

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

THE SUSAN B. ALLEN MEMORIAL HOSPITAL

and

GAY KIMBLE, an Individual

Case 14-CA-233000

and

LORI DASHNER, an Individual

Case 14-CA-233898

Lauren Fletcher, Esq., for the General Counsel.

Alan L. Rupe and Annie E. Calvert, Esqs. (Lewis Brisbois, Wichita, Kansas and Kansas City, Missouri), for the Respondent.

Donald N. Peterson, II, and Sean McGivern, Esqs. (Graybill & Hazelwood, LLC, Wichita, Kansas), for Charging Party Gay Kimble.

DECISION

STATEMENT OF THE CASE

Arthur J. Amchan, Administrative Law Judge. This case was tried in El Dorado, Kansas on July 1 and 2, 2019. Gay Kimble filed the charge in case 14-CA-233000 on December 18, 2018. Lori Dashner filed the charge in case 14-CA-233898 on January 11, 2019. The General Counsel issued a consolidated complaint on March 7, 2019.

The General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by issuing Lori Dashner a “skills update” on September 17, 2018, issuing Dashner an oral warning on October 24, 2018 and discharging her on November 20, 2018 in retaliation for protected concerted activity.

The General Counsel also alleges that Respondent violated Section 8(a)(1) by discharging Gay Kimble, its Chief Human Resources Officer, a statutory supervisor, on November 20, 2018, for refusing to commit unfair labor practices with regard to Lori Dashner.

On the entire record,¹ including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

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FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, operates a nonprofit hospital in El Dorado, Kansas, where it annually derives gross revenues in excess of \$250,000. Respondent purchases and receives goods valued in excess of \$50,000 directly from points outside of Kansas. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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II. ALLEGED UNFAIR LABOR PRACTICES

Lori Dashner

Respondent hired Lori Dashner in 1998. Initially, Dashner worked at the hospital as a registered nurse. However, for the last several years of her employment, Dashner was a meditech coordinator, an information technology position dealing with such matters as patients' computerized records. In that capacity, Dashner reported directly to Mark Rooker, now Respondent's Chief Operating Officer and Chief Information Officer until 2016, when she started reporting to a former peer, Diana Wasson, who was promoted to manager of information systems.

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Prior to September 2018, Respondent had disciplined Dashner once, in 2007. Prior to September 2018, hospital management had never issued a coaching or "skills update" to Dashner. For the several years prior to 2018, Dashner's supervisors, including Diana Wasson, had given her performance reviews that rated Dashner as "exceeds expectations."²

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In March 2016, James Kirkbride became CEO of Susan B. Allen Hospital. The hospital apparently suffered some financial losses in 2017 and 2018. In late 2017, Respondent laid off a number of employees in its business office. In August 2018, Respondent laid off Gary Blaine, the hospital chaplain, who appears to have been a friend of Lori Dashner's.

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¹ Tr. 251, line 11 should read "leading" instead of "baiting."

² G.C. Exh. 8, page A347 is Dashner's review for 2016, completed by Wasson on March 29, 2017. Page 356 is the review for 2017, completed by Wasson on March 20, 2018.

Starting in August 2018, Dashner began posting material on her Facebook page critical of Kirkbride. Some of these posts were under her real name and others under a pseudo-name, Susie Bee Bear. No later than September 21, Respondent was aware that Dashner was Susie Bee Bear, G.C. Exh. 5(d). These posts included criticism of the lay-offs, particularly the lay-off of Blaine,³ critical comments about his salary, complaints about employees' loss of a cafeteria benefit,⁴ a reduction in the number of employees' hours of paid time off and a cap on the hospital extended illness benefit. Dashner also met with Kirkbride, Rooker and Wasson to discuss these changes.

In a post, dated August 19, using her pseudo-name, Dashner implicitly criticized Kirkbride for laying off employees and compared their salaries to his. The post included a "head shot" photo of Kirkbride, G.C. Exh. 2 (a). On all her posts from August to her discharge on November 20, Dashner used the same Kirkbride photo.

In a post under Susie Bee Bear dated August 23, Dashner wrote that the "[hospital] board needs to hire a new CEO that can put the hospital back on the right path, and that includes having a chaplain for patients, families, community and staff," G.C. Exh. 2(i). In early September 2018, she accused Kirkbride of unethically accepting complimentary tickets from a vendor to a Kansas City Royals baseball game, and violating Respondent's policy on accepting gratuities, G.C. Exh. 2(n). At about the same time she questioned his ethics with regard to a decision to establish an urgent care center, G.C. Exh. 2(o).

In mid-November Dashner posted an implied criticism of the hospital's decision not to provide employees with a certificate with which to purchase Thanksgiving turkeys. Then on November 19, at 6:46 p.m., Dashner posted a message under her own name, soliciting employees to sign a petition to the hospital board of directors to remove Kirkbride as Respondent's CEO, G.C. Exh. 2(x).

Dashner's September 17, 2018 skills update

On September 11, 2018, Dashner sent an email to all hospital employees entitled "Top Desk Requests." Top Desk is the customer service system by which employees request help from the hospital's IT department. In that email, Dashner stated that in order to be more efficient with IT resources, several IT/Meditech Top desk tickets were going to be closed. She stated further that employees would be notified of this fact by email. Dashner added that employees who wanted the IT staff to revisit their request could do so by forwarding the closure email to her or enter a new ticket.

On the evening of September 11, Dashner's direct supervisor, Diana Wasson, sent Mark Rooker an email stating that she was livid about Dashner's email and that it was sent without her knowledge. She asked Rooker if she could issue Dashner a verbal warning, R. Exh.503.

³ Some of Dashner's posts included a petition to "Bring Gary Back." It appears that it was the lay-off of Blaine that led Dashner to start making the Facebook posts critical of Kirkbride.

⁴ Respondent had given hospital employees a \$500 benefit to eat in the hospital cafeteria. After this was eliminated, the benefit was changed to \$0.35 for each hour worked. That benefit was also eliminated shortly after it was implemented.

The next day, Wasson called Dashner into her office and told Dashner that her email was inappropriate and overstepped her role. Wasson consulted with Respondent's Chief Human Resources Officer, Gay Kimble, who recommended that Wasson issue Dashner a "skills update," which is akin to a coaching, Tr. 417.⁵

Dashner's September 24, 2018 oral warning

On September 24, 2018, Respondent, by Diana Wasson, issued Dashner an oral warning. This warning was the result of a meeting the day before in which Dashner questioned the value of Top desk. This made Wasson angry. Apparently, Wasson and Dashner yelled at each other and Wasson abruptly ended the meeting. Dashner may have repeated her reservations as to the value of Top desk in an email on the 24th. Wasson issued the oral warning to Dashner for being disrespectful to her and having a negative attitude, G.C. 4(B). HR Director Kimble was present when Wasson issued the warning. Dashner offered to resign. Kimble told her that wasn't necessary, that Respondent simply wanted everyone to be on the same page, working together.

Respondent discharges Dashner on November 20, 2018

As mentioned previously, on November 19, at 6:46 p.m., Dashner posted a message under her own name, soliciting employees to sign a petition to the hospital board of directors to remove Kirkbride as Respondent's CEO, G.C. Exh. 2(x). Jim Kirkbride became aware of this posting no later than 7:15 that evening. At 7:36 p.m. he emailed COO Mark Rooker. Kirkbride stated that the photo used by Dashner was not on his Linked In account or Facebook page. Thus, he concluded it was a hospital picture. He informed Rooker that he was going to ask the marketing department to determine whether the photo used by Dashner was a hospital photo, G.C. Exh. 7(b). On the morning of November 20, Chase Locke, Executive Director of the Hospital Foundation emailed Kirkbride, informing him that the photo had appeared in several issues of *Highlights*, a newsletter published by the hospital's marketing department.

On the evening of November 19 or the morning of the November 20, Mark Rooker initiated a search of Lori Dashner's computer. Although looking for evidence that the Kirkbride photo was in her files, he did not find it. However, Rooker determined that Dashner stored a lot of personal information (material about her divorce, taxes, bills, etc.) on her work computer.

Rooker testified that Dashner violated Respondent's policy on the use of Electronic Communications Devices, R. Exh. 538. However, Rooker was aware that some other employees also have personal information on their work computers, for example, their résumé, or insurance information. Rooker conceded that Respondent's electronic communications policy does not make exceptions that allow a small amount of personal information to be kept on hospital computers. He did not search any other employee's computer looking for personal information.

⁵ Respondent states a skills update is non-disciplinary, however, the last paragraph of the "skills update" document, G.C. Exh. 4 (A), suggests that it is a first step towards disciplinary action. The oral warning issued to Dashner on October 24 is in fact predicated in part on the "skills update."

On November 20, in the afternoon, after Dashner posted her solicitation to sign a petition about Kirkbride, G.C. Exh. 2(x), she was summoned to Mark Rooker's office. Rooker presented Dashner with a document discharging her for the following reasons: unauthorized removal or possession of hospital property or records; malicious abuse of hospital property; and blatant acts of misconduct damaging to the facility or a patient. By way of further explanation, the discharge document, G.C. Exh. 4(c) states:

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. Upon investigating Lori's use of hospital computers for personal reasons, many inappropriate folders and documents were discovered indicating she has been misusing hospital equipment for a long period of time.

At trial, Rooker testified that he made the decision to terminate Dashner.

Summary of the record evidence regarding the Kirkbride photo

Lori Dashner had been using the same photo of CEO Kirkbride that she used on November 19 in all her Facebook posts since August. Respondent did not show any interest in where she obtained that photo until after she posted the solicitation for his removal petition at 6:46 p.m. on November 19, R. Exh. 520. Dashner asserts she obtained the photo from the hospital's *Highlights* newsletter, which is publicly available.⁶ When Respondent searched her computer for images of the photo, she used in her Facebook posts, it did not find it. Respondent never asked Dashner where she got the photo. I credit her testimony that she obtained it by photographing the picture from *Highlights* on her I-phone.

Gay Kimble

Respondent hired Gay Kimble in 1983. Kimble worked in human resources throughout her employment at Susan B. Allen. In about 2015 or 2016, she became the Chief Human Resources Officer. Respondent never disciplined Kimble prior to November 20, 2018. It gave her excellent performance reviews. It is also clear that she was highly respected, indeed beloved by members of her staff.

Respondent contends that it discharged Kimble for reasons totally unrelated to Lori Dashner. However, the record shows that in late 2018, Kimble was heavily involved in the hospital's deliberations as to how to handle Dashner.

⁶ *Highlights* is published by the hospital's marketing department. It is sometimes available on tables in the hospital cafeteria and copies are available at the hospital's information desk. It is also distributed electronically. Respondent does not contend that *Highlights* is a confidential document.

After becoming aware of Dashner's posts about the lay-off of Gary Blaine and others, and her other criticisms of his stewardship of the hospital, Jim Kirkbride sent an email to Mark Rooker, Gay Kimble and Respondent's then-attorney Forrest Rhodes on August 16, 2018, stating, "Gay, please work with Forrest to see what our response to this employee should be. I read confidential information and feel her actions are terminal," G.C. Exh. 5, pg. A197.

On September 10, Kimble sent an email to Kirkbride, Rooker and others regarding her conversations with attorney Rhodes. She cautioned, based on her conversations with Rhodes, that termination could lead Dashner to file a potentially successful NLRB charge. Kirkbride wrote, "Gay gave Forrest [Rhodes] the impression we were talking termination. I requested a face to face meeting with him because I suspected she was misleading him," G.C. 5, pg. A190.⁷

In regular weekly senior leadership meetings in September, Kirkbride also recommended that strong disciplinary action be taken against Dashner. In response, Kimble said that the NLRA seemed to preclude this. Kirkbride became very angry, Tr. 136-38.⁸ Rooker also angry with this response and in periodic visits to Kimble's office, pressured her to initiate disciplinary action, Tr. 138-39.

A September 21, 2018 email from Kimble to Rooker, indicates that she was aware the upper management was unhappy with her handling of Lori Dashner and that she was being pressured to discipline Dashner.

Let me see what Forrest says. I'll keep pushing. I know you think I'm not doing anything, and I disagree. I continue to talk through issues with Forrest, and he continues to tell me that employees have the right to talk about their employment openly. But, you're right, maybe Lori went over the line when she posted her emails to Jim. Let's see if we can address. I read through our Electronic Communications policy and our Confidentiality policy yesterday and didn't find anything that hit head on.

G.C. 5, pg. 153.

Rooker then sent an email to Kimble and Rhodes stating that he was very frustrated with the Lori Dashner situation. He was clearly looking for an opportunity to discipline her for misuse of the hospital's information technology systems.

At some point Rooker suggested to Kimble that Respondent should hire a different attorney. Kimble responded that to do so would make it appear that the hospital was trying to circumvent the NLRA. She told Rooker that she would not be willing to do this, Tr. 142-43.

⁷ While there is no testimony that Kirkbride authored this note, I conclude he did so by comparing the manner in which he wrote "Gay" on this document with the manner he wrote her name at the bottom of her discharge paper, G.C. Exh. 6, pg. 2.

⁸ I credit all of Kimble's testimony with regard to statements made to her by Jim Kirkbride. The General Counsel called Kirkbride briefly as an adverse witness, but Respondent did not call him to testify as part of its case. Thus, all of Kimble's testimony regarding statements made by Kirkbride is uncontradicted and credited.

In October 2018, Jonathan Immordino, Respondent's interim Chief Financial Officer, came to Kimble's office. He told Kimble that he had never worked for an organization that ignored employee behavior similar to Dashner's Facebook posts. Immordino told Kimble she was being uncooperative in not terminating Dashner, Tr. 149.⁹

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The Jim Holderman Matter and Kimble's discharge

Respondent contends that it discharged Gay Kimble for her failure to act sufficiently promptly in terminating Jim Holderman, a painter in Respondent's environmental services department. It further contends that her discharge had nothing to do with Lori Dashner.

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The environmental services department conducted a fire drill on October 31, 2018. Jim Holderman was in charge of conducting the drill. Part of his responsibilities was to submit statements from 4 participants in the drill.

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On November 8, Alan Patterson, the environmental services manager, went to the office of Shelia Hoyt, a human resources manager who reported to Kimble. Patterson told Hoyt that one of the participant statements submitted by Jim Holderman for the October 31 fire drill was false; the employee was not at work that day. Patterson told Hoyt that he thought Holderman might be covering up for another employee and was not sure whether he wanted Holderman fired.¹⁰

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Hoyt went to Kimble, who told her to talk to Mark Rooker. Hoyt spoke to Rooker on Friday, November 9. Rooker told Hoyt that he wanted to fire Holderman but that the possibility of a "cover-up" had to be clarified. Neither Hoyt nor Kimble worked Saturday and Sunday, November 10 and 11. On November 15, Kimble emailed Hoyt asking where she was on the Holderman matter; that HR need to address the situation in a timely manner. Hoyt emailed Kimble stating that she emailed Patterson that morning asking him for documentation. Further, she said that the material she received was "rough" and did not indicate what level of discipline Patterson was seeking. Finally, Hoyt stated that she wanted to be sure what Patterson and Mark Rooker wanted with regard to Holderman's discipline, G.C. Exh. 5 (h).

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By November 15, it was clear that Holderman was not covering up for anyone. However, Kimble was concerned that termination might be inconsistent with Respondent's progressive discipline policy. While falsification of an official document is grounds for termination on a first offense, dishonesty or making a false statement would be grounds only for a suspension. Due to her uncertainty as to how Holderman's conduct should be classified, Kimble and Hoyt met with

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⁹ Immordino did not testify in this proceeding. Thus, Kimble's account of this conversation is uncontradicted and credited. There is no evidence that Immordino no longer worked Susan B. Allen at the time of the instant hearing.

¹⁰ Patterson did not testify at this hearing, thus the accounts of Hoyt and Kimble about their interactions with him are uncontradicted and credited.

5 Francia Bird, Respondent's Chief Quality Officer on November 15. Bird is responsible for the hospital's relationship with the Joint Commission on Accreditation, the body that oversees hospital fire drills. Bird told Kimble and Hoyt that Holderman's falsification wasn't a "big deal" in part because the fire drill could be repeated in the last quarter of 2018, which apparently would satisfy the Joint Commission. Bird said that a suspension was a more appropriate penalty for Holderman than termination, Tr. 158-59.¹¹

10 After their meeting with Bird, Kimble instructed Hoyt to go back to speak with Mark Rooker. Hoyt met with Rooker on Friday, November 16. Rooker was angry that Kimble and Hoyt had consulted with Francia Bird. Hoyt advocated a suspension for Holderman; Rooker wanted Holderman fired. However, they agreed that Hoyt would talk to Jim Kirkbride and let him make the decision. Hoyt was unable to meet with Kirkbride on November 16.¹² At trial, Rooker admitted that he could have ordered Hoyt and/or Kimble to terminate Holderman on 15 November 16 but did not do so.

20 Kimble met with Kirkbride and Rooker in Kirkbride's office on Monday, November 19.¹³ Kirkbride told her she should have fired Holderman immediately, that Holderman committed a very serious offense and that she should have known that. Kirkbride said that if the Joint Commission learned of the falsification, it could have told CMS, and that the hospital could have been fined millions of dollars, leading to its demise.¹⁴

25 Kimble told Kirkbride and Rooker that if they were so concerned about the Holderman matter, they could have come to her directly. Neither Kirkbride nor Rooker had discussed the Holderman matter with her prior to November 19, Tr. 280. Neither had complained to her about Hoyt's handling of the matter.

30 Kirkbride then stated that human resources have been an obstacle to the leaders of this organization. Kimble replied, "Let me guess, is this about Lori Dashner? You think I've been an obstacle in regard to Lori Dashner." Kirkbride responded that HR has put up numerous obstacles when it comes to Lori Dashner. At the end of the meeting, Kimble gave Kirkbride and Rooker termination documents for Jim Holderman, Tr. 167-69. They signed the termination documents immediately, R. Exh. 532.¹⁵ Rooker testified that he was at this meeting on

¹¹ Bird did not testify in this proceeding. Thus, Kimble's account of their conversation is uncontradicted and credited.

¹² Rooker testified that he had no contact with Kimble about the Holderman matter. He also testified that he gave updates to Jim Kirkbride on its progress, but that he did not recall Kirkbride making any comment about Kimble and the Holderman investigation, Tr. 280. The record does not support the assertion in Respondent's brief at page 7 that Rooker met with Kirkbride on November 16, to discuss the Holderman matter, after he met with Hoyt, Tr. 280-81.

¹³ Sheila Hoyt was on bereavement leave from November 19-23. She returned to work on Monday, November 26.

¹⁴ The Joint Commission is a nonprofit organization that accredits health care facilities for CMS, the Centers for Medicare and Medicaid. CMS is the federal government body overseeing Medicare reimbursements to hospitals.

¹⁵ The termination document was presented to Holderman on November 28, by Alan Patterson. Respondent has offered no explanation as to why Holderman's termination was so time sensitive.

November 19, but did not contradict Kimble's testimony, Tr. 339. Kirkbride, who was present throughout the instant hearing, did not testify about the November 19 meeting with Kimble. I credit her uncontradicted account.

5 After leaving Kirkbride's office, Kimble asked Alan Patterson to come to her office. She apologized if he thought HR had been obstacle the Holderman investigation. Patterson replied that he did not think so and that he had difficulty deciding the appropriate level of discipline.

10 On Tuesday, November 20, Kimble attended a senior leadership meeting. Her attendance at this meeting is inconsistent with Respondent's assertion that Jim Kirkbride had previously drafted her termination notice, R. Brief at 7 and 8.¹⁶ At this meeting, Kirkbride asked if everyone had seen Lori Dashner's latest Facebook post soliciting a petition for his removal as CEO. Cecelia Goebel, the Chief Nursing Officer, said she was afraid Dashner could become violent. When the meeting ended Kimble sent an email to Kirkbride at 9:41 a.m. suggesting another
15 meeting with Forrest Rhodes.

20 Jim-After our SLT conversation this morning where fear was expressed that Lori could be a physical threat, I'm wondering if we should schedule a meeting with Forrest for you, me and Mark. There will be risk, as Forrest has already identified, if we terminate Lori's employment, as her Facebook actions are protected. But, there is also a risk if we do nothing, as we have fear that she might hurt someone. I think we should talk those issues through carefully with Forrest, then balance the risks and determine if we should take action regarding her employment.

25 Please let me know your thoughts.

G.C. Exh. 7(d).

30 At 10:26 a.m. Kirkbride forwarded Kimble's email to Rooker and Jonathan Immordino. The subject line read: "FW: Lori Dashner-Additional conversation with legal counsel?" Included in the email was an attachment, "termination LD 11-20-2018.docx"¹⁷

35 Take a look at the email below. You have to be kidding me. HR is telling me this employee is protected and a danger to the organization in the same paragraph. Mark, please take a look at the attached termination document. Let's discuss after lunch. Chase has confirmed that the picture she posted of me on FB has only been used in highlights, so she has downloaded it from the hospital server. Can you track evidence of that? If not, it doesn't matter, we will ask her and see where that goes.

Holderman was on leave from November 19 to November 28. He was terminated upon his return.

¹⁶ If Kirkbride had drafted a termination document, but had not decided on terminating Kimble, I would expect him to so testify. He did not testify at all about when and why he fired Kimble.

¹⁷ The attachment line of the email makes it clear that the termination document referred to in the email is for Dashner, not Kimble, G.C. Exh. 7(d). It does not refer to 2 termination documents. If Kirkbride had already decided to fire Kimble, I would expect Kirkbride to have said so.

At 1:53 p.m. on November 20, Kirkbride emailed Rooker instructing him to terminate Gay Kimble's access to the hospital at 2:10 p.m. and to terminate Dashner's access at 2:45, G.C. Exh. 7(e).¹⁸ The fact that Kirkbride directed the discharge of Dashner and Kimble in the same email strongly suggests that the two personal actions are related to one another.

Shortly before 2:00 p.m. on November 20, Kirkbride summoned Kimble to his office and fired her in the presence of Jonathan Immordino, Tr. 174-75. The termination document, G.C. Exh. 6, states that Respondent fired Kimble for Willful violation of safety regulations-Failure to support a leader. The document incorrectly states that on November 7, Alan Patterson recommended termination of an employee [Jim Holderman]. It states further that HR's recommendation for a lesser penalty was rejected by Mark Rooker on November 16. The document also states that during a meeting on November 19, Kimble admitted there was a strained relationship between the HR manager [Sheila Hoyt] and Alan Patterson yet Kimble remained out of the major discussion regarding Holderman's discipline. The termination document concludes that: "Gay's lack of involvement in the serious HR issue demonstrates her inability to promote a supportive relationship between HR and department leaders. This failed attempt to support Alan Patterson has caused undue stress to many individuals."

Sheila Hoyt was not disciplined for her role in the Holderman matter and continues to work at Susan B. Allen. There is no evidence in this record of a strained relationship between Alan Patterson, on the one hand, and Hoyt or Kimble, on the other. There is no evidence that either Hoyt or Kimble was not supportive of Patterson. At 1:06 p.m. on November 20, Alan Patterson emailed Mark Rooker. He informed Rooker that Kimble had come to his office to apologize for not getting more involved with the Holderman matter and not getting things done in a more timely manner. He advised Rooker that Holderman's next day at work would be Wednesday, November 28 and he and Kimble were planning to meet with Holderman early that morning, G.C. Exh. 7(g).

While Respondent contends Kimble's apology is evidence that she knew her performance was insufficient in the Holderman matter, I do not find that to be so. Kimble apologized to Patterson after Kirkbride had castigated her about her role in the matter. Moreover, Kimble's uncontradicted testimony establishes that Patterson did not think she owed him an apology.

Since CEO Kirkbride did not testify as part of Respondent's case there is no evidence that he decided to terminate Kimble prior to the morning of November 20. The record is also unclear as to when he made this decision, although the record strongly suggests it was after he received Kimble's email at 9:41 a.m.

Respondent introduced evidence suggesting that Kirkbride decided to fire Kimble before November 20. I find that evidence not to be credible. Mark Rooker testified to receiving an email from Kirkbride at 8:04 a.m. on November 20. The lower portion of the first page of R.

¹⁸ If Rooker and Kirkbride met and discussed Kimble and/or Dashner after lunch, as Kirkbride suggested in his email at 10:26 a.m. on November 20, there is no evidence as to what was said.

Exh. 550 from Kirkbride to Rooker lists the subject as “Bad Night.” The email asks if Rooker has anything to add to the document. Kirkbride didn’t testify about the document. However, it was clearly not the final version of a document terminating Gay Kimble.

5 The upper portion of R. Exh. 550 is an email from Kirkbride to counsel on July 1, 2019
purportedly forwarding the “Bad Night” email with an attachment, “termination GK 11-16-
2018.doc.” The last page of Exhibit R-550 is commonly referred to as “metadata.” That
document is intended to suggest that Kirkbride drafted Kimble’s discharge document at 11:45
10 a.m. on November 17 and modified it the last time at 9:02 a.m. on November 20. This metadata
document is inconsistent with the November 16 date on the upper portion of the first page of R.
Exh. 550. Secondly, Mark Rooker admitted the one cannot determine from the metadata the
content of the document created on November 17, Tr. 355-56.¹⁹ There is no evidence,
testimonial or otherwise, to support the proposition that on November 17, there was a draft
document terminating Kimble’s employment.

15 Although, I received R. Exh. 550 in its entirety, I should have rejected receipt of the
metadata page, the fifth page of the exhibit. It is not properly authenticated. No witness testified
as to the circumstances under which it was created.²⁰ It is not substantial evidence. Moreover,
the fact that Jim Kirkbride did not testify that he created a document pertaining to Kimble’s
20 termination prior to November 20, establishes that he did not do so. I find Mark Rooker’s
testimony at Tr. 283 that the last or fifth page of R. Exh. 550 is a screenshot of the disciplinary
action calling for the termination of Gay Kimble not to be credible.²¹ I also find incredible
Rooker’s testimony at Tr. 289 that at 8:04 a.m. he reviewed a document purporting to terminate
Kimble. To establish this to my satisfaction, Respondent, would at a minimum have had to
25 introduce corroborating testimony from Kirkbride.

30 Finally, there is no evidence explaining why Kirkbride would decide to terminate Kimble
over the Holderman matter prior to November 20. Rooker met with Hoyt on November 16. The
upshot of the meeting was that Hoyt would meet with Kirkbride about Holderman. Rooker did
not testify to any conversations with Kirkbride about Holderman after that meeting.²² He did
testify that Hoyt was to meet with Kirkbride. Although, Hoyt was unable to meet with Kirkbride
on November 16, there is no evidence as to why Kirkbride would decide to fire Kimble that day
or on Saturday, November 17.

¹⁹ The inconsistency of this testimony at Tr. 355-56 with Rooker’s assertion at Tr. 283 that the document he saw pertained to Kimble’s termination is sufficient for me to discredit his testimony generally.

²⁰ The metadata shows that a document was created by Jim Kirkbride on November 17 and last modified by him on November 20. Not only did Kirkbride not testify as part of Respondent’s case, he was not asked any questions by Respondent when called by the General Counsel.

²¹ I note that this testimony was given in response to a leading question from Respondent’s counsel, which is another reason to discredit it.

²² See footnote 12 herein.

Lori Dashner was terminated for engaging in protected activity

Dashner's Facebook posts, including the November 19 post constituted protected activity

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Respondent admitted at trial and in its brief that Lori Dashner's Facebook posts were protected by the Act. Even in the absence of this admission, I find that this is so.

10 In soliciting signatures on a petition for employees to sign a petition asking the hospital board to remove Jim Kirkbride as CEO, Dashner did not mention employment-related concerns. However, her November 19 post must be read in the context of Dashner's repeated posts criticizing Kirkbride for employment related concerns, e.g. lay-offs, the loss of employees' cafeteria benefit, reduction in personal time off, and the certificate for Thanksgiving turkeys. Dashner's posts also criticized Kirkbride for issues unrelated to employment conditions, i.e.,
15 allegedly accepting complimentary tickets to a baseball game.²³ Given the context in which the November 19 post was made, I find that it was protected, *see Five Star Transportation*, 349 NLRB 42, 47 (2007) enfd. 522 F. 3d 46 (1st Cir. 2008). None of Dashner's posts were knowingly or maliciously false. They also were not so violent or of such a serious character to render Dashner unit for further service, *Dalton Schools, Inc.*, 364 NLRB No. 18 (2016) [email to
20 coworkers accusing administration, including the head of the school, of lying to employees and demanding an apology]; *Dreis and Krump, Mfg. v. NLRB*, 544 F. 3d 320 (7th Cir. 1076); *St. Margaret Mercy Healthcare Centers*, 350 NLRB 20, 204-205 (2007), enfd. 519 F. 3d. 373 (7th Cir. 2008). Dashner thus did not forfeit the protection of the Act.

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Respondent violated Section 8(a)(1) in discharging Lori Dashner

Lori Dashner engaged in protected concerted activity, Respondent knew of that activity, bore animus towards that activity and discharged her as a result of that activity. Thus, the
30 General Counsel made an initial showing of illegal discrimination, *Wright Line*, 251 NLRB 1083 (1980) enfd. on other ground, 662 F. 2d 889 (1st Cir. 1981) cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Once, as in this case, the General Counsel meets its initial burden of showing that union or protected activity motivated an employee's discipline or discharge, the burden shifts to the respondent employer to show that it would have taken the same action absent the employee's protected activity. A
35 respondent does not satisfy this burden by showing that a non-discriminatory reason existed for discipline or discharge, it must persuasively show that it would have taken such action in the absence of the protected conduct. If the proffered reason is pretextual-either false or not relied upon-the respondent fails to meet its burden. Moreover, a finding that the proffered reason is pretextual reinforces the initial showing of animus and discriminatory motive, *Fast Food Merchandisers*, 291 NLRB 897, 898 (1988); *Fluor Daniel, Inc.*, 304 NLRB 970, 970-71 (1991);
40 *Shattuck Denn Mining Corp. v. NLRB*, 362 F. 2d 466, 470 (9th Cir. 1966).

²³ Her criticism of Kirkbride's decision to build an urgent care center could impact employment related concerns if resources devoted to that facility adversely impacted the resources available to other parts of the hospital.

Dashner's post of November 19, 2018, precipitated her discharge. Respondent did not establish that Dashner's use of the Jim Kirkbride photo or maintaining personal information on her work computer were the non-discriminatory reasons for her discharge. Thus, it failed to meet its burden under *Wright Line* to show that would have taken the same action in the absence of Dashner's protected activity. The fact that Respondent did not react to Dashner's use of the photo for several months, establishes she was discharged for the content of her Facebook posts, rather than her use of the Kirkbride photo.

Dashner's explanation of how she obtained the photo is uncontradicted and credited. Since Respondent has not established that *Highlights* is confidential, her use of the photo fails to provide a valid reason for her termination. Mark Rooker admitted that the hospital's electronic communications policy is not strictly enforced. His testimony in this regard does not establish that the policy makes a distinction between employees who kept a little bit of personal information on their work computer and those who kept a lot.

More importantly, Respondent would never have searched Dashner's computer were it not for its animus toward Dashner's protected Facebook posts. It is black letter law that if an investigation is commenced to find a lawful reason for a discharge motivated by an unlawful reason, evidence of misconduct does not render the discharge lawful, *Supershuttle of Orange County, Inc.*, 339 NLRB 1, 3 (2003); *Kiddie, Inc.*, 294 NLRB 840, fn. 4 (1989) and cases cited therein. Thus, even if Respondent discovered a valid non-discriminatory reason for terminating Dashner while searching her computer files, it cannot rely on it.²⁴

Respondent violated Section 8(a)(1) in terminating Gay Kimble for refusing or failing to commit an unfair labor practice

Supervisors, such as Gay Kimble, are generally not protected by the Act. However, an employer violates Section 8(a)(1) when it discharges a supervisor for refusing to commit an unfair labor practice, *Parker-Robb Chevrolet, Inc.*, 262 NLRB 402 (1982); *Trus Joist Macmillan*, 341 NLRB 369, 389-90 (2004). In *Parker-Robb Chevrolet, Inc.*, the Board reversed the Judge's conclusion that the employer violated the Act by discharging a supervisor. The Board, however, stated that:

.. an employer may not discharge a supervisor for giving testimony adverse to an employer's interest either at an NLRB proceeding or during the processing of an employee's grievance under the collective bargaining agreement. Similarly, an employer may not discharge a supervisor for refusing to commit unfair labor practices, or because the supervisor fails to prevent unionization. In all these situations, however, the protection afforded supervisors stem not from any statutory protection inuring to them, but rather from the need to vindicate employees' exercise of their Section 7 rights.

262 NLRB at 402-403.

²⁴ In its brief at page 23, Respondent appears to rely on exhibit R-504 for the proposition that it had a valid non-discriminatory reason to discharge Dashner. First of all, this document was prepared after Dashner was terminated, Tr. 416-17. Moreover, it is a hearsay document entitled to no weight.

The legality of Kimble's discharge, like Dashner's discharge, turns upon Respondent's motivation. Thus, the *Wright Line* analysis applies here as well. The General Counsel met his initial burden of proving that Respondent's discharge of Gay Kimble was casually related to her failure to assist Respondent in discharging Dashner. Respondent wanted Kimble's assistance in retaliating against Dashner for activities that were protected in part. Secondly, even if she did not refuse to carry out a direct order, Kimble was vindicating Dashner's exercise section 7 rights in refusing to assist Respondent in retaliating against her.

Furthermore, the illegality of Kimble's discharge does not rest solely upon the protected or unprotected nature of Dashner's November 19 Facebook post. Kimble's conduct pertained as well to Respondent's earlier efforts to retaliate against Dashner for posts that clearly were protected, i.e., complaints and criticisms of lay-offs and loss of benefits.

Respondent's reliance on the Jim Holderman issue is clearly pretextual

Respondent has not met its burden of establishing that it would have discharged Kimble had she not resisted its efforts to discharge Dashner. Jim Kirkbride never testified as to why he decided to fire Kimble. The reasons given in Kimble's discharge notice are hearsay and not credible. Without explanation, Respondent's discharge of Kimble for the Holderman matter is irrational and incredible. There is no testimony that Kimble was amiss in entrusting the matter to her subordinate Sheila Hoyt. Neither Kirkbride nor Rooker complained to Kimble about Hoyt's handling of the Holderman discipline. Neither suggested Kimble take responsibility for the matter away from Hoyt, at least not before November 19. The fact that Respondent continues to employ Hoyt establishes that Respondent does not consider Hoyt incompetent. I find that Respondent's reliance on the Holderman matter to be a pretext. Further, even assuming that the Holderman matter was a factor in her discharge, Kimble's uncontradicted testimony as to Kirkbride's statements to her on November 19 show that at a minimum her resistance to disciplining Dashner was a material factor in her discharge.²⁵

Respondent has not shown any adverse impact from Kimble's actions in relation to Holderman. As stated in footnote 15, herein, Respondent has offered no explanation as to why Holderman's termination was time sensitive.

Kimble was willing to fire Holderman if told to do so. The discharge notice statement that HR's failure to give a recommendation at the conclusion of the November 16 meeting left Alan Patterson feeling unsupported is not supported by this record. Alan Patterson did not testify in this proceeding, thus Kimble's testimony about her conversation with Patterson after her discharge on November 20 is uncontradicted and credited. Kimble testified that:

²⁵ Any material relationship between her resistance to retaliating against Dashner and her termination renders Kimble's discharge illegal. The Board will not seek to quantitatively analyze the effect of the unlawful cause once it has been found. "It is enough that the employees' protected activities are causally related to the employer action which is the basis of the complaint. Whether that 'cause' was the straw that broke the camel's back or a bullet between the eyes, if it were enough to determine events, it is enough to come within the proscription of the Act." *Wright Line*, 251 NLRB 1083, at 1089 fn. 14; accord: *Bronco Wine Co.*, 256 NLRB 53, at 54 fn. 8 (1981).

He said, Gay, you weren't an obstacle to me in this investigation. I was slow to get the documentation done because I couldn't figure out what level of discipline I wanted to do. You're the one that always helps me in this organization. When I don't know what to do about things, I come to you and you help me through it.

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Tr. 171.

The General Counsel has not established that Respondent violated the Act in giving Lori Dashner a skills update and oral warning in September 2018

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The only evidence supporting the proposition that Lori Dashner's skills update and oral warning were discriminatory is that she, with one exception, had not received any discipline or coaching in 20 years until she began her protected activities. It is clear that Respondent, by Kirkbride and Rooker, were looking to take action against Dashner prior to the skills update and oral warning. However, I find that is not enough of a connection between her protected activities and discipline to find Section 8(a)(1) violations. Diana Wasson consulted Rooker before issuing Dashner a "skills update." However, there is no evidence that the initiative for this and the oral warning came from Rooker or Kirkbride. There is also no evidence that Wasson bore animus towards Dashner as a result of her protected activities.

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CONCLUSIONS OF LAW

Respondent violated Section 8(a)(1) of the Act in discharging Lori Dashner and Gay Kimble on November 20, 2018.

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REMEDY

The Respondent, having illegally discharged Lori Dashner and Gay Kimble, must offer them reinstatement and make them whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). Respondent shall compensate them for their search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings, computed as described above.

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Respondent shall file a report with the Regional Director for Region 14 allocating backpay to the appropriate calendar quarters. Respondent shall also compensate Lori Dashner and Gay Kimble for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *AdvoServ of New Jersey*, 363 NLRB No. 143 (2016).

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On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁶

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ORDER

The Respondent, Susan B. Allen Memorial Hospital, El Dorado, Kansas, its officers, agents, successors, and assigns, shall

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1. Cease and desist from:

(a) Discharging, suspending or otherwise discriminating against any employee for engaging in protected concerted activity.

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(b) Discharging, suspending or otherwise discriminating against any supervisor or manager for refusing to commit an unfair labor practice or because the supervisor or manager acted otherwise to vindicate the Section 7 rights of employees.

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(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

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(a) Within 14 days from the date of the Board’s Order, offer Lori Dashner and Gay Kimble full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

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(b) Make Lori Dashner and Gay Kimble whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

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(c) Compensate Lori Dashner and Gay Kimble for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 14, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(d) Compensate Lori Dashner and Gay Kimble for their search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings.

²⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

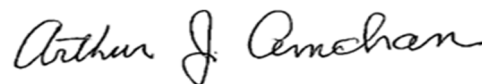
5 (e) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges and within 3 days thereafter notify Lori Dashner and Gay Kimble in writing that this has been done and that their discharges will not be used against her in any way.

10 (f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

15 (g) Within 14 days after service by the Region, post at its El Dorado, Kansas hospital, copies of the attached notice marked "Appendix".²⁷ Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 20, 2018.

30 (h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 15, 2019

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Arthur J. Amchan
Administrative Law Judge

²⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

**Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT discharge, suspend or otherwise discriminate against any of you for engaging in protected concerted activity.

WE WILL NOT discharge, suspend or otherwise discriminate against any supervisor or manager for refusing to commit an unfair labor practice or otherwise acting to vindicate the rights accorded to employees by Section 7 of the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Lori Dashner and Gay Kimble full reinstatement to their former jobs or, if those jobs no longer exist, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Lori Dashner and Gay Kimble whole for any loss of earnings and other benefits resulting from their discharges less any net interim earnings, plus interest compounded daily.

WE WILL compensate Lori Dashner and Gay Kimble for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and **WE WILL** file a report with the Regional Director for Region 14 allocating the backpay award to the appropriate calendar quarters.

WE WILL compensate Lori Dashner and Gay Kimble for their search-for-work and interim employment expenses regardless of whether those expenses exceed her interim earnings.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Lori Dashner and Gay Kimble and **WE WILL**, within 3 days

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

**THE SUSAN B. ALLEN
MEMORIAL HOSPITAL**

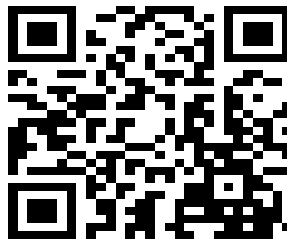
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

1222 Spruce Street, Room 8.302, Saint Louis, MO 63103-2829
(314) 539-7770, Hours: 8 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/14-CA-233000 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (314) 539-7780.