

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 2

Montefiore Medical Center  
Respondent

and

Case 02-CA-229024

New York State Nurses Association  
Charging Party

**COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN SUPPORT OF  
EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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## **STATEMENT OF THE CASE**

On May 30, 2019, Administrative Law Judge Kenneth W. Chu issued a Decision dismissing General Counsel's Complaint in Case 02-CA-229024. The Complaint alleged a single violation of the NLRA – that on June 25, 2018, Respondent violated Sections 8(a)(1) of the Act by threatening employees with unspecified reprisals for requesting union representation for an investigatory interview which employees reasonably believed could result in discipline.

Pursuant to Section 102.46 of the Board's Rules and Regulations, Counsel for the General Counsel, herein General Counsel, hereby excepts to various legal findings and conclusions on which the ALJ based his failure to find the alleged violation and urges the Board to grant remedial relief. General Counsel urges the Board to adopt those findings and conclusions of the ALJ to which General Counsel does not except and which General Counsel submits are supported by a preponderance of credible evidence.

## **QUESTIONS PRESENTED**

1. Whether the ALJ properly discredited the testimony of employee witnesses Andrea Guzman, Una Davis, and Marie Kiffin regarding the alleged threat. (Exceptions 1, 2(c), 3, and 4.)
2. Whether the ALJ properly credited the testimony of Supervisor Shalom Simmons regarding the alleged threat. (Exception 2.)
3. Whether the ALJ properly considered recognized legal and analytic standards in his evaluation of the evidence and dismissal of the allegation in the Complaint. (Exceptions 1(a), (b), and (d), 2, 3 and 5.)
4. Whether the ALJ's findings were supported by a balanced consideration of the record evidence and appropriate inferences. (Exceptions 1, 2, 3, 4, and 5.)

## STATEMENT OF FACTS

### A. Background

Respondent Montefiore Medical Center operates a hospital in the Bronx, New York, providing inpatient and outpatient medical care. ALJD 1; G.C. Ex. 1(c), (g). Respondent's Administrative Nurse Manager Shalom Simmons supervises nine nurses who work in Respondent's surgical step-down unit, including Andrea Guzman, Una Davis, and Marie Kiffin.<sup>1</sup> Tr. 14, 87-88, 144, 157, 182.

Nurses Guzman, Davis, Kiffin, and others among Respondent's nursing staff are represented for purposes of collective bargaining by the New York State Nurses Association (herein, the Union). Tr. 14. The most recent contract between Respondent and the Union expired in December 2018. Tr. 14, 88.

### B. Shalom Simmons asked Andrea Guzman to file an incident report and to meet with her.

On the afternoon of Thursday, June 21, 2018, Nurse Manager Simmons sent an email to Nurse Andrea Guzman, asking about a bleeding episode with a patient who had been in Guzman's care. ALJD 2:34; G.C. Ex. 2. In the email, Simmons told Guzman that she was hoping to talk that day, and that the patient's family had clinical concerns. She further wrote that she had been hoping to see a report come through about the incident. She told Guzman to enter a "Midas" report if she had not already done so. ALJD 2:37-43; G.C. Ex. 2, Tr. 17, 185-86.<sup>2</sup>

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<sup>1</sup> The surgical step-down unit provides intermediate care between the intensive care unit and regular hospital floor beds. Tr. 182.

<sup>2</sup> A "Midas" report is an incident report which is filed when a patient is harmed in some way. ALJD 3:5-7; Tr. 17, 188-89, 237.

Guzman replied, by email, that she did not know the bleeding incident would require a Midas report. She asked Simmons to explain why one should be filed. ALJD 2:45-47; G.C. Ex. 3, Tr. 17, 188.

Simmons did not respond to Guzman's question, but rather, in her email on the following day, told Guzman, "I would like to get your take on it so when your [sic] back we will discuss." ALJD 2:47-3:2; G.C. Ex. 2, Tr. 189. Guzman was not scheduled to work on Friday, June 22 or during that weekend. ALJD 3:26-27; Tr. 20, 190-91.

Because Guzman was concerned that Simmons had asked her to enter a report for a situation which did not call for one, she forwarded Simmons's email to Union Representative Marlina Fontes and said she wanted to invoke her *Weingarten* rights. ALJD 3:9-24; G.C. Ex. 3, Tr. 17, 33. Fontes is a Union representative who has an office at the Medical Center and has previously represented Guzman and other nurses in meetings with Simmons. Tr. 39-40, 215, 226, 233, G.C. 5. Guzman told Fontes that she would like to talk to Simmons about the incident that Simmons referenced, but that she was uncomfortable going to a meeting with Simmons alone. ALJD 3:9-24; G.C. Ex. 3. G.C. Ex. 3, Tr. 17, 33.

Guzman's next day of work was Monday, June 25, 2018. ALJD 3:26-27; Tr. 20, 54, 190-191. Upon arrival for her 7:00 a.m. shift, she saw that she had been designated charge nurse for the day. Tr. 20, 191-2. She started her work shift by receiving a report from the night charge nurse about the status of patients on the unit. ALJD 4:9-10; Tr. 20. However, shortly thereafter, Simmons asked Davis to assume charge nurse duties from Guzman. ALJD 4:11-12; Tr. 101, 145-46, 193. Guzman passed along to Davis the information she had learned from the night charge nurse. Tr. 21-23, 102.

While staff were gathered for the morning “huddle,” at which nurses and staff members discuss what is happening that day, Simmons announced that although Guzman’s name was on the board as charge nurse, Davis was in charge. ALJD 4:19-21; Tr. 23, 102, 147, 165.<sup>3</sup> Guzman asked Simmons to send an email to the staff, so that in the future she would not be embarrassed about being taken off charge duty publicly. ALJD 4:21-26; Tr. 23, 203.

In response to the ALJ asking about Guzman’s stated embarrassment, Guzman explained that no one in the step-down unit had ever before been taken off charge. ALJD 4:28-32; Tr. 24. Although this testimony initially created some confusion, Guzman explained that while she had been previously removed from the charge rotation, that had been done in a private conversation with Simmons. Tr. 48, 52. By contrast, on June 25, 2018, she had been assigned the charge role and was in the process of performing charge duties when Simmons announced in front of doctors, nurses, and other staff that she was changing the charge assignment to another nurse. Tr. 52. Thus, it was the public change in the midst of her serving as charge which Guzman found unique in her experience, and embarrassing. Tr. 52.<sup>4</sup>

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<sup>3</sup> The three employee witnesses described the charge nurse designation as appearing on a board. Tr. 20, 48, 145, 163. Simmons testified that the designation is actually in an “assignment book in a binder,” and that, while there is a board in the unit, it is “for the patients.” Tr. 192. It is in any case undisputed that Guzman was the assigned charge nurse when she began work on the morning of June 25, 2018, and that Simmons changed the charge assignment to Davis. Tr. 192-93, 199-201. The General Counsel has not alleged that Guzman’s removal from the charge rotation, or the charge assignment on June 25, 2018, violated the Act.

<sup>4</sup> Simmons initially denied that she had made a public announcement. Tr. 200. She testified that she changed the charge nurse assignment after the huddle, by telling Davis, while Guzman, “was there also,” that she was going to make Davis the charge nurse. Tr. 199. But, she allowed that, “there may have been a couple nurses that might have heard me make the assignment change.” Tr. 201. Finally she said, “I don’t think I made an announcement, per se, but I think, you know, I wasn’t quiet about – and I wasn’t, like, hush-hush about it. I said, I’m going to change her. I’m going to make you the charge nurse and move Nurse Guzman from that role.” Tr. 201.

After the “huddle,” Guzman met with Patient Care Technician (“PCT”) Natalie Grant to discuss their patients.<sup>5</sup> Tr. 24, 66. Shortly thereafter, Simmons told Guzman that Grant had not understood Guzman’s patient care instructions. ALJD 6:20; Tr. 25, 68, 70. She specifically told Guzman that her conversation with the PCT should be simple, featuring layman’s terms rather than medical terms. Tr. 25, 68-70, 102. Guzman replied that the conversation had been simple and that Grant had not expressed a lack of understanding. ALJD 6:24-25; Tr. 25. Guzman asked Simmons what she meant by layman’s terms, and Simmons replied that Guzman should be talking to the PCT on an eighth-grade level. ALJD 6:26-27; Tr. 25, 68, 103-04.

Shortly thereafter, Guzman was working at the nurses’ station, along with Nurses Lydia Asamoia and Una Davis. Tr. 26-27. Simmons came to the station, asked Davis to come into her office as a charge nurse for a meeting with Guzman, and departed. ALJD 7:14-16, 8:3; Tr. 26, 28, 105, 155, 168.<sup>6</sup> Guzman told her coworkers that she was not comfortable going to Simmons’s office without a Union delegate. ALJD 7:19-20, 26-27, 8:5-7; Tr. 27, 105, 169.

C. Guzman asked to have union representation when meeting with Simmons.

Nurses Guzman, Davis, and Kiffin discussed the possibility of Guzman invoking her *Weingarten* rights. ALJD 8:7-8; Tr. 27. Marie Kiffin made a copy of the Union’s *Weingarten* rights notice and brought it to Guzman. ALJD 8:14-16; G.C. Ex. 4, Tr. 27-28, 60, 106, 149-50, 169-70. The notice reads:

NOTICE: WEINGARTEN RIGHTS

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<sup>5</sup> PCTs, who were previously known as nursing assistants, help nurses take care of patients. Tr. 65, 205. They have training beyond high school in a 4-week certification program. Tr. 66-67, 209.

<sup>6</sup>Kiffin’s recollection was that Simmons spoke to Guzman, saying that she wanted to talk to Guzman with the charge nurse. Tr. 148, 154-55, 160-61, 168. Regardless of to whom Simmons directed her words, all the nurses recalled that Simmons referenced having Davis attend as *charge nurse*.

If called into a meeting with management, you should state the following: If this discussion could in any way lead to my being disciplined or terminated or affect my personal working conditions, I respectfully request that my union representative be present at this meeting. Until my representative arrives, I choose not to participate in this discussion. ALJD 8:16-18; G.C. Ex. 4.

Guzman brought the *Weingarten* notice to Simmons's office. ALJD 8:20; Tr. 29, 61, 212, G.C. Ex. 5. She told Simmons that she understood Simmons wanted to see her in the office that day, "but," and handed her the *Weingarten* notice. Tr. 29, 62-64. Simmons looked at the paper, looked up at Guzman, and said, "no, no, no you don't have to." ALJD 8:25-26; Tr. 30, 62-63. Guzman then left the room and returned to the nurses' station. ALJD 9:11-12, 16; Tr. 30.

D. Simmons threatened reprisals for Guzman's invocation of *Weingarten* rights.

A few minutes later, Simmons approached Guzman at the nurses' station, in the presence of Nurses Asamoia, Davis, and Kiffin, holding the *Weingarten* notice that Guzman had given to her. ALJD9:12-14, 16, 10:4-5; Tr. 30, 72-73, 106, 108. Holding the notice, Simmons said to Guzman that she wanted to make sure Guzman wanted to do, "this." ALJD 9:19, 35; Tr. 30, 64, 73, 108. She told Guzman that if she attended the meeting without a delegate, anything she said could not be held against her. ALJD 9:21-22, 39-40; Tr. 30-31, 73, 108.

Guzman insisted that she wanted a delegate with her. ALJD 9:23, 29-30, 10:7-8, 11:17; Tr. 108, 214, 150, 214, G.C. Ex. 5. Simmons responded that she just wanted to make sure, "because if you have a delegate with you, I'm going to have to pull your file." ALJD 9:26-27, 40-41, 10:9; Tr. 31, 73-4, 108, 150, R. Ex. 1. Simmons said that doing so would, "open a whole can of worms," and gestured with open hands, seeming to indicate abundance. ALJD 9:26-27, 41, 10:10; Tr. 31, 74, 108, 150, 172-73, R. Ex. 1. Guzman repeated that she was sure and was not comfortable going into the room without her Union delegate. Tr. 31, 75, 173. None of the other

nurses said anything. ALJD 9:30-31, 43-44, 10:14-15; Tr. 74, 122, 152, 174. Simmons then walked away, still holding the *Weingarten* notice. ALJD 9:44; Tr. 76.

Guzman returned to work but ultimately was too upset to complete her shift. She reported to Occupational Health Services and, on the advice of the nurse there, went home for the rest of the day. ALJD Tr. 31-32, 77, 111; G.C. Ex. 5.

Later that morning, Simmons emailed her account of the events to Director of Nursing Justine Huffaker. G.C. Ex. 5. After discussing the events with Nurse Guzman, Nurse Kiffin sent an email to Guzman on July 5 in which she recalled hearing Simmons tell Guzman on June 25 that if Guzman had a union delegate Simmons would be forced to pull her file which could, “open a whole can of worms.” ALJD 10:19 – 11:3, R. Ex. 1.

It is undisputed that Guzman never filed a Midas report about the patient bleeding incident, that Simmons never met with Guzman about the matter, and never contacted Guzman again about it. ALJD 11:35-36; Tr. 31, 60, 77, 80, 138, 217. Simmons testified that after she fully read the patient’s chart, she concluded that Guzman had not caused the patient to bleed. ALJD 11:36-38; Tr. 218-19.

#### IV. ARGUMENT

##### A. The Legal Standard for Overturning Credibility Resolutions

In *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf’d. 188 F.2d 362 (C.A. 3, 1951), the Board set forth the standard of review of an Administrative Law Judge's findings of fact. The Board stated:

In all cases, save only where there are no exceptions to the Trial Examiner's [now Administrative Law Judge] proposed report and recommended order, the Act commits to the Board itself, not to the Board's Trial Examiners, the power and responsibility of determining the facts, as revealed by the preponderance of the

evidence. Accordingly, in all cases which come before us for decision we base our findings as to the facts upon a *de novo* review of the entire record, and do not deem ourselves bound by the Trial Examiner's findings. Nevertheless, as the demeanor of witnesses is a factor of consequence in resolving issues of credibility, and as the Trial Examiner, but not the Board, has had the advantage of observing the witnesses while they testified, it is our policy to attach great weight to a Trial Examiner's credibility findings insofar as they are based on demeanor. Hence we do not overrule a Trial Examiner's resolutions as to credibility except where the clear preponderance of *all* the relevant evidence convinces us that the Trial Examiner's resolution was incorrect. *Id.*, at 544-545.

It is well-settled that the Board is reluctant to overturn credibility findings of an ALJ and will only do so in rare cases. *E.S. Sutton Realty Co.*, 336 NLRB 405, 405 fn. 2 (2001). However, the Board has consistently held that where credibility resolutions are *not* based primarily on an evaluation of the demeanor of witnesses, the Board may independently evaluate credibility. *Stevens Creek Chrysler Jeep Dodge*, 357 NLRB 633, 635 (2011)(citations omitted); *Trim Corporation of America*, 349 NLRB 608, 610, fn. 2 (2007). Where the demeanor factor is diminished, the Board determines conflicts in testimony based on the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. *El Rancho Market*, 235 NLRB 468, 470 (1978).<sup>7</sup> Further, where an ALJ's credibility resolution is based on an illogical or inadequate rationale, the credibility resolution itself fails. *Kelco Roofing*, 268 NLRB 456 (1983), citing *Custom Recovery v. NLRB*, 597 F.2d 1041, 1045 (5th Cir. 1979).

It is clear that a general reference by an ALJ to demeanor does not indicate that credibility findings were based on this factor. *El Rancho Market, supra.*; *Stevens Creek Chrysler Jeep Dodge, supra* (Board reverses credibility findings where ALJ had generally referenced demeanor but did not specifically refer to the demeanor of any of the witnesses). *Permaneer*

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<sup>7</sup> Even credibility findings based on demeanor will not be deemed dispositive when the testimony is inconsistent with these other factors. *E.S. Sutton Realty, supra*, at 407, fn. 9 (quoting *Humes Electric, Inc.*, 263 NLRB 1238 (1982)).

*Corp.*, 214 NLRB 367, 369 (1974), (“An Administrative Law Judge cannot simply ignore relevant evidence bearing on credibility and expect the Board to rubber stamp his resolutions by uttering the magic work “demeanor.”), citing *Interboro Contractors*, 157 NLRB 1295, 1301, fn. 14 (1966).

In the instant case, the ALJ makes passing reference at the opening of his Decision to having observed the demeanor of the witnesses. ALJD 1: “Statement of the Case.” However, he does not thereafter reference any specific findings made on the basis of demeanor, nor does he describe any describe any specific observations from which such findings could be drawn. Thus, the Board may proceed to examine the record in this case *de novo*, with an eye to the other factors as outlined in the caselaw described above. *El Rancho Market, supra*.

In evaluating the evidence, the Board, “is not free to prescribe what inferences from the evidence it will accept and reject, but must draw all those inferences that the evidence fairly demands.” *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 378 (1998). Such fairness requires an evenhanded scrutiny of the record evidence from each side. *Sutter East Bay Hospitals v. N.L.R.B.*, 687 F.3d 424, 437 (D.C. Cir. 2012). In *Sutter East Bay Hospitals*, the D.C. Circuit vacated the factual record because of misapplication of legal standards, and as such found no basis to address whether the ALJ credibility determinations were so flawed as to exceed its deference. However, the court noted that the ALJ had treated conflicting evidence with, “an almost breathtaking lack of evenhandedness. The employer’s witnesses saw their testimony completely disregarded for the slightest of immaterial inconsistencies, while the union’s witnesses survived even material contradictions.” *Id.* at 436. The court noted the apparent application of different standards with “great concern,” and expressed hope that the concern would be alleviated on remand to the Board. *Id.* at 438.

As further described below, the ALJ has discredited the employee witnesses and credited Supervisor Shalom Simmons, without articulating any legitimate basis for doing so.

B. The ALJ erred by discrediting the three employee witnesses.

The ALJ correctly reported that three current employees testified to the alleged threat, each recalling Simmons's coercive statements in essentially identical words. ALJD 9:20 -27, 39-41; 10:9-10. He also correctly found that one of the nurses, Marie Kiffin, wrote a nearly contemporaneous email recalling the same words. ALJD 10:19-11:3. Yet, because of flawed evaluation of the entire record evidence, he found that the threats were not made.

Initially, the ALJ utterly failed to acknowledge and consider that Nurses Guzman, Davis, and Kiffin were all testifying publicly against their own Employer and, moreover, against their own supervisor. It is well-settled that current employees whose testimony contradicts that of their supervisors is, "particularly reliable because [the employees] are testifying adversely to their pecuniary interests." *The Avenue Care & Rehabilitation Center*, 360 NLRB 152, fn.2 (2014), citing *Advocate South Suburban Hospital*, 346 NLRB 209, 209 fn. 1 (2006), quoting *Flexsteel Industries*, 316 NLRB 745 (1995), affd. mem. 83 F.3d 419 (5th Cir. 1996). Thus, a judge may rely on current employee status as a significant factor in resolving credibility issues.. *Id.* While a judge should not presume the credibility of witnesses simply because of their current employee status, it is clear that he may rely on that status as a significant factor in resolving credibility issues. *Id.* In light of this well-recognized principle, it was an error for the ALJ here to fail, at a minimum, to acknowledge the status of the three employee witnesses and explain his reasons for disbelieving them.

Likewise, the ALJ correctly noted, but failed to consider, that the description of Simmons's threat on June 25, 2018, was mutually corroborated by three employee witnesses. Two of the employees also mutually-corroborated their memory of Simmons's accompanying hand gestures, which were also referenced in Marie Kiffin's nearly contemporaneous email about the incident. The presence or absence of corroboration is a well-recognized factor in resolving credibility disputes. *Marshall Engineered Products*, 351 NLRB 767, 768 (2007)(Board finds that the judge mistakenly discredited a witnesses based, in part, on his failure to appreciate that a significant portion of his testimony was independently corroborated by another witness). *See also, Kelco Roofing, supra.; El Rancho Market, supra*, at 470, fn.10.

As the ALJ does not clearly explain his basis for discrediting any of the employee witnesses, an analysis of his credibility resolutions requires a certain amount of guesswork. With respect to Nurses Guzman and Davis, it appears that the ALJ was inclined to disbelieve their account of the alleged threat based on their testimony about events which had occurred earlier on the morning of the threat. In describing their testimony about those events, about which there are no allegations, he nevertheless repeatedly uses variations of the word, "alleged."<sup>8</sup> Presumably in doing so the ALJ is signaling his skepticism about the events as related by the employees, as he proceeded to make findings contrary to their testimony. Perhaps he relied upon these findings in his discrediting of their testimony with respect to the actual allegation; he does not say.

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<sup>8</sup> ALJD 4:19 ("Simmons **allegedly** interrupted" the huddle. In fact, all three employees testified to Simmons's telling staff at the huddle that Davis, rather than Guzman, would be the charge nurse. Tr. 23, 102, 147, 165); ALJD 6:26, 35 ("Simmons **allegedly** responded, 'at eighth-grade level.' This language was reported by Guzman and Davis. Tr. 25, 102-05); ALJD 8:24 ("It is **alleged** that Simmons stated "no, no, you don't have to (get a union representative) upon reading the notice.") Tr. 29, 30, 62; ALJD 14, fn.11 ("I find that mere indignities and embarrassment **allegedly** suffered by Guzman is not a violation of the Act.").

Each instance of this nit-picking of testimony on ancillary matters need not be parsed to display the point. One example is the ALJ's finding that Supervisor Simmons did not use the phrase, "8<sup>th</sup>-grade level" when telling Nurse Guzman to communicate with a patient care technician (PCT) by using "simple" language. ALJD 13:38-39. The ALJ appears to make this finding because he finds that there is particular "seriousness" to what he calls Guzman's "contention" that the phrase was used. ALJD 14:12-13. The testimony, however, shows simply that Guzman described Simmons using the phrase, and Davis corroborated the description. As the incident was not alleged to be a violation of any sort, and the matter was only background, Davis appropriately described the conversation that she overheard in a summary manner. She then provided additional detail when the ALJ cross-examined her on the point. ALJD 14:1-16, Tr. 103. It is clear from the ALJ's comments during his questioning (which took place in the midst of Davis's direct testimony) that he believed this testimony was relevant to Davis's credibility. When Davis replied in the affirmative to the ALJ asking whether Simmons had used the phrase, "8<sup>th</sup> grade level," the ALJ commented, "But you didn't testify that earlier, you just said simple, basic terms." Tr. 103. He then elicited more detailed testimony about what Davis heard Simmons say to Guzman. When Davis provided the additional detail, the ALJ told her, "I'm hearing three different things... There's simple, basic term, and then when I asked you eighth-grade level, and then when I asked you again, you say medical terminology." Nurse Davis then patiently repeated the entire conversation. Tr. 104. Again, nothing about this conversation was alleged to be a violation of the Act.

In *Sutter East Bay Hospitals, supra*, the D.C. Circuit noted that the ALJ had rejected a witness's account of an incident because the witness had initially quoted profane language, and then later, when discussing the sequence of events rather than the language, the witness had left

out the profane word, though confirming under inquiry from the ALJ that the profanity had been used. The ALJ had rejected the witnesses account of the incident based on this supposed inconsistency. The Court advised that, “[d]ismissing as contradictory such clearly consistent testimony tries both our deference and our patience,” especially because the ALJ had been willing to countenance more significant reversals in the testimony of witnesses called by the opposing party. *Id.* At 438.

Davis’s reporting in turn that Simmons told Guzman to use simple language, 8<sup>th</sup>-grade-level language, and avoid medical terminology does not evidence a contradiction in her testimony. Nor is it an appropriate basis on which to discredit her. As further discussed below, the ALJ compounds this error by ignoring what *are* actual contradictions in Simmons’s testimony about similar ancillary events on direct, on cross, and in Simmons’s own description of those events in her contemporaneous email.

Even were it the case that Nurses Guzman and Davis had not been consistent in their testimony about Simmons’s specific instructions regarding how to speak with a PCT, such an inconsistency would not serve to discredit their testimony about the alleged violation. *Precision Plating*, 243 NLRB 230, 236 (1979) (Board upheld the ALJ’s crediting of GC witnesses in a *Standard Dry Wall* footnote, where ALJ credited witnesses who were consistent over matters of greater substance despite their minor inconsistencies over non-critical issues.). See also, *Big “G” Corporation*, 223 NLRB 1349, fn. 1 (1976)(ALJ failure to resolve credibility conflict over a matter about which there was no finding of a violation does not affect the ALJ’s determination on the merits of the allegations).

The ALJ articulates no basis whatsoever for his implicit discrediting of Nurse Kiffin, who corroborated her coworkers’ account of Simmons’s threat in her testimony, and whose near-

contemporaneous email to Nurse Guzman records her recollection of the same threat that she recounted in her testimony. R. Ex. 1. The ALJ acknowledged Kiffin's email, but discounts its value because the Union did not file the charge in the underlying case until three months after Kiffin sent it. ALJD 15: fn. 13, Tr. 82. There is no legal or rational basis for this discounting. There is simply no support for dismissing an alleged violation of the Act based on the timing of the charge upon which the Complaint is issued, so long as the charge is timely-filed under the Rules, as is the case here). The ALJ himself observed during the hearing that how soon the charge was filed after the threat was reported to the Union is not relevant. Tr. 82

As further discussed below, the coercive nature of a threat is not determined by the subjective responses of the employees who hear it, but rather by how it would be perceived by a reasonable employee in the circumstances. *Sunnyside Home Care Project*, 308 NLRB 346 fn.1 (1992)(“We note that the Board does not consider subjective reactions, but rather whether, under all the circumstances, a respondent's remarks reasonably tended to restrain, coerce, or interfere with employees' rights guaranteed under the Act.”); *Frontier Telephone of Rochester*, 344 NLRB 1270, 1276 (2005)(in analyzing 8(a)(1) allegations, “the critical element of reasonableness is analyzed under an objective standard, not the subjective reaction of the individual involved, to determine whether an employer's actions tend to restrain, coerce, or interfere with the Section 7 rights of employees.”). Here, the ALJ, in discrediting the three employees, relied in part on his finding that the employees did not immediately challenge their supervisor about her threat, and did not discuss it amongst themselves in the immediate aftermath. ALJD 15:9-10 (“Perhaps, the nurses were afraid to confront Simmons over her

alleged threat, but no one testified to that.”).<sup>9</sup> This implies that the ALJ was applying a subjective standard, rather than the appropriate objective standard. Furthermore, the finding that the employees did not discuss the threat afterward is contrary to the record evidence. Nurse Guzman texted with Nurse Kiffin about the incident afterwards, and Nurse Kiffin then emailed Guzman her recollection of Simmons’s threat. Tr. 175, R. Ex. 1.

Finally, while the Board is not in a position to observe the witnesses’ demeanor in a review of the record, it can review the transcript of testimony, which reveals in a general way the straightforward manner in which the employee witnesses answered questions from the General Counsel, Respondent Counsel, and the Judge alike. The employee witnesses maintained consistency in their testimony at the trial despite being subjected to unusually extensive cross-examination about ancillary matters.<sup>10</sup>

C. The ALJ erred in crediting Supervisor Simmons’s denial that she threatened employees as alleged.

The ALJ bases his crediting of Simmons on her status as a supervisor with three years of experience and her familiarity with *Weingarten* rights. It behooves General Counsel to note that the prohibition on threats in Section 8(a)(1) of the Act presupposes that supervisors may make threats, and ALJs, the Board, and the courts have all recognized that they do so. There is no legal

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<sup>9</sup> Nurse Davis was subjected to particularly intense cross-examination about having not responded in the moment to Simmons’s unlawful threat on June 25, 2018. While acknowledging that as a delegate she is responsible for correcting unfair practices, she nevertheless consistently testified that she had said nothing in the moment. Tr. 124-26. Her consistency on this point, at the possible cost to her comfort, serves to *bolster* her credibility. Tr. 122-125. *T.M.I.*, 306 NLRB 499, 503 (1992)(Board affirms ALJ decision in which credibility of a witness was based in part on his answering with apparent truthfulness despite Respondent having suggested contradictions in his testimony).

<sup>10</sup> The cross-examination was so extensive that the ALJ himself noted that it was longer than direct. Tr. 79-80. Indeed, Andrea Guzman’s direct testimony takes up 15 pages of transcript, while her testimony on cross spans nearly 50, much of which does not relate to the violation alleged in the Complaint.

basis for finding a supervisor to be credible because she is a supervisor or to find that a supervisor has not violated the Act because she knows she is not supposed to do so.

The only other factor the ALJ appears to rely on in his crediting of Simmons is her email to the Director of Nursing late on the morning of June 25, 2018. It apparently impresses the ALJ that Simmons did not report therein that she had made an unlawful threat. ALJD 15:1-2; G.C. Ex. 5. But, it is clear that Simmons would have an interest in withholding reference to a violation of the NLRA in a report to her superior.

Moreover, the ALJ's treatment of Simmons's email is in marked contrast to his rejection of Kiffin's, showing a disturbing lack of even-handedness. *Sutter East Bay Hospitals, supra*. While Kiffin's email is entirely consistent with her testimony and that of her coworkers, Simmons's email exposes several contradictions with her own testimony which are ignored by the ALJ.

In this regard, with respect to her discussion with Nurse Guzman about how to communicate with a PCT, Simmons testified that the PCT had reported being asked to perform a medical procedure, and that she had then discussed that with Nurse Guzman. ALJD 6:40-7:8; 6:fn.6. However, Simmons's email makes no mention of any such thing. Rather, she wrote to Huffaker that, "[the PCTs] don't know the braden scale per se and should be simple stuff like right sided weakness." G.C. Ex. 5; Tr. 234-235. In her testimony, however, as the ALJ correctly noted but failed to consider in his credibility analysis, Simmons initially denied telling Guzman how to speak to technicians and specifically denied telling Guzman to speak in "simple" language. ALJD 7:4-6, 6:fn.6; Tr. 206-208, 235; G.C. Ex. 5. Simmons's email on this point serves not only to contradict her testimony, but also corroborates both Guzman and Davis's testimony. Tr. 25, 68-70, 102. Simmons had difficulty reconciling this contradiction.

On direct, Simmons insisted that on the morning of June 25, 2018, she had not talked to Guzman about the manner in which she spoke with PCT Grant, but only about the propriety of nurses, as opposed to PCTs, performing a certain task. Tr. 206-09. On cross examination, Simmons initially doubled-down on her insistence that she did not talk with Guzman about Guzman's manner of communicating with Grant. Tr. 234. When pressed, Simmons admitted that she had told Guzman that Grant did not understand Guzman's reference to the, "Braden Scale." But, she denied that her point had anything to do with Guzman's manner of communicating. Tr. 234-235. When then asked whether she told Guzman that Grant didn't know the, "Braden Scale," per se, and should be spoken to in more simple terms, she denied having used, "those words." Tr. 235. Eventually, Simmons admitted that she might have told Guzman that in speaking with PCTs she should refer to "right-sided weakness," rather than the, "Braden Scale." Tr. 235. However, she continued to deny saying Guzman should use "simple" language, in direct contradiction of what she reported in her email. Tr. 235, G.C. Ex. 5. The ALJ opined, "more likely than not, Simmons told Guzman to speak in a simple language and use basic medical terminology." ALJD 14:13-16. He thus apparently finds that Simmons lied in her testimony about this matter. Contrary to the dictates of evenhandedness, the ALJ ignored this and other inconsistencies in Simmons's testimony, despite his own expressed opinion that they existed. He also fails to properly weigh the probative value of Simmons's email in light of the testimonial evidence that shows it to be less than fully reliable as a record of events. *Kelco Roofing, supra*, quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.") At the same time, he took great pains to find inconsistencies in the testimony of the employee witnesses where there are essentially none.

There is no basis for the ALJ's conclusion, which he describes as obvious, that Simmons's self-serving email outweighs the testimony of the employee witnesses. ALJD 15:1-2. The ALJ inexplicably describes the employee witnesses' testimony as having been, "made several months later." ALJD 15:1-2. However, as the ALJ acknowledged, one of the employee witnesses wrote a nearly-contemporaneous email recounting the threat in precisely the terms of the testimony. The two others provided affidavits to the NLRB during the investigation of the case, which the ALJ was aware of as they were produced to Respondent counsel on the record. Tr. 36, 112-113. It is error to conclude that the employees were concocting memories on the day of the trial simply because it was the day on which they were called to testify, and to suggest that the first person to document an exchange thereby prevails in a credibility dispute.

D. The ALJ erred by failing to properly weigh and evaluate all the record evidence and draw reasonable inferences from it.

The ALJ's Decision is broadly flawed in its focus on background events, its improper findings regarding those events, and reliance on those findings to reach the ultimate conclusion that the alleged violation did not occur.<sup>11</sup> The errors in this respect include the following:

- 1) *Finding that Respondent did not violate the Act with respect to the change in charge nurse assignment or the instructions to Guzman about communicating with patient care technicians, despite acknowledging that there are no allegations related to these events. ALJD 14:fn11.*

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<sup>11</sup> The ALJ incorrectly found that General Counsel proffered testimony about the events of the morning of June 25, 2018, "to demonstrate Simmons's proclivity to interfere and coerce the exercise of employee rights." ALJD 13:16-17. In fact, this evidence was offered in an attempt to briefly provide background context for Simmons's alleged threat, which context is, as the ALJ correctly noted, appropriately considered when determining whether a statement is unlawfully coercive. ALJD 13:3.

The ALJ apparently bases his discrediting of Guzman and Davis in part on this finding, which is akin to setting up a “straw man” and then knocking it down. Witnesses should not be faulted to failing to testify in support of a violation where no violation has been alleged.

- 2) *Finding that Nurse Davis did not testify that Supervisor Simmons made additional, unalleged, statements to employees that she had previously represented at prior investigatory interviews. ALJD 15:21-23.*

This finding is troubling in several respects. Initially, to the degree the ALJ relied upon it to discredit Nurse Davis’s testimony about the alleged threats, it is inappropriate to find a witness is not credible based on her failure to testify to something about which she was not asked, whether or not it was alleged. Further, the alleged violation is not predicated on any other violations, so the absence of any others is not relevant. Finally, as the ALJ admitted, he rejected testimony from Nurse Davis regarding prior coercive statements by Simmons. ALJD 10, fn.7, Tr. 140-143. The coercive statements in the rejected testimony were made to Simmons *about* investigatory interviews, rather than to another nurse who was being investigated. Tr. 140-143. It is nonetheless an error for the ALJ, having rejected this testimony, to fault General Counsel’s case for lacking this analogous evidence.<sup>12</sup>

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<sup>12</sup> General Counsel was clear on the record that this was offered for the context in which Davis heard the June 25, 2018 threat, and *not in support of any unalleged violation*. Tr. 95-100. As Davis was one of the employees present for the threat, it seemed relevant to General Counsel that she had previously heard Simmons say that a nurse did not need a delegate, should see her without a delegate, and that Davis, as delegate, was interfering with her ability to discipline employees and should back off. Tr. 141. The ALJ’s reference to an administrative law judge’s decision in *Irving Ready-Mix*, 357 NLRB 1272 (2011) is misplaced. In that case, an unalleged admitted statement by a manager was found to be a violation where it was made in the same telephone call as an alleged violation and otherwise was closely related to it. There is no caselaw known to General Counsel which would have required the ALJ to decide the merits of an unalleged possible violation which is barred by Section 10(b) of the Act.

It is worth noting that Nurse Kiffin testified that she recalled the words of Simmons’s threat because she believed Simmons was violating employees’ rights, based on her own (unspecified) experience with Simmons. Tr. 151-52, 158. Having rejected Davis’s testimony as described, the ALJ did not question Nurse Kiffin about what she was referring to with respect to her experience with her supervisor.

- 3) *Crediting, "testimony of Simmons," that, "everyone already knew that Guzman was not the charge nurse on [June 25]." ALJD 13:21-22.*

Simmons did not so testify, nor is there any evidence to support this finding. Simmons herself testified that she told Guzman of her removal from the rotation in a private conversation some months before. Tr. 195-96. While Marie Kiffin testified that she had been aware that Guzman had previously been removed from the charge rotation, there is no evidence to support a finding that "everyone" knew of the removal, or for how long the removal was to last. Indeed, on June 25, Simmons emailed Huffaker that there was a plan to put Guzman back in rotation at the time of this incident. G.C. Ex. 5. And, it is undisputed that Guzman was assigned charge nurse when she arrived at work on June 25, 2018. As this matter is not alleged in the Complaint, it would not matter that the ALJ misconstrued it, had he not apparently relied upon his misunderstanding to discredit employee witnesses.

- 4) *Finding that Davis had previously served as delegate for Guzman. ALJD 11:24-26, and fn.9.*

The ALJ appears to rely on this finding, in part, in his discrediting of Nurse Guzman. He intimates that her testimony about requesting representation from Marlina Fontes was false, or, if true, was an unreasonable demand somehow reflecting on Guzman's credibility, based on the presence on the scene of Davis, who had previously served as a delegate for other employees. However, the evidence shows that not only was Davis at the time serving as charge nurse, but also that she was not Guzman's delegate at the prior meeting referenced by the ALJ. Rather, the evidence shows that Guzman's delegate at the meeting Marlina Fontes. It furthermore is clear that Simmons knew this, since she reported it to Huffaker in her email of June 25. G.C. Ex. 5, Tr 17, 39, 215.

As discussed below, the threats credibly related and corroborated by the three employee witnesses are textbook examples of unlawful coercion. Respondent's defense thus requires a finding that all of General Counsel's witnesses testified falsely. The record does not support such a finding.

E. The credible testimony of the three employee witnesses establishes that the employer violated the Act as alleged.

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their rights protected under the Act. Whether a statement is lawful depends on whether it tends to interfere with the free exercise of these rights when viewed from the perspective of a reasonable person. *ITT Federal Services Corp.*, 335 NLRB 998, 1002 (2001), citing *American Freightways Co.*, 124 NLRB 146, 147 (1959). The circumstances surrounding a statement are properly considered in the inquiry as to whether it reasonably tends to restrain, coerce, or interfere with employees' rights. See, e.g., *Sunnyside Home Care Project*, supra, at 346, fn. 1 (1992) ("We note that the Board does not consider subjective reactions, but rather whether, under all the circumstances, a respondent's remarks reasonably tended to restrain, coerce, or interfere with employees' rights guaranteed under the Act.") citing *American Freightways Co.*, supra. Unlawful threats may be explicit or implicit. *Pomona Valley Hospital Medical Center*, 355 NLRB 234, 235 (2010) (where words could reasonably be construed as coercive, they may violate the Act).

Animus is not relevant to a finding that an employer is in violation of Section 8(a)(1) because of a coercive statement. The motivation of the speaker making the disputed statements is immaterial. *Hanes Hosiery, Inc.*, 219 NLRB 338 (1975) ("We have long recognized that the test of interference, restraint and coercion...does not turn on Respondent's motive, courtesy, or

gentleness...the test is whether Respondent has engaged in conduct which reasonably tends to interfere with the free exercise of employee rights under the Act.”); *El Rancho Market*, supra, at 471.

Ambiguities that could render a statement unlawful are construed against the speaker. *Con-Way Freight*, 366 NLRB No. 183 (Aug. 27, 2018), slip op at 5-6, fn. 23 (unlawful threat found where employees could reasonably believe that labor consultant who made a statement about his propensity for violence, with accompanying gestures, was referencing employees’ union sympathies, even if his remark might have been only a reference to his own general inclination toward self-defense), citing *ITT Federal Services Corp.*, supra. In *ITT Federal Services Corp.*, an employer representative brought an employee for a ride, during which they passed union signs. The representative commented, “whoever’s doing this better watch out.” The Board found that “this,” reasonably construed, referred to union activity, and so the representative had made an unlawful threat, even though he might have been intending to express concern over the placement of the signs rather than the content. *Id.*

It is clear that threats made regarding employees’ invocation of *Weingarten* rights are unlawfully coercive.<sup>13</sup> *Good Samaritan Nursing Home*, 250 NLRB 207 (1980); *Southwestern Bell Telephone Company*, 227 NLRB 1223 (1977).

In *Good Samaritan Nursing Home*, 250 NLRB 207 (1980), Supervisor Michael Dailey requested a meeting with employee Rose Stasz, an LPN. He did not give Stasz a reason for the

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<sup>13</sup> In *NLRB v. J. Weingarten*, 420 U.S. 251 (1975), the Supreme Court held that employers violate Section 8(a)(1) of the Act by insisting that an employee attend an interview that the employee reasonably believes could result in disciplinary action without the presence of a union representative requested by the employee. The Court noted that the presence of a union representative serves to safeguard not only the interest of the employee in the meeting, but also that of the entire bargaining unit against unjust punishment. *Id.* at 260-61. As noted by the ALJ, this case involves threats related to *Weingarten* rights but does not allege that Respondent violated employees’ right to a *Weingarten* representative.

meeting, but she believed it might result in discipline because she had recently written a memo about alleged patient abuse by Dailey. *Id.* at 208. When she arrived for the meeting, Stasz found a second supervisor present along with Dailey in the office. Stasz asked to have a coworker with her as a witness in the meeting, but Dailey refused her request, saying she did not need a witness since the other supervisor was already present to witness. *Id.* at 208. When Stasz pressed her request, Dailey said Stasz would be considered insubordinate if she refused to talk to him without her coworker, and would be suspended. *Id.* at 208. Dailey told Stasz that he had already prepared a memo for her, which he would put in her file if she did not talk to him without her requested witness. *Id.* at 208. Stasz then stayed for the meeting, without her coworker. The employer argued, among other things, that there were no objective facts to support the employee's asserted belief that the meeting could result in discipline and that the meeting was not an, "investigatory interview" because a memo had already been written for Stasz. *Id.* at 208-9. The Board did not agree, and, in addition to finding a *Weingarten* violation, found that the employer unlawfully threatened Stasz with being considered insubordinate and being suspended if she refused to attend the meeting without her own representative.

According to all three employees' testimony, Simmons, like the supervisor in *Good Samaritan Nursing Home*, threatened an employee with adverse consequences in retaliation for the employee pressing her request for representation at a meeting. The ALJ correctly found that Guzman reasonably believed the meeting requested by Simmons was part of an investigation which could result in discipline. ALJD 12:23-28. When Guzman invoked her *Weingarten* rights, Simmons threatened to pull her file, which would open a can of worms, and implied that she

could take actions against Guzman if she had a union representative in attendance at a meeting that she could not take if there was no representative.<sup>14</sup>

In *Southwestern Bell Telephone Company, supra*, seven employees were called into meetings about serious misconduct allegations. There was no dispute that the employees reasonably believed the interviews might result in discipline. The employees asked about obtaining union representation. They were told that if such representation were provided, higher management would be called in, and the probable consequences would be worse for the employees. The Board found that, “The Employer’s threat that the exercise of the right to representation would lead to more severe discipline or that the employees’ fate would be in more capricious and hostile hands is no less interference and restraint than an outright denial of his right.” *Id.* Simmons’s threats to Guzman are a more colorful version of the threats found unlawful in *Southwestern Bell*. She was clearly communicating that the presence of a union representative in the meeting would be likely to lead to a poor outcome for Guzman.

Counsel for Respondent solicited testimony purporting to show that Simmons did not intend to discipline Guzman. However, even if it could be proven that Simmons did not contemplate discipline, her intent is not relevant to the alleged violation. As discussed above, alleged coercive statements are analyzed from the point of view of employees who hear them, and the speaker’s intent is not considered. *Hanes Hosiery, supra*.

Further, Simmons’s threats would have been unlawful even if Guzman had not had a reasonable expectation of discipline at a meeting with Simmons on the morning of June 25,

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<sup>14</sup> Guzman and Davis both testified to this second threat. That Kiffin did not testify to it is of no moment. Kiffin explained that she was in a position to hear some, but not all, of what was said at the nurses’ station at the time. Tr. 154. *Poly-America, Inc. v. NLRB*, 260 F.3d 465, 483-484 (5<sup>th</sup> Cir. 2001) (court upheld ALJ’s crediting of single employee witness concerning statement made by supervisor at meeting even though two other employee witnesses who attended meeting failed to mention supervisor’s statement, where those who did not mention the statement did not specifically contradict the credited testimony).

2018. It is undisputed that Simmons made the threats in the presence not only of Guzman but of Davis, Kiffin, and at least one other employee. There is no evidence that Kiffin or any other employees in the vicinity (excepting, perhaps, Davis) were privy to any of the background to Simmons asking to meet with Guzman. They knew only that their coworker was asking for *Weingarten* representation. Their reasonable belief, when confronted with their supervisor's statements, and her use of the word, "this" while holding the *Weingarten* notice, was that the threats were related to *Weingarten* rights. *ITT Federal Services Corp.*, 335 NLRB 998, 1002 (2001) (employer who used the word "this," referencing union signage, without specifying whether he meant the placement or content of the signs, "ran the risk that his statement—or any ambiguity in his statement—could be construed by an employee as containing an unlawful threat").

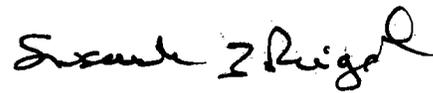
The ALJ correctly found that the meeting requested by Simmons was to have been an investigatory interview, and that an employee would have a reasonable belief that it could result in discipline. ALJD 12:23-28. Even if this were not the case, however, Simmons's threats, as related by the employees, would not be lawful statements. Any employee present hearing Simmons's words would reasonably have understood her to be making threats of reprisal for an employee invoking *Weingarten* rights. Thus, the finding that Guzman would have had the right to a union representative for the requested meeting is not required in order to establish that Simmons made unlawful threats. Her statements as related by Guzman, Davis, and Kiffin establish the violation. *Good Samaritan Hospital, supra*.

**V. CONCLUSION AND REMEDY**

For the foregoing reasons, Counsel for the General Counsel respectfully urges that the Administrative Law Judge find that Respondent violated Section 8(a)(1) of the Act as alleged and order that Respondent post a Notice remedying the violation.

Dated at New York, New York,  
June 27, 2019.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Susannah Z. Ringel". The signature is written in a cursive, flowing style.

Susannah Z. Ringel  
Counsel for the General Counsel

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 2**

Montefiore Medical Center  
Respondent

and

Case 02-CA-229024

New York State Nurses Association  
Charging Party

**AFFIDAVIT OF SERVICE**

I hereby certify that a copy of Counsel for the General Counsel's Exceptions to the Administrative Law Judge's Decision and Counsel for the General Counsel's Brief in Support of Exceptions is being served on June 27, 2019, on the following parties:

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