fact that in submitting her letter to the editor she was joining forces with other employees in the common endeavor of seeking improvements to working conditions. ALJD at 13. In that regard, the Board has held that to find an employee’s activity to be concerted, the activity must be engaged in with or on the authority of other employees and not solely by and on behalf of the employee himself. *Meyers Industries*, 268 NLRB 493, 496-497 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir 1985), cert denied 474 U.S. 971 (1985), raffd. *Meyers Industries*, 281 NLRB 882 (1986) (*Meyers II*), enfd. sub nom. 835 F.2d 1481 (D.C. Cir. 1987) cert. denied 487 U.S. 1205 (1988). In *Meyers II* the Board explained that individual activity can be concerted where there is evidence that “at any relevant time or in any manner, an employee

¹⁶ Based on this testimony, the claim that Respondent makes in its Brief that Young did not testify that she actually engaged in discussions with her co-workers about doctors leaving the Hospital (Brief at 19, fn. 6) is plainly wrong.

¹⁷ Also significant is that the record shows that Respondent was aware that staff were talking about the issues that were being reported in *The American* involving the departing doctors and staffing. Ronan specifically testified that the things being said in the press “started to funnel down in throughout the – you know the staff. You know, they were hearing things. They were reading things. And it was—it was starting to cause some concern there.” TR 173:1-11.

joined forces with any other employee, or by his activities intended to enlist the support of other employees in a common endeavor.” *Meyers II*, 281 NLRB at 885-886. The question of whether an individual has engaged in concerted activity is a factual one based on the totality of the record evidence. *Meyers II*, 281 NLRB at 886. In *Meyer’s II* the Board observed that when the record evidence demonstrates group activities, whether “specifically authorized” in a formal agency sense, or otherwise, we shall find the conduct to be concerted. *Meyers II*, 281 NLRB at 886.

Here, there can be no doubt that in writing her letter, Young was joining forces and making common cause with the doctors and the nurses in their labor disputes with Respondent. As she testified, her letter served to add her voice to validate what the nurses were saying about staffing to bring public awareness to the issue. TR. 63:24 - 64:19. She openly expressed her support for the collective actions of the nurses in submitting their staffing petition to Respondent when she wrote, “I have to applaud the nurses for going public with their valid concerns of inadequate staffing levels.” GCX 10. By her letter, Young obviously joined the nurses’ cause by calling upon management to make the necessary changes in staffing.¹⁸ GCX 10. In her letter, Young also joined forces with Respondent’s doctors, noting how their departure had caused unrest, uncertainty and concern among staff and calling upon Maine Coast’s Board of Directors to show “loyalty to our local hospital, staff, patients, and communities that have benefited by the consistent, dedicated, experienced care given by trusted local doctors.” GCX10. As the ALJ correctly concluded:

¹⁸ As the ALJ properly concluded, “a finding of concerted activity would be compelled because the [nurses] petition signed by over 60 employees, was indisputably concerted activity, and Young, by arguing and in support of the observations and objectives of that petition was joining forces with those employees in that group action.” ALJD 13, lines 13-16

No reasonable reading of Young's letter permits the conclusion that it reflects solely Young's individual concerns about her own working conditions and not those of other employees including the nurses and physicians. It joins with the signers of the petition, the parting physicians and other employees in the common endeavor of seeking improvements to working conditions at Respondent."

ALJD at 13, lines 23-27.

Respondent argues that the ALJ's conclusion that Young was joining forces with the nurses and doctors in the common endeavor of improving working conditions is flawed because there is no evidence that she spoke to any doctor about their disaffection nor any nurse about the petition that they presented. Respondent maintains that because Young learned of these things from the reports in *The American* it could not be said she was joining forces with them. The fact that Young learned from the reports in *The American* physicians were departing the Hospital as a result of Respondent's contract demands and that the nurses had submitted a petition to management protesting their inadequate unsafe staffing is of no consequence in this case. The fact of the matter is that what was reported in *The American* about the labor disputes involving Respondent's departing physicians and nurses, that Young addressed in her letter to the editor, were accurate. As discussed above, Respondent's physicians had in fact resigned their employment rather than agree to the changes Respondent was proposing to their contracts and the nurses in fact presented Respondent with a petition protesting staffing levels that was taking a physical and emotional toll on them causing them to be exhausted. GCX 16. What is also evident is that Young knew from her conversations with co-workers that the departure of experienced physicians was upsetting to everyone (TR. 39:24- 40:5), she knew from the nurses and CNA's that they believed they had more patients than they could manage (TR. 49:5-8; GCX14), and that Young herself experienced the problems these staffing levels caused when she was placed in unsafe situations as a result. TR. 134:6-23; GCX 14. In addition, the reports in *The American* of the disaffection among the Hospital's doctors, their feeling of not being

respected or valued by the administration, was consistent with her own experience (TR. 47:10-13) – something she had communicated to Respondent more than a year earlier in response to a performance evaluation she had received when she reported “[m]any employees, including myself are dissatisfied with their jobs.” GCX 13. Under these circumstances, the totality of the record evidence overwhelmingly supports the ALJ’s finding that Young had joined forces with Respondent’s physicians and nurses and her letter, where she addresses these issues, specifically supporting the collective actions of the nurses, calling upon management to address them, is concerted activity protected by the Act.¹⁹

3. Exceptions 9, 10, 18, 19, 22, 24, 26, 31, 34, 39 should be dismissed because the ALJ correctly determined that Young’s letter to the editor was Union activity such that her resulting discharge violates Section 8(a)(3).

There is no doubt that the nurses were engaged in Union activity when they submitted their staffing petition to management on August 28, 2017. As the ALJ correctly determined, Young’s letter clearly supported the Union by arguing in favor of the observations and objectives of the petition that the Union had submitted to Respondent and in arguing more generally in support of Union efforts to secure fair wages and better working conditions for hospital workers. ALJD at

¹⁹ This case is not like *Mannington Mills*, 272 NLRB 176 (1984) as Respondent argues. Brief at 24-25. *Mannington Mills* did not involve a situation like the one presented here where an employee is engaged in third party communications related to a labor dispute involving an employer and its employees. In *Mannington Mills*, the Board determined that an employee who told a foreman that some employees were not going to perform certain work was acting alone and not concertedly because there was insufficient evidence to establish that he was acting on anyone’s behalf in making the threat. As the *Meyers II* Board explained, this case does not stand for the proposition that an individual must be specifically authorized by a group in some formal declarative manner for the activity to be concerted as Respondent seems to suggest. *Meyers II*, 281 NLRB at 886. As fully explained above, the record in this case supports the ALJ’s findings and conclusions that Young had discussed the issues she raised in her letter about the departing physicians and staffing levels with her co-workers and that her letter was plainly related to those ongoing labor disputes involving Respondent, its physicians, and nurses, with whom she joined forces and made common cause. Under these circumstances it is apparent that Young’s letter is not reflective of someone acting alone about her own terms and conditions of employment.

12. As the ALJ correctly stated, the Board has determined that the discharge of an employee for expressing such support, even by one like Young, who is not part of the bargaining unit the Union represents, would discourage membership in a labor organization and, therefore, would be violative of Section 8(a)(3). *Id.* For example, in a case relied on by the ALJ, the Board found an employer to have violated Section 8(a)(1) and (3) of the Act when it discharged an unrepresented employee for expressing his support of a potential strike by a unit of represented employees. *Signal Oil and Gas Co.*, 160 NLRB 644 (1966), *enfd.* 390 F.2d 338 (9th Cir. 1968). In that regard the Board determined that the unrepresented employee was making common cause with the represented employee in voicing support for their strike, concluding that “[d]ischarges for such expressions would clearly interfere with rights protected by the statute, and would tend to discourage membership in a labor organization.” *Id.* At 649. Similarly, in *Pride Ambulance Co.*, 356 NLRB 1023 (2011), another case relied on by the ALJ, the Board determined that the discharge of a non-unit employee for failing to perform struck work violates Section 8(a)(1) and (3). The same result is warranted here and the ALJ correctly found that Respondent violated Section 8(a)(3) of the Act by discharging Young. See also *Office Depot*, 330 NLRB 640, 642 (2000) (It is well settled that employees’ conduct on behalf of the employees of another employer who are engaged in protected concerted activity is itself protected concerted activity.”)

Respondent argues that the ALJ erred in finding Young’s discharge violative of Section 8(a)(3) because there is no independent evidence that Respondent acted for an anti-Union purpose or evidence that any worker was discouraged by Respondent’s actions from joining the Union. Respondent further notes that no evidence of any anti-Union animus by Respondent was presented. Brief at 26-27. As discussed below, Respondent’s reliance on *Southcoast Hospitals Group, Inc. v. NLRB*, 846 F.3d 448 (1st Cir. 2017) in support of these arguments is misplaced.

Contrary to Respondent's assertions, proof of motive is not required in case like this where the *sole* issue is whether the employer's reason for taking an adverse employment action against an employee is for conduct that is protected by Section 7 of the Act. *Phoenix Transit System*, 337 NLRB 510 (2002), enfd. 2003 WL 21186045, 63 Fed.Appx. 524 (D.C. Cir. 2003) (unreported opinion). In *Phoenix Transit System*, the employer discharged an employee (Weigand) for articles he wrote in a union newsletter concerning the employer's handling of sexual harassment complaints. In finding the discharge unlawful, the administrative law judge applied the *Wright Line* test examining whether the General Counsel had made a *prima facie* showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision and whether the employer's defenses were sufficient to any aspect of the General Counsel's *prima facie* showing. 337 NLRB at 513-514. In affirming the judge's ruling the Board did **not** rely on *Wright Line* ²⁰ stating that,

The *Wright Line* analysis is appropriately used in cases that turn on the employer's motive. Here, however, it is undisputed that Respondent discharged Weigand because of the articles he wrote in the union newsletter concerning the Respondent's handling of employee sexual harassment complaints. The judge found and we agree that Weigand's articles constituted protected concerted activity. Thus the only issue is whether Weigand's conduct lost protection of the Act

Id. at 510. See also *Saia Freight Line, Inc.*, 333 NLRB 784, 785 (2001)(where the Board found it unnecessary to engage in a *Wright Line* analysis in finding a written warning to have violated Section 8(a)(3) where the warning was for distributing union literature).

²⁰ *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 445 US 989 (1982). In *Wright Line*, the Board established a causation test that is to be used in cases alleging violations of Section 8(a)(3) or (1) that turn on employer motive.

In this case, Respondent admits that it terminated Young for violating its media contact policy when she wrote her letter to the editor that was published in *The American*. Respondent's motive is, therefore, not at issue. Because Young's letter to the editor constitutes protected concerted activity, the only remaining area of inquiry is whether Young lost the protection of the Act by what she wrote in the letter.

Respondent erroneously relies on *South Coast Hospitals, supra.* to support its claim that proof of its unlawful motive in discharging Young is necessary to make out a Section 8(a)(3) violation. In *South Coast Hospitals Group, Inc.*, 363 NLRB No. 9 (Sept. 16, 2015), vacated and remanded 846 F.3d 448 (1st Cir. 2017), vacated 365 NLRB No. 140 (Oct. 6, 2017) the issue involved an employer's hiring/transfer policy under which the employer gave preference to unrepresented employees over represented employees when filling positions at its non-union facilities, as well as its alleged refusal to consider/hire represented employees pursuant to the policy. Because the policy discriminates against employees based on their representative status the Board applied the analytical framework set forth in the Supreme Court's decision in *Great Dane Trailers, Inc.* 388 U.S. 26 (1967) to determine whether the conduct violated Section 8(a)(3) of the Act. Pursuant to *Great Dane Trailers*, if it can be concluded that an employer's discriminatory conduct is inherently destructive of important employee rights, no proof of anti-union motivation is necessary and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. If the adverse effect of the discriminatory conduct is comparatively slight, however, an anti-union

motive must be shown if the employer produces evidence of a legitimate and substantial business justification for its conduct.²¹

In *South Coast Hospitals Group*, applying the analytical frame work set forth in *Great Dane Trailers*, the Board found that the employer's hiring/transfer policy had at least a comparatively slight impact on the employees' Section 7 rights because it discriminates against represented employees based on their representative status. The Board concluded that because the employer failed to offer a legitimate and substantial business justification for the policy, Respondent violated Section 8(a)(3) of the Act by maintaining it. 363 NLRB No. 9. The First Circuit, also applying the *Great Dane Trailers* analytical framework, vacated and remanded the decision to the Board holding that substantial evidence did not support the Board's rejection of the employer's claim that it had a legitimate and substantial business reason for the maintaining the policy. 846 F.3d 448. On remand, accepting the decision of the First Circuit as the law of the case, the Board dismissed the complaint because the General Counsel, having only litigated whether Respondent had a legitimate and substantial business justification for the policy, failed to present evidence of an anti-union motive. 365 NLRB No. 140.

This case is not like *South Coast Hospitals* and the analytical framework established in *Great Dane Trailers* does not apply. As stated above, Respondent admits that it terminated Young for having written her letter to the editor. Its motive in terminating her is therefore, not at issue. If Young's submission of the letter to the editor constitutes activity protected by the Act –

²¹ In *Great Dane Trailers* the issue involved an employer's refusal to pay striking employees vacation benefits accrued under a terminated contract, while it announced its intention to pay such benefits to striker replacements, returning strikers and non-strikers who has been at work on a certain date during the strike. 388 U.S. at 27.

which it does – the only issue to be considered is whether Young did anything that would cause her to forfeit that protection. *Phoenix Transit System, supra.*; *Saia Freight Line, Inc., supra.*

Respondent also argues that the ALJ erred in finding Young’s discharge to be unlawful, based on Ronan’s self-serving testimony that even if Young’s letter was the product of concerted undertakings with the doctors, nurses or the Union, he would have nevertheless fired Young because she made what amounts to unprotected “unfair invective, and misrepresentations about patient safety, and was causing harm to Respondent.” Brief at p. 6. It is clear from Ronan’s testimony the issues that concerned him the most about Young’s letter were her comments about patient safety, her comments about management decision makers being out of touch with the experience of direct providers of patient care, and her comments that the Hospital’s Board Chairwomen showed inordinate allegiance to EMHS management, because he believed these comments undermined the Respondent’s efforts to turn the condition of the Hospital around and were unfair to the administration working so hard to do so. TR. 181 -185, 188-189, 222-225.

Contrary to Respondent’s assertions, the ALJ properly rejected this argument. ALJD at 17, fn. 14. The Board has held that where the alleged misconduct at issue arises from protected activity the Board does not consider such conduct as a separate and independent basis for discipline. *Goya Foods, Inc.*, 356 NLRB 476, 477 fn. 8 (2011); *Cayuga Medical Center of at Ithaca, Inc.*, 365 NLRB No. 170, slip op. at 23 (Dec. 16, 2017). Rather, the proper analysis in these situations is whether the conduct is sufficiently egregious to remove it from the protections of the Act. *Id.*

The aspects of Young’s conduct that Respondent objects to – namely her reference to patient safety and her criticisms of management were - as the ALJ properly determined - not made in

isolation but were part of the res-gestae of her protected activity. ALJD at 17, fn.14. Her comments about patient safety were specifically tied to the understaffing of nurses. Young's statements about management who work out of their offices, attend meetings, who are not working where patients are cared for, but who make staffing decisions, and her comments about the Hospital Chairwomen showing allegiance to EMHS in Respondent's efforts to renegotiate physician contracts are inextricably intertwined with the labor disputes involving Respondent's nurses and departing physicians. These later comments, when read in context, call upon management to address the concerns of the direct care providers and for the Hospital's Board to take a more active role in the renegotiation of the physicians contracts so that the "consistent, dedicated, experienced care given by trusted local doctors" that benefits the hospital, staff, patients, and the community, could be retained. GCX 10

Inasmuch as the comments Respondent objects to arises from Young's protected concerted third-party appeal concerning the labor disputes involving Respondent's physicians and nurses, the proper analysis in which Young's alleged offending comments should be viewed, as the ALJ did here, is whether they were "so disloyal, reckless, or maliciously untrue as to lose the Act's protection." *MassTec Advanced Technologies, a Division of MassTec, Inc.*, 357 NLRB 103, 107 (2011). The ALJ correctly applied this legal analysis in deciding that nothing Young wrote caused her to lose the protection of the Act. To that end, the ALJ correctly concluded that Young's comments about patient safety were the "type of expression that the Board has repeatedly held, with consistent Court of Appeals approval, to be both protected by the Act and not so disloyal, reckless or maliciously false as to forfeit that protection. ALJD at 14, line 31-49 citing *Manor Care, supra.*; *Valley Hospital, supra.* and *Mount Desert Island Hospital, supra.* The ALJ also correctly concluded that based on the record, the purpose of Young's letter was not

to impinge Respondent's operations or to harm Respondent's reputation or income, but to encourage improvements to working conditions. ALJD at 14 -15. In that regard, the ALJ correctly noted that that Young's letter was not timed to coincide with a financially critical period for the Hospital, inasmuch as Ronan had testified that Respondent's financial problems dated back 7 years to 2010 (TR. 167:2-10). ALJD at 15, fn. 11. The ALJ also correctly determined that nothing she wrote in her letter was maliciously false or reckless, noting that the only demonstrated inaccuracy concerned her reference to a statement that was reported in September 7, 2017 edition of the *The American* (GCX 5), that she reasonably relied on - that the nurses had followed the grievance procedure before submitting their petition. The ALJ also considered Young criticisms of management and the Hospital's Chairwoman in his analysis – correctly determining that “[e]ven one with paper thin skin cannot reasonably see these mildly expressed opinions, which directly related to employees working conditions and the labor dispute over staffing, as the type of ‘flagrantly disloyal’ statements that are so ‘wholly incommensurate with any grievances’ . . . that they forfeit NLRB protection for efforts to improve working conditions. ALJD at 16 citing *Five Star Transportation* 349 NLRB 42, 46 (2008).²²

Based on the forgoing, the ALJ's conclusion that the Respondent discriminated in violation of Section 8(a)(1) and (3) of the Act on September 21, 2017 when it discharged Young for

²² In its Brief, Respondent criticized the ALJ for “carefully and thoroughly debunking an argument that Respondent never pressed.” Brief at 25 fn. 7 citing ALJD at 13-17. In that regard the Respondent states “based on the ALJ's decision, one would assume the Respondent seriously argued that even if Ms. Young had engaged in concerted protected activity, she lost the protection of the Act under an Atlantic Steel and/or Jefferson Standard Lynn Young analysis. It did not.” Id. Under these circumstances the Board should adopt the ALJ's finding and conclusions that nothing Young wrote caused her to forfeit the protection of the Act since Respondent does not appear to be taking an Exception to this finding having never argued that she had.

engaging and protected concerted and Union activity when she submitted her letter to the editor of *The American* protesting employee's working conditions and making common cause with co-workers in their labor dispute with Respondent – and that nothing she did caused her to forfeit the Act's protection - is fully supported by the record and well established case law.²³

4. Respondent's Exceptions 1, 37, 38 Should Be Dismissed Because the ALJ's Recommended Order Properly Requires Respondent to:

- **Advise all Employees that Work for EMHS Member Organizations that the Media Policy (EMHS System Policy #12-000) has been rescinded or revised and will not be used to discipline them for communicating with the news media, with or without the involvement of Respondent regarding employees' terms and conditions of employment or union activity; and**
- **Post at its Ellsworth Maine facility and at all other facilities where the EMHS Media Policy has been in effect copies of the ALJ's Proposed Notice to Employees.**²⁴

The Respondent takes issue with the ALJ requiring it to rescind or revise its Media Policy beyond Maine Coast or to post the recommended Notice in any location other than Maine Coast. Respondent claims that the only Respondent in this case is Maine Coast – that neither EMHS nor its other member organizations can properly be considered the Respondent in this case. The Respondent's argument should be rejected.

²³ The Board's recent decision in *Alstate Maintenance, LLC*, 367 NLRB No. 68 (Jan. 11, 2019) does not require a different result. That case involved the issue of whether an individual's complaint made to a supervisor in the presence of other employees constitutes concerted activity protected by the Act. That particular issue is not present in this case as this is not a situation where Young's concerted activity occurred in the context of a group setting. Moreover, as fully discussed above, no reasonable reading of Young's letter permits the conclusion that it reflects her individual gripes. Rather, it is apparent that in her letter to the editor Young is making common cause with Respondent's nurses, physicians, and other co-workers, on issues of mutual concern in their common endeavor to seek improvements in their working conditions.

²⁴ Respondent did not associate Exception 1 with the question it presented regarding the remedy that the ALJ issued. That Exception is however relevant to that issue as it is related to the relationship between EMHS and Maine Coast and therefore, it is appropriately addressed here.

The Board has held that it is appropriate to require an employer to rescind an unlawful rule at all locations where it is maintained and to post a notice to employees at all such locations, even though some of the impacted locations were not subject to the proceeding. *Albertson's, Inc.*, 300 NLRB 1013, 1013 fn.2 (1990); *Kinder-Care Learning Centers*, 299 NLRB 1171, 1176 (1990). In this case, the record clearly establishes that Respondent has maintained EMHS System Policy 12-000 at facilities beyond Maine Coast. As Ronan testified, and as set forth on the face of the both the policy that was in effect up until January 15, 2018, as well as the policy that was amended effective that date, EMHS System Policy 12-000 was in effect at all EMHS member organizations – not just at Maine Coast.²⁵ JTX 1, 2; TR. 209:8 - 211:1.

Respondent's claim that EMHS is not properly considered a Respondent party along with Maine Coast is also without merit. The record establishes that Maine Coast is organized as a public benefit corporation under the laws of the State of Maine. JTXs. 3 and 4 at Exh. A. Maine Coast became affiliated with Eastern Maine Healthcare Systems (EMHS) in 2015. TR. 162 – 163, 201-205. EMHS operates a healthcare network in the State of Maine that includes at least nine hospitals. TR 162:10—163:3, 201:17—202:4; JTX 2. In connection with Maine Coast's affiliation with EMHS, Maine Coast's articles of incorporation were amended on October 1, 2015 and again on November 21, 2017. JTXs 3 and 4. By these amendments, EMHS became the sole member of Maine Coast and was granted initiatory powers to control Maine Coast and its operations. JTXs 3 and 4 at Exh. A, Appx. 1, TR. 410:20-411:10. In addition to giving

²⁵ Those additional EMHS member organizations where EMHS System Policy 12-000 is in effect include Acadia Healthcare, Acadia Hospital, Affiliated Lab, Beacon Health, Blue Hill Memorial Hospital, CA Dean Memorial Hospital, Eastern Maine Medical Center, EMHS Foundation, EMHS Home Office, Inland Hospital, Lakewood Continuing Care Center, Meridian Mobile Health, Miller Drug, Sebasticook Valley, The Aroostick Medical Center, VNA home Health& Hospice and Work Health

EMHS the power to appoint Maine Coast's Board of Trustees, the control these initiatory powers gave EMHS over Maine Coast and its operations, included the powers to: amend its articles of incorporation or bylaws; change its corporate form; take action on its operating budget and capital expenditures; acquire assets and assume liabilities of third parties; transfer 5% or more of its assets; merge, consolidate, lease, mortgage, pledge or other disposition of all or substantially all assets; add, revise, or eliminate healthcare services; take action concerning third party affiliation and dissolve the corporation. JTX 3 and 4 at Exh. A, Appx. 1. EMHS also provides human resources, patient accounting, general accounting and legal services to Maine Coast. TR 199. Ronan, the president of Maine Coast, who oversees the day to day operations of the Hospital, is an employee of EMHS. TR. 204:1-3, 213:22.

As Respondent's counsel represented at trial, the relationship between EMHS and Maine Coast is the equivalent of a parent/subsidiary – with EMHS being the parent and Maine Coast being the subsidiary. TR. 268. Counsel also explained that in the non-profit world the equivalent term for the parent/subsidiary relationship is member. TR. 267: 15-23.²⁶ To that end, the parties stipulated that when EMHS became the sole member of Maine Coast, it became the non-profit equivalent of a corporate parent of Maine Coast. TR. 411:6-10.²⁷ The Complaint and other formal papers were specially amended at the Trial, with Respondent's consent, to correctly name the Respondent in this case as Maine Coast Regional Health Facilities Inc., doing business as Maine Coast Memorial Hospital, the sole member of which is Eastern Maine Healthcare Systems. TR. 409:16-410:16. The name of Respondent as amended thereby

²⁶ In his testimony Ronan, who has been employed by EMHS for 21 years, characterized EMHS as the "parent company" of Maine Coast. TR. 198:16-23, 202:22.

²⁷ As such, Exception 1 should be dismissed, as the record fully supports the ALJ's finding that Maine Coast is the non-profit equivalent of a wholly owned subsidiary of EMHS.

incorporates EMHS as a Respondent to reflect the legal relationship that exists between EMHS and Maine Coast. Under these circumstances, EMHS is properly considered to be a named Respondent in this case in this case for purposes of carrying out a remedy that would effectuate the policies and purposes of the Act.

This is not a case like *Brockway Motor Trucks, a Division of Mack Trucks, Inc.*, 251 NLRB 29, 33 fn. 19 (1980), enforcement den. 656 F.2d 32 (3rd Cir. 1981). In that case, the Board refused to name a parent company as a Respondent to remedy a violation where the issue was not raised until the General Counsel filed his brief to the Board. In so holding, the Board noted that the parent company was never afforded fair notice or an opportunity to defend against the unfair labor practice, or to litigate the question of its relationship to with or control over Respondent. *Id.* In this case, Respondent was aware at trial that Counsel for the General Counsel was seeking to add EMHS as a party to the case to remedy the fact that EMHS maintains its unlawful rule at all of its member organizations – not just at Maine Coast. TR. 265:9-266:24. Moreover, at trial Respondent stipulated to facts regarding the relationship between EMHS and Maine Coast and consented to amending the Complaint and formal papers to add EMHS to reflect that legal relationship.

For all of the foregoing reasons, the ALJ's recommended order properly requires the rescission of the unlawful media policy and a posting of a Notice to Employees in all locations where that policy was maintained, which includes those EMHS member organizations where it is maintained. Such a remedy fully effectuates the purposes and policies of the Act.

III. CONCLUSION

Based on the foregoing, the General Counsel has established that none of Respondent's Exceptions to the ALJ's Decision are meritorious. Accordingly, Counsel for the General Counsel respectfully requests that the Board dismiss Respondent's Exceptions in their entirety and affirm the Decision and Order of the Administrative Law Judge.

Dated at Boston, Massachusetts, this 1st day of February 2019.

Respectfully Submitted:

A handwritten signature in black ink, appearing to read "Gene M. Switzer", written over a horizontal line.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the aforesaid *Counsel for the General Counsel's Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision and Recommended Order* was served on February 1, 2019, in the manner set forth below:

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