UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

BAYSTATE FRANKLIN MEDICAL CENTER and BAYSTATE FRANKLIN SECURITY OFFICERS UNION a/w LAW ENFORCEMENT OFFICERS SECURITY UNION	Cases	01-CA-198949 01-CA-199030 01-CA-199306
BAYSTATE FRANKLIN MEDICAL CENTER and SHANNON WISSMAN-HOAR, An Individual	Case	01-CA-205215
BAYSTATE FRANKLIN MEDICAL CENTER and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 877	Cases	01-CA-206295 01-CA-210169
BAYSTATE FRANKLIN MEDICAL CENTER and CHRISTOPHER LIVINGSTON, An Individual	Case	01-CA-210329

Jo Anne P. Howlett, Esq.,
for the General Counsel.
Timothy F. Murphy, Esq. and
Amelia J. Holstrom, Esq.,
(Skoler, Abbott & Presser, P.C.)
Springfield, Massachusetts,
for the Respondent.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This case was tried in Hartford, Connecticut, on August 20 to 23, 2018. Baystate Franklin Security Officers Union a/w Law Enforcement Officers Security Union ("Security Officers Union" or "Union") filed the charge in case 01-CA-198949 on May 17, 2017, and filed amended charges in that case on September 29 and November 29, 2017. The Security Officers Union filed the charge in case 01-CA-199030 on May 17, 2017, and the charge in case 01-CA-199306 on May 18, 2017. Shannon Wissman-Hoar, an individual charging party, filed the charge in case 01-CA-205215 on August 29, 2017. The International Union of Operating Engineers, Local 877 ("Engineers Union" or "Local 877") filed the charge in case 01-CA-206295 on September 15, 2017, and an amended charge in that case on February 13, 2018. Local 877 filed the charge in case 01-CA-210169 on November 17, 2017. Christopher Livingston, an individual, filed the charge in case 01-CA-210329 on November 22, 2017. The Acting Regional Director for Region One of the National Labor Relations Board ("NLRB" or "the Board") issued the Order Consolidating Cases and Consolidated Complaint on December 28, 2017, and the Order Further Consolidating and Second Consolidated Complaint ("the Complaint") on February 26, 2018. The Complaint alleges that Baystate Franklin Medical Center ("the Employer" or "the Respondent") committed a number of violations of Section 8(a)(1), 8(a)(3) and 8(a)(5) of the National Labor Relations Act ("the Act") during, and in the aftermath, of the union organizing campaigns that resulted in the Security Officers Union and Local 877 being certified as bargaining representatives for units of employees at the Respondent. The Respondent filed timely Answers in which it denied committing any of the alleged violations.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT AND ANALYSIS

I. JURISDICTION

The Respondent, a corporation, operates a facility in Greenfield, Massachusetts, where it provides inpatient and outpatient medical care and annually derives gross revenues in excess of $250,000 and purchases and receives goods valued in excess of $50,000 directly from points outside the Commonwealth of Massachusetts. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act. At all material times, the Security Officers Union and Local 877 have both been labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. BACKGROUND FACTS

The Respondent operates a hospital in Greenfield, Massachusetts, ("the facility" or "the hospital") where it employs approximately 750 persons. It is part of Baystate Health – an umbrella organization that includes five hospitals in the State of Massachusetts and employs a

total of approximately 10,000 persons.[1] All of the relevant events in this case occurred at the Respondent, although in some instances the Respondent availed itself of management and investigative resources from other Baystate Health entities.

Kerry Damon, the senior director of labor and employee relations for Baystate Health,[2] testified that "union avoidance" is a "goal of the organization." The vast majority of employees of entities under the Baystate Health umbrella are not represented by unions. This includes all of the more than 5000 employees at Baystate Health's "flagship" facility in Springfield. However, many employees at the Greenfield facility involved in this litigation have chosen a course inconsistent with Baystate Health's goal of union avoidance. The Respondent's nursing staff in Greenfield has been represented by a union for some time. During 2016 and 2017, the nurses' union and the Respondent were engaged in contentious contract negotiations and, in January 2017, the nurses voted to authorize a strike. Around the time that the nurses voted to authorize a strike, the Respondent's security officers[3] and engineers also began discussing union representation. According to Damon, the organization was "concerned" when, in the midst of the nurses' contract negotiations, the security officers filed a petition for union representation. On February 10, 2017, the Respondent's security officers, who number approximately 18 and are not armed, elected the Security Officers Union as their bargaining representative.[4] When Damon subsequently heard that the Respondent's engineers were also thinking of choosing union representation she was concerned to have yet another union enter the scene. On May 12, 2017, the Respondent's engineering department employees voted to be represented by Local 877.[5]

Shannon Wissman-Hoar, an individual charging party and alleged discriminatee in this case, was a security officer with the Respondent from June 2016 until the time of her discharge on June 23, 2017. Wissman-Hoar was a participant in an employee text message group created for security officers who supported the unionization effort. However, shortly after the security officers filed their representation petition on January 17, 2017, Wissman-Hoar changed her mind and began to actively oppose unionization and to offer assistance to management's anti-union effort. During that time she secretly forwarded the group text messages, which included discussion of pro-union strategies and information, to the Respondent's security supervisor, Fred Bogalhas. In one instance, on about January 30, 2017, Wissman-Hoar inadvertently included the pro-union security officers as recipients of a text to Bogalhas, and thereby exposed to the group that she had been sharing their conversations with Bogalhas. The revelation that Wissman-Hoar had been monitoring the pro-union group's text messages and sharing them with the security supervisor was a source of a rift between Wissman-Hoar and a number of the other security officers. In the aftermath, Wissman-Hoar complained to the

[1] About half of those employees work at Baystate Health's "flagship" facility – Baystate Medical Center – in Springfield, Massachusetts.

[2] Subsequent to the time period relevant to this litigation, Damon became senior director of human resources for community hospitals and labor relations.

[3] These are the same employees sometimes referred to in the record as "patrol officers."

[4] The Security Officers Union was certified on February 24, 2017, to represent a unit consisting of:
All full time, regular part time security officers and per diem security officers performing guard duties under Section 9(b)(3) of the . . . Act employed by the Respondent at its Greenfield, Massachusetts location, but excluding all other employees, and supervisors as defined in the Act.

[5] Local 877 was certified on May 24, 2017, to represent an employee unit consisting of:
All full time, regular part-time and per-diem skilled trades employees, including Electricians, Painters, Carpenters, Maintenance Mechanics, Licensed Engineers, Licensed Firemen, HVAC Mechanics, Plumbers, and Leads, but excluding all other employees, managers, confidential employees, clerical/administrative assistants, guards, and Supervisors as defined by the Act.

Respondent about the conduct of other security officers and these complaints led to the Respondent terminating two of the alleged discriminatees in this case – Mike Kubasek and Kris Morandi.[6] Eventually Wissman-Hoar was herself the subject of a complaint by another security guard, and the Respondent's investigation of that complaint led to Wissman-Hoar's own discharge for bullying a co-worker by threatening to publicize personal information about his past. The complaint allegations regarding interrogations and other coercive conduct largely revolve around the meetings that managers and supervisors had with Wissman-Hoar after she approached the Respondent to discuss the unionization effort and also around the investigations that management conducted in response to concerns that Wissman-Hoar raised about co-worker conduct.

Christopher Livingston, an engineering department employee whose discharge the Complaint challenges, was not part of the unpleasant interactions among the security officers. Wissman-Hoar had, however, approached Livingston in his work area and questioned him about the unionization campaign in the engineering department.

B. Interrogation and Surveillance

1. Russo

Facts

The General Counsel alleges that, during the period from January 30 to February 10, 2017, the Respondent's president, Cindy Russo, unlawfully interrogated security officer Wissman-Hoar and created the impression that union activities were under surveillance. The record shows that shortly after the security officers filed their petition for representation on January 17, Russo began making frequent visits to the security office to interact with officers. Tony Triano, the Respondent's human resources director, also began to visit the security officers. Russo told the security officers that she had not previously known about their discontents. Russo asked the officers to "give [her] a chance," and stated that she had an "open door policy," was "all ears," and was "willing to listen." Wissman-Hoar testified that, as a result of this communication, she began to think that the problems in the security department could be worked out directly with management rather than by involving a union. Shortly thereafter, Wissman-Hoar concluded that the representative of the Security Officers Union was not trustworthy and she began to zealously oppose the unionization effort.

On January 27, around the time that she began to oppose unionization, Wissman- Hoar reached out to Russo by email. In the email, Wissman-Hoar stated, "I personally appreciate the fact that you have checked in with the department the last few days." Wissman-Hoar, who had never been to Russo's office before, offered to "stop by sometime, have a coffee and chat." Subsequently, Wissman-Hoar visited Russo in her office, and the two discussed negative information about the union representative. During the first meeting, Russo gave her personal cell phone number to Wissman-Hoar. During the subsequent days and weeks, Wissman-Hoar used Russo's personal cell phone number to have numerous contacts with her. Wissman-Hoar testified that she met with Russo "quite often" to discuss the Union between the time when the security officers' petition was filed and the election. Although Russo was the highest level onsite manager at the facility, Wissman-Hoar began to stop by her office for unscheduled visits. The only subject Russo and Wissman-Hoar ever talked about during these meetings was the

[6] Wissman-Hoar also complained to the Respondent about three other security guards – Chris Goshea, Ryan Johnson, and Richard DiGeorge – all of whom ceased working at the Respondent shortly thereafter. The Complaint does not allege that these three individuals were discriminated against.

Union. Russo asked Wissman-Hoar where each security officer stood regarding the Union. Wissman-Hoar did not know every security officer's position, but she did know that a number of officers, including Kubasek and Morandi, supported the Union, and she shared that information with Russo. Russo and Damon (senior director of labor and employee relations for the umbrella organization, Baystate Health) talked about what Wissman-Hoar reported to Russo, including Wissman-Hoar's statements about "which way people in the department were leaning."

In one instance, Russo paged Wissman-Hoar. When Wissman-Hoar arrived at Russo's office, Russo asked her what she knew about the cancellation of a previously scheduled union meeting. Wissman-Hoar had not told Russo about the cancellation of the meeting. According to Wissman-Hoar, meeting with Russo on this and other occasions "wasn't like an interrogation." Rather, Wissman testified, "It was we were – I thought we were friends," "I really thought she was my friend." Wissman-Hoar testified, further, that the Respondent supported her, and checked on her, during the period leading up to the election. Wissman-Hoar, in addition to discussing opposition to the Security Officers Union with Russo, also voluntarily discussed it with Jill Wyman (senior human resources business partner) and Fred Bogalhas (security supervisor).

Discussion

An interrogation violates Section 8(a)(1) when, in light of the totality of the circumstances, it reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Mathews Readymix, Inc.*, 324 NLRB 1005, 1007 (1997), enfd. in part 165 F.3d 74 (D.C. Cir. 1999); *Emery Worldwide*, 309 NLRB 185, 186 (1992); *Liquitane Corp.*, 298 NLRB 292, 292-293 (1990). "In the final analysis," the Board has stated, the "task is to determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act." *Medcare Associates, Inc.*, 330 NLRB 935, 940 (2000); see also *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1217 (1985).

The totality of the circumstances present in this case do not support finding that Russo's discussions with Wissman-Hoar amounted to coercive interrogations. Indeed, Wissman-Hoar did not have to be solicited or coerced to cooperate. She was a zealous opponent of the union campaign and assisted the antiunion effort of her own accord. Wissman-Hoar reached out to Russo to initiate their discussions about the union campaign, not the other way around. After the first meeting, Wissman-Hoar frequently dropped by for unscheduled visits with Russo to provide information about the union effort. Wissman-Hoar does not claim, and the record does not show, that during their meetings Russo made threats against Wissman-Hoar, or employees in general. Similarly, the record does not suggest that Russo asked Wissman-Hoar to reveal anything beyond what Wissman-Hoar wished to reveal. It is true that Russo was a high-ranking manager and that many of the discussions took place in Russo's office, factors that under other circumstances would weigh in favor of finding the discussions intimidating or coercive. However, in this case Wissman-Hoar was a union opponent who sought out the meetings in Russo's office. To the extent that the record suggests that Russo's position or the place of the meetings bear on the nature of the discussions here it is not because Wissman-Hoar would, under the circumstances, be intimidated, but because those factors appear to have induced in Wissman-Hoar an exhilarating sense that she was friends with a powerful manager. Even at trial, Wissman-Hoar, an alleged discriminatee who was testifying on behalf of the General Counsel, stated that meeting with Russo "wasn't like an interrogation," but like "we were friends."

Where, as here, an employee initiates discussions with their employer in order to voluntarily disclose information about union activities in circumstances free of coercive threats, promises, or solicitation, the Board has found that the resulting discussion is not an unlawful interrogation. In *Manor West, Inc.*, the Board reversed the administrative law judge, and found that a discussion was not an unlawful interrogation where the employee initiated the conversation with a supervisor and volunteered that he had been approached about starting a union. 311 NLRB 655 (1993), reversed on other grounds at 60 F.3d 1195 (6th Cir. 1995). This was the case even though the supervisor had prolonged the discussion by asking the employee about his own views regarding the union. In *Manor West*, the Board relied on the fact that, as in the instant case, the employee volunteered the information in circumstances that were free of employer threats or promises. Ibid. Similarly, in *The Los Angeles Airport Hilton*, no unlawful interrogation was found where an employee volunteered to a manager that "something was going to happen," and the manager asked follow up questions to see if the employee was referring to an employee walkout or strike. 354 NLRB 202, 207 (2009).[7] Not surprisingly, the Board has reached a different result in cases where the employee initiates such a discussion only after having been subjected to employer threats, direction, or solicitation, that coerced him or her "into making such a 'voluntary' offer." *Basin Frozen Foods*, 307 NLRB 1406, 1416 (1992); see also *Glenoaks Hospital*, 273 NLRB 488, 490 (1984) (it is unlawful for an employer to solicit an employee to spy on union activities of other employees). In the case of Russo and Wissman-Hoar, however, Wissman-Hoar's assistance was not triggered by employer threats, direction, solicitation, promises, or other coercion. Rather, Wissman-Hoar was an opponent of the unionization and offered her assistance to the effort to defeat it. There is no evidence that at any point Wissman-Hoar wished to withdraw her cooperation but was pressured to continue. To the contrary, she continued appearing at Russo's office for unscheduled visits to discuss the Union. Russo, moreover, was not the only official of the Respondent with whom Wissman-Hoar voluntarily discussed her opposition to the Union or information relevant to the antiunion effort. She also initiated such discussions with Wyman and Bogalhas.

After considering the totality of the circumstances, I find that the record does support finding that Russo coercively interrogated Wissman-Hoar during January or February 2017. This complaint allegation should be dismissed.

In addition to claiming that Russo's discussions with Wissman-Hoar amounted to unlawful interrogations, the General Counsel contends that those discussions unlawfully created the impression that union activities were under surveillance. This is so, the General Counsel asserts, because Russo raised the subject of the cancelled union meeting even though Wissman-Hoar had not informed Russo about the cancellation. This allegation also fails. The record does not show that Russo indicated to Wissman-Hoar, or that a reasonable employee would infer, that the information about the cancellation was obtained through unlawful surveillance or other improper means. The Board has held that an employer creates an impression of surveillance when it "reveals specific information about a union activity that is not generally known, and does not reveal its source." *New Vista Nursing & Rehabilitation, LLC*, 358 NLRB 473, 482 (2012).[8] In the instant case, the record does not show that information about the cancellation of the meeting was not generally known or that Russo's statement about the cancellation "suggest[ed] that [s]he acquired [her] knowledge through solicitation or spying." *Carrick Foodland*, 238 NLRB 568, 569 (1978); see also *North Hills Office Services,*

[7] The Board incorporated and approved this decision subsequent to the U.S. Supreme Court's decision in *New Process Steel v. NLRB*, 560 U.S. 674 (2010). See 355 NLRB 602 (2010).

[8] The Board has affirmed the analysis of an administrative law judge's decision that relies on *New Vista Nursing* as precedent subsequent to the U.S. Supreme Court's decision in *NLRB v. Noel Canning*, 573 U.S. 513 (2014). See *Kalthia Group Hotels, Inc.*, 366 NLRB No. 118, slip op. at 17 (2018).

Inc., 346 NLRB 1099, 1103-1104 (2006) (Board holds that employer did not unlawfully create the impression of surveillance when it volunteered information to an employee concerning the union activities of other employees, "particularly in the absence of evidence that management solicited that information."). The information that Russo conveyed was very general – simply that a meeting had been cancelled – and is not the sort of information that an employer would only be expected to obtain through improper surveillance or solicitation. It was not detailed as to participants, planning, dates, times, and so forth. The contention that Russo was coercing or intimidating Wissman-Hoar by creating the impression of surveillance is particularly unpersuasive here because Russo's statement was made in the context of a conversation with an employee who was voluntarily cooperating with the anti-union effort on an ongoing basis.

The record does not show that Russo, during her conversations with Wissman-Hoar, unlawfully created the impression of surveillance. That allegation must be dismissed.[9]

2. Bogalhas

Facts

The Complaint alleges that the Respondent, by Fred Bogalhas, security supervisor, violated Section 8(a)(1) from mid-January 2017 until early February 2017 by interrogating employees about their union and protected exchanges and by requesting and receiving copies of the pro-union security officers' group texts. As with the above-discussed allegations regarding Russo, the allegations regarding Bogalhas apparently arise out of interactions with Wissman-Hoar after she began to oppose the union campaign. The Respondent counters that

[9] The General Counsel also asks me to rule that, during the union campaign, the Respondent solicited employee grievances and promised to resolve them in violation of Section 8(a)(1) of the Act. This allegation is *not* set forth in the Complaint or in any of the ten charges and amended charges underlying the Complaint. At trial, the General Counsel did not state its intention to insert the allegation into the litigation. According to the General Counsel, I should rule on this allegation because it is sufficiently connected to the allegations, rejected above, that Russo unlawfully interrogated Wissman-Hoar and created the impression that union activities were under surveillance. Brief of the General Counsel at Pages 44-45. I have considered the General Counsel's request, and find that it would not comport with due process to rule on the newly alleged claim that the Respondent unlawfully solicited, and promised to remedy, employee grievances. Except in unusual circumstances an allegation has not been fully and fairly litigated where it was not alleged in the complaint or the charge and the employer "was not put on notice . . . and did not have the opportunity to mount a defense." *Preferred Building Services, Inc.*, 366 NLRB No. 159, slip op. at 21 (2018). The record includes the testimony of alleged discriminatee Kubasek, who stated that, during the union campaign, Russo told a group of security officers that she had an "open door" policy and that they could bring their concerns directly to her. Tr. 434. Wissman-Hoar reported a somewhat different version, testifying that Russo made the following statement to security officers: "give me a chance, and I'm all ears and I will listen to you," Tr. 192. Russo was not called as a witness to address either version, but then again it was not until after the record closed that the General Counsel alleged that these statements were unlawful. I note that it is not unlawful for an employer to solicit grievances during a union campaign unless the employer promises, impliedly or explicitly, to remedy them. *Albertson's, LLC*, 359 NLRB 1341, 1341 (2013) (quoting *Amptech, Inc.*, 342 NLRB 1131, 1137 (2004), enfd. mem. 165 Fed. Appx. 435 (6th Cir. 2006)), affd. and incorporated by reference 361 NLRB 761 (2014); *George L. Mee Memorial Hospital*, 348 NLRB 327, 329 (2006). Under the circumstances here, including the fact that the General Counsel did not put the Respondent on notice that it was alleging that such unlawful promises had been made, the Respondent did not have a fair opportunity to mount a defense by trying to show – through testimony by Russo or otherwise – either that Russo did not make statements soliciting grievances or did not promise to remedy them. Under these circumstances, I conclude that the General Counsel's post-trial claim that the Respondent unlawfully solicited and promised to remedy employee grievances was not fully litigated and I do not rule on it.

it could not have violated Section 8(a)(1) on these bases because Bogalhas was neither a statutory supervisor nor an agent of the Respondent and that, even if he was, his actions were not shown to constitute a violation.

Regarding Bogalhas' status in the early months of 2017, the evidence shows that the Respondent had previously, in October 2016, made him interim security supervisor and that Bogalhas introduced himself to the department in his new supervisory role at that time. General Counsel Exhibit Number (GC Exh.) 58. Upon becoming interim security supervisor, Bogalhas began receiving increased compensation and benefits. Wyman (senior human resources business partner) conceded that Bogalhas was a supervisor by June 2017, Transcript at Page(s) (Tr.) 152-153, at a time when he was performing the same duties he had performed since becoming interim security supervisor in October 2016, Tr. 541. Bogalhas testified that at meetings he often served as "the supervisory presence for the staff." Tr. 544-545. In multiple instances after Bogalhas become interim security supervisor and prior to the union election, the Respondent hired security officers based on Bogalhas' recommendation, and in some of those instances he was the only person who interviewed the applicant and made a recommendation. Tr. 555-557.

Turning to the alleged interrogation and surveillance by Bogalhas, the record shows that in January 2017 Wissman-Hoar telephoned Bogalhas to express concern about statements in the pro-union text group that she understood to suggest that she could lose her job and could not trust management's representations. She telephoned Bogalhas about these text messages to ask him for "help or guidance" and because she was looking for "a leader to kind of get things back on the right track." Bogalhas responded that he could not help Wissman-Hoar unless he saw the texts that she was referring to. Thereafter, Wissman-Hoar began providing Bogalhas with copies of the texts from the pro-union security officers' text group. As noted above, in one such instance, on January 30, Wissman-Hoar inadvertently sent a text intended for Bogalhas to the entire pro-union text group, and this alerted the group to the fact that Wissman-Hoar had been sharing their communications with Bogalhas. One of the security officers participating in the pro-Union text group, Nick Jablonski, wrote to Wissman-Hoar that he knew she had "betrayed" the group.

The record makes clear that relations between Wissman-Hoar and a number of other security officers became antagonistic after it was discovered that she had been sharing the pro-union group's texts with Bogalhas. Wissman-Hoar approached Bogalhas again and asked him to talk to Jablonski about the "nastiness" in the department. Bogalhas spoke to Jablonski in an effort to "smooth things over." Tr. 551. No further information was elicited at trial about this conversation between Bogalhas (who testified) and Jablonski (who did not testify).

Discussion

1. I find that Bogalhas was a supervisor within the meaning of Section 2(11) of the Act at all times relevant to this proceeding. Section 2(11) defines "supervisor" as follows:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 2(11), 29 U.S.C. Sec. 152(11). The supervisory authorities are listed in the disjunctive, meaning that if an individual possesses even one of the authorities listed in Section 2(11), that individual is a statutory supervisor as long as the exercise of the authority involves a degree of discretion that rises above the "routine or clerical," and the authority is held in the interest of the employer. The burden of proving supervisory authority is on the party asserting it. *Oakwood Healthcare*, 348 NLRB at 687; see also *NLRB v. Kentucky River Community Care,* 532 U.S. 706, 711-713 (2001).

Bogalhas' status as a supervisor for purposes of Section 2(11) is demonstrated most clearly, although not exclusively, by the fact that he had the ability to effectively recommend the hiring of officers for the security department. The uncontradicted evidence shows that, during the period at issue, Bogalhas recommended hiring applicants as security officers and that his recommendations were consistently accepted by the Respondent. In some instances Bogalhas was the only individual who interviewed the applicant or made a recommendation regarding the applicant's suitability prior to the applicant being employed. Deciding whether an applicant for one of these security-sensitive positions should be hired is important, involves independent judgment, and is more than merely clerical.

2. I find that the above-described communications between Wissman-Hoar and Bogalhas did not constitute unlawfully coercive interrogations in violation of Section 8(a)(1). As in the case of Wissman-Hoar's discussions with Russo, it was Wissman-Hoar who initiated these discussions with Bogalhas, not the other way around. Wissman-Hoar's outreach did not result from any coercion by Bogalhas or the Respondent more generally. Wissman-Hoar testified that she was motivated, instead, by the fact that the pro-union security officers were making statements that caused her to be concerned that she might lose her job. Based on the record as a whole, I find that her cooperation was also motivated – if not at the outset then soon thereafter – by a desire to assist the effort to defeat the union campaign among the security officers. In any case, her cooperation was neither solicited nor coerced by Bogalhas. Although Bogalhas told Wissman-Hoar that he could not assist her regarding the text group statements that she found alarming unless he saw the statements she was talking about this was, under the circumstances, not a coercive request but part of a legitimate attempt to respond to concerns that an employee had raised to him. The circumstances here are, in my view, comparable to those where no violation was found in *Manor West*, supra, and *Lost Angeles Airport Hilton*, to the extent that, as in those cases, the employee initiated the discussion and the employer's questions merely followed up on what the employee raised, and did so under circumstances free of threats or other coercion by the employer.

To the extent that this claim is premised on whatever discussion that Bogalhas and Jablonski had as a result of Wissman-Hoar's request that Bogalhas "smooth things over" between them, the record does not show that Bogalhas asked Jablonski any questions at all, much less that he engaged in questioning that rose to the level of a coercive interrogation.

I find that the evidence does not show that Bogalhas interrogated employees about their union and protected exchanges in violation of Section 8(a)(1) of the Act from mid-January 2017 until early February 2017. That allegation must be dismissed.

3. Hutchinson

Facts[10]

The Complaint alleges that, on about May 15, 2017, Deb Hutchinson unlawfully interrogated employees about union and protected concerted activities while investigating an internal complaint that Wissman-Hoar made about statements by Kris Morandi. The background circumstances relating to this allegation arise out of the friction that persisted in the security department after the Security Officers Union was certified as bargaining representative in February 2017. That friction led to an unpleasant text exchange between Morandi – the officer most closely associated with the unionization effort in the security department[11] – and Wissman-Hoar. The exchange was triggered on May 1, 2017, when a pro-union security officer, Nick Jablonski, reported in the security officers' group text that the engineering department employees were on the verge of voting to be represented by a union.[12] This text group included approximately ten employees, and no supervisors or managers. Jablonski added: "Now they better start worrying about the next union. Toodaloo Cindy." The last phrase refers to the Respondent's president, Cindy Russo. Jablonksi did not add anything further, but the text chain continued with the following exchange between Wissman-Hoar and Morandi:[13]

Wissman-Hoar:	Be lucky you are employed. You haven't gone through depression or otherwise. Lose the cockiness. You want better . . . move on
Morandi:	Fuck that bullshit.
Wissman-Hoar:	Then quit.
Morandi:	You want your pink pussy hat to wear to hahahahaha
Wissman-Hoar:	What? Repeat that please
Morandi:	What are you f****** blind
Wissman-Hoar:	What are you implying?
Morandi:	Your sister
Wissman-Hoar:	I can't believe you are 54 and are talking this way. Nice.
Morandi:	Who's 54

[10] This section also addresses the interrelated facts that bear on the allegation that the Respondent unlawfully discharged Morandi.

[11] Morandi set up the initial meeting between a group of security officers and a union representative and also conducted a meeting with a group of employees regarding unionization.

[12] On May 12, less than two weeks later, the Respondent's engineers did in fact vote to be represented by Local 877. Local 877 was certified as the bargaining representative of the unit on May 24, 2017.

[13] All ellipsis in the following recitation are in the original.

Wissman-Hoar:	Ummmmm . . . . . I don't have a sister. You . . . . . 50 something
Morandi:	Thank God you don't
Wissman-Hoar:	Why is that?
Morandi:	Because you're nasty
Wissman-Hoar:	Define please
Morandi:	N A S T Y

GC Exh. 21. At the time of this exchange, Wissman-Hoar was using her personal cell phone and was off-duty. The notes of an interview that the Respondent conducted with Morandi indicate that he was on medical leave, and not working, at the time of the exchange.

Either on the day of the text exchange, or the following day, Wissman-Hoar arranged to meet with Triano (the Respondent's human resources director). On her way to meet with Triano, Wissman-Hoar stopped off to meet with Christopher Livingston, an engineering department employee who is also a charging party in this case. Wissman-Hoar questioned Livingston in an effort to discover what he knew about Jablonski's text statement that the engineers had decided to unionize.

When Wissman-Hoar met with Triano, she complained that Morandi's May 1 texts to her, including the "pink pussy hat" text, constituted harassment. Subsequently she shared a number of text messages from the security officers' group with Triano. These shared texts included one from May 2 in which Jablonski referenced Wissman-Hoar's May 1 meeting with Triano and opined that the human resources department was "playing favorites" by meeting with her on such short notice while "my guys" had been trying for months to schedule a meeting with Triano. In addition to sharing these texts, Wissman-Hoar told Triano which of the employees were part of the group text and identified who wrote various messages.

Triano arranged for Wissman-Hoar to meet with Hutchinson, a director-level human resources and/or labor relations official who did not work at the Respondent, but rather was based at Baystate Health's larger facility in Springfield. Triano provided Hutchinson with the text messages that Wissman-Hoar had provided to him. On May 3, Hutchinson met with Wissman-Hoar and then proceeded with an investigation. The record indicates that Hutchinson interviewed Wissman-Hoar on May 4 and 12, Bogalhas on May 5, Jablonski on May 5, Chip O'Dowd (a security officer who had asked to be removed from the group text) on May 5, Eric Mosher (a security officer in the text group) on May 12, and Morandi on May 15.

Hutchinson's report regarding her investigation states that on May 4 she asked Wissman-Hoar why she had responded to Jablonski's text (about the engineers voting to unionize) and to Morandi. Wissman-Hoar responded "that she had a right to her view (non-union) and that she was tired of the way she has been treated." According to Hutchinson's report, Wissman-Hoar stated that she was "not sure if [her treatment] was gender related," and also stated that it was "a Union thing, the team is angry with me for not supporting the Union."

Hutchinson interviewed Morandi on May 15. Also present for this interview were Steve Maritas (representative from the Security Officers Union) and Cody Wells (a security officer). According to Hutchinson's notes and investigative report, Morandi confirmed that he had written

the texts that Wissman-Hoar complained about. Morandi stated that his messages were a "political statement," and that he had called Wissman-Hoar "nasty" because of a vulgar message she had previously sent him and which he had already forwarded to an attorney for Baystate Health. Morandi also expressed the view that Shannon-Hoar "goes after everyone" and referenced prior complaints she had made against two other security officers. Morandi said that he did not know what he meant by his text statement "your sister" and that Wissman-Hoar did not have a sister.

Hutchinson interviewed Jablonski on May 5. According to Hutchinson's report, Jablonski began by expressing apprehension about submitting to an interview without a union representative present. Hutchinson stated that Jablonski agreed to continue only "hesitantly" after she indicated that there was "no anticipated corrective action for him." In addition to asking Jablonski about Morandi's texts, she asked him about his own text statement that Triano was more responsive to Wissman-Hoar's complaints than to those of other security officers. She asked him for specifics and he mentioned two instances in which he said that Triano and/or the human resources department had been unresponsive to security officer complaints, including one complaint about Wissman-Hoar's performance. Hutchinson states that she then asked Jablonski about his text statement: "[N]ow they better start to worry about the next union, Toodaloo Cindy." At that point Jablonski said he would not continue without a union representative present. He stated further that he did not trust the human resources department, believed that human resources would use his statements against him, and that an officer had already been discharged by the Respondent based on a complaint by Wissman-Hoar.[14]

Hutchinson made a report in which she summarized her investigation and recommended that Morandi be discharged. She stated that this was "based on the obvious inappropriate nature of the text messages that [Morandi] sent, directed at Shannon Wissman-Hoar, in a group text with other security officers." GC Exh. 39, Page 5. Hutchinson referenced Baystate Health's "code of conduct" language, which provides: "We do not tolerate intimidating, threatening or harassing behavior. We are expected to: Behave appropriately in the workplace. Act responsibly and collaboratively and treat everyone in a respectful and professional manner." She reported that Bogalhas had, in fact, discharged Morandi on May 17 with Triano present. Damon, the Baystate Health's senior director of labor and employee relations, indicated that the discharge was a "group decision" made by herself, Triano, Oles and in-house legal counsel. She testified that she viewed Morandi's text message as referring to Wissman-Hoar's gender and as a "gender-based insulting comment." Tr. 757. She stated that "it gave me great pause to allow . . . Morandi to continue employment." Tr. 754.

Analysis

Factors the Board has recognized as bearing on the question of whether an interrogation unlawfully interferes, restrains, or coerces employees' exercise of Section 7 rights include: whether the interrogated employee was an open or active union supporter; whether proper assurances were given concerning the questioning; the background and timing of the interrogation; the nature of the information sought; the identity of the questioner; and the place and method of the interrogation. *Stoody Co.*, 320 NLRB 18, 18-19 (1995); *Rossmore House Hotel*, 269 NLRB 1176, 1177-1178 (1984), affd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

[14] As is discussed later in this decision, a month prior to this interview, the Respondent discharged security officer Kubasek based on its investigation of a complaint made against him by Wissman-Hoar. In addition, C. Goshea, R. Johnson, and R. DiGeorge left the Respondent's employ after Wissman-Hoar lodged complaints against them.

In this case, I find that the circumstances weigh in favor of finding that Hutchinson engaged in an unlawfully coercive interrogation of Jablonski. Hutchinson was a director-level official who was not based at the Franklin facility. Although Jablonski had indicated support for unionization in the pro-union officers' text group, it was not shown that he had intentionally divulged his union views to the Respondent or otherwise been "open" with the Respondent about those views. In her account of the interrogation, Hutchinson does not claim that she assured Jablonski that he could answer without fear of retaliation. Indeed, it was only after Jablonski suggested that he might not proceed unless a union representative was present that Hutchinson made the ambiguous statement that no corrective action against him was "anticipated." See *United Rentals Inc.*, 349 NLRB 190, 200 (2007) (interrogation unlawful where, inter alia, the employer did not provide assurances that the employee's answers would not be used against him, but only made an ambiguous statement that was "susceptible of implying a future reprisal."). The timing of the interrogation also weighs in favor of finding it unlawfully coercive and intimidating. Wissman-Hoar's recent complaints had led to other pro-union officers being discharged and investigated. In three additional cases, her complaints against employees were followed by the separation of those employees from the Respondent for reasons that are not explored in the record.

In reaching the conclusion that Hutchinson engaged in the unlawful interrogation of employees, I considered that an employer has a legitimate interest in investigating an employee's facially valid complaint about inappropriate statements by a co-worker, even where those statements are made during the course of otherwise protected activity. *Bridgestone Firestone South Carolina*, 350 NLRB 526, 528-529 (2007). The Board has found that an employer's questioning of an alleged wrongdoer about his or her alleged inappropriate statements is not an unlawful interrogation where the employer "made reasonable efforts to circumscribe its questioning to avoid unnecessary prying into . . . union views." Ibid. In this instance, however, Hutchinson did not make reasonable efforts to avoid unnecessary prying into union views. To the contrary, Hutchinson brazenly strayed from questioning Jablonski about the statements by Morandi that Wissman-Hoar complained about, and questioned Jablonski about his own statement of support for the unionization effort in the engineering department and his subsequent discussion with co-workers about the preferential treatment he believed that the human resources department was providing to anti-union employee Wissman-Hoar. Not only was Hutchinson interrogating Jablonski about union-related statements that were not the subject of any claim of impropriety, but she was doing so after Jablonski had indicated that he was uncomfortable proceeding with the questioning without a union representative present. Hutchinson also asked Jablonski about his text statement "Toodaloo Cindy," which he only meant to share with co-workers. Not only was this questioning of Jablonski regarding his dismissive remark about the Respondent's president unnecessary to the investigation of *Morandi's* allegedly harassing statement to Wissman-Hoar, but a reasonable employee would find it highly intimidating to be asked by a director-level official about his insulting reference to the Respondent's president. This is especially true because during this time period Wissman-Hoar's complaints had led to pro-union officers being investigated and discharged. Indeed, Jablonski eventually felt compelled to refuse to submit to further questioning without representation. See *United Rentals Inc.*, 349 NLRB at 200 (interrogation found to be unlawfully coercive where employer expanded probe to the point that the employee felt compelled to refuse to answer).

For the reasons discussed above I find that in May 2017 the Respondent, by Hutchinson, engaged in a coercive interrogation about union activities in violation of Section 8(a)(1).[15]

4. Oles

Facts

The General Counsel alleges that Greg Oles, the Respondent's engineering manager, unlawfully interrogated engineering department employee Mike Kuehl[16] on August 30, 2017, about union activity. Kuehl was one of the engineering employees who initially reached out to the Local 877 about representation. While he was an active union supporter, the record does not reveal whether he made his role or support public or voluntarily disclosed it to the Respondent. The engineering department employees filed a petition for representation on April 19, 2017. The day after the petition was filed, Kuehl and another engineering department employee initiated a conversation with Oles and told him that the employees' decision to seek union representation was "nothing personal against him." Oles responded with a letter, dated April 24, to the engineers in which he stated: "I was totally shocked, and disappointed, to be informed that the hospital had received a petition for unionization. This pains me . . . . I've been told this unionizing isn't about me. But it is."

In late August 2017, Kuehl had a conversation in the Respondent's cafeteria with Donna Stern – the chairperson of the nurses' bargaining unit. Kuehl was on his lunch break during this union-related conversation. Kuehl testified that relations between the nurses union and management were on the verge of the "boiling point" and that he told Stern some of the nurses' actions were not helping matters.

On August 30, Oles directed Kuehl to come to Oles' office for a one-on-one meeting. Oles asked Kuehl if it was true that he had been discussing union matters with Stern in the mental health unit for approximately an hour.[17] Kuehl told Oles that he had not been in the mental health unit for weeks, and he told Oles that this could be confirmed by checking the record of where he had "swiped" his key card. Kuehl told Oles that while he had not been in the mental health unit, he did recently have a conversation with Stern in the Respondent's cafeteria during his lunch break. There is no evidence that Oles continued the questioning once Kuehl stated that he was on his lunch break at the time of his recent conversation with Stern. Kuehl testified that the exchange worried him – so much so that he felt the need to defend himself and doubled back to Oles' office and asked who had raised questions about the conversation with Stern. Oles told Kuehl that Russo had asked that the matter be looked into. Kuehl asked who

[15] Since I find that Hutchinson's questioning of Jablonski is sufficient to establish the alleged violation, and to justify the relief the General Counsel seeks for that violation, I do not reach the issue of whether Hutchinson's questioning of other employees would also establish the violation.

[16] In a number of places in the record this individual's name is inaccurately spelled "K*r*uehl."

[17] I credit Kuehl's testimony that Oles specifically asked him if he had been talking to Stern "about union matters." Tr. 400. Kuehl's testimony on this point was specific and confident and is consistent with the written account that Kuehl created near in time to the event. GC Exh. 59. Oles' testimony regarding the exchange omits reference to a question "about union matters," but did not include a denial that he asked that question. When Oles summarized the exchange he stated that he told Kuehl "that I got a report that he was – how can I put it, had a meeting with [Stern] that wasn't work." Tr. 624. Oles' testimony – in particular his use of the phrase "how can I put it" when recounting what he said, indicates that he was paraphrasing. Therefore, to the extent that his testimony may be considered inconsistent with Kuehl's on this point, I credit Kuehl's more confident, specific and corroborated testimony that Oles specifically asked him whether he had been talking to Stern about union matters.

had reported him to Russo, and Oles stated that Russo could not remember. Oles told Kuehl not to worry because Russo and himself had concluded that the story about conducting union business with Stern on work time had "no backbone."

Kuehl gave credible testimony that, prior to the events described above, the Respondent did not require him to request permission before going to lunch and did not place any restrictions on who he had lunch with or the subjects discussed during lunch.

Analysis

I find that the totality of circumstances supports finding that Oles' questioning of Kuehl on August 30 was unlawfully coercive. I was given pause in reaching this conclusion by the evidence indicating that Oles discontinued the questioning when Kuehl informed him that his conversation with Stern occurred during a lunch break. A number of other factors, however, lead me to conclude that a reasonable employee would have been intimidated and/or coerced in the exercise of Section 7 rights by the questioning. Kuehl was shown to be an active, but not necessarily open, union supporter. Indeed, immediately after the engineers' representation petition was filed, Kuehl took steps to maintain good relations with Oles by telling him that the employees' petition was "nothing personal against him." Shortly thereafter, Oles communicated with the engineering employees in a letter that rebuffed Kuehl's overture, stating: "I've been told this unionizing isn't about me. But it is." Oles further expressed his displeasure over the unionization effort, stating that it "shocked," "disappointed," and "pain[ed]" him. This was, moreover, taking place during a time when management's relationship with the nurses' union was so combative that Kuehl feared it was reaching a "boiling point." The trepidation an employee would feel about being interrogated by a manager about a union-related conversation would, I expect, be heightened under circumstances where that manager had, like Oles, not only indicated that he took the unionization effort as a personal affront, but had already rebuffed the employee's conciliatory overture. In addition, I note that at the time when Oles questioned Kuehl, the Respondent had recently violated employees' Section 7 rights. As discussed above, during the previous May, Hutchinson unlawfully interrogated Jablonski. In addition, as is discussed infra, in May the Respondent had also unlawfully discharged union activist Morandi.

I find that the nature of the information sought also weighs in favor of finding the questioning coercive. Oles did not confine himself to asking Kuehl if he had been meeting with Stern at a time when he was supposed to be working, but rather specifically asked Kuehl whether he had been talking to Stern "about union matters." Although an employer has a reasonable interest in investigating whether employees are engaging in activities that cause them to neglect their duties, neither Oles, nor the Respondent, provides any benign explanation for Oles asking whether Kuehl had been talking about union matters. The fact that Oles specifically asked whether Kuehl had been talking about union matters further heightened the intimidating and coercive nature of the questioning, especially in light of Oles' openly hostile posture towards the engineers' unionization efforts. Also weighing in favor of finding a violation is the fact that Oles summoned Kuehl to his office for the meeting without prior notice about the meeting or its subject matter, and without anyone else present. Oles divulged that Russo, the Respondent's highest on-site manager, had called for the questioning. The Respondent does not claim that Oles gave Kuehl any assurances that the questioning would not be used against him and, in fact, the testimony suggests that no such assurances were given.

Finally, I note that while the inquiry into whether an interrogation is unlawfully coercive is an objective one, and not based on the subjective reaction of the employee, it is worth noting that Kuehl's reaction was consistent with the view that a reasonable employee would find Oles' questioning intimidating. Compare *United Rentals Inc.*, 349 NLRB at 200 (interrogation found to

be unlawfully coercive where employee felt compelled to refuse to answer) and *Miller*, 334 NLRB 824, 824 (2001) (test for whether interrogation is coercive is objective rather than subjective). Specifically, Kuehl stated that the questioning caught him off-guard and that he was sufficiently unnerved that he felt the need to return to Oles' office to "defend" himself and attempt to identify his accuser.

I find that on August 30, 2017, Oles coercively interrogated Kuehl about union activities in violation of Section 8(a)(1).

C. Non-Solicitation Policy and Verbal Warning to Livingston

The Complaint alleges that in an oral communication to Livingston on May 5, 2017, and an email communication to him on May 9, 2017, the Respondent promulgated and maintained its no-solicitation policy to interfere with employees' exercise of Section 7 rights, and to prohibit union-related conversations or discussions.[18] Baystate Health maintains a "solicitation and distribution" policy, effective since January 20, 2017, which applies to the Respondent's employees. The written policy includes the following prohibitions:

> 1. Solicitation and distribution of literature is prohibited during the working time of either the employee doing the solicitation or distribution or the targeted employee. The term "working time" does not include an employee's authorized lunch or rest periods or other time when the employee is not required to be working.
>
> 2. Solicitation is prohibited at all times in immediate patient care areas, including patient rooms, treatment rooms and corridors immediately adjacent to patient rooms or treatment rooms.

GC Exh. 8, Section V.B. Wyman, the Respondent's human resources business partner, testified that this is not a "rule against talking." She stated that employees are allowed to have non-work related conversations at the facility when those conversations do not interfere with the execution of their job duties or violate social norms. Tr. 57. Livingston testified that the Respondent permitted employees to talk to co-workers during work time "as long as you're doing your work too." Tr. 315.

Livingston was not one of the engineering employees who initiated or actively supported the unionization effort in the engineering department. Indeed, the employees actively involved in that effort avoided notifying Livingston about the campaign because they were concerned that he would disclose the information to managers. It was not until the day before the engineers filed their representation petition that Kuehl and another engineering employee, Jim Fairbanks,[19]

---

[18] The same Complaint paragraph (GC Exh. 1(x), paragraph 9) also alleges that in "[a]bout early May 2017, Respondent, by Triano, at the facility, advised employees that they were not to discuss an issue that was being investigated with other employees." The Respondent, in its brief, states that the record contains no evidence that Triano made such a statement to employees. In its brief, the General Counsel does not devote a section to this issue. It appears that the General Counsel has effectively abandoned this allegation. To the extent that is not the case, I find, based on my review of the record, that the evidence does not establish that Triano made the statement alleged. Since Triano was not shown to have made the statement, the claim the statement violated Section 8(a)(1) must be dismissed.

[19] Throughout this decision I will refer to this employee as Jim Fairbanks, rather than simply Fairbanks, to distinguish him from his son, Jeffrey Fairbanks, another employee who figures in this decision.

informed Livingston about the unionization effort. They approached Livingston during his work time, provided him with written material and some oral explanations about Local 877 and stated that they "would love to have" his "support," but did not need his vote to win the election. Livingston subsequently had conversations with Jablonski and/or Oles during which he reported that the engineers had the votes to unionize and that it was a "done deal." In addition, Wissman-Hoar (a security officer and not part of the engineering department) came to Livingston's work area and asked him what he knew about the engineers' unionization effort.

On May 5, Triano (human resources director) and Joe Mitko (manager of materials and support service) called Livingston into a meeting and issued a verbal warning to him for violating the solicitation and distribution policy.[20] At the start of the meeting, they handed Livingston a document regarding solicitation and told him to read it. Then Triano said: "You're talking about the Union. And that's solicitation." Mitko stated that "this is like a verbal warning." Mitko also told Livingston: "You get paid for your lunch. So you're not allowed to talk about it at all." Mitko asked who Livingston had been talking to, and Livingston responded that he talked to another employee about the union "like it was a football game." Livingston also recounted the conversation with Wissman-Hoar and told Triano and Mitko that he was "still doing things" during the conversation.[21]

On May 9, 2017, Triano sent Livingston an email about the May 5 meeting and verbal warning. Triano included a version of the solicitation and distribution policy as an attachment to that email. The email states that "you had conversations with 2 other employees" and that this had occurred during Livingston's "work time" and when "those employees were also on work time." GC Exh. 22. It noted that there were restrictions under the solicitation and distribution policy that Livingston had to comply with.

Analysis

The General Counsel alleges that the Respondent's solicitation policy as described to Livingston on May 5 and 9, 2017, violated Section 8(a)(1) of the Act. The General Counsel further alleges that the verbal warning issued to Livingston on May 5 pursuant to that policy violated Section 8(a)(3) and (1) of the Act. The General Counsel *does not* allege that the Respondent has violated the Act by maintaining the written version of the solicitation and distribution policy. The General Counsel's proposed notice posting does not reference any action with respect to that written policy. Rather the General Counsel seeks to prohibit the Respondent from advising employees that the solicitation policy prohibits them from having union-related discussions while at work and also seeks to require the Respondent to rescind the verbal warning issued to Livingston. In its brief, the Respondent "concedes that the General Counsel has met his burden of establishing that on May 5, 2017, Triano and Mitko verbally, and

[20] The Respondent did not enter a record of the Livingston's verbal warning into its electronic human resources database. However, the record shows that the verbal warning to Livingston was memorialized in other records of the Respondent. These records include the May 9, 2017, email from Triano to Livingston, GC Exh. 22, and also the "pre-termination worksheet" that was created when Livingston was terminated in July 2017, GC Exh. 26.

[21] These findings regarding the February 5 meeting are based on Livingston's testimony. For reasons discussed later in this decision, Livingston was not a fully credible witness with respect to disputed matters. However, his testimony regarding the February 5 meeting was not disputed. Neither Triano nor Mitko was called as a witness or otherwise provided testimony regarding the meeting. Livingston's testimony regarding the February 5 meeting was facially credible, not undermined on cross-examination, and in the absence of contrary evidence, I credit his account.

later by email on May 9, applied its facially valid 'No-Solicitation' in a way that could be construed to interfere with Livingston's Section 7 rights." Brief of Respondent at Pages 56-57.

"An employer violates the Act when employees are forbidden to discuss unionization, but are free to discuss other subjects unrelated to work, particularly when the prohibition is enforced only in response to specific union activity in an organizational campaign." *Jensen Enterprises, Inc.*, 339 NLRB 877, 878 (2003); see also *Orchids Paper Products Co.*, 367 NLRB No. 33, slip op. (2018) (employer violates Section 8(a)(1) by "prohibiting employees from discussing the Union on the production floor or during work time while permitting employees to discuss other nonwork-related subjects"). In this case, the record establishes that the Respondent permits employees to have non-work related conversations during work time as long as those conversations do not interfere with the employees' work duties. Nevertheless, during the organizing campaign among the engineering department employees, the Respondent's managers met with Livingston on May 5 and issued a verbal warning to him because he had been talking about union matters. Their statements to him did not include any suggestion that Livingston's union-related conversations had prevented him from working. To the contrary, Livingston continued working during his conversation with Wissman-Hoar and Mitko told him that the prohibition on union-related conversations extended even to the lunch break. Because the Respondent discriminatorily prohibited Livingston from talking about union matters while permitting employees to talk about other non-work subjects, it violated Section 8(a)(1). See *Orchids Paper Products*, supra, *Jensen Enterprises,* supra. The violation is especially clear because the Respondent announced the prohibition in response to activity that was part of a union campaign and extended it to conversations occurring during lunch breaks.[22] In addition, the Respondent violated Section 8(a)(3) and (1) when it disciplined Livingston based on the application of the unlawful and discriminatory prohibition to conduct by Livingston that implicates the concerns underlying Section 7 of the Act. *Tinley Park Hotel*, 367 NLRB No. 60 (2019); *Continental Group, Inc.*, 357 NLRB 409 (2011); *Double Eagle Hotel & Casino*, 341 NLRB 112 (2004).

The Respondent violated Section 8(a)(1) on May 5 and May 9, 2017, when it told Livingston that, under the solicitation policy, he was prohibited from having workplace discussions with co-workers about the union campaign. In addition, the Respondent violated Section 8(a)(3) and (1) on May 5, 2017, by issuing a verbal warning to Livingston for violating the unlawful prohibition on workplace discussions about the union campaign.

D. SECTION 8(A)(5) ALLEGATIONS

1. Respondent's Application of Harassment Policy to Conduct Outside the Workplace

Facts and Analysis

The Complaint alleges that the Respondent failed to meet its bargaining obligations and violated Section 8(a)(5) and (1) of the Act in May 2017 by extending the application of its workplace harassment policy to employee conduct outside the workplace without prior notice to the Security Officers Union. This claim fails. Although the General Counsel showed that, in May and June 2017, the Respondent applied its harassment policy to outside-the-workplace

[22] The Board has held that an employer may not prohibit solicitation during an employee's own time, such as meal times and break periods. *Grimmway Farms*, 314 NLRB 73, 90 (1994), enfd. mem. in part 85 F.3d 637 (9th Cir. 1996); *Wellstream Corp.* 313 NLRB 698, 703 (1994); *Keco Industries*, 306 NLRB 15, 19 (1992).

conduct by Morandi and Wissman-Hoar, it did not establish that such application constituted a change from the way the policy was applied prior to May 2017.

The relevant version of the Respondent's workplace harassment policy, Respondent's Exhibit Number (R Exh.) 2, became effective on January 20, 2017 – prior to when the security officers' union was elected as a bargaining representative at the Respondent. The General Counsel does not point to any language in that pre-existing written policy that confines its application to co-worker harassment that occurs at the workplace. On its face, that policy is not limited to conduct occurring in the workplace, but rather provides that employees are "expected to conduct themselves in a professional and cooperative manner when performing services on behalf of Baystate *and* refrain from disruptive, abusive, or otherwise inappropriate conduct towards patients, employees, visitors, and other practitioners." Ibid. (emphasis added). Such inappropriate conduct includes "threats" and "bullying." Moreover, prohibiting employees from harassing each other outside the workplace is consistent with the harassment policy's statement of purpose since co-worker harassment, even when occurring outside the workplace, would interfere with "mutual respect" among employees and tend to "create workplace disharmony." Ibid.

In addition, the Respondent's "Corrective Action" policy has expressly provided for the imposition of discipline for off-duty conduct since long before May 2017. That policy, which has been effective since at least 2015, states that discipline may be imposed for "[o]ff duty conduct that . . . impairs the employee's ability to effectively fulfill and perform his/her, job duties," as well as for "bullying, using intimidation tactics, making veiled or direct threats . . . or publicly disclosing another person's private information," GC Exh. 5 at Page 5, Paragraph 14 and Page 6, Paragraph 16.

Not only does the language of the Respondent's harassment policy not limit its application to conduct at the facility, but the record does not show that, prior to May 2017, the Respondent's standard practice was to refrain from investigating or disciplining employees who engaged in prohibited harassment outside of work. To the contrary the scant evidence there is on that score suggests that he Respondent has, in fact, disciplined employees for harassing or threatening conduct that they engaged in while they were outside the workplace and off-duty. For example, in 2016 the Respondent discharged nurse D. Laflamme because, during an off-duty exchange that occurred away from the facility, she threatened that she would deny care and cooperation to an individual if he came to the Respondent's emergency room. Tr. 772. Another employee was terminated because his wife, also an employee, obtained a restraining order against him, even though it was not shown that any of the underlying conduct had occurred in the workplace. Ibid.

The allegation that, in May 2017, the Respondent violated Section 8(a)(5) and (1) of the Act by extending its workplace harassment policy to conduct outside the workplace without prior notice to the Security Officers Union, must be dismissed.

2. Information Request of June 12, 2017

Facts and Analysis

On May 24, 2017, Local 877 was certified as the bargaining representative of a unit composed of the Respondent's engineering department employees. On June 12, 2017, John Kilduff, the business agent for Local 877, sent an email to Triano requesting information, including "A copy of any disciplinary actions that are in force." GC Exh. 56. Triano and the Respondent provided information to Kilduff about the members of the unit, but that information

did not include the verbal warning that the Respondent issued to Livingston for purportedly violating the Respondent's policy on solicitation. At trial it was established that, while the Respondent did not enter this verbal warning into its electronic human resources database program, the Respondent did memorialize it in a May 9 email from Triano to Livingston. GC Exh. 22. The verbal warning to Livingston was memorialized again in the "worksheet" that Wyman (senior human resources business partner) created when Livingston was discharged in July 2017. GC Exh. 26. The Respondent's termination worksheet discusses the fact that Livingston had previously received a verbal warning on May 5, 2017, for "talking to two other employees about joining the union during work hours."

An employer has the statutory obligation to provide relevant information that the union has requested and needs for the performance of its duties as collective-bargaining representative. *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979); *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956). Where the union requests information pertaining to members of the bargaining unit, that information is presumptively relevant and the employer must provide it. The Respondent attempts to defend itself against a finding of violation by arguing that it did not provide Kilduff with information or documentation regarding the May 5 discipline against Livingston because that was only a "discussion" not an official disciplinary action that was entered into the electronic human resources database and, in any case, Damon was not aware of it. These defenses are not persuasive. First, given that the Respondent discussed the verbal warning when deciding what disciplinary action to take for subsequent conduct by Livingston, it was "a disciplinary action in force" that fell within the information request. In addition, assuming that Damon did not, in fact, know about the verbal warning, that does not constitute a defense because the official to whom the information request was made was Triano, not Damon, and Triano clearly knew about the verbal warning since he was the one who dispensed it. Triano was not called to explain why he did not provide the information. Moreover, a reasonable inquiry by Damon would have revealed the existence of the verbal warning. Indeed, Wyman apparently discovered the verbal warning in time to mention it on the paperwork for Livingston's discharge.

The Respondent violated Section 8(a)(5) and (1) by failing to fully respond to the June 12, 2017, information request from Local 877.

3. Alleged Direct Dealing on August 31, 2017

Facts

On May 12, 2017, the Respondent's engineering department employees voted to make Local 877 their bargaining representative. The General Counsel alleges that the Respondent engaged in unlawful direct dealing with engineering unit employees when Oles met with them on August 31, 2017, to discuss ways to fill the vacuum left when the Respondent discharged an engineering department employee.

There is no factual dispute that Oles and Triano engaged in such discussions with Kuehl, Jim Fairbanks, and Scott Kierstead and that they initiated these discussions without giving Kilduff, the business agent for the Local 877, notice or an opportunity to bargain. However, 2 or 3 months earlier, Kilduff, on behalf of Local 877, informed the Respondent that Kuehl was the shop steward for the bargaining unit. Kilduff did not expressly state to Oles that he was, or was not, authorizing Kuehl to act on his behalf or speak for Local 877 generally. After being made shop steward, Kuehl attended every session of the contract negotiations that were ongoing at the time when Oles and Triano allegedly engaged in direct dealing with Kuehl.

There is a disagreement between the parties about whether Oles and Triano attempted, on August 31, to negotiate changes to the positions and schedules of bargaining unit employees, or whether they were merely giving those employees the opportunity to express an interest in transferring to Livingston's position before offering the opportunity to others. Two of the individuals at the meeting – Kuehl and Oles – testified about what occurred. That testimony shows that Kuehl was called into the meeting without any advance notice regarding its subject. Oles and Triano conducted the meeting and began by talking to the attendees – Kuehl, Jim Fairbanks, and Kierstead – about the need to look at open positions and then fill them. In Kuehl's account, Oles and Triano then "rolled into they wanted me and Jim to figure out a way to accomplish our daily tasks, as well as have Jim work approximately 20 hours in the boiler room each week" in order to perform the work that Livingston had been doing before his discharge. Oles, on the other hand, testified that he was not asking Jim Fairbanks or Kuehl to absorb Livingston's duties, but rather was offering them, as well as Kierstead, the opportunity to switch to Livingston's old assignment before offering it to other applicants.

I credit Kuehl's testimony that Oles and Triano told him and Jim Fairbanks to figure out a way to absorb Livingston's workload without the hiring of another employee. Kuehl's testimony included his account of specific statements made to him, whereas Oles' testimony on the subject was limited to a conclusory claim that all he did was offer the opportunity to switch to Livingston's assignment. Moreover, Kuehl gave uncontradicted testimony that, during a meeting a week later, Russo responded to a question about filling Livingston's slot by stating that the Respondent was "looking into not filling the positions that opened." Tr. 399. This suggests that the Respondent was, in fact, contemplating the type of job restructuring that Kuehl says that Oles and Triano discussed with him. Kuehl's testimony is lent further credence by the fact that Oles, during subsequent bargaining, actually did propose to Local 877 that Jim Fairbanks' be restructured to cover duties he had not previously performed. Tr. 404.

Although Oles denied that, on August 31, he asked Kuehl and Jim Fairbanks to absorb Livingston's workload, he conceded that during the August 31 meeting he proposed that Kierstead do so. Specifically, Oles testified that he offered to allow Kierstead to move to a different shift in order to take over Livingston's workload, but that he expected Kierstead to continue performing his pre-existing duties as boiler room chief.[23]

In October 2017, the Respondent hired or transferred someone to fill the vacancy created by Livingston's termination.

Analysis

Direct dealing in violation of Section 8(a)(5) and (1) is shown where an employer communicates with represented employees for the purpose of establishing conditions or making changes regarding a mandatory subject of bargaining and does so to the exclusion of the Union. *Southern California Gas* Co., 316 NLRB 979, 982 (1995); *Permanente Medical Group*, 332 NLRB 1143, 1144-1145 (2000); *Southern California Gas Co.,* 316 NLRB 979, 982 (1995); see also *Allied Signal, Inc.*, 307 NLRB 752, 753 (1992) ("[d]irect dealing need not take the form

[23] The record does not establish whether Kierstead was a supervisor under Section 2(11) of the Act. He is not alleged to be a supervisor in the Complaint. The Respondent and the General Counsel both refer to him as a supervisor in their briefs, see Brief of the General Counsel at Page 111, Brief of the Respondent at Page 47, but neither party makes clear whether it considers him a *Section 2(11)* supervisor or makes an argument about his status. Livingston states that Kierstead was the "chief" of the boiler room, but his testimony does not shed any meaningful light on whether Kierstead met the supervisory standard set forth in Section 2(11) of the Act.

of actual bargaining") and *East Tennessee Baptist Hospital*, 304 NLRB 812 (1991), enfd. in relevant part, 6 F.3d 1139 (6th Cir. 1993) (not every inquiry between an employer and its represented employees outside the presence of their representative constitutes unlawful direct dealing).

In this case, Oles and Triano were discussing a mandatory subject of bargaining when they proposed that the engineering department restructure positions so that, rather than replacing Livingston, three workers would perform the assignments previously performed by four. *Cincinnati Enquirer*, 279 NLRB 1023, 1031–32 (1986) (restructuring of job duties to eliminate a position is a mandatory subject of bargaining). I find, however, that the Respondent did not communicate on that subject "to the exclusion of the Union" as is required to establish direct dealing in violation of 8(a)(5) and (1). Kuehl who was present for the August 31 discussion, had been identified to the Respondent as the union steward for the engineers unit. Board precedent shows that, depending on the circumstances, discussing a mandatory subject of bargaining with a union steward may, or may not, constitute direct dealing. The issue often turns on the indications that the union, the steward, or past practice, have given the employer regarding the steward's authority. See, e.g., *International Game Technology*, 366 NLRB No. 170, slip op. at 11 (2018) (communication to employees was not "to the exclusion of the union" where the employees were union stewards and members of the union bargaining team);[24] *SPE Utility Contractors*, 352 NLRB 787, 787 fn.4 (2008) (where union business representative specifically told employer to communicate with him, not the union steward, regarding the bargaining, the communication to the steward did not constitute notice to the union); *Certco Distribution Centers*, 346 NLRB 1214, 1219 (2006) (where union steward notified the employer that he was "not authorized to bargain in any way, shape or form on our pension plan" the employer engaged in unlawful direct dealing by attempting to discuss changes to pension plan with the union steward); *Brimar Corp.*, 334 NLRB 1035, 1038–39 (2001) (employer engaged in direct dealing where union steward who was notified of change "was an ordinary production worker with no role in matters relating to bargaining subjects, and [employer] had no reason to believe otherwise"); *Serramonte Oldsmobile*, 318 NLRB 80, 103 (1995) (discussion with employee of change to compensation was not direct dealing where employee was a union steward and the parties' past practice was to allow the steward to resolve similar issues); cf. *Mercy Health Partners*, 358 NLRB 566, 568 (2012) (the fact that employer communicated decision to relocate to employees, but kept it from the union steward, indicates that the employer was trying to resolve effects bargaining issues directly with employees rather than with their union).

In this case, Kuehl was not only a union steward, but a steward who the Respondent knew was attending all sessions in the ongoing contract negotiations. Neither Kilduff nor Kuehl claimed that they notified the Respondent about any limitations on Kuehl's authority to act on behalf of Local 877. Under these circumstances, I find that the Respondent did not communicate "to the exclusion of the Union" when it discussed job restructuring with Kuehl and one or two other employees.

For the reasons discussed above, the allegation that Oles and Triano engaged in direct dealing in violation of Section 8(a)(5) and (1) of the Act during the discussion on August 31, 2017, must be dismissed.

[24] In the absence of exceptions, the Board adopted the dismissal of the direct dealing allegation in *International Game Technology*, Id. slip op. at 1 fn.2. Therefore, that decision is cited only for the persuasive value of the administrative law judge's discussion.

D. Allegations Regarding Discipline Imposed on Kubasek, Livingston, Morandi, and Wissman-Hoar

1. Kubasek

Facts

The General Counsel alleges that the Respondent discriminated in violation of Section 8(a)(3) and (1) of the Act when it suspended and then terminated Kubasek. Kubasek was employed by the Respondent as security officer until he was discharged in April 2017 following the Respondent's investigation of questions that Wissman-Hoar raised about his conduct. As discussed above, in late January 2017 the pro-union security officers discovered that Wissman-Hoar was secretly sharing their pro-union group text messages with supervisor Bogalhas. This discovery led to antagonism between some of the pro-union officers and Wissman-Hoar. Kubasek was an active supporter of the unionization effort and Wissman-Hoar testified that during the campaign she had identified him to the Respondent as one of the officers who she knew to be pro-union. Kubasek and Wissman-Hoar were both among the select group of officers who, early in the organizing effort, attended an initial meeting with a union organizer. Kubasek testified that after he became aware that Wissman-Hoar was secretly sharing the pro-union text group messages with Bogalhas, he no longer trusted her and tried to avoid working with her. In addition, in the aftermath of the revelation about Wissman-Hoar's assistance to management's anti-union effort, Wissman-Hoar sent arguably threatening texts messages to Kubasek on February 15, 2017. At that time, Kubasek and Wissman-Hoar were scheduled to work together for the first time since the texting-sharing incident. Kubasek informed Wissman-Hoar that he had suffered a stroke and would not be able to work. Wissman-Hoar did not express sympathy for Kubasek's health issue, but rather stated: "Oh was so looking going (sic) toe to toe. Your damn luck." Kubasek did not respond, but about 30 minutes later Wissman-Hoar attempted to provoke a continuation of the exchange, texting Kubasek to "speak now or forever hold your peace." GC Exh. 42, Page 11.

On March 9, after Kubasek returned to work from his medical absence, Wissman-Hoar relieved him at the end of a shift. Wissman-Hoar and Kubasek had a routine "pass down" conversation during which Kubasek provided information about conditions or circumstances relevant to the assignment. The record shows that the lingering hostility between the two made the pass down conversation tense. Their conversation took no more than a minute, after which Kubasek proceeded to the security office to pick up some of his belongings and punched out at 4:37 pm using the time clock immediately outside the security office.

Wissman-Hoar proceeded to perform her duties on March 9 but discovered that the key card she used to access various parts of the facility had stopped working. Although she could not use the key card, Wissman-Hoar was able to move through the facility with a physical key that she testified was "a little bit more cumbersome" to use than the key card. Tr. 277. At 7:25 pm, Wissman-Hoar went to the security office and checked on her key card. In the security office there is a computer terminal that security officers use exclusively to manage the key card system. Wissman-Hoar accessed the system and discovered that her key card entry authorizations – which are denoted by checked boxes in the program – had been erased. She re-checked all of the appropriate authorization boxes for her key card and the card resumed working.

Wissman-Hoar suspected that Kubasek had used the computer terminal in the security office to delete/uncheck her key card authorizations after the tense pass-down conversation. She conveyed this on March 10 in an email to Oles. Oles responded that Wissman-Hoar should

raise the issue in an email to Dave Hall, an interim manager. Wissman-Hoar believed that Hall had been lax about discipline and told Oles that, while she would contact Hall, "in my short time here I've learned, it really won't matter." Oles reminded Wissman-Hoar about the importance of following the chain of command.

On March 10, Oles asked Timothy Harper to investigate Wissman-Hoar's accusation against Kubasek. Bogalhas also discussed the issue with Harper. Harper did not work for the Respondent; rather he was the security manager at Baystate Medical Center – the flagship facility that was part of the same umbrella organization as the Respondent. Harper had been involved with troubleshooting the key card system at a number of Baystate Health facilities. Harper credibly testified that the key card system was in use at four Baystate Health facilities, including the Respondent, and that the key cards at all four facilities were part of a single, centralized, system. Tr. 702. Particular key cards could be locked/unlocked, updated, deleted, or created, from special computer terminals at the four participating facilities, but from no other locations. The problems he observed with the key card system did not vary from one facility to another.

Harper investigated Wissman-Hoar's accusation by, inter alia, obtaining a key card system report showing when various key cards had been updated. This report showed that, on March 9 from 4:36 to 4:37 pm, the terminal in the Respondent's security office had been used to update Wissman-Hoar's key card by deleting all of her entrance authorizations. As discussed earlier, Kubasek had been at the security office to punch out at 4:37 pm. Harper's report also states that he viewed security camera footage showing that Kubasek was alone in the security office from 4:34 pm to 4:37 pm.

I find that the above investigation provided a reasonable basis upon which the Respondent could conclude that Kubasek had intentionally interfered with Wissman-Hoar's work by deleting the access authorizations for her key card.[25] In reaching this conclusion, I considered the General Counsel's argument that, in March 2017, the key card system was still relatively new and that card malfunctions were common. Specifically, the key card system was sometimes overloaded and this would result in system files becoming corrupted and cause key cards to cease functioning. However, these recurring problems did not involve a card's previously checked authorization boxes becoming unchecked. Harper credibly testified that he dealt with key card malfunctions on a large number of occasions, and at multiple facilities, but that the incident involving Wissman-Hoar's card was the only instance in his experience that the problem was that a card had been "updated" to uncheck previously checked authorization boxes. I also considered the General Counsel's argument that Kubasek showed the Respondent texts that could be understood as showing that Wissman-Hoar was biased against Kubasek. That evidence might have undermined the reasonableness of the Respondent's conclusion if its investigator had simply decided to take Wissman-Hoar's word over Kubasek's. However, that is not what happened. The Respondent obtained system reports, time clock data, and security camera evidence indicating that Kubasek was alone in the security office at the time when Wissman-Hoar's access authorizations were deleted using the terminal in the security office. In addition, Kubasek argued in an email to Damon that Wissman-Hoar would have been trapped in some part of the facility if he had deleted her key card access as alleged. However, this is not persuasive because there was uncontradicted testimony that Wissman-Hoar had a physical key that, while less convenient to use, allowed her to move around the facility when her key card was not working.

[25] This not a finding as to whether Kubasek did, or did not, actually engage in this conduct. My finding is only that the Respondent's conclusion was reasonable.

Damon, senior director of labor and employee relations for Baystate Health, received a copy of Harper's investigative report on March 24. The email transmitting the report came from Monica Wynn, director of security for Baystate Health. Wynn opined that "another officer [, Kubasek,] was the only person in the office at the time [Wissman-Hoar's] access rights were erased" and that "[t]his posed a significant safety risk to patients, employees as well as Officer Wissman-Hoar and her partner on the night in question." At trial, Damon testified that these same reasons were the basis for her decision that Kubasek should be terminated. Tr. 749. Damon ultimately made a recommendation to terminate Kubasek, but states that when she received Harper's report from Wynn she did not initiate any action. Rather she followed the Respondent's standard procedure which was to wait for the manager of the department – in this case Hall – to be the first to weigh in on discipline so that they could make a recommendation together. Damon notified the business representative for the Security Officers Union about the investigation and spoke to him about it at least twice, but the record does not include details or dates of these contacts.

As of April 7, Wissman-Hoar thought that insufficient progress was being made regarding her accusation against Kubasek. She sent an email directly to the facility's president, Russo, recounting her accusation that Kubasek had erased her key card authorizations and complaining that she had been waiting too long for action to be taken. Damon testified that it is possible that Russo contacted her about the subject, but she was not clear on that. What is clear is that, the same day that Wissman-Hoar escalated her complaint to Russo, the Respondent removed Kubasek from the work schedule. This was communicated to Kubasek by Hall. Hall told Kubasek that he had failed to follow proper protocol when he did not come to work for scheduled shifts and that "we got some things to discuss." GC Exh. 51.

When Kubasek contacted Bogalhas to ask to be returned to the work schedule. Bogalhas set up a meeting for Kubasek, Bogalhas, and Triano. Kubasek brought union steward Jablonski with him to the meeting. At the meeting, Triano questioned Kubasek about the key card system. Triano stated that Wissman-Hoar's access authorizations had been deleted from the system when Kubasek was in the security office. Kubasek told Triano that he believed that Wissman-Hoar was accusing him because of personal reasons. He showed Triano a text exchange from January 16, 2017, in which Wissman-Hoar made a social overture to Kubasek that he understood to be "borderline . . . sexual" in nature. When Kubasek made no response to that overture, Wissman-Hoar followed up by texting "Hey shithead . . . You ignoring me?" GC Exh. 42 at Page 5. He also showed Triano the text exchange, discussed above, from February 15, 2017, when, after Kubasek had a stroke, Wissman-Hoar lamented that he was lucky because she had been "so looking" forward to "going toe to toe." Kubasek also pointed out to Triano and Bogalhas that there had been chronic problems with the recently implemented key card system.

During a phone call on or about April 12, the Respondent informed Kubasek that his employment was being terminated. Wyman (senior human resources business partner), Triano, and Bogalhas were on the line for the Respondent during this call.

The General Counsel introduced evidence of instances in which managers or supervisors had been lax about disciplining security officers. This included instances in which security officers were alleged to have bullied or threatened co-workers, taken food from the Respondent's café without paying, played video games at work, or slept on the job. None of the instances concerned misconduct vaguely comparable to what the Respondent concluded that Kubasek had done – intentionally sabotaging another officer's key card and ability to perform security functions.

Analysis

The General Counsel alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by removing Kubasek from the work schedule and then terminating him because of his union and concerted activities.[26] The Respondent's defense is that it lawfully terminated Kubasek because he had created a safety risk by intentionally sabotaging the operation of Wissman-Hoar's key card. In cases, such as this one, where motivation is in dispute, the General Counsel bears the initial burden under the *Wright Line* analysis of showing that the Respondent's decision to take adverse action against an employee was motivated, at least in part, by activities protected by the Act. 251 NLRB 1083, 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. (1982), approved in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983). The General Counsel may meet its initial *Wright Line* burden by showing that: (1) the employee engaged in union or other protected activity, (2) the employer knew of such activities, and (3) the employer harbored animosity towards the union or other protected activity. *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1184-1185 (2011); *ADB Utility Contractors*, 353 NLRB 166, 166-167 (2008), enf. denied on other grounds, 383 Fed. Appx. 594 (8th Cir. 2010); *Intermet Stevensville*, 350 NLRB 1270, 1274-1275 (2007); *Senior Citizens Coordinating Council*, 330 NLRB 1100, 1105 (2000); *Regal Recycling, Inc.*, 329 NLRB 355, 356 (1999). Animus may be inferred from the record as a whole, including timing and disparate treatment. See *Camaco Lorain* supra. If the General Counsel establishes discriminatory motive, the burden shifts to the employer to demonstrate that it would have taken the same action absent the protected conduct. *Camaco Lorain,* supra; *ADB Utility*, supra; *Intermet Stevensville*, supra; *Senior Citizens*, supra. The Respondent cannot meet this burden by simply showing a legitimate reason for the termination, but rather must show that it would have taken the same action for that legitimate reason even in the absence of the protected activity. *Monroe Mfg.*, 323 NLRB 24, 27 (1997); *T & J Trucking Co.*, 316 NLRB 771, 771 (1995), enfd. 86 F.3d 1146 (1st Cir. 1996) (Table).

The General Counsel has established all three elements of the prima facie case in this instance. The evidence shows that Kubasek was a union supporter and that the Respondent was aware of that fact. Wissman-Hoar testified that, as part of her effort to assist the employer's response to the union campaign, she informed management that Kubasek was one of the officers who she knew to be union supporter. Not only did Kubasek support unionization, but he was one of the select group of employees who participated in an early meeting with a union organizer. This was also something that Wissman-Hoar knew about. The evidence also shows that the Respondent bore anti-union animus as is demonstrated by its multiple violations of the Act. In particular, Triano, who questioned Kubasek about the key card issue, was also one of the managers who violated the Act by prohibiting Livingston from discussing unionization with co-workers. In addition, Oles, who contacted Harper about investigating Kubasek, was also the manager who told the engineering employees that he took their unionization effort personally and then violated the Act by coercively interrogating Kuehl. Damon, who recommended Kubasek's termination, testified that "union avoidance" was a "goal of the organization," and that she was "concerned" about the union campaigns at the Respondent.

[26] The Complaint alleges that many of the challenged disciplinary actions, including the discharge of Kubasek, were violations not only of Section 8(a)(3) and (1), but also of Section 8(a)(5) because they were imposed without necessary bargaining. The General Counsel, after trial and in a footnote to its brief, stated that it was withdrawing the Complaint paragraphs alleging that the disciplinary actions violated Section 8(a)(5). Brief of the General Counsel at Page 112 fn.28. I will not consider the allegations that those disciplinary actions violated Section 8(a)(5).

Since the record shows that Kubasek supported unionization and engaged in pro-union activity and that the Respondent was aware of that activity and hostile to it, the General Counsel has met its initial burden under *Wright Line* and the burden shifts to the Respondent to show by a preponderance of the evidence that it would have terminated Kubasek even in the absence of his protected activity. *Camaco Lorrain*, supra; *ADB Utility*, supra; *Intermet Stevensville*, supra; *Senior Citizens*, supra. In this case I find that the Respondent, took Kubasek off the work schedule after receiving a facially credible complaint that Kubasek had sabotaged a co-worker's key card and terminated him after performing an investigation that led to a good faith belief that Kubasek had, in fact, engaged in such sabotage. I agree that this intentional interference with a fellow officer's ability to move around the facility as required to provide security to patients, visitors, and co-workers was an extremely serious breach and one that the Respondent would have dealt with by discharging Kubasek even in the absence of his union support and activity.[27] There was no evidence that the Respondent had ever imposed lesser discipline on another employee who it found had engaged in a similar act of sabotage against a co-worker. Moreover, the Respondent did not decide on its own to focus attention on Kubasek's conduct, but rather reacted to a complaint that was repeatedly pressed by Wissman-Hoar, a rank-in-file employee. I find that the Respondent has met its responsive burden under *Wright Line* and rebutted the prima facie case of discrimination by showing that it would have taken the same action even in the absence of the protected activity.

For the reasons discussed above, the allegation that the Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily removing Kubasek from the work schedule and then terminating his employment must be dismissed.

2. Livingston

Facts

As discussed in the section of this decision that addresses the Respondent's non-solicitation policy, the Respondent violated Section 8(a)(3) and (1) by unlawfully applying that policy to issue a verbal warning to Livingston on May 5, 2017.[28] The Complaint alleges that the Respondent discriminated against Livingston again when it suspended him on July 19, 2017, and discharged him on July 26, 2017. The Respondent counters that it did not suspend and discharge Livingston because of his union activity, but because he directed a violent outburst at co-worker Jeffrey Fairbanks on July 19, 2017.[29]

Livingston was an engineering employee assigned to the boiler room who worked the shift from 11:00 pm to 7:00 am. Jeffrey Fairbanks worked the following shift – starting at 7:00

[27] The effects of this sabotage were mitigated somewhat in this case by the fact that Wissman-Hoar had a physical key that, while less convenient to use than the key card, prevented her from being trapped in, or barred from, areas at the facility. I note however, that Kubasek argued to Damon that he must not have disabled Wissman-Hoar's key card as alleged because if he had done so Wissman-Hoar would have been trapped somewhere in the facility. On its face, this indicates that Kubasek was under the impression that disabling Wissman-Hoar's key card, as the Respondent concluded Kubasek had done, would have prevented her from moving through the facility.

[28] For a discussion of the facts relating to the verbal warning that the Respondent gave Livingston in May 2017, see Section II.C., supra, that addresses the non-solicitation policy and the verbal warning. Those facts are also relevant to this section.

[29] I refer to Jeffrey Fairbanks using both his first and last name in order to distinguish him from his father, Jim Fairbanks, who also works in the Respondent's engineering department and also figures in this decision.

am. At the relevant time they were both relatively new employees by the standards of the engineering department, with Livingston having started in December 2015 and Jeffrey Fairbanks in early 2017. Livingston testified that he was "pretty much" upset with Jeffrey Fairbanks in the period leading up to the July 19 incident. Tr. 375. In his opinion, Jeffrey Fairbanks was leaving others to clean up his trash and "wasn't pulling his job." Livingston testified that he sometimes had to start his shift by disposing of Jeffrey Fairbank's trash in the boiler room rather than attending to his own duties. Two days before the incident, Livingston, during a conversation with a more experienced engineering department employee named Donald Gewehr, complained that Jeffrey Fairbanks was not taking out his trash and also questioned whether Jeffrey Fairbanks was "pulling his weight." Gewehr pointed out that Jeffrey Fairbanks was a new employee and told Livingston "don't let it bother you, it's no big deal." Livingston also apparently discussed his concerns with Kierstead – the boiler room chief – who responded that if Livingston was upset that Jeffrey Fairbanks was not cleaning up his own trash, then Livingston should just leave the trash there. On one occasion leading up to the July 19 incident, Livingston raised his voice to Jim Fairbanks (Jeffrey Fairbanks' father) and told him that the two Fairbanks should not be working in the same department.

Jeffrey Fairbanks and Livingston both testified about the July 19 incident that the Respondent cites as the reason for Livingston's discharge. Although the two accounts are consistent regarding the general circumstances of the exchange, Jeffrey Fairbanks described more violent conduct than what Livingston testified to. Regarding disputed aspects of the accounts, I found Jeffrey Fairbanks the more credible of the two witnesses. He testified in a calm and certain manner, was not shown to have any bias against Livingston or regarding protected activity, and was not shown to have anything to gain by giving testimony harmful to Livingston or the General Counsel's case. On the other hand, Livingston not only had a significant personal stake in the outcome of the case, but on the stand he proved to be a volatile and difficult witness. See, e.g., Tr. 371-372 (Livingston suggests counsel is trying to "trip me up" and resists answering question), Tr. 384-386 (Livingston refuses to disengage when counsel ends examination), Tr. 357 (Livingston hedges testimony, reporting that he told management that the assault "didn't happen," and then qualifying to say "[t]hat *ultimately* [the assault] did not happen."). Moreover, Jeffrey Fairbanks' testimony was free from meaningful contradictions and was supported by the testimony of Ryan Sokolowski, a custodial employee, who witnessed part of the exchange and was not shown to have any bias relative to the incident. Sokolowski testified that he witnessed Jeffrey Fairbanks "trying to defuse the situation," but that Livingston was raising his voice, getting into Jeffrey Fairbanks' personal space, "aggressively jabbing his finger at Jeff's face," and claiming to be his "boss." Tr. 573-574.

I find that the following occurred on July 19. Jeffrey Fairbanks was relieving Livingston at the end of his shift from his assignment in the boiler room. The two men had their initial confrontation near a time clock that is about 200 feet from the boiler room entrance. Livingston began to yell at Jeffrey Fairbanks, criticizing him for being too young to work in the shop. It is likely that Livingston also raised objections to how Jeffrey Fairbanks was performing his duties in the boiler room.[30] In addition to raising his voice, Livingston jabbed his finger towards Jeffrey Fairbanks' face – not touching him, but coming within six to twelve inches. Livingston stated that he was Jeffrey Fairbanks' supervisor – which the record shows was not the case. Jeffrey

[30] According to Livingston, the conversation related to Jeffrey Fairbank's purported failure to clean up his own trash, while Jeffrey Fairbanks testified that it was about his age. Neither witness, and nothing else in the record, suggests that the conversation concerned, or grew out of, protected union or concerted activity.

Fairbanks told Livingston that if he had complaints he should raise them with Oles (production manager) or Kierstead (boiler room chief).

After the interaction at the time clock, Livingston proceeded to the boiler room, although his shift was over. Jeffrey Fairbanks, who had just clocked in and was starting his shift in the boiler room, also headed there, although he purposely kept his distance from Livingston to avoid further interaction. When Jeffrey Fairbanks got to the door of the boiler room, Livingston, who was already inside, threw two trash cans in his direction. Neither of these trash cans hit Jeffrey Fairbanks. Jeffrey Fairbanks continued into the boiler room, and began to move the first two trash cans out of the way. Then Livingston shoved a trash bin at Jeffrey Fairbanks. The trash bin was on wheels, filled with metal debris, and, with its contents, weighed approximately 150 pounds. Livingston hit Jeffrey Fairbanks in the side with this heavy trash bin. The impact caused Jeffrey Fairbanks pain and knocked the wind out of him, but did not leave a bruise. Jeffrey Fairbanks told Livingston that he was going to the security office to report what had happened, at which point Livingston left the boiler room and the area. Jeffrey Fairbanks went to the security office, where he was told to report his complaint to Bogalhas – the security supervisor – when Bogalhas arrived in the morning. Jeffrey Fairbanks did so. In addition, when Oles arrived at the facility, Jeffrey Fairbanks told him about the incident with Livingston and stated that he did not want to work with Livingston in the future. Oles directed Jeffrey Fairbanks to the security department where officers helped him prepare a statement regarding the incident.

The next time that Livingston appeared for work, he was directed to meet with Oles. Oles told Livingston that Jeffrey Fairbanks had reported that the two had had a confrontation during which Livingston rammed him with a trash bin. While testifying, Livingston admitted that he had pushed the trash bin in Jeffrey Fairbank's direction, Tr. 381-382, but during this conversation he told Oles, "I didn't do any of this." He testified that he told Oles: [T]hat did not happen. That ultimately did not happen." Oles then had Livingston talk to Bogalhas who in turn had Livingston talk to another security officer. Livingston gave that security officer his account of the incident, after which Livingston met with Bogalhas. Livingston complained to Bogalhas about Jeffrey Fairbank's performance. Livingston acknowledged that he was loud and opined to Bogalhas that this could be "misconceived as aggressive," but he denied that he had hit Jeffrey Fairbanks with a trash bin. Tr. 382. After this meeting, Livingston met with Oles again, and Oles placed him on paid leave pending the outcome of an investigation of the incident.

During the investigation of Jeffrey Fairbanks' internal complaint, the Respondent interviewed Livingston, Gewehr and Sokolowski. Oles asked Gewehr if he knew about problems between Livingston and Jeffrey Fairbanks, and Gewehr recounted the conversation, discussed above, in which Livingston had complained about Jeffrey Fairbanks' performance and Gewehr had advised Livingston that Jeffrey Fairbanks was new and that Livingston should not let things get to him. Gewehr, who was more senior than Livingston but not a supervisor, said that he had long been urging Livingston to let things bounce off him. Bogalhas interviewed Sokolowski, who reported that he had seen Livingston "jabbing his finger at" Jeffrey Fairbanks when they were near the time clock.

On about July 25, Oles spoke to Livingston by phone and told him that the Respondent was going to terminate his employment. Livingston stated that Kilduff, the representative for Local 877, had not been informed about the action. Oles contacted Kilduff by email and agreed to put off the termination for a day to provide an opportunity to discuss the investigation. On July 26, Livingston received a telephone call from Oles informing him that he was discharged. Two other persons, most likely Triano and Wyman, also participated in this call. The human resources worksheet that was created for the discharge includes a "summary of previous

warnings" and that section reports that on May 5, 2017, Livingston received a "verbal" for "talking to two other employees about joining a union during work hours." The Respondent's discharge notice states that Livingston engaged in conduct that "denigrated, intimidated, undermined confidence, showed hostility toward and belittled his co-worker" and violated the Respondent's harassment policy. The form states that Livingston had yelled at Jeffrey Fairbanks about not putting tools away and emptying trash containers and eventually threw trash cans and "push[ed] a wheeled trash cart at Jeff [that] ended up hitting Jeff."

The record shows that, as of the time of trial, Livingston was the only member of the Local 877 bargaining unit to be disciplined since the certification of Local 877 as bargaining representative. The General Counsel presented evidence regarding the discipline imposed on employees who worked in other departments. Three of these cases arguably involved discipline for threats of violence, but none involved an actual assault. In one case, B. Rivard, a nursing assistant, received a written warning on November 29, 2013, for responding to a nurse's request that she take a patient's vital signs by refusing and pushing the vital signs apparatus towards the nurse. According to the disciplinary report, when the nurse asked if there was something wrong with the apparatus, Rivard responded "Here are your vital signs." GC 11, Page 27. The evidence does not suggest that Rivard hit the nurse with the machine, or that she attempted to do so. In a second case, the Respondent, in November 2016, discharged S. Graves, a hospital aide who, while in a patient care area, verbalized her frustration with recently announced changes and told a co-worker to "get the fuck out of my way." This individual had previously received a final written warning for reasons that are not established in the record. A third employee, security officer L. Hameedi, received a written warning on April 7, 2016, after he had a verbal confrontation with another officer during which he "threatened to take care of him out of work." GC Exh. 15. The warning stated that future events would result in "progressive discipline up to and including termination." Id. Hameedi was, in fact, discharged only 2 months later.

Analysis

The allegations that the Respondent discriminated against Livingston because of his union activity when it suspended him on July 19, 2017, and discharged him on July 26, 2017, are properly analyzed using the *Wright Line* burden-shifting analysis. Under that framework, the General Counsel has met its initial burden of showing that anti-union animus played a part in the discipline. The evidence shows that, less than 3 months earlier, Livingston had a conversation with co-workers regarding the unionization effort and that the Respondent not only knew about this conversation, but had unlawfully disciplined Livingston for it. That being said, I believe the General Counsel's initial showing of anti-animus is not particularly strong given that, while Livingston supported Local 877, he was not a leader or an active supporter of the campaign. In fact, the employees who were organizing the effort kept Livingston in the dark regarding it until immediately before the representation petition was filed. There is no claim that any of the employees who were leaders of the Local 877 campaign have been disciplined by the Respondent.

Since the General Counsel has established a prima facie case, the burden shifts to the Respondent to demonstrate that it would have taken the same action absent the protected conduct. *Camaco Lorain,* supra; *ADB Utility*, supra; *Intermet Stevensville*, supra; *Senior Citizens*, supra. The Respondent has done that. After an investigation, the Respondent reasonably, and I find accurately, determined that Livingston had assaulted a co-worker. The co-worker, Jeffrey Fairbanks, had not threatened Livingston or provoked him in any way remotely commensurate with either Livingston's agitation or his violent action. To the contrary, the record, including the credible testimony of Sokolowski, indicates that Jeffrey Fairbanks tried

to defuse the situation. The Respondent could not be expected to tolerate employees physically attacking one another, and the record does not show that it previously had. None of the examples of supposedly disparate treatment that the General Counsel discussed involved a physical assault such as was at issue here. Indeed, in one of the examples that the General Counsel discusses, an employee was discharged for the less physically extreme action of telling a co-worker to "get the fuck out of my way." I find that the Respondent has met its responsive burden and shown that it would have terminated Livingston based on the July 19, 2017, attack on Jeffrey Fairbanks, even if Livingston had not engaged in protected union activity.

For the reasons discussed above, the allegation that the Respondent discriminated in violation of Section 8(a)(3) and (1) of the Act when it suspended Livingston pending investigation on July 19, 2017, and when it discharged Livingston on July 26, 2017, must be dismissed.

3. Morandi

Analysis

The General Counsel alleges that the Respondent discriminated in violation of Section 8(a)(3) and (1) of the Act when, based on Morandi's "pink pussy hat" text messages to Wissman-Hoar, it suspended Morandi on May 12, 2017, and then discharged him on May 17, 2017. The facts relative to this allegation are set forth in Section II.B.3., supra, which addresses Hutchinson's unlawfully coercive interrogation during the investigation that led to Morandi's discharge. Those facts show that the text messages that the Respondent relies on to justify Morandi's termination were part of an employee debate about unionization. The brief exchange began when Jablonski expressed his support for union victories at the Respondent and Wissman-Hoar responded by expressing what she characterized as her anti-union view that employees who were not happy at the Respondent should "move on." Morandi responded "fuck that bullshit," a statement that, in context, is a rejection of the Wissman-Hoar's argument that employees who were not happy at the Respondent should quit rather than seek to use union activity to improve working conditions. Wissman-Hoar plainly understood Morandi's comment that way, and responded by telling Morandi that he should "quit." Morandi responded to the assertion that he should quit by asking Wissman-Hoar do "you want your pink pussy hat" – a reference to the hats that were adopted as a symbol of female empowerment during recent political protests by women.[31] A brief, but sharp, exchange followed that included no other explicit references to Wissman-Hoar's gender, but which did include Morandi twice referring to Wissman-Hoar as "nasty" and Wissman-Hoar accusing Morandi of not acting his age.

The employees' text-message discussion about unionization efforts and disagreement about the appropriateness of using union activity, rather than resignation of employment, to address dissatisfaction with the Respondent, was activity protected by Section 7. This is especially clear given that Morandi was the leader of the security officers' unionization effort and Wissman-Hoar was the most visible employee-opponent of that effort. The Respondent argues that even if the conversation was protected activity, Morandi's texts in the context of that discussion were sufficiently "demeaning and sexist" to forfeit the Act's protection and permit the Respondent to discharge him for those texts. As both the General Counsel and the Respondent recognize in their briefs, this issue is properly evaluated using the analysis set forth in

[31] See Wikipedia Entry for "Pussyhat," downloaded 2/22/2019 ("A pussyhat is a pink, knitted hat created in large numbers by thousands of participants involved with the United States 2017 Women's March. They are the result of the Pussyhat Project, a nationwide effort.").

Atlantic Steel, 245 NLRB 814 (1979). Brief of General Counsel at Pages 90- 93,[32] Brief of Respondent at Pages 68-70.

Under *Atlantic Steel*, the determination about whether an employee's conduct in the course of otherwise protected activity is "sufficiently egregious or opprobrious" to forfeit the Act's protection is based on a balancing of four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. 245 NLRB at 816; see also *Meyer Tool, Inc.*, 366 NLRB No. 32, slip op. at 1 fn.2 (2018) (same), *Postal Service*, 360 NLRB 677, 677 fn. 2 and 683 (2014), and *Stanford Hotel*, 344 NLRB 558, 558 (2005) ("When an employee is discharged for conduct that is part of the *res gestae* of protected concerted activities, the pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act."). This framework balances employees' rights under Section 7 of the Act and the employer's interests in maintaining workplace order and discipline. *Triple Play Sports Bar & Grille*, 361 NLRB 308 (2014), affd. 629 Fed. Appx. 33 (2d Cir. 2015); see also *Piper Realty*, 313 NLRB 1289, 1290 (1994) ("[E]mployees are permitted some leeway for impulsive behavior when engaging in concerted activity, [but] this leeway is balanced against an employer's right to maintain order and respect."). I find that Morandi's conduct during the course of an otherwise protected discussion regarding unionization fell far short of being so egregious or opprobrious as to cause him to forfeit the Act's protection.

As regards the place of the discussion, the evidence shows that it did not occur in the workplace or during work time. Moreover, Morandi did not make the comment in the presence of, or in contravention of an order from, a supervisor or manager. Under these circumstances Morandi's text did not meaningfully risk undermining the Respondent's authority in the workplace. The Board has held that the absence of such risk weighs in favor of the employee retaining protection for conduct that is part of the *res gestae* of protected activity. *Kiewit Power Constructors Co*., 355 NLRB 708, 709 (2010).

The second factor, the subject matter of the discussion, weighs heavily in favor of the retention of protection. The discussion specifically related to union activity at the facility – regarding which Jablonski and Morandi were expressing support and Wissman-Hoar was expressing opposition. The discussion of views regarding unionization – whether positive or negative – is at the core of the activity that the Act protects.

Similarly, the third factor – the nature of the "outburst – weighs heavily in favor of continued protection. Morandi is not alleged to have threatened Wissman-Hoar with retaliation, much less violent or otherwise improper retaliation. Nor was there evidence that Morandi had any history of violent behavior towards Wissman-Hoar. His "outburst" was brief and the evidence is clear that he did not persist in the face of an effort by Wissman-Hoar to disengage. The fact that Morandi's statement was not a threat, threatening, or violent weighs in favor of retention of the Act's protection. *Kiewit Power Constructors Co.*, 355 NLRB 708, 710 (2010); see also See *Plaza Auto Center*, 360 NLRB 976 (outburst not threatening where, inter alia, employee had no history of violent behavior). In addition, although Morandi's reference to the "pink pussy hat" was gender-related, it was not a sexual slur, an epithet, or sexually aggressive. Rather the reference was to the common moniker for the hats that had been adopted during political protests by women as a symbol of women's empowerment. Finally, as noted above,

[32] The General Counsel also argues, in the alternative, that a violation is demonstrated under the *Wright Line*, supra, analysis. Not only do I find that *Atlantic Steel*, not *Wright Line*, provides the appropriate analytical framework, but since I find that Morandi's discharge was a violation under *Atlantic Steel* I do not reach the General Counsel's alternative arguments based on *Wright Line.*

the fact that Morandi's outburst was not made to a supervisor or manager, and was not insubordinate, means that it cannot reasonably be seen as undermining the employer's authority in the workplace. For all these reasons, the nature of Morandi's "outburst" weighs heavily in favor of retained protection.

The final factor to be considered under *Atlantic Steel* is "whether the outburst was, in any way, provoked by an employer's unfair labor practice." I find that this factor weighs neither in favor of, nor against, continued protection. At the time that Morandi sent the texts to Wissman-Hoar, the Respondent had recently committed a number of unfair labor practices, including coercively interrogating employees, prohibiting employees from discussing unionization in the workplace, and discriminatorily issuing a verbal warning to an employee for discussing unionization with co-workers. Although the text exchange between Morandi and Wissman-Hoar took place against a backdrop that included the Respondent's unfair labor practices, in this instance the connection between those unfair labor practices and Morandi's texts to Wissman-Hoar is too attenuated for that connection to weigh in favor of continued protection.

On the other hand, even if one assumes that the Respondent's unfair labor practices did not provoke Morandi's texts to Wissman-Hoar, this factor does not weigh against Morandi retaining the Act's protection because those texts were not directed at a supervisor or manager. Under circumstances, such as those present here, where the employee's offending statement is directed towards a coworker, the Board has affirmed that the lack of employer provocation weighs neither in favor of, nor against, finding the conduct protected. *Murtis Taylor Human Services Systems*, 360 NLRB 546, 558 (2014). Lastly, regardless of whether the Respondent's unfair labor practices provoked Morandi, it is clear that Wissman-Hoar herself instigated the unfriendly exchange by voluntarily inserting herself into a pro-union group text discussion and stating that the pro-union employees should quit rather than seek to improve working conditions. Indeed, the Board has repeatedly recognized how provocative this type of statement is, finding that when an employer tells pro-union employees they should quit if they are unhappy with working conditions, that employer commits an unfair labor practice. See, e.g., *Ozburn-Hessey Logistics*, 366 NLRB No. 177, slip op. at 1-2 and 34 (2018), *El Paso Electric Co.*, 350 NLRB 151, 152 (2007), *Paper Mart*, 319 NLRB 9 (1995).[33]

Three of the four *Atlantic Steel* factors weigh in favor of Morandi retaining the Act's protection for his texts on May 1, 2017, and the fourth factor is neutral. Therefore, I find that Morandi's text communications retained the Act's protection and that the Respondent violated Section 8(a)(3) and (1) by suspending him on May 12, 2017, and terminating him on May 17, 2017, for his protected communications.

[33] The Respondent also makes a frivolous argument that even though Morandi and Wissman-Hoar were debating unionization, Morandi's references to "pink pussy hat," "sister," and "nasty" in the course of that debate were not protected because those words were not themselves references to mutual aid and protection. The Respondent's argument ignores the thrust of the *Atlantic Steel* precedent, which is that outbursts that take place in the course of an otherwise protected communication are protected as part of the res gestae of that protected activity. Even assuming that the words that the Respondent points to would be unprotected if they were made in isolation, the Respondent cannot lawfully discharge Morandi based on them because they were not made in isolation, but rather as part of the res gestae of the employees' debate regarding union activity. See *Cayuga Medical Center*, 365 NLRB No. 170, slip op. at 23 (2017), citing *Goya Foods*, 356 NLRB 476, 477 fn. 8 (2011).

4. Wissman-Hoar

Facts

Wissman-Hoar began with the Respondent as a security officer in June 2016. On June 23, 2017, the Respondent terminated her employment, citing statements she made regarding Jablonski in a group text on June 7, 2017, and which the Respondent states were in violation of its code of conduct and harassment policy. Wissman-Hoar had not previously been disciplined by the Respondent.

In late May or early June 2017, Wissman-Hoar became upset that Morandi was visiting and/or was planning on visiting the Respondent's facility. As discussed above, Morandi had been terminated in mid-May 2017 after Wissman-Hoar complained to management about comments he made to her in a group text. Wissman-Hoar asked Triano whether the recently fired Morandi was permitted to come to the facility, and Triano told her that Morandi could only come if he had business at the facility. Morandi told Wissman-Hoar that he would have security supervisor Bogalhas inform Morandi of this restriction.

Although Triano had told Wissman-Hoar that Bogalhas would advise Morandi that he could only visit the facility if he had business there, Wissman-Hoar took it upon herself to convey this information to Morandi on June 7 in a group text that was circulated among ten security officers. One of those officers was Jablonski, who ended up on the receiving end of some of Wissman-Hoar's negative attention. The relevant exchange proceeded as follows:

Wissman-Hoar:	Pretty sure u are not welcome on proprty, unless you have personal business there, ie endo etc.
Morandi:	Who's this?
Wissman-Hoar:	U know who this is . . . your not gonna play 'marko polio w/me
Morandi:	Thanks Shannon Greatly appreciated
Morandi:	Have a great night . . . . Hahaha
Jablonski:	[posts a picture of a wine glass]
Morandi:	Nick [Jablonski] leave it alone.
Wissman-Hoar:	Nice drink Nick. Does anyone know your history or past. Cuz I [d]o!
Morandi:	Nick, you know what to do . . . send copies to
Wissman-Hoar:	ya . . . tou [sic] boys have enough to say about me . . . let's talk about Nick
Morandi:	Nick disengage!!
Wissman-Hoar:	You can't do it alone, Morandi? Got your arsenal behind you? Girl power?!

I taught where Nick went to school. I know oh too well what kind of program he had to go through

Shall we chat about that?

Also. So looking forward to working with you on Sunday!

GC Exh. 24, pages 6-9.

The next day, June 8, Jablonski visited the Respondent's human resources department and made a complaint to Wyman regarding the June 7 texts from Wissman-Hoar. According to Wyman's report, Jablonski told her that he felt that Wissman-Hoar was threatening him, that he was concerned about her future actions, and that he would prefer not to work with her again. He described the texts and explained to Wyman that they referred to his having been in special education classes in high school. It appears that, prior to the union campaign, Wissman-Hoar and Jablonski had a conversation during which Wissman-Hoar mentioned that she had once worked at a high school for students with behavioral issues, and Jablonski volunteered that he attended that school. Wyman also reports that Jablonski told her that he considered Wissman-Hoar's statement that she was "looking forward" to working with him on Sunday to be an indication that she planned to "start something" with him at work. Jablonski told Wyman that the reason he had posted the picture of a wine glass was to "toast" Morandi and Wissman-Hoar for ending their exchange in a polite fashion. Wyman asked Jablonski for copies of the texts he was complaining about. Wyman's understanding was that neither Wissman-Hoar nor Jablonski were working at the time of the exchange of the June 6 texts.

The same day that she received Jablonski's complaint, Wyman sent an email to Damon and Triano notifying them about it. On June 9, Damon told Wyman by email to investigate Jablonski's complaint against Wissman-Hoar's texts and told her to follow the same investigative process that Hutchinson had used to investigate Wissman-Hoar's complaint regarding Morandi's texts. On June 14, Wyman interviewed other security guards who were part of the text group to ask them about the June 7 texts. According to Wyman's notes and report, one officer told her that he did not think that Wissman-Hoar's texts were "derogatory," but that he felt her comment about looking forward to working with Jablonski was "facetious." This officer said he had sent a text to Wissman-Hoar advising her not to text the officers, especially late at night. A second officer who was part of the text group stated that he did not, in fact, receive the texts because he had already blocked the text group on his phone. This officer told Wyman that he had previously discouraged Wissman-Hoar from texting with the group. A third security officer told Wyman that, in his opinion, Wissman-Hoar's initial text was unnecessary and that bringing up personal information about Jablonski's past was not right and was crossing the line.

Wyman interviewed Wissman-Hoar on June 16. Wissman-Hoar stated that she raised Jablonski's personal educational history because she felt she was being "judged" and wanted to show that she could "judge him back." She stated that in the past Jablonski had texted her messages such as "time to go to bed," which she saw as being similar in their meaning to the picture of a wine glass that he sent on June 7. Although she did not expressly say so, the record as a whole suggests that Wissman-Hoar believed that Jablonski was insinuating that she was intoxicated. Wissman-Hoar told Wyman that she did not mean to threaten Jablonski by saying that she would publicize negative information about his educational past. She did, however, concede that she could understand why her texts would be taken as a threat. She

also conceded that she "possibly" wanted Jablonski to know that she could affect his employment by revealing negative information about his educational history. Tr. 291-292. She told Wyman that relations in the security department had become "toxic," but that she still felt she could work with Jablonski and would apologize to him. Wissman-Hoar asked if she was being discharged, and Wyman indicated that she did not know and that the Respondent was engaged in fact finding.

Wyman forwarded her investigative materials to Triano and Damon. These materials included a copy of the text messages themselves, as well as Wyman's interview notes, and investigative report, and a pre-termination work sheet. Wyman did not make a recommendation regarding what, if any, discipline the Respondent should impose on Wissman-Hoar, and she did not participate in the discussions that led to the discharge. That decision was made jointly by Damon, Triano, and Oles, in consultation with the Respondent's in-house employee relations attorney. Damon was the first one to propose discharging Wissman-Hoar. Oles testified that he reviewed Wissman-Hoar's text messages threatening to publicize information about Jablonski's past and that he considered them to constitute text "bullying" and a violation of the Respondent's policy.[34] In response to a question from counsel for the General Counsel, Oles stated that Wissman-Hoar should have understood her text bullying would result in discharge since her own complaint about text bullying by Morandi a month earlier had led the Respondent to discharge him. Tr. 634. Similarly, Damon testified that she too believed that Wissman-Hoar knew that the Respondent did not tolerate such conduct because "[w]e took similar action towards a complaint that she made towards one of her co-workers and it should not be any surprise to her that a similar infraction arose and we took a similar approach in our outcome." Tr. 769-770.

During a phone call on June 23, 2017, Oles informed Wissman-Hoar that she was terminated. Triano also participated in this call. Oles and Triano chose to inform Wissman-Hoar by phone, rather than in person, because they did not want her returning to the facility at that time.

Analysis

The General Counsel alleges that the Respondent discriminated in violation of Section 8(a)(3) and (1) of the Act when it discharged Wissman-Hoar. The General Counsel does not claim that management was motivated by hostility towards Wissman-Hoar's protected activity, which, after all, aligned with, and assisted, the management's own anti-union campaign. Nor does the General Counsel claim that Wissman-Hoar's texts were, as in Morandi's case, part of the res gestae of otherwise protected activity such that the discharge decision should be analyzed under *Atlantic Steel*, supra, and/or *Burnup & Sims,* 256 NLRB 965 (1981). Rather the General Counsel's contention is that Wissman-Hoar's discharge was discriminatory in violation of the Act because Wissman-Hoar was discharged in order to disguise the anti-union motive for the Respondent's prior decision to discharge union supporter Morandi.

The Board has recognized in multiple decisions that when, in the course of a union organizing drive, an employer discharges employees who either do not individually support, or

[34] The Respondent's harassment policy provides, inter alia, that employees are expected to "refrain from disruptive, abusive, or otherwise inappropriate conduct towards patients, employees, visitors, and other practitioners." Its stated purpose is, inter alia, to prevent conduct that will interfere with "mutual respect" among employees and tend to "create workplace disharmony." In addition, the Respondent's "Corrective Action" policy provides that discipline may be imposed for "bullying, using intimidation tactics, making veiled or direct threats . . . or publicly disclosing another person's private information."

are not known to support, union activity together with pro-union employees in an effort to disguise its unlawful intent, the discharge of both groups violates the Act. See, e.g., *Bay Corrugated Container*, 310 NLRB 450, 451 (1993), enfd. 12 F.3d 213 (6th Cir. 1993), *Mini-Togs, Inc.*, 304 NLRB 644, 648 (1991), enforcement granted in part, denied in part 980 F.2d 1027 (5th Cir. 1993), *ACTIV Industries*, 277 NLRB 356, 356 fn.3 (1985), *Dawson Carbide Industries*, 273 NLRB 382, 389 (1984), enfd. 782 F.2d 64 (6th Cir. 1986), *Howard Johnson Co.*, 209 NLRB 1122,1122 (1974). All of the Board decisions cited by the parties on this point concern discipline occurring during a union organizing effort, and all of them involve employees who were not known to support a union being swept up in a single layoff or disciplinary event designed to retaliate against the unionization effort. Wissman-Hoar's circumstances are dissimilar from the ones in those cases in both of these respects. First, Wissman-Hoar's discharge did not take place during a union campaign, but rather approximately 4 months *after* the union campaign among the security officers ended with certification of the Union. Second, the instant case concerns two separate discharge events, a month apart, each of which was set in motion by a different employee's complaint about a co-worker's conduct.

Even assuming that the Board precedent cited above extends, or should be extended, to discharges that do not take place during a union campaign and to situations involving separate discharge events, the allegation regarding Wissman-Hoar's discharge fails because the General Counsel has not presented meaningful evidence that the Respondent terminated her for the purpose of disguising discrimination against a pro-union employee. The best that the General Counsel can do in this regard is note Oles' testimony that Wissman-Hoar should have known that the Respondent would not tolerate her threatening and bullying texts to a co-worker because her own complaint about text bullying by Morandi a month earlier had led the Respondent to discharge him. Although the General Counsel attempts to cast this testimony as an admission that Morandi's discharge was the motivation for Oles' decision to discharge Wissman-Hoar, that is not a reasonable reading of that testimony. Rather, Oles was merely pointing out that Wissman-Hoar engaged in text bullying of a co-worker even though she was fully aware that the Respondent did not tolerate such behavior.

The General Counsel's argument that the Respondent was motivated by a desire to disguise its motivation for discharging Morandi is particularly unconvincing in this case given that the Respondent did not really even attempt to disguise its motive for discharging Morandi. Rather, it freely admitted that it was motivated by the May 1, union-related, exchange between Morandi and Wissman-Hoar. Rather than hide that motivation, it contends that Morandi's sharply worded texts were not part of the res gestae of the protected discussion or were so demeaning and sexist that, under *Atlantic Steel*, supra, the Act's protection was forfeited.

Similarly unpersuasive is the General Counsel's suggestion that the Respondent's discharge of Wissman-Hoar for bullying a co-worker outside of work was so draconian that an unlawful motive to disguise prior discrimination should be inferred. As found earlier in this decision, contrary to the Complaint allegation regarding application of the harassment policy, that policy is not limited to harassment at work and the Respondent has discharged employees other than Wissman-Hoar and Morandi for conduct occurring outside the workplace. Under the circumstances present here, the severity of the Respondent's disciplinary response to Wissman-Hoar's threats to publicize negative personal information about a co-worker does not show a motive to disguise prior discrimination against Morandi. If anything, the record indicates that the Respondent refrained from giving Wissman-Hoar special consideration even though she had previously assisted the Respondent's anti-union campaign. The General Counsel is attempting to turn the meaning of discrimination on its head by arguing that the employer

discriminated in violation of the Act by applying its policies in the same way to anti-union employee Wissman-Hoar as it had previously done to pro-union employee Morandi.[35]

I find that the Respondent has not shown that the Respondent discriminated in violation of Section 8(a)(3) and (1) of the Act when it discharged Wissman-Hoar on June 23, 2017. This allegation must be dismissed.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act.

2. Baystate Franklin Security Officers Union a/w Law Enforcement Officers Security Union ("Security Officers Union" or "Union") is a labor organization within the meaning of Section 2(5) of the Act.

3. International Union of Operating Engineers, Local 877 ("Local 877" or "Engineers Union") is a labor organization within the meaning of Section 2(5) of the Act.

4. In May 2017 and on August 30, 2017, the Respondent coercively interrogated employees about union activities in violation of Section 8(a)(1) of the Act.

5. The Respondent violated Section 8(a)(1) of the Act on May 5 and May 9, 2017, by telling an employee that he was from prohibited from having workplace discussions with co-workers about a union.

6. The Respondent violated Section 8(a)(5) and (1) by failing to fully respond to the June 12, 2017, information request from Local 877.

7. The Respondent discriminated in violation of Section 8(a)(3) and (1) of the Act: on May 5, 2017, when it issued a verbal warning to Christopher Livingston for having workplace discussions about a union; on May 12, 2017, when it suspended Kris Morandi; and on May 17, 2017, when it discharged Kris Morandi.

8. The Respondent was not shown to have committed the other violations alleged in the Complaint.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent, having discriminatorily suspended and discharged Kris Morandi, must offer him full and immediate reinstatement and make him whole for any loss of

[35] The Respondent's imposition of the same discipline on Morandi and Wissman-Hoar, even if it resulted from the uniform application of the Respondent's policies, was, nevertheless a violation of the Act with respect to Morandi since Morandi's texts were part of a Section 7-protected discussion about unionization whereas Wissman-Hoar's texts were unrelated to any protected discussion. Moreover, Wissman-Hoar's texts, unlike Morandi's, contained a threat against a co-worker. *Kiewit Power Constructors Co.*, 355 NLRB at 710 (absence of threatening language weighs in favor of employee retaining the Act's protection).

earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010). The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters and shall also compensate the discriminatee for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.,* 359 NLRB No. 44 (2012). The make whole relief for Morandi shall include any amounts he expended on a reasonable search for work and interim employment expenses, plus interest.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.[36]

ORDER

The Respondent, Baystate Franklin Medical Center, Greenfield, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about union support or union activities.

(b) Promulgating or maintaining a rule that prohibits employees from having discussions about a union or union activity.

(c) Failing to provide Local 877 with information it requests that is necessary for and relevant to performance of its duties as exclusive collective-bargaining representative.

(d) Discharging, suspending, warning, or otherwise disciplining employees for their protected discussions about a union or union activity.

(e) Discharging or otherwise discriminating against employees for supporting the Security Officers Union, or Local 877, or any other labor organization.

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

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

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

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

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

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful suspension and discharge of Kris Morandi, and the unlawful verbal warning to Christopher Livingston, and within 3 days thereafter notify them in writing that this has been done and that those disciplinary actions will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

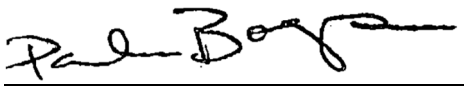
(e) Within 14 days after service by the Region, post at its facility in Greenfield, Massachusetts, copies of the attached notice marked "Appendix."[37] Copies of the notice, on forms provided by the Regional Director for Region One, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 5, 2017.

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

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. March 11, 2019.



PAUL BOGAS
U.S. Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT discharge, suspend, discipline or otherwise discriminate against any of you for supporting Baystate Franklin Security Officers Union a/w Law Enforcement Officers Security Union (Security Officers Union) or International Union of Operating Engineers, Local 877, (Local 877) or any other union.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT promulgate or maintain a rule that prohibits you from having discussions about a union or union activity.

WE WILL NOT fail to provide Local 877 with information it requests that is necessary for and relevant to performance of its duties as exclusive collective-bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

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

WE WILL make Kris Morandi whole for any loss of earnings and other benefits resulting from his suspension and discharge, less any net interim earnings, plus interest compounded daily.

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

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

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge and suspension of Kris Morandi, and the unlawful verbal

warning issued to Christopher Livingston, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the unlawful disciplinary actions will not be used against them in any way.

BAYSTATE FRANKLIN MEDICAL CENTER

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

10 Causeway Street, 6th Floor, Boston, MA 02222–1072

(617) 565-6700, Hours of Operation: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/01-CA-198949 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (857) 317-7816.