UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

HAYWARD SISTERS HOSPITAL D/B/A
ST. ROSE HOSPITAL

and **Case 32-CA-197728**

BABITA ROOP, an Individual

and **Cases 32-CA-197958**
32-CA-203396
JERNETTA BACKUS, an Individual **32-CA-218138**

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DECISION

STATEMENT OF THE CASE

JOHN T. GIANNOPOULOS, Administrative Law Judge. This case was tried before me in Oakland, California, over a 12 day period in March, April, and May of 2018. The Complaint, as amended and consolidated at trial, alleges that Hayward Sisters Hospital d/b/a St. Rose Hospital ("Respondent" or "St. Rose") committed 24 separate violations of Section 8(a)(1) of the National Labor Relations Act (the "Act"), including the discipline, suspension, and termination of Charging Party Babita Roop ("Roop"), and one violation of Section 8(a)(1) and (4) of the Act involving the final written warning issued to Charging Party Jernetta Backus ("Backus"). Respondent denies it has violated the Act in any manner.

Based upon the entire record, including my observation of witness demeanor, and after considering the briefs filed by the General Counsel and Respondent, I make the following findings of fact and conclusions of law.[1]

[1] Testimony contrary to my findings has been specifically considered and discredited. Witness demeanor was the primary consideration used in making all credibility resolutions.

I. JURISDICTION AND LABOR ORGANIZATION

Respondent operates an acute care hospital in Hayward, California, where it derives annual gross revenues in excess of $250,000. In operating the hospital, St. Rose purchases and receives goods and materials in excess of $5,000 directly from points outside the State of California. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

II. FACTS

A. General Background

Respondent operates a 270 bed hospital providing both acute and emergency care services to residents living the southern part of Alameda County, California.[2] About 900 employees work at the hospital, which provides both inpatient and outpatient services. Aman Dhuper ("Dhuper") serves as the hospital's President and chief executive officer; he assumed those duties in August 2016. Before becoming CEO, Dhuper was the hospital's vice president of operations; he started working at St. Rose in 2013. Joseph Ambrosini ("Ambrosini") was the hospital's human resources manager from 2013 until February 2017. He was replaced in March 2017 by Stephanie Jones ("Jones"). The human resources manager reports directly to Dhuper. Mike Sarrao serves as the hospital's legal counsel. (Tr. 1515–16, 2088, 2406–08, 2488; GC. 51)

This case involves employees who work in the hospital's respiratory department. Joe Marino ("Marino") has been the manager of the respiratory department since April 2014; he started working at St. Rose in 1995 as staff therapist. Marino reports to the hospital's director of nursing Rosanne O'Keefe ("O'Keefe"), as do the managers of the other clinical departments. O'Keefe reports to the hospital's chief nursing officer Sylvia Ventura, who in turn reports to Dhuper. (Tr. 1273, 1276, 1484, 2263– 65, 2500)

About 35 respiratory therapists ("therapists" or "RTs") work in Respondent's respiratory department. RTs work throughout the hospital caring for patients who are in respiratory distress, or who have various lung ailments, such as pneumonia, COPD, or the flu. RTs assist with intubating and managing patients on ventilators, perform bronchoscopies, pulmonary function tests, six-minute walk tests, arterial blood gas tests, and attend emergency or rapid response situations. As part of their job duties they also administer bronchodilators to patients such as Albuterol, DuoNeb, and Atrovent.[3] RTs are licensed by the State of California Respiratory Care Board. (Tr. 22, 239, 263, 325, 541, 577, 773–74, 808, 950, 1024, 1274, 1843; GC. 6, pp. 5-6)

[2] Transcript citations are denoted by "Tr." with the appropriate page number. Citations to the General Counsel, Respondent, and Joint Exhibits are denoted by "GC." and "R." and "JX." respectively. Transcript and exhibit citations are intended as an aid only, as factual findings are based upon the entire record as a whole.

[3] "A bronchodilator is a medication that relaxes the bronchial muscles and thus expands the" bronchial air passages. *Sea "B" Mining Co. v. Dunford*, 188 F. App'x 191, 200, fn. 11 (4th Cir. 2006). DuoNeb is a combination of the drugs Atrovent (also known as Ipratropium) and Albuterol. (Tr. 991, 1738, 2260; R. 16).

Respondent's respiratory therapists are broken down into three categories: full-time, part-time benefited, and per-diem. Most full-time employees work 72 hours a pay-period, working 12 hour shifts three days a week. Part-time benefited employees work two 12 hour shifts per week. Although they are considered part-time, these employees have a fixed schedule and receive the same fringe benefits (such as insurance and retirement) as full-time staff. Per-diem employees work as needed, and have executed a separate per-diem employment agreement with the hospital. Per-diem employees work an average of two to three shifts a pay period; however when the hospital is busy, they can work up to six shifts. Per-diem employees do not receive fringe benefits. (Tr. 239, 150, 1214, 1254, 1275; GC. 26, p. 6)

Within the respiratory department, about four therapists are designated as team leads; they receive premium pay when they work in this capacity. As part of their job duties, leads adjust the work schedule, check for work orders, update assignments, and attend emergency and specialty procedures. Also, a therapist named Mike Gandhi ("Gandhi") serves as the department's "clinical lead." As clinical lead, Gandhi completes the staff scheduling for the department, maintains various machines, and performs different testing required by the state or other accrediting agencies. Although Gandhi is not officially designated by the hospital as a manager or supervisor, he is viewed by many of the therapists as a supervisor, or at least as someone who is aligned with the department's management. Employees referred to him as a supervisor, he acted like one, and the department's telephone directory listed Gandhi as the "Supervisor for Pulmonary Services." (Tr. 22–23, 241, 250, 596, 622, 955–57, 1125, 1212–13, 2448, 2450–51, 2586–90; GC. 26, 75, 99, 155)

All of the hospital's respiratory therapists, including Gandhi and the team leads, are represented by Teamsters Union Local No. 856 (Union), and are covered by a collective bargaining agreement between the Union and Respondent. During the relevant time period, Teamsters business agent Matt Mullany ("Mullany") was the Union representative responsible for the unit of respiratory therapists. (Tr. 61, 260, 699, 1214, 1364, 1517, 1544–45; GC. 22, 26)

B. The physical layout of the respiratory department

The respiratory department is located on the first floor of the hospital and encompasses a number of large rooms, along with some office and storage areas. These rooms are situated across the hall from each other. One suite contains the hospital's pulmonary function testing lab ("PFT lab"). Next to the PFT lab is the pulmonary tech room (hereinafter referred to as the "tech room" or "pulmonary department").[4] The tech room is actually two rooms separated by a large open doorway. Each room has a separate door that accesses the hospital's hallway/corridor. The top half of the tech room contains a refrigerator, sink, microwave, two coffee makers, a water dispenser, chairs, and a table on which various condiments, such as hot sauce and ketchup, are kept. On the walls are a towel dispenser, a soap/sanitizer dispenser, a clock, a white-board, and a bulletin board. Before it was removed, a flat-screen television was also kept in this part of the tech room, above the microwave oven. The bottom half of the tech room contains a desk/table with two computers, chairs, a printer, a copy machine, and lockers. There is also a coat rack,

[4] Witnesses consistently referred to the tech room as the "break room." (Tr. 90–91, 102, 257–58, 356–57, 362–63, 370, 388, 391, 400, 544, 781, 1538, 1552, 1582, 1594, 1910, 1995, 2050) They also referred to it as the "department," because as one therapist testified "that's the only place we have." (Tr. 373) (Tr. 379, 932, 961, 964)

telephone, and a bulletin board in this half of the room. Each full-time therapist gets a locker, and some of the other therapists share a locker. Therapists store their personal belongings in the lockers, most of which are secured with a padlock. Marino's keeps his printer in the tech room, and he goes in and out of the room on a regular basis. (Tr. 123, 131, 358, 546, 630, 963, 947, 1284–88, 1296–1300, 1422, 2003, 2534, 2543; R. 9)

RTs go to different areas of the hospital to perform their work, as opposed to just staying in one location. They use the tech room as a break area, to eat their lunch, and to store their personal effects. They also use the tech room as a work area, to do their charting, computer work, and to exchange reports about the status of various patients as the therapists change shifts (referred to as "giving report"). With the layout of the room, it appears the hospital was trying to create both a break area (with a refrigerator and sink on one side) and a work area (with computer terminals and a telephone on the other). However, with the lockers located in the work area, and the ease of access between both rooms, in reality both sides of the tech room are used as a work and break area. As human resources manager Ambrosini testified, the area is "like a break room and a work area combined in one. There was really no differentiation between break and work room." (Tr. 1594) (Tr. 370–71, 544, 547, 1994)

Across the hallway from the lower half of the tech room is the bronchoscopy suit, where bronchoscopies are performed. Cardiology employees also use this area to perform tests. Above the bronchoscopy suite, and directly across the hall from the door leading into the upper half of the tech room, is an office area that Marino shares with Dr. Hung, who is the medical director for the department of pulmonary services. (Tr. 963, 1284–85, 1810; GC. 128)

C. Morale changes in the respiratory department

Most of the respiratory therapists who testified had worked at the hospital for a number of years. And, by all accounts, the respiratory department used to be a great place to work; employees in the department were friends, they enjoyed working together, and socialized with each other after work. However things changed drastically in early 2016. The respiratory department went from a place that was viewed as the "envy of the whole hospital" to one where employees broke into factions, and were filing for restraining orders against each other. (Tr. 552) It is against this backdrop that the unfair labor practice allegations in the complaint unfold. (Tr. 436, 498–99, 551–52, 568, 729, 757, 773, 1054, 1066, 2014–15)

D. The harassment of Jojesmar Pereyra

Jojesmar "Joje" Pereyra ("Pereyra") has worked at St. Rose as a respiratory therapist since 1999. At the time of the hearing, he had been on medical leave since August of 2017 because of the stress caused by various episodes of harassment against him. Pereyra, who is of Filipino descent, testified that he had been having problems with a coworker named Kevin Seigal ("Seigal") for a number of years. According to Pereyra, whenever they worked together Seigal would make monkey/gorilla sounds and call him names like "monkey," "gorilla," and "Jogilla." The problems came to a head in 2016. According to Pereyra, one day at work Seigal threw a banana at him. Then, on May 12, 2016, Pereyra walked into the tech room and found pictures posted on the walls with his head photo-shopped onto the bodies of gorillas and monkeys. The

night shift employees who were present told Pereyra who had posted the pictures. Pereyra thought to himself "are we at this again" and reported the pictures to management. (Tr. 399) (Tr. 28, 393–95, 398–99, 504; GC. 15; GC. 23)

The pictures in question were posted around the large open doorway separating the two sides of the tech room. Four pictures were posted above the doorway, all of which either referred to Pereyra or included a photo of his head superimposed into the scene. One picture was the iconic depiction of King Kong atop the Empire State building swatting airplanes; Pereyra's head was superimposed onto King Kong's body. In another photo, Pereyra's head is on the body of four gorillas. In another, a man holds a cell phone in one hand and a banana in the other, Pereyra's head is in the background on the body of an ape; the caption of the picture reads "Recycle a cellphone, save a jogilla." (Tr. 401–02, 408–09, 503–504; GC. 15)

Nine pictures were posted along the side of the doorframe. Of these, one includes an image of Pereyra. That picture depicts five seemingly naked men, with tattoos, in a group hug; Pereyra's head is superimposed on one of the bodies. The remaining pictures depict other respiratory department employees. In one, the head of RT Ahmad "Chris" Hamid ("Hamid") is superimposed on an image of someone riding a camel. Another picture shows the head of RT Marco Garcia on a person with female breasts. In still another, the face of an unidentified individual is superimposed on a shark with a caption that reads "Shalom to the GREATEST STENCH SHARK;" the picture also includes a Star of David. Marino's head is even superimposed onto one of the pictures depicting four shirtless men. (Tr. 27, 402–03, 513, 578, 1261, 1989, 2522–23; GC. 15)

The pictures were posted on May 11 by Seigal and Hamid, who used the computers and printer in the tech room to print out the images. Garcia witnessed them printing and posting the pictures, which were posted when he left work on the evening of May 11. Respiratory therapist Monique Johnson was also was working on May 11. She walked into the tech room between 6:00 and 6:30 p.m.; present were Hamid, Garcia, Gandhi, and an RT named Eric Thom. She saw the images and told her colleagues that the pictures needed to be removed as Pereyra was working the next day, and he had previously said that he did not want pictures of himself posted in the department. Hamid replied that they were just having some fun; Thom and Garcia denied any involvement with the photos. (Tr. 542–546, 577–79, 631–32)

The actual intentions of those posting the pictures are unclear, and it appears similar types of photos had been posted in the past. What is clear is that none of the scenes depicted in the pictures are flattering, and the pictures themselves would be more appropriately found in the background scene of the movie Animal House rather than on the wall of an acute care hospital.[5] Seigal was leaving his full-time position at St. Rose to work at another hospital, and human resources manager Ambrosini testified that the day the pictures were posted was "like [Seigal's]

[5] Animal House is a 1978 feature film, which has become part of American pop culture, depicting the exploits of a fictional college's most "disreputable fraternity house" as its members "guzzle and spit beer, dump Fizzies in the school swimming pool, pile up 1.2 grade-point averages on their permanent records and wreck the homecoming parade." *Blakeman v. The Walt Disney Co.*, 613 F. Supp. 2d 288, 307, fn. 5 (E.D.N.Y. 2009) (internal quotations omitted).

farewell to the hospital."[6] (Tr. 1633) Ambrosini also testified that this episode was the trigger for the rapid downward spiral and dissention in the respiratory department. (Tr. 1581–82) (Tr. 573, 631, 1234, 1269, 1348–49)

E. Pereyra complains to Marino and human resources

Pereyra used his cell phone to take pictures of the images plastered on the tech room wall, and emailed them to Marino.[7] In the email he asked that Marino "put a stop to this," and threatened to go to human resources if he did not. Five minutes later, Marino emailed Seigal and Hamid, with a copy to Gandhi and Pereyra, saying "I don't know who put up the pictures, could you please remove all pictures today;" he included in the email the photos Pereyra had sent him.[8] After Marino sent the response, Pereyra went to see Marino in his office. Later that day, Gandhi asked Seigal to remove the photographs. However, before Seigal did so, he took a picture of two of the images (the one with Pereyra's head on King Kong and the one where Pereyra's head is on the body of four apes) and posted them on his Instagram account with the caption "[s]ome people have no sense of humor." (GC. 17, p. 4) Respiratory therapist Marie Matuszak ("Matuszak") "liked" Seigal's Instagram post. (Tr. 400, 404–05, 407, 515, 1235, 1344, 2047; GC. 15, 16, 17)

Pereyra heard about the Instagram post from one of his coworkers later that same day. The human resources office was closed, and Marino had left, so Pereyra went home and wrote a letter which he submitted to human resources the next day along with a bullying complaint form. In the letter, Pereyra accused Seigal of harassing him for several months. He lays the background of the name calling and photo-shopped pictures, and explains Seigal's Instagram posting. The letter also says that Seigal's conduct is "NOT funny and it's hurtful and humiliating." (GC. 17) (Tr. 405–07)

Pereyra did not hear anything about his complaint until a few weeks later when he met with Ambrosini and Marino. Pereyra told them that the pictures came from the computer in the tech room, and gave Ambrosini the names of three possible witnesses to the incident including Monique Johnson; Ambrosini wrote their names down on the bullying form. Pereyra also complained about the Instagram posting, but Ambrosini told him there was nothing they could do because the posting was on Seigal's personal Instagram page. Ambrosini instructed Pereyra that he was not to work with Seigal or Hamid in the future, and said that Respondent would investigate the incident. (Tr. 408–412, 1538; GC. 17)

Notwithstanding the fact that Pereyra had identified Seigal in his complaint to human resources, identified three potential witnesses, and Marino emailed Seigal and Hamid telling them to remove the pictures, Ambrosini testified that the investigation took some time, and was

[6] Seigal was resigning his full time position at the hospital, and becoming a per-diem employee. However, he never again worked another shift at the hospital. (Tr. 1348–49, 1633)

[7] The General Counsel submitted into evidence paper copies of these, and other exhibits, containing pictures and images. Because it is difficult to view some of the images on the paper exhibits, the parties were also provided with electronic versions of these exhibits. (GC. 4, 5, 15, 17, 18, 19, 57, 58) The electronic versions of the exhibits are contained in the NLRB's case management system and are hereby made part of the official record.

[8] There is no evidence anyone had told Marino who posted the pictures and, notwithstanding the wording of the email, it was clear that Marino believed Seigal and Hamid were responsible. I credit Pereyra's testimony that he had not spoken with Marino before the email was sent asking that the pictures be removed. (Tr. 404)

not leading anywhere initially because nobody had first-hand knowledge as to who posted the pictures. Ambrosini never asked Hamid whether he was involved in the incident and could not remember whether he had actually spoken to the potential witnesses Pereyra identified. He further testified that he did not recall asking any of the RTs if they witnessed anyone making ape sounds or gestures. Respondent claimed that the tech room computers were removed and replaced in early June, and the computers were checked for evidence of the pictures in question, but nothing was found. (Tr. 1349, 1541, 1550–51, 1631–37)

F. Respondent fills the vacant PFT tech and resource positions

In the hospital's PFT lab, pulmonary function testing is performed on an outpatient basis. Private physicians schedule their patients for tests to examine lung strength, capacity, volume, and flow rates. (Tr. 67, 121, 774–75, 947, 949)

One respiratory therapist, referred to as the PFT lab tech, works in the PFT lab full time. The PFT lab tech generally works an 8 hour shift, Monday through Friday, from 8:30 a.m. to 5:00 p.m. The RTs consider working in the PFT lab a plum job because the PFT lab tech has a set schedule of patients, does not respond to emergency calls, does not work evenings, weekends, or holidays, and has a small office. (Tr. 779, 1415–16)

Before he resigned, Seigal was the hospital's PFT lab tech and Matuszak was his backup, filling in when Seigal was out sick or on vacation. Matuszak had worked as Seigal's backup for a number of years, even before Marino became manager of the department. Matuszak also worked as the department's "resource" technician. The job duties of the resource technician were instituted in 2013 to alleviate some of the workload for the RTs during the day shift. The resource technician was responsible for auditing, ordering, stocking supplies, performing bronchoscopies, six-minute walks, covering cesarean sections, high risk delivers, and working generally as a floater. (Tr. 775, 1219 – 20, 1349–51, 1416, 1471, 2368; GC. 98, #632–634)

When Seigal resigned, it created an opening for a new permanent PFT lab tech. On May 12, 2016 the position was given to Matuszak, without the job opening being posted. This, in turn, created an opening for a new backup PFT lab tech, and the need for someone to work as the resource technician. Ultimately, a per-diem employee named Steve Ochoa ("Ochoa") was selected as the backup PFT lab tech and Hamid was chosen to perform the resource functions. (Tr. 65, 1308–09, 1414–15, 1612; GC. 98, #613)

The selection of the new PFT lab tech, the backup tech, and the resource tech, caused more friction and turmoil in the department, as many people were interested in working in these jobs, and some thought Marino was playing favorites when he filled the openings. The timing also corresponded with the complaints about the monkey pictures in the department. (Tr. 378–387, 777–80, 1219–1220, 1231–32, 1350–51, 1357, 564, 2018, 1356, 2368; GC. 52)

1. Changing the qualifications to work in the PFT lab

Before Matuszak was hired to replace Seigal as the PFT lab tech, Marino changed the department's policy regarding the qualifications needed to work in the PFT lab. While the State

of California offered a specialized license in pulmonary function testing, but the hospital had never required such a license to work in the PFT lab. Instead, any RT with training in pulmonary function testing and procedure could work there. In fact, the PFT lab tech before Seigal was not licensed by the state. She had tried many times to become licensed but was unsuccessful. Notwithstanding, she continued working in that position. (Tr. 779–78, 946–47, 1354; GC. 6, p. 18–19)

With the openings in the PFT lab, Marino decided to change the hospital's existing policy and require RTs working in the PFT lab to hold a state license in pulmonary function testing; this required passing a state administered board examination. The board exam is a fairly difficult test, and in order to pass, appropriate time is needed to study for the test, including an optional week-long prep class. Also, time is needed to take the exam itself, which is only offered at certain times each month. The process was not something that could be completed in a week. (Tr. 386, 777, 1309, 1353, 1357; GC. 6, p. 20–21; GC. 98, #631)

When Marino became manager, Seigal already had his state license. According to Marino, this served as proof of Seigal's competency in pulmonary function testing for accreditation purposes. Thus Marino did not need to maintain documentation showing that Seigal was otherwise competent to work in the PFT lab. However, Matuszak was not licensed. About six to eight months before Seigal quit, Marino told Matuszak to obtain her state PFT license. She did so, and when the opening for the full-time PFT tech position arose, she was the only other full-time RT at the hospital with a state license as required by the hospital's new policy. (784, 927, 945, 1355–58, 1416–17)

2. Filling the backup PFT lab tech and resource positions

With Matuszak taking over the job of permanent PFT lab tech, Marino needed to fill both the backup PFT tech job and the resource tech position, both of which were previously performed by Matuszak. On Friday, May 6, 2016, Marino sent an email to the staff announcing the job opening for a backup PFT lab tech. The email said that anyone bidding for the job needed to be licensed by the state, and that a decision would be made on Friday, May 13. On that date, Marino placed Ochoa into the position as the new backup PFT lab tech. Ochoa, who was a per-diem employee, was the only other RT at the hospital with a state license. Then, Marino placed Hamid, who was previously working the night shift, into the day-shift resource job without posting or otherwise informing the department of the opening. (Tr. 783–84, 927, 945, 1351, 1358, 1219–1220, 1257–58, 1360, 1414, 1472, 2025; R. 25)

The new requirement of having a state license to work in the PFT lab upset many therapists, as did the short notice Marino gave to fill the open backup PFT tech position. One week did not allow them enough time to obtain a state license before the bidding closed. They were also upset that Ochoa was chosen while other RTs with greater seniority could not even apply for the position given the new licensing requirement and the short application period. (Tr. 34, 83, 378, 387, 779–81, 927)

As for the resource position, some therapists were upset that Hamid was awarded the resource job, which was a day-shift position, even though other night shift RTs with greater

seniority wanted to work the day shift and were interested in doing the job. Many believed that Marino's decisions in filling all these positions smacked of favoritism, and were unfair. (Tr. 83, 386–87, 779–82, 1356–1358, 2368; GC. 36, p. 11)

3. Two therapists call Marino about the job openings

On May 19, 2016, Alexandria Aguilar and Frank Mardenzai called Marino, using a speakerphone, to discuss the backup PFT lab tech position and the resource job.[9] They wanted to express their interest in both positions, and see if they could have more time to take the newly required state board examination. On the call, both complained to Marino that they had more seniority than either Hamid or Ochoa. They expressed interest in training in the PFT lab, and suggested that the PFT backup and resource positions be rotated among therapists who were interested in the jobs. According to Mardenzai, on the call Marino seemed receptive to the idea. However, the day after the call Aguilar's schedule was abruptly changed so that she no longer worked with Mardenzai. Aguilar asked Marino and Gandhi if the schedule change was a mistake, and Marino said it was not. He told Aguilar that her schedule was changed because of all the complaints that were coming from her and Mardenzai; they were riling up the department, and there was "more BS than work" going on. Aguilar protested and said that she was not the only one complaining. Marino then told Aguilar that Matuszak was not going to train everyone in the department, referring to the PFT lab, and that Aguilar should not listen to other people, because they like to "plant seeds" and watch what unfolds. Regarding her working with Mardenzai, Marino and Gandhi both said that they did not want the two of them working together. After this conversation, Aguilar called Mardenzai and Monique Johnson and told them what had occurred. (Tr. 378–82, 385–87, 393, 781–89; GC. 52)

4. Roop complains about Hamid's appointment to the resource position

On about June 14, 2016, Roop went to see Marino to complain about Hamid; she was upset he would no longer be working weekends as the resource technician. As the new PFT lab tech, Matuszak would also not be working weekends. Roop had worked at the hospital as an RT for about 17 years while Hamid had worked there for six years. Roop went to Marino's office and told him that senior therapists, such as her, followed the rules and worked weekends, while other individuals were not required to work weekends. Marino responded by saying that some positions did not require weekend work, and the department would continue operating that way. Roop told Marino that she was just voicing her opinion, one that was shared by many senior therapists, but ultimately he was the manager and it was his decision. According to Marino, the conversation did not go well. Roop was not happy when she left his office, and she let him know that she was displeased. (Tr. 21, 25–26, 779, 1415–16, 1989, 1360; GC. 97)

G. Employees march to human resources

On about June 17, 2016, eight respiratory therapists, Roop, Monique Johnson, Alexandria Aguilar, Shilu Yogi, Christina Concepcion, Phil Duong, Amanpreet Kaur, and Grant Vea, marched to the human resources office to support Pereyra's situation and to put a stop to what they believed was the racially offensive conduct in the department. They went to human

[9] I credit Aguilar's testimony regarding the date of the call. (Tr. 378)

resources at 3:00 p.m. in the afternoon, and told the office secretary that they were there to see Ambrosini. After some back and forth regarding whether the therapists had an appointment, the secretary told them that Ambrosini had agreed to speak with only one of them. It was decided that Johnson would meet with Ambrosini. When Johnson went into his office, Ambrosini seemed upset.[10] Johnson told Ambrosini that they were not trying to appear aggressive, but they wanted to speak with him regarding the situation involving Pereyra. Ambrosini replied saying that he could not discuss Pereyra's situation at all, because the matter was confidential. Johnson said that the employees wanted to discuss some of the things going on in the department, including the pictures that were posted, but Ambrosini said he did not want to talk about those matters. Johnson told him that they felt as if nobody was listening to them. And, even though they keep reporting things, nothing happens. Ambrosini told Johnson that he did not want them to feel that way. Nonetheless, the meeting ended. After the encounter, Ambrosini told Marino about what had occurred. (Tr. 27–29, 388, 580–82, 679–81, 811–12, 1562–63)

H. Respondent's breakthrough in the tech room picture investigation

The breakthrough Respondent was apparently looking for in their investigation into the tech room pictures occurred when Marco Garcia, on his own accord, telephoned Ambrosini in June 2016. Garcia actually called Ambrosini twice. The first time he left Ambrosini a message, but never received a response. Garcia's second call to Ambrosini was successful. Garcia told Ambrosini that he saw Seigal and Hamid printing the pictures and posting them in the tech room. Ambrosini told him okay. Notwithstanding, Respondent never questioned Hamid or Seigal as to their involvement or about Seigal's Instagram post. (Tr. 550, 573, 1542, 1629, 1632–33)

After hearing from Garcia, Ambrosini spoke with Marino and O'Keefe, along with Mullany at the Union. On June 21, 2016, Hamid was given a final written warning and three day suspension. Seigal was also issued a final written warning and three day suspension, but his is dated June 28, 2016. No explanation was given as to why Seigal's suspension is dated a week after Hamid's. While Ambrosini testified that he could not get Seigal to come into the hospital for the discipline, Seigal's signature appears on the disciplinary document just above Ambrosini's. (Tr. 1544, 1551; 1629, GC. 123; R. 13)

In June, after Respondent completed its investigation, Pereyra met with Ambrosini and Marino. They told him that Seigal and Hamid were responsible for posting the photographs. However, Respondent did not tell Pereyra whether Seigal or Hamid were disciplined because of the incident. Pereyra tried asking, but Ambrosini told him that the hospital's privacy policy prevented disclosing that information. (Tr. 411–13, 537–38)

During this meeting, Ambrosini and Marino also told Pereyra that they did not find anything on the tech room computers regarding the pictures. Notwithstanding, a few months later Pereyra was using the tech room computers when he came upon the pictures in question,

[10] I credit Johnson's testimony as to what was said in the office with Ambrosini. (Tr .580–82)

along with other files with names such as "King Jogilla," "JOJE GORILLA," "save a jogilla," "rise of the jogilla," and "gorilla." (Tr. 411–20, 2601; GC. 18, GC. 53).[11]

Most respiratory therapists did not know about the type of discipline was meted out to Seigal and Hamid, as that information was not disseminated to the department. And, their discipline did not put an end to Pereyra's harassment. Instead, as discussed further below, the harassment took an even more individual and uglier turn.

I. Roop files bullying complaint against Matuszak

On June 21, Roop had a confrontation with Matuszak in the tech room involving the employee march to human resources that occurred a few days earlier. Matuszak's birthday was coming up, and Roop bought a present for her. Matuszak told Roop that she did not want her gift, saying that a group of workers went to human resources to complain about Matuszak's position, and they were after her job. Roop told Matuszak that she was one of the people that went to human resources, and that it had nothing to do with Matuszak's job. Instead they went there to support Pereyra. Matuszak said she knew that Roop complained to Marino about people not working weekends, and asked Roop what her complaints to Marino achieved. Roop admitted to speaking with Marino, said that nothing came of the complaint, but that she had the right to voice her opinion. Matuszak then raised the topic of Ochoa, saying people in the department were upset that he was working in the PFT lab. Roop replied saying that Ochoa was only a per-diem employee, and there were many experienced therapists who were upset at the new requirement of having a state license to work in the PFT lab. Roop told Matuszak to put herself in the shoes of the senior therapists, and how it would feel to be bypassed and have the job given to a per-diem employee. Matuszak said that, if it happened to her she would be upset, but she would then go and obtain her state license. Roop said that people were just voicing their opinions because many of the therapists had worked at the hospital a long time. Matuszak said that she did not want to hear or know anything else, that she was just there to do her job, and then stormed out of the room, leaving the birthday present behind. (Tr. 32–35)

About a week after the confrontation with Roop in the tech room, therapist Amanpreet Kaur ran into Matuszak in the hallway at work. Matuszak started speaking about the problems in the department and told Kaur that, if "Roop keeps this up . . . she's going to go down." (Tr. 809) Roop was working that day and Kaur told Roop to keep her distance from Matuszak. Kaur went into detail about their discussion, relaying that Matuszak said the department was never going to be the same because of Roop, and that Roop's "going to go down, peace out." (Tr. 37) Roop then complained to Marino, telling him what Kaur had relayed to her. Roop told Marino that the comments sounded like a threat, she did not want to get into any trouble if something happened, and she was going to lodge a complaint with human resources.[12] During this conversation Marino told Roop that he had just returned from human resources, and Ambrosini told him that several people were at his office complaining about his job. Roop told Marino that she was one

[11] It appears the pictures and related files were actually saved on the hospital's network drive as GC. 18 and GC. 53 show Pereyra searching the hospital's network drive when he found the files in question. Seigal appears listed as the author of one of the files. (Tr. 418; GC. 18)

[12] Transcript page 38, line 17 should read as follows: "Q: [by the General Counsel] Okay did he say anything else about that? A: [by Roop] He said well [continuing with her answer] . . ."

of the people that went to human resources, in reference to the march that occurred a few days earlier, and that it had nothing to do with Marino's job, but that they were there to support Pereyra. (Tr. 35–39, 809–10)

On June 28, Roop filed a bullying complaint form with human resources regarding what Matuszak told Kaur. In the complaint form Roop reported the incident as relayed to her by Kaur. She also discussed her confrontation with Matuszak in the tech room, and Matuszak saying that several people went to human resources to complain about her job. In the form, Roop further wrote that she wanted to file the complaint on the record so Matuszak did not try to implicate something that would affect Roop's job. (GC. 3)

That same day, Ambrosini sent a copy of Roop's complaint to Marino, suggesting that he meet with Matuszak about the matter. Later that day Marino emailed Ambrosini and O'Keefe saying that he had spoken with Matuszak, who claimed that what she actually told Kaur was that Roop "has changed the dynamics of the department negatively for good and she is bringing us down. All I want is peace." In the email, Marino goes on to say that he believed something was lost in the translation, as Roop did not hear the comments directly, but they were relayed to her by Kaur. Marino did not believe the incident warranted a bullying complaint, saying there was nothing sinister about the matter, and that it was "just blown way out of proportion by a misguided individual," referring to Roop. At the time he sent the email, he had not spoken with Kaur about what occurred. (Tr. 1345–46, 1452, 1456; GC. 65)

A couple days later, Marino called Kaur into his office. He gave Kaur the hospital's policy covering gossiping, had her read it, and told Kaur to stop gossiping as it would not be tolerated in the workplace. Marino believed that Kaur was gossiping when she told Roop about Matuszak's comments. After the meeting, Kaur told various other therapists, including Roop, about her meeting with Marino and what he told her. (Tr. 808–11, 1456–58)

J. Therapists draft and deliver a "list of concerns" to the Union

On June 24, 2016, some of the RTs delivered a list of concerns to the Union regarding issues in the respiratory department. Roop and Monique Johnson had the idea to create the list, which was based upon discussions with coworkers. The list set forth six specific complaints/concerns: (1) employees being told they would lose seniority if they moved from a 36 to 24 hour benefited position; (2) some benefited employees not working weekends; (3) per-diem employees not being scheduled for 9 work days during the 6 week work schedule; (4) inquiring as to why the PFT position was never posted; (5) questioning why two new 36 hour positions were posted, while the work-hours for some benefited employees were being cancelled; (6) alleging misuse of the resource position, suggesting the resource position was not needed, and the tasks could be performed by the RTs who did most of the work anyway; and (7) complaining about the new requirement of needing a state license to work in the PFT lab. Along with the list, the employee included various documents, emails, etc., to illustrate or expound upon some of their complaints. (Tr. 59–72, 586–91; GC. 6, 24, 98)

Ambrosini had several discussions with the Union about recurring issues in the department, and eventually received a copy of the list of concerns. He then met with Marino to

discuss the complaints, and gave Marino a copy of the list. Marino, in turn, prepared a written rebuttal. And, as discussed later, he called two staff meetings in August 2016 to address the complaints. (Tr. 592, 1301, 1313, 1565–66; GC. 7, 98)

K. July 7, 2016 meeting to discuss professionalism

On July 7, 2016, a respiratory department staff meeting was called to discuss the issue of professionalism within the department, and the hospital's new bullying policy. St. Rose had initiated a new policy for bullying and workplace safety, and all units within the hospital were receiving training on the policy. Because the therapists were disgruntled, Respondent called a mandatory meeting to discuss the policy. (Tr. 1334–35, 1443, 2266–67; GC. 69)

At the July 7 meeting Marino, Ambrosini, and O'Keefe were present on behalf of the hospital. Ambrosini started the meeting by explaining the hospital's standards of conduct and the policy on bullying. He also discussed how postings were not allowed in the department, unless they dealt specifically with the business of the respiratory department. O'Keefe then spoke, saying that she was profoundly disappointed in the therapists, and that it had come to her attention that many bullying complaint forms were being submitted to human resources. She told the staff that there seemed to be a sixth-grade mentality regarding the infighting that was occurring. She explained that everyone chooses where they want to work, and if they elected to work at St. Rose the expectation was that they will behave professionally at work. As O'Keefe was speaking, an RT named Brian Smith ("Smith") was making gestures, noises, and shaking his head as if to say O'Keefe was on her soapbox once again. (Tr. 2269–70, 2378)

L. Pereyra and Roop start getting anonymous text messages

On July 8, the day after the staff meeting on bullying and professionalism, both Roop and Pereyra started receiving text messages from phone numbers they did not recognize. The phone numbers were "spoofed;" they were fake numbers used to mask the identity of the senders.[13]

1. Pereyra's text messages

The first message Pereyra received contained a picture of a baby crying with gorillas dancing in the background. Pereyra replied to the unknown phone number with an expletive, and telling the sender to "man up." Over the next year, Pereyra continued receiving the same types of gorilla/monkey themed, and otherwise offensive, text messages periodically from various spoofed phone numbers. In all, about 28 different spoofed text messages to Pereyra were introduced into evidence, virtually all of which either contained pictures of, or referenced, monkeys, gorillas, "monkey business," or bananas; one text just contained the word "Jogilla" designed into a logo. (Tr. 431; GC. 19)

In July 2016, after receiving the first anonymous text message, Pereyra complained to Marino who said he would follow-up with human resources. Not hearing back, and after

[13] Technology exists allowing people to make calls and send text messages from fake telephone numbers, making it virtually impossible to trace the origin and identity of the caller/sender. See Gabriella Sneeringer, *Contact That Can Kill: Orders of Protection, Caller Id Spoofing and Domestic Violence*, 90 CHI.-KENT L. REV. 1157, 1169 (2015).

receiving more text messages, Pereyra spoke with Marino again a month later. Pereyra told Marino that he was still getting anonymous text massages, and he wanted it to stop. Marino asked if Pereyra had proof of who was sending the messages. Pereyra said that he suspected Seigal, Matuszak, Hamid, and Smith of sending the texts. (Tr. 437–441)

2. Roop's text messages

Roop also received her first anonymous text message on July 8. It contained an image of someone dressed as a witch. The next message she received was on July 20, containing an internet meme ("meme") of Star Trek's Captain Pickard with the words "WHY IN THE FUCK ARE YOU SUCH A CUNT."[14] (GC. 4) She received two more anonymous texts on July 29, which were similarly pejorative. Roop forwarded the messages to Marino saying "this is getting to a point o[f] harassment [a]nd we talk about being professional." Roop received more text messages in early August, and eventually spoke with Marino about the anonymous text messages around August 10. She met with Marino in his office and showed him the text messages she was receiving. Marino tried calling one of the numbers, but it went to a generic voicemail. He told her that the phone numbers on the messages were not connected with anyone so it would be hard to prove who was sending the texts. He also said that hospital could not do anything without proof, and that he could not investigate. The conversation ended with Roop saying that she was going to talk to human resources about the matter. (Tr. 47–48, 52–58; GC. 4, 5)

In all, Roop received approximately 14 spoofed text messages between July 2016 and May 2017. All contained memes or images that were either disparaging, pejorative, or derogatory. (GC. 4) Trying to unmask the identity of the sender, Roop replied to two of the text messages with her own memes—both of which contained grammatical errors. At some point Matuszak posted these memes on her Instagram account with a comment "How a hypocrite with poor grammar threatens someone," in an apparent reference to Roop. Matuszak's Instagram home page also included a meme with the phrase "MONKEYS ARE ORNERY AND HARD TO WORK WITH." (Tr. 52; GC. 4)

3. Human resources learns about the text messages

Pereyra brought some of his text messages to Ambrosini, who believed they were racially discriminatory, inappropriate, and hurtful. Pereyra also filed a written complaint with human resources on November 30, 2016. Ambrosini ran a report of the telephone numbers on file for the RTs, but none of them matched with the text message phone numbers. Ambrosini asked whether Pereyra had filed a police report, and Pereyra said that he had shared everything with the police. Ambrosini discussed the matter with Marino and the Union, telling them that Pereyra thought the texts were potentially being sent by current employees in the department, and by Seigal. Regarding Roop's messages, Ambrosini was aware that Roop was receiving similar types of text messages and suggested that she call the police and change her phone number. Ambrosini never interviewed any of the therapists in the department about who may have sent the text messages. (Tr. 1554–58, 1646–47; GC. 20)

[14] Internet memes are usually photos, images, quotes, or sometimes text superimposed over images, which pass from person to person over the internet. See e.g. Terrica Carrington, Note, *Grumpy Cat or Copy Cat? Memetic Marketing in the Digital Age*, 7 GEO. MASON J. INT'L COM. L. 139, 142 (2016).

M. Marino proposes disciplining Roop in July 2016

In July 2016 Marino proposed issuing Roop a written verbal discipline over two alleged incidents where Marino believed she was involved in unprofessional verbal altercations with others. Marino completed a disciplinary form and emailed it to Ambrosini on July 26, intending to issue it to Roop that afternoon. In the form, Marino had included a paragraph stating that any future similar occurrences could lead to termination. Ambrosini replied, asking Marino what Roop had done to warrant a discipline, and further inquiring as to whether Marino had interviewed Roop for her side of the story before deciding to discipline her. He also told Marino to remove the paragraph about possible termination, as it was heavy handed for a verbal warning. Marino replied saying that Roop allegedly had words with a nurse over a doctor's order and also disagreed with someone in the department regarding the daily assignment sheet. Even though he had proposed disciplining Roop, Marino told Ambrosini that he had not spoken to her about the allegations. The discipline was never issued. (Tr. 1334–37, 1426–27, 1571–74; GC. 69, 72)

N. August staff meetings called to address the "list of concerns"

Two meetings were held in 2016, one on August 15 and one on August 17, to address the June 26 list of concerns. While it appears the topics discussed in both meetings were identical, the majority of the testimony at trial involved what was said during the August 17 meeting. This meeting occurred in the boardroom, near the cafeteria. About 15 RTs attended; a meeting agenda was distributed to employees as they signed-in. The meeting started with Marino telling employees that the Union forwarded the list of concerns to Ambrosini, who gave them to Marino, and the purpose of the meeting was to discuss the matter. He said that the meeting was the first and last time that he was going to address the list of concerns. (Tr. 74–76, 593, 1314)

Although it was not on the list, the first issue Marino discussed was the anonymous text messages being sent to people in the department. Pereyra spoke up, saying that the text messages needed to stop, as it was affecting both him and his family. Roop also said that she was receiving anonymous text messages. Marino told the staff that, if the texts were coming from people within the department, he wanted them to stop, that it was a form of harassment which would not be tolerated, and people would be putting their jobs at risk by engaging in such conduct. (Tr. 76, 1228–29, 1314–15; GC. 7)

Marino then addressed the list of concerns, going issue by issue and explaining to the therapists the points set out in his written rebuttal. The PFT lab tech position was a significant part of the discussion during the meeting. Eric Thom addressed the matter directly with Marino, complaining about the newly instituted state licensing requirement, as it conflicted with past practice. Marino said that he did not need to consult with the Union or tell employees when he was going to make some changes in the department. And, he said that he did not need to go through human resources to fill the position, as there was no differential in pay. Thom raised the issue of seniority, complaining that Ochoa, as a per diem and relatively new hire, was given the position. Thom also asked whether he would be allowed to train in the PFT lab if he received his state license. Marino replied saying he would think about it, but that he was not going to remove Ochoa to put Thom in the position. Thom responded by saying that it seemed like favoritism on

Marino's part. At one point, a frustrated Marino raised his voice and told Thom to get to the "damn point." It was clear to Thom that Marino did not want to hear what he had to say, so Thom told Marino not to swear at him. (Tr. 77–83, 595, 926–28, 944–45, 1231–32, 1311–13)

In the list of concerns, employees had complained that day shift therapists were performing the majority of the job tasks that were supposed to be performed by the resource technician, without getting any credit for the work. They wanted the resource job duties to be incorporated into their daily tasks, which could alleviate the need to cancel hours for some of the benefited employees. At the meeting Marino announced that the resource job duties would be distributed among all the day shift therapists, obviating the need for a resource tech. Thus Hamid only worked in the resource tech position for about three months. (Tr. 66, 84–85, 2015; GC. 6, p. 12, GC. 98, #635)

O. Matuszak, Hamid, and Smith file a written complaint against Roop

On October 4, 2016, Matuszak, Smith, and Hamid drafted a three page, single space, letter to Marino claiming that Roop had subjected them to "unprofessional hostility within the workplace." In the letter each person listed his/her own specific alleged instances of hostility and ended the document with a group summary. (GC. 25)

Matuszak complained that, after she was awarded the PFT lab tech position, and Hamid the resource job, Roop became unprofessional and rude towards her. Matuszak alleged Roop stopped speaking to her, and started spreading gossip that Matuszak would not train anyone else in the PFT lab. Matuszak accused Kaur of lying to Roop about their discussion, and of informing Roop about Matuszak's movements within the department. Matuszak accused Roop of walking out of the break room and saying things like "I gotta get outa here," "nasty," and "Oh God" whenever she was present. Matuszak also alleged that Roop abused her power as team-lead by favoring her friends regarding assignments. Among her complaints, Matuszak alleged that a coworker had told her that Roop was checking the PFT lab schedule "behind her back" to see how many patients cancelled their appointments, and that Roop was overly interested in what Matuszak was doing at all times. Matuszak ended her complaint noting that the she had attached, and highlighted, policies that Roop had violated and commented to Marino that Roop's "display of disrespect to your position must weigh on you." (GC. 25)

Hamid complained that Roop badmouthed people when they were not in the room, constantly gave him a "bad attitude," and made "snarky remarks" towards him and in his general direction. He further complained that Roop was rude to people, and tried to disparage other therapists to make herself look good. Hamid also claimed that Roop was manipulating the assignment sheets to keep her friends from being temporarily laid off, while doing the opposite for people she did not like. (GC. 25)

As for Smith, he complained of having to witness Roop's "antics" like sighing, talking under her breath, and using profanities. He also accused Roop of manipulating the assignment sheets, and asked Marino to "put an end to her antics of thinking she owns the" department, and to consider removing her as team lead. Smith stated that he enjoyed working for Marino, not

only as a manager but also as a friend, but was willing to "resign if this 'monkey business'" continued. (GC. 25)

The summary claimed that Roop was "well known" for dismissively waiving her hands and saying "Fuck that! aloud for all to see." And, all three noted that while they did not work with Roop "moment to moment" they believed that Marino knew their accusations were accurate and were "hoping for a remedy to this unpleasantness." (GC. 25)

Marino testified that Matuszak, Hamid, and Smith presented the letter to him around October 10, and he discussed it with them. He then contacted Ambrosini. According to Ambrosini, at the time of the letter two distinct camps had formed within the department. One camp was aligned with Matuszak and another aligned with Roop. Those in Matuszak's camp included Hamid and Smith, while the majority of the other therapists had aligned themselves with Roop. Eventually a meeting was set up with Roop a month later to discuss the letter. (Tr. 1331, 1336, 1579–80; GC. 95)

P. Marino blocks computer system access to patient scheduling

After receiving the letter from Matuszak, Hamid, and Smith, sometime during the first week of November Marino blocked the computer access to patient scheduling, including the PFT lab, for team leads. One day in early November Roop tried logging into the scheduling system but could not do so. Roop called IT, and was told that Marino had blocked her access. Two other leads also told Roop that their access was blocked. She spoke with Marino and asked him why he had blocked their access to the system. Marino said that people were going into the computer system and looking at the different patient schedules and he did not want them to do so. Roop protested, asking how the team leads would know when to show up for prescheduled C-sections. Marino said that the hospital would print out the schedule and put it on the bulletin board. According to Marino, he blocked everyone's access to the patient scheduling system because he believed that Roop was accessing patient information regarding patients being scheduled in the PFT lab. (Tr. 87–91, 875–78)

Q. November 10, 2016 Meeting with Roop

On November 10, 2016, Ambrosini and Marino met with Roop; Union representative Mullany was also present. [15] The meeting started with Ambrosini saying that he had received a letter from Matuszak, Hamid, and Smith, setting forth some concerns. Roop was never shown the letter. (Tr. 93–94; 1363–65)

Marino told Roop that she was unprofessional, curses, looks down on people, and does not do her job. However, other than discussing an alleged incident with a nurse in July, Marino

[15] Marino testified that this meeting occurred on November 10, 2016. (Tr. 1497) Some of his notes confirm this date, while other documents refer to the meeting as having occurred on November 14. (GC. 74, 91, 95) Roop testified the meeting occurred on November 14. However, she also testified that Marino called her on a Wednesday to attend the meeting which occurred the next day. (Tr. 93) November 10, 2016 was a Thursday, while November 14 was a Monday. Thus, I believe the meeting occurred on Thursday, November 10, 2016, and will refer to it as having occurred on this date throughout the decision.

did not give Roop any specific examples backing up his allegations.[16] Roop asked Ambrosini whether he had spoken with anyone who actually worked with her, and whether he had any problems with her work; Ambrosini said no. Roop also asked whether she had any write-ups with respect to her work, and Ambrosini said there were none. Roop denied cursing at people, or looking down on anyone. She said her job as a team leader required her to intervene in critical situations, but that she did not step on people's toes. Marino said that they were going to remove Roop from the position as team lead. Mullany protested saying that Roop was a 17 year employee, had nothing in her file, and that it was extreme to remove her from being a team lead based on a letter somebody wrote.[17] Roop then brought up the issue of her text messages, saying that she had never received these types of texts before, and that it was not a coincidence she was receiving them now. Ambrosini said they could not do anything about the text messages, as they were not linked to anyone's phone number. He told Roop they were going to discuss the issues raised in the letter and get back to her. (Tr. 94–97, 1365; GC. 95)

R. Shop steward election in the respiratory department

In November 2016, Mullany asked Pereyra to conduct an election for an additional shop steward. Pereyra and Matuszak were already designated as stewards, but the Union wanted to add an additional person to become part of its bargaining team. On November 17, Pereyra sent an email to the members of the department informing them of the vote. There were two candidates for shop steward, Roop and Smith. Pereyra's email asked that all votes be submitted to him by November 24. (Tr. 106, 443, 495; GC. 21)

On November 23, at 4:26 p.m., Pereyra received an anonymous text. This one read "VOTE MONKEY;" an ape's face appeared instead of the "o" in the word "VOTE." (GC. 20; GC. 19, p. 12) That same evening, at 6:55 p.m., Smith sent Pereyra a text message asking for another update as to the vote tally. Pereyra replied saying that Smith had received 9 votes, while Roop had 20 votes. Smith then replied "9 people like me?" (GC. 55)

On December 1, Pereyra emailed the entire respiratory department, including Marino, informing them that Roop won the election with 20 votes, while Smith received 9 votes. Roop's position as Union steward lasted through March 2017 when the Union placed a "hold" on all the shop steward positions, pending open forum meetings to address the issues taking place in the respiratory department. (Tr. 107, 447–51, 520 – 23; GC. 22, 54)

S. Roop's November 21 discipline

Roop received a written verbal warning on November 21, 2016. The warning says that she violated the hospital's standards of conduct for "Bullying, Discrimination, Harassment and

[16] The alleged nurse incident was one of reasons used by Marino to propose disciplining Roop in July 2016. But after emailing Ambrosini, no discipline was issued.

[17] What appears to be an agenda for the meeting was introduced into evidence. (GC. 95) However, other than discussing the nurse incident, and telling Roop that she was she curses, is unprofessional, does not do her job, and looks down at people, there is no evidence that any of the other items set forth in the agenda were discussed with Roop. Also, the document lists Justin Kmetz participating as Roop's Union steward; both Roop and Marino testified that Mullany was actually present for the Union. (Tr. 94, 1364) Thus I believe the document is simply a draft or proposed agenda prepared in advance, and does not indicate what was actually discussed during the meeting.

Retaliation Provisions and Complaint Procedure," and she was being disciplined for "unprofessional behavior in the work place." It also warned Roop to refrain from any further incidents, including but not limited to, "language, gestures, incitement, behavior, gossip and/or hearsay," and says that "any further incidences will result in the progression of the disciplinary process." (GC. 8)

Marino emailed a draft of the discipline to Ambrosini the morning of November 21, asking him to review the discipline.[18] The document states that it was being issued by both Marino and Ambrosini. According to Ambrosini, the discipline was issued to Roop because there was an unpleasant interaction between Roop and Matuszak. The interaction was unprofessional, but not so severe that it warranted anything greater than a verbal warning. When asked at trial what conduct Roop engaged in that would have constituted bullying or harassment, Ambrosini could not answer definitively, saying it would have depended on Roop's interaction with Matuszak at the time and the wording of the specific policies. He admitted that, notwithstanding the wording of the discipline, her conduct did not constitute discrimination or retaliation, nor was it afoul of the "complaint procedure" process. (Tr. 1588–89, 1651, 1667–68; GC. 8, 73)

According to Marino, he made the decision to discipline Roop based on her interactions with Matuszak, Hamid, and Smith as set forth in their October 4 letter. (Tr. 1362) Marino testified that, after he spoke with Roop on November 10, no other investigation of the incident occurred. (Tr. 1362, 1365)

As for the disciplinary meeting itself, Roop was called into Marino's office on November 21; only the two of them were present. Marino told Roop that the hospital had come to a conclusion based on their earlier meeting and had decided to issue Roop a written verbal warning, and that the discipline was based on his findings. According to Marino's notes, Roop was disciplined because of her unprofessional behavior towards coworkers, which included harsh language, rolling her eyes, and verbally belittling other employees. However, Marino did not give Roop any examples of when she behaved unprofessionally or any other specifics regarding her alleged improper behavior. The only thing he told her was that she rolled her eyes, and she could not do that. Marino thought that Roop had leaked information from the November 10 meeting to other employees in the department, so during this meeting he asked Roop if she had done so. Roop replied that she had not relayed any information about that meeting to anyone. (Tr. 100–05, 1365–66, 1458–59; GC. 91, GC. 100)

Marino gave Roop the document and said he would forward it to human resources. Roop signed the document; it was her first discipline in 17 years at the hospital. (Tr. 104, 154)

T. A group of therapists file bullying complaints with HR

After receiving her November 21 discipline, Roop called Backus complaining that "they won't leave me alone," and specifically mentioned Matuszak. Backus told Roop there were

[18] Marino included in the draft discipline a phrase stating that the Respondent reserved the right to proceed directly to termination if any future incidents occur. However, after Ambrosini received the proposed draft, that paragraph was removed from the actual discipline that was issued. (Tr. 1652–53; GC. 73)

things they could do, and places to help them, and said she would speak with Marino and Gandhi. Backus found Marino and Gandhi outside the hospital smoking. She told them she was concerned about the health of the department, that people are saying they are being bullied, intimidated, and harassed, and workers do not believe they can come to either Marino or Gandhi who they think are part of the problem. (Tr. 240–42)

Gandhi told Backus that she was only getting information from one source. Backus replied that she works both shifts, day and night, and has heard this from not just one source, but from other people as well. Backus had, in fact, heard these complaints from more than one person. Marino told Backus that he felt it was going to get better, but that it was going to get worse before getting better. Backus told Marino that he and Roop had been friends for a long time, and they needed to talk because what was occurring was ridiculous. She also told Marino and Gandhi that her next step was to go to human resources. Both Marino and Gandhi said that they understood. (Tr. 242–43)

After this discussion, Backus obtained a bunch of bullying complaint forms. Both she and Roop filled out the forms, and Backus also distributed them to various other therapists telling them to submit the forms if they had been bullied, or if they had witnessed such conduct. Frank Mardenzai and Philip Duong completed forms and gave them to Backus to submit to human resources. On November 28, Backus took the completed forms, submitted them as a group to human resources, and had each one date and time stamped. Whenever a bullying complaint is filed with human resources by someone Marino supervises, he is contacted by human resources and asked about the complaint. Notwithstanding, Roop, Backus, Mardenzai, and Duong, were never contacted about their complaint forms. (Tr. 244–46, 790–91, 1401–02, 1611–17; GC. 36)

As for the individual grievances listed in their bullying complaint forms, Backus complained that Matuszak was using human resources to harass Roop, and referred specifically to the letter she wrote with Smith and Hamid. She further complained that management had been discriminating against workers. Specifically, she wrote that several people of color had filed complaints which were not acted upon, but when Matuszak and Smith complained, actions were taken against employees who were of different ethnicities. She also asserted that telling employees they cannot discuss their problems violates their freedom of speech. (GC. 36; Tr. 246–47)

Roop attached a supplemental letter to her form, and complained about being called into HR based upon the letter written by Matuszak, Hamid, and Smith. She went on to list various grievances against Matuszak, Hamid, Smith, and Marino. Roop said she believed they were retaliating against her for going to human resources, with her coworkers, to support Pereyra and that Matuszak, Marino, and Gandhi thought they went to human resources to complain about their job performance. Roop stated that there were instances of favoritism in the department, and when she would raise the issue she faced retaliation. In her letter Roop also wrote that anyone who spoke up became the victim of retaliation. Roop, who is of Indian ethnicity and is originally from the Fiji Islands, also stated her belief that she was being mistreated because of her race and color, along with her speaking up. (Tr. 28; GC. 9, 10, 36)

In his complaint form Mardenzai protested the fact that, when the resource tech position became available, it was not filled by seniority and instead went to someone less-senior. And, when a complaint was made, they were told that they were inciting the department into an uproar. (GC. 36)

Finally, in his bullying complaint form, Duong wrote that he was submitting the form in support of Roop who he understood was getting disturbing text messages and was being harassed by the management team. Duong further wrote that he heard throughout the department that Roop was written up for absurd reasons, and that he and his coworkers believed it was in retaliation for Roop becoming a Union representative and defending the department from all the favoritism that existed. As a resolution, Duong stated that they must find out who was sending the terrible text messages and stop the bulling before it got out of hand and became physical. (GC. 36)

Ambrosini acknowledged receiving the complaints, and said that they were the driving force behind the eventual meeting in December 2016 with CEO Dhuper. According to Ambrosini, after receiving the forms "it was like an all hands on deck type of thing where we all decided to meet." (Tr. 1608–10, 1944–45)

U. Leak investigation

On November 21, 2016, Marino emailed Ambrosini saying it had come to his attention that information discussed with Roop in their November 10 meeting, specifically the names of the three employees who had authored the complaint letter, had been leaked to others in the department. According to Marino, the information was to have remained confidential, and he speculated as to whether other information had also been leaked as well. (Tr. 1329–30; GC. 74) It was Matuszak who told Marino "the information leaked out." (GC. 91)

Ambrosini replied to Marino by asking, among other things, whether he was certain Roop was the one who leaked the information. And, if so, what Marino wanted to do as potential discipline. Marino replied saying that he had not verified the leak had come from Roop, but if it did he thought that a suspension would be warranted. Ambrosini responded telling Marino to be certain, as he wanted to be careful that it was not just Matuszak, Hamid, and Smith trying to get Roop into more trouble. At the same time the pair were exchanging emails, Matuszak sent Ambrosini an email, with a copy to Marino, complaining about Roop generally and inferring that Roop was responsible for the leak. (Tr. 1645–46; GC. 74, 87)

Marino then proceeded to launch an investigation into the alleged leak, questioning several employees, and taking notes as his inquiry progressed. He spoke with Matuszak and asked how she knew that others in the department were aware Matuszak, Smith, and Hamid drafted the letter about Roop. Matuszak told him that, during a conversation with Rose Rogers, Rogers told her that Roop believed "you guys are after her," and referred to "the letter you wrote." (GC. 91) Matuszak gave Marino the names of others who might have further information, and Marino continued with his investigation speaking with multiple employees. (Tr. 1461–62; GC. 91)

Marino spoke with Fawad Meskinyar about the leak on November 23, 2016. According to Marino's notes, he told Marino that he did not know who leaked the information, but had heard talk about it in the department. After the Thanksgiving holidays, on November 28, Marino again spoke with Matuszak, who told him that Roop had been handing out bullying complaint forms to the staff; Matuszak learned this from My-Quyen Giang . That same day, Marino asked Giang if she had seen anyone handing out bullying forms. Giang told him that she saw Backus give a bullying form to Grant Vea while they were working at another hospital, but did not know if the form had been completed.[19] She also told Marino that Backus asked Vea who he voted for in the shop steward election. Finally, she said that she did not know anything about the meeting in human resources. (Tr. 1459–60; GC. 91)

On November 28, Marino also spoke with respiratory therapist Rose Rogers. Marino called Rogers into his office and with only the two of them present said that what they were going to discuss was strictly confidential and that he needed to know if Roop had discussed anything with her regarding a meeting Roop had with human resources. Rogers told Marino that she was not going to answer the question. Rogers further said that she was friends with everyone in the department, Marino knew where she stood, and she was not answering the question. Marino did not say anything in response, and the conversation ended. A day or two later Rogers went back into Marino's office and told him that she was disappointed he would attempt to put her in the middle of a situation, and it made her feel uncomfortable. She asked Marino why he would do that, and Marino told Rogers that her name came up. Rogers told Marino that what he did was wrong, as he is in a position of authority as the manager. Marino apologized to Rogers who then walked out. (Tr. 729–32, 1459; GC. 91)

On November 29, Marino continued his investigation by speaking with Grant Vea. He asked whether Vea knew anything about a meeting in human resources earlier in the month, and about bullying forms being handed out. Vea denied knowing anything about either subject. According to his notes, Marino did not believe Vea's answer regarding the bullying forms. Marino then told Vea that he gave a form to Backus, who had asked for one, and now the forms were being circulated. Marino asked Vea whether he had anything to tell him about being bullied, that if he filled out a bullying complaint form it would have to be specific as to the mistreatment he experienced, and that he could come to Marino who would take care of the situation. However, Vea told Marino there was nothing to say, and that he was good with everyone in the department. On November 29, Marino also asked Eric Thom about the leak, however Thom told him he did not hear anything about it. (Tr. 1460–63; GC. 91)

Finally, on November 30, Marino asked Amanpreet Kaur about the alleged leak. Kaur was working that day and Marino called her into his office; only the two of them were present. Marino asked Kaur whether she knew anything about a confidential meeting that took place in human resources. Kaur assumed Marino was talking about the meeting with Roop, as Roop had told her that she had been called to human resources. Kaur denied knowing anything about it. According to his notes, Marino did not believe Kaur, thought she knew more than she was saying, but was trying to play dumb. After the meeting ended, Kaur told her coworkers about the meeting. (Tr. 817–18, 1459–60; GC. 91)

[19] I do not credit Marino's subsequent testimony that Giang "offered" the information to him. (Tr. 1460–61)

Notwithstanding Marino's eagerness to punish Roop for the alleged leak, Ambrosini recommended against it, and no discipline was ultimately issued. According to Ambrosini, while the preferred position of management was that matters discussed during investigatory interviews remain confidential, employees were free to share that information with whoever they wanted so long as it did not compromise the investigation. In this instance there were no grounds to discipline anyone. (Tr. 1591; GC. 88)

V. Respondent meets with Matuszak and Roop

1. Meeting with Matuszak

On about December 4, 2016, O'Keefe, Ambrosini, and Marino met with Matuszak in the human resources department and listened to her complain about Roop. According to O'Keefe, who ran the meeting, Matuszak claimed that Roop demeaned, ignored, and disrespected her. Matuszak further complained that whenever she walked into the department, one group had aligned against her and would disrespect her. O'Keefe recommended that Matuszak own her part of the conflict, but Matuszak claimed that she did not know what had happened to create the problem, and speculated that a decision was made that Roop did not agree with, and it spiraled from there. At O'Keefe's recommendation, Matuszak agreed to speak with Roop one-on-one. O'Keefe ended the meeting saying that she would try and facilitate a meeting with Roop. (Tr. 2226–27, 2277–78, 2345–46)

2. December 5, 2016 meeting with Roop

On December 5, Marino told Roop that she needed to attend a meeting in human resources later that day. Roop called Justin Kmetz, a Union steward who works in the radiology department, and asked him to attend the meeting as she did not feel comfortable attending the meeting alone. (Tr. 108–09; 688–89)

The meeting took place sometime after 2:00 p.m. in the boardroom near the human resources office. Earlier that morning, Marino emailed Ambrosini a document he wanted him to have for the meeting. The document concerned Roop's alleged leaking of information that was contained in Backus's complaint to human resources. Marino outlined the hospital's standards of conduct that he believed Roop had violated, including "abusive treatment, . . . discourteous conduct or inappropriate language directed towards" coworkers, and "incompatibility or inability to work in harmony" with others. Marino also set forth a list of possible disciplinary actions, numbering them from one to five, for Ambrosini to consider: (1) resignation with the understanding the hospital will not report the situation to the Respiratory Care Board; (2) termination and the hospital will report the situation to the Respiratory Care Board; (3) a final written warning, to stay in her file for 24 months, with termination for any further inappropriate behavior; (4) removing Roop from the position of team leader; and (5) changing the schedule to accommodate replacing the team lead. (Tr. 109, GC. 79)

Present for the meeting was Ambrosini, Marino, O'Keefe, Roop, and Kmetz. Ambrosini started the meeting saying that there was talk that Roop had breached confidentiality regarding a previous meeting, and they were there to investigate the claim. Referring to the November 10

meeting, Ambrosini said that word has gotten out that Roop had broken confidentiality by talking about the meeting with others, and he asked Roop if she did so. Roop denied the allegation, and implied that it must have been Marino who had been talking about it. Marino denied the claim and said it was very coincidental other people were hearing about the things that were discussed in that meeting. Ambrosini also said that it was a coincidence they had received bullying forms from a bunch of people in the department complaining about bullying and harassment, and that the statements seemed to defend Roop. Ambrosini asked Roop what she had done to get people to submit these complaints. Roop said that she did not have the power to control what other people write or say, and did not make anyone submit the complaints. (Tr. 109–10, 689–91)

At some point during the meeting, O'Keefe said that one of the purposes of the meeting was to take away Roop's position as team leader, thereby putting her back as a regular therapist.[20] Roop protested, complaining that Smith, who worked as a night-shift team lead, had multiple complaints against him and was still working as a lead, while she had a clean record and the only time she called in sick was the previous week because she was being picked on. Roop further complained that Smith was disrespectful to her whenever she gave report to him during shift changes, and that he crumpled up her written reports and threw them away. Roop said that she was under a lot of pressure, had been receiving anonymous text messages, and tried to avoid people that were causing trouble in the department. O'Keefe told Roop that she needed to speak with everyone in the department, and that she wanted Roop to sit down with Ambrosini and Matuszak and sort things out. Roop agreed to do so. Ambrosini and O'Keefe said that they were going to talk about her team lead status, and get back to her. However, O'Keefe said that if things did not start changing, and if she kept hearing more talk about bullying or harassment, "I'm going to start firing all of you." They then agreed to meet back in a week for the joint meeting with Roop and Matuszak. After the meeting, Roop filed three complaint forms with the EEOC. (Tr. 111–114, 204–05, 691–92, 2283; GC. 10)

On December 12, Kmetz and Roop met with Ambrosini, who was trying to set up a meeting where Roop and Matuszak could work out their issues. Both Matuszak and Roop had originally expressed an interest in such a meeting, but Roop changed her mind and did not want to meet with Matuszak. She told Ambrosini that she was under a lot of stress, had a lot of anxiety, was becoming sick, and was not ready to sit down and talk with Matuszak to work things out. Roop said that she was just going to keep doing her job, avoid Matuszak, and avoid people who were causing her trouble. Ambrosini told Roop that, if she changed her mind, to let him know. (Tr. 205, 219–20, 692–693; R. 28)

W. December 10, 2016 email from Backus to Dhuper

On December 10, 2016 Backus sent an email to CEO Dhuper, along with three other hospital executives, regarding the respiratory department. In the email, Backus detailed her professional background and stated that she was taking it upon herself, realizing it put a target on her back, to write on behalf of a large group of Respondent's respiratory therapists who found themselves with no other recourse. Backus complained that workers of color, or of a different national origin and race, were constantly subjected to a hostile work environment by coworkers

[20] Transcript page 691, line 22, reads "take away your leave pay." It should read "take away your lead pay."

and members of the hospital's management and administration who were Caucasian; she claimed that they had even found the same discrimination with human resources. In the email, Baucus stated that their problems included coworker bullying, harassment, threats, demotions, racial discrimination, intimidation, retaliation, and breach of the union contract. She declared that the workers were at their wits end trying to give their best to the hospital, but the continued retaliation and hostile work environment had taken its toll. Therefore Backus wrote that they wanted to reach out for assistance, as far up as necessary, to get some type of resolution. (GC. 37; Tr. 247–48)

At the time he received the email, Dhuper testified that he did not know who Backus was, nor did he know any of the respiratory therapists. Dhuper, who is of Indian descent and came to the United States when he was 12 years old, was shocked by the email. He spoke to O'Keefe, who told him there was a problem in the department that needed to be addressed, but it was a problem with just a few of people, that it was more a personality issue, along with some images related issues. He also spoke with Ambrosini. Ambrosini told him that they had investigated complaints in the past, and that there were significant issues related to text messages with bad pictures that constituted extremely disturbing and highly inappropriate behavior. Ambrosini showed Dhuper numerous complaint files that were on his desk regarding the respiratory department that Ambrosini was investigating; the files were thick. Dhuper testified that he was eventually made aware that there were two camps, involving two people, and that the department got split taking sides. When he saw the department's complaint file in Ambrosini's office, it raised an alarm; Dhuper knew he needed to have a staff meeting. (Tr. 2406–12, 2284, 2431–33)

X. December 14, 2016 staff meeting

1. Dhuper tours the department

Based on Backus's email, and his discussions with O'Keefe and Ambrosini, Dhuper requested that an immediate staff meeting be scheduled with the respiratory department; the meeting was scheduled for December 14, 2016. A few days before the meeting, Dhuper decided to take a tour of the respiratory department for the first time. Dhuper, Ambrosini, O'Keefe, Marino, and one of the hospital's engineers, walked through the department together. Dhuper was quite disappointed with what he saw and the state of the department in general. Inside the tech room were empty soda bottles, fruit flies, a broken wall clock, and a television with DVDs. He commented to the group on potential safety hazards, things that were dirty, the clutter lying around, and graffiti markings. He also pointed out things he wanted changed and new equipment that he wanted to order. Dhuper was extremely upset with Marino and the dirty and unorganized fashion in which he found the department. He told Marino that the condition of his department was unacceptable and that he needed to get the department in order. Among other things, Dhuper told him that the clock needed to be fixed, the walls painted, the floor replaced, and a new lockable bulletin board installed. (Tr. 1592–95, 2413–14, 2424– 29)

2. The December 14 staff meeting

The staff meeting took place in a conference room near the human resources department. Present for the hospital was Dhuper, Ambrosini, Marino, and O'Keefe. About 20 respiratory

therapists, over half of the department, attended. Marino took notes of what was said during the meeting. (Tr. 116, 250–51, 452, 736, 814, 869–73, 1595–96, 2289, 2415–16; GC. 76)

The meeting started with Dhuper introducing himself, discussing his employment history, and the various improvements and upgrades that were made to the hospital since becoming CEO. He spoke about his recent tour of the department, and the renovations he wanted to make in the tech room including repairing and painting the walls, and installing a new floor. He noted that personal belongings and electrical items like toasters, the microwave, and television set, needed to be removed; also the clock, which was broken, needed to be replaced. He stressed the importance of cleanliness, said the department needed to be kept clean and documents could not be left just lying around. (Tr. 252, 2416, 2290, 2425–26; GC. 76)

Dhuper then said that he was made aware of issues and concerns in the department, and that he wished to hear from the staff to see if he could bring a solution to their problems. He held up a stack of papers that were in a file, said it was the respiratory department's harassment file, and it was the thickest file in the hospital. He said that if people had personal issues, likes or dislikes, these needed to be kept outside of the building. Dhuper told the staff he was very disappointed about the behaviors he had heard about regarding the department, and said that he could fire everyone in the department, those that did something about this and those that did not. He stated that he could not believe a group of people who took care of patients would behave in such a manner, and that CEOs usually do not deal with these types of matters . Finally, he told the therapists that he had a firm belief people should enjoy where they worked, so the staff needed to ask themselves "do I want to be employed here. Am I happy here." (GC. 76) (Tr. 116–17, 452, 596–97, 736, 2290–91, 2416–17, 2430–32; GC. 76)

Dhuper then told the therapists that he wanted to hear their problems. He said that he knew there had been a lot of complaints in the department going back several months, that human resources had kept him in the loop, and the meeting was an open forum for employees to discuss their concerns to see if he could find a solution. Despite Dhuper's invitation to speak, the staff was hesitant to talk about the problems in the department. (Tr. 253, 453, 2290–91)

Monique Johnson eventually started the discussion by talking about issues with the hospital's internal phone system, which Dhuper said he would look into. Finally, Backus spoke up to address the harassment complaints and said that people were hesitant to speak up in an open forum as they were afraid of retaliation and intimidation because the offenders were sitting in the room and as soon as someone speaks up they will be targeted. Backus said that she was not afraid to speak because, as a per-diem employee, this was not her full-time job; she could afford to lose her job at the hospital, but others in the room could not. Dhuper then chastised the therapists for not speaking up sooner. Johnson said that she had been speaking up for years about these issues, had told Marino, but nothing had been done. (Tr. 118, 253, 328, 597–98, 2291, 2421; GC. 76)

Pereyra also spoke up and said that he had been the target of discriminatory text messages which some coworkers were sending him and they included pictures with animals which were discriminatory. Pereyra gave copies of what he had received to Dhuper, who then asked whether Pereyra had filed a police report. Pereyra said that he had done so and Dhuper

asked for copy of the report. Pereyra then discussed the pictures that had been up in the tech room, and on social media, saying that he wanted it to stop. Roop also got up and gave Dhuper copies of the text messages that she had received. Dhuper said that the text messages were grotesque and disgusting, he had seen them and did not want to see any more of them; he said that he would investigate the matter. (Tr. 117, 254, 453, 530–32, 597, 1598, 2291–93, 2418–20; GC. 76)

Dhuper next addressed the staff about the split in the department. He said that, as he understood it, a rift had formed in the department, there were factions that were polarizing the staff and he wanted to know who those people were. One employee suggested hiring a mediator to bring the groups together, and said the identity of the factions were obvious due to the individuals who had filed the complaints in the thick file Dhuper was holding. After this discussion, Roop complained that she no longer had access to scheduling in the computer system, and that she could not do her job as team leader without this access; Dhuper said he would look into her claim. (Tr. 118. 2291; GC. 76)

At this point, Dhuper testified that the "messages, discrimination, racial teddy bears and all things" were "starting to fly up." (Tr. 2437) It occurred to him that the meeting was becoming bigger, longer, and more deeper than he expected; quite a few people had a lot to say, some had opinions, some had facts, and others were suffering. Therefore, he told the staff that he wanted to hear from each them; anyone who wanted to meet with him in person and speak openly could do so. He told them to contact his administrative assistant to schedule an appointment. However, he told them not to just bring their problems, but to also bring a solution. The meeting, which lasted about an hour, then adjourned. (Tr. 118–119, 254, 453, 598,736, 1598, 2293, 2418, 2437–38; GC. 76)

Y. Dhuper's individual meetings with employees in December 2016

About 10 employees took Dhuper up on his offer to meet individually. Their meetings occurred either in a boardroom near Dhuper's office, or in a nearby conference room. O'Keefe was present with Dhuper for all the meetings, but generally did not speak.

1. Meeting with Babita Roop

Roop met with Dhuper on about December 18. She introduced herself to Dhuper and O'Keefe and they discussed their respective backgrounds. Dhuper then asked Roop about her concerns. Roop had multiple complaints. She complained that her computer access to scheduling was blocked. She complained about Marino reducing the minimum staffing per shift while two people were sometimes working in the PFT lab when there was not enough work. She complained that Smith was disrespectful during shift changes, would take her assignment sheet, crumple it up, and throw it on the floor. She complained generally about Matuszak, bringing up what Dhuper called serious concerns, including a claim she was double-dipping by working as a college instructor while also on the clock for Respondent. She also brought up the text messages she had received. At some point during the meeting Dhuper made a statement about there being two groups in the department, and asked Roop which group she belonged to. Roop said that she did not belong to any group, but was an individual. If she believed something was wrong, if

people were not following the rules, or if she was not being treated properly, she was going to speak up. Dhuper also asked Roop if she was the ringleader. Roop replied saying that she was not the ringleader, but again said that when something is not right she will speak up. Roop testified that she took that comment personally, and then became upset and emotional. She told Dhuper that she was upset and did not want to talk anymore. Dhuper told her they would have another meeting after he spoke with everyone else. (Tr. 119–22, 212, 2300, 2461–62; 2583)

2. Meeting with Jernetta Backus

Backus met with Dhuper on December 19, at 3:30 p.m. Before the meeting, she drafted some talking points and emailed them to Dhuper's assistant who put the document on Dhuper's desk. Backus's talking points consisted of 14 typewritten pages, setting forth 19 separate events, and critiquing how management handled each event. She also provided her recommended solutions for the department. The events themselves included the pictures posted in the tech room and the text messages and memes sent to Roop and Pereyra. Throughout the document Backus was critical of Marino and Matuszak; she also criticized Smith and Hamid. Backus's solutions for the department included the resignation/removal of Matuszak; training for Marino on how to work as a leader (but noting his resignation as manager was the best scenario); re-education for Ambrosini and O'Keefe on their responsibilities as leaders; and suspensions for Smith and Hamid along with requiring them to take a sensitivity class for their role in assisting Matuszak "in her harmful vendetta." (Tr. 2559, GC. 38, 99)

As for her actual meeting with Dhuper, it occurred in the boardroom with Dhuper and O'Keefe present. After discussing Backus's background, Dhuper asked her to tell him about the document she sent. Backus asked if he had read it, but Dhuper had not. He said that he would read it but wanted to know if Backus had been personally harassed. Backus said that, while she had not been personally targeted, she had a very big problem with the gorilla pictures and found them offensive. Dhuper asked if Backus was the speaker of the house for the group, and Backus said yes. Backus told Dhuper that the mood of the department was negative, and that Matuszak was a problem in the department. Dhuper told Backus that he was only interested in what she has experienced personally, and the meeting ended. A few days after the meeting, Dhuper read Backus's 14 pages of talking points; he then gave the document to Ambrosini to investigate. (Tr. 256 – 57, 2301, 2453–54, 2559–2564; GC. 99)

3. Meeting with Marie Matuszak

Dhuper and O'Keefe met with Matuszak on December 21, 2016. Dhuper asked Matuszak her concerns and Matuszak discussed her dispute with Roop. Matuszak said that she believed the issue started when she was promoted to become the PFT lab tech, and that people in the department wanted to target her because she was overly qualified; she taught at a local college whose students trained at the hospital and she held various certifications. Matuszak suggested an audit be conducted on assignments prepared by shift leads, and also recommended that the PFT lab be run independently of the respiratory department, saying that she was the most competent person to run the lab. (Tr. 2294–97, 2454–56; GC. 99)

4. Meeting with Monique Johnson

Dhuper and O'Keefe met with Monique Johnson sometime near Christmas. Johnson described to them how certain people in the department behaved poorly, said there was no discipline and little decency left, and that it was time someone did something about it. Overall, Johnson was disgusted about what was occurring. During the meeting Dhuper asked Johnson what team she was on. Johnson replied by asking whether Dhuper was inquiring as to whether she was friends with Roop; Dhuper said no. Johnson said that she would not support anyone sending nasty text messages and harassing people, regardless of whether someone was her friend. Dhuper then asked Johnson about Brian Smith, and also asked who the troublemakers were in the department. Johnson said that Matuszak was the "queen," that she was the one controlling everything, she had her "minions" in the department and was using them to her own advantage. During the meeting Johnson also said that, if the hospital got rid of the people sending the text messages, then the problems would stop. The meeting ended with Dhuper thanking Johnson for coming and telling her that she was more than welcome to come back and speak with him if she had anything else to add. (Tr. 598–600, 644–45, 649–54, 2448–49)

5. Meetings with Marco Garcia and Amanpreet Kaur

During Marco Garcia's meeting with Dhuper and O'Keefe, along with discussing some of his personal issues, he gave them a photograph of himself that he had found on, and printed from, the department's computer. He told Dhuper that he needed to check the computers in the respiratory department, and if he did so he would find some of the images that were at issue. After the meeting, Dhuper had the computers replaced. (Tr. 652, 2457–59)

Amanpreet Kaur also met with Dhuper and O'Keefe in the conference room. At one point during their meeting Dhuper asked Kaur whether she was at the department meeting on December 14. When Kaur answered yes, he asked whether she sat next to Roop during the meeting. Kaur said that she sat next to someone else. After some more discussion, Dhuper asked Kaur which side she was on, Roop's or Matuszak's. Kaur said that she was neutral, that she just wanted to come to work, do her job, treat her patients, and not have to deal with any of the department's issues. After the meeting, Kaur called Yogi, Roop, and Johnson, and told them what happened during the meeting. (Tr. 815–17)

6. Meeting with Pereyra

Pereyra also met with Dhuper and O'Keefe in the boardroom. He had printed off the various text messages and pictures he had received and gave them to Dhuper along with the police report he had referenced in the December 14 meeting. Dhuper testified he was disgusted by the pictures and messages. Pereyra asked for Dhuper's help, and said he was still receiving messages, sometimes at 2:00 a.m. or 3:00 a.m., and that his account is synched with that of his family and kids. Dhuper told Pereyra to block the offending number on his iPhone, to shut down his Facebook page or open a new account, and that Pereyra had not done enough to protect himself. Dhuper said that he is the hospital's CEO and has 900 employees on a 26 acre property; he was responsible for Pereyra's wellbeing at work, but outside of work Pereyra needed to seek

help and do whatever he needed to do. The meeting ended with Dhuper saying he would follow-up with Pereyra after his investigation concluded. (Tr. 454–59, 533, 2298–99, 2443–45)

7. Dhuper's impressions of his individual meetings

Regarding his now involvement with the problems in the respiratory department, Dhuper testified that, "within a matter of two weeks, the mountain was breaking on my head with all this. It was absurd." (Tr. 2445) And, Dhuper said that he could not connect the dots. During his interviews he had offered to put a temporary surveillance camera in the department, but nobody wanted one, while everyone wanted to talk about the other person. This led Dhuper to believe that perhaps everyone in the department was somehow involved in the behavior, and that something that at one point was considered humorous, had now turned into violent behavior. Regarding the things going on in the department, Dhuper was disappointed and disgusted. He could not believe that trained professionals, who were responsible for putting patients on ventilators, would behave so poorly. (Tr. 2445–46, 2473, 2477, 2605)

Z. Removal of the television set in the tech room

The respiratory department tech room contained a flat-screen television along with a microwave oven, radio, toaster, and two different coffee machines. They were placed in the upper part of the tech room where the sink and refrigerator were located. (Tr. 356, 368, 372, 461, 874, 964–65, 1236, 1287, 1297–1300, 2546; R. 4)

The television, which had been in the tech room for a number of years, was purchased by employees; they previously only had a radio. The microwave, toaster, and the coffee machines were also purchased by the employees. (Tr. 372, 738, 1236–37, 1299–1300)

When Duper toured the department after receiving Backus's December 10 email, he made specific note of the TV in the tech room and the fact that an employee was sitting with his legs crossed watching DVDs on the television. During the December 14 staff meeting, Dhuper requested that the television be removed from the tech room, saying they do not allow televisions in the department. According to Marino's notes, during this meeting he also told employees that the tech room would be renovated with new flooring, wall repairs, and new paint. Therefore, all personal electronic items including the toaster, television, and microwave needed to be removed. (Tr. 2351–52, 2424–26, 2538, 2541; GC. 76)

The television was subsequently removed in either December 2016 or January 2017, when the department was painted and refurbished, along with the microwave, radio, coffee machines, and personal items. As of the time of the hearing, the microwave and both coffee machines had been returned to the tech room. However, the television was never returned. Instead, after it was removed it was placed in storage where it remained. (Tr. 356, 359–60, 460–62, 737–40, 874–75, 1295–1300, 2541; GC. 76; R. 9, p. 9)

It is undisputed that multiple other employee break rooms in the hospital have televisions. As for why the respiratory department television was removed and never replaced, Dhuper testified that the hospital does not allow televisions in working departments. He also testified

that personal electronics are not allowed in the hospital, because electrical circuitry has to be of healthcare grade. That being said, Dhuper admitted that he has never inspected the televisions in the other hospital break rooms to ensure their electrical circuitry were of healthcare grade, nor has he requested any such inspection. (Tr. 358, 461, 738, 2320–25, 2538–40)

AA. "WTF" Stamp in the respiratory department

Dhuper learned from employees that the initials "WTF" had been stamped on some of the lockers in the respiratory department. When he saw the lockers stamped with those initials, he was offended and had the lockers cleaned the stampings removed. (Tr. 2471–73)

Sometime in late January or early February 2017, Dhuper was making his rounds at the hospital, and walked into the tech room. Present was Roop, night-shift therapist Susan Dachouk, and Hamid. Dhuper walked in, started looking around, and asked if there was any drama going on, any pictures, or anything else he needed to know. He then commented on the fact the lockers had been cleaned, and the stampings had been removed. Roop had found the actual WTF stamp in one of the unused lockers a few days earlier, so she retrieved the stamp and gave it to Dhuper. Dhuper asked Roop where she found the stamp and Roop told him. Dhuper said that, if anyone comes looking for the stamp, to tell them that the CEO has it. (Tr. 123–27, 768–70; GC. 27)

As they were discussing the stamp, Dhuper looked at Roop and jokingly said that she was the instigator of all the drama in the department, which Roop "kind of laughed" off. He then looked at Hamid and said that the hospital had 20 pages of complaints against him. Dhuper made a comment about not tolerating the drama going on in the department, and then left with the stamp. On February 6, 2017, Marino sent out an email to the department saying the WTF stamp was found "hidden" in an unused locker; the email also said that everything in the empty lockers would be thrown out to ensure no other "hidden treasures" came to light. (Tr. 769 –71; GC. 27)

BB. Roop's meeting with Dhuper on February 7, 2017.

On February 7, 2017, Roop was involved in an incident which ultimately resulted in her receiving a final written warning and suspension six days later. What occurred, and the decision to discipline and suspend Roop, is more fully discussed below in Section IV(B). On February 7, Roop had a meeting in human resources to discuss the incident and then met with Dhuper later that evening.

Roop met with Dhuper in the board room near his office, only the two of them were present. Roop told Dhuper that she was under a lot of pressure at work and that since giving him the WTF stamp she was being picked on even more than before. Dhuper asked Roop how people knew she gave him the stamp. Roop said that Gandhi was going around asking people why Roop turned in the stamp; she did not know how he found out. Roop then told Dhuper that she was called into human resources earlier that day. According to Roop, Dhuper then asked her "if these people are picking on you, why don't you just quit?" Roop told him that she had been working at the hospital since 1999, had stayed with the hospital when it was experiencing difficult financial times, and was not about to quit now just because some people wanted her to

do so. Instead, she was going to quit on her own terms. The meeting ended with Dhuper telling her to "just ignore those people and keep doing your job." (Tr. 149–50)

Regarding his meeting that day with Roop, at trial the General Counsel questioned Dhuper as to whether he asked Roop why she did not consider just quitting if she was having all these problems at work. He replied "that's not how I said it." When asked what he actually said, Dhuper digressed, explaining how he offered Roop a cup of tea during the meeting where they had a brief and private one-on-one conversation as mature individuals. He said from what he remembered "there was no encouragement of resigning," but told Roop "we all have options," eventually telling her to just ignore it. "Just say no." (Tr. 2609–11)

CC. Dhuper's statement to Roop in the hallway

Sometime in late March 2017, Roop and Pereyra were working in the respiratory department when they received a "stat" call to the emergency room. Responding to the call they left the tech room heading towards a set of automatic double doors that open to the hospital's main hallway. Roop and Pereyra were trying to rush to the emergency room, but were having trouble with the automatic doors which would not open. Dhuper was standing in the hallway. Roop said hello to him, and as the automatic doors finally opened Dhuper told Roop "don't let the door hit you, because that's the only thing you got left." (Tr. 465) With the doors now open, Roop looked back at Dhuper and told him that what he said was not nice. The pair then proceeded to the emergency room. (Tr. 160–61, 463–65)

Dhuper admitted speaking to Roop that day but denied making the statement attributed to him by Roop and Pereyra. He testified that the hospital's doors open and close quickly, and because the sensors are sensitive and the hospital has received some workers compensation complaints, he oftentimes tells people to "be careful of the door not hitting you or anything like that." (Tr. 2491) Dhuper denied making any derogatory comments to Roop. (Tr. 2490–92) Whether he intended it to be derogatory or not, I credit the testimony of Roop and Pereyra that Dhuper made the statements that they attributed to him.

DD. Door incident involving Roop and Matuszak

On March 14, 2017, both Roop and Matuszak separately complained to human resources about each other regarding an incident involving a door. On March 16, Stephanie Jones met with Roop and they discussed what occurred. On March 18, Jones interviewed Rose Rogers and Eric Thom, who both witnessed what happened. And on March 20, she interviewed Matuszak. (Tr. 156–59, 2097–2106, 2169–70; GC. 81, 82, 93, 94)

As to what occurred on March 14, Rogers and Roop were in the hallway, about to enter the tech room. Matuszak was inside the tech room with a student, and opened the door to come out. Matuszak held the door open for the student to leave first. Seeing Rogers and Roop were waiting to come in, she continued to hold the door open for them to enter. Rogers walked through the open door but Roop did not. Instead, Roop walked down the hallway and entered the tech room from the opposite doorway. As she did so, Matuszak told Roop that she was not mature enough to allow someone to hold the door open for them. Matuszak then walked over to

the opposite doorway, opened the door, and told Roop that she was too good to walk through the door, and was acting very childish. Roop did not respond and Matuszak left. (Tr. 156–58, 741–42, 928–29; GC. 82, 93, 94)

Jones discussed the matter with Marino and on April 11, 2017, issued Matuszak a written-verbal warning because of Matuszak's comments, which could have escalated the situation and ended up in a confrontation. Matuszak became very angry upon receiving the discipline, protesting that it was not fair, and asserting that she was the victim as Roop would not go through the door. As for why it took nearly a month to issue the discipline, Marino testified that it took thirty days to speak with Matuszak, Roop, and the any other witnesses. However, Jones's notes show that she had completed her investigation by March 20. (Tr. 1319–20, 2106; GC. 81, 82, 93, 94, 116)

EE. Power outage at the hospital

In March 2017, Monique Johnson, Frank Mardenzai, Israel Oliviolo, and Phillip Duong, were working in the respiratory department when a power outage occurred due to a thunderstorm. During an outage the hospital's backup generators are supposed to provide emergency lighting and power equipment such as patient ventilators. However, the respiratory department was in complete darkness as the backup power for the lighting did not automatically kick-in. As the RTs scurried around to ensure the various life support equipment was working, both Johnson and Mardenzai ran into Dhuper in the hallway. Dhuper was directing employees on what to do, and thanking them for their hard work. (Tr. 601–02, 608, 792–93, 2466–70)

Later, after the employees checked all the ventilators, they returned to the respiratory department. Dhuper walked into the tech room where Johnson, Mardenzai, and the other therapists were stationed. He explained to them what had occurred, in relation to the generator, looked around the tech room and commented on how much better it looked with nothing stamped on the lockers. Johnson told Dhuper that he was talking to the wrong people, as none of them would destroy property. She told Dhuper that it was Matuszak who brought the WTF stamp into the department, that the stamp ended up with Seigal, and then with Smith. (Tr. 602–04, 793–94)

As Dhuper was about to leave, Johnson lightheartedly asked whether it was true that he hated the respiratory department. Dhuper jokingly replied that it was true—he hated all of them for the problems they were causing. The conversation then became serious. Dhuper said that he was tired of everything that was going on in the respiratory department. Johnson replied saying they were not the ones who were causing all the problems. And, Oliviolo said that he did not have anything to do with any of what was occurring in the department. Dhuper then pointed at Mardenzai, Oliviolo, and Duong, telling them that, just because they thought they were not involved in the drama that they would be fired as well, and if they wanted to sue to him they could get in line. Mardenzai asked why Dhuper did not fire the people who were causing all the problems, and Dhuper responded that he was well aware of the ringleaders—and the two individuals causing all the drama. However, because they had worked at the hospital for 15-20 years, he wanted to give them some respect, a cooling off period, and an opportunity to work out their problems on their own. During the conversation Johnson defended Roop saying that she

put herself in the line of fire by talking about things that were right. Dhuper replied saying that the he knew what was causing the problems, it was the PFT lab, and he could close the lab in a second but that he was not going to do that. Johnson told Dhuper that, while he was giving Matuszak and Roop a cooling off period, nothing had cooled off and things had gotten worse. The conversation ended with Dhuper saying that if they wanted to fix things, they should come together as a department, start a petition, and come to him and human resources. If they see something that is wrong, they were the ones that needed to fix it. (Tr. 603–05, 662, 793–97)

FF. Employees circulate a petition

After her conversation with Dhuper, Johnson called Backus and told her that Dhuper had suggested doing a petition. A group of therapists started having talking sessions where they discussed their various workplace issues and Backus started drafting a petition. (Tr. 261, 605)

Backus started drafting the document in early April 2017, soliciting input from coworkers as to what should be included in the petition. The idea was to send the completed petition to the hospital in order to inform Respondent of their problems. They also contemplated sending the document to the Respiratory Care Board, the entity responsible for licensing the therapists, but that idea was eventually abandoned. (Tr. 169–70, 261–63, 315–17, 606–07; GC. 40)

When the petition was done, Backus sent a group text message to about 15 coworkers informing them that document was available for employees to view and sign until April 12. Along with the text message, Backus, Roop, and Johnson also spoke personally with coworkers about the petition and solicited employee signatures on the document. Eventually 17 out of the 33 respiratory therapists working in the department signed the petition including Roop, Backus, Johnson, and Pereyra. (Tr. 170–72, 177, 199, 264, 271, 315, 364–65, 467–68; GC. 34, 40)

On April 13, 2017, Backus dated the petition and delivered it to Dhuper's office, leaving a copy of both the petition and the signature sheet with Dhuper's assistant. That same day she left a copy of the petition, without the signature sheet, with Jones in human resources. She also emailed a copy of the petition, without the signature sheet, to the Union and to Michael Blaisdell ("Blaisdell"), who was the director of respiratory education at Ohlone College where Matuszak served as a clinical instructor. That same day, she emailed Dhuper telling him that she left a petition that was signed by the majority of the department with his assistant. According to Backus, the reason she only gave Dhuper the signature sheet was because some of RTs were afraid of retaliation; she stated this in her email to Dhuper as well. (Tr. 218, 268–70, 336, GC. 41, 42)

The petition itself was two pages long, in letter form. The letterhead read "Petition of Right to Protect License and Workplace." It was addressed to Dhuper, Jones, Blaisdell, and the therapists' Union representatives. The subject matter read: "Right to a Hostile-Free Work Environment." The document said that the necessity of a petition arose because of a hostile work environment existing in the respiratory department, and that the signatories felt it had reached a point where they needed to protect their jobs, their licenses, and their department. The petition identified Matuszak as the catalyst of the hostile work environment and identified Marino, Gandhi, Smith, and Hamid as her coconspirators who participated in, and perpetuated,

her actions. The document further said that, even after reporting incidents to human resources, and executive intervention, they were still being bullied, harassed, targeted, and retaliated against; the petition listed various transgressions that were allegedly perpetrated by the five individuals, and the resulting effects on the department. The document ended with the following demands/affirmations: (1) the signatories would no longer work with Ohlone College students while Matuszak was assigned as their clinical instructor in order to protect their licenses and the welfare of their department; (2) the five individuals identified in the petition needed to be reprimanded and/or removed to restore a safe and non-hostile work environment; (3) the signatories wanted Mullany to remain as their union representative; and (4) they were open to discuss these issues—but only collectively as a group. (GC. 34)

GG. Respondent's reaction to the petition

Dhuper saw the petition and signature sheet on April 13 or 14, looked at them, and then gave them to Jones and Mike Sarrao, the hospital's attorney, asking them to investigate the matter. He then emailed Backus on April 14 telling her that Jones and Sarrao were looking into the issue. (Tr. 2486–89, 2622; GC. 41)

Marino received an email from Blaisdell on Thursday, April 13, 2017, at 3:25 p.m. asking Marino what was happening at the hospital, and saying that he just received a disturbing email from Marino's staff regarding Matuszak and their refusal to work with students going forward. Marino replied at 6:20 p.m. saying that he was sorry for the situation, he could explain later, and asking Blaisdell to forward the email to him. Blaisdell replied to Marino saying that the college was not taking sides, and he wanted to be careful about getting involved in internal conflicts; he preferred that Marino got a copy of the document from the hospital's human resources department. Blaisdell wanted to meet to discuss a resolution, and suggested that, for the remainder of the semester, he act as the clinical instructor for the two Ohlone students that were doing their rotations at the hospital. (GC. 140)

Marino forwarded Blaisdell's message to Jones, just before 9:00 p.m. on April 13, saying "Can we talk ASAP???" At 11:00 p.m., Marino also forwarded Blaisdell's email chain to Dhuper, telling him that he had already forwarded the emails to Jones, but thought Dhuper should know as well, saying they needed to have a discussion about "this entire issue." (GC. 140) That night Marino also called O'Keefe, telling her that he had received an email from Blaisdell and explaining to her the content of the email exchange. (Tr. 1483–84)

On April 14, at 8:49 a.m. Jones replied to Marino's email from the previous night saying that she was available to speak with him "now." Marino emailed Jones a minute later saying "I will come to you." Marino walked to Jones's office where Jones told him about the petition, pulled it up on her computer screen, and showed Marino what was in it; the two then discussed what the document said.[21] A few weeks earlier, Hamid had told Jones that, according to coworkers, Backus and Roop were asking employees to sign paperwork stating that there was a

[21] While Marino claimed that he only read the first paragraph of the petition, I do not find this testimony credible, especially since Marino admitted he was "dying to know" what was in the petition. (Tr. 1479, 1482) In any event, with Jones "showing [ ] or telling" Marino what was in the petition, I find that Marino knew what the petition said when he left Jones's office that day. (Tr. 1479)

hostile work environment caused by several individuals in the department. (Tr. 1479, 1481; GC. 85, 140)

After meeting with Jones, Marino again spoke with O'Keefe about the petition. That same morning Marino he also spoke with Matuszak and Dhuper about the document. (Tr. 1482–88)

HH. Respondent drafts a letter to employees about the petition

Dhuper gave the petition to the hospital's legal counsel Mike Sarrao, asking him to investigate the matter. Sarrao drafted a letter addressed to the Union and all the respiratory therapists, dated April 17, 2017. He gave the letter to Jones and told her that she and Marino were to deliver it to all of the respiratory therapists at the hospital. Marino delivered the letter to the therapists, and had them initial a sheet of paper acknowledging that they had read and understood the letter. (Tr. 363, 366–67, 2143, 2488; GC. 51)

Sarrao's letter is four pages, single spaced. It discusses the allegations in the petition, sets forth the actions Respondent would take in response to the petition, and actions the hospital would not tolerate or condone including discrimination, bullying, and unlawful harassment. While the hospital's management team was willing and available to listen to employee concerns, the letter states that the hospital was extremely disappointed in the decision to deliver a copy of the petition to Blaisdell. It notes that the hospital has a contract with the college, and claims the petition put them at risk of legal liability. It also states that the therapists are required to assist in the orientation of students by their job description. While the letter acknowledges the right of employees to engage in concerted activities, and expresses the hospital's appreciation for the willingness of employees and the Union to raise concerns so they can be investigated, the letter states that, "[b]y their petition, the 'Majority Therapists' have notified St. Rose that they do not intend to perform requirements of their job and have forced St. Rose to consider whether such actions give rise to just cause for discipline." (GC. 51)

The letter ends by advising employees that: the therapists were expected to assist in the orientation of students; the hospital, not employees, would decide whether or not to accept students; the hospital would determine whether to discipline employees and that decision would not be influenced by the threats in the petition; the hospital would continue to recognize Mullany as the Union's authorized representative; the hospital would investigate the allegations in the petition and ensure the Union was given an opportunity to participate; discrimination, harassment, and bullying were not tolerated; and that nothing in the letter was intended to limit employee free speech rights, or otherwise limit employee rights as set forth in their union contract or under the National Labor Relations Act. (GC. 51)

II. Backus reports receiving anonymous text messages

As discussed further below in Section IV(B), Roop was fired on April 17, 2017. Three days later Backus started receiving anonymous text messages. Backus received spoofed text messages intermittently between April 20, 2017 through September 2017. All contained different memes which were distasteful. Backus suspected the messages were coming from

Matuszak or Seigal, so she replied to one of them with an inflammatory message attacking Matuszak, thinking it might bait the sender. (Tr. 280–81, 330–335, 342–43; GC. 45; R. 1)

Sometime in the fall of 2017, Backus reported the text messages to Jones. Backus showed Jones the messages she had received, along with some social media postings by Matuszak and Seigal that Backus's friends had forwarded to her. In one post Seigal made a veiled reference to Roop and Matuszak commented that she was perfectly happy with what was happening, and in an apparent reference to Roop wrote "Termination #1. Who's next?" (Tr. 281–82, 290–92, 1964–65, 2456; GC. 45–47)

Backus also told Jones that Matuszak tried to get her in trouble at Backus's other job. Jones told Backus that Matuszak had shown her the inflammatory text message that Backus had sent. Backus explained to Jones that she had sent that text to an anonymous number, and the only way Matuszak could have the text message was if she was the one sending Backus the anonymous texts. Jones told Backus there was nothing she could do. (Tr. 282, 332–33; 347–51)

JJ. Marco Garcia speaks with Marino and O'Keefe about the petition

On about April 19, Marco Garcia had a discussion with Marino about the petition. Garcia and Eric Thom were in the hallway near the respiratory department and they saw Marino walking towards them. Garcia asked Marino how he was doing. Marino said that he was stressed out, and he might be working 24 hours a day, seven days a week, because of the petition. Garcia replied saying that both he and Thom had signed the document, as they wanted to get things back to normal, and asked if there was going to be any backlash because of the petition. Marino said that he might have to get rid of half of his department. Marino denied making the statements attributed to him by Garcia and Thom. (Tr. 555–58, 932–33, 948, 1390)

After their conversation with Marino, Garcia and Thom were leaving work and ran into O'Keefe in the parking lot at around 6:30 to 7:00 p.m. Garcia's conversation with Marino made him nervous about losing his job because of the petition. So when he saw O'Keefe he brought up the topic, and asked her whether anyone was going to be disciplined or fired for signing the petition. Thom, who was trying to calm Garcia down, interjected saying that if they just came to work, kept their nose clean, and did their jobs, they would probably be okay. O'Keefe agreed, saying that nobody was going to lose their job if they came to work, did their jobs, and kept their nose clean. However, she went on to say that management was extremely unhappy, what the therapists did was the equivalent of an unwarranted attack on the hospital, and the way they voiced the problem was outside the scope of what was reasonable. (Tr. 558–59, 933–37, 949, 2318)

According to O'Keefe, this discussion with Garcia and Thom occurred prior to her even learning about the petition. She testified that Garcia asked her if he was going to get fired, and she asked him for what reason. Garcia then told her that he signed the petition, but O'Keefe said she did not know what petition he was referring to. She then told him that her best suggestion was to keep his nose clean, do a good job, and he would be fine. (Tr. 2315–18)

KK. Marino speaks with Nancy Mardenzai about the petition.

Around April 21 or 22 Marino had a conversation with Nancy Mardenzai about the petition while they were in the tech room. According to Mardenzai, the conversation occurred when Marino handed her Sarrao's letter, and had her sign a sheet acknowledging receipt of the document. When Marino handed the letter to Mardenzai she asked him what it was about. Marino told her that the letter was based on the petition. He further said that, according to the CEO, whoever signed the petition would be fired, and since a majority of the department had signed the document, a majority of the department might be fired. He then asked Mardenzai whether she had signed the petition and Mardenzai said no. Mardenzai testified that she did not tell Marino the truth about signing the petition because she was scared after what Marino said about people getting fired. Mardenzai told her brother Frank and Rose Rogers about what Marino had told her. (Tr. 362–67, 1388; GC. 51)

Marino admits having a conversation with Mardenzai about the petition in the tech room. However he denied asking her whether she signed the petition. He also denied telling her that, according to the CEO, anyone who signed the petition would be fired. (Tr. 1388)

LL. Respondent hires an outside attorney to investigate the petition

After receiving the petition, Dhuper and Sarrao decided to retain an outside attorney to investigate the complaints as outlined in the petition. On May 1, 2017, Jones emailed Mullany at the Union informing him that an attorney had been hired. The email also contained a list of 11 therapists, including Roop, Backus, Matuszak, Smith, and Hamid, that the attorney wanted to speak with. (GC. 43; Tr. 611–12, 2144–46)

Eventually the attorney spoke with Monique Johnson. Although she could not recall the exact date of the conversation, Johnson testified that she received a call from the attorney sometime in May or June 2017. A week earlier, Jones had called asking if she would be willing to speak to a third-party investigator; Jones said that the person was going to investigate "all sides of the story" regarding the issues going on in the respiratory department. (Tr. 612–13, 617).

Johnson had been suffering much stress and anxiety because of work. Along with the issues going on in the department, her car tires were punctured while parked at the hospital, which distressed her greatly. She apparently correlated the tire incident to the factionalized department as Pereyra's tires had also been slashed in the hospital parking lot. Johnson told Jones that the problems in the department had caused her much stress and anxiety, as she viewed her coworkers as friends and was upset as to how far things had escalated. She also said that she would be willing to speak with the attorney if it would bring a resolution to the situation in the respiratory department. (481, 613–14)

The attorney called Johnson while she was home on medical leave. He introduced himself and asked whether Johnson knew why he was calling. Johnson replied asking whether he was calling about the petition. The attorney said that the petition was one area of inquiry, that he was there to collect information from all the parties involved, and was not on anyone's side. He also told Johnson that he had already been to the hospital on two previous occasions to

collect information. The attorney then asked Johnson about what was occurring in the department. Johnson said that the issues were so large she did not know where to start. (Tr. 611, 615)

Johnson explained the incident involving her car tires, which she said had caused her to take medical leave, and that others also had their tires compromised. The attorney asked Johnson what she would like to see happen in the department. Johnson said "these are my friends so initially I wanted there to be some resolution, but now I just want them gone." (Tr. 615) Towards the end of their conversation the attorney asked Johnson about the petition and who drafted it. This question upset Johnson, and she did not answer. However, she told the attorney that she signed the petition, and that the only reason the petition was initiated was because Dhuper had suggested it. Johnson testified that, at no time during the conversation did the attorney tell her there would be no repercussions if she refused to answer any of his questions, or that she would not be retaliated against in any way. However, he did tell Johnson that she did not have to speak with him if she did not want to. The call ended with the attorney telling Johnson to call him if she thought of anything else, and that he appreciated her honesty. (Tr. 615–616)

MM. Pereyra gets an injunction against Seigal

In August 2017, Pereyra received a civil restraining order against Seigal for a period of three years. This was the second time he had attempted to get a restraining order against him. The first time he tried, in January 2017, it was denied but he was told to reapply if the harassment continued. Pereyra hired a forensics company to try and track the senders of the spoofed texts, but his efforts were unsuccessful. (Tr. 441–42, 490–92, 499; GC. 19)

On July 18, 2017, Pereyra received text message containing a picture of an ape smoking a cigarette. The caption of the photograph starts with the phrase "Jogilla, whose Korean name is 'Joje,'" and then goes on to describe a cigarette smoking gorilla held in a North Korean Zoo; the gorilla, whose actual name was Azalea, had received some media attention in 2016.[22] A coworker told Pereyra that the exact same image was posted on Facebook by Kevin Seigal. Pereyra found the Facebook image Seigal had posted, and it was the exact same meme that was in the text message. Seigal's Facebook post included the hashtags "#jogilla" and "#lol." With this information Pereyra filed another application for a civil restraining order against Seigal and it was granted. (Tr. 433–35, 499; GC. 19, pp. 18–19)

One night, after the restraining order had issued, Johnson was working the night shift with Smith and a couple other therapists, including Frank Mardenzai. Smith walked into the department and exclaimed that Pereyra was a pussy, and repeated the comment a couple of times. When asked why he was saying that, Smith said that it was because Pereyra had taken out a restraining order against Seigal. (Tr. 621, 655)

NN. Hallway incident between Matuszak and Backus

[22] See https://www.nbcnews.com/news/world/north-korea-s-new-star-azalea-smoking-chimp-pyongyang-zoo-n668821 (last retrieved May 15, 2019)

On November 7, 2017, Matuszak and Backus passed each other in the hallway at the hospital. Both filed bullying complaints with human resources over the interaction, each blaming the other for what occurred. Jones contacted the hospital's security manager and pulled the camera footage. (Tr. 2152–2157; GC. 49)

The security camera footage shows Matuszak walking into the hospital and swiping her keycard to clock in, using a machine attached to the wall on the right-side of the hallway. Matuszak then starts walking down the hall, veering towards the left-side of the hallway. She is holding a cell phone to her ear with her left hand, has a large bag slung over her left shoulder, and her sunglasses are in her right hand. Backus is walking down the left-side of the hallway in the opposite direction of Matuszak, holding a piece of paper in her left hand towards her chest. As they pass each other Backus moves her left arm just slightly, thereby avoiding direct contact with Matuszak's left arm/bag. Matuszak keeps going, still on the phone. After they pass Backus turns her head to look towards Matuszak, who was long down the hallway. (GC. 49)

Regarding the incident, the video shows that nothing happened. It did not appear that the two touched each other at all. Maybe they could feel the air whisk by as they passed. At worst, perhaps Matuszak's bag ever so softly brushed by Backus's left arm, or vice-versa, as they passed each other walking in the opposite direction. However, even that level of contact is being generous. (GC. 49)

Notwithstanding the hallway camera, they both reported the matter to human resources. Matuszak reported the incident first, speaking directly to Jones and claiming that she had been assaulted by Backus; Matuszak told Jones that she wanted Backus fired, because the incident was a battery. For her part, Backus filed a bullying complaint form claiming that she perceived Matuszak "go out of her way to cross my path and push me with her bag." Backus also told Jones that she wanted Matuszak fired. (Tr. 2153, 2216; GC. 152, 153)

As part of her investigation, Jones asked both to recreate what happened. She first brought Matuszak into her office and, using one of her staff members to play Backus, asked Matuszak to reconstruct the incident. Matuszak claimed she was hit on her left side and that she was body slammed. Jones testified that, during the recreation, Matuszak "basically knocked my staff member into the wall." (Tr. 2155) She next brought Backus in to recreate the incident. In Backus's recreation, she hit Jones's staff member "very hard with her elbow." (Tr. 2155–56)

After reviewing the security video, Jones concluded that nothing happened. She shared her conclusion with both, and no discipline was issued. She did however suggest to them that, in the future, they stop and let the other person pass so the issue did not come up again. Jones testified that she did not believe that either was willfully lying. Instead, they were just shocked at seeing each other in the hallway; each thought that the other hit them, although it did not really happen. (Tr. 2156–57)

OO. Pereyra gets a text message from Brian Smith

In about August 2017, Pereyra went on medical leave because of his circumstances at work. On December 4, 2017, Brian Smith sent Pereyra a text message that said "Miss you," with

an image of a stuffed gorilla wearing a t-shirt that said "Get well soon!" The last time Smith had sent Pereyra a text message was one year earlier involving the union steward election which he lost. Other than these two messages, the record contains no evidence that the two ever communicated by text message. (Tr. 394–95, 475, 1928–29, 1950–51; GC. 55)

Pereyra complained about Smith's text message to Jones in December 2017, and gave her a copy of the message. Jones called Marino informing him of the complaint, and both she and Marino met with Smith on January 23, 2018. They asked Smith about the stuffed gorilla image. Smith claimed that he missed Pereyra, that he did not know what offends him, that the image should not bother anyone, and claimed he was unaware that people were calling Pereyra "Jogilla." (Tr. 477, 1438–39, 2159–60; GC. 56, 144)

At trial, Smith testified that he knew about the pictures posted in the tech room with Pereyra's face superimposed on the body of apes, and about his belief that "everybody thought it was funny." (Tr. 1926–27) He also testified that, at some point, he knew Pereyra was upset because he was getting anonymous text messages, and that he had heard that Pereyra was out on medical leave because he was getting text messages of monkeys. Notwithstanding, as he told Marino and Jones, he testified that he sent the text message because he missed Pereyra.[23] (Tr. 1926–31)

Marino did not believe Smith's explanation, and presumed that Jones did not believe him either. And, Marino thought that Smith had lied during the course of their investigation into the matter. Notwithstanding, the hospital did not discipline Smith in any fashion for sending the text message with the gorilla image. Instead, Marino met Smith again on January 30, 2018, told him that he should not be contacting Pereyra in any way, including text, email, or by telephone. He said that Smith's actions at work needed to be completely professional, and he thanked Smith for his time. He also had Smith sign a document acknowledging the discussion. (Tr. 1439, 1459, 2161–62; GC. 144)

Pereyra had not heard back about his complaint against Smith, so on January 29, 2018, he sent Jones an email asking about the status; he was upset that, since the complaint, Smith had been promoted back to the position of team lead. Jones replied saying that she had addressed his concerns with Smith the prior week. Jones never told Pereyra that Smith had claimed the two were really good friends and that Smith asserted that he really missed Pereyra. Nor did she ever ask Pereyra if he and Smith were actually friends, or whether Pereyra viewed Smith as one of his harassers. Pereyra received more spoofed text messages with gorilla pictures in January and March of 2018. (Tr. 476–79, 2229–30, GC. 56, GC. 57)

PP. Backus applies for a restraining order against Matuszak

On January 3, 2018, Backus filed a petition for civil harassment and restraining order against Matuszak in California Superior Court. (R. 4) In her petition, Backus stated that Matuszak had harassed her via text message and on social media and described the various alleged incidents. Included in her petition was the hallway incident; Backus wrote that Matuszak

[23] I did not find Smith to be a credible witness, and I do not credit his testimony that he sent Pereyra the text message because he "missed him." (Tr. 1929)

forcefully bumped into her, hitting Backus on the left shoulder so hard that her shoulder ached for a few days. (R. 4, p. 57)

An ex-parte hearing for a temporary restraining order (TRO) was conducted on January 24, 2018, and Backus was granted a TRO against Matuszak, pending a full hearing for a permanent restraining order. Among other things, the TRO required Matuszak to stay at least 50 yards away from Backus, including while they were at work. The permanent injunction hearing was rescheduled on multiple occasions, and the TRO extended. (R. 2)

At one of the scheduled hearing dates for the restraining order Marino was in the courtroom to be a witness on Matuszak's behalf. As of the close of the hearing in this matter the TRO was still in place, and the full hearing for a permanent restraining order had not yet occurred. (Tr. 320, 1490–91; R. 2)

III. ANALYSIS OF THE 8(a)(1) ALLEGATIONS

A. November 2016 interrogation allegations involving Joe Marino

Complaint paragraph 6(c)(i) alleges that, in about late November 2016, Marino interrogated employees several times about their protected concerted activities, and those of their coworkers. This allegation concerns Marino asking employees if Roop disclosed to them any information from an investigatory meeting, and whether they knew anything about the bullying/harassment complaint forms being disseminated amongst their colleagues.

1. Background

On November 10, 2016, Marino and Ambrosini met with Roop to discuss the letter complaining about her behavior that was submitted by Matuszak, Hamid, and Smith. Respondent relied upon the allegations in the letter to discipline Roop on November 21.

During her disciplinary meeting on November 21, along with presenting Roop with her discipline, Marino asked Roop if she had leaked any information about their November 10 meeting to other employees in the department; Roop denied doing so. That afternoon, Marino emailed Ambrosini saying it had come to his attention that information discussed in the November 10 meeting, specifically the names of Matuszak, Hamid, and Smith, as the authors of the letter, had been leaked to others in the respiratory department. Marino wrote to Ambrosini that he wanted to confirm the leak came from Roop, and if so suggested Roop be suspended. Marino then started questioning several employees to investigate the alleged leak. After a group of RTs filed bullying/harassment complaint forms with human resources, Marino broadened the scope of his investigation to include questions about the complaint forms.

As part of his investigation, Marino spoke with RT Fawad Meskienyar about the leak. Meskienyar told him that he did not know who leaked the information, but he had heard talk about it in the department. On November 28, Marino called Rose Rogers into his office. With only the two of them present, he told Rogers what they were about to discuss was strictly confidential, and that he needed to know if Roop discussed anything with her about a meeting

Roop had with human resources. Rogers told Marino she would not answer the question; a few days later she told Marino that it was wrong for him to have questioned her and it made her feel uncomfortable.

On November 28, Matuszak conveyed to Marino information about Roop handing out bullying complaint forms to the staff; she told Marino the information had come from RT My-Quyen Giang. That day Marino asked Giang if she had seen anyone handing out bullying complaint forms. Giang told him that she saw Backus ask RT Grant Vea who he voted for in the shop steward election and also hand him a St. Rose bullying complaint form. Giang also told Marino that she did not know anything about the meeting in human resources.

On November 29, Marino asked Grant Vea both about the leak, and whether bullying forms were being handed out. And, on November 30, Marino called Amanpreet Kaur into his office. With only the two of them present, he asked Kaur if she knew anything about a confidential meeting that took place in human resources. Even though Kaur had spoken with Roop about the meeting in question, Kaur told Marino that she did not know anything. Marino wrote in his notes that he thought Kaur was trying to play dumb.

2. Analysis

The board reviews a variety of factors to determine whether an unlawful interrogation occurred including: the general background; the nature of the information sought; the identity of the questioner; the place and method of the interrogation; the truthfulness of the reply; whether the employer had, or conveyed, a legitimate purpose for the questions; and whether assurances against reprisals were provided. See *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985); *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964); *RHCG Safety Corp.*, 365 NLRB No. 88 slip op. at 1-2 (2017). These and other factors are not applied mechanically. Instead, they are "useful indicia that serve as a starting point for assessing the totality of the circumstances." *Westwood Health Care Center*, 330 NLRB 935, 939 (2000) (internal quotations omitted). In the final analysis, 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." Id. at 940.

Applying these factors here, I find that Marino's questioning of employees during his investigation of the alleged leak were unlawful interrogations. Absent compelling business justifications, "it is settled Board precedent . . . that employees have a protected right to discuss discipline or disciplinary investigations with fellow employees." *Inova Health System v. NLRB*, 795 F.3d 68, 85 (D.C. Cir. 2015); *Caesar's Palace*, 336 NLRB 271, 272 (2001) (confidentiality rule during investigation of illegal drug activity with claims of a management cover-up and threats of violence was a compelling business justification outweighing the infringement on employee rights). Here, Respondent has not presented any business justification that would have prohibited Roop from discussing with coworkers her November 10 meeting in human resources. Nor is there. Unlike *Caesar's Palace*, the complaint letter about Roop did not involve illegal

drug activity, threats of violence, management cover-ups, or anything close to such weighty matters.[24] Instead they were general work complaints about Roop's demeanor and behavior.

Thus, the nature of the information Marino sought during his questioning, whether and which coworkers Roop spoke with regarding the November 10 investigatory meeting, was protected by the Act. Marino was the head of the department, and the place and method of the questioning (at least with respect to Rogers and Kaur) was unnatural, as he called both of them into his office for no apparent reason and questioned them about what they knew of the meeting. Kaur told Marino she did not know anything, notwithstanding the fact Roop had told her about the meeting, and Rogers simply refused to answer his questions. Also, there is no evidence Marino gave anyone he questioned assurances against reprisals. Finally, Marino neither had, nor conveyed, a legitimate purpose for his questions; because Roop had a protected right to discuss the investigatory meeting with her coworkers, she could not have been legally disciplined for doing so. Accordingly, I find that, under the totality of the circumstances, Marino's questioning constituted an unlawful interrogation in violation of Section 8(a)(1) of the Act.

I believe the same is true regarding Marino's asking employees about whether coworkers were passing out bullying/harassment complaint forms. Backus retrieved the complaint forms, handed them out to colleagues, collected the completed forms, and submitted them to human resources. Her actions were clearly concerted activity protected by the Act. See, e.g., *Dignity Health*, 360 NLRB 1130, 1131–32 (2014) (employee circulating petition soliciting signatures from colleagues who had concerns about a coworker's attitude and conduct towards them was both concerted and protected); *Meyer Tool, Inc.*, 366 NLRB No. 32 slip op. at 9–10 (2018) enfd. --- Fed.Appx. --- 2019 WL 949082 (2d Cir. 2019) (employees going to human resources to file complaints about working conditions protected and concerted even if they did not present the same issues or concerns in their complaints). Thus the nature of the information Marino sought in his questioning, who was handing out and receiving bullying complaint forms, concerned activities protected by the Act. And, there is no evidence that Marino had any legitimate purposes for the questioning or provided the individuals questioned with assurances against reprisals. Accordingly, the evidence presented sustains the allegations contained in complaint paragraph 6(c)(i) that Marino interrogated employees about their protected concerted activities and those of their coworkers.

B. December 2016 allegations of interrogations and threats

Complaint paragraph 6(c)(ii) alleges that, during a meeting in human resources on December 5, 2016, Marino interrogated employees about their protected concerted activities and

[24] In its brief, and without citing the record, Respondent asserts that, during the November 10 meeting there was an "agreement" that the information discussed would be kept confidential during the investigation. *Resp't. Br.*, at 31. The only testimony from this meeting regarding discussions about confidentiality is hearsay testimony from Marino saying Ambrosini talked about keeping the meeting discussion confidential. (Tr. 1498) However, neither Ambrosini nor Roop testified about any such discussion. Instead, Ambrosini testified that, while confidentiality was management's "preferred position," employees could share the information with whomever they wanted so long as it did not compromise the investigation. (Tr. 1591) Here, there was no evidence the investigation was compromised, and slim evidence that any meaningful investigation occurred at all. Moreover, Ambrosini testified there was no basis for disciplining Roop for the leak. (Tr. 1591) Therefore, I do not credit Marino and I find that no such agreement on confidentiality occurred.

those of their coworkers. Complaint paragraph 6(d) contains the same allegation, but involving Ambrosini. And, complaint paragraph 6(a)(i) alleges that, on this same date, O'Keefe unlawfully threatened employees with demotion, discipline, and job loss. All these allegations center on what was said during a meeting with Roop that occurred on December 5.

1. Background

Around 2:00 p.m. on December 5, 2016, Roop attended a meeting with Marino, Ambrosini, and O'Keefe in the boardroom near the human resources office. Justin Kmetz, who works in the radiology department was also present as Roop's Union representative. Before the meeting started, Marino had suggested to Ambrosini that Roop be disciplined, perhaps even suspended, for leaking information to Backus. Marino claimed that Roop leaked information to Backus, and Backus included that information in her bullying complaint form. Among the items listed in Backus's complaint was the claim that Matuszak was using human resources to harass Roop, referring specifically the letter written by Matuszak, Smith, and Hamid. [25]

The meeting started with Ambrosini saying there was talk that Roop had breached confidentiality regarding a previous meeting, and they were there to investigate the claim. Referring to the November 10 meeting, Ambrosini told Roop that word had gotten out that she had broken confidentiality by talking about the meeting with others. He then asked Roop if she had talked about the meeting with anyone. Roop denied doing so, and implied that Marino was the leaker. Marino denied the claim, saying it was very coincidental that people were hearing about things that were discussed in the meeting. Ambrosini mimicked Marino's remarks, also saying that it was a coincidence RTs were filing bullying/harassment complaints that seemed to defend Roop. Ambrosini asked Roop what she did to get her coworkers to submit those complaints to human resources. Roop denied doing anything.

During the meeting O'Keefe said that one of the purposes of the meeting was to take away Roop's position as team leader. However, after Roop protested, and they discussed arranging a meeting between Roop and Matuszak to sort things out, Ambrosini and O'Keefe said they would further discuss the issue of her team lead status. However, O'Keefe told Roop that, if things did not start changing, and if she kept hearing more talk about bullying and harassment, "I'm going to start firing all of you."

2. Analysis

The complaint alleges that both Marino and Ambrosini interrogated Roop during this meeting. However, the credited evidence shows that Marino only said that it was coincidental therapists were hearing about things that were discussed in the November 10 meeting. I do not believe that this statement constitutes an unlawful interrogation, and recommend that Complaint paragraph 6(c)(ii) be dismissed.

As for Ambrosini's question to Roop asking whether she talked with others about their previous meeting, I believe that, the totality of the circumstances supports a finding of an unlawful interrogation. Ambrosini was Respondent's human resources director, and this was a

[25] I found Kmetz to be a very credible witness, and credit his testimony as to what occurred during this meeting.

formal investigatory meeting with two other high level management officials present. As noted earlier, the Act protected Roop's right to discuss what occurred in her November 10 investigatory meeting with her coworkers, including Backus. Thus the nature of the information Ambrosini sought was protected. And, although she had in fact discussed the November 10 meeting with others, Roop denied doing so. Because Roop, under these circumstances, could not have been lawfully disciplined for discussing what occurred in the November 10 investigatory meeting with her coworkers, Ambrosini did not have a legitimate purpose for his question. Finally, there is no evidence that anyone in the meeting gave Roop assurances against reprisals. As such, I find the totality of the circumstances support a finding that Ambrosini's questions constituted an unlawful interrogation in violation of Section 8(a)(1) of the Act, as alleged in paragraph 6(d) of the Complaint.

The General Counsel also alleges that O'Keefe's statement that, if things did not start changing, and if she kept hearing more talk about bullying and harassment, "I'm going to start firing all of you," constitutes an unlawful threat. Respondent counters that there was no violation because O'Keefe's statement was not linked to protected activity. Instead, arguing that O'Keefe was referring to acts of harassment and bullying, which she wanted stopped, and not individuals reporting such conduct. *Resp't Br.*, at 32–33.

In determining whether a statement constitutes an unlawful threat, the Board uses an objective standard, whether the statement can reasonably be interpreted by employees as a threat. *Smithers Tire & Auto*, 308 NLRB 72, 72 (1992). The actual intent of the speaker and the actual effect on the listener is not determinative. Id.; Cf. *Steelworkers Local 1397 (United Steel Corp)*, 240 NLRB 848, 849 (1979). The circumstances in which the statement is made must also be examined to determine whether a violation occurred. *Sacramento Clinical Laboratory, Inc.*, 242 NLRB 944 (1979) (examining the circumstances and words used Board finds a violation).

Here, in context, I believe the statement was an unlawful threat. As stated by Ambrosini when the meeting started, the reason for the meeting was to investigate the claim that Roop spoke with her coworkers about what was discussed in her November 10 investigatory meeting, conduct that was protected by the Act. Thus, the meeting was to investigate Roop's protected concerted activities. And, while discussing that subject, Ambrosini brought up the issue of coworkers filing bullying and harassment complaint forms with human resources, conduct that was is also protected by the Act; some of these forms seemed to defend Roop. Considering the primary reason for the meeting was to investigate Roop's concerted activities, and Ambrosini spoke about the concerted filing of bullying/harassment complaints, I believe that, objectively, O'Keefe's statement related directly to RTs filing bullying/harassment complaints with Respondent. Accordingly, O'Keefe's statement that she would start firing everyone if she kept hearing more talk about bullying and harassment constituted an unlawful threat in violation of Section 8(a)(1) of the Act. *Rockford Newspapers, Inc.*, 229 NLRB 429, 432–33 (1977) (Statement that employee would be fired if she "caused any more trouble" or "filed any more complaints" related directly to employee's protected activity and constituted an unlawful threat).

C. December 2016 allegations involving Aman Dhuper

Complaint paragraph 6(b)(i) alleges that, on December 14, 2016, Dhuper threatened to terminate employees during a meeting in the respiratory department. This allegation is based on what occurred during the mandatory staff meeting called after Dhuper had received Backus's December 10 email complaining about discrimination, bullying, harassment, etc., and after he had taken his first tour of the respiratory department.

a. Background

During the December 14 staff meeting, Dhuper told the RTs that he was aware of the issues in the department and wanted to hear from the staff directly to try and bring forth a solution. Dhuper held up a file containing a stack of papers for the therapists to see, said he was holding the respiratory department's harassment file, and that it was the thickest in the hospital. He told the staff to keep their personal issues, likes and dislikes, outside of the workplace. He further said that he was very disappointed regarding the behavior he had heard about in the department, he could fire everyone those who did something and those who did nothing. He could not believe a group of people who take care of patients would behave in such a manner. Dhuper told the staff that he firmly believed people should enjoy where they are working, so the staff needed to ask themselves "do I want to be employed here. Am I happy here."

The General Counsel argues that Dhuper's statements constitute an unlawful threat. *GC. Br*., at 42–43. Respondent contends there was no violation, and that what Dhuper was "saying (albeit nicely) [was] what the hell is going on, how has this behavior gone on so long, and stop it before everyone gets fired." *Resp't Br.*, at 42.

b. Analysis

Regarding threat allegations, the "subjective thinking of the speaker is not controlling." *Central Cartage, Inc.*, 236 NLRB 1232, 1254–55 (1978). And, the decision as to whether a violation occurred does not turn on the employer's motives or whether the coercion succeeded or failed. *NLRB v. Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946). Instead, the question is "whether, under all the circumstances, the statement reasonably tends to restrain, coerce, or interfere with employees' rights guaranteed under the Act." *El Paso Electric Co.*, 350 NLRB 151, 152 (2007), enfd. 272 Fed. Appx. 381 (2008).

Here, the ultimate question is whether Dhuper's statement that he could fire everyone was linked to employee protected activity. If so, it constitutes a violation. If not, then the statement was not unlawful. See e.g., *Consolidated Bus Transit, Inc.*, 350 NLRB 1064, 1064 fn. 3 (2007) (Board majority and dissent debating whether threat to close facility was linked to an incident of vandalism or to employee protected activities); *PCL Construction*, 269 NLRB 16, 17 (1984) (Board finds supervisor's statement to union steward that he would "shut the goddamn job down" was not related to the steward's protected activities, but was directed to his personal difficulties with other employees).

When Dhuper said he could fire everyone, he had just referenced the respiratory department's harassment file, saying it was the thickest file in the hospital. Backus had distributed some of those complaint forms to coworkers, gathered them, and filed them as a

packet with human resources, actions which constituted protected concerted activities. *Mitsubishi Hitachi Power Systems Americas, Inc.*, 366 NLRB No. 108, slip op. at 18 (2018) (employee who, in part, submitted complaint letters to human resources asserting manager was subjecting employees to bullying and abusive behavior was engaged in concerted activity for mutual aid and protection). I believe the fact Dhuper referenced the complaint file before saying he could fire everyone serves as sufficient nexus to sustain a violation. That is particularly true considering that Dhuper said he could fire everybody, those who did something and those who did not. Based this last statement, I believe a reasonable employee who was not involved in any of the bullying/harassment, but witnessed such conduct, would think twice about filing such a complaint with human resources if asked to do so by a coworker. If there was any ambiguity in the statement, "the Board has been clear that it will construe any ambiguity in a threatening statement against the employer making the statement." *Labriola Baking*, 361 NLRB 412, 413 fn.6 (2014). Accordingly, I find that Dhuper's statements would tend to coerce a reasonable employee and chill the exercise of employee Section 7 rights, which includes the right of employees to file group complaints about working conditions, and therefore violates Section 8(a)(1) of the Act.

D. Alleged interrogations during the individual meetings with Dhuper

a. Background

In the two weeks after the December 14, 2016 staff meeting, Dhuper scheduled a series of individual meetings with various therapists. These meetings were held either in a boardroom near Dhuper's office, or in a nearby conference room. Dhuper and O'Keefe were present in each meeting. In paragraphs 6(b)(ii) and 6(b)(iii) of the Complaint, the General Counsel alleges that various statements made by Dhuper during these meetings constituted unlawful interrogations.

Coming into these meetings, Dhuper was aware that two camps had formed in the department, involving two different individuals, and that people were choosing sides. He also knew that multiple complaints had been filed with human resources by the therapists, and was aware of the nature of the complaints including the posting of racist/degrading pictures and coworker harassment, among other issues. It is against this backdrop that the individual meetings occurred.

During his meeting with Roop, Dhuper asked about her complaints. Roop discussed multiple problems she was having in the department. At some point during their meeting, Dhuper made a statement about there being two groups in the department and asked Roop which group she belonged to. Roop denied belonging to any group, saying that she was an individual but would speak up if something was wrong. Dhuper then asked if Roop was the ringleader. Roop denied being the ringleader, but again said that she would speak up if there was something wrong.

In his meeting with Monique Johnson, after she discussed how certain people in the department behaved, and the lack of discipline and decency, Dhuper asked her which team she was on. When Johnson inquired as to whether he was asking if she was friends with Roop, Dhuper said no. Later, Dhuper questioned her about Brian Smith, and asked Johnson who the

troublemakers were in the department. In reply, Johnson pointed to Matuszak and her minions, saying that if the hospital ridded itself of the people sending the text messages, the problems would stop.

During his meeting with Amanpreet Kaur, Dhuper asked whether she sat next to Roop at the staff meeting on December 14. He also asked her which side she was on, Roop's or Matuszak's. Kaur told Dhuper that she was on neither side, and that she did not sit next to Roop at the meeting, but was next to someone else.

The General counsel asserts that Dhuper's questions to employees about "troublemakers," "ringleaders," and which side they were on – Roop's or Matuszak's – constituted unlawful interrogations. Respondent asserts that it was no secret which side employees had taken, and that any reference to "troublemakers" or "ringleaders" did not involve Section 7 activity. *Resp't Br.,* at 48.

b. Analysis

Here, viewing the questions objectively and in context, I believe that Dhuper's asking Roop whether she was the "ringleader" constituted a violation, but his statements to the other employees did not. At the time of his discussion with Roop, Dhuper was aware that the department had split into two camps, and there were significant issues involving pictures, text messages, and allegations of harassment/bullying in the department. He was also aware of the complaints submitted to human resources by the therapists (including Roop), and heard both Pereyra and Roop complain about receiving anonymous text messages in the December 14 staff meeting. Accordingly, I believe that the circumstances show there was enough of a connection to employee concerted activity to make the question to Roop about her being the "ringleader" coercive. Dhuper was Respondent's highest level management official, he did not convey any legitimate purpose for asking Roop if she was the ringleader, nor did he give her any assurances against reprisals regarding the question. Accordingly, I find that Dhuper's statement to Roop constituted an unlawful interrogation. *Sentry Investigation Corp.*, 249 NLRB 926, 931 (1980) (Employer, who did not state a reason for his questions or give assurances against reprisals, violated Section 8(a)(1) by asking employee if he was the "ringleader.").

I believe the question to Johnson about "troublemakers" in the department related directly to the individuals who were causing the problems by posting derogatory pictures and sending the harassing text messages, and therefore is not a violation. When speaking to Johnson, Dhuper first asked about Smith and then asked who the troublemakers were. Johnson pointed to Matuszak and her cohorts, and said that if the people sending the text messages were dismissed the problems would be stop. Accordingly, this situation is unlike those cases where the word "troublemaker" was used as a "code" for employees engaged in union or other protected activities. See *Blue Star Services, Inc.*, 328 NLRB 638, 639 (1999) ("troublemaker" and "bad attitude" are "sort of code words for union activities."). Therefore I find that no violation occurred.

Finally, I do not believe that Dhuper's questions to Kaur or Johnson about which "team" or "side" they supported were coercive. By this time it was no secret that the department had

split into two camps—Roop's and Matuszak's—with many of the therapists choosing sides. Viewed objectively and considering the surrounding circumstances, I believe that these questions were not related directly or indirectly to any concerted activities; nor were protected activities referenced. Instead, it appears Dhuper was simply trying to determine through which prism (that favoring Roop or that favoring Matuszak) to assess the statements and complaints from these employees.

E. January 2017 statements made by Dhuper in the tech room

Sometime in late January or early February 2017, Dhuper was making his rounds and walked into the tech room where Roop was present along with Susan Dachouk and Chris Hamid.[26] Dhuper looked around and asked if there was any drama going on, any pictures or anything else he needed to know about. He commented about how clean the lockers looked, and how the WTF stampings had been removed. Roop, who had found the WTF stamp a few days earlier, gave it Dhuper. As they were discussing the stamp, Dhuper looked at Roop and jokingly said that she was the instigator of all the drama in the department; Roop kind of laughed off the statement. He then looked at Hamid and said the hospital had 20 pages of complaints against him. Dhuper made a comment about not tolerating the department's drama and then left with the stamp.

Dhuper's comment about Roop being the instigator of all the "drama" in the department could be subject to two conflicting interpretations: "drama" could refer to Roop as being responsible for the WTF stamp; or it could refer to Roop as being responsible for all the employee complaints. Although it was Matuszak, Seigal, and Smith who were actually responsible for WTF stamp, Dhuper did not learn this until March 2017, when Johnson told him. Accordingly, given the context of the statement, which was made in direct reference to the WTF stamp, I find the evidence is insufficient to sustain a violation. See *Alliance Rubber Co.*, 286 NLRB 645, 657 (1987) (no violation where foreman's comments were susceptible of two interpretations, one referring to union activity and the second to sabotage, particularly in view of the context in which the statement was made). Accordingly, I recommend that Complaint paragraph 6(b)(iv) be dismissed.

F. Allegation that Dhuper solicited employees to quit in February 2017

After Roop's meeting in human resources on February 7, 2017, she met with Dhuper in the boardroom near his office, with only the two of them present. Roop told Dhuper that she was under a lot of pressure at work, and was being picked on even more since giving him the WTF stamp. After discussing the stamp, Roop told Dhuper that she was called into human resources earlier that day. Dhuper then asked Roop "if these people are picking on you, why don't you just quit." Roop told Dhuper that she stuck with the hospital through difficult times, and was not going to quit just because some people wanted her to do so. Dhuper then told her to just ignore those people and continue doing her job.

[26] Both Roop and Dachouk testified about what was said during this interaction. Regarding any conflicts in their testimony, I credit Dachouk as to what was said; she had no personal interest in the outcome of the litigation.

The General Counsel asserts that Dhuper's statement violated Section 8(a)(1) of the Act, as alleged in Complaint paragraph 6(b)(v). *GC Br.*, at 47–49. Citing Dhuper's testimony, Respondent denies that he made the comments attributed to him by Roop, and argues that no violation occurred. *Resp't Br.*, at 51–52.

I credit Roop's testimony, and find that the Dhuper made the statements set forth above. I do not believe Dhuper's testimony that he only told Roop "we all have options," without also discussing with her the specific options in question, one of which would have been quitting and moving on, as Roop testified.

At the time of the meeting, Roop had engaged in concerted activities protected by the Act. These included participating in the group march to human resources and the filing of bullying/harassment complaints in conjunction with her coworkers. The Board has consistently found that statements to employees who have engaged in concerted activities that they should consider working elsewhere if they are unhappy to be a violation. *El Paso Electric Co.*, 350 NLRB 151, 152 (2007), enfd. 272 Fed. Appx. 381 (2008). In her November 2016 bullying/harassment complaint, which Backus filed with human resources as a packet with other complaints, Roop basically complains about being picked on, the same thing she complained about to Dhuper in their February 7 meeting, after which Dhuper asked why she didn't just quit. As such, assessing the entire factual context, I find Dhuper's comment would tend to coerce a reasonable employee and chill the exercise of employee Section 7 rights in violation of Section 8(a)(1) of the Act.

G. Allegation that Marino interrogated employees in February 2017

Complaint paragraph 6(c)(iii) alleges that on about February 7, 2107, during a meeting in human resources, Marino interrogated employees about their Union activities. This allegation involves the meeting in human resources after the incident between Roop, Smith, and Bousheri, the hospital's security guard. During the meeting Roop claimed that Marino asked her whether she was speaking with Union representative Matt Mullany about their staffing issues. (Tr. 147) Because Marino did not deny this testimony, the General Counsel asserts that the statement was made and constituted an unlawful interrogation. *GC. Br.*, at 46–47.

However, in determining what was said in this meeting, unless otherwise noted I primarily credited the testimony of Kmetz as to what occurred. Kmetz testified that, during this meeting, Roop said she was speaking on the phone with Mullany when Bousheri accused her of swearing, she denied swearing, and said they could call Mullany and confirm that she was speaking with him. In reply, Marino acknowledged that she was, in fact, speaking with Mullany. Significantly, Kmetz does not include the statement Roop attributed to Marino. Accordingly, I find the statement was not made, and recommend that Complaint paragraph 6(c)(iii) be dismissed.

H. Allegation Dhuper impliedly threatened employees in March 2017

I have credited the testimony of Roop and Pereyra that, sometime in March 2017, Dhuper told Roop "don't let the door hit you, because that's the only thing you got left." On that day,

Roop and Pereyra were working in the respiratory department and received a "stat" call to the emergency room. Both were trying to rush to the ER but were having trouble with the automatic doors which would not open. Dhuper was standing in the hallway. Roop said hello to him, and as the doors finally opened Dhuper made the above statement; Roop told him that what he said was not nice.

While Dhuper's statement may not have been nice, in the context presented I do not think it violated Section 8(a)(1). Neither Roop nor Pereyra were engaged in concerted activities at the time of the statement, nor was any related topic discussed or referenced. And, in the circumstances of this case, I do not believe a connection can be drawn to Roop's February 13, 2017 discipline to warrant a violation.[27] Citing *Aladdin Gaming, LLC*, 345 NLRB 585, 597 (2005), the General Counsel asserts that Dhuper's statement, even if "oblique or vague, would reasonably be construed as coercive and a threat of job loss" in violation of Section 8(a)(1) of the Act. *GC. Br.*, at 51. However, in the exchange cited by the General Counsel, an employee was wearing a union button when he had a conversation with a supervisor who asked why the employee had the button, said he felt betrayed, and told the employee to think about his work, his family, and his future. *Aladdin Gaming, LLC*, 345 NLRB at 596–97. Thus, there was a clear connection between the supervisor's comments and the employee's protected activities. Had there been a connection between Dhuper's statement and employee concerted activities, the finding of a violation may have been appropriate. Cf. *Marsak Leasing, Inc.*, 313 NLRB 817, 824–25 (1994) (statement to employees who were complaining about the speed of a truck that, if they did not like working there they should not let the door hit them on the way out, evidence of unlawful motive in the discharge of one of the employees). However, there is no such nexus here. Under the specific circumstances presented, I do not believe that Dhuper's statement constituted a violation and recommend that the allegation in Complaint paragraph 6(b)(vi) be dismissed.

I. Allegation involving Dhuper and the March 2017 power outage

In March 2017, Monique Johnson, Frank Mardenzai, Israel Oliviolo, and Phillip Duong, were working in the respiratory department when a power outage occurred due to a thunderstorm. The respiratory department was in darkness, as the backup power for the lighting did not activate automatically. At some point Dhuper walked in. He explained what had occurred regarding the generator, and commented on how much better the tech room looked noting the WTF stampings had been removed. Johnson told Dhuper that he was talking to the wrong group of people as none of them would destroy property. She also told Dhuper that it was Matuszak who brought the WTF stamp into the department and the stamp then made its way to Seigal and Smith. As Dhuper was about to leave, Johnson lightheartedly asked whether Dhuper hated the respiratory department. He jokingly replied that it was true; he hated all of them for the problems they were causing.

Then the conversation became serious. Dhuper told the group that he was tired of everything that was going on in the respiratory department. Johnson replied saying that they were not the ones causing all the problems, and Oliviolo said that he had nothing to do with

[27] I do not believe a connection can be drawn because the violation involving the February 13, 2017 discipline is premised on the fact that it relied upon the unlawful discipline issued to Roop in November 2016

anything that was occurring in the department. Dhuper pointed to Oliviolo, Mardenzai, and Duong and told them that, just because they thought they were not involved in the drama, they would be fired as well and could get in line if they wanted to sue him. Mardenzai asked why Dhuper did not fire the people causing all the problems and Dhuper replied that he was well aware of the ringleaders causing all the drama in the department, in an apparent reference to Roop and Matuszak.[28] But, Dhuper said he wanted to give them an opportunity to work things out on their own, a cooling off period, out of respect for the fact they had worked at the hospital for 15-20 years. Johnson told Dhuper that Roop was putting herself in the line of fire by speaking about things that were right. Dhuper then said that he knew what was causing the problems, it was the PFT lab, and he could close the lab in a second but was not going to do so. Johnson replied saying that, while he was giving Matuszak and Roop a cooling off period, nothing had cooled off and things had gotten worse.

The General Counsel alleges that Dhuper's comments violated Section 8(a)(1) of the Act, in that they constituted an implied threat to terminate employees, and an implied threat to close the PFT lab, as alleged in Complaint paragraph 6(b)(vii). I agree that the statement to Oliviolo, Mardenzai, and Duong that they could be fired, even though they thought they were not involved in any of the drama, constituted an unlawful threat. Dhuper prefaced the comment by saying he was tired of everything that was going on in the respiratory department, and this comment was broad enough to include both the misconduct engaged in by some employees, and the concerted complaints engaged in by other employees; Dhuper made no differentiation. As such, considering the context, I find that Dhuper's statement would tend to coerce a reasonable employee and chill the exercise of employee Section 7 rights.

I do not believe that Dhuper's comment about the PFT lab constituted a violation. In context, it appears the comment was related specifically towards the personal and individual sniping between Matuszak and Roop that seemed to have started after Matuszak became the full-time PFT lab tech, and was unrelated to employee concerted complaints. Accordingly, given the context in which the statement was made, I do not believe it had a reasonable tendency to interfere with, restrain or coerce employees in their protected concerted activities. Thus I recommend the allegation on Complaint paragraph 6(b)(vii)(3) be dismissed.

J. Alleged threats by Marino and O'Keefe in April 2017

Complaint paragraph 6(c)(iv) alleges that, in April 2017 Marino threatened employees with termination for signing the petition. And paragraph 6(a)(ii) alleges that O'Keefe made coercive statements to employees in violation of Section 8(a)(1). Both these allegations involve discussions with Marco Garcia and Eric Thom that occurred after Backus delivered the employee petition to Dhuper, Blaisdell, and the Union.

1. Conversation between Garcia, Thom, and Marino

The credited evidence shows that, on about April 19 Garcia and Thom were in the hallway near the respiratory department when they saw Marino walking towards them; Garcia

[28] I recommend the interrogation allegation in Complaint paragraph 6(vii)(1) be dismissed, as I credit Mardenzai's testimony that Dhuper said he was "well aware of the ringleaders." (Tr. 795)

asked Marino how he was doing. Marino said he was stressed out and might be working seven days a week, twenty four hours a day, because of the petition. Garcia said that both he and Thom signed the document because they wanted things to get back to normal. Garcia then asked Marino whether there was going to be any backlash because of the petition. In reply Marino said that he might have to get rid of half of his department.

The General Counsel alleges that Marino's statement constituted an unlawful threat. Citing Marino's testimony, Respondent asserts that the conversation did not occur. *Resp't Br.*, at 63. However, assessing the demeanor of all the witnesses, I credit the testimony of both Garcia and Thom as to what happened, and find that the conversation occurred as set forth above. I found both Garcia and Thom to be very credible witnesses; the same is not true with Marino.

Regarding the petition itself, I find that the act of the RTs circulating, signing, and delivering the petition constituted protected concerted activity. The petition complains about a hostile working environment, bullying, retaliation, racial and professional harassment, and breach of the union contract, among other things. These are all matters of common concern, and are protected by the Act. *Continental Pet Technologies*, 291 NLRB 290, 291 (1988) (Board finds that letter written by two employees accusing supervisor of favoritism and harassment constituted protected concerted activity); *Hoytuck Corp.*, 285 NLRB 904, 904 fn. 3 (1987) (petition complaining about kitchen supervisor, and seeking his discharge, protected activity where the supervisor's conduct had an impact on working conditions); *Senior Citizens Coordinating Council of CO-OP City*, 330 NLRB 1100, 1102–04 (2000) (employees who signed and sent letter threatening a work stoppage with the object of influencing respondent in selection of management personnel were engaged in protected concerted activity where the demand for qualified supervision had a direct impact on the terms and conditions of their employment); *Walls Mfg. Co., Inc.*, 137 NLRB 1317, 1319 (1962), enfd. 321 F.2d 753 (1963) (employee letter, supported by coworkers, to the Texas health department complaining about, among other things, unsanitary working conditions and lack of heating, constituted protected concerted activity even if the information was inaccurate, so long as it was not deliberately or maliciously false); *Empire Gas, Inc. of Denver*, 254 NLRB 626, 630 (1981) (employees submitting a joint petition to management stating they would walk off the job if the rest of their bonus was not paid constituted concerted activity for their mutual aid and protection).

Respondent does not argue in its brief that the circulating, signing, and delivery of the petition by employees somehow lost the protection of the Act because it was delivered to Blaisdell, or because of some of the employee demands made in the document. And, I believe that the record evidence is insufficient to support such a claim. As such, I find that the therapists engaged in conduct protected by Section 7 of the Act when they circulated and signed the petition, and Marino's statement that he might have to get rid of half of his department, in relation to whether there would be any backlash from the petition, constituted an unlawful threat. *Enterprise Products Co.*, 196 NLRB 549, 562 (1972), enfd. 471 F.2d 651 (5th Cir. 1973) (Table) (Supervisor's statement that he might have to lay off employee who signed union card constituted an unlawful threat.); See also *NLRB v. Stanton Enterprises, Inc.*, 351 F.2d 261, 263 (4th Cir. 1965) (Banquet manager's statement that company president would fire any waitresses he found signing union cards constituted an unlawful threat.).

2. Conversation between Garcia, Thom, and O'Keefe

After their conversation with Marino, Garcia and Thom were leaving work and ran into O'Keefe in the parking lot. Garcia's conversation with Marino made him nervous about losing his job so when he saw O'Keefe in the parking lot, Garcia asked her whether anyone was going to be disciplined for signing the petition. Thom intervened. Trying to calm down a nervous Garcia, Thom said that if they came to work, kept their nose clean, and did their jobs, they would probably be okay. O'Keefe agreed with Thom's statement, saying that if they came to work, did their jobs, and kept their nose clean, nobody was going to lose their jobs. However, she went on to say that management was extremely unhappy, that what the employees did was the equivalent of an unwarranted attack on the hospital, and the way they did it was outside the scope of what was reasonable.

The General Counsel asserts that O'Keefe's statement constitutes a violation of Section 8(a)(1). Respondent, citing O'Keefe's version of what was said, and her claim that she had no knowledge of the petition at the time the conversation occurred, argues that there was no violation. *Resp't Br.*, at 35. Having assessed the demeanor of the witnesses, I again credit the testimony of both Garcia and Thom as to what was said, and find that the conversation occurred as set forth above.

Along with assessing witness demeanor, I also discredit O'Keefe based on her testimony that she did not know anything about the petition when this conversation occurred, as it is inconsistent with Marino's testimony. (Tr. 2317–18) Marino testified that during the evening of April 13, the day the petition was delivered to Dhuper and emailed to Blaisdell, he telephoned O'Keefe telling her about his email exchange with Blaisdell. And on April 14, after meeting with Jones and having a chance to review and discuss the petition with her, he called O'Keefe again. (Tr. 1482–84, 1488) The conversation with Thom, Garcia, and O'Keefe occurred 5–6 days after the petition was delivered, and well after Marino's discussions with O'Keefe. As such, O'Keefe's claim that she knew nothing of the petition is not credible.

As for O'Keefe's comments themselves, I find them to violate Section 8(a)(1) of the Act. It is well settled that statements equating employee protected activity with disloyalty to the employer constitutes coercion in violation of Section 8(a)(1). *Health Now, Inc.*, 353 NLRB 453, 464 (2008) (citing *HarperCollins San Francisco v. NLRB*, 79 F.3d 1324, 1330 (2d Cir. 1996)). O'Keefe's statement, in relation to the petition, that management was extremely unhappy and that what employees did was the equivalent of an unwarranted attack on the hospital, was the same as accusing employees of disloyalty for signing the petition and was therefore coercive.

K. April 2017 alleged threats and polling

Around April 21 or 22, Marino was in the tech room along with RT Nancy Mardenzai. He handed Mardenzai the letter drafted by Sarrao, along with a sheet for her to sign acknowledging receipt of the letter. Mardenzai asked Marino what the documents were about. Marino told her the letter was based on the petition, that according to the CEO whoever signed the petition would be fired, and since a majority of the department had signed the document they might be fired. He then asked Mardenzai whether she signed the petition. Even though she had

signed the document, Mardenzai said no because she was scared. Marino denied making the statements attributed to him by Mardenzai. However, I found Mardenzai to be a credible witness, and credit her testimony as to what occurred.

Marino's statement that, according to the CEO, whoever signed the petition would be fired constitutes an unlawful threat in violation of Section 8(a)(1). *Stanton Enterprises, Inc.*, 351 F.2d at 263. And, I find that Marino's questioning of Mardenzai as to whether she signed the petition was an unlawful interrogation. Marino had no legitimate reason for asking Mardenzai the question, did not convey a legitimate reason, and did not provide Mardenzai with any assurance against reprisals if she did not answer. And, I credit Mardenzai's testimony that she lied to Marino when she told him that she did not sign the petition because she was scared about getting fired. Under these circumstances I find Marino's questioning was coercive and a violation of Section 8(a)(1).

L. Alleged Johnnie's Poultry violations in May 2017

Complaint paragraph 6(e) alleges that, on May 18, 2017, Respondent interrogated employees. The facts surrounding this allegation involve Respondent's hiring of an outside attorney from a law firm to investigate the employee complaints made in the petition.

1. Background

After the petition was delivered to Respondent, in April 2017 the hospital hired an outside attorney to investigate the complaints outlined in the document. In connection with the investigation, Jones called Monique Johnson and asked whether she would be willing to speak to an attorney who was going to investigate all sides of what was happening in the respiratory department. Johnson agreed to do so if it would help to bring about a resolution.

The attorney called Jonson sometime in either May or June. He introduced himself and inquired as to whether Johnson knew why he was calling. Johnson asked if he was calling about the petition. The attorney said the petition was one of the reasons for the call, that he was there to collect information from everyone involved, and was neutral. He told Johnson that he had been to the hospital on two previous occasions to collect information, and asked her what was occurring in the department. After Johnson told him some of the issues, the attorney asked what she would like to see happen. Johnson said that she wanted the people who were causing the problems gone. Towards the end of their conversation the attorney asked Johnson who drafted the petition. The question upset Johnson and she did not answer. However, she told the attorney that petition was initiated because Dhuper had suggested it, and that she had signed the document. At no time during this conversation did the attorney tell Johnson that there would be no repercussions for refusing to answer any of his questions, or that Johnson would not be retaliated against in any way. The attorney did tell Johnson that she did not have to speak with him if she did not want to.

2. Analysis

It is undisputed that Respondent hired the outside attorney to conduct an investigation into the matters discussed in the petition. However, in its Answer to the Complaint Respondent denied that the attorney was its agent pursuant to section 2(13) of the Act. (GC. 1 (ff), 1(hh)) Instead, during testimony, and in its brief, Respondent referred to the attorney as a "third party investigator." (Tr. 2144–45; *Resp't Br.*, at 67) Notwithstanding Respondent's characterization, an outside attorney conducting an investigation for an employer "is not a 'third party' in the same way that a . . . detective agency would be." *Hartman v. Lisle Park District*, 158 F. Supp. 2d 869, 876 (N.D. Ill. 2001). Unlike other contract workers, "the attorney has a relationship of trust, confidence, and confidentiality with his client and owes the client a duty of loyalty that, among other things precludes the attorney from taking on engagements that would give rise to a conflict with the client's interests." Id. Therefore "[w]hen an attorney conducts for an employer/client an investigation of an employee's dealings with the employer, he is acting as the client, just as would be the case if the employer had one of its employees conducting the investigation." Id. at 876–77. Although the issues in *Hartman* involved an alleged Fair Credit Reporting Act violation, the court's reasoning is equally applicable here. Accordingly, I find that the attorney who spoke with Johnson was Respondent's agent pursuant to Section 2(13) of the Act when he questioned her about who drafted the petition.

Citing *Johnnie's Poultry, Co.*, 146 NLRB 770 (1964), the General Counsel alleges that the attorney's questioning Johnson as to who drafted the petition constituted an unlawful interrogation. The General Counsel argues that Johnson was not given assurances that no reprisals would be taken against her in connection with the conversation, and the attorney had no legitimate purpose for asking who drafted the petition. *GC. Br.*, at 59–62. Respondent argues that *Johnnie's Poultry* is inapplicable, as it only applies in two instances: (1) the verification of a union's majority status; and (2) the "investigations of issues raised in a complaint where such interrogation is necessary in preparing the employer's defense for trial of the case." *Resp't Br.*, at 68. Because the attorney was not preparing Respondent's defense to an unfair labor practice charge, Respondent asserts that *Johnnie's Poultry* does not apply. Id. at 69. Instead, it argues that the "totality of circumstances" test in *Rossmore House*, 269 NLRB 1176 (1984) applies. And, under this standard, there was no interrogation because the attorney was not Respondent's employee, the interview was conducted over the phone, was purely voluntary, and the attorney was "investigating all sides." *Resp't Br.*, at 69.

Here, I agree with the General Counsel that the analysis set forth in *Johnnie's Poultry* is the proper framework to apply. At the time the attorney spoke with Johnson, two of the unfair labor practice charges in this proceeding had already been filed and were actively being investigated by the NLRB. (GC. 1(a); 1(e)) The first charge involved Roop's suspension and discharge. (GC. 1(a)) The second charge specifically mentions the petition, and alleges that Respondent violated Section 8(a)(1) by "threatening employees with discharge for signing a petition; and interrogating and polling employees about whether or not they signed the petition." (GC. 1(e)) The Board has specifically applied *Johnnie's Poultry* to situations involving employee interviews which occur while a charge is being investigated by the Board and before a complaint has issued. *WXGI, Inc.*, 330 NLRB 695, 712 (2000), enfd. 243 F.3d 833 (4th Cir. 2001) (citing *Le Bus*, 324 NLRB 588 (1977)). Here, because the attorney, who as noted above was Respondent's agent, asked questions directly related to the petition, including the identity of

the drafter, I find that the questioning was closely related to the allegations in the outstanding charge to warrant the protections required by *Johnnie's Poultry*.

In *Johnnie's Poultry*, 146 NLRB at 770, the Board noted that, where an employer has a legitimate cause to inquire into matters involving employee Section 7 rights, they may do so without incurring Section 8(a)(1) liability if the following safeguards are communicated to the employee: (1) the purpose of the questioning must be conveyed; (2) assurances of no reprisals must be given; (3) the employee's participation must be obtained on a voluntary basis; (4) the questioning must take place in an atmosphere free from union animus; (5) the questioning must not be coercive in nature; (6) the questions must be relevant to the issues involved; (7) the employee's subjective state of mind must not be probed; and (8) the questions must not otherwise interfere with the statutory rights of employees.

Here, the attorney failed to provide Johnson with assurances against reprisals when he questioned her about the petition. The simple failure to provide assurances against reprisals is enough to trigger a violation. *Standard-Coosa-Thatcher, Carpet Yarn Division,* 257 NLRB 304, 304 (1981) (violation where employer's attorney failed to recite the assurances only once in more than 70 interviews). The Board's rule "simply recognizes that a significant risk of coerciveness arises when an employer questions employees" about Section 7 activity "without informing them that they may, with impunity, decline to respond." *Standard-Coosa-Thatcher Carpet Yarn Division, Inc. v. NLRB*, 691 F.2d 1133, 1141 (4th Cir. 1982) Also, I find that the question as to who drafted the petition was not relevant to the purported reason for the questioning and was therefore coercive. The attorney was supposed to be investigating the allegations of misconduct set forth in the petition, which was signed by seventeen employees. There was no legitimate purpose for him asking who drafted the petition, as the identity of the drafter was unrelated to the allegations of misconduct set forth in the document.[29] Accordingly, I find that Respondent violated Section 8(a)(1) of the Act by interrogating Johnson as to who drafted the petition .

IV. ANALYSIS OF THE ALLEGED DISCRIMINATION AGAINST ROOP AND BACKUS

A. Legal Standard

To determine whether an employee's discipline, suspension, or termination violates the Act, the Board applies the burden shifting analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Although *Wright Line* involved a violation of Section 8(a)(3), this same framework is generally used whenever unlawful motivation is at issue, including violations of Section 8(a)(1) and Section 8(a)(4) of the Act. See *NLRB v. Main St. Terrace Care Center*, 218 F.3d 531, 540–41 (6th Cir. 2000) (applying *Wright Line* to uphold Board's finding that worker was discharged for engaging in concerted activity in violation of Section 8(a)(1) of the Act); *NLRB v. Overseas Motor, Inc.*, 721 F.2d 570, 571 (6th

[29] Because of the other violations found herein, the fact there was no legitimate purpose for asking who drafted the petition, assurances against reprisals were not given, and the fact that Johnson refused to answer the question as to the identity of the drafter, even under the totality of the circumstances standard advocated by Respondent, I find that the questioning violated Section 8(a)(1) of the Act.

Cir. 1983) (applying *Wright Line* to sustain the Board's finding of an unlawful discharge in violation of Section 8(a)(4) of the Act).

Under this framework, the General Counsel must prove by a preponderance of the evidence that the employee's protected activity was a motivating factor for the employer's actions. The elements required to support such a showing are union or protected concerted activity, the employer's knowledge of that activity, and animus on the part of the employer. See, e.g., *Consolidated Bus Transit*, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009).

If the General Counsel makes this initial showing, the burden of persuasion shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even if the employee had not engaged in protected activity. Id. at 1066; see also *Ready Mixed Concrete Co. v. NLRB*, 81 F.3d 1546, 1550 (10th Cir. 1996) (by shifting the burden the employer's justification becomes an affirmative defense). Where an employer's explanation is "pretextual, that determination constitutes a finding that the reasons advanced by the employer either did not exist or were not in fact relied upon." *Limestone Apparel Corp.*, 255 NLRB 722, 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). Also, where the "proffered non-discriminatory motivational explanation is false even in the absence of direct motivation the trier of fact may infer unlawful motivation." *Roadway Express*, 327 NLRB 25, 26 (1998).

B. The Discipline, Suspension, and Discharge of Babita Roop

The record evidence shows that Roop engaged in protected concerted activities, that Respondent knew about her actions, and that it harbored the animus against employee concerted activities. Accordingly, the General Counsel has presented sufficient evidence to sustain a prima facie case regarding the allegations involving Roop.

1. Roop's protected concerted activity

Roop was engaged in activities protected by Section 7 of the Act going back to at least June 2016, when employees marched to human resources in support of Pereyra and asked to meet with Ambrosini to discuss what was occurring in the department, including the gorilla pictures that were posted in the tech room.[30] Also in June 2016, Roop and Johnson collaborated on drafting the list of concerns involving workplace issues and submitted them to the Union to be

[30] See *Original Oyster House*, 270 NLRB 87, 91 (1984), enfd. 770 F.2d 1073 (3d Cir. 1985) (table) (Employees engaged in concerted activities which included requesting meetings with management about their working conditions, even though the meetings were never held); *Riley International Corp.*, 314 NLRB 785, 789 (1994) (employee who, in part, brought employee complaint about working conditions to management's attention by requesting a meeting between management and employees to discuss and resolve those complaints, was engaged in concerted activities); *Industrial Hard Chrome, Ltd.*, 352 NLRB 298, 310 (2008) (work stoppage by unionized employees was to call management's attention to mistreatment of a coworker and constituted concerted activity protected by the Act). *Charleston Nursing Center*, 257 NLRB 554, 555, 561 (1981) (employees were engaged in protected concerted activity when they requested meeting with management to discuss grievances, but the employer was under no obligation to meet with them as a group).

addressed. These actions are protected by the Act.[31] Some of the issues in the list of concerns included questioning why certain benefited employees were not working weekends, which was an issue that Roop had complained about directly to Marino earlier that month. The union provided the list of concerns to Ambrosini who gave them to Marino. He, in turn, addressed the items listed at a staff meeting in August 2016.

In November 2016 Roop ran for, and was elected, shop steward and Marino was informed of the election results. She kept this position until March 2017. Roop also engaged in concerted activities when she, along with Backus and two other coworkers, filed complaint forms with human resources on the same day.[32] Finally, Roop spoke with coworkers about, solicited signatures on, and signed, the "Petition to Protect License and Workplace."[33]

2. Respondent's knowledge of Roop's protected concerted activity

The record establishes that Respondent had knowledge of Roop's protected concerted activities; this includes Marino, Ambrosini, O'Keefe, Dhuper, and Jones. Both Ambrosini and Marino knew about the employees who marched to human resources. Ambrosini testified that he walked out to the lobby that day, saw the group of RTs who had gathered, and recognized them. (Tr. 1531) As for Marino, when he spoke with Roop in late June 2016, he relayed to her that Ambrosini had told him a group of employees were at human resources complaining about Marino's job. Roop told him that she was one of the people present, and they were not complaining about Marino but were there to support Pereyra.[34] (Tr. 38) Also, on March 16, 2017, Roop and Pereyra met with Jones. In this meeting Roop told Jones about the 2016 gorilla pictures in the tech room photo-shopped with Pereyra's face, and that Roop was one of several employees who went to human resources to complain that the pictures were offensive. (GC. 81)

I also believe that it is reasonable to infer that Marino suspected Roop to be involved with the list of concerns that RTs submitted to the Union, which she was. Among other things, the list complained that some employees did not work weekends, stated the resource position was being misused, was not needed, and could be performed by the RTs who did most of the work anyway. About a week before the list was submitted to the Union, Roop complained to Marino about

[31] See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978) (Employees have the right to "seek to improve terms and conditions of employment . . . through channels outside the immediate employee-employer relationship."); *Carolina Paper Board Corp.*, 183 NLRB 544, 556 (1970) (Employee's actions in complaining to the union about mistreatment and harassment regarding work assignments was protected by the Act, even if the complaints lacked merit, as the employee was seeking the union's help in connection with what he believed to be a justifiable grievance.); *Farmer Bros. Co.*, 303 NLRB 638, 651 (1991), enfd. 988 F.2d 120 (9th Cir. 1993) (Table) ("In seeking the aid of his local union to help resolve his work dispute, the Charging Party engaged in obvious union activity.").

[32] *Meyer Tool, Inc.*, 366 NLRB No. 32 slip op. 9–10 (2018) enfd. --- Fed.Appx. --- 2019 WL 949082 (2d Cir. 2019) (employees going to human resources to file complaints about working conditions protected and concerted even if they did not present the same issues or concerns in their complaints).

[33] In her brief, the General Counsel cites other instances of alleged concerted activity. However, for purposes of the analysis here, it is redundant and unnecessary to address every instance cited by the General Counsel.

[34] Whether Marino thought that the employees who marched to human resources were complaining about him, or were supporting Pereyra, is not relevant as both complaints are concerted activity protected by the Act. Moreover, because Marino was the department manager to whom Pereyra initially complained, and employees perceived that nothing had been done about Pereyra's harassment concerns, the subjects overlap and any complaints of inaction by Respondent and harassment in the department would necessarily encompass Marino as the manager.

Hamid, who had just been appointed to the resource job, and the fact that he was not going to be working weekends. Under these circumstances, I believe a reasonable inference can be drawn that Marino, at the very least, suspected Roop's involvement with the list.[35]

Also, the record shows that Marino suspected Roop of having spoken with coworkers about her November 10 human resources meeting involving the letter drafted by Matuszak, Smith, and Hamid. On November 21, 2016, the same day Roop received her written verbal warning, Marino emailed Ambrosini saying that information from the November 10 meeting had been leaked to others in the department. Marino suspected Roop, wanted to confirm it, and proposed suspending her for doing so. And, when he presented Roop with the discipline, Marino asked Roop if she had spoken with anyone about their previous meeting. As noted earlier, in these circumstances Roop had a right protected by the Act to discuss what occurred in her November 10 meeting with coworkers. *Inova Health System v. NLRB*, 795 F.3d 68, 85 (D.C. Cir. 2015); *Caesar's Palace*, 336 NLRB 271, 272 (2001). And, Marino's suspecting Roop of discussing the meeting with other therapists is sufficient to establish knowledge of her concerted activities.[36] It is also clear from the record that that Ambrosini and O'Keefe knew, or suspected, that Roop had discussed the November 10 meeting with her coworkers, as the issue was specifically discussed with Roop in their December 5 meeting.

Ambrosini, Marino, and Dhuper all knew about the group bullying/harassment complaints filed with human resources by Roop, Backus, and others. Ambrosini knew because they were filed with his office and were on his desk when he spoke with Dhuper and showed him the complaints filed by respiratory department employees. Dhuper had these complaints with him when he addressed the RTs in a staff meeting, showing them the stack of papers and saying it was the department's harassment file which was the thickest in the hospital. Roop's election as union steward was no secret, as the election results were emailed to Marino. Finally, as for the petition, Dhuper was given a copy of the signature sheet showing every RT that had signed the document, including Roop. Accordingly, the record shows that Respondent was well aware of Roop's concerted activities.

3. Animus

The record is replete with evidence of animus against employee concerted complaints. The various 8(a)(1) violations by Marino, Ambrosini, O'Keefe, and Dhuper are sufficient to establish animus. *Dynasteel Corp.*, 346 NLRB 86, 88 (2005) ("The Respondent's numerous 8(a)(1) violations provide evidence of its anti-union animus").

Also, although not alleged in the complaint, Marino's statements to Frank Mardenzai and Alex Aguilar, and his changing Aguilar's work schedule, also are evidence of animus.[37]

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[35] *East Bay Rambler, Inc.*, 168 NLRB 1000, 1005 (1967) ("The Board has long held that employer knowledge . . . of union activities may properly inferred from circumstantial evidence.")

[36] *Respond First Aid*, 299 NLRB 167, 169 fn. 13 (1990), enfd. mem. 940 F.2d 661 (6th Cir. 1991) ("The Board and the courts have long held that when the General Counsel proves an employer suspects discriminatees of union activities, the knowledge requirement is satisfied.").

[37] *Stoody Co.*, 312 NLRB 1175, 1182 (1993) (animus can be based on unalleged conduct, and on conduct that does not necessarily violate of the Act); *Gencorp*, 294 NLRB 717, fn. 1 (1989) (conduct not found to be a violation may still be used to show animus).

Regarding this incident, in May 2016, after Matuszak had been appointed as the new PFT lab tech, Ochoa appointed the backup, and Hamid given the newly opened resource position, Aguilar and Mardenzai called Marino to discuss the backup tech and the resource jobs. They complained to Marino that they had more seniority than either Hamid or Ochoa, expressed their interest to train in the PFT lab, and suggested the backup PFT lab tech position and the resource job be rotated among therapists interested in this work. With this conversation, Aguilar and Mardenzai engaged in protected concerted activity for mutual aid and protection.[38] Marino's response to this conversation was to: (1) change Aguilar's work schedule so that she no longer worked with Mardenzai; and (2) tell Aguilar her schedule was changed because she and Mardenzai were riling up the department and that Aguilar should not listen to others because they like to plant seeds and see what unfolds. Both are evidence of animus.[39]

As set forth above, the General Counsel has presented sufficient evidence of a prima facie case of discrimination. Accordingly, Respondent bears the burden of persuasion to show that it would have disciplined, suspended, and discharged Roop absent her protected concerted activities. *Consolidated Bus Transit*, 350 NLRB at 1066.

4. Roop's November 21, 2016 written verbal warning

a. Background

On October 4, 2016, Matuszak, Smith, and Hamid drafted a three page letter to Marino complaining that Roop had subjected them to "unprofessional hostility within the workplace." In the letter each set forth their various grievances against Roop. Marino used this letter as a reason to issue Roop a written verbal warning on November 21, 2016; this was Roop's first discipline in her 17 years at the hospital.

Before issuing the discipline, Ambrosini and Marino met with Roop on November 10. In the meeting Ambrosini said they had received a letter from Matuszak, Hamid, and Smith setting forth some concerns. However, Roop was never shown the letter or told specifically what allegations the three had made against her. Instead, Marino told Roop that she curses, is unprofessional, does not do her job, and looks down on people. But he did not give her any specific examples of incidents where she allegedly engaged in this conduct. All Roop could do was profess her innocence, and ask Ambrosini whether Respondent had any problems with her work; Ambrosini said that they did not.

On November 21, Marino met with Roop and gave her the discipline. In the meeting, Marino told Roop that the discipline was being issued because of her unprofessional behavior towards coworkers, which included using harsh language, rolling her eyes, and belittling other

[38] *Pilot Freight Carriers, Inc.*, 265 NLRB 129, 130–131 (1982) (several data entry operators who complained to management about the individual selected for a vacant data control clerk position, claiming the successful applicant was unqualified and lacked seniority, were engaged in concerted activities, but employee was fired for insubordination that was unrelated to her concerted activities).

[39] *Terpening Trucking Co.*, 271 NLRB 96, 99 (1984) (Statements to employee asking why he was "riling up the men" violated Section 8(a)(1)); *Hobson Bearing Intl., Inc.*, 365 NLRB No. 73, slip op. at 13 (2017) (owner telling worker to stop "stirring up drama with employees" a violation); *General Baptist Nursing Home*, 259 NLRB 982, 985 (1982) (change in work schedule because of employee's union or protected concerted activities a violation).

employees. Again, however, Marino did not give Roop any examples of when she allegedly behaved unprofessionally or engaged in the conduct that Marino attributed to her. The only thing Marino told her was that she was not to roll her eyes going forward. And, during the meeting Marino pressed Roop as to whether she had discussed with her coworkers what had occurred in the November 10 meeting.

At trial, Marino testified that Roop was ultimately disciplined because of her interactions with Matuszak, Hamid, and Smith. (Tr. 1362) However, he gave no examples of what Roop allegedly did. Ambrosini initially testified that Roop was disciplined because of an unpleasant interaction that he believed occurred during a handoff. However, the October 10 letter complaining about Roop does not say anything about an unpleasant interaction during a handoff. Later in his testimony, when asked what specifically Roop did to warrant a discipline, Ambrosini answered that he could not recall. And, he could not tell from the face of the disciplinary document itself. (Tr. 1651)

Roop's discipline states that her actions violated the following the Respondent's Standards of Conduct Policy regarding "Bullying, Discrimination, and Harassment and Retaliations Prohibitions and Complaint Procedure." Notwithstanding, when asked what Roop did that constituted "bullying," Ambrosini testified that he was not certain anything she did would fall under the bullying policy. He also testified that her conduct would not constitute discrimination or retaliation. As for harassment, Dhuper testified that it may have been harassment, depending upon her interaction with Matuszak at the time, that it may have been bullying as well, but ultimately Ambrosini could not recall what, if anything, Roop did that subjected her to discipline. (Tr. 1651, 1667–68; GC. 8)

b. Analysis

Based upon the evidence presented, I find that Respondent has not rebutted the General Counsel's prima facie case, and has not shown that it would have disciplined Roop absent her protected concerted activities. Respondent could not explain what specific incidents were relied upon for Roop's discipline, nor did it present credible evidence that Roop engaged in the conduct attributed to her. *Central Cartage, Inc.*, 236 NLRB 1232, 1255 (1978), enfd. 607 F.2d 1007 (7th Cir. 1979) (table) (employer's "vague accusations that the alleged discriminatees were engaged in" misconduct was not supported by any competent evidence and "strengthens the clear inference" that the actions taken against them were discriminatorily motivated).

Similarly, during the underlying investigation, Respondent did not explain to Roop what specific events it was investigating that could potentially subject her to discipline. While Respondent met with Roop on November 10, Marino only made general accusations that Roop curses, is unprofessional, does not do her job, and looks down on people. Roop was never provided with any specific incidents which the hospital was investigating where this alleged conduct occurred. Under these circumstances, I find that Roop was not afforded a meaningful opportunity to answer the allegations against her, which is evidence of an unlawful motive. *Keller Manufacturing Co.*, 237 NLRB 712, 719 (1978) (Where employee was ostensibly fired for poor work, various factors, including the fact respondent did not explain what exactly was wrong with the work in question, supported a finding of unlawful motive); *Tubular Corporation*

of America, 337 NLRB 99, 99 (2001) (failure to afford employee an opportunity to answer the allegations raised by the investigation is evidence of unlawful motive); *Joseph Chevrolet, Inc.*, 343 NLRB 7, 8 (2004), enfd. mem. 162 Fed. Appx. 541 (6th Cir. 2006) (respondent's true, and unlawful, motive was "was evidenced by its failure to conduct a complete investigation by asking [the employee] for his position regarding the incident.").

Pointing to the employee march to human resources, in its post-hearing brief Respondent argues that Roop's concerted activities were too remote in time to support a violation. *Resp't Br.*, at 78–79. I disagree. "[A]n employer might wait for a pretextual opportunity to discipline an employee." *United Parcel Service*, 340 NLRB 776, 778 fn. 10 (2003) (statement made to employee that he was a "troublemaker" made 6 months prior to discipline was not too remote to show animus). Moreover, Roop continued to engage in concerted activities even after the employee march to human resource. In fact, in the weeks preceding her discipline, Marino suspected Roop of engaging in concerted activities by discussing her November 10 disciplinary interview with coworkers, and he interrogated various individuals, including Roop, about her actions. He also pushed for her to be disciplined in July 2016, and even advocated suspending Roop on the very day she was disciplined if he could prove she had spoken with coworkers about the November 10 meeting. *Station Casinos, LLC*, 358 NLRB 1556, 1559 (2012) (supervisor's unsuccessful attempt to discriminatorily discipline employee based on the pretext of poor work performance evidence of animus). There is nothing remote regarding either Roop's concerted activities, or Respondent's animus towards such protected conduct. In fact, I believe that Marino's asking Roop if she spoke with any of her coworkers about the November 10 meeting, conduct which is protected by the Act, at the very same time he was presenting her with her discipline, is further evidence that the discipline was unlawfully motivated.

Accordingly, I find that Respondent has not shown that it would have disciplined Roop absent her protected concerted activities. Instead, the record shows that Respondent violated Section 8(a)(1) of the Act by disciplining Roop on November 12, 2016, as alleged in the complaint.

5. Roop's final written warning and suspension

a. Background

Seyed Reza Boushari (Bousheri) is a security guard at Saint Rose. Respondent's security guards patrol the interior and exterior of the hospital, both on foot and using a golf cart.[40] (Tr. 1857–58)

On about February 7, 2017, sometime between 5:00 a.m. and 6:00 a.m. Boushari was patrolling outside the hospital near the respiratory department employee entrance when he heard a noise that sounded like fighting. Bousheri walked towards the noise to assess the situation. What he saw was Roop standing on a walkway, about 10 feet from the employee entrance, on her cell phone screaming and swearing at someone. At the time, Bousheri did not know Roop's name, but recognized her as working in the respiratory department. (Tr. 1872, 1888) Roop, who

[40] I found Boushari to be a credible witness and credit his testimony as to what occurred regarding this incident. .

was scheduled to work from 6:00 a.m.–6:30 p.m., was at the hospital early and had yet to clock-in for her shift. (Tr. 21, 131, 135, 1861–64, 1872, 1876–79, 1881–82, 1888)

Bousheri decided not to encounter Roop. He thought she might start yelling at him and instead of solving a problem it might create more issues. So, Bousheri walked back and forth a couple of times in front of her, trying to show his presence as a security guard; Roop did not acknowledge him. He then walked away to continue his patrol. At some point he saw Brian Smith, who was working the overnight shift and was scheduled to clock-out at 6:30 a.m. that day. Bousheri knew Smith as they sometimes talked during coffee/lunch breaks. He told Smith what had occurred and asked if there was anything going on with Roop. Bousheri thought Smith would inform someone in the respiratory department so the situation did not happen again. After speaking with Smith, Bousheri finished his rounds, and then went to the security booth. (Tr. 1858, 1865, 1882–83, 1889, 1903– 04)

i. Argument between Smith and Roop

After speaking with Bousheri, Smith made his way back to the respiratory department to give his report to Roop, as he was the team lead going off shift and she was the team lead coming on shift.[41] Roop, who by this time was already in the tech room, had discovered that someone highlighted parts of the previous day's assignment sheet which she had completed as part of her duties as team lead. Roop assumed that Smith had made the highlights because he was the night-shift lead. Smith had, in fact, made the markings. Marino had previously asked Smith to note anything that he thought showed some sort of improper conduct by Roop and slip it under his office door. This is what Smith was planning to do with the assignment sheet, however Roop found the document before Smith could do so. (Tr. 129–30, 133, 1906–10, 1944)

When Smith walked into the tech room and started to give his report to Roop about the evening's activities, Roop challenged him about the assignment sheet, asking him to explain the highlights. The two started arguing. One other respiratory therapist was in the room at the time, at least one student was present, and others were coming in. Roop told Smith that they needed to step outside, as they were not going to do this in front of the students. Smith told her that it was too late—she had already started it. He then told Roop that she had been reported by security for using profanities in the common area and that Smith was asked to tell Roop not to do it again. This escalated the argument between the two. Eventually they left the tech room to speak with the security guard; it took them about two minutes to walk from the tech room to the security both. (Tr. 130–136, 1906–1919, 1944–1947)

According to Boushari, about 15–20 minutes after he spoke with Smith, Roop and Smith arrived at the security booth unexpectedly. Smith spoke first, asking Boushari to confirm that he saw Roop being loud and swearing. Roop then challenged Boushari, asking him whether she

[41] The facts surrounding the interaction between Smith and Roop involving this incident are based upon the portions of their testimony which I find credible. Regarding this incident both were prone to exaggeration. It is clear from the record they were aligned with opposing factions in the department and during their testimony about this incident they exaggerated what the other did and said, while downplaying their own role into what occurred. Also, I did not find Smith to be generally credible at all, and I have discounted his testimony throughout this proceeding unless it was corroborated by otherwise credible evidence.

was using profanities and was loud. Boushari answered yes. Roop then turned toward Smith and started mocking him saying—what are you going to do about it, and shaking her hands in the air exclaiming "Oh, I'm scared." Smith walked away towards the respiratory department and Roop followed him. They argued their way back to the respiratory department. Back in the tech room Smith finished whatever he needed to do, grabbed his "stuff . . . kind of chuckled . . . and left." (Tr. 1918–19) (Tr. 135, 1867–70, 1890, 1893–95, 1918–19)

ii. Telephone Call to Marino and meeting in human resources

Marino testified that he was still at home, in bed when Smith called him and told him what happened with Roop. Soon after Roop called. According to Marino, the call with Roop lasted about six minutes, and was "one long stream of someone yelling at me," and blaming him for what was occurring in the department. Marino claimed that he tried to calm Roop down, even calling out and then screaming her name, but he could not get through to her; Roop then hung up, ending the call. Marino testified that Roop was so loud that the speaker on his phone was distorted to the point he could not really understand what she was saying. After Roop hung up the phone, Marino left Ambrosini a voicemail, and then called a nursing supervisor. He also called Henry Aquino, another respiratory therapist, asking him to check on Roop; Aquino did, and told him that Roop looked fine. (Tr. 1371–72, 1478; GC. 90)

Regarding the phone call, Roop testified that she stepped outside of the hospital, called Marino and told him what occurred. She then told him that everyone was picking on her, that she was tired of it, and started crying because she was emotional and "had a breaking point." (Tr. 138) As she was crying, she hung up on Marino. After speaking with Marino, Roop took a break as she had been crying and was upset. She then went back to the department and picked up her assignments; she also called Dhuper's secretary to make an appointment to meet with him that evening. (Tr. 136–38, 142–43)

When Marino arrived at the hospital, he called Ambrosini and they discuss what had occurred. Marino wanted to send Roop home, saying that she was insubordinate and needed to cool down, but Ambrosini was against it. After speaking with Ambrosini, Marino started looking for Roop thinking she would be an emotional mess. However, when he found Roop she was fine; she looked at him and said good morning. Marino was puzzled. He told her that they would be having a conversation in human resources at 8:30 a.m. Roop told Marino she needed to get a shop steward for the meeting, and would contact Marino after she located one. Roop found Justin Kmetz to serve as shop steward; she contacted Marino and they arranged to meet in human resources later that day. (Tr. 144, 1373, 1478–79; GC. 90)

Roop's meeting in human resources occurred at around 9:30 a.m. on February 7. Present was Kmetz, Roop, Ambrosini, Marino, O'Keefe, and Mike Gandhi.[42] The meeting started with Ambrosini saying Marino had reported to him that Roop was upset, screaming, and crying. And, they were there to find out what happened that morning when Roop called Marino. Roop asked why Gandhi was present. Gandhi said it was because Roop apparently had a problem with him. The meeting then started getting loud and a short argument ensued between Gandhi and Roop as

[42] Regarding any contradictory or extraneous testimony as to what occurred during this meeting, I specifically credit Kmetz's testimony as to what was said during this meeting.

to why he was present at what was supposed to be a meeting involving Roop and management. Ambrosini intervened, telling everyone to stop, and saying that he "did not like where this is going." (Tr. 696) Apparently without resolving the issue involving Gandhi's presence, the meeting continued with Marino saying that he was trying to determine why Roop called him that morning crying and yelling and said that she was hysterical during the call. (Tr. 145, 694–97)

Marino further said that Roop hung up on him during the call while he was trying to understand what was going on and whether Roop was able to continue working. Roop apologized saying that she wasn't yelling at Marino, but was just having a breakdown and could not take it. In fact, she was very apologetic to Marino, saying "sorry" numerous times for calling, crying, and being upset. Roop admitted to hanging up the phone, but said her throat was closing, she couldn't talk, and was just crying. As for her ability to keep working that day, Roop said that she was fine, and that next time she would just take a breather and avoid everyone who was causing her trouble. Roop then started talking about the problems she was having with her coworkers, including an argument she had with Hamid, and said there was so much stress and anxiety at work, that she was seeing a therapist, taking medication, and was calling in sick for the first time. (Tr. 146–47, 697–98, 701, 711, 1671)

Ambrosini then said that there was a complaint that someone had witnessed Roop cursing during a conversation. Roop replied saying that she was not cursing, that she was off the clock, outside the hospital, and on the phone speaking with Union business agent Matthew Mullany. She recommended they call Mullany to confirm the conversation; Marino acknowledged that Roop spoke with Mullany. (Tr. 146–47, 698–99)

At one point Marino inquired about Roop's scheduled appointment with Dhuper later that day, asking her what the appointment was about. Roop said that she was going to tell Dhuper everything that was going on in the department. Marino then asked Roop for specifics as to what she was going to say. Roop would not go into details. Instead, she said there were a lot of things to talk about and she was going to tell Dhuper everything. The meeting ended with Ambrosini saying that they were going to look into the matter and contact Roop if they needed to speak with her again. (Tr. 149, 699–701; 1375)

iii. Roop's meeting with Dhuper

Sometime that evening Roop met with Dhuper in the board room near his office; only the two of them were present. As detailed earlier, Roop told Dhuper that she was under a lot of pressure at work, was being picked on even more than before, and she had been called into human resources that day. It was during this meeting that Dhuper asked Roop why she did not just quit if people were picking on her. Roop told him that she had worked at the hospital since 1999, and was not about to now just because some people wanted her to do so. (Tr. 149–50)

iv. Decision to suspend Roop

Dhuper, Ambrosini, O'Keefe, and Marino met to discuss Roop's fate. During the meeting "it was determined the progression of discipline was going to have to take place. It was really determining which level of discipline." (Tr. 1376) This was Roop's second discipline.

Ambrosini believed Roop's conduct was unprofessional, and referencing her prior verbal warning he believed that Roop should be issued a written warning. O'Keefe strongly asserted that they should move directly to a written suspension, arguing that her conduct was continuous, that she had an altercation with a coworker in the tech room, and was attacking her manager on the telephone; O'Keefe also believed Roop should be demoted from her position as team leader. Marino agreed with O'Keefe. Ultimately Dhuper made the final decision, agreeing with Marino and O'Keefe that they should progress directly to a written suspension, and that Roop should also be removed as team lead. In making his decision, Dhuper was aware that Roop had worked at the hospital for 17 years and that her only prior discipline was the November 2016 verbal warning. However, Dhuper believed this was a clear case of misbehavior and insubordination that occurred on the hospital grounds. Therefore, he chose the recommendation put forward by Marino and O'Keefe over the one advanced by Ambrosini. (Tr. 1369, 1376, 1656–58, 2309, 2615–17, 2478–2483, 2612–2617)

v. Roop's discipline and suspension

On February 13 Marino called Roop into human resources saying they needed to meet as a follow-up to the February 7 meeting. When Roop arrived with her shop steward, she found Marino and Ambrosini waiting. Marino told Roop the hospital had decided to "progress to a final written warning and suspension," and handed her the disciplinary document. (Tr. 1376) According to the document, the hospital was also relieving Roop of her position as team leader. The discipline, dated February 13, was prepared by Marino and signed by both Marino and Ambrosini. (Tr. 151, 1377, 1602) It reads in part as follows (GC. 11):

> The purpose of this written warning is to counsel you for the following occurrence:
>
> 1) On 2/07/2017 you participated in a verbal altercation in the pulmonary report room during the morning shift change. This exchange was carried out in front of and without regard for staff members and students.
>
> 2) At 07:25 on 2/07/2017 I received a phone call from you in which you were very angry and emotional. You proceeded to berate me in an accusatory manner followed by disconnecting the call.
>
> This display of unprofessional behavior violates the Standards of Conduct policy specifically procedure items 2,7,15 and 32. This will not be tolerated at any time while you are on the hospital campus.
>
> St. Rose Hospital provides standards based on mutual understanding, respect and cooperation, which maintains the highest standards of personal/professional conduct. Disruption will not be condoned.
> . . .
>
> Any further actions such as this, will result in the progression of the disciplinary process. (GC. 11)

Roop read the document and asked Marino whether he even investigated the allegations or had spoken to anybody who works with her. Marino did not respond. Roop said the document was a lie and she was not going to sign it. Ambrosini told her that, whether she signed it or not, Roop was suspended for two days and she would no longer be a team leader. (Tr. 152)

Roop did not sign the document. After the meeting she contacted the Union which filed a grievance over the matter. As of the date of the hearing, the grievance was pending arbitration. On February 14, Roop filed a charge of discrimination with the EEOC regarding her discipline claiming that she had been discriminated against based upon her national origin, and further alleging that Matuszak, Hamid, and Seigal had created a hostile work environment. (Tr. 153–57, 1337; GC. 29)

Roop's suspension was one of Ambrosini's last actions in his role as Respondent's human resources manager. On February 23, 2017 Ambrosini stopped working for St. Rose; he started a new job elsewhere on March 1, 2017. And the problems in the respiratory department now became an issue for Stephanie Jones, who took over for Ambrosini on March 6. (Tr. 1514, 1665, 1670, 2029)

b. Analysis

Based on the evidence presented, I believe that Respondent has shown that would have issued Roop a discipline over the February 7 incident, despite her concerted activities. While Smith certainly played a role in inflaming the situation with Roop, it was Roop who initiated the confrontation with Smith in the tech room involving the highlighted assignment sheet. And, other than the fact she was mad that the sheet was highlighted, no legitimate issue was presented for Roop's questioning Smith about the assignment sheet. This is what led to the initial argument, which then led to the argument about Roop being reported by security. Then, instead of focusing on their job assignments, treating sick patients at the hospital, the two left the respiratory department completely to speak with the security guard to see who was right. This conduct was not activity protected under the Act.

As for Roop's phone call to Marino, while I do not credit Marino's testimony that the call lasted six minutes, or some of his other hyperbole related to call, I do credit his testimony that Roop was screaming and yelling at him over the phone. Had she not been yelling, there would have been no need for Roop to continually apologize to Marino about the call during their meeting in human resources. And, while I have no doubt that Roop had reached a breaking point, and started crying before hanging up on Marino, her call did not involve a patient, nor was it an emergency situation. Moreover, it did not involve concerted activity for mutual aid and protection; Roop was feeling picked on, and called to let Marino know. Under these circumstances, I am not in a position to second-guess Respondent's decision to discipline Roop for the February 7 incident, nor has the General Counsel shown that this decision was pretext.

Notwithstanding, while I find the decision to discipline Roop was not unlawful, the same is not true regarding the level of discipline issued to her and her suspension. Board law is clear that "where a respondent disciplines an employee based on prior discipline that was unlawful,

any further and progressive discipline based in whole or in part thereon must itself be unlawful." *The Hays Corp.*, 334 NLRB 48, 50 (2001); *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 787 (8th Cir. 2013) ("An adverse employment decision is unlawful if it relies upon and results from a previous unlawful action."). Such is the case here with respect to Roop's suspension and final written warning.

Based on the record evidence, it cannot be disputed that Respondent followed a progressive disciplinary policy,[43] which O'Keefe described during her testimony as follows: "you have a verbal first. You can skip a written – just a written to a written suspension depending on the severity. And then all of them are grounds for termination depending on the discipline that – and the incident, why you're getting disciplined." (Tr. 2402)

And, the evidence shows that the decision to issue Roop a final written warning and suspension was based, in part, on Respondent's progressive disciplinary policy and took into consideration her November 2016 written verbal warning, which I have found to be unlawful. Specifically, Marino testified that when he met with Ambrosini and O'Keefe to discuss the matter, "it was determined that the progression of the discipline was going to have to take place. It was really determining which level of discipline." (Tr. 1376)

Based on O'Keefe's outline of Respondent's progressive disciplinary policy, because Roop had already been issued a verbal warning, the question was whether to issue her a written warning, or a written suspension. The evidence shows that this was, in fact, the discussion. Ambrosini thought her actions were unprofessional, but did not warrant a suspension. Referencing her prior verbal warning, Ambrosini thought a written warning was more suitable. However, Marino and O'Keefe both believed skipping straight to a written suspension was more appropriate for Roop's second discipline. Dhuper, who was informed of Roop's work history, including her prior discipline, ultimately chose progressing directly to a written suspension. Finally, disciplinary records introduced into evidence show that other employees who were accused of being rude to colleagues, using foul language, verbal abuse, or arguing with coworkers, were issued lesser forms of discipline, had received multiple disciplines, or had multiple incidents, before being suspended. (GC. 111, 112, 113, 115, 118, 122)

Based on the foregoing, I do not believe St. Rose has shown it would have issued Roop a final written warning and suspension without reliance on the discriminatorily issued November 2016 discipline. Accordingly, because the evidence shows that Roop's February 2017 discipline was premised, in part, on her November 2016 verbal warning, which was found to be unlawful, I find that the decision issue Roop a final written warning and suspension violated Section 8(a)(1) of the Act.[44] *The Hays Corp.*, 334 NLRB at 50; *RELCO Locomotives, Inc.*, 734 F.3d 7at 787; *Dynamics Corp.*, 296 NLRB 1252, 1254 (1989), enfd. 928 F.2d (2d. Cir. 1991).

[43] See, e.g. (Tr. 717, 1376, 1546, 1572, 2313–14, 2402, 2125–26, 2135, 2207) Also, both of Roop's disciplines include the phrase that any further incidents "will result in the progression of the disciplinary process." (GC. 8, 11)

[44] I do not believe that the General Counsel has shown that the decision to remove Roop from her duties as team was somehow tied into the progressive disciplinary policy. Therefore, I find that her removal from the position of team lead does not constitute a violation, as it was premised on the conduct that occurred on February 7.

6. Roop's April 17, 2017 discharge

a. Background

Roop was terminated on April 17, 2017, over an incident that occurred on March 19, involving an exchange between herself and per diem therapist My-Quyen Giang ("Giang"). Giang had worked as a per-diem RT at St. Rose since 2014, and was friends with Matuszak. On March 18, Giang had been working the night shift and was covering the emergency room; her shift was scheduled to end at 7:00 a.m. on March 19. Roop was starting her shift the morning of March 19, and was taking over Giang's emergency room coverage. When her shift ended Giang needed to report to Roop over what occurred during the night shift, and give Roop the emergency room phone along with any remaining medication that needed to be administered. (Tr. 2054–56, 2076–77; GC. 14)

In March 2018 the emergency room had run out of concentrated dosages of a particular medication used with a nebulizer. Therefore, therapists were using diluted dosages, and splitting the administration of the medicine over an hour-long period. Half of the dosage would be put into the nebulizer first, and the other half later. Splitting the medication, and handing off the remaining medicine to the oncoming therapist, was something the RTs had been doing for a while, well before the exchange between Giang and Roop occurred. With this backdrop in mind, various respiratory therapists who were present on March 19 testified as to what happened. (Tr. 224–25, 676–77, 2060, 2083–84)

i. The testimony of My-Quyen Giang

The morning of March 19, Giang was sitting at a table in back half the tech room, when Roop came in and sat at a table in the other half of the room. Just before 6:45 a.m., Giang got up and walked up towards Roop to give her the shift report on the evening's activities; Roop was sitting facing the wall with her back to Giang. Giang testified that Chris Hamid was also present, as he was giving his shift report to Rose Rogers, who was sitting at the same table as Roop. (Tr. 2057–59, 2064; R. 9, p. 5)

According to Giang, she told Roop that she had started administering Albuterol to a specific patient at 6:15 a.m., and handed Roop two unopened packets of Albuterol that needed to be administered, saying that she had completed the charting and related record keeping for the patient. Giang was unsure whether Roop was listening to her, as Roop did not look at her while she was giving the report. Giang testified that Roop took the Albuterol, threw it on the table, and then turned and looked at Giang asking her what time she started the medication. Giang again said 6:15 a.m., and told Roop that she needed to give the patient the rest of the Albuterol at 7:15 a.m. Giang initially testified that Roop did not reply to her, instead she just started speaking with Shilu Yogi who was sitting right next to her. According to Giang, she wanted to give Roop more information about the patient, but did not. Giang just said okay, as she did not think Roop was listening to her. Giang testified that Hamid then put his hand on her shoulder, but did not say anything to her as he was till giving his report to Rogers. Giang then walked back to the other half of the tech room where she had been sitting, gathered her belongings, and waited until her shift ended at 7:00 a.m. so she could go home. When asked whether she actually told Roop that

she had more information to give as part of her shift report, Giang testified that she did not do so because she thought Roop was being disrespectful, and she thought that Roop told her that she was experienced and did not need to know about the patient. (Tr. 2059 – 2066, 2074–75, 2081–82)

Giang testified that she believed Roop had disrespected her. And she thought Roop acted this way because Giang and Matuszak were friends. Giang testified that she could not let the matter got, and decided to report the matter to Marino. On March 22, Giang emailed Marino telling him about what occurred. According to Giang, this was the first time she had reported someone at work. (Tr. 2062–2063, 2065–68, 2073; GC. 84)

ii. The testimony of Babita Roop

Roop testified that at about 6:45 a.m., the night shift was leaving and Giang asked whether Roop had the next shift. Roop said that she did. Giang handed her the emergency room phone, and Roop put it on the table. Giang then took out two doses of medication and gave them to her. Roop told Giang that she knew about the situation involving the medication. Roop took the drugs and put them on the table next to the phone. According to Roop, there was a respiratory "stat" call, indicating an emergency, and she grabbed the ER phone and left the department to respond. (Tr. 223–25)

According to Roop, Shilu Yogi was sitting next to her the entire time. Also present were Rose Rogers and Eric Thom. As for Hamid, while he was working the same shift as Giang, Roop testified that he was not even present when the exchange with Giang occurred. (Tr. 226–28)

Roop further testified that the exchange of the phone and medication with Giang was a non-issue. She did not believe that she did anything wrong, and claimed that she did not have any issues with Giang. In fact, the evidence shows that Roop had recommended Giang for a job at another hospital, and Giang had sent her a nice thank you note in return. (Tr. 226–27; GC. 151)

iii. The testimony of Shilu Yogi

Shilu Yogi was working the night shift with Giang, and was present when the exchange between Giang and Roop occurred. According to Yogi, she was "around the computer side" of the tech room doing her charting and could see both Roop and Giang during handoff. Giang handed the ER phone to Roop, gave a brief report, told Roop about the medication that needed to be given and handed it to Roop. According to Yogi, Roop did not throw anything on the table. Yogi testified that the entire episode was nothing out of the ordinary. It was just like any other report given on any other day, "[s]omebody comes in, we tell them what happened, and then we leave." (Tr. 672) Yogi testified that she did not hear Roop say anything unusual in response to Giang handing over the medication, and the volume of Roop's voice was normal; Roop was not aggressive during the incident whatsoever. Yogi testified that Roop may have said "we have been doing this," referring to splitting the medication dosage, as this was a practice they had

been doing in the department for some time. According to Yogi, Hamid was not present when the exchange occurred, but that Rose Rogers and Eric Thom were. (Tr. 669–77, 684)

iv. The testimony of Chris Hamid

Hamid testified that the morning of March 19, Roop was taking over some of his patients, as well as Giang's. Roop came into the department at about 6:30 a.m. Hamid testified that he started giving his report of the evening's activities directly to Roop, and not to Rogers as Giang had testified. Roop was sitting at a table, directly under the clock and facing the wall. Hamid was standing behind Roop and to her right. Eric Thom was also in the room, sitting at the same table as Roop; Rose Rogers and Shilu Yogi were also present, sitting in the other half of the Room. (Tr. 1991–2004, 2030–31, 2033; R. 9, p. 5)

Hamid testified that at about 6:40 a.m., Giang approached and stood to Hamid's his left, but between him and Roop. As Hamid was finishing his report to Roop, Giang started to give her own report to Roop, and offered to give Roop the ER phone. According to Hamid, Roop did not turn around to acknowledge Giang. Instead, she asked Giang whether it was 6:45 a.m., implying that it was not yet time for her to take the phone. Giang then placed the phone on the table, near Roop's right hand; Hamid did not recall what Roop did with the phone after Giang set it on the table. (Tr. 1992, 1995, 1997–98, 2004, 2030, 2035–37)

Then, Giang started her report on the evening's activities and took out some medication, saying it needed to be given in about 10 minutes. Hamid testified that Giang wanted to hand off the medication, but Roop reached over with her left hand and violently grabbed the medication from Giang's hand, threw it on the table, said that she did not need Giang's help and that she knew what she was doing. According to Hamid, Roop never looked at Giang or even acknowledged her presence. Hamid claimed that Roop's statement was so loud that the entire room could hear what was said, and "the tension, you could cut it with a knife." (Tr. 1999) Hamid testified that everyone in the room went quiet, they were already scared of Roop and everyone "cowed down and just started looking at their own stuff." (Tr. 1999) (Tr. 1995–98, 2033, 2035)

Hamid said that he then patted Giang on the shoulder as she was shaking and could not speak because of the anxiety. He tried to comfort her and told Giang that if Roop did not want a report then Giang could not force it on her. He also told Giang that the "the best thing we can do is write an email and let them know what happened today." (Tr. 2005– 06) Giang and Hamid went to the other half of the tech room where they stayed a few minutes, grabbed their belongings and then clocked out. (Tr. 2006) According to Hamid, there was no code blue or emergency "stat" call during the incident. (Tr. 2007–09)

Hamid testified that both he and Giang made phone calls to Stephanie Jones in human resources. (Tr. 2010) In fact, according to Hamid, he called Jones the day of incident and left her a voicemail. (Tr. 2027)

b. Marino's Investigation

Although Hamid testified that he called Jones on the day of the incident and left her a voicemail, it does not appear the investigation into what occurred started until Giang sent Marino an email on March 23. Giang's recitation of events in her March 22 email generally corresponded with her testimony at trial. However, one difference is that in the email Giang makes no mention of Roop allegedly saying that said she was experienced and did not need to know about the patient.[45] The email also states how Giang felt uncomfortable and disrespected in contrast to how nicely Roop was speaking to both Yogi and Rose Rogers. (Tr. 2027; 1380; GC. 84)

After receiving Giang's email, Marino testified that he called Giang and asked her to tell him what happened. (Tr. 1380–82) During their phone call, Giang told Marino that she started to give Roop her report of the evening's activities, but Roop did not turn around to look at her. Giang stopped and asked Roop if she wanted to get a report, and Roop told her "I'm listening." Giang then continued on with her report, told Roop what time she started the treatment, and handed Roop the ER phone. Without looking at Giang, Roop reached over her shoulder for the phone and then placed it on the table. Giang then handed off the medications and Roop put those on the table as well. Giang told Marino that Roop never looked at her during the encounter. (Tr. 1380 – 81) According to Marino, Giang seemed to be very upset, said that she was treated poorly and did not know why. She also told Marino that Hamid was standing next to her when this happened. (Tr. 1382)

Marino continued his investigation by speaking with Hamid briefly about the situation. Marino only asked Hamid a few "yes" or "no" questions about what happened. According to Marino, he then called Stephanie Jones. (Tr. 1382)

c. Jones's investigation

i. Jones's interview with Giang

Jones testified that she received an email from Marino about the incident, the two spoke, and it was decided that Jones would speak with all the parties. (Tr. 2112) The evidence shows that, upon receiving Giang's email, Marino immediately forwarded it to Jones writing that "the email speaks for itself." (GC. 84)

According to Jones, she then proceeded to conduct her investigation, and Giang was the first person she contacted; Jones spoke with Giang on March 23 and took a written statement as to what occurred. (Tr. 2112–13) Jones testified that, when she takes investigatory notes she reads back what the person is saying in order to be accurate, and that her notes are as verbatim as possible. (Tr. 2113) Giang testified that her statement to Jones was given over the phone, and that she described to Jones exactly what happened on that day. (Tr. 2068)

[45] I do not credit Giang's testimony that Roop said she was experienced and did not need to know about this patient. Along with not being in her email, this statement is also not in Jones's March 23 notes of their discussion. (GC. 84, 86)

In their discussion, Giang described to Jones what happened. What Giang told Jones is generally consistent with Giang's trial testimony and her email. Giang identified Rose Rogers, Shilu Yogi, and Chris Hamid as witnesses, and noted that Hamid was standing next to her giving his own report. Giang told Jones that Hamid looked at her sympathetically when the incident occurred. (GC. 86; Tr. 2113–15, 2068–2069)

ii. Jones speaks with Babita Roop

Jones testified that the same day she spoke to Giang, she also talked with Roop over the telephone; she took notes of the conversation. (Tr. 2208; GC. 92) Jones claims that she told Roop what Giang was alleging, and asked her about the allegations. (Tr. 2210 – 11) According to Jones's notes, Roop said that she did not remember any incident. Instead, she remembered Giang telling her about a patient, saying that she had the ER, and that Roop "needed to drop another Albuterol." Then, according to Roop there was a "code blue" called so Roop ran out of the room. Roop told Jones that she did not "snap" at Giang, and that there were other people in the room including Rose Rogers, Shilu Yogi, and Eric Thom. Roop also said that Hamid was possibly there was well. This was the only time Jones spoke to Roop about the incident. (GC. 92) (Tr. 2208–12, 2132)

iii. Jones contacts Chris Hamid

According to Jones, she spoke with Chris Hamid over the telephone and took his statement. Then, because the interview was conducted over the phone, and Hamid was busy and could not come into the office to see her anytime soon, she asked Hamid to put his statement in writing and send it to her to ensure that her notes were correct. Hamid testified that Jones specifically asked him to put his statement in writing so he emailed it to her. The evidence shows that on April 11 Jones sent Hamid an email following-up on her request for a written statement of what happened. Hamid emailed his statement to Jones the next day. (Tr. 2203, 2010, 2217; GC. 85)

The record contains both the notes of Jones's phone call, and Hamid's email. Jones's notes show that she spoke with Hamid on April 4, 2017. During this conversation, Hamid told Jones that he was giving a report to Roop on the evening's activities, when Giang asked him if she could interrupt to give Roop the ER phone and let her know quickly as to what was happening. Giang tried to hand Roop the phone, but Roop refused to take it saying she could not take the phone because it was not yet 6:45 a.m. Then, Giang "gently set the phone on the table." According to Jones's notes, Hamid said "you could cut the tension with a knife." Giang then told Roop about medication that needed to be given to a patient and Roop "snatched" the medication from Giang and threw it on the counter. Hamid told Jones that what stood out to him was Roop's refusing to take the phone and the fact she snatched the medication from Giang and threw it on the table. According to Jones's notes, in their conversation Hamid made comments that were critical of Roop, saying that she was snarky, rude, unprofessional, borderline intimidating, and that Roop has an "aura" about her and makes it known when she is unhappy. (GC. 85, p. 2)

During their April 4 discussion, somehow they started speaking about other issues involving Roop. Hamid told Jones that, on April 3 several employees reported to him that Roop and Backus had paperwork for employees to sign stating that there was a hostile work environment being caused by several individuals. (Tr. 2203 – 04; GC. 85, p. 2)

Hamid's email to Jones is dated April 11, 2017, at 7:40 a.m. (GC. 85; Tr. 2118–19) In it he says that Roop was acting "hostile, angry, and completely unprofessional." He again stated that Roop refused to take ER phone, but this time wrote that, instead of saying anything, she just looked at the clock "indicat[ing]" it was not time for her to take the phone; thus Giang "quietly placed the phone" by Roop's hand. Hamid wrote that when Roop "snatched" the medicine from Giang she said something to the effect of "I know what I'm doing." He further wrote that "the room went completely quiet, and tension filled the air instead," as a distressed Giang walked away while Hamid "gently intervened" patting her on the back saying she did a good report. In the email Hamid gave his own conclusory clinical analysis claiming Roop could have possibly put a life of a patient in danger as she refused to take a proper report and by not acknowledging or even looking at Giang. Hamid ends his email saying that Roop's behavior was uncalled for and that he hopes his email "sheds more light on this continued problem we have been facing in our department for the better of 14 months." (GC. 85)

iv. Jones tries to speak with Shilu Yogi

Both Jones and Shilu Yogi agree that that Jones called Yogi in an attempt to take a statement from her. However, the testimony varied greatly as to what actually happened.

Yogi testified that Jones called her sometime towards the latter part of March saying she wanted to ask Yogi a couple of questions because Yogi had witnessed something. Yogi, who was driving at the time, asked Jones what the questions were about, but Jones would now say. Instead, Jones said that it was not safe for her to talk about it because she was driving. Jones asked Yogi to come into the office the next day, but Yogi told her she was working the night shift. Therefore, they set up a telephone appointment the next day, for around 4:30 – 5:00 p.m., before Yogi's shift started. Yogi called at the agreed upon time, but Jones did not answer. Yogi left Jones a voicemail saying that she was calling in regards to the appointment they had set up, and left Jones her phone number. After that, Yogi testified that she may have had a missed call from Jones, but they never spoke. According to Yogi, she was working day shifts the following week, so Jones could have easily reached out to her if she wanted. Yogi testified that, had she known the issue involved someone getting fired, she would have called Jones multiple times, but Jones never told her what the questions were about. (Tr. 673–74, 678–79, 685)

Jones testified that she tried calling Yogi, but Yogi was driving. She asked Yogi to come in the next day for a statement, but Yogi could not. They made an appointment for a phone call the next day, but Jones testified that Yogi never called her. Jones claimed that she tried calling Yogi, but it went straight to her voicemail. Yogi then called Jones later that evening, but it went to Jones's voicemail. Jones testified that when she came to work the next day and got Yogi's voicemail, she went to speak with Marino and learned Yogi was scheduled to work the next day. According to Jones, she went to look for Yogi that day, but Yogi was not there; Jones claims that Yogi had called in sick. When asked why Jones simply did not order Yogi to report to human

resources for a meeting, Jones did not fully explain; she just said that it was difficult to do so as Yogi only worked two days every couple of weeks. Jones closed her investigation without ever speaking to Yogi or getting a written statement from her. (Tr. 2119 – 24)

v. Other witnesses to the incident

Everyone agreed that Eric Thom and Rose Rogers were also present when this exchange occurred. However, Jones did not try to speak with either of them. Jones testified that she did not think about contacting Rogers, because she felt she had "enough there" looking at the statements she received from Hamid and Giang, as they basically corroborated what happened. (Tr. 745, 2199, 2212)

When asked why she did not try to contact Rogers after Roop said she was present during the incident, Jones testified that Roop only said Rogers was present, not that Rogers was a witness. (Tr. 2212) When it was noted that Giang identified Rogers as a witness in her statement, Jones testified that Giang said that Rogers "was not paying attention," and "was doing something else and most likely would not have heard anything that went on," in that she was doing her report. (Tr. 2197) But neither Giang's email, nor Jones's notes of their discussion, say anything about whether Rogers was or was not paying attention, or whether she would have likely heard anything or not. Jones's notes simply say Rogers was sitting at the same table as Roop "and was doing a report too." (GC. 84) And, in the section of her notes regarding who else may have seen or heard the incident, Jones wrote "Chris [Hamid], Rose [Rogers], and Shilu [Yogi]. (GC. 86) Also, Jones's notes state that Hamid was also giving a report to someone else at the time of the incident; nonetheless, Jones spoke with Hamid and also asked him to provide a written statement. (GC. 86)

d. The Decision to Fire Roop

i. Testimony of Joe Marino

Marino testified that Roop's termination document was prepared by Jones, with his input. He identified the document as "the final step in the disciplinary process." (Tr. 1377–78, 1384; GC. 12)

According to Marino, the decision to fire Roop was collective, but if "it were to sit on somebody's desk, it would be mine." (Tr. 1378) Marino explained that, because he is the department manager, "the buck stops" with him. (Tr. 1378) However, he cannot fire someone without Jones's approval— so Jones had to approve the decision. Therefore, Mario recommended that Roop be fired, but the decision had to be approved by Jones. Marino claims that he spoke with both Jones and O'Keefe about his recommendation, but he could not remember the actual date of their meeting. (Tr. 1378–79, 1384–85)

Marino further testified that he recommended Roop be discharged because the situation that occurred between Giang and Roop displayed the same behavior that Roop had "previously displayed along the disciplinary chain." (Tr. 1379 – 80) Marino testified that his view of the disciplinary process is not to get someone fired, but to counsel them on behavior that is not

acceptable so the employee can change course. According to Marino, Roop had just returned from a suspension that involved the issue of her professionalism, and in Marino's view she was not rectifying her behavior. (Tr. 1382–83)

ii. Testimony of Rosanne O'Keefe

According to O'Keefe, she learned about the incident involving Roop and Giang from Marino, and she took part in the meetings about Roop's disciple. Specifically, O'Keefe testified that she received a call from both Jones and Marino, "and we had a discussion about progressive discipline and what we were going to do," about Roop. (Tr. 2313)

O'Keefe also testified that there was a meeting in the CEO conference room on April 11, 2017 to discuss the matter. Present was O'Keefe, Dhuper, Marino, and Jones. O'Keefe claims that she asked about the details of the case, and whether it was investigated. Jones told her that it was investigated, that there was very disruptive behavior, that Roop would not take the handoff, and there was medication supposedly thrown on the table. (Tr. 2314, 2381, 2383)

According to O'Keefe, she recommended termination as "[t]his is progressive discipline. She already had a written suspension; this behavior continued." (Tr. 2314) During the meeting O'Keefe said they had given Roop every opportunity to rectify the situation, nothing was changing; and it was just different people at different times. Therefore, according to O'Keefe, she recommended, in collaboration with the team, that Roop be terminated. Dhuper agreed with her recommendation, and Marino also recommended discharge. (Tr. 2314–15, 2380–82)

During the meeting, Jones had recommended an alternative discipline, that Roop be given a "final, final, final." (Tr. 2381) However O'Keefe objected, asking "at what point does a suspension final take affect," apparently referring to Roop's previous discipline. (Tr. 2381) O'Keefe said that Roop's behavior had continued, she had opportunities to correct her behavior, so they were done. (Tr. 2381)

iii. Testimony of Stephanie Jones

Stephanie Jones testified that, when she had completed her investigation she contacted O'Keefe, Marino, and Dhuper, and they all met in her office the afternoon of April 11. During the meeting she went over the investigation and either read or summarized the statements she had received. She also reviewed Roop's prior disciplines, outlined where Roop was in the progressive disciplinary process, and said that the next step in progressive discipline was termination. (Tr. 2124–25, 2204–05)

Jones further testified that she also outlined an alternative discipline, a final, final warning in lieu of termination. However, Dhuper and O'Keefe expressed their frustrations, and believed that the most appropriate decision was termination, the next step in the disciplinary process. According to Jones, both of them were frustrated that the situation had been going on for so long. They did not believe that a "final, final" would ensure that Roop would change, that she would treat people with respect, or otherwise follow the hospital's policies. According to

Jones, Dhuper instructed her to go forward with termination based, in part, on the hospital's policy of progressive discipline. (Tr. 2125–26, 2206–07)

iv. Testimony of Aman Dhuper

Dhuper testified that he participated via telephone in the meeting where the decision was made to fire Roop. According to Dhuper, during the meeting the necessary details were presented to him, the trend in Roop's behavior, a trend of insubordination, and it was said that Roop was not following the code of conduct. He was made aware that Roop raised her voice, and was not appropriately dealing with team members. And, he testified that the clinical team did not find the incident acceptable, specifically the shift-handoff and the fact the patient in the ER was in the middle of a treatment. Jones informed him about the investigation, and during the meeting he "was made pretty well aware" that Roop's behavior was a trend, and that it was turning into something that was never-ending. (Tr. 2483–85, 2618–20)

According to Dhuper, it was a combination of both Jones and Marino that presented the information to him during the meeting. O'Keefe and Marino felt strongly that Roop should be fired, while Jones provided the alternative of issuing Roop a final, final, in lieu of termination. According to Dhuper, they expected him to evaluate the situation in light of the trend, and everything that was going on, and make a final decision. He evaluated the recommendations and told them to go forward with the termination. (Tr. 2485, 2521, 2620)

e. Respondent's meeting with Roop

Jones and Marino met with Roop on April 17, 2017 to present Roop with her discharge. Roop's termination letter, which was prepared by Jones, states that she was being terminated for violating company policy: standards of conduct, discourteous conduct, and unprofessional behavior. The document further states "[y]our disciplinary actions are summarized below" and include the following incidents: (1) Roop's November 21, 2016 verbal warning; (2) the February 13, 2017 final warning and suspension; (3) the March 14, 2017 door incident with Matuszak, stating that Roop's "failing to enter a door courteously held open for you caused this situation to escalate;" and (4) Roop's March 19, 2017 exchange with Giang.

Regarding the incident with Giang, Roop's termination letter states that Giang addressed Roop "and tried to hand you the ER phone per department procedure. You ignored her and did not take the phone." Giang then tried to hand Roop medication for a patient in the ER but it was reported that Roop "snatched the medication from the coworker's hand and threw it on the table in front of her stating 'I know what I'm doing.'" The document also says that Roop's "discourteous behavior caused a tense situation as well as could possibly have put the life of a patient in danger from an improper pass over of medical information." Roop's termination letter also notes that her actions were in violation of the final written warning and suspension given to her on February 12, 2017, and that Roop's violations of the hospital's policies and standards related to patient care are not acceptable and could have placed the hospital and patients at risk. (GC. 12)

Justin Kmetz accompanied Roop to the meeting as her shop steward. During the meeting, Jones told Roop that the hospital was investigating a complaint about inappropriate behavior, and they determined that Roop had violated the hospital's policies. Jones then handed Roop her termination letter. Roop looked at the document, said "no" a few times, and further said that what was in the letter was not true. Roop told Jones that she should have investigated and asked the people that were standing right next to her about what happened. Jones replied saying she had a lot of witnesses, and they saw her engage in this conduct. Roop asked who the witnesses were, and said that Jones needed to speak with Yogi and Rogers. Jones said that she had already spoken with a few people and that was why she was being terminated.[46] (Tr. 701 – 03)

Kmetz asked if he could escort Roop to her locker so that a security guard did not have to follow them around. Marino walked along with pair as Roop collected her belongings. Roop handed Marino her badge, and then Kmetz walked Roop, who was crying, out to the parking lot. (Tr. 703 – 04) And with that, Roop's career at St. Rose came to an end.

Almost immediately after Roop's discharge, the Union filed a grievance on her behalf. It appears that the Union and Respondent met to discuss the grievance on April 20, 2017, and on April 24, Jones sent a letter to the Union stating why Roop's discharge was justified. In the letter to the Union, Jones outlined Roop's prior disciplines, and included the door incident with Matuszak—which Jones said was included in the termination paperwork only as a point of reference. She further stated that the decision to fire Roop was not based on the door incident, "but rather the incidents in reference in the November 14, 2016 verbal warning and counseling, the February 13, 2017 Final Written Warning and Suspension, and the March 19, 2017 incident" involving Giang. (GC. 14) As of the close of the hearing, Roop's grievance was still pending. (Tr. 201, 2138; GC. 14)

f. Analysis

Ultimately Roop's discharge suffers from the same defect as her suspension. In deciding to terminating Roop, Respondent applied its progressive disciplinary system and relied upon Roop's unlawful November 2016 discipline, thereby rendering her discharge unlawful as well. *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 787 (8th Cir. 2013) ("An adverse employment decision is unlawful if it relies upon and results from a previous unlawful action."). The November 2016 discipline is explicitly stated in Roop's termination letter, it also listed as a justification for the discharge in Jones's April 24 letter to the Union. Moreover, Jones testified that, during the meeting where Respondent's officials decided to terminate Roop, she reviewed Roop's prior disciplines with them, outlined where Roop was in the progressive disciplinary process, and told them that the next step was termination. She further testified that both Dhuper and O'Keefe believed that termination was appropriate, as it was the next step in the disciplinary process. This testimony was confirmed by O'Keefe who said that, in deciding to fire Roop, they discussed Respondent's progressive disciplinary system, and it was ultimately determined that discharge was appropriate.

[46] During Kmetz's testimony, the transcripts refer to Yogi as "Seila" instead of Shilu. (Tr. 703, 711)

The evidence does not show that Roop would have been discharged without reliance on the unlawful November 2016 discipline. Indeed, disciplinary records introduced into evidence by the General Counsel show that employees who were discourteous or disrespectful during handoff reports received lesser forms of discipline, such as a verbal counseling or written warning. (GC. 114, GC. 117 #1874).

Also, even if Respondent had not relied upon the November 2016 discipline, I believe that there is sufficient evidence in the record to support a finding that Respondent's proffered reasons for terminating Roop are pretext. As discussed above, other employees who were discourteous or disrespectful during handoff reports received lesser forms of discipline. I also believe that Respondent tried to exaggerate the incident to support a termination. For example, Roop's discharge letter says that Roop ignored Giang and did not take the ER phone. However, Giang told Jones that Roop took the phone and put it inside her pocket. (GC. 86) Also, Roop's discharge letter states that her exchange with Giang "could possibly have put the life of a patient in danger from an improper pass over of medical information." However, Giang never stated to anyone that Roop's actions could have resulted in any issues regarding the patient. The evidence shows that the RTs knew about the practice of splitting medication, as it had been going on for some time.

While Giang perceived that Roop was being rude and disrespectful, Roop specifically asked her what time she had started the Albuterol treatment, and Giang told her. Although Giang claimed there was more she wanted to say, she never told Roop that she had anything else to say. As a responsible professional, had there been a true risk to the patient, Giang would have said that there was more she needed to say; she did not do so. Instead, the comment about patient safety seems to have been lifted directly from Hamid's exaggerated April 11 email to Jones, notwithstanding the fact that when he spoke with Jones on April 4, there was no mention whatsoever of a potential risk to any patient; nor did the trial evidence show that the patient was actually put in any risk. See *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 787 (8th Cir. 2013) (decision to add after the fact justifications to prior misconduct is recognized grounds for inferring animus).

Also, the evidence shows that there were other employees whose actions actually put patients at risk, but were not fired. One employee administered the wrong type of examination, raising a "serious concern for patient care and safety," but was given a first written warning. (GC. 104 #1723). Three months later, that very same employee performed a CT head scan on the wrong patient, thereby exposing the patient to unnecessary radiation and causing "patient care and safety concerns" but was given a second written warning. (GC. 104 #1724) Another employee mislabeled blood units and was only given a written warning despite the fact that, because of his conduct "[a] patient's life could've been at risk with such an error." (GC. 105 #1779) I believe this evidence supports a finding of pretext.

I also believe Respondent's investigation into Giang's accusations support a finding of unlawful motive. Jones did not speak with Rogers, Yogi, or Thom about what occurred, even though they were identified to her as being present. Instead, Respondent relied solely on the statements from Hamid and Giang. Hamid was clearly biased against Roop, having submitted to Marino the October 2016 letter, along with Smith and Matuszak, which Marino used to issue

Roop her November 2016 discipline. And, the evidence shows Giang, who was friends with Matuszak, had reported to Marino on the protected concerted activities of Backus, one of Roop's friends and supporters. Under the circumstances of this case, had Respondent wanted to truly determine what happened that day, it seems that, at the very least, someone would have interviewed Yogi, Rogers, and Thom, as well as Giang and Hamid.

I find Jones's explanation as to why she did not interview Rogers as contrived. When asked why she did not contact Rogers, even though Roop told her she was present during the incident, Jones testified that Roop only said that Rogers was present, and not that she was a witness. When directed to the fact that Giang identified Rogers as a witness, Jones testified that Giang said Rogers was not paying attention, doing something else, and likely would not have heard anything. However, neither Giang's email, nor Jones's notes of their discussion say this. Instead, Rogers was specifically identified as someone who "may have seen or heard the incident," along with Hamid and Yogi. (GC. 86, p. 2) It seems that Jones was straining to manufacture a reason for not speaking with Rogers.

Similarly questionable is Jones's excuse for not taking a statement from Yogi. While the record shows that the two exchanged phone messages, Jones never told Yogi exactly what she was calling about, or the specific incident for which Yogi was allegedly a witness.[47] Yogi was working the week after they spoke, and was available if Jones wanted to speak with her. Jones seemed eager to get Hamid to send her a written statement, and even emailed him a reminder. It is puzzling why Jones, if she wanted to truly determine what occurred that day, would not have similarly emailed Yogi asking for a written statement, particularly if she was having such a hard time reaching her by phone. The same holds true as to why Jones, as the director of human resources, did not simply order Yogi to meet with her. Again, it seems that the statements Respondent received from Hamid and Giang fit a predisposed narrative, and that the hospital was not interested in exposing any facts to the contrary.

Also, during her discussion with Hamid about this incident on April 4, the two spoke about the fact that several employees told Hamid that Roop and Backus were asking people in the department to sign paperwork regarding a hostile work environment. (Tr. 2203–04; GC. 84) As noted previously, I have found similar conduct by Roop and Backus to be both concerted and protected. I believe the fact Hamid and Jones discussed Roop's concerted activities while Jones was interviewing him about the incident for which Roop was ultimately terminated lends weight to the argument that Roop's concerted activities played a role in her discharge.

Similarly suspect is the fact Respondent specifically listed in Roop's discharge letter, as a prior disciplinary action, the March 14, 2017 door incident involving Matuszak. No disciplinary action was ever issued to Roop regarding this incident. *Air Flow Equip., Inc.*, 340 NLRB 415, 419 (2003) (relying on conduct where no past discipline was issued is an indicator of pretext).

[47] I credit Yogi's version of what occurred, over that of Jones, regarding this incident. Along with assessing the demeanor of both, I note that Yogi was a current employee when she testified as the General Counsel's witness, and was testifying against her employer which was contrary to her own self-interest. *S.E. Nichols, Inc.*, 284 NLRB 556 fn. 2 (1987) (Current respondent employee's testimony more reliable because it is given against his interest to remain employed by Respondent.).

And, I find that Jones's letter to the Union referring to this incident as a "point of reference" was simply an attempt to change Respondent's reasoning after the fact.

Finally, Marino's testimony about the decision making process does not comport with that of Respondent's other witnesses. Marino testified that he recommended Roop be fired, and that he spoke with O'Keefe and Jones about his recommendation. Nowhere in his testimony is there any discussion about speaking with Dhuper regarding the matter. Marino also testified that, while the final decision to fire Roop was "collective," he was the manager and the "buck stops" with him. But he needed the approval of human resources to fire Roop. Thus, ultimately Jones had to approve Marino's recommendation that Roop be discharged. This testimony is different from that of Respondent's other three witnesses who testified that Dhuper was the final decision maker. In fact, according to the others, Jones recommended a final, final, warning in lieu of discharge. I find Marino's inconsistent testimony as further evidence of pretext. See *Maywood, Inc.*, 251 NLRB 979, 993-994 (1980) (inconsistent testimony from company witnesses as to who made decision to discharge employee and the reason for the discharge is evidence of pretext to hide the real reason, advocacy for the union); Cf. *Planned Building Services, Inc.*, 347 NLRB 670, 713-15 (2006) (in a refusal-to-hire case, inconsistent testimony as to who made decision to not hire employees supports a finding of pretext).

In conclusion, I find that Respondent has not met its burden to show that it would have fired Roop notwithstanding her protected concerted activities. Instead, Respondent relied upon prior unlawful discipline to terminate Roop, which taints the discharge. The evidence does not show that Roop would have been terminated notwithstanding the prior unlawful discipline, and I further believe that the proffered reasons for Roop's discharge are pretext. Based on the foregoing, I find that Respondent violated Section 8(a)(1) of the Act by discharging Roop on April 17, 2017.

C. The final written warning issued to Jernetta Backus

On April 9, 2018, about two weeks after Backus testified as a witness in this matter, she was issued a final written warning over an incident that occurred on March 12, 2018.[48] That evening Backus administered DuoNeb to a patient that she did not retrieve from the hospital's automated dispensary system. Instead she picked it up from the table in the tech room.

1. Administering and documenting medications

a. Administering medications

To acquire medications they need to administer, practitioners at the hospital use an automated medication storage and dispensing system called a PYXIS. Almost every floor at the hospital contains a secure medication room with a PYXIS, and there is also one in the emergency

[48] Backus filed a charge with the Board over the discipline and on April 27, 2018, the government issued a complaint and notice of hearing in Case 32-CA-218138, alleging that Backus's discipline violated Sections 8(a)(1) and (4) of the Act. That case was consolidated with the already outstanding unfair labor practice allegations in this proceeding. (GC. 1(jj), 1(ll), 70)

room. Only personnel authorized to dispense medications are allowed entry into the medication room and access to the PYXIS. (Tr. 967, 2257–58)

One of the hospital's pharmacists compared the PYXIS to a vending machine, except it dispenses medication instead of snacks. To retrieve drugs from the PYXIS, an RT enters their username and thumbprint to access the system. Using a computer screen on the machine, the RT chooses the patient in question, and selects the medication needed. After choosing the drug, dosage, and the time the drug is to be administered, the RT chooses the "remove" option on the screen. A drawer clicks open and plastic lid pops up with the medication. As soon as the medication is dispensed from the PYXIS, it is charged to the patient's account. (Tr. 968, 2238, 2249–51)

Hospital policy requires that any unused medication be returned to the PYXIS. Medicine is returned in the same way as it is removed, except the user chooses the "return" option. A drawer opens, a plastic lid pops up, and the medicine is returned. St. Rose's policy regarding retrieving and returning medications applies throughout the hospital. (Tr. 969, 2258–59)

The only official methods approved by the hospital for acquiring medication are by using the PYXIS, or physically walking to the hospital's central pharmacy and getting the drugs from the pharmacist. People rarely go the central pharmacy. Instead, if there is a problem with one PYXIS, they go to another, as there are several throughout the hospital. (Tr. 990, 2258)

Notwithstanding the official hospital policy about using the PYXIS to acquire and return medication, RT's regularly leave loose and unopened medication lying around the tech room, particularly Albuterol and DuoNeb. These are found lying around on tabletops, in pencil holders, and on shelves.[49] Instead of returning unused medications to the PYXIS, sometimes RTs just leave them in the break room. Then, another therapist grabs the unused medication and uses it when needed instead of withdrawing another one from the PYXIS. It happens so often, that on any given day one is very likely to find unused medications lying around the tech room. "They seem to migrate around the department." (Tr. 962) (Tr. 961 – 64, 975, 2049–51)

It was also common for therapists to handoff unused medication during shift changes when giving report to the oncoming therapist about a patient. Even though such handoffs are against hospital policy, and management knew the policy was being violated, it was an accepted practice in the department. (Tr. 971, 985–86, 1098, 1147, 2082, 2385–89)

b. Documenting medications

To document the administration of medicine to a patient the hospital uses an electronic medication administration record (MAR). RTs have access to several mobile computer work stations to access the MAR. These computers, which include a handheld scanner, can be pushed around the hospital, including into a patient's room. (Tr. 980, 1007–08, 1018, 2239, 2249)

[49] Various pictures introduced into evidence, including one taken by Marino while the hearing was still in session, show unopened medications lying around the tech room. (Tr. 1288; GC. 126; R. 9, p. 8)

When a patient is assigned to receive a certain medication or treatment, it shows up in the MAR as a red box/bubble. For example, if a patient is supposed to receive DuoNeb four times a day, the patient's MAR will show four red boxes for DuoNeb, at the appropriate times: 8:00 a.m., Noon, 4:00 p.m, and 8:00 p.m.[50] (Tr. 987, 1005–06, 1052, 1688)

To document administering the drug, using the scanner, the RT scans the patient's wristband, scans the medication, and then administers the drug. Once the medication is scanned, the MAR documents it as having been administered, noting the appropriate time, and turning the red box to green. Therapists can also perform a manual entry into the computer system, where they physically type the information into the MAR. The patient's ID number is typed into the system, and then the drug administered and time given is also typed into the MAR. After the manual entry is completed, the red box turns to green. In either situation, if the patient is on a ventilator, the information is also documented on the ventilator flow sheet which is located in the patient's room.[51] The best practice is to perform a manual entry, and record the information on the ventilator flow sheet, as close in time as to the actual administration of the medication as possible. While manual entries are allowed, RTs have been instructed that using the scanner is the method preferred by the hospital. If for whatever reason a treatment is missed, it is supposed to be documented into the MAR with the initials "NG," which stands for "not-given." (Tr. 981–98, 1017, 1021)

2. The March 12 incident and Backus's discipline

Backus was working the overnight shift on March 12; her shift started at 6:30 p.m. and ended at 7:00 a.m. the next morning. She was assigned to the emergency room, the fourth floor of the hospital, and the transitional care unit ("TCU"). As she started her shift, Backus reviewed her assignment sheet which listed her assigned patients. It also listed whether these patients had any outstanding treatment orders.[52] Backus was assigned a certain patient who had significant case of subcutaneous emphysema.[53] The assignment sheet indicated the patient had orders for a ventilator, but did not indicate that any other treatments were ordered by the physician. And, during the handoff report, the therapist going off-shift did not tell Backus that the patient had any treatments scheduled. (Tr. 1033–35, 1040, 1075–78, 1100, 1107; R. 4)

Backus went to visit the patient, who had a tracheostomy procedure performed to help him breath. At the time, the patient was not on a ventilator, but one was in his room on standby. Backus communicated with the patient and asked whether the patient thought a breathing treatment would help; the patient shrugged his shoulders. Backus told the patient that she believed a treatment would be beneficial and told him that she was going to administer one. She took a DuoNeb out of her pocket and dispensed the medication to the patient; it was 8:30 p.m.

[50] Pursuant to hospital's policy, DuoNeb needs to be administered within 30 minutes either before or after the scheduled time. (GC. 127, p. 4)

[51] A ventilator flow sheet is a paper chart that accompanies a ventilator. Therapists can manually write progress notes and chart vital statistics, along with any drugs administered, on the sheet. (Tr. 1019–20, GC. 128)

[52] The lead therapist is responsible for preparing and updating the assignment sheet. (Tr. 1122–25)

[53] Subcutaneous emphysema occurs when air gets into tissue under the skin. It can often be seen as a smooth bulging of the skin which produces an unusual a cracking sensation when touched as the gas passes through the tissue. (Tr. 1034) See also National Institute of Health Medline Plus, https://medlineplus.gov/ency/article/003286.htm (last visited May 15, 2019)

Backus had not retrieved the DuoNeb she administered from the PYXIS. Instead she had grabbed it off the tech room table earlier in her shift and put it in her pocket. (Tr. 1034–36, 1082, 1096–97, 1102, 1823)

Backus made notations on the patient's ventilator flow sheet about his condition and other vital statistics. She also recorded on the ventilator flow sheet administering DuoNeb to the patient at 8:30 p.m. She did this by writing a number "7" in a "Meds CODE" box on the document, denoting that DuoNeb was administered. Along with the number "7" Backus had also marked a vertical line through the Meds CODE box, which generally indicates that no medications were given. Another therapist, Diana Garduno, made the exact same notation for her assessment of the patient on March 22, 2018, at 3:15 a.m., writing a number "7" but also marking a vertical line through the Meds CODE box (R. 5, Tr. 1121, 1821) (Tr. 1043–47, 1082–83, 1091, 1104; GC. 128)

After administering the treatment and completing the ventilator flow sheet, Backus was called away to other duties. At some point that evening she received a call that the patient was being moved from the fourth floor to the TCU. As she was walking to the patient's room, Backus saw a coworker who told her a nurse had called about the patient, asking about a treatment that was showing as a red box in the MAR. Backus told her colleague that she did not know the patient had any treatments scheduled, and asked why the nurse did not call her directly, as she was assigned the patient. Backus said she was on her way back to the patient's room and would look at the situation. (Tr. 1035–38, 1093–94, 1103–05)

When Backus arrived at the patient's room, he had already been moved to the TCU, but his ventilator was still in his original room; Backus pushed the ventilator to the patient's new room. She then connected the patient's T-piece, which provides oxygen and assists with expiration, and gave him the television remote control. It was now 11:10 p.m., and Backus completed the patient's ventilator flow sheet regarding her assessment of the patient's vital statistics. She then left the room and was standing near one of the mobile computers when a nurse told her there was a red box for one of the patient's treatments. Using the computer Backus accessed the patient's MAR and saw that his doctor had ordered DuoNeb treatments four times a day and there was an outstanding red box for a DuoNeb treatment at 8:00 p.m. This was the first time that Backus learned the patient's doctor had ordered DuoNeb to be administered four times a day. Backus told the nurse she had administered a treatment earlier and would clear the box manually. At 11:31 p.m. Backus manually entered the 8:30 p.m. DuoNeb treatment into the MAR, which cleared the red box. (Tr. 1037–38, 1044–45, 1049–52, 1080, 1095–96, 1104; R. 18; GC. 128, 129)

On April 9, Marino gave Backus a final written warning regarding the 8:30 p.m. treatment on March 12, and the surrounding documentation. During their April 9 meeting, Marino asked Backus where she got the DuoNeb for the 8:30 p.m. treatment. Backus told him that she did not know, she either got it from another therapist during the handoff or off the table. Marino told Backus that she was being disciplined for not pulling the medication from the PYXIS and for false documentation; he did not tell her specifically what she did that constituted false documentation. At some point during the meeting, Backus told Marino "with all due

respect, you've been half-assing this for a long time," referring to Marino's job performance. (Tr. 1113–14, 1096, 1124; GC. 127)

This was the first discipline Backus had received in her five years working at the hospital. After receiving the discipline, Backus contacted the Union which filed a grievance on her behalf. As of the time of the hearing, Backus's grievance was still pending. Backus's meeting with Marino on April 9 was the first time that Marino, or any hospital official, had asked her about the incident or the related documentation. Backus denied falsifying anything regarding the patient's treatment, including the documentation, all of which she testified was accurate. (Tr. 321, 1052–55, 1111)

3. Marino's investigation and his decision to discipline Backus

Sometime on either March 14 or March 15, Marino was in the ICU chatting with an ICU nurse.[54] The two were engaged in small talk about a certain fastidious cardiothoracic surgeon who had admitting privileges at the hospital. As they were talking, the nurse told Marino that the surgeon was upset regarding his respiratory care orders involving a particular patient, thinking someone changed them. She told Marino that one of the night nurses made a comment about an issue regarding one of the respiratory medications. The nurse did not identify any of the respiratory therapists who may have been involved. (Tr. 1679–82, 1736, 1783)

Marino looked through the hospital's order management system to review the doctor's orders for the patient in question and saw the physician had ordered that, starting at noon on March 11, DuoNeb was to be administered to the patient every four hours, which means at 8:00 a.m., Noon, 4:30 p.m. and 8:00 p.m. Marino did not see anything out of the ordinary with the orders and noted that nothing had been changed. (Tr. 1682–84, 1688, 1737–38, 1827; GC. 142 #2530–31)

On March 15 Marino went to the PYXIS and looked to see what medications were withdrawn for the patient in question. Marino testified that he did not see DuoNeb withdrawn for this patient for the scheduled 8:00 p.m. treatment on March 12, or for the scheduled 8:00 a.m. and Noon treatments on March 13. He then looked at the ventilator flow sheet and saw Backus had documented administering DuoNeb to the patient at 8:30 p.m. on March 12. Marino testified he thought her notation stood out as odd. Along with a number "7" (indicating DuoNeb was administered), there was also a vertical line going through the same box. He also found it strange there was no treatment administered the next day, when the patient was on a ventilator and Thuc Ho had noted the patient's vitals on the ventilator flow sheet at 7:40 a.m. and 11:30 a.m. (Tr. 1684–89, 1704–05, 1710, 1714; GC. 128, R. 15 #2342; R. 16)

According to Marino, he then looked at the patient's MAR, which showed that Backus made a manual entry at 11:31 p.m. on March 12 indicating she had administered DuoNeb to the

[54] During his direct testimony, Marino testified that this conversation occurred "around March 14 or 15." (Tr. 1783) During cross examination, when asked about the conversation, he testified that it occurred "I think it was 13th or 14th, I'm thinking in there." (Tr. 1783) I credit his original testimony that this conversation occurred on March 14 or March 15. I note that the photo of the PYXIS screen Marino took was printed on March 15, 2018, and the first report produced by the pharmacy is dated March 16, 2018. (R. 15, p. 3)

patient earlier that day at 8:30 p.m. (Tr. 1716, 1746–47; GC. 129) Even though it was a manual entry, and was made three hours later, Marino testified that the entry did not necessarily stand out because things happen at the hospital, therapists get busy with patients, which sometimes requires MAR entries to be made manually, after the fact. (Tr. 1716, 1720) Indeed, according to Marino, about 20% of the treatments respiratory therapists administer each month involve manual entries.[55] (Tr. 1805)

Marino then contacted the pharmacy and asked to see records of all medications that were pulled from, and returned to, the PYXIS for this patient on March 12 and March 13. He reviewed a variety of reports produced by the pharmacy, including one showing all DuoNeb pulls from the PYXIS made by therapists for these two dates; he lined up the treatments listed with the medications pulled. Marino again noted that there was no medication pulled for the patient's 8:00 p.m. treatment on March 12 when Backus was on duty, and no medication pulled for the 8:00 a.m. or noon treatment on March 13 when Thuc Ho was assigned the patient. And, at 2:52 p.m. on March 13, Thuc Ho noted in the MAR that the patient's 8:00 a.m. and noon treatments were not given. Marino testified that, while all of this this was a concern, at the time it was "not like a super red flag." (Tr. 1718–25, 1763, 1767–68, 1835–36; GC. 138 ex. E, GC. 142; R. 26–27)

At some point Marino focused on the fact Backus had charted administering DuoNeb to the patient at 8:30 p.m. on March 12, but no DuoNeb was pulled from the PYXIS to correspond with that treatment. He then spoke with Stephanie Jones, telling her that he had a medication/documentation issue, and explained what had occurred. He also spoke with Brian Smith. Smith was the lead therapist for the night shift on March 12, and was responsible for updating Backus's shift-assignment sheet. Smith relayed to Marino a second-hand account about an ICU nurse calling regarding a missed medication. (Tr. 1120–23, 1768–71; R. 4)

Marino testified that he had never previously investigated anyone for not acquiring medication from the PYXIS,[56] and he could not recall any time that he had investigated anyone for making a manual entry. However, according to Marino, he took these steps here because there was a complaint that a doctor had concerns about his orders being changed or not being followed. That being said, Marino never actually tried speaking with the cardiothoracic surgeon in question to find out what, if any, complaints the he actually had. And, despite the fact the doctor's orders were not followed on March 13, when Thuc Ho twice did not administer DuoNeb to the patient as ordered, Marino never investigated why Thuc Ho failed to follow the physician's written orders. He did not speak to Thuc Ho about the matter nor was Thuc Ho disciplined. (Tr. 1768, 1820–21, 1825–29, 1835–42, 1855)

On April 4, Marino left Backus a voicemail, asking if they could meet. That evening, Backus emailed Marino asking what he wanted. Marino left Backus another voicemail the next day. On April 6, Backus emailed Marino saying "this email is in response to your voicemail request to meet with you in HR for disciplinary actions. We can meet you in HR at 10 a.m. on

[55] The parties stipulated that, in the 14 month period from January 1, 2017 to April 30, 2018, there were 3,716 instances where a respiratory therapist made a manual entry. (Tr. 1805–06; JX. 1)

[56] Page 1820. Line 12 should read "getting a medication out of the Pyxis?" instead of "giving a medication out of the Pyxis?"

Monday April 9, 2108." Marino replied that same day saying "I don't believe the message was for disciplinary reasons. I think Monday at 10:00 will be fine." A few hours later Marino emailed Backus again telling her that the meeting would occur in his office. Backus replied, saying a meeting in his office would be a problem because of her restraining order against Matuszak, who apparently was working that day. Eventually they agreed to meet in an adjacent building on Monday, April 9, 2018, at 11:30 a.m. (Tr. 1772, 1779–81; R. 20–21)

Before meeting with Backus, Marino spoke with Steve Ochoa, who was the therapist assigned to the patient on the day shift, to ask whether he handed off any medications to Backus during the shift change. He also confirmed again that Backus did not pull any DuoNeb for that patient from the PYXIS. (Tr. 1784, 1789)

On April 8, Marino drafted a disciplinary document for Backus, giving her a final written warning. He had the document with him on April 9 when they met. Present for the meeting was Marino, Backus, Justin Kmetz, who was serving as Backus's Union steward, and Melissa Curtis, a secretary in the cardiology department who was present to take notes. According to Marino, he thanked Backus for coming in, and gave her a brief description of his concerns. He also showed her the ventilator flow sheet, pointing out that Backus indicated DuoNeb was delivered on March 12 at 8:30 p.m., and asked Backus where she got the DuoNeb. Marino testified that Backus asked him to explain what exactly he was asking her. Marino told Backus that she documented giving DuoNeb, "just tell me where you got the DuoNeb." Backus said she did not know. She said that she could have gotten it off the table, or could have gotten it during the handoff between shifts. Marino told Backus that he spoke with the therapist who performed the shift handoff report and that no medication given during the handoff. Backus then told Marino that he was "half-assing this whole thing." (Tr. 1791–95; GC. 127)

Marino told Backus that he had information for all the medications she had pulled and returned that evening, and for all the DuoNeb withdrawn from the PYXIS throughout the hospital for March 12 and March 13. According to Marino, Backus asked to look at the documents and take them with her to review. Marino told her that she could not do so, but could get them through the Union. The meeting concluded with Marino telling Backus he was issuing her a final written warning. Backus protested, saying that she had never previously been disciplined. Marino acknowledged her lack of any prior discipline, but said this was a fairly sever situation, and presented her with the disciplinary document. Marino acknowledged during his testimony that this meeting was the first time he had discussed the matter with Backus, or otherwise asked her what happened regarding the incident in question. (Tr. 1794–95, 1818)

Backus's Final written warning is dated April 9, 2018, and attached to the document is the hospital's five page medication administration and documentation policy. Backus's discipline reads, in part, as follows:

> Action: Medication Administration Error:
> On 3/12/2018 you documented that a medication was administered to a ventilator patient at 20:30. The ventilator flow sheet shows a medication was delivered at 20:30. The medication was not scanned, instead was manually entered in the Medication Administration Record at 23:31 as being delivered at 20:30. The

> pharmacy records indicate that there was not a medication removed from the Medication Pixis for the patient in question. This constitutes a medication administration error as well as false documentation.
>
> Policy violated:
> Medication Administration and Documentation #2911904.
>
> Plan of Corrective Action:
> All medications you administer to any patient at St. Rose Hospital must be properly removed, recorded and delivered. Additionally, a patient assessment must be performed for all medication administration.

At trial, Marino was asked a number of times why he issued Backus a final written warning, which is the last step before termination in the hospital's disciplinary process, despite the fact she had never previously been disciplined. Marino first testified that he issued the discipline for two reasons: (1) because Backus could go through the grievance procedure; and (2) because Backus could not provide him with information as to where she withdrew the medication, but could only say definitively "I don't know." Immediately thereafter, Marino testified that Backus was disciplined for documenting a medication on a medical record without evidence of actually having the medication and dispensing it. He also testified that it was the hospital's established practice to issue a final written warning whenever a medication had been documented as being dispensed to a patient without evidence of that medication existing. That being said, Marino also testified that he had no reason to disbelieve Backus when she told him that she could have retrieved the medication off the table in the tech room. (Tr. 1794, 1796–98)

Later, when asked what Backus did that constituted a "medical administration error" and "false documentation," as noted in her disciplinary document, Marino testified that Backus wrote on the vent flow sheet that she administered DuoNeb to the patient, and Marino did not believe that she actually administered the drug. In short, Marino said that he thought Backus lied when she documented having administered DuoNeb to the patient that night. (Tr. 1852–53)

As for Marino's testimony that the hospital had an established practice of issuing a final written warning whenever a medication had been documented as being dispensed to a patient without evidence of the medication existing, on cross examination he recanted this testimony. When asked by the General Counsel for examples of any such prior disciplines, Marino could not come up with any examples. He then admitted his prior testimony was incorrect, and he was referring to something else. (Tr. 1798, 1818–19)

According to Marino, he alone made the decision to discipline Backus. And, despite the fact Marino had prepared Backus's discipline on April 8, and had it with him when they met on April 9, he initially testified that he had not yet decided whether or not to issue Backus the discipline when they met. According to Marino, if Backus had told him that she got the DuoNeb from a source that he had not already looked into, then he would have further investigated. However, during cross-examination, Marino testified that he knew of no other sources for the medication, and agreed that he was basically planning to give Backus the final written warning when they met on April 9, regardless. (Tr. 1791, 1795–99, 1818)

4. The General Counsel's prima facie case

a. Backus's protected concerted activities

There is abundant evidence of Backus's protected concerted activities. She passed out, collected, and filed with human resources, bullying complaint forms.[57] She sent the email to Dhuper complaining about bullying,[58] harassment, racial discrimination, and breach of the union contract, which was an outgrowth and synopsis of employee group complaints going back for months.[59] (GC. 37) Backus's discussion with Marino after Roop's November 21, 2106 discipline was also concerted. After Roop was disciplined she spoke to Backus about her concerns, and Backus then spoke with Marino and Gandhi telling them that people in the department were saying that they were being bullied, intimidated, and harassed; the same issues set forth in her email to Dhuper a few weeks later. After Gandhi said she was only getting one side of the story Backus said that she had heard this from multiple sources. By expressing support for Roop's complaint, Backus's discussion was concerted and protected.[60]

Backus's conduct with respect to the petition is also concerted. She spoke with coworkers about what to include in the petition, drafted it, solicited signatures on the document, and she delivered the petition to Dhuper.[61] Finally, Backus filed a charge, and testified at the unfair labor practice proceeding in this matter on three different dates, each time in the presence of Marino who was the employer's representative throughout the hearing. (Tr. 20) And, during her testimony on March 27, 2018, which was less than two weeks before her discipline, Respondent was provided with a copy of the affidavit Backus gave during the underlying investigation in order to prepare for her cross examination.[62]

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[57] See *Dignity Health*, 360 NLRB at 1131–32;*Meyer Tool, Inc.*, 366 NLRB No. 32 slip op. at 9–10 (2018).

[58] The email says it was sent "on behalf of a large group of RT professionals." (GC. 37) And, throughout the email, Backus uses terms such as "we," "us," "those of us," "our problems," indicating that the complaints outlined are not her own individual issues, but group complaints shared by many staff members; hospital management would surely understand that her email refers to group complaints.

[59] See *Oakes Machine Corp.*, 288 NLRB 456 (1988), enfd. in pertinent part 897 F.2d 84 (2d Cir. 1980) (employee who mailed unsigned letter complaining about mismanagement that consistently used the term "we" and specified complaints concerning more than one employee was engaged in concerted activity and employer had reason to know more than a single employee was involved in the protest*); Champion Home Builders Co.*, 343 NLRB 671, 671 fn. 3 & 680 (2004), enfd. in pertinent part sub nom. *Carpenters Local 1109 v. NLRB*, 209 Fed.Appx. 692 (9th Cir. 2006) (employee who, with the support of coworkers, wrote a "protest letter" raising concerns about working conditions was engaged in protected, concerted activity); *Interboro Contractors, Inc.*, 157 NLRB 1295, 1298 (1966) enfd. 388 F.2d 495 (2d Cir. 1967) (complaints by single employee concerted when they are made in an attempt to enforce provision of the existing collective-bargaining agreement); *Meyers Industries, Inc. (Meyers II)*, 281 NLRB 882, 887 (1986) (individual employee engages in concerted activity when she brings "truly group complaints to the attention of management.").

[60] *Burle Industries*, 300 NLRB 498, 501 (1990), enfd. 932 F.2d 958 (3d Cir. 1991) (table) (noting that if an individual employee expresses support for another employee's complaint, that conduct is presumed concerted without any evidence of authorization).

[61] *Continental Pet Technologies*, 291 NLRB 290, 291 (1988); *Hoytuck Corp.*, 285 NLRB 904, 904 fn. 3 (1987); *Senior Citizens Coordinating Council of CO-OP City*, 330 NLRB 1100, 1102–04 (2000); *Walls Mfg. Co., Inc.*, 137 NLRB 1317, 1319 (1962); *Empire Gas, Inc. of Denver*, 254 NLRB 626, 630 (1981).

[62] *NLRB v. Scrivener*, 405 U.S. 117, 122–125 (1972) (The protections of Section 8(a)(4) are broad, and protects not only those who file charges and give testimony in a formal hearing, but also those who provide sworn statements to NLRB investigators during investigations.).

b. Knowledge

The evidence clearly shows that Respondent knew about Backus's protected concerted activities. Dhuper and Marino were directly involved in, or were informed of, most if not all of her concerted activities. Marino was told that Backus was handing out bulling complaint forms to coworkers. And, Marino was Respondent's representative throughout the trial. He was present each time Backus testified, thereby learning the full extent of her concerted activities, including her direct involvement with the petition and the fact she provided an affidavit to the government during the underlying investigation.

c. Animus

The record is replete with evidence of animus against employee concerted complaints. The various 8(a)(1) and other violations previously found are sufficient to show a general animus. *Dynasteel Corp.*, 346 NLRB 86, 88 (2005) ("The Respondent's numerous 8(a)(1) violations provide evidence of its anti-union animus"). Also, as noted earlier, Marino's interaction with Frank Mardenzai and Alex Aguilar, including the statements he made and changing Aguilar's work schedule is evidence of animus. Finally, the timing of the discipline, coming less than two weeks after Backus testified in this matter, is further evidence of unlawful motive. *Robert Orr/Sysco Food Services, LLC*, 343 NLRB 1183, 1194 (2004) (timing of discharge, just 2 weeks after employee testified in a Board proceeding, indicates a connection between the Board testimony and the discharge).

Accordingly, the General Counsel has presented sufficient evidence of a prima facie case of discrimination. Accordingly, Respondent bears the burden of persuasion to show that it would have issued Backus a final written warning absent her protected concerted activities. *Consolidated Bus Transit*, 350 NLRB at 1066. Respondent has not done so.

5. Respondent has not rebutted the General Counsel's case

a. Respondent's reasoning does not withstand scrutiny

Respondent's reasons for issuing Backus a final written warning do not withstand scrutiny. At trial, Marino testified that Backus was issued a final written warning: because she can go through the grievance procedure as everyone has the right to do; because she did not provide Marino with information as to where she got the medication administered to the patient in question on March 12; and for documenting a medication on a medical record without evidence of actually having the medication and dispensing it. He also testified that the hospital's established practice was to issue a final written warning whenever a medication had been documented as being dispensed to a patient without evidence of the medication existing. As discussed below, I believe each is pretext.

As per the Union contract, the right to file a grievance is available to everyone covered by the agreement. Based on Marino's reasoning, every employee covered by the contract would receive a final written warning anytime a discipline is issued, because they can file a grievance.

The record shoes that this does not occur; I find Marino's asserting that Backus was issued a final written warning because she had the right to file a grievance is pretext.

As for Marino's statement that the discipline was issued for not providing Marino with information regarding where Backus got the DuoNeb administered on March 12, the evidence shows that Backus told him that she either got the medication from the table in the tech room or from another therapist during the hand-off. She did not know for sure, but those were the two options she gave. There is abundant evidence in the record, even photographs taken by Marino himself, that RTs left unused respiratory medications lying around the tech room, instead of returning them to the PYXIS. The credited evidence shows that therapists generally did, in fact, pick up unused medication from the tech room and use them. At trial, Backus credibly testified that she picked up the medication in question from the table, put it in her pocket, and administered it when visiting the patient on March 12 as she believed a treatment would be beneficial to the patient. Marino testified he had no reason to disbelieve Backus when she told him that she could have picked up the medication from the table; nonetheless he issued her a final written warning. Because the evidence shows that picking up, and administering, unused medication found lying around was an accepted practice in the department, I find that this reason advanced by Marino for the discipline to be pretext.

Regarding the claim that Backus was disciplined for documenting a medication on a medical record without evidence of having the medication, as just noted, it was not uncommon for therapists to pick up and use medication left lying around the department; other than Backus nobody was ever disciplined for this practice. Also, it was even more common for one therapists to handoff unused medication to another therapist during shift changes. Both would have been against hospital policy, and since the handoffs are done orally, there would be no record of the oncoming therapist actually receiving the medication in question. Nonetheless, at least under Marino, this was an accepted practice that did not subject anyone to discipline. As for his testimony that it was an established practice to issue a final written warning whenever a medication has been documented as being dispensed to a patient without evidence of the medication existing, during cross examination he recanted. When asked for specific examples that show this established practice, Marino could not think of any. When pressed, he changed his testimony saying he was referring to unrelated incidents when RTs issued medication to patients but never charted the medication as having been issued. Again, I find Marino's reasons, and his changed testimony, as evidence of pretext.

Regarding Marino's claim that Backus documented a medication without evidence of dispensing it to the patient, the evidence shows that manual entries are not only accepted by the hospital but account for 20% of treatments administered by respiratory therapists. Instead of scanning the medication and a patient's wrist band, when a manual entry occurs the RT simply types the information into the MAR. In these cases, other than the therapist typing the information into the system, as Backus did on March 12, there would be no other evidence of the medication being dispensed. Backus both completed a manual entry for the March 12 treatment, and also documented the information on the ventilator flow sheet. Pursuant to the hospital's practice, both are evidence that the medicine was administered.

At trial, Marino testified that if he could have backed up a claim that Backus got the DuoNeb off the table with some evidence that the "medication existed," he would not have disciplined her.[63] (Tr. 1798) However, Marino never gave Backus the opportunity to support her claim, as the first time he met with her to discuss what happened was on April 9, the day he presented her with the discipline. Indeed, he had drafted the document the day before they even met. Reaching a disciplinary decision without giving the affected employee a meaningful opportunity to advance an explanation is evidence of discriminatory intent and pretext. *Ozburn-Hessey Logistics, LLC v. NLRB*, 609 F. App'x 656, 658 (D.C. Cir. 2015); *Tekform Products Co.*, 229 NLRB 733, 739 (1977); *New Orleans Cold Storage & Warehouse Co., Ltd*., 326 NLRB 1471, 1477 (1998), enfd. 201 F.3d 592 (5th Cir.2000). Such is the case here.

b. The evidence does not support Respondent's claim of consistent discipline

St. Rose claims that Backus's discipline was consistent with those issued to other therapists in similar circumstances. *Resp't Br.*, at 133. However, a closer look shows that this claim does not bear scrutiny. The incidents Respondent points to involve situations where hospital audits showed that four respiratory therapists "treated a number of patients with medications and that no charting was done on any of them." (GC. 136) Thus, on multiple occasions these therapists administered medication to multiple patients but never completed any of the requisite charting whatsoever. (Tr. 1802) For their conduct, the therapists received written disciplines; the bottom of each document stated that any similar future occurrences would be grounds for immediate termination.

However, Backus charted administering the DuoNeb in question in the MAR. She went an extra step and also documented it on the ventilator flow sheet. Here, Respondent is comparing apples to oranges as the proposed comparators never charted administering medications whatsoever. This is something that Marino agreed could be potentially deadly as without the documentation a practitioner would not know what, if any medications, a patient had taken. (Tr. 1803–04) Moreover, the four therapists in question treated multiple patients without charting; Backus was accused of one specific incident. Also, the record evidence shows that Backus received a final written warning despite the fact she had never previously been disciplined in her five years at the hospital. The record is silent as to whether any of the four proffered comparators had any prior disciplines, and if so how many. These are not valid comparators.

c. Respondent's claim that Backus is not credible

In its brief, Respondent asserts that Backus's testimony about what occurred on March 12 is not credible because she made false statements at trial, and to the state court, involving the hallway incident on November 7, 2017, which resulted in her TRO against Matuszak. About his

[63] That Marino requested PYXIS reports from the pharmacy for only March 12 and March 13 belie this testimony. The March 13 PYXIS report could not account for any loose/unused DuoNeb that Backus picked up in the tech room and administered on March 12. Had Marino really been interested in determining whether there was any loose/unused DuoNeb migrating around the department that Backus could have administered, he would have asked for pharmacy PYXIS reports for the days before March 12, not after.

incident, Backus testified that Matuszak "walked around my left side and bumped me really hard." (Tr. 294)

Undoubtedly, Backus's testimony is not accurate. As stated earlier, the video of the incident shows that Matuszak and Backus passed each other in the hallway, touching each other barely – if at all. That being said, I do not believe Backus's testimony about this incident bears upon her credibility about whether she administered DuoNeb on the night of March 12, 2018; the incidents are unrelated.

It is obvious from the record that Matuszak and Backus had an intense dislike for each other. Both fabricated what occurred in the hallway on November 7, 2017, in an attempt to get the other in trouble. And they both gave false stories to Stephanie Jones in human resources as to what occurred—with Matuszak's story being even more fictional than Backus's. Nevertheless, I believe Jones was accurate in her testimony that she did not believe either Backus or Matuszak were willfully lying. (Tr. 2157) Instead, they both perceived being hit by the other; most likely out of the shock of passing in the hallway and their intense dislike for each other.

Moreover, I found that Marino gave inaccurate testimony in this proceeding as well, on matters directly relating to the outstanding complaint allegations. For example, Marino's testimony about what he knew, and when he knew it, regarding the petition was erroneous; it did not comport with his emails. Marino testified that he did not see the petition, and Jones did not tell him anything about it, until the "Monday or Tuesday of the next week" (which would have been April 17 or 18). (Tr. 1483, 1481) However, Marino's emails show that he spoke with Jones about the petition on the morning of April 14. (GC. 140) That morning Jones showed Marino the petition on her computer screen and the two discussed what was in the document.

Unlike Backus's testimony about the hallway incident, which is simply background and not directly related to the complaint allegations, Marino's testimony regarding the timing of what he knew is directly related to Roop's discharge. She was fired on April 17, and Respondent argues that the petition played no role in that decision. *Resp't Br.*, at 103. By testifying he did not actually see the petition until April 17 or 18, Marino attempted to bolster Respondent's argument that the petition played no role in Roop's termination.

In sum, while both Backus and Marino may have given inaccurate testimony at times, I generally found Backus more credible than Marino. This is particularly true regarding what occurred surrounding the incident of March 12.[64]

d. Other evidence of pretext/discriminatory motive

[64] In its brief, Respondent references the ventilator flow sheet notation with the number "7" that also contains a vertical a line through the box, arguing Backus is not credible and was trying to cover-up her mistake. *Resp't Br.*, 137. However, the evidence shows that a therapist named Diana Garduno made the exact same notation for her assessment of the same patient 10 days later. (R. 5, Tr. 1821) There is no claim Garduno was involved in a cover-up, nor did Marino do anything to investigate her conduct. (Tr. 1821) Rather than some nefarious plot, I believe these two instances simply show that RTs work quickly, and sometimes make mistakes, or put stray markings, when completing the ventilator flow sheets by hand.

I believe that surrounding facts involving the investigation into the physician's original complaint, which ultimately resulted in Backus's discipline, also support a finding of unlawful motive. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966) ("Actual motive, a state of mind, being the question, it is seldom that direct evidence will be available that is not also self-serving. In such cases, the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise no person accused of unlawful motive who took the stand and testified to a lawful motive could be brought to book.") According to Marino, the investigation stemmed from a March 14/15 discussion with an ICU nurse that a certain surgeon was upset about his respiratory care orders involving a particular patient, thinking they had been changed. Marino's investigation showed that Thuc Ho neither retrieved nor administered DuoNeb ordered by the physician for the patient's 8:00 a.m. or 12 noon treatments on March 13. This could have easily been the cause of the physician's concern, as the medication was never actually administered. And, Thuc Ho did not document that the treatments were missed until 2:52 p.m., almost 7 hours after the first treatment was supposed to have been dispensed. However, Marino never tried to contact the doctor in question to determine his concern.

Instead, Marino simply relied on second and third-hand accounts of the doctor's complaint to ultimately focus his investigation on Backus. And, it appears Marino's reason for the investigation, the surgeon's concerns that his orders had been changed, was disregarded completely. He never spoke with the doctor and not investigate or question Thuc Ho about the matter. (Tr. 1828–29, 1842, 1845–46) The investigation focused solely on Backus, without even questioning her before making the decision to issue discipline. I believe these circumstances also support a finding of unlawful motive. *Shattuck Denn Mining Corp.*, 362 F.2d at 470; *Iowa Beef Processors, Inc.*, 226 NLRB 1372, 1380 (1976) enforcement denied in pert. part 567 F.2d 791 (8th Cir. 1977) (the fact investigation focused on one person, without discovering others involved, supports the finding of a violation).

e. Respondent's did not have a good faith belief of misconduct

Finally, Respondent asserts that there can be no violation, as it needed to only show that Marino had a good faith belief that the misconduct occurred. *Resp't Br.*, at 127, 132. However, here Marino's belief was not held in good faith. *Wells Aluminum Corp.*, 319 NLRB 798, 812-13 (1995), enfd. in pertinent part 248 F.3d 1150 (6th Cir. 2000). Instead, I find that the circumstances surrounding Respondent's purported reliance on the alleged incident is also evidence of pretext. *Cf. Countryman v. Nordstrom, Inc.*, 2007 WL 38912, at *7 (D. Minn. 2007) (in an employment discrimination case, the court noted that the proper inquiry was whether the employer had an honest belief the employee was abusing her breaks or whether it used "break abuse" as a pretext).

In *Wells Aluminum Corp.*, the employer argued, in part, that based upon its investigation it held an honest belief that an employee engaged in misconduct by making threats, and was fired because of these threats, and not for his protected activity. The Board, and the Sixth Circuit, affirmed the ALJ's finding that the employer's "belief" the employee engaged in misconduct was not made in good faith, noting that the termination decision was made before the employee was even interviewed about the alleged incident. *Wells Aluminum Corp.*, 319 NLRB at 813.

Therefore, the employer did not demonstrate the discharge would have occurred absent the employee's protected conduct. Id. See also *Archer v. Mesaba Aviation, Inc.*, 210 F.3d 371, 2000 WL 376677 *5 (6th Cir. 2000) (unpublished opinion) (Employer may not invoke the "honest belief rule" where, in part, employee was never informed of the allegations against him and the termination letter was prepared before he was given an opportunity to respond to the allegations). Such is the case here. Before April 9, 2018, Backus was never informed of the allegations against her or given an opportunity to explain her actions. Her final written warning was prepared the day before Marino even met with her for the first time to discuss the incident. Along with showing that Marino did not have a good faith belief that misconduct occurred, it is also evidence of pretext. *Wells Aluminum Corp.*, 319 NLRB at 813.

Accordingly, I find that Respondent has not rebutted the General Counsel's prima facie case. The evidence supports a finding that Backus was issued a final written warning on April 9, 2018, in violation of Section 8(a)(1) of the Act because she engaged in protected concerted activities, and because she filed charges with the Board, cooperated in the underlying investigation, and provided testimony in this matter, in violation of Section 8(a)(4) of the Act.

V. ALLEGED DISCRIMINATORY REMOVAL OF THE TECH ROOM TELEVISION

For many years the respiratory department tech room contained a flat-screen television which employees had purchased for their use; some techs would watch DVDs on the television during their breaks/down-time. The RTs purchased the television because they previously only had a radio. The tech room also contained other items, such as a toaster, microwave, and two coffee machines, also purchased by the employees. During Dhuper's December 14 staff meeting, he told the RTs that the television needed to be removed, as they do not allow televisions in the department. He also told them during this meeting that the hospital was going to renovate the tech room by installing new flooring, and repairing and painting the walls. Thus all personal electronic items including the television, toaster, and the microwave, needed to be removed.

It is undisputed that, after the December 14 staff meeting the tech room was renovated/refurbished. The walls were painted, lockers cleaned, new flooring installed, and bulletin boards replaced. Before the renovation the television, microwave, and coffee machines, among other items, were removed. After the renovation the microwave and coffee machines were returned to the tech room, the television was not. Instead, the television was placed in a storage room.

The General Counsel alleges that the removal of the television was unlawfully motivated, and therefore violated Section 8(a)(1) of the Act. *GC. Br.*, at 102–05. Respondent asserts there was no violation regarding the television, arguing that Dhuper did not know about employee concerted activities at the time the decision was made to remove the TV. *Resp't Br.*, at 88–90.

Wright Line 251 NLRB 1083 (1980) is used to analyze situations where the government asserts that an unlawful motive is at play. See *Cast-Matic Corp.*, 350 NLRB 1270, 1339 (2007) (using *Wright Line* to analyze whether employer's removal of refrigerator and microwave from department was unlawfully motivated). Here, when Dhuper announced to employees that the

television needed to be removed, during the December 14 meeting, he had already been to human resources and was made aware of the multiple complaints filed regarding the respiratory department that human resources was investigating. He had also read Backus's December 10 email which says that it was sent "on behalf of a large group of RT professionals," complaining about bullying, harassment, racial discrimination, and breach of the union contract. This email alone is sufficient to show knowledge of employee concerted activities. *Oakes Mach. Corp.*, 288 NLRB 456 (1988), enfd. in pertinent part 897 F.2d 84 (2d Cir. 1980) (employee who mailed unsigned letter complaining about mismanagement that consistently used the term "we" and specified complaints concerning more than one employee was engaged in concerted activity and employer had reason to know more than a single employee was involved in the protest); *Champion Home Builders Co.*, 343 NLRB 671, 671 fn. 3 & 680 (2004), enf. in pertinent part sub nom. *Carpenters Local 1109 v. NLRB*, 209 Fed.Appx. 692 (9th Cir. 2006) (employee who, with the support of coworkers, wrote a "protest letter" raising concerns about working conditions was engaged in protected, concerted activity); *Interboro Contractors, Inc.*, 157 NLRB 1295, 1298 (1966) enfd. 388 F.2d 495 (2d Cir. 1967) (complaints by single employee concerted when they are made in an attempt to enforce provision of the existing collective-bargaining agreement); *Meyers Industries, Inc. (Meyers II)*, 281 NLRB 882, 887 (1986) (individual employee engages in concerted activity when she brings "truly group complaints to the attention of management."). Thus, I find Respondent's argument that Dhuper did not know about employee concerted activity as unsupported by the record evidence; he clearly read Backus's December 10 email.

The animus against employee concerted complaints is shown by the various 8(a)(1) violations found herein, including Dhuper's statement at the December 14 meeting threatening to fire everyone in the department. *Dynasteel Corp.*, 346 NLRB 86, 88 (2005). Accordingly, I find that the General Counsel has met her burden of showing that the permanent removal of the television was unlawfully motivated, and the burden of persuasion shifts to the Respondent to show it would have taken the same action absent employee protected activity. *Consolidated Bus Transit*, 350 NLRB 1064, 1065 (2007). I find that Respondent has failed to rebut the General Counsel's case.

It appears that Respondent's best argument is that the television was removed as part of the renovations in the respiratory department. *Cast-Matic Corp.*, 350 NLRB 1270, 1339 (2007) (employer showed microwave and refrigerator were removed from department as part of a cleanup of the department, and not because of employee union activities). However, the fact the television was never replaced after the renovation, while the two personal coffee makers and the microwave oven were, belies any such defense.

At trial, Dhuper testified that he requested the television be removed because the hospital does not allow televisions in working departments. However, other than Dhuper's self-serving testimony, there is no evidence of any such hospital policy. And, it does not explain why the hospital had allowed a television in the tech room for multiple years; before Backus's December 10 email a television in the tech room was never an issue. Dhuper's testimony also does not explain the undisputed evidence that numerous other employee break rooms in the hospital have televisions. The tech room was the only space RTs had to use as their break room, and the television was in the half of the room that contained the sink, refrigerator, coffee maker and microwave. When pressed on the lack of a written policy regarding televisions in working

departments, Dhuper stated that personal electronics were not allowed in the hospital because all electronic circuitry needed to be of "healthcare grade." However, he admitted he has never inspected, nor has he requested an inspection, of the televisions in the other break rooms to ensure their circuitry were of "healthcare grade." And, it does not explain why the two personal coffee makers and microwave were replaced, but the television was not; there is no evidence that the Mr. Coffee and Keurig machines in the tech room were of "healthcare grade." (Tr. 1298–99, 2546) In sum, I find that Respondent has failed to rebut the General Counsel's case, and the evidence supports a finding that the television set was permanently removed from the tech room because RTs had engaged in protected concerted activities in violation of Section 8(a)(1) of the Act. *Morgan Precision Parts*, 183 NLRB 1141, 1142 (1970) (violation where employer stopped making facial tissue, aspirin, candy, and gum available in the break room because employees had expressed an interest in unionization); *Hialeah Hospital*, 343 NLRB 391, 393 (2004) (employer removing ping pong table used by employees violated Section 8(a)(3)).

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.

2. By interrogating employees about their protected concerted activities, and those of their coworkers, Respondent has violated Section 8(a)(1) of the Act.

3. By threatening employees with discharge or other reprisals because they engaged protected concerted activities, Respondent has violated Section 8(a)(1) of the Act.

4. By soliciting employees to quit because they engaged in protected concerted activities, Respondent has violated Section 8(a)(1) of the Act.

5. By making coercive statements to employees because they engaged in protected concerted activities, Respondent has violated Section 8(a)(1) of the Act.

6. By removing the benefit of a television set from employees because of their protected concerted activities, Respondent has violated Section 8(a)(1) of the Act.

7. By disciplining, suspending, and discharging Babita Roop because she engaged in protected concerted activities, Respondent has violated Section 8(a)(1) of the Act.

8. By disciplining Jernetta Backus because she (1) engaged in protected concerted activities; (2) testified at a hearing before the National Labor Relations Board; and (3) cooperated in a Board investigation, Respondent has independently violated Sections 8(a)(1) and 8(a)(4) of the Act.

9. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act.

Specifically, having found that Respondent violated Sections 8(a)(1) of the Act by suspending and discharging Babita Roop, I shall order Respondent to reinstate her and make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her.

Respondent shall compensate Babita Roop for any adverse tax consequences of receiving a lump–sum backpay award in accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas,* 361 NLRB 101 (2014). Respondent shall also compensate Babita Roop for her search–for–work and interim employment expenses regardless of whether those expenses exceed interim earnings. *King Soopers, Inc.*, 364 NLRB No. 93 (2016).

Backpay, search–for–work, and interim employment expenses, shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Additionally, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), Respondent shall file with the Regional Director for Region 32, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration.

The Respondent shall also be required to expunge from its files any references to the unlawful discipline, suspension, and discharge issued to Babita Roop and the unlawful discipline issued to Jernetta Backus, and notify them and the Regional Director of Region 32, in writing, that this has been done and that these unlawful employment actions will not be used against them in any way. The Respondent shall also post the attached notice in accordance with *J. Picini Flooring*, 356 NLRB 11 (2010) and *Durham School Services*, 360 NLRB 694 (2014).

Finally, Respondent shall be required to restore the television set to the respiratory department tech room.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[65]

[65] 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.

ORDER

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

1. Cease and desist from

   (a) Interrogating employees about their protected concerted activities, or the protected concerted activities of their coworkers.

   (b) Threatening employees with discharge or other reprisals because they engaged protected concerted activities.

   (c) Soliciting employees to quit because they engaged in protected concerted activities.

   (d) Making coercive statements to employees because they engaged in protected concerted activities.

   (e) Removing the benefit of a television set from its employees because of their protected concerted activities.

   (f) Disciplining, suspending, discharging, or otherwise discriminating against employees because they engaged in protected concerted activities.

   (g) Disciplining, or otherwise discriminating against, employees because they provided testimony in a hearing before the National Labor Relations Board, or otherwise cooperated in a Board investigation.

   (h) 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.

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

   (a) Restore the television set to the respiratory department tech room.

   (b) Within 14 days from the date of this Order, offer Babita Roop full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

   (c) Make whole Babita Roop for any loss of earnings and other benefits suffered as a result of the unlawful suspension, discharge, and discrimination against her, including any search-for-work and interim employment expenses, in the manner set forth in the remedy section of this decision.

   (d) Compensate Babita Roop for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 32, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for Babita Roop.

   (e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline, suspension, and discharge of Babita Roop and the unlawful discipline of Jernetta Backus, and within 3 days

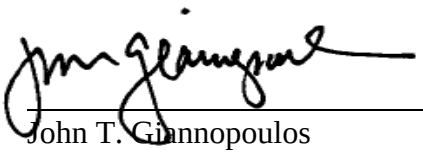
thereafter, notify them in writing that this has been done and that the unlawful employment decisions will not be used against them in any way.

(f) 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 electronic copies of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its Hayward, California hospital copies of the attached notice marked "Appendix."[66] Copies of the notice, on forms provided by the Regional Director for Region 32, 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, 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. If 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 November 21, 2016.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 32 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the

Dated, Washington, D.C. May 17, 2019



John T. Giannopoulos
Administrative Law Judge

[66] 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."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT interrogate our employees about their protected concerted activities, or the protected concerted activities of their coworkers, including by asking them if they spoke with coworkers about an investigatory meeting; asking employees who drafted a concerted and protected petition; asking employees if they signed the petition; and asking employees if they are the ringleader of the workers engaged in protected concerted activities.

WE WILL NOT threaten our employees with discharge or other reprisals because they engaged in protected concerted activities.

WE WILL NOT solicit our employees to quit because they engaged in protected concerted activities.

WE WILL NOT make coercive statements to our employees, including by telling them that management was extremely unhappy that employees lodged a protected concerted petition and that the conduct was the equivalent of an unwarranted attack on the hospital.

WE WILL NOT remove the benefits of a television set from our employees because the engaged in protected concerted activities.

WE WILL NOT discipline, suspend, discharge, or otherwise discriminate against or employees because they engaged in protected concerted activities.

WE WILL NOT discipline, or otherwise discriminate against our employees because they gave testimony in a hearing before the National Labor Relations Board or otherwise participated in a Board investigation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL restore the television set for our employees' use in the respiratory department tech room.

WE WILL, within 14 days from the date of the Board's Order, offer Babita Roop full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Babita Roop whole for any loss of earnings and other benefits resulting from her unlawful suspension and discharge, less any net interim earnings, plus interest, and **WE WILL** also make Babita Roop whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Babita Roop for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and we will file with the Regional Director for Region 32, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to the unlawful discipline, suspension, and discharge of Babita Roop, and the unlawful discipline of Jernetta Backus, and **WE WILL**, within 3 days thereafter, notify them in writing that this has been done and that these unlawful employment actions will not be used against them in any way.

Hayward Sisters Hospital d/b/a St. Rose Hospital
(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

Oakland Federal Bldg., 1301 Clay Street, Room 300-N, Oakland, CA 94612-5224
(510) 637-3300, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/32-CA-197728 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, (510) 671-3034.