

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

THE SUSAN B. ALLEN MEMORIAL HOSPITAL

and

Case 14-CA-233000

GAY KIMBLE, an Individual

and

LORI DASHNER, an Individual

Case 14-CA-233898

**COUNSEL FOR THE GENERAL COUNSEL'S
BRIEF TO THE ADMINISTRATIVE LAW JUDGE**

I. STATEMENT OF THE CASE

This case was heard by Administrative Law Judge Arthur Amchan on July 1-2, 2019, based on a complaint that The Susan B. Allen Memorial Hospital (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (Act) when it unlawfully (1) issued Lori Dashner a skills update on September 17, 2018 because of her protected, concerted activity; (2) issued Lori Dashner an oral warning on October 24, 2018, because of her protected, concerted activity; (3) terminated Lori Dashner on November 20, 2018, because of her protected, concerted activity; and (4) terminated Gay Kimble on November 20, 2018, because she refused to commit unfair labor practices. Respondent has argued that its actions had nothing to do with Dashner's protected, concerted activity and with Kimble's refusal to discipline or terminate Dashner for her protected, concerted activities; however, the credible record evidence clearly demonstrates that Dashner engaged in protected, concerted activity and Respondent's actions were intended to discourage employees from engaging in protected, concerted activities.

II. STATEMENT OF FACTS

a. Background

Respondent is a corporation located in El Dorado, Kansas engaged in operating a private nonprofit hospital providing both inpatient and outpatient medical care. (GC Exh. 1-I, 1-K).

Lori Dashner worked for Respondent for almost twenty years. (Tr. 24). Dashner began as a registered nurse and was an Information Services (IS) Meditech Coordinator when Respondent terminated her on November 20, 2018. (Tr. 24). Gay Kimble worked for Respondent for 35 years and at the time of her termination on November 20, 2018, was Respondent's Chief Human Resources Officer. (Tr.116-7).

b. Dashner's Protected Concerted Activity

In March 2016, Jim Kirkbride became the Chief Executive Officer (CEO) of Respondent. (Tr. 25). After he began working, Respondent started making changes to its employees' terms and conditions of employment. (Tr. 26-27). For example, Respondent changed a cafeteria benefit that allowed employees to receive a \$500 credit to eat in the cafeteria; instead, after the change, employees were paid \$0.35/hour for every hour worked to cover the cafeteria benefit and the additional amount paid was taxed. (Tr. 27). Respondent ultimately cancelled the cafeteria benefit all together. (Tr. 27). Additionally, Respondent reduced the cap on paid time off and extended illness bank leave. (Tr. 27-28). As the employees' terms and conditions of employment changed, Lori Dashner discussed these changes with her co-workers, as well as members of management, including CEO Jim Kirkbride, Chief Information Officer/Chief Operating Officer (CIO/COO) Mark Rooker, and Supervisor Diana Wasson. (Tr. 27). Then, in December 2017, Dashner learned that Respondent laid off somewhere between 10 and 15 employees. (Tr. 26).

In 2018, Dashner began posting about Respondent and changes to working conditions on her Facebook page. (GC Exh. 2(a)-(cc)). Dashner posted under her own name and under the pseudonym “Susie Bee Bear.” (Tr. 29-30). Dashner used the pseudonym because she feared she would lose her job because of her posts criticizing Respondent’s treatment of its employees. (Tr. 30). On her “Lori Dashner” Facebook account, Dashner used a picture of herself as her profile picture. (Tr. 29). As “Susie Bee Bear,” Dashner used a picture of CEO Jim Kirkbride as her profile picture. (Tr. 30). Dashner got the picture of Kirkbride from an email she received from work that contained Respondent’s newsletter, “Highlights.” (Tr. 30). Respondent distributes “Highlights” to its staff so it can inform them about what is happening at the hospital, but it is not a confidential newsletter and it is available to members of the public. (Tr. 30; Tr. 141). After receiving an issue of Highlights by email, Dashner used her phone to take a screenshot of a picture of Kirkbride, changed it to a black and white photo, and used that screenshot as her “Susie Bee Bear” Facebook profile picture. (Tr. 30-31). All of the Facebook posts under Lori Dashner and Susie B. Bear were made on Dashner’s own time using her own equipment. (Tr. 31).

On August 17, 2018, Dashner wrote a Facebook post under her own name that read, “#bringGaryback #susanballenmemorialhospital.” (GC Exh. 2A; Tr. 33). Respondent had recently laid off hospital chaplain Gary Blaine and Dashner was upset about the lay off and considered it a negative change. (GC Exh. 2G, 2I; Tr. 33). On August 19, 2018, Dashner used her “Susie Bee Bear” account to repost an August 14, 2018 article by the “Butler County Watchdog.” (GC Exh. 2B, Tr. 33-4). The Butler County Watchdog article discussed layoffs at Respondent and Dashner added a comment that compared the salaries of the lowest paid employee at Respondent and CEO Kirkbride. (GC Exh. 2B). Dashner posted under her “Susie Bee Bear” pseudonym to protect her employment, but she wanted Respondent’s staff to know about what was

going on at the hospital with respect to money losses and layoffs. (Tr. 33-4). On August 20, 2018, Dashner used her “Susie Bee Bear” account for another post comparing the salaries of the lowest paid employees at Respondent and CEO Kirkbride. (GC Exh. 2F). Dashner made the post to let Respondent’s staff know how much the CEO made when compared to the employees Respondent had laid off earlier in the month and to bring awareness of how the impact of losing these individual’s salaries was nothing compared to Kirkbride’s salary. (Tr. 35). On August 22, 2018, Dashner wrote a Facebook post under her own name that contained a link to an article about why hospital chaplains are important, as well as a link to a petition she created to bring Gary Blaine back to work. (GC Exh. 2G; Tr. 35-6). Dashner created the petition so other employees could join and let their feelings about Blaine’s layoff be known, as well as to try to get Blaine his job back. (Tr. 36).. Dashner also posted a link to the petition for Respondent to rehire Gary Blaine on her “Susie Bee Bear” account to make sure that the largest audience possible had the opportunity to see and to sign the petition. (GC Exh. 2I; Tr. 36-7).

On August 24, 2018, Dashner wrote a Facebook post under her own name about her attempts to bring Gary Blaine back to work. (GC Exh. 2J). Dashner also explained that she no longer wanted to hide behind her “Susie Bee Bear” pseudonym but that the other employees posting as “bears” needed to be careful because they would be made examples for other employees. (GC Exh. 2J). Dashner explained that she was voicing her concerns to help Respondent become great again. (GC Exh. 2J).

On September 6, 2018, Dashner posted on Facebook twice. (GC Exh. 2O; 2P). In one post, Dashner showed a copy of an issue of “The Direct Line,” under her “Susie Bee Bear” Facebook account. (GC Ex. 2O). “The Direct Line” is a communication tool that allows employees to submit questions directly to Respondent’s management. (Tr. 38). The issue of “The

Direct Line” Dashner posted on September 6, 2018, contained the picture of CEO Jim Kirkbride that Dashner had already been using as the profile picture on her “Susie Bee Bear” account. (Tr. 39; GC Exh. 2O). In “The Direct Line” post, Dashner wrote about her concerns with Respondent creating a new urgent care clinic when it was losing employees. (Tr. 38). In a separate September 6, 2018 “Susie Bee Bear” post, Dashner wrote about Respondent’s decision to eliminate the meal allowance benefit for its regular employees, while catering meals for members of management. (Tr. 39; GC Exh. 2P). Dashner also wrote that Kirkbride broke hospital policy when he attended a KC Royals game in August 2018, and she warned employees that further layoffs were possible. (GC Exh. 2P).

Dashner continued to post on Facebook about Respondent using her personal and “Susie Bee Bear” accounts. On November 14, 2018, Dashner used her personal Facebook account to post about Thanksgiving and Respondent’s decision to stop issuing turkey/ham gift certificates to employees for the holiday. (GC Exh. 2U; 2V; 2W; Tr. 40). In years past, Respondent had provided employees with frozen turkeys and/or gift certificates for turkeys; however, Dashner asked management and found out that Respondent was not going to provide the turkey certificates in 2018 because of Respondent’s finances. (Tr. 40). In an effort to boost morale, Dashner started a turkey fund where people could donate to and she would use the proceeds to buy gift certificates for employees. (Tr. 40; GC Exh. 2U). On November 15, 2018, Dashner posted on Facebook that she had been told not to solicit funds for turkeys on work time, but she would continue to do so on her own time. (Tr. 41.; GC Exh. 2V). Dashner then posted that she had received a skills update and an oral warning for being negative, that she was under increased scrutiny, and that she was feeling low for these reprimands since she is a high performer. (Tr. 41; GC Exh. 2V). Dashner continued to explain how her employment at Respondent was taking a toll on her. (Tr. 41.; GC

Exh. 2V). On November 17, 2018, Dashner reported on Facebook that the Susan B. Allen Hospital Foundation (Foundation) had decided to come through in 2018 and give employees gift certificates for turkeys. (Tr. 42.; GC Exh. 2W).

On November 19, 2018, Dashner posted on Facebook inviting employees to sign a “Vote of No Confidence” petition to have Kirkbride removed by Respondent’s Board. (Tr. 42; GC Exh. 2X). The post included the same picture of Kirkbride that Dashner had been using for several months. (Tr. 43-4). Soon after, Dashner deleted the post because she decided to do an electronic petition instead of a paper petition. (Tr. 42). Prior to going to work the morning of November 20, 2018, Dashner created a Facebook post with a link to a website with an electronic petition to have Kirkbride fired as Respondent’s CEO. (Tr. 43; GC Exh. 2Y). Dashner created the petition because Respondent had been losing millions of dollars and, as a result, people were losing their jobs, employees lost benefits, and hours were being cut. (Tr. 43). Dashner’s November 20 Facebook post included the same picture of Kirkbride she had been using for months from the “Highlights newsletter,” although this time she added the words “You’re fired” using a picture editing app on her phone. (Tr. 44).

c. Respondent’s Response to Dashner’s Protected Concerted Activity

Members of Respondent’s management took notice of Dashner’s above-described Facebook posts and wanted to take action against Dashner for the posts. (Tr. 119; GC Exh. 5). At 11:46 am on August 16, 2018, CEO Kirkbride sent an email to Kimble, CIO/COO Mark Rooker, and Forrest Rhodes, Respondent’s outside legal counsel. (GC Exh. 5A). Kirkbride forwarded a copy of one of Dashner’s Facebook posts wherein she discussed how upset she was about Chaplain Gary Blaine’s layoff. (GC Exh. 5A). Kirkbride instructed Kimble to work with Forrest Rhodes to see what Respondent’s response to Dashner should be. (GC. Exh. 5A). Further, Kirkbride

wrote “I read confidential information and feel her actions are terminal.” (GC. Exh. 5A). Kimble understood that Kirkbride meant that Dashner’s actions warranted termination. (Tr. 120). Although Kirkbride did not mention Dashner by name, in an email sent at 4:51 pm that day, Kirkbride describes the author of the Facebook post as a clinical analyst in the IS department that is not in leadership that has been talked to about her bad attitude. With the information provided by Kirkbride in the email, Kimble deduced that Kirkbride meant Lori Dashner. (GC Exh. 5A; Tr. 121).¹

Between August 16, 2018 and September 10, 2018, Kimble reached out to Attorney Forrest Rhodes regarding Dashner’s Facebook posts and received advice from Rhodes on the subject. (Tr. 123). On September 10, 2018, Mark Rooker sent an email to other members of management about Dashner’s continuing Facebook posts and requested to speak with Rhodes about whether Dashner’s posts could be considered defamation against Respondent. (GC Exh. 5B). Kimble responded to Rooker’s emails by summarizing Rhodes’ position on Dashner’s Facebook posts. (GC Exh. 5B). Specifically, Kimble included the following excerpt from a communication from Rhodes:

“[t]his looks to me to be a disgruntled employee offering her opinion about what she’s observed in terms of other employee departures. That information may be inaccurate, but it’s within her rights under the NLRA. If we could prove that she used her position to access information to which she wasn’t authorized, and then shared that information, the situation would be different, but I’m not getting those facts from our exchanges to this point...

[I]f the employee is or becomes aware of her rights under the NLRA, then she would know to file an unfair labor practice charge with the Board. She has six months to do so. The Board would investigate the situation and I anticipate it would determine that her comments constitute protected activity, and that those comments led to the decision to terminate her employment. That would make our discipline of her unlawful...While the Trump NLRB is moving away from the much more labor friendly positions taken by the Obama Board, this case presents a pretty clear

¹ As will be discussed further below, Respondent did not put Kirkbride on the stand to deny that he was referring to Dashner in his email. Kimble testified that she believed Kirkbride was writing about Lori Dashner.

picture of protected activity. I think even under the Trump Board we would be taking a big risk in expecting a different outcome.”

(GC Exh. 5B).

Despite the fact that Rhodes advised Respondent that Dashner’s Facebook posts were likely protected, concerted activity under the National Labor Relations Act and that disciplining or terminating her would likely result in liability, Kirkbride wrote that he would like to “move forward with a call to Forrest to discuss next steps.” (GC Exh. 5B).

On September 20, 2018, CIO/COO Rooker sent an email to Kimble in which he wrote he had concerns that Dashner’s actions raised cyber bullying concerns, copyright concerns, and concerns regarding the integrity of the IS department. (GC Exh. 5C). In response, Kimble wrote that she would reach out to Rhodes about Rooker’s concerns. (GC Exh. 5C). On September 21, 2018, Kimble forwarded to Rhodes an email exchange between Kirkbride and Dashner. (GC Exh. 5D; Tr. 129). Dashner had submitted a report to the Respondent’s Compliance Hotline about Kirkbride’s attendance at a Royals game. (GC Exh. 5D). Dashner made the report to the compliance hotline after being approached by several other employees. (GC Exh. 5D). Kimble forwarded the Dashner/Kirkbride email exchange to Rhodes and asked Rhodes for his opinion on whether Dashner was violating various Respondent policies. (Tr. 130). On September 21, 2018, Rhodes responded to Kimble and Rooker with the following:

“Unfortunately these types of communication will fall into the same category as the other social media postings we’ve discussed. As long as she’s posting information about terms and conditions of employment and doing so on behalf of other employees (which appears to be the case), then the communications are protected under the National Labor Relations Act. There are limits to what she can share, and we have the right to protect information that is proprietary or otherwise confidential, but there has to be a strong underlying justification for confidentiality. Simply because our e-mail footer states that work-related information must be treated as confidential isn’t going to be enough. The allegations about the Royals game and whether/how Lori properly reported it don’t implicate the type of

confidentiality concerns that would trump the employee's otherwise protected rights.”

(GC Exh. 5D).

On September 21, 2018, Rooker sent an email to Kimble and Rhodes in which he wrote that he was frustrated and concerned with the Dashner situation. (GC Exh. 5D; Tr. 131). Rooker forwarded the emails to Kirkbride. (GC Exh. 5D). In an email just to Rooker, Kirkbride reiterated that he thought Dashner was making false statements and indicated he wanted to reevaluate the identity of another poster, “Amber Bear.” (GC Exh. 5D).

On September 25, 2018, Rooker again emailed Kimble to express his frustration with Rhodes' legal advice and that he could not find a determination by Rhodes that Respondent could take action against Dashner for her Facebook posts. (GC Exh. 5E; Tr. 132). Rooker also wrote that wanted to know whether Kimble and Rhodes would be able to defend a disciplinary action against Dashner. (GC Exh. 5E). Kimble responded that she believed Rhodes' advice was that he didn't find that Dashner committed any wrongdoing and that if Respondent disciplined Dashner, it would be violating the National Labor Relations Act. (GC Exh. 5E; Tr. 133).

In response to Rooker's request for additional information from Rhodes, Kimble emailed Rhodes on September 26, 2018 to ask Rhodes directly whether Dashner had breached Respondent's systems and/or policies when she posted emails from the Respondent's email system on Facebook. (GC Exh. 5F; Tr. 134-5). On September 27, 2018, Rhodes emailed back and explained that the sharing of an email by an individual who was a party to the email is not a breach of systems. (GC Exh. 5F). Further, Rhodes again explained that “based on current National Labor Relations Board authority (interpreting the National Labor Relations Act), I think it is more likely than not that Lori's conduct would be viewed as protected activity under the NLRA such that

disciplining her for engaging in that conduct would be viewed as an unfair labor practice.” (GC Exh. 5F).

Aside from these email conversations, Dashner’s Facebook posts and behavior also came up during in-person management meetings. (Tr. 137). Respondent held weekly senior leadership meetings on Tuesday mornings that were typically attended by CEO Kirkbride, CIO/COO Rooker, Chief Nursing Officer (CNO) Cecelia Goebel, Interim Chief Financial Officer (Interim CFO) Jonathan Immordino, Chief Quality Officer (CQO) Francia Bird, Kimble, and Executive Assistant Becky Sundgren. (Tr. 137). The purpose of these meetings was for senior members of staff to discuss activities at the Respondent, the operations of the hospital, strategic planning, and problems at Respondent. (Tr. 137). During one of the senior leadership meetings in September 2018, Kirkbride asked those in attendance if they had seen any of Dashner’s Facebook posts. (Tr. 137). Many attendees nodded indicating their awareness of Dashner’s posts. (Tr. 137). Kirkbride said that Dashner’s posts reflected badly on the hospital and that Respondent should take strong disciplinary action against Dashner. (Tr. 137). Kimble responded that she did not believe Respondent could take strong disciplinary action because of the National Labor Relations Act, which gave employees the right to speak freely about their terms and conditions of employment. (Tr. 137-8). Kirkbride got very angry and repeated that he thought the Facebook posts were a bad reflection on Respondent and that they needed to take strong disciplinary action. (Tr. 138). Kimble told the attendees that she would be glad to run the issue of Dashner’s posts by Respondent’s legal counsel to see if he had any ideas or if Kimble was missing anything. (Tr. 138).

In addition to the weekly meetings, members of management went directly to Kimble to vent their frustrations about Dashner’s activities. Mark Rooker went to Kimble’s office on

multiple occasions to tell Kimble that he and Kirkbride had been meeting about Dasher's Facebook posts and they were both angry that no action was being taken in response to Dashner's Facebook posts. (Tr. 138-9). Kimble responded the same way each time – she explained that she had run the facts by Forrest Rhodes and that Dashner had the protection of the National Labor Relations Act. (Tr. 139). Kimble told Rooker that if Respondent acted against Dashner for her Facebook activity, Respondent would be put at legal risk and that, as officers of the organization, they couldn't do that. (Tr. 139).

After receiving Rhodes' advice explaining that acting against Dashner for her Facebook posts would expose Respondent to legal liability, Rooker sent an email to Kimble and wrote that he thought that Respondent should consider getting a different attorney involved and not to use Rhodes anymore. (Tr. 142). Kimble responded to Rooker by email and copied Kirkbride. (Tr. 142). In her response to Rooker, Kimble wrote that if Respondent changed attorneys, it would look like Respondent was trying to avoid the National Labor Relations Act and Kimble did not support changing attorneys and she would not be willing to do that. (Tr. 142-3).

Towards the end of October 2018, Interim CFO Jonathan Immordino came into Kimble's office for an informal meeting about Dashner. (Tr. 149). Immordino was angry and told Kimble that he had never worked in an organization that ignored inappropriate behavior like how Respondent was doing with Dashner and her Facebook posts. (Tr. 149). Immordino told Kimble that she was being uncooperative by not terminating Dashner's employment. (Tr. 149). Kimble became upset because of Immordino's behavior, but she told Immordino that she had run the situation by Respondent's legal counsel and that Dashner was protected by the National Labor Relations Act. (Tr. 150). Kimble told Immordino that if Respondent took action against Dashner, the organization would be at risk for legal action. (Tr. 150). Kimble then told Immordino that

Dashner had recently received two documents to address her performance. (Tr. 150). Immordino demanded to know about what Dashner received, but Kimble told him that Human Resources regularly issued disciplinary documentation and didn't share it with others that did not need to know. (Tr. 150).

d. Dashner's Skills Update and Oral Warning

In the midst of Dashner's protected, concerted activity and Respondent's attempts to respond to Dashner's protected activity, in September 2018, Respondent issued Dashner a "Skills Update" and an "Oral Warning."

i. September 17, 2018 Skills Update Issued to Dashner

In September 2018, Respondent's IS Department used a program named TopDesk that allowed employees to put a ticket in for the IS department if they were having computer problems. (Tr. 46). After a member of the IS department received a ticket, the IS employee would follow up on the issue contained in the ticket and then either close the ticket or keep it open if the problem was not immediately solved. (Tr. 46). On September 11, 2018, Dashner sent an email to all employees explaining how TopDesk ticketing worked and included a document that fully explained how to create a TopDesk ticket. (GC Exh. 3). Dashner sent the email to clear up some issues employees had using TopDesk. (Tr. 46). In her email, Dashner explained that TopDesk had several open tickets where the underlying issue was addressed and that that IS was going to close several of these open TopDesk tickets. (GC Exh. 3). Dashner further explained that IS would contact directly those individuals whose tickets were closed and if they had an issue or needed additional help, the individual could contact Dashner to open a new ticket, with a reference to the original ticket. (GC Exh. 3). Dashner had sent emails to all employees at the hospital before without supervisory approval, so she sent the September 11, 2018 TopDesk email to all employees

without first running it by her supervisor, Diana Wasson. (Tr. 46). Although she did not show the email to Supervisor Wasson prior to sending it to all employees, Dashner did show the email to the other IS Coordinator in her department, Steve Hubeli. (Tr. 47). Hubeli had no concerns and told Dashner to go with it. (Tr. 47).

On September 12, 2018, Wasson called Dashner into her office. (Tr. 47). Wasson told Dashner that she believed Dashner's September 11, 2018 email was inappropriate and that Dashner had overstepped her role. (Tr. 47). Dashner told Wasson that she did not think that she had overstepped her role and that the email was sent to inform staff how to use TopDesk. (Tr. 47).

On September 17, 2018, Wasson called Dashner into her office and gave her a "Skills Update." (Tr. 48; GC Exh. 4A). Wasson gave Dashner the Skills Update to clarify Dashner's role in the department. (Tr. 48). Per the Skills Update, since Wasson was responsible for department activities, communications about the operation of the department needed to be approved by Wasson prior to communication being distributed. (Tr. 49; GC Exh. 4A). A copy of the "Skills Update" was placed in Dashner's personnel file. (GC Exh. 4A). After Wasson gave Dashner a copy of the Skills Update, Dashner responded that she did not think that she deserved the Skills Update because she had historically communicated with Respondent's staff without Wasson's approval up until that day. (Tr. 49). After meeting with Wasson, Dashner talked about the Skills Update with Mark Rooker since they had known each other for a long time. (Tr. 49-50). Dashner told Rooker that she was upset that she received the Skills Update and that she felt bad for being reprimanded. (Tr. 50). Dashner spoke with many other employees about her discipline and posted about the discipline on Facebook. (Tr. 51).

ii. October 24, 2018 Oral Warning Issued to Dashner

On October 23, 2018, Dashner attended a regularly scheduled status update meeting in Wasson's office with Wasson and IS Coordinator Steve Hubeli. (Tr. 50). The purpose of these status meetings was to have everybody on the same page in terms of where the department was with projects so that the IS department worked as a team and stayed up to date. (Tr. 50). During the October 23, 2018 meeting, Dashner was frustrated because she hadn't received billing codes for a project she was working on. (Tr. 51). Dashner then brought up TopDesk issues, since she had spoken with Rooker after receiving the Skills Update and he thought it would be a good idea to bring it up during one of the weekly meetings. (Tr. 51). Wasson was offended that Dashner brought up TopDesk, dismissed the meeting, and slammed the door. (Tr. 52).

On October 24, 2018, Wasson presented Dashner with an "Oral Warning." (GC Exh. 4B). Dashner met with Wasson and Kimble in Wasson's office. (Tr. 53). Dashner spoke first and said, "I'll just turn in my resignation right now." (Tr. 54). In response, either Wasson or Kimble told Dashner that Dashner did not need to resign, but Respondent wanted to get everybody on the same page. (Tr. 54). Wasson explained to Dashner that she was being disciplined for being negative during the October 23, 2018 meeting; specifically, for calling a query stupid and for bring up the TopDesk again. (Tr. 54). Dashner said that it was bogus that she was being reprimanded for that. (Tr. 55). Dashner believed she was being reprimanded because of her Facebook posts. (Tr. 55). Under the terms of the Oral Warning, Dashner agreed to present information to Wasson positively with ideas and solutions and to complete her work to the best of her ability. (Tr. 55). Dashner then asked Wasson whether she could have weekly meetings with Wasson and Rooker to discuss her progress in improving her behavior. (Tr. 56). The purpose of the meeting was to make sure that she was meeting management's expectations and to avoid any further discipline,

including termination. (Tr. 56; 331). Wasson agreed to participate in these progress meetings. (Tr. 56). Dashner said that she would be cooperative and do her best and Dashner and Wasson discussed that they were going to be more appropriate and try to work well together. (Tr. 195).

e. Gay Kimble's Termination

On October 31, 2018, Respondent held a regularly scheduled fire drill. (Tr. 151). Following the fire drill, maintenance employee Jim Holderman was required to get four participant statements about the drill and turn the statements into the Safety Clerk. (Tr. 151). On Thursday, November 8, 2018, Manager of Environmental Services Department Alan Patterson came to Human Resources Manager Sheila Hoyt and told her that Holderman had forged one of the participant statements he had turned in and that Patterson wanted Holderman fired. (Tr. 152; 376). Sheila Hoyt reported what had happened during her meeting with Patterson to Kimble. (Tr. 152; 376). Hoyt talked to Kimble because she had concerns about Patterson's request to terminate Holderman and believed he might be trying to bypass the progressive disciplinary policy. (Tr. 152). Kimble and Hoyt discussed Hoyt's concerns and Kimble explained it was important for Hoyt to perform a thorough investigation of the facts. (Tr. 153). Kimble told Hoyt that she should visit with Patterson's supervisor, CIO/COO Mark Rooker, and that Holderman's discipline would be a collaborative decision and the leadership team needed to work together. (Tr. 153).

As a Human Resources Manager, Hoyt handled most of the discipline for Respondent. (Tr. 155). Hoyt had been a Human Resources Manager for about three years and prior to being a manager, Hoyt worked as a Human Resources Specialist. (Tr. 370). Kimble was hands on as Hoyt's supervisor and provided guidance, mentoring, and oversight to Hoyt as needed. (Tr. 155; 370-1). Hoyt always involved Kimble in terminations and other serious situations. (Tr. 373).

On Friday, November 9, 2018, Hoyt met with Rooker. Rooker told Hoyt he wanted Holderman terminated. (Tr. 154). Hoyt explained to Rooker that Patterson told her that he thought Holderman was covering for someone and they agreed that Hoyt would talk to Patterson about what he meant. (Tr. 154). Hoyt proceeded to talk to Patterson about Holderman; at the end of their conversation, Hoyt asked Patterson to begin drafting Holderman's disciplinary documentation. (Tr. 155). Patterson agreed to begin drafting the Holderman disciplinary paperwork and to send it to Hoyt when he was done so she could clean up the document. (Tr. 155).

On Thursday, November 15, 2018, Kimble sent an email to Sheila Hoyt asking about the status of the Holderman discipline since she wanted to handle it timely. (GC Exh. 5H). Hoyt responded that she had contacted Patterson that morning to inquire on the status of the paperwork and he had sent her a rough draft of the paperwork in response. (GC Exh. 5H). Hoyt and Kimble discussed the Holderman matter at length on November 15, 2018 since Hoyt still had concerns about whether termination was the appropriate level of discipline. (Tr. 157). Hoyt and Kimble wanted to confirm that the fire drill form was an official hospital document, which would make the forgery a terminable offense, and they decided to talk to CQO Francia Bird. (Tr. 157-8; 385). As Chief Quality Officer, Bird had responsibility for Joint Commission accreditation and oversaw fire drills. (Tr. 158). Kimble wanted to meet with Bird because of her knowledge about safety matters and she thought Bird would have a valuable opinion on the issue of whether Holderman deserved to be terminated for falsifying the report. (Tr. 158). Bird knew about the Holderman situation and told Kimble and Hoyt that she did not believe that Holderman should be terminated for forging the document; rather, she agreed with Hoyt and Kimble that suspension was more appropriate. (Tr. 159; 386). After meeting with Bird, Kimble encouraged Hoyt to tell Rooker her

findings and to collaborate with him to determine the appropriate discipline for Holderman; however, Kimble reminded Hoyt that Rooker was the senior leader. (Tr. 160).

Hoyt met with Rooker the morning of Friday, November 16, 2018. (Tr. 160-1). After meeting with Rooker, Hoyt went to Kimble's office to report what had happened during their conversation. (Tr. 161). Hoyt was upset because the meeting with Rooker did not go well. (Tr. 161). Rooker and Hoyt could not agree on whether to suspend or terminate Holderman and they agreed to let Kirkbride decide. (Tr. 388-90). Hoyt explained that she told Rooker that she would write Holderman's disciplinary documentation as a termination and she would take it to Kirkbride for final approval. (Tr. 161). Kirkbride was out of the office the afternoon of November 16, 2018, so Hoyt did not have a chance to meet with him that day. (Tr. 162).

On Monday, November 19, 2018, Kirkbride asked Kimble to meet with him and Rooker in his office about the Holderman termination. (Tr. 162). To start the meeting, Kimble summarized the Holderman situation. (Tr. 163). Kirkbride became angry and told Kimble that Holderman committed a very serious offense and that she should have terminated Holderman immediately. (Tr.163). Kimble explained that she did not know how serious offense the forgery was and so she had instructed Hoyt to perform a careful and thorough investigation. (Tr. 164). Kimble told Holderman that she had gone to Francia Bird for her input and that Bird had agreed that termination was too strong of a response. (Tr. 164). Kirkbride responded that as a senior leader, Kimble should have known that this was a serious offense and that he had done some research himself and found out that the accrediting agency, the Centers for Medicare and Medicaid Services (CMS) would fine Respondent for millions of dollars if it discovered Respondent falsified a fire drill. (Tr. 164). Kimble asked Kirkbride why he had not come directly to her if he was that concerned about the seriousness of Holderman's actions. (Tr. 165). Kimble asked Rooker the

same question and Rooker responded that Kirkbride was his leader and hadn't done anything wrong. (Tr. 165). Kimble said that she knew Hoyt had been nervous about the Holderman investigation so Kimble had been very careful to stay close to the Holderman investigation and keep an eye on it. (Tr. 165-6). Kimble also said that she was concerned about the timeliness of the investigation because Alan Patterson didn't inform Human Resources about the Holderman situation for over a week after it originally happened and then did not return the disciplinary documentation to Human Resources in a timely manner. (Tr. 166).

At this point, Kirkbride began shooting dates at Kimble. (Tr. 166). She was not prepared to answer Kirkbride since she thought the purpose of the meeting was for Kirkbride to sign the Holderman termination documentation. (Tr. 166). Kimble told Kirkbride she didn't have documentation regarding the dates of the Human Resources' investigation and that if he wanted to know about when things happened during the investigation, Hoyt should be invited to the meeting. (Tr. 166). Kirkbride told Kimble that she should have been deeply involved in the Holderman investigation. (Tr. 167).

Clearly frustrated, Kirkbride said, "Let's just get to the heart of this. HR is an obstacle to the leaders of this organization." (Tr. 167). Kimble was angry and told Kirkbride and Rooker that she took that offense seriously and that she never wanted Human Resources to be an obstacle to the organization. (Tr. 167). Kimble asked for the names of any other leaders that thought she was an obstacle and then explained that she had helped many leaders of the organization with employee issues and she did not believe that the other leaders saw her as an obstacle. (Tr. 167). Neither Kirkbride nor Rooker said anything, so Kimble said, "Let me guess, is this about Lori Dashner? You think I've been an obstacle in regards to Lori Dashner." (Tr. 168). Kirkbride responded, "HR has put up numerous obstacles when it comes to Lori Dashner." (Tr. 168). Kimble said, "Jim

we've looked into this. I told you about the National Labor Relations Act. We ran it by Forrest Rhodes. Lori has protections in the Act. We couldn't take action, it would have put the organization at legal risk." (Tr. 168). Kimble could see that nothing she said satisfied Rooker and Kirkbride and they were angry and frustrated, so she decided to apologize for the Holderman situation and move forward. (Tr. 168-9).

After apologizing, Kirkbride asked Kimble what they were going to do about Holderman. (Tr. 169). Kimble handed Kirkbride the termination paperwork she had brought with her and told him that she believed Respondent should terminate Holderman. (Tr. 169). Kirkbride said, "So Sheila [Hoyt] was going to come in and argue with [him] about it and now you're just going to terminate him?" (Tr. 169). Kimble said that Kirkbride had been very clear and that Holderman had committed a very serious offense and termination was the only solution. (Tr. 169). Kimble added that Hoyt had not intended to argue with Kirkbride about Holderman's discipline, she intended to discuss the matter. (Tr. 169). Kirkbride and Rooker signed the Holderman termination documentation and the meeting ended. (Tr. 170).

After leaving Kirkbride's office, Kimble found Alan Patterson and they went into her office. (Tr. 170). Kimble apologized to Patterson and told him that she understood that he thought she had been an obstacle in the Holderman investigation. (Tr. 170). Kimble told Patterson that Holderman would be terminated and she would schedule a time to help Patterson with the termination. (Tr. 170). Patterson looked shocked and told Kimble that she had not been an obstacle and that he was slow to tell Human Resources about the Holderman situation and complete the paperwork because he didn't know what level of discipline he wanted to impose. (Tr. 171). Kimble thanked Patterson and he left her office. (Tr. 171).

Kimble came to work the morning of Tuesday, November 20, 2018 and attended the regularly scheduled senior leadership meeting. (Tr. 171). Kirkbride asked the members of the meeting if they had seen Dashner's latest Facebook post, the petition for Kirkbride's termination. (Tr. 172). CNO Cecelia Goebel responded that she was afraid Dashner could become violent and implied Dashner could be an active shooter. (Tr. 172). Kimble was shocked – she had never heard anyone describe Dashner as violent and Dashner had never been reported to Human Resources for making threats of violence. (Tr. 173). After the meeting, Kimble sent an email to Kirkbride and recommended scheduling a meeting with Forrest Rhodes to discuss Dashner. (GC Exh. 7D). Kimble was concerned about Goebel's comments about Dashner, but she also wanted Kirkbride to be cognizant of Dashner's protected Facebook activity. (GC Exh. 7D).

At approximately 1:50 pm, Kirkbride emailed Kimble and asked to meet at 2:00 pm in his office. (Tr. 174). Kimble went to Kirkbride's office, where she saw Kirkbride and Interim CFO Immordino. (Tr. 174). Kirkbride told Kimble that he was terminating her employment for the willful violation of safety regulations and failure to support a department leader. (Tr. 175; GC Exh. 6). Kimble told Kirkbride that there hadn't been a fair investigation – there hadn't been any investigation. (Tr. 175). Kirkbride pushed the termination document toward Kimble and told her to sign it. (Tr. 176; GC Exh. 6). Kimble read through the statement, wrote that she disagreed with statements made in the document, and signed it. (Tr. 176; GC Exh. 6).

f. Lori Dashner's Termination

As described above, prior to going to work the morning of November 20, 2018, Dashner posted a petition to remove Kirkbride on her personal Facebook page. (Tr. 58). Dashner then went to work. (Tr. 58). Sometime during the afternoon, Supervisor Wasson came to Dashner's office and told Dashner that Rooker wanted to see her. (Tr. 58). Wasson and Dashner went to

Rooker's office, where they met with CIO/COO Rooker and Interim CFO Immordino. (Tr. 58). Dashner saw the discharge paperwork when she walked in the room then Rooker read the paperwork out loud. (Tr. 59). According to the discharge paperwork, Respondent terminated Dashner for the unauthorized removal or possession of Hospital property or records, malicious or deliberate use of Hospital property, or a blatant act of misconduct that is damaging to the facility or a patient. (Tr. 59; GC Exh. 4C). After hearing the reasons for her termination, Dashner left Respondent. (Tr. 59).

III. CREDIBILITY

Credibility determinations may stem from various factors, "including, among other things, his demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole." *Double D Construction Group Inc.*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001). A trier of fact may believe some, but not all, of a witness's testimony when making credibility resolutions. *NLRB v. Universal Camera Corp.*, 179 F. 2d 749 (2nd Cir. 1950).

a. General Counsel's Witnesses

General Counsel's witnesses, Lori Dashner and Gay Kimble, should be credited since the witnesses were honest and straightforward. Both Dashner and Kimble answered every question asked of them, regardless of how the answer reflected on them. Dashner and Kimble's testimony didn't waiver and fully matched the facts set forth in General Counsel's exhibits, which consisted of documents produced by Respondent pursuant to a *subpoena duces tecum*. Kimble's credibility is further bolstered because her account of the events leading to Jim Holderman's termination is fully corroborated by the testimony of Respondent's witness Human Resources Manager Sheila Hoyt. Hoyt is still employed by Respondent and her testimony should be given weight since the

consistent testimony of current employees that is adverse to their employer should be considered particularly reliable. *Gold Standard Enterprises, Inc.*, 234 NLRB 618, 619 (1978); *Flexsteel Industries*, 316 NLRB 745 (1995).

b. Respondent's Witnesses

Respondent's first presented CIO/COO Mark Rooker. Rooker's credibility is untrustworthy and self-serving and his testimony should not be validated in any manner. Rooker often did not answer the questions directly asked of him. (Tr. 315). Further, as detailed several times in this brief, Rooker's testimony is contradicted by Lori Dashner, Gay Kimble, and documentary evidence. With regard to Kimble's termination, Rooker's credibility should not be validated as he had no input in the decision to terminate Kimble. Rooker's opinion on Kimble's actions is irrelevant; his opinions did not lead to Kimble's termination. Kirkbride decided to terminate Kimble and, despite the fact that Kirkbride took the stand as a 611(c) witness to provide foundational evidence for some emails, Respondent did not ask him any questions regarding his decision to terminate Kimble or his involvement in the decision to terminate Dashner. Kirkbride did not deny any of the Kirkbride's admissions, which were testified to by both Kimble and Dashner.

Respondent also called Human Resources Specialist Chelsea Bannon as part of its defense. Ms. Bannon testimony corroborated Dashner's testimony that the picture of Kirkbride came from the Highlights newsletter and was not found in Dashner's electronic files; however, she admitted she did not know when the files found on Dashner's computer were created or whether Dashner performed personal tasks on Respondent computer's during working time. (Tr. 362-363). Respondent's witness Sheila Hoyt did appear credible since her timeline of events that lead to

Holderman's termination matched almost exactly the timeline of events Kimble testified to the day before.

Most importantly, although General Counsel called Jim Kirkbride to the stand as a 611(c) solely for the purpose of authenticating documents, Respondent did not ask Jim Kirkbride any questions and did not call Kirkbride as a Respondent witness. The Board "recognizes the 'missing witness rule' that when a party fails to call a witness who is under the control of that party and who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which that witness is likely to have knowledge," particularly where a witness is an agent of the party. *Desert Cab, Inc. d/b/a Ods Chauffered Transportation*, 367 NLRB No. 87 (2019)(citing *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. 861 F.2d 720 (6th Cir. 1988); *Natural Life, Inc.*, 366 NLRB No. 53, slip op. at 1, fn. 1 (2018)). Respondent chose not to provide an opportunity to assess Kirkbride's credibility and to ask substantive questions about Kirkbride's decision-making process when determining whether to terminate Dashner and Kimble. Kirkbride sent multiple emails about Dashner's protected concerted activities and Rooker testified that Kirkbride made the decision to terminate Gay Kimble's employment. Respondent's decision not to ask Kirkbride any questions about his decisions with regard to Dashner and Kimble's terminations, leads to the conclusion that Respondent did not believe Kirkbride would be a credible witness; therefore, General Counsel respectfully requests the Administrative Law Judge apply an adverse inference to the fact that Respondent did not call Kirkbride to testify to facts only he knows about (*e.g.*, the reasons for Dashner's termination; the reasons for Kimble's termination).²

² It is important to note that on July 1, 2019, after General Counsel asked Kirkbride questions as a 611(c) witness, Counsel for Respondent stated that Respondent would be calling Kirkbride and would ask him questions on July 2, 2019. (Tr. 231-2).

IV. ANALYSIS

a. Respondent Unlawfully Disciplined and Terminated Dashner in violation of Section 8(a)(1) of the Act.

The evidence set forth at hearing indisputably establishes that Respondent issued a Skills Update and Oral Warning to Lori Dashner and ultimately terminated Dashner's employment because she engaged in activities protected by the Act. Respondent has the burden to show that it would have disciplined and terminated Dashner's employment regardless of her protected conduct. As discussed below, Respondent utterly failed to meet its burden.

i. On or about September 17, 2018, Respondent Issued Dashner a Skills Update for Engaging in Protected Concerted Activity.

The burdens of proof in this case fall under the framework of *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). The General Counsel must first prove by a preponderance of the evidence that Dashner's conduct was a motivating factor in Respondent's decision to terminate her employment. *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004). In order to do so, the General Counsel must show (1) that the employee conduct was protected and concerted; (2) the employer knew or believed that the employee engaged in the protected conduct; and (3) the employer harbored animus against the employee's protected activity. *Id.* Once the General Counsel establishes a *prima facie* case of discriminatory conduct through these factors, it has met its burden of persuasion that the protected activity was a motivating factor in the employer's conduct. *Id.* The burden then shifts to the Respondent to show that it would have taken the same action in the absence of the employee's protected activity. *Id.* Respondent cannot simply present a legitimate reason for its decision, but it must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity. *W.F. Bolin Co.*, 311 NLRB 1118, 1119 (1993). In

the instant case, the General Counsel can overwhelmingly meet its burden. However, Respondent cannot show that it would have issued a Skills Update to Dashner had she not engaged in protected activity.

1. Dashner's protected concerted activity

Section 7 of the Act protects employees' rights "to engage in ... concerted activities for[their]... mutual aid or protection. An employer violates the Act if it takes an adverse employment action that is "motivated by the employee's protected concerted activity." *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984) and *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986). For employee conduct to fall within the protection of Section 7, it must be both concerted and engaged in for the purpose of "mutual aid or protection." *Holling Press, Inc.*, 343 NLRB 301, 302 (2004). To be "concerted," an employee's actions must be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. The Board's definition has also presented an inclusive interpretation of concerted activity that covers individual activities that "seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Meyers Industries*, 281 NLRB 882, 887. An individual conversation may constitute concerted activity although it involves only a speaker and a listener if the speaker sought to initiate, induce, or prepare for group action, or if the speaker's words had some relation to group action in the interest of the employees. *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964). The evidence clearly establishes that Dashner's efforts to address layoffs and other negative changes to terms and conditions of employment were concerted matters for "mutual aid and protection" of the Respondent's employees and of employees generally. *See Dreis & Krump Mfg.*, 221 NLRB 309, 314 (1975).

Here, the evidence clearly demonstrates that Dashner engaged in protected, concerted activity for the purpose of mutual aid or protection of herself and her coworkers. Dashner's protected concerted activity took place over the course of several months using her personal Facebook page and her "Susie Bee Bear" Facebook persona.³ (GC Exh. 2A-2CC; Tr. 29-30). Between August 17, 2018 and September 17, 2018, Dashner made multiple posts about Respondent's decision to lay off Chaplain Gary Blaine and she created an online petition for the purpose of inducing other employees to engage in collective action and to protest Respondent's decision to terminate Blaine's employment. (GC Exh. 2A; 2G; 2H; 2I; 2J). Dashner made several posts comparing the salary of CEO Kirkbride and the lower-paid employees that were laid off in an effort to inform other employees that losing lower-paid employees was nothing compared to Kirkbride's salary and to prevent future layoffs. (GC Exh. 2B; 2F). Dashner also wrote about negative changes to employees' terms and conditions of employment that occurred after Kirkbride became the CEO. (GC Exh. 2P). Dashner posted several articles on the topic of how employees could get rid of a CEO, in an effort to gain the support of her fellow employees to have Kirkbride removed. (GC Exh. 2D; 2L; 2M; 2P). In addition to Facebook posts, Dashner discussed her concerns about the changes to terms and conditions of employment and layoffs in conversations with her coworkers and with members of management. It is indisputable that Dashner was engaged in protected activity from August to September 2018, when she attempted to educate her coworkers about matters concerning employees' terms and conditions of employment and how Kirkbride's decisions led directly to negative impact on employees.

³ Respondent admitted on the record that Dashner's activity was protected by the National Labor Relations Act. (Tr. 22).

2. Respondent's knowledge of Dashner's protected activity

It is undisputed that Respondent was aware of the Dashner's protected concerted activity starting in August 2018. Dashner's made public Facebook posts under her own name and under the pseudonym "Susie Bee Bear." The evidence clearly establishes that members of Respondent's management knew about Dashner's Facebook posts and knew that she was "Susie Bee Bear." (GC Exh. 5; Tr. 121). Not only did members of management, such as Kirkbride and Rooker, know about Dashner's Facebook posts, on August 16, 2018, Kirkbride asked Gay Kimble to investigate whether Dashner could be terminated for her Facebook posts. (GC Exh. 5A). In August 2018, Kimble and Forrest Rhodes explicitly informed Kirkbride and Rooker of the definition of protected concerted activity and that, in all likelihood, the National Labor Relations Board would find Dashner's Facebook posts to be protected, concerted activity.

In summary, there is no question that Respondent knew about Dashner's protected concerted activity and wanted to discipline her for the activity.

3. Respondent issued a Skills Update based on discriminatory animus.

Discriminatory animus can be inferred through both direct and indirect evidence. When determining whether an inference of discriminatory animus exists, the Board considers several factors, including proffering false reasons for taking the adverse action, disparate treatment of employees who have similar work records or offenses, deviating from past practices, and the length of time between the discipline and the protected activity. *Embassy Vacation Resorts*, 340 NLRB 846, 847 (2003); *Austal USA, LLC*, 356 NLRB 363, 363 (2010); *Lucky Club Co*, 360 NLRB No. 43 (2014). The Board also looks at other unfair labor practices, statements and actions showing the employer's discriminatory motivation. *Wright Line*, 251 NLRB 1083, 1089 (1980). Each of these factors was established during the hearing.

Although skills updates are not an official part of Respondent's progressive discipline policy, Respondent considered its skills updates formal coaching and the document is kept in an employee's personnel file permanently. (GC Exh. 4A). The Board has held that coachings are forms of discipline if they lay a foundation for future disciplinary actions. *Station Casinos, LLC*, 358 NLRB 1556, 1580 (2012). Here, Respondent specifically relied upon Dashner's September 27, 2018 Skills Update when it issued Dashner the October 24, 2018 Oral Warning. In fact, Respondent specifically mentioned the September 17, 2018 Skills Update and that "the following additional issues have occurred." (GC Exh. 4B). This language clearly shows Respondent used the September 17, 2018 Skills Update to lay a foundation for issuing the Oral Warning, thereby establishing that the Skills Update was an adverse employment action.

As detailed above, members of Respondent's management sent several emails in which they specifically admitted that they wanted to discipline Dashner for her protected activity. (GC Exh. 5). Although neither Rooker nor Kirkbride specifically admitted they wanted to issue a Dashner a skills update for her Facebook posts, it is clear that because of those Facebook posts, they wanted to find any reason to discipline Dashner.. On August 16, 2018, upon learning of one of Dashner's Facebook posts about Gary Blaine's termination, Kirkbride's initial response was to forward Dashner's post to Rooker, Kimble, and Rhodes with the comment that he believed her actions were "terminal." (GC Exh. 5A). On September 10, 2018, one week before issuing Dashner a skills update, Rooker sent an email to all of senior management asking whether employees who wrote posts on Facebook critical of Respondent could be disciplined for defamation or slander. (GC Exh. 5B). Kimble responded by reiterating Forrest Rhodes' legal opinion that Dashner's actions were protected under the Act; Kirkbride replied that Dashner's actions were silly and he wanted to discuss next steps with Rhodes. (GC Exh. 5B). Respondent's myriad comments about

leadership's desire to discipline Dashner for her Facebook posts clearly support a finding of animus.

The timing of Dashner's Skills Update is also indicative of Respondent's animus toward Dashner. Animus can be inferred from circumstantial evidence such as timing and disparate treatment. *Tubular Corp. of America*, 337 NLRB 99 (2001). Respondent issued the skills update to Dashner in the midst of her Facebook activity. Dashner began posting about layoffs and problems she had with Kirkbride in August 2018 and Respondent reacted by giving Dashner a skills update for the first time ever in the middle of September 2018. Further, Dashner was disciplined for an email she sent on September 11, 2018 – one day after Rooker and Kirkbride sent an email asking whether employees could be disciplined for posting criticism of Respondent on Facebook. (GC Ex 5B). Members of management were aware that the timing of the skills update was suspicious; in an email to Rooker and Wasson, Gay Kimble wrote, "Just checking in on the progress of Lori's Skills Update for the inappropriate email. The longer out we go from the event, the greater chance it will look like we are retaliating against her for other communications." (GC Exh. 5G).

Finally, Respondent's displayed animus when it issued the Skills Update to Dashner for something she had done, without incident, in the past. On September 11, 2018, Dashner sent an email to all employees about how to submit work tickets to the IS department using TopDesk and included a file with TopDesk instructions. (GC Exh. 3). In the past, Dashner had sent emails to the entire hospital staff without first running it by her supervisor, so she did not think anything of sending the September 11, 2018 email without first showing Supervisor Wasson. Dashner did run the email by her co-worker, Steve Hubeli, and he told her that he had no concerns and to go with

it. Giving Dashner the Skills Update for doing something Respondent had consistently condoned in the past is clearly evidence of animus against Dashner.

4. Respondent failed to meet its burden

Respondent has the burden to show that it made the decision to issue Dashner the Skills Update prior to her protected activity or that it would have issued the Skills Update regardless of her protected activity. Respondent failed to meet its burden. Respondent cannot simply present a legitimate reason for its decision, but it must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity. *W.F. Bolin Co.*, 311 NLRB 1118, 1119 (1993). The only evidence to support Respondent's assertion that it had a legitimate reason to issue Dashner a skills update is the testimony of Diane Wasson and Mark Rooker. Wasson and Rooker's testimonies are not credible as they are self-serving and not supported by the rest of the record. Dashner had worked at Respondent for almost twenty years, and had been supervised by Wasson for approximately three years and by Rooker for four years (both directly and indirectly). Dashner had sent emails to all hospital employees in the past; neither Rooker nor Wasson had ever given Dashner a skills update for sending an email to all employees about a work matter before September 2018. Indeed, neither Rooker nor Wasson had issued discipline of any sort to Dashner. (Tr. 328-9; 433)⁴. Respondent did not issue a skills update to Steve Hubeli, even though Dashner had run her September 11, 2018 email by him before sending it. Many employees had issues with TopDesk, but Dashner was the only one disciplined for criticizing the program, despite the fact that she continued using it. (Tr. 330). It is disingenuous for Respondent to argue that it would have issued Dashner a skills update for a September 11, 2018 civil email, reviewed by a coworker, that simply gave instructions on how to use TopDesk to ask

⁴ Dashner received discipline for a HIPAA violation in 2007. Dashner received a suspension after self-reporting that she accidentally disclosed HIPAA protected information.

IS for help but for Dashner's protected, concerted activity – particularly where Rooker sent an email on September 10, 2018 looking for reasons to discipline Dashner. (GC Exh. 5D).

The evidence does not support Respondent's position and Respondent has failed to show it would have given Dashner a skills update even if she hadn't been engaging in protected concerted activity.

ii. On or about October 24, 2018, Respondent Disciplined Dashner for Engaging in Protected Concerted Activity.

As set forth in detail above, the burdens of proof regarding Dashner's October 24 discipline fall under the frame work of *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). Again, General Counsel can overwhelmingly meet its burden to establish a *prima facie* case; however, Respondent has failed to show it would have given Dashner an Oral Warning even if she had not engaged in protected activity.

1. Dashner's protected concerted activity

Dashner's protected concerted activity through October 24, 2018 is set forth in Section IV, a, i, 1, *supra*.

2. Respondent's knowledge of Dashner's protected activity

Respondent's knowledge of Dashner's protected activity through October 24, 2018 is set forth in Section IV, a, i, 2, *supra*.

3. Respondent issued Discipline to Dashner based on discriminatory animus.

As set forth in Section IV, a, i, 3, *supra*, Respondent demonstrated different forms of animus from August 2018 through September 2018 and this animus persisted through Dashner's October 24, 2018 Oral Warning. In addition to the evidence of animus described above, emails show that in late September 2018, Rooker and Kirkbride continued to ask Kimble and Rhodes

whether Respondent could discipline Dashner for her protected concerted activity. (GC Exh. 5D; 5E; 5F). Kimble and Rhodes consistently explained that the National Labor Relations Act protected Dashner. (GC Exh. 5D; 5E; 5F). The statements contained in the emails amply support the conclusion that Respondent wanted to discipline Dashner and would use any excuse to do it.

Further, as explained below, Respondent's proffered reason for giving Dashner an Oral Warning is pretextual, which is evidence of animus toward Dashner. *See, Wright Line*, 251 NLRB 1083, 1089 (1980).

4. Respondent failed to meet its burden

Respondent has failed to show that it made the decision to issue Dashner an Oral Warning regardless of her protected activity. Respondent cannot simply present a legitimate reason for its decision, but it must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity. *W.F. Bolin Co.*, 311 NLRB 1118, 1119 (1993). Here, Respondent's reason for issuing the Oral Warning is clearly pretextual and the evidence Respondent presented demonstrates that it would not have disciplined Dashner but for her protected, concerted activity.

In their testimony, Wasson and Rooker attempted to paint Dashner as a problem employee for years who had a bad attitude and that the Oral Warning was a long time coming; however their testimony demonstrates is that Respondent did not take the same disciplinary actions against Dashner in the past for alleged similar behavior in the absence of protected activity. Wasson and Rooker claimed that they had been having problems with Dashner's behavior for months, even years; however, Dashner never received a discipline for her behavior until she began engaging in protected, concerted activity on Facebook in 2018. (Tr. 328-9; 405). Kimble testified that Rooker had spoken to her about Dashner's behavior for years, but he never requested that she be

disciplined until Dashner began criticizing Respondent on Facebook. (Tr. 146-7). Additionally, Respondent's own records contradict Wasson and Rooker's testimony about Dashner's performance history at Respondent, rendering their testimony incredible. Dashner's 2016 and 2017 performance appraisals, signed by Wasson, clearly indicate that Dashner was a good employee who exceeded performance standards and performed timely work. (GC Exh. 8, p. A00354, A00367, A00370).

Finally, the evidence provided by Respondent shows that management only began documenting Dashner's alleged negative attitude after she began engaging in protected, concerted activity, which supports the finding that Respondent was trying to find a pretextual reason to discipline Dashner. Wasson testified that in the summer of 2018, she created a list to document alleged problems she had with Dashner. (Tr. 431). Wasson admitted that only one event on the list occurred prior to mid-August 2018, after Dashner began her protected, concerted Facebook activity.⁵ Respondent then introduced Respondent's Exhibit 504, which is documentation of events Wasson created describing problems she had with Dashner. However, Rooker asked Wasson to create Respondent Exhibit 504 **after** Respondent terminated Wasson, presumably to create *post hoc* documentation to support its pretextual reason for Dashner's discipline. (Tr. 417).

The evidence is overwhelming and Respondent has no legitimate defense to the conclusion that Dashner received an Oral Warning only after engaging in protected conduct.

iii. On or about November 20, 2018, Respondent Terminated Dashner for Engaging in Protected Concerted Activity.

As set forth in detail above, Dashner's November 20, 2018 termination is analyzed using *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). General Counsel more than meets its burden to establish a *prima facie* case under

⁵ Respondent did not offer the document labeled as Respondent Exhibit 501 into evidence.

Wright Line and Respondent cannot show it would be terminated Dashner but for her protected concerted activity.

1. Dashner's protected concerted activity

Dashner's protected concerted activity through October 24, 2018 is set forth in Section IV, a, i, 1, and Section IV, a, ii, 1, *supra*.

In addition to the protected, concerted activity described above, between November 14 and November 17, 2018, Dashner had made repeated posts on her personal Facebook page about Respondent's decision not to provide gift certificates for turkeys to its employees and the Hospital Foundation's reversal of that in December 2018. (GC Exh. 2U; 2V; 2W).

On November 19, 2018 and November 20, 2018, Dashner posted that she would be creating a petition calling for Kirkbride to be removed as Respondent's CEO. (GC Exh. 2X, 2Y). Dashner included a picture of Kirkbride with her post – the same picture that she had used as the “Susie Bee Bear” profile picture since August 2018. Dashner deleted the November 19, 2018 post because she decided to use an electronic petition website, and on November 20, 2018, Dashner reposted about the petition to remove Kirkbride with a link to an electronic petition.

Actions addressing the conduct of supervisor or quality of supervision may be protected, including activities directed toward the election or termination of a supervisor where certain conditions are present. In making this determination, the Board applies the first three parts of the four-part test set forth in *NLRB v. Oakes Machine Corp.*, 897 F.2d 84, 89 (2d Cir. 1990): “(1) whether the protest originated with employees rather than other supervisors; (2) whether the supervisor at issue dealt directly with the employees; [and] (3) whether the identity of the supervisor is directly related to terms and conditions of employment.” See *Southern Pride Catfish*, 331 NLRB 618, 620 (2000); *QSI, Inc.*, 346 NLRB 1117, 1117 (2006) (unlike some courts of

appeals, including the Second Circuit, the Board does not impose a “reasonable means” requirement on employees’ concerted activity). See *Metropolitan Transport, LLC*, 351 NLRB 657, 661-662 (2007). Here, Dashner’s petition to remove Kirkbride as Respondent’s CEO is protected, concerted activity. The protest clearly originated with Dashner, a rank-and-file employee. Kirkbride regularly dealt with employees directly – he held regular “State of the Hospital” meetings with employees and published a regular column called “Direct Talk from the Direct Line” in which employees could ask submit questions and Kirkbride would answer them. Finally, Kirkbride’s identity is directly related to the terms and conditions of employment. Kirkbride was and remains the CEO of Respondent and, among other things, had the final say in whether to lay off employees and change terms and conditions of employment. Under the current Board standard, Dashner’s petition to remove Kirkbride as CEO was protected, concerted activity designed for the mutual aid and protection of Dashner and her fellow employees.

2. Respondent’s knowledge of Dashner’s protected activity

Respondent’s knowledge of Dashner’s protected activity through October 24, 2018 is set forth in Section IV, a, i, 2, and Section IV, a, ii, 2 *supra*.

Emails provided by Respondent show that Respondent knew of Dashner’s petition almost immediately. (GC Exh. 7A). Further, Kirkbride specifically mentioned Dashner’s petition during a senior leadership meeting the morning of November 20, 2018. (Tr. 172).

3. Respondent terminated Dashner based on discriminatory animus.

As is explained above, when determining whether an inference of discriminatory animus exists, the Board considers several factors, including proffering false reasons in defense of taking the adverse action, disparate treatment of certain employees with similar work records or offenses, deviation from past practice, and the proximity in time of the discipline to the protected activity.

Again, the record is replete with examples of animus toward Dashner for her November 2018 protected, concerted activity.

The timing of Dashner's termination, less than 24 hours after creating a Facebook post about a petition to remove Kirkbride as Respondent's CEO, provides the clear impression Respondent fired Dashner because she engaged in protected concerted activity. In his first email to Rooker after seeing Dashner's Facebook post about the petition, Kirkbride wrote, "[s]he's at it again," referring to Dashner's prior protected, concerted activity. (GC Exh. 7A). Sixteen minutes later, Kirkbride wrote that he believed Dashner had used a hospital picture and would be asking marketing to investigate the matter. (GC Exh. 7B). The facts demonstrate that almost immediately after Dashner posted about her petition, Kirkbride was attempting to try to find a pretextual reason to discipline Dashner for what he considered protected, concerted activity.

During the hearing, Respondent attempted to shift the reason for Dashner's termination to include her behavior, another clear indication of animus. Shifting reasons for termination "raises the inference that the employer is "grasping for reasons" to justify an unlawful discharge." *Meaden Screw Prod., Co.*, 336 NLRB 298, 302 (2001). Dashner's termination paperwork does not list her behavior as a reason for her discharge. (GC Exh. 4C). Yet, during his testimony, Rooker tried to explain that behavior played a role in Dashner's termination (Tr. 300-1). Rooker stated that Dashner did not accept coaching which factored into her termination, despite the fact that after her coaching Dashner voluntarily asked to meet with Rooker and Wasson to evaluate her performance and to try to improve. (Tr. 301; 56). Also, as described above, after terminating Dashner, Rooker asked Wasson to create a document describing problems she had with Dashner, seemingly to create other shifting reasons why Respondent fired Dashner. (Tr. 417; Resp. Exh. 504).

Most importantly, as discussed below, Respondent's proffered reason for terminating Dashner is pretext, which is evidence of animus toward Dashner. *See, Wright Line*, 251 NLRB 1083, 1089 (1980). Respondent made up a reason to terminate Dashner that was not based upon the facts and that relied on applying a policy to Dashner in a discriminatory manner.

4. Respondent failed to meet its burden

As explained above, since General Counsel made its initial showing of discrimination, the burden of persuasion has shifted to Respondent to show it would have terminated Dashner regardless of her protected activity. *See, Wright Line*, 251 NLRB 1083 (1980). If a Respondent's reasons for discipline are pretextual, it fails to meet its burden. *Id.* Here, Respondent provided only pretextual reasons for terminating Dashner's employment. The first reason provided by Respondent is "Unauthorized removal or possession of Hospital property or records." In her termination paperwork, Respondent wrote that "on or before November 19, 2018, Lori downloaded a picture of the CEO from the Hospital server and posted that picture without permission on a social media site." (GC Exh. 4C). This is not true. Dashner had used a publicly disseminated picture of CEO Jim Kirkbride as her "Susie Bee Bear" Facebook profile picture since August 2018 and Respondent knew Dashner had been using this picture. (GC Exh. 5A; Tr. 60). Dashner obtained the image of Kirkbride by screenshotting a picture of Kirkbride contained in an issue of Respondent's "Highlights" newsletter that she had received by email on her personal phone. (Tr. 30-1). "Highlights" is not a confidential document. (Tr. 305-6). After Kirkbride alerted Rooker about Dashner's petition for Kirkbride's termination, Rooker searched Dashner's computer files to see whether she had unlawfully downloaded the picture of Kirkbride. (Tr. 343). Rooker did not find the picture in Dashner's folder. (Tr. 305). Rooker did find the picture in the Susan B. Allen Hospital Foundation's server files, but Dashner did not have access to the

Foundation's server. (Tr. 60). Additionally, Rooker did not even attempt a simple investigation and ask Dashner where she got Kirkbride's picture. (Tr. 308). Despite knowing Dashner had not downloaded Kirkbride's picture from the Respondent's server, Respondent listed it as the first reason for Dashner's termination, which is clear evidence of pretext.

The second reason proffered by Respondent for Dashner's termination is that she had used her hospital computer for personal reasons over a long period of time. (GC Exh. 4C). Again, this reason is unequivocally pretextual. First, it is important to point out that Respondent would not have discovered Dashner's personal files but for Rooker searching Dashner's computer trying to figure out how Dashner got the picture she used in her protected, concerted activity. Additionally, prior to November 19, 2018, Rooker had never reviewed Dashner's individual electronic folders for personal items. (Tr. 344). Moreover, Dashner was the only employee whose computer Rooker looked at on November 19, 2018. (Tr. 297).

With regard to the policy upon which Rooker relied to terminate Dashner, Rooker admitted that Respondent's policy about saving personal items in electronic work folders stated that **any** personal information stored in work files is a violation. (Tr. 299). However, Rooker also stated that he expected employees to have some personal items on their computers. (Tr. 298-9). Rooker's story then changed and he testified that it wasn't necessarily that Dashner kept personal files on her computer, but it was the amount of personal information she had stored over the course of more than 10 years. (Tr. 299-300). Again, the shifting rationale for how Dashner violated Respondent's computer policy supports a finding of pretext. Finally, Respondent provided no examples of other individuals it had disciplined or terminated for keeping personal items in their electronic work files, demonstrating that while Rooker admitted that employees kept personal

items on their computers, the only person who was discipline for doing so was Dashner, evidencing the disparate treatment of Dashner. (Tr. 299).

The evidence is overwhelming. Respondent has no defense to the conclusion that it would not have terminated Dashner had she not engaged in protected, concerted activity. There is no question that Dashner's protected, concerted activity led Respondent to terminate her employment.

b. Respondent Unlawfully Terminated Kimble Because She Refused to Commit Unfair Labor Practices.

The facts clearly demonstrate that Respondent terminated Gay Kimble, an employee with over 35 years of experience and no discipline, because she refused to countenance the termination of Dashner based on her protected, concerted activities. . Typically, supervisors do not enjoy the protections that the Act provides to employees. *Parker-Robb Chevrolet*, 262 NLRB 402 (1982). However, the Board has held that the discharge of a supervisor is unlawful when it interferes with the right of employees to exercise their rights under Section 7 of the Act, such as if a supervisor refuses to commit an unfair labor practice. *Parker-Robb Chevrolet*, 262 NLRB 402 (1982).

In cases where the motivation behind an employer's decision to terminate an employee is at issue, the Board uses the *Wright Line* framework. *See, e.g., Kenrich Petrochemicals*, 294 NLRB 519, 531 (1989); *Texas Dental Ass'n*, 354 NLRB 398 (2009). As explained above, under *Wright Line*, the General Counsel must show (1) that the employee conduct was protected and concerted; (2) the employer know or believed that the employee engaged in the protected conduct; and (3) the employer harbored animus against the employee's protected activity. *Meyers Industries*, 268 NLRB 493, 497 (1984); *Grand Canyon University*, 360 NLRB No. 14 (2013). Once the General Counsel establishes a prima facie case under *Wright Line*, the burden then shifts to the Respondent to show that it would have taken the same action in the absence of the employee's protected activity. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied*

455 U.S. 989 (1982). Respondent cannot simply present a legitimate reason for its decision, but it must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity. *W.F. Bolin Co.*, 311 NLRB 1118, 1119 (1993).

In the instant case, General Counsel can overwhelmingly meet its burden; Respondent cannot show it would have terminated Gay Kimble if she had not refused to commit an unfair labor practice by agreeing to discipline and terminate Lori Dashner's employment.

i. Kimble refused to commit an unfair labor practice

Between August and November 2018, members of management repeatedly told Kimble that they wanted to terminate Dashner for her protected, concerted Facebook posts. In response, Kimble repeatedly explained that disciplining Dashner for protected concerted activity would violate the National Labor Relations Act. Through in-person meetings and emails, CHRO Kimble tried to educate other members of management about the National Labor Relations Act and explained that their desire to punish Dashner for her protected, concerted activity could open Respondent to legal liability.

General Counsel provided several emails in which Kimble told other members of management not to discipline or terminate Dashner because doing so would open Respondent to legal liability under the Act. CEO Kirkbride first expressed interest in terminating Dashner's employment on August 16, 2018 via email; in response, Kimble received legal advice from Rhodes that doing so would risk liability for violating the Act. (GC Exh. 5A; 5B). On September 10, 2018, CIO/COO Rooker sent an email inquiring whether Dashner's Facebook posts could be considered defamatory. (GC Exh. 5B). In response, Kimble wrote that Rhodes' legal advice was that Dashner was protected by the Act. (GC Exh. 5B). On September 25, 2018, Rooker emailed Kimble to express his frustration with Rhodes' legal advice because Rhodes did not state that

Respondent could act against Dashner for her Facebook posts. Kimble responded that Rhodes' advice was that Dashner did not commit wrongdoing and if Respondent disciplined Dashner, it would violate the National Labor Relations Act. (GC Exh. 5E). Despite knowing the answer, per Rooker's request, Kimble reached out to Rhodes again and received the same answer – if Respondent disciplined Dashner for her protected activity, it risked liability under the Act. (GC Exh. 5F).

Kimble also explained the Respondent's potential liability under the National Labor Relations Act during in person meetings with other members of management. During a September 2018 senior leadership meeting, Kirkbride said Respondent should take strong disciplinary action against Dashner for her Facebook posts. (Tr. 137). Kimble told everyone at the meeting that Respondent could not take disciplinary action against Dashner for the posts because of the Act. (Tr. 137-8). Rooker often came to Kimble's office to tell her that he and Kirkbride were upset that Human Resources refused to act against Dashner; every time, Kimble explained that the Act protected Dashner. (Tr. 138-9). On one occasion, Interim CFO Immordino came into Kimble's office to complain that Human Resources was being uncooperative by not terminating Dashner; Kimble again explained that Dashner was protected by the Act. (Tr. 150).

There is no question that Kimble refused to discipline or terminate Dashner because of her protected, concerted activity and Respondent never denied that Kimble refused to commit an unfair labor practice.

ii. Respondent knew of Kimble's refusal to discipline or terminate Dashner for her protected concerted activity.

Since Kimble was an agent of Respondent and the most senior Human Resources employee at Respondent, Kimble told other members of senior leadership directly that she refused to discipline or terminate Dashner because she believed it would violate the National Labor Relations

Act. Examples of times Kimble directly told other members of management that she refused to commit an unfair labor practice are detailed above.

iii. Respondent harbored animus toward Kimble for her position on Dashner

The record is full of examples of animus Respondent showed toward Kimble because she told them their actions might violate the National Labor Relations Act. In determining whether an inference of discriminatory animus exists, the Board considers several factors, including proffering false reasons for taking the adverse action, disparate treatment of employees who have similar work records or offenses, deviating from past practices, and the length of time between the discipline and the protected activity. *Embassy Vacation Resorts*, 340 NLRB 846, 847 (2003); *Austal USA, LLC*, 356 NLRB 363, 363 (2010); *Lucky Club Co*, 360 NLRB No. 43 (2014); *Wright Line*, 251 NLRB 1083, 1089 (1980).

Regarding timing, similar to how Dashner was terminated in close proximity to her protected, concerted activity, Kimble was terminated in close proximity to telling other members of management that Dashner could not be terminated for her protected activity. Respondent argues that Dashner and Kimble's terminations were unrelated; such an argument is disingenuous, at best. In the week prior to Kimble's termination, Dashner had been causing a fuss by notifying other employees of Respondent's decision not to give gift certificates to employees for Thanksgiving. (GC Exh. 2U, 2V, 2W). The day before Kimble's termination, Dashner posted about a petition to remove Kirkbride as CEO of Respondent. (GC Exh. 2X). Respondent has appeared to argue that Kirkbride began drafting Kimble's termination paperwork before Dashner created the petition to have Kirkbride fired; however, this overlooks the fact that Dashner had been engaging in protected concerted activity for **months** and that, prior to the petition, Rooker told Kimble that he and Kirkbride had met several times and were angry that Kimble refused to take response to Dashner's

Facebook posts. (Tr. 138-9). Further, Respondent clearly timed Dashner and Kimble's terminations to happen one after the other, which supports the fact that Kimble's unlawful termination was related to Dashner's unlawful termination. Kimble and Dashner were terminated between 2:00 pm and 3:00 pm on November 20, 2018. Kirkbride sent only one email to Rooker to terminate both Kimble and Dashner's access. The facts clearly support a finding of animus.

Additionally, Respondent made several clear statement to Kimble about the fact that other members of management did not like how she was handling the Dashner situation. Rooker told Kimble that he and Kirkbride were upset that she had not disciplined Dashner. (Tr. 138-9). Interim CFO Immordino told Kimble she was being "uncooperative" by refusing to terminate Dashner.⁶ (Tr. 150). On November 19, 2018, the day before firing Kimble, Kirkbride told Kimble that "HR is an obstacle to the leaders of this organization," and that "HR has put up numerous obstacles when it comes to Lori Dashner," clearly referring to the fact that Kimble refused to terminate Dashner's employment because doing so would violate that National Labor Relations Act. (Tr. 167-8). Of course, because Kirkbride did not testify, this admission is unrebutted.

Finally, animus can be inferred because Kimble was not involved in the decision to terminate Dashner – a clear deviation from past practice regarding the termination of employees. Kimble was always involved in serious disciplinary disputations, such as suspensions and terminations. (Tr. 146). Kimble reviewed the applicable documents, made sure that Respondent followed the law, and acted as the final say before Human Resources made a termination recommendation to Kirkbride. (Tr. 146). Yet, even though Kimble was always involved in employee terminations, Rooker and Kirkbride did not involve Kimble in Lori Dashner's termination. One can assume Kimble was not involved in Dashner's termination because she again

⁶ Despite the fact that Immordino is still a member of management and an agent of Respondent, Respondent did not call Immordino to testify and did not deny he made these statements.

would have told Kirkbride and Rooker that the termination would likely violate the National Labor Relations Act. If the terminations were completely unrelated, one would assume Kimble would have been involved in the decision to terminate Dashner.

Most importantly, as discussed below, Respondent's proffered reason for terminating Kimble is clear pretext and another example of animus toward Dashner. *See, Wright Line*, 251 NLRB 1083, 1089 (1980).

iv. Respondent failed to satisfy its burden and would not have terminated Kimble but for her refusal to discipline or terminate Dashner for her protected concerted activity.

Again, General Counsel has made its initial showing of discrimination and the the burden of persuasion has shifted to Respondent to show it would have terminated Kimble regardless of her protected activity. *See, Wright Line*, 251 NLRB 1083 (1980). Respondent has provided only pretextual reasons for Kimble's termination and the facts show that Kimble would not have been terminated but for her protected activity.

First, as is noted above, Rooker testified that Kirkbride made the decision to terminate Kimble and that he was not involved; however, Respondent chose not to call Kirkbride, the person who made the decision to terminate Kimble, to the stand. (Tr. 319). This should automatically lead to an adverse inference that the reasons Kirkbride would have articulated are not credible. *See, Desert Cab, Inc. d/b/a Ods Chauffered Transportation*, 367 NLRB No. 87 (2019)(citing *International Automated Machines*, 285 NLRB 1122, 1123 (1987), *enfd.* 861 F.2d 720 (6th Cir. 1988); *Natural Life, Inc.*, 366 NLRB No. 53, slip op. at 1, fn. 1 (2018)).

Second, every reason listed on the Personnel Report terminating Kimble's employment is pretextual and false. (GC Exh. 6). Respondent wrote Kimble was terminated for "willful violation

of safety regulations” and “failure to support a department leader.” (GC Exh. 6). These reasons are not supported by any facts.

Respondent has alleged that Kimble violated an unidentified safety regulation when she took too long to investigate whether an employee named Jim Holderman should be terminated for falsifying a form relating to a hospital fire drill.⁷ Further, Respondent alleges that Kimble did not support Rooker or Kirkbride’s decision to terminate, and not suspend, Holderman. Again, the evidence contradicts Respondent’s allegations. Human Resources was notified on Thursday, November 8, 2018 that Holderman had forged a document when Holderman’s manager, Alan Patterson, notified Human Resources Manager Sheila Hoyt. (Tr. 152; 376). Patterson wanted Holderman fired, but Hoyt had some doubts about whether termination was appropriate. (Tr. 152). Hoyt then met with Kimble to notify her what was going on with Holderman and to get some advice on how to proceed. (Tr. 152). Kimble told Hoyt to perform a thorough investigation and to work with Patterson and Rooker (Patterson’s supervisor) so they could reach a collaborative decision. (Tr. 153). On Friday, November 9, 2018, Hoyt met with Rooker and Patterson and Patterson agreed to start writing the documentation for Holderman’s discipline. (Tr. 154). When Hoyt did not hear from Patterson by Thursday, November 15, 2018, she sent him an email asking about the status of the Holderman disciplinary paperwork. (GC Exh. 5H). At almost the same time, Kimble emailed Hoyt to check on the status of the Holderman paperwork. (GC Exh. 5H). At this point, 6 working days had passed from when Human Resources was notified about Holderman and Hoyt had waited for Patterson’s paperwork for 4 out of the 6 days.

On November 15, 2018, since Hoyt and Kimble were still not sure whether Holderman’s actions warranted termination and not suspension, they met with CQO Francia Bird, the person

⁷ There is no dispute that the fire drill occurred or that Mr. Holderman falsified the document at issue.

who oversaw fire drills. (Tr. 157-8; 385). After meeting with Bird, Hoyt and Kimble believed suspension was the appropriate discipline for Holderman. (Tr. 159; 386). On Friday, November 16, 2018, Hoyt met with Rooker and explained that she and Kimble thought suspension was appropriate. (Tr. 388-390). Rooker did not agree, so Hoyt agreed to write Holderman's discipline as a termination and let CEO Kirkbride make the final decision. (Tr. 388-90). Per Rooker's testimony, Rooker never ordered Hoyt or Kimble to fire Holderman and neither Hoyt nor Kimble refused to effectuate Holderman's termination. (Tr. 324). On Monday, November 19, 2018, Hoyt was out of the office, so Kimble presented the termination paperwork to Kirkbride. (Tr. 163).

Respondent's proffered reasons for Kimble's termination do not make sense, since they are clearly pretextual and not based in fact. Kimble was a 35-year employee at Respondent who had never been disciplined before. Kimble committed no safety violation. Human Resources performed a timely investigation into Holderman's misconduct and any delay was because Holderman's manager took four days to draft preliminary paperwork. Although Hoyt did the bulk of the investigation, Kimble kept herself informed, became involved in every step of the way, and did everything she could to help Hoyt. Kimble met with subject matter expert Francia Bird to make sure that Holderman's discipline was supported by the facts.⁸ Ultimately, Human Resources supported Rooker and Kirkbride's decision and finalized paperwork to terminate Holderman's employment. At no point did Kimble refuse to follow Kirkbride's orders or fail to support Kirkbride. Kimble did everything as she should have; Kirkbride had no reason to terminate Kimble for the Holderman investigation.

These facts support one obvious conclusion: Respondent would not have terminated Kimble but for her refusal to commit an unfair labor practice and terminate Lori Dashner. In his

⁸ Kirkbride claims he was angry that Kimble researched whether falsifying the document was a terminable offense, but in his November 19, 2018 statement, he told Kimble he too had to research the issue.

own words, Kirkbride saw Kimble as an “obstacle” to firing Lori Dashner and he terminated Kimble as a result.

V. CONCLUSION

Counsel for the General Counsel submits that, as alleged in the Consolidated Complaint and demonstrated above, Respondent violated Section 8(a)(1) of the Act by (1) unlawfully issuing a skills update to Lori Dashner on September 17, 2018; (2) unlawfully issuing an oral warning to Lori Dashner on October 24, 2018; (3) unlawfully terminating Lori Dashner on November 20, 2018; and (4) unlawfully terminating Gay Kimble on November 20, 2018. Counsel for the General Counsel urges the administrative law judge to so find and order the appropriate remedies.

Dated: August 6, 2019

Respectfully submitted,

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