

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

Montefiore Medical Center
Respondent

and

Case 02-CA-229024

New York State Nurses Association
Charging Party

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

Susannah Z. Ringel
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Dated at New York, New York
August 7, 2019

Counsel for the General Counsel submits this reply brief in support of her exceptions to the decision of the Administrative Law Judge in this case, and in opposition to the answering brief filed by Respondent. For the reasons set for the General Counsel's Brief in Support of Exceptions, the Board should independently evaluate the credibility of the witnesses who testified in this case. It is clear, and not contested by Respondent, that when an Administrative Law Judge has made credibility resolutions which are not based primarily on an evaluation of the demeanor of witnesses, the Board may independently evaluate credibility. *Stevens Creek Chrysler Jeep Dodge*, 357 NLRB 633, 635 (2011), and other cases cited in the Brief in Support of Exceptions.

While Respondent attempts to bolster the conclusions of the Administrative Law Judge in its answering brief, a review of the record, as summarized in the Brief in Support of Exceptions, will serve to demonstrate that the credibility resolutions in the Decision are not properly supported. I will not belabor the points made already in the Exceptions and Brief in Support, but take this opportunity to address two points argued in Respondent's Answering Brief.

As discussed in the Brief in Support of Exceptions, the Administrative Law Judge did not articulate a basis for his discrediting of the testimony and near-contemporaneous email of Marie Kiffin, who corroborated the other two nurses' recollection of their supervisor's threat to pull an employee's file, opening a, "whole can of worms." The ALJ, rather, implied that he was discounting her testimony, and her email describing the same threat, because the underlying charge in the case had not been filed immediately after the incident alleged in the complaint. ALJD 15: fn 13. In an attempt to support this logic, Respondent cites two cases from the 1960s in which the Board does not make any findings regarding the timing of filing of charges and credibility. Answering Brief at 12-13.

The cases relied upon by Respondent -- *Walter Toebe*, 162 NLRB 80 (1966), and *Ira S. Bushey & Sons*, 175 NLRB 1015 (1969) -- are both cases in which the Board affirmed findings by Trial Examiner Paul Bisgyer. In both of these cases, the charges had been filed by an individual charging party who was a witness in the trial. It was the testimony of that charging party witness which the trial examiner considered in his decision. In each of these cases, the trial examiner found that the *Charging Party witness's* credibility was not enhanced by his failure to file his charge more promptly after the alleged violation. The Board did not comment on this reasoning in adopting the decisions. General Counsel is unaware of any cases in which the Board has applied this reasoning itself. In any event, the cited cases do not support the proposition that an employee witness should be discredited in whole or in part based on the timing of the filing of a charge that *she did not file*. In the instant case, the Union, and not any of the employee witnesses, filed the underlying charge. There is no evidence indicating that any of the witnesses played any role in the timing of the filing of the charge, nor indeed is there any evidence regarding the reasons for the timing of the filing whatsoever.

Finally, Respondent argues that the Administrative Law Judge did not apply an incorrect subjective standard in relying upon the nurses' testimony that they did not object when Simmons made her threat. ALJD 15:1-14; Answering Brief at 20-21. Rather, Respondent argues, the employees' testimony (apparently deemed credible, in Respondent's argument) that they did not speak up is appropriately used to undermine the credibility of their testimony that the threat was made at all. Respondent's logic requires that the three employees would all lie about the threat itself but not about their own failure to object to their supervisor about it.

Counsel for the General Counsel respectfully urges that the Board find that Respondent violated Section 8(a)(1) of the Act as alleged and order that Respondent post a Notice remedying the violation.

Dated at New York, New York,
August 7, 2019.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Susannah Z. Ringel". The signature is written in a cursive style with a large, looped initial "S".

Susannah Z. Ringel
Counsel for the General Counsel

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AFFIDAVIT OF SERVICE

I hereby certify that a copy of Counsel for the General Counsel's Reply Brief in Support of Exceptions to the Decision of the Administrative Law Judge is being served on August 7, 2019, on the following parties:

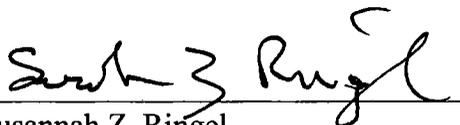
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