

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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MONTEFIORE MEDICAL CENTER : Case Number: 02-CA-229024
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-and- :
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NEW YORK STATE NURSES ASSOCIATION :
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BRIEF OF CHARGING PARTY
NEW YORK STATE NURSES ASSOCIATION IN SUPPORT OF ITS EXCEPTIONS TO
THE ADMINISTRATIVE LAW JUDGE’S DECISION

Charging Party New York State Nurses Association (“NYSNA”) respectfully submits this brief in the above-captioned case in support of its Exceptions to Judge Kenneth W. Chu’s May 30, 2019 Administrative Law Judge Decision (“Decision”).

INTRODUCTION

This case involves a supervisor’s threat of retaliation for an employee’s exercise of her Weingarten Rights. Three Registered Nurses (“RNs”) testified that their current supervisor, Shalom Simmons, threatened to “pull the file” and “open up a can of worms” against an RN who had requested union representation for an investigatory meeting. Only Simmons refuted their corroborated testimony.

Nevertheless, in his Decision, Administrative Law Judge Kenneth W. Chu credited Simmons’ testimony alone. Judge Chu strained to explain why the three RNs corroborating this incident would testify falsely under oath, against their strong interests in keeping their current employment. Instead of commenting on the demeanor of witnesses or other relevant credibility factors, Judge Chu relied upon irrational and irrelevant factors. This reliance undermined well-

established Board precedent regarding unlawful threats. No other judge has considered such factors relevant.

For example, Judge Chu found Simmons credible merely *because* she is supervisor with experience conducting investigatory interviews and disciplining employees. According to this rationale, practically every supervisor must be credited over her employees. Furthermore, Judge Chu's credibility finding contravenes the basic, well-established principle that the testimony of current employees against their supervisors is reliable because they testify against their strong job-security interests. Moreover, the Decision undermines the objective standard for threats under Section 8(a)(1) by relying on whether the RNs testified of their fear after the threat and whether they talked back to Simmons or discussed the threat immediately afterward. Finally, it is especially troubling that Judge Chu relied upon the lack of record evidence of Simmons' past coercive statements, when the record only lacked that evidence because Judge Chu specifically and erroneously excluded relevant background evidence of Simmons' previous coercive statements.

For these reasons, the Board should reject the Decision and find that Montefiore violated the Act.

STATEMENT OF FACTS

The Parties

The New York State Nurses Association ("NYSNA") is a union representing RNs across New York State, including RNs working at Montefiore Medical Center ("Montefiore" or the "Employer").

Montefiore is an acute care hospital located in Bronx, New York providing a range of patient care services.

Employer Investigation of Bleeding Episode and Family Complaint

Andrea Guzman is an RN employed by Montefiore who works in Foreman 7B, the Surgical Progressive Care Unit. Tr. 13. The Progressive Care Unit is an intermediate care unit, providing a level of care in-between the Intensive Care Unit (“ICU”) and a typical hospital floor. Tr. 182. Guzman reports to Administrative Nurse Manager Shalom Simmons. Tr. 14.

Simmons testified that on June 19, 2018, the daughter of a patient in room 82 complained to her about care provided by Guzman. According to Simmons, the daughter alleged that RN Guzman was “rough” while suctioning her father through a tracheostomy, an incision in his windpipe, and caused him to bleed. Tr. 187-88. The daughter also complained about Guzman’s attitude, alleged that Guzman was rude and stated that she did not want Guzman to care for her father in the future. *Id.*; GC Ex. 5 (June 25, 2018 e-mail from Simmons). Simmons admitted that she was investigating the incident in order to determine the veracity of the daughter’s allegations. Tr. 189 (“I was just sort of, like, just trying to get her side of what happened.”).

On June 21, 2018 at 4:37 pm, Simmons emailed Guzman regarding this patient, stating:

I was hoping to talk to you today I wanted to know what happened with 82 during the bleeding episode the family has some clinical concerns so I was hoping to see a midas report come through but I didn't see anything if you have not done so please enter a midas and I am also hoping will get a chance to talk about what happened . . .

General Counsel Ex. 2 (emphasis added). According to Simmons, a Midas report is an incident report used to track hospital errors and near misses. Tr. 237-38. Guzman then asked Simmons to “please explain further the reasoning behind filing a midas report” and Simmons then responded “I would like to get your take on it so when your back we will discuss.” General Counsel Ex. 2.

When Guzman arrived to work her next scheduled shift on June 25, 2018, the night shift staff assigned her to work as charge nurse and listed her name on the bulletin board. Tr. 20; Tr.

199. The charge nurse position is rotated daily among bargaining unit RNs and involves assigning patients and break times to RNs and ancillary staff. Tr. 13, 179, 198, 200. Simmons, however, had previously decided that Guzman would not be part of the rotation into charge due to an alleged “altercation” with Patient Care Technician (“PCT”) Natalie Grant that occurred in February 2018. Tr. 193-94.¹

Simmons told Una Davis, another RN on Foreman 7B, that she was “going to change the assignment.” Tr. 199. Davis then approached Guzman and informed her that Simmons wanted Davis, not Guzman, to be in charge. Tr. 22. Then, during the 8 am huddle, a meeting in which all Foreman 7B staff discuss what is happening that day (including approximately 9 RNs), Simmons stated in front of the staff, “just so everyone knows, although Nurse Guzman’s name is on the board as charge nurse, Una Davis is the one who’s in charge.” Tr. 23, 182.² It is undisputed that Guzman then asked Simmons to please ensure that night staff would not assign her to charge nurse in the future so that Simmons would not make a similar embarrassing announcement in front of all of her co-workers, again. *Id.*; Tr. 203 (Testimony of Shalom Simmons).

After the huddle, Guzman met with PCT Natalie Grant, regarding their assigned patients. They discussed which patients needed to be fed or needed assistance in getting out of bed. Tr. 24. About 20 minutes later, Simmons admonished Guzman for not speaking to PCT Grant in

¹ PCTs assist RNs in caring for patients but are not permitted by law to perform certain nursing tasks, which are outside their scope of practice. Tr. 205-07 (Testimony of Simmons) (performance of urinalysis and culture from a Foley catheter site is outside PCT scope of practice). Guzman found Grant in the staff lounge when another RN needed Grant to help her with a patient leaving the floor to get testing. Tr. 194. Grant became upset after her interaction with Guzman. Tr. 195.

² Shalom Simmons admitted that “there may have been a couple nurses that might have heard me make the assignment change.” Tr. 201.

layman's terms, as opposed to medical terms. Tr. 25. *See also* GC Ex. 5 (Simmons e-mails that she told Guzman to use simple terms like "right sided weakness" instead of medical terms like "the braden scale"). Simmons told Guzman that she should be talking to Grant on an eighth grade level. Tr. 25.

Soon thereafter, at approximately 8:30 am, Simmons approached Una Davis and stated that she wanted Davis to come into her office. Simmons advised Davis that she wanted her there in her capacity as the charge nurse, because Simmons was going to call Guzman into her office. Tr. 26. Simmons admitted that she sought to speak to Guzman in order to complete her investigation into what occurred regarding the bleeding episode of patient 82 and that she sought to have Davis present as a "charge nurse," as opposed to a delegate. Tr. 210, 239; GC Ex. 5.

Simmons' Threats

Guzman told Davis, who is a union delegate, and fellow RN Marie Kiffin, that she was not comfortable going into Simmons' office without a union delegate.³ Guzman was concerned about being questioned by Simmons regarding the bleeding episode of patient 82 and her alleged failure to do a Midas report, indicating a patient care error or near miss. Tr. 35. Kiffin found a NYSNA pamphlet including a Weingarten Rights notice and made a copy for Guzman. Tr. 28; GC Ex. 4. It is undisputed that Guzman then took the notice, walked to Simmons' office and handed it to Simmons. Tr. 29, 212. The notice states:

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.

³ Simmons admitted that, approximately two weeks prior, she called in Guzman for another investigatory interview regarding Guzman's interactions with ancillary staff. Tr. 214. Simmons also testified regarding several different investigatory interviews she held with various staff members, including Una Davis and Ann Vincent. Tr. 229-32. Further, Marie Kiffin testified that she never had a reason to use a delegate until Ms. Simmons became her supervisor. Tr. 158.

GC Ex. 4. Simons then stated, “no, you don’t have to.” Tr. 30. A few minutes later, Simmons approached Guzman at the nurses station in front of three other RNs, including Davis and Kiffin. Simmons stated that she wanted to confirm that Guzman wanted a representative “because if you come in without a delegate, anything you say cannot be used against you.” Tr. 73-74, 108. Guzman confirmed that she wanted a representative present. Simmons then threatened, “if you have a delegate with you, I’m going to have to pull your file.” Tr. 31, 108, 150. And, gesturing with her hand, indicating abundance, Simmons further threatened, “it would open a can of worms.” *Id.* Guzman then responded, “I’m sure, I’m not comfortable going into the room without my union delegate.” Tr. 31. RN Marie Kiffin, who witnessed this encounter, testified credibly that she vividly remembers Simmons’ threats because she felt that Guzman’s rights were violated. Tr. 151-52. RN Davis also witnessed these threats. Tr. 108. On July 5, 2018, Marie Kiffin e-mailed Guzman confirming that Simmons stated on June 25, 2018 that “if you get a delegate the[n] I will be forced to pull your file which could open a whole can of worms.” Respondent Ex. 1 (“open hand gesture was used by Ms. Simmons which indicates an abundance”).

Given the events that morning between the hours of 7 am to 9 am, Guzman was unable to finish working. After Simmons’ threat, Guzman “expressed to [RN Davis] that she was anxious and was unable to focus and she was going to go to employee’s health.” Tr. 111. Guzman went to Occupational Health Services and was then sent home. Tr. 31-32.

At 11:17 the same morning, after Guzman left for Occupational Health Services, Simmons sent an e-mail to her supervisor Justine Huffaker, with the subject, “URGENT NURSE GUZMAN.” In the e-mail, Simmons corroborated the testimony of RNs Guzman, Davis and Kiffin regarding much of the Weingarten Rights incident, but left out the threat. Instead

Simmons wrote that she told Guzman, “it’s not needed but if this is what you want to do I would like to meet with your delegate sooner because of the nature of the issue.” It is undisputed that despite the alleged urgency of the situation, Simmons never followed up or further contacted Guzman or NYSNA after her “URGENT” e-mail. Tr. 31-32, Tr. 217-18.

ARGUMENT

I. Judge Chu Erred by Finding that Three RNs Should Not Be Credited Because They Did Not Reply to Simmons or Testify that They Were Afraid of Simmons

In analyzing potentially coercive remarks from supervisors, “the Board applies the *objective standard* of whether the remark tends to interfere with the free exercise of employee rights. The Board does not consider either the motivation behind the remark or *its actual effect*.” *Miller Electric Pump and Plumbing*, 334 NLRB 824, 824 (2001) (emphasis added). *See also El Rancho Mkt.*, 235 NLRB 468, 471 (1978) *enfd.* 603 F.2d 223 (9th Cir. 1979) (employer violates Section 8(a)(1) of the Act when the “conduct may reasonably be said to have a tendency to interfere with the free exercise of employee rights under the Act”). Therefore, in analyzing a threat, the Board does not consider the subjective impact that a threat may have had on a particular employee, including whether or not the threatened employee is afraid. *See Miami Systems Corp.*, 320 NLRB 71 n. 4 (1995) *enfd. in relevant part* 111 F.3d 1284 (6th Cir. 1997) (test for a Section 8(a)(1) threat does not depend “on an employee’s subjective interpretation of a statement”).

Judge Chu did not apply the appropriate, objective analysis to this facts of this case. Instead, he discredited three RNs-Guzman, Davis and Kiffin- who plainly testified they heard a clear threat because supposedly “no one spoke up when Simmons allegedly made this threat.” Decision at p.15. Yet Guzman did respond to Simmons threat by stating, “I’m not comfortable

going into the room without my union delegate.” Tr. 31. Judge Chu went on to speculate that “[p]erhaps the RNs were afraid to confront Simmons over her alleged threat, but no one testified to that.” *Id.* However, any fear that these RNs experienced as a result of Simmons’ threat to pull Guzman’s file and open up a can of worms, is irrelevant to the objective standard articulated by the Board. Indeed, during the course of the hearing, Judge Chu himself ruled after an evidentiary objection that “[i]t’s not relevant . . . what [Guzman’s] state of mind is. . . how she feels is not relevant.” Tr. 78.⁴ Judge Chu’s abrupt reversal on this issue and finding that the lack of testimony regarding the RNs’ states of mind now somehow negates their credibility, is a serious error which undermines his credibility determinations.

Further, the Decision appears to add a legal requirement, nowhere in Board precedent, that employees immediately speak up when a supervisor threatens them. There are any number of reasons an employee threatened by her supervisor may not talk back to her supervisor. For example, as in this case, an employee may be so shocked and upset by the threat that she is unable to immediately respond. Given the unequal power dynamic between an employee and her supervisor and very real possibility that an employee may be ultimately disfavored or even potentially terminated for challenging her supervisor, it makes no sense to put the burden of immediately responding on a threatened employee. Rather, the remedy for an unlawful threat is to file an unfair labor practice charge, as NYSNA did here. Thus it was wholly improper for Judge Chu to consider the absence of a contemporaneous objection to the threat in this case as a factor in assessing creditability of the three employees who testified to it.

⁴ Even if somehow Guzman’s emotional state was relevant, it is undisputed that after the threat, she was so upset that she went to Occupational Health and was not able to complete her shift. Tr. 31-32, 78.

Judge Chu's sole other basis for discrediting the three RNs- the idea that "no testimony was proffered that they spoke afterwards about the threat,"- is almost as problematic, because it is blatantly inaccurate. Decision at p.15. Contrary to the Judge's finding, Davis testified that she spoke to Guzman after Simmons' threat and that Guzman "expressed to me that she was anxious and was unable to focus and she was going to go to employee's health." Tr. 111. This testimony (and Guzman's undisputed inability to complete her shift) establishes the seriousness of the threat. Similarly, the record shows that Guzman and Kiffin also subsequently discussed the threat and Kiffin e-mailed Guzman approximately a week later describing what had occurred, establishing that the RNs did discuss this serious threat after it occurred. Tr. 175; Respondent Ex. 1 (July 5, 2018 e-mail from Kiffin to Simmons).

II. Judge Chu Erred by Crediting Simmons Simply Because of her Status as a Manager

The "Board has consistently held that 'where credibility resolutions are not based primarily upon demeanor . . . the Board itself may proceed to an independent evaluation of credibility.'" *In Re Stevens Creek Chrysler Jeep Dodge, Inc.*, 357 NLRB 633, 635 (2011) (applying de novo review and reversing ALJ finding that manager was credible) quoting *J. N. Ceazan Co.*, 246 NLRB 637, 638 fn. 6 (1979). *See also Humes Elec., Inc.*, 263 NLRB at 1238 (applying de novo review to creditability determinations because they were not based on witness demeanor). Here, in the Decision, Judge Chu did not discuss the demeanor of any witnesses. Consequently, in the absence of any specific finding on witness demeanor, the Board should therefore conduct a de novo review of creditability.

Judge Chu finds Simmons to be credible because she had been the nurse manager for three years and

engaged in previous investigatory interviews and discipline with collective-bargaining employees, was well aware and knowledgeable of employees' Weingarten rights and the need to refrain from uttering comments and threats that may interfere, restrain or coercive [sic.] employees over the exercise of their Section 7 rights.

Decision, p.15. Therefore, Judge Chu found, “[i]t is reasonable to believe that Simmons would not make a notorious and open threat in front of the nurses and other medical employees.” *Id.* Essentially, Judge Chu credits Simmons *because* she is a manager. Under this rationale, any somewhat experienced manager would be credited over their employees. Board case law directly contradicts this circular rationale. Board precedent establishes that when current employees contradict their supervisors, such testimony is particularly reliable as they are testifying against their strong monetary incentive to keep their employment. *See Advocate South Suburban Hospital*, 346 NLRB No. 23, n.1 (2006) (current employee witness “risked the ire of management”); *Flexsteel Indus.*, 316 NLRB 745, 745 (1995) *aff’d* 83 F.3d 419 (5th Cir. 1996) (“a witness' status as a current employee may be a significant [credibility] factor”).

III. De Novo Review Establishes the Credibility of the Three Corroborating RN Witnesses

An appropriate, *de novo* review of the record reveals that the Union’s three witnesses were more credible. The Employer called only one witness in its defense, supervisor Shalom Simmons, who had a strong interest in protecting herself and unsurprisingly denied making the threats in question. In contrast, the General Counsel called three credible RNs: Guzman, Davis and Kiffin. All three RN witnesses testified that Simmons made the two-pronged threat to: (1) pull Guzman’s file, and (2) open up a can of worms, in response to Guzman’s repeated written and oral requests for union representation. Tr. 31 (Testimony of Andrea Guzman); Tr. 108 (Testimony of Una Davis); Tr. 150 (Testimony of Marie Kiffin).

Therefore, there was not one, but three current employees all testifying against their current supervisor and all risking their future livelihood and treatment by their employer. Yet instead of considering this significant factor, Judge Chu applied an inverse principle, that manager Simmons should be credited simply because she has a few years of experience in disciplining employees and conducting investigatory interviews. Judge Chu never considered whether Simmons had a strong motivation to lie to protect herself and her job with Montefiore.

IV. Judge Chu Erred in Relying on Simmons' Self-Serving E-mail to her Supervisor

Simmons' strong concern for her job is likely why she wrote a long contemporaneous e-mail to her supervisor, Justine Huffaker, shortly after the incident to document what had occurred that morning with the subject matter, "URGENT." GC Ex. 5. Judge Chu relied on this e-mail in his decision as a "contemporaneous statement." Decision at p.15. Yet, if Simmons had merely told Guzman that she could have a delegate, as Simmons stated in her e-mail, then it is unclear why Simmons needed to write this e-mail at all, much less write "URGENT" in the subject line as she did here. *Id.*⁵ It is also telling that this e-mail was the first time Simmons had even notified her supervisor regarding the patient complaint regarding Guzman or her request to Guzman to file an error report. The event that triggered this e-mail and made the situation "URGENT" was Simmons' threat to Guzman witnessed by two other RNs and Simmons' strong interest in protecting herself at the expense of the truth.

Further, Simmons' e-mail is inconsistent with her testimony in another important way and further undermines her credibility. First, Simmons stated in her e-mail that she told Guzman

⁵ In contrast to Simmons' testimony that she believed Guzman acted appropriately regarding the patient in question, nowhere in this e-mail does she state this. GC Ex. 5. Rather, Simmons states in her e-mail that she "wanted to get [Guzman's] take on the situation." *Id.*

that “she does not need a delegate and *that the charge nurse Una* can be in the room with us.” GC Ex. 5 (emphasis added). Then, during the hearing, Simmons testified that she told Guzman “if you want to bring *your delegate, here’s Una*.” Tr. 214 (emphasis added). In her e-mail, Simmons refers to Una as a charge nurse, which corroborates Guzman and Davis’ testimony. Yet, in her self-serving testimony, Simmons refers to Una as a delegate, an important distinction considering this case revolves around a threat made after Guzman asserted her Weingarten rights.⁶ Judge Chu also erred in utterly failing to address this contradiction.

Finally, Judge Chu erred in finding that “Simmons testified that Guzman did not need a delegate but if she wants one, Simmons suggested Davis attend as the charge nurse along with a union delegate” and that this testimony was somehow consistent with her e-mail to Huffaker. Decision at p.14. The record explicitly disproves this finding because as explained above, Simmons’ testimony directly contradicts her e-mail on this point. *See* Tr. 214.

V. Simmons’ Coercive Statements Were Excluded from Evidence Yet Judge Chu Cites a Lack of Coercive Statements from Simmons

In discussing Simmons’ credibility, Judge Chu states that “Nurse Davis never testified that Simmons made any coercive statement to other employees that she had represented at previous investigatory interviews conducted by Simmons.” Decision at p.15. However, the only reason the record does not include Davis’s testimony about such statements is because Judge Chu himself excluded them. At hearing, the General Counsel offered Davis’ specific testimony about an April 2018 incident in which Simmons accused another RN, Deisha Kellogg, of taking

⁶ In addition, Judge Chu also ignored the serious contradiction between Simmons’ testimony and her e-mail to Huffaker regarding PCT Natalie Grant. While Simmons testified that she spoke to Guzman regarding directing Grant to perform a test outside of her scope of practice, Simmons e-mailed that she directed Guzman to use “simple” language with Grant, such as “right sided weakness.” Tr. 206-09; GC Ex. 5. This e-mail therefore corroborates Guzman and Davis’ testimony on this point.

an excessively long lunch break. Tr. 141-42. Davis testified that when Simmons requested to meet with Kellogg, Kellogg asserted her Weingarten rights and requested a delegate. Davis added that Simmons insisted that Kellogg did not need a delegate (as she did with Guzman) and that Simmons subsequently told Davis, “You are being intrusive and you’re not allowing me to discipline my nurses. You need to back off.” Tr. 141. Finally, Davis testified that Simmons told her, “you baby and coddle the nurses,” when nurses come to you, “[g]ive them a swift kick and send them back to me.” Tr. 142.

However, when Montefiore objected to all of this background testimony establishing Simmons’ past coercive conduct, Judge Chu improperly granted the objection and excluded it. *See Grimmway Farms*, 314 NLRB 73, 74 (1994) (evidence regarding events occurring outside the statute of limitations period “may be considered as background to shed light on a respondent’s motivation for conduct within the 10(b) period”). Thus, after improperly excluding relevant evidence on Simmons’ past coercive statements, Judge Chu seriously erred by relying upon the absence of that evidence to establish Simmons’s credibility

CONCLUSION

For the foregoing reasons, the Board should reject Judge Chu's decision and find that Montefiore violated the Act.

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Claire K. Tuck
Director
Legal Department
New York State Nurses Association
131 West 33rd Street, Floor 3
New York, New York 10001
Direct Dial: (646) 640-3196
Fax: (212)-785-0429