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Montefiore Medical Center and New York State Nurses Association. Case 02-CA-229024

October 23, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN
AND EMANUEL

On May 30, 2019, Administrative Law Judge Kenneth W. Chu issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, the Respondent filed an answering brief, and the General Counsel and the Charging Party filed reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. October 23, 2019

John F. Ring, Chairman

Marvin E. Kaplan Member

William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

¹ The General Counsel and Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In addition, some of the General Counsel's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the General Counsel's contentions are without merit.

Susannah Z. Ringel, Esq., for the General Counsel.
Peter D. Conrad, Esq., for the Respondent.
Claire K. Tuck, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

KENNETH W. CHU, Administrative Law Judge. This case was tried in New York, New York, on March 19, 2019. The New York Nurses Association filed the charge on October 9, 2018,¹ and the General Counsel issued the complaint on December 21, 2018.

On the entire record, including my observation of the demeanor of the witnesses,² and after considering the briefs filed by the parties,³ I make the following

FINDINGS OF FACT

I. JURISDICTION AND UNION STATUS

The Respondent is a New York not-for-profit corporation with an office and place of business at 111 E. 210th Street, Bronx, New York (Respondent's medical facility) and, at all material times, admits it has been engaged in operating a hospital providing inpatient and outpatient medical care at the facility. During the past 12 months, Respondent admits that it derives gross revenues in excess of \$250,000, and purchases and receives at its Bronx medical facility goods valued in excess of \$5000 directly from points outside of the State of New York. The 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. At all material times, the Union, New York State Nurses Association, is a labor organization within the meaning of Section 2(5) of the Act (GC Exh. 1).

II. ALLEGED UNFAIR LABOR PRACTICES

Paragraph 5 of the complaint (GC Exh. 1(c)) alleges that

On or about June 25, 2018, Respondent, by Shalom Simmons, at Respondent's facility, threatened employees with unspecified reprisals for requesting union representation for an investigatory interview with Respondent, which employees reasonably believed could result in disciplinary action.

The counsel for the General Counsel alleges that by such conduct, the Respondent has been interfering with, restraining, and coercing employees in the exercise of rights guaranteed to the employees by Section 7 of the Act in violation of Section 8(a)(1) of the Act. The counsel for the Respondent argues that the General Counsel has failed to demonstrate that there were any threats

In affirming the judge's credibility determinations, we do not rely on his statements concerning the Union's delay in filing the unfair labor practice charge or the employees' failure to challenge their supervisor after she allegedly made the unlawful threat.

¹ All dates are 2018 unless otherwise indicated.

² Witnesses testifying at the hearing included Andrea Guzman, Una Davis, Marie Kiffin, and Shalom Simmons.

³ The exhibits for the General Counsel are identified as "GC Exh." and Respondent's exhibits are identified as "R. Exh." The closing briefs are identified as "GC Br." for the General Counsel; "R. Br." for the Respondent; and "CP Br." for the Charging Party. The hearing transcript is referenced as "Tr."

of reprisal made as alleged in the complaint.

The Patient Care Incident

Andrea Guzman (Guzman) has been a registered nurse with the Respondent's Bronx medical facility for the past 5 years. Guzman is currently stationed at the surgical progressive care unit and, on occasions, she is also assigned to perform charge nurse duties. A charge nurse makes assignments for nurses and ancillary staff for the day. The charge nurse is a rotating position among the nursing staff because a permanent charge nurse has not been appointed. Guzman receives her daily assignments from the administrative nurse manager, Shalom Simmons (Simmons), including any charge nurse duties. Guzman testified that Simmons has been the nurse manager since early 2017. Guzman is also a member of the Union (Tr. 13–16).

Guzman received an email from Simmons in the afternoon on June 21 inquiring as to an incident involving patient care. The email (GC Exh. 2) stated

Hi Nurse Guzman

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

Guzman replied 10 minutes later by email and stated that she did not know that a bleeding episode would require a midas report and to have Simmons explain the reasons to complete a midas report. Simmons replied the following morning that she would like to have (Guzman's) take on it (presumably the need to file a report) and they will discuss further when Guzman returns from her leave (GC Exh. 2).

Guzman testified that a patient had bled while on her shift and that Simmons was hoping to review a report over the incident. The report is identified as "midas report" and is completed by the responsible nurse where there's the possibility that harm was done to the patient or if harm could have been prevented. Guzman did not complete a midas report (Tr. 17, 58).

Guzman also forward a copy of Simmons' June 21 email to Marlana Fontes (Fontes) (GC Exh. 3). Guzman testified that Fontes was her union representative and delegate (Tr. 17). Guzman's email stated

Hi Marlana,

I would like to talk with Shalom about what happened to my patient but I am uncomfortable going in and talking with her alone. I would like to implement my Wiengarten (sic) Right. I will text you on when is a good time to meet.

thanks—Andrea Guzman

Upon my examination of Guzman as to why she needed to email Fontes, Guzman responded that Simmons' email stated that the patient's family had some clinical concerns over the bleeding episode. Guzman said that a midas report was not required because it was expected for the patient to bleed according

to the to the patient's diagnosis, but she was nevertheless worried over the family's concerns⁴ (Tr. 34, 35).

Guzman said that she did not receive a reply from Fontes. Guzman was on leave on June 22 and returned to work on June 25 (Tr. 54).

Shalom Cheri Simmons (Simmons) is and was the administrative nurse manager for the Respondent's step-down unit at all material times of this complaint. She has held this position for the past 3 years and is responsible for the unit on a 7 day/24-hour basis. Simmons said Guzman was already working at the step-down unit when Simmons was hired at the Respondent's facility (182–185).

Simmons said she was prompted to write the June 21 email to Guzman because a family member of a patient under the care of Guzman had complained that Guzman was "rough" in a medical procedure used by Guzman on the patient. Simmons said that she had spoken to Guzman the morning of June 21 about the incident. According to Simmons, Guzman agreed to meet with Simmons on June 21, but when she did not, Simmons then sent her the June 21 email (Tr. 186–189; GC Exh. 2).

Simmons said in her email that she was hoping to see a midas report over the incident. Simmons said the report is completed when there is some adverse event or incident that happened to a patient (Tr. 188, 189). Simmons testified that there was no concern over Guzman's technique or clinical practice with the patient, but she wanted to just "get her side of what happened" (Tr. 189). Simmons did not see any urgency for Guzman to respond and was willing to wait until Guzman returned to work on June 25.

The Reassignment of the Charge Nurse

Guzman arrived to work on June 25 at 6:45 a.m. She said there is a bulletin board at the nurses' station and Guzman noticed that she was assigned as the charge nurse for that morning. Assuming that she was the charge nurse for the day, Guzman obtained the patient report from the night charge nurse and reviewed the overnight activities. She took about 15–30 minutes to review the report. As she was reviewing the report, Guzman said that she was informed by Una Davis (Davis), another staff nurse, that Simmons had asked Davis to be charge nurse for the day. Guzman believed her conversation with Davis occurred between 7:15–7:30 a.m. Guzman asked Davis if she could be the "co-charge nurse." Davis said that would be fine with her (Tr. 20–22).

There is staff meeting or "huddle" at approximately 8 a.m. where the nurses and staff discuss the activities for the day. Simmons was present at the meeting. As Guzman was explaining her charge nurse activities from the report (before Davis took over the responsibilities) to the attendees at the huddle, Simmons allegedly interrupted Guzman and informed the attendees that although Guzman's name was on the bulletin, the charge nurse for the day was Una Davis. Guzman was embarrassed by Simmons' announcement and told Simmons in the future if

... [s]he can please email the night staff or email all the staff, so that way I don't have to go through this embarrassment again

⁴ "The family has some clinical concerns," and she (Simmons) wanted me to fill out a MIDAS report" (Tr. 35).

of being taken off of charge nurse. And she said we'll talk about it later (Tr. 23).

Even though the charge nurse position is rotated on a daily basis, Guzman testified she was embarrassed over this incident because Simmons had never previously taken a nurse off as a charge nurse (Tr. 23, 24). Guzman maintained that everyone was present at the meeting when Simmons made the announcement and she felt embarrassed. Guzman said on past occasions Simmons would tell her in private when she was taken off as charge nurse (Tr. 51, 52).

Simmons' first contact with Guzman was on June 25 at the 8 a.m. huddle. Simmons said that she could not recall who assigned Guzman as the charge nurse and when the assignment was made, but she did remember changing the charge nurse assignment from Guzman to Davis on June 25 (Tr. 192, 199). Simmons said there is a binder with the charge nurse assignments and denied that the name of the charge nurse for the day is placed on a bulletin board.

Simmons explained that she reassigned the charge nurse from Guzman to Davis because of multiple complaints she received from the patient-care technicians about Guzman. Simmons testified that Guzman was removed as a charge nurse in March 2018 because she was having arguments with the patient-care technicians, nursing attendants, and some of the nurses. Simmons specifically recalled an incident in February with a patient-care technician named Natalie Grant and a nurse attendant when Guzman was unable to locate Grant to assist a nurse, identified as "Lewis." According to an investigation conducted by Simmons, Grant was located in the employee lounge and another nurse reported to Simmons that Guzman had "very strong words" with Grant. Simmons said that Grant subsequently became very upset because when Grant went to assist nurse Lewis, she was told by Lewis that Grant was never needed. Simmons said that Grant was so upset that she almost had an asthma attack and was sent to the emergency room (Tr. 191-195).

Simmons felt best to take Guzman off the charge nurse rotation for the moment and told her in March. Simmons said that she would ensure that the nightshift was aware who would be assigned as the charge nurse if the assignments are not done by her (Tr. 195, 196). Simmons said that Guzman's removal as a charge nurse was grieved and a grievance meeting was held on June 13. Simmons testified that even before the June 13 meeting, she was willing to return Guzman to the rotation if Guzman agreed to take a charge nurse class and then 3 days of orientation with a nurse. Simmons said that Guzman took the class on May 21. Simmons said that as of June 25, Guzman had not completed her 3-day orientation (Tr. 196-198).

Simmons testified that she waited until the huddle before informing Davis to take the charge nurse assignment. Simmons said that Guzman was present when she informed Davis. Simmons denied making a general announcement about the reassignment to the attendees at the huddle but believed that some nurses may have overheard (Tr. 199-201). Simmons could not recall Guzman's response

I don't recall exactly what was said, but it would be something along the—it would—she would ask me way. She would ask me why (Tr. 201).

Later in her testimony, Simmons recalled telling Guzman why she was no longer in charge. Simmons explained to Guzman that she wanted Guzman to complete her 3-day nurse orientation. Simmons said that Guzman then asked her to send out an email to inform the staff that she was no longer the charge nurse (Tr. 203, 204).

Una Davis (Davis) has been a registered nurse at the Respondent's Bronx facility for over 13 years and a union delegate representing member nurses in disciplinary proceedings. Davis is supervised by Simmons. Davis testified that she has represented nurses as a union delegate in past meetings with Simmons regarding performance, patient care, time and attendance issues, and other matters (Tr. 86-88).

Davis testified that on June 25, she was approached by Simmons during the huddle and asked to take over the charge nurse duties. Davis inquired why and was not given a reason. Davis agreed to take the charge nurse rotation for that day. Davis then asked Guzman if she would be willing to be her co-charge nurse and Guzman responded in the affirmative. Davis noticed that although Guzman was no longer the charge nurse, her name was on the bulletin board (Tr. 101, 102). Davis did not testify if Guzman said anything to Simmons when she was taken off as charge nurse during the huddle.

Marie Kiffin (Kiffin) is a registered nurse employed by the Respondent at the Bronx facility since 2007 and is a member of the Union. Kiffin works alongside Guzman, Davis and the other nurses in the step-down unit (Tr. 144).

Kiffin noted that Guzman was the charged nurse on the morning of June 25 because the assignment was done during the night shift and her name was placed on a bulletin board. Kiffin said that she was surprised that Guzman's name was on the charge nurse rotation for June 25 because she knew "quite some time ago" ("a few months ago") that Guzman was taken off the rotation by Simmons.⁵ Kiffin attended the nurses and staff huddle that morning around 8 a.m. and overheard Simmons informing Guzman that she was being taken off as the charge nurse (Tr. 149). Kiffin did not testify hearing anything else or if there was a response from Guzman over the reassignment. Kiffin said she attended to some other activities after the meeting and came back to the nurses' station "a moment or two later" and observed Simmons talking to Guzman (Tr. 145, 148, 165).

The Incident with Patient Care Technician Natalie Grant

Guzman testified that she was approached after the huddle by Simmons and patient-care technician Natalie Grant (Grant). Guzman testified that her conversation with Simmons regarding Grant's complaint occurred around 8:20 a.m. near the nurses' station. Guzman said that Una Davis was standing approximately 5 feet away during this conversation.

Simmons told Guzman that she was informed by Grant that in a conversation between Guzman and Grant that morning, Grant

⁵ Kiffin testified that there is no permanent charge nurse and most of the nurses stationed at the step-down unit would rotate into that position once or twice per week (Tr. 158, 178, 179).

was unable to understand what Guzman was saying to her. Simmons allegedly instructed Guzman to talk in “layman’s terms” and not use medical terms the next time she speaks to Grant over patient care.

Guzman responded that it was a “simple conversation” and Grant never said she was unable to understand Guzman. Guzman asked what Simmons meant by using only “layman’s” language. Simmons allegedly responded that Guzman should speak to Grant at an “8th grade” level (Tr. 24–26).

Davis had left the huddle and attended to her nursing duties. Upon her return to the nurses’ station, she noticed that Guzman, Grant, and Simmons were having a conversation. Davis admitted that she did not hear the entire conversation and only heard Simmons explain to Guzman how she should communicate to Grant. Davis testified that Simmons said to use “basic terms without using medical terminology” (Tr. 102). Upon my questioning, Davis elaborated and testified that after Guzman asked, “what do you mean by basic language?” Simmons allegedly responded, “at eighth-grade level” (Tr. 103–105). Davis believed it was appropriate for a supervisor to address a communication issue between two employees (Tr. 122).

Simmons testified that Natalie Grant is a patient-care technician and is responsible for assisting the nursing staff in the care of patients. Simmons recalled a discussion with Guzman on June 25 at around 9 or 9:15 a.m. regarding Grant. Simmons said that Grant complained to her that Guzman instructed Grant to perform a medical procedure.⁶ Simmons said that Guzman asked Grant to perform a procedure that Grant was not responsible to perform (Tr. 205–208).

Grant asked Simmons to talk to Guzman about the assignment. Simmons agreed to speak to Guzman. Simmons told Guzman that the medical procedure is something that the nurses do and was not part of the patient-care technician’s practice. Simmons denied telling Guzman how she should speak to the technicians. Simmons specifically denied telling Guzman to talk to the technicians at an 8th grade school level or to speak to Grant in a “simple” language. Simmons said that Guzman did not object that it was the nurse’s responsibility to collect the urine sample (Tr. 208, 209, 235).

Guzman’s Asserts her *Weingarten* Rights

Guzman testified that she resumed her patient rounds after her conversation with Simmons and returned to the nurses’ station and met up with Davis and another nurse named Lydia Asamaoa. Guzman said that Simmons approached all three at around 8:30 a.m. and asked that Davis, as the charge nurse, to meet her in the office with Guzman because Simmons was going to have a meeting with Guzman. Guzman said that she was not told to attend the meeting because Simmons had directed her conversation to Davis, but Guzman admittedly overheard the conversation. Simmons then left Davis. Guzman said that Davis asked her if she heard what Simmons had said. Guzman replied to Davis and Asamaoa that she was not comfortable talking with Simmons without a union delegate.

Davis said that Simmons approached her and stated that as the

charge nurse, Simmons would like to see her and Guzman in her office. Davis understood her involvement in the meeting would be in her role as the charge nurse. At this point, Simmons left the area. Davis said she turned to Guzman and asked if it was alright that Davis went to the meeting as the charge nurse. Davis said Guzman replied in the negative and stated to her that “No, I would prefer to have a delegate” (Tr. 102–105). Davis denied asking Guzman if Guzman wanted her to serve as a union delegate (Tr. 118).

Simmons recalled that she spoke to Guzman on June 25 near the nurses’ station regarding the incident with the patient and her email about entering a midas report after the huddle. Simmons testified

I was wondering if we can have some time today where we can talk about what happened on Tuesday with the daughter’s claim. And I know I sent you the email about the MIDAS+ and entering a MIDAS+.”

And she said, “I don’t know why I have to do a MIDAS+. This does not rise to the occasion of a MIDAS+.”

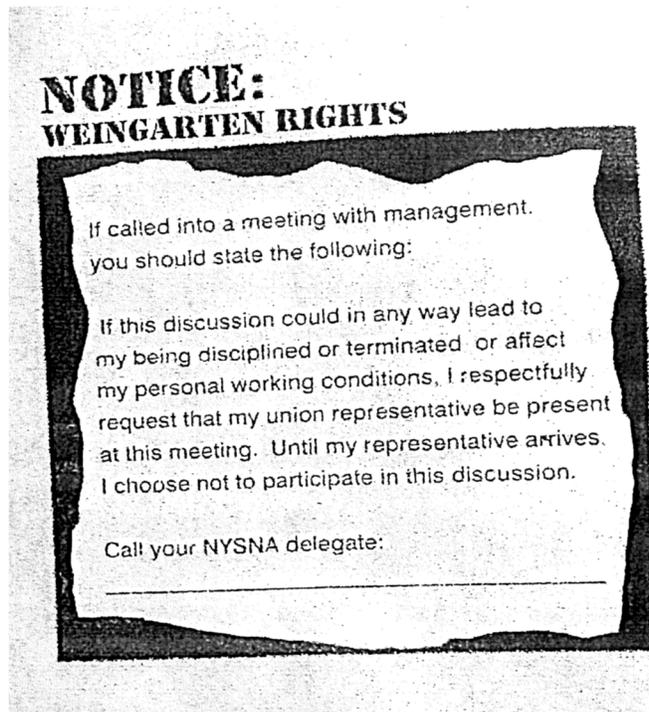
And I said, “Okay. Well, let’s—can —let’s talk about it, and you can ask Una, who’s charge today, maybe she can join us and we can, you know, talk about this, and hopefully we can, you know, finish the case, close the case (Tr. 210, 211).

Simmons was very clear that she spoke directly to Guzman and that the meeting was about a patient’s bleeding from a tracheostomy procedure. Guzman responded and said the incident did not rise to the level to complete a midas report but agreed to meet with Simmons later. Simmons then returned to her office (Tr. 211).

Nurse Marie Kiffin (Kiffin) said she was approximately six or seven feet away from Simmons and Guzman. Kiffin admitted that she did not hear the entire conversation but heard Simmons say to Guzman, “I would like to talk to you with the charge nurse” (Tr. 148, 154, 155, 168). Kiffin walked away from the nurses’ station and when she returned minutes later, Guzman told Kiffin that Simmons wanted to talk to her without a [union] delegate. Guzman again expressed that she was uncomfortable meeting with Simmons without a union delegate to nurses Davis, Asamaoa, and Kiffin. At this point, there was some discussion about *Weingarten* rights and that Guzman should use her rights. Guzman said that Kiffin started looking at a “Union book” ostensibly to look up the *Weingarten* rights. Kiffin left the nurses’ station and return a brief time later with a copy of the *Weingarten* notice issued by the Union.

Kiffin noticed that Guzman was upset and went to her locker to obtain a copy of the *Weingarten* notice and made a copy for Guzman. Kiffin testified that she did not say anything to Guzman before going off to obtain a copy of the notice (148, 149, 169, 170; GC Exh. 4). A copy of the *Weingarten* rights was found by Kiffin and she made a copy for Guzman (Tr. 26–29; GC Exh. 4). The Notice of *Weingarten* rights stated

⁶ The medical procedure was the insertion a Foley catheter in a patient to collect a urine sample (Tr. 206, 207).



Davis said Guzman took the *Weingarten* notice and left the nurses' station. Davis testified she did not know where Guzman was heading. Guzman said she proceeded to walk alone to Simmons' office with a copy of the *Weingarten* rights. Guzman did not ask that Davis attend the meeting with her. Guzman knocked on Simmons' office and met with Simmons. However, before Simmons said anything, Guzman gave a copy of the *Weingarten* rights to Simmons. It is alleged that Simmons stated "no, no, you don't have to (get a union representative) upon reading the notice." Guzman then left the office and walked back to the nurses' station (Tr. 29, 30, 62). Guzman told Simmons that she wanted her union delegate present at the meeting but did not specifically mention Fontes by name (Tr. 55, 56). It is not disputed that the meeting between Guzman and Simmons involving the patient bleeding incident never occurred on June 25 or at any other time. (Tr. 60, 61).

Simmons testified that Guzman came to her office and knocked on the door. Simmons said that the knocking continued but no one entered so she opened the door. Simmons said that Guzman was at the door and hand Simmons a piece of paper. Simmons said 'hello,' but Guzman just handed the *Weingarten* notice to her and walked away without saying anything to Simmons. Simmons said she read the notice Guzman left. Simmons then decided to seek out Guzman and ask why she was given a copy of the *Weingarten* rights (Tr. 212, 213).

The Alleged Threat of Reprisal

Nurses Asamaoa, Davis, and Kiffin were present at the nurses'

station when Guzman returned from her interaction with Simmons. Guzman testified that "a few minutes later," Simmons approached her and the three nurses. Guzman said that Simmons had the *Weingarten* notice in her hand.

Davis testified that Guzman returned "a minute" later to the station. Davis said Simmons approached the nurses' station about 5 minutes later with a copy of the *Weingarten* notice in her hand (Tr. 105-107; GC Exh. 4).

Guzman testified that Simmons stated to her, within the earshot of the other three nurses, "I just want to make sure and clarify that this is what you want, that you don't want a representative, because I call you in, anything you say I cannot use it against you" (Tr. 30, 31, 72, 73). Guzman responded that she was sure she wanted a representative. At this point, Simmons allegedly stated to Guzman

... [o]kay, I just want to make sure, because if you have a delegate with you, I'm going to have to pull your file. . . it would open a can of worms (Tr. 31).

Guzman repeated that she was sure about wanting a representative and told Simmons she was not comfortable going into the meeting without her union delegate. Guzman said that none of the other nurse said anything. Guzman said that all the nurses present heard what was said and that Kiffin walked away after Simmons made the threat. Guzman denied that Simmons said that Davis could be present at the interview (as a union delegate) (Tr. 73-76).

Davis testified Simmons asked Guzman "Are you sure you want to do this?" and "I just wanted to talk to you, you do not need a delegate." When Guzman insisted on a delegate, Davis said that Simmons stated to Guzman (Tr. 108, 118).

Okay. You know, if we talk to each other one-on-one, I won't be able to do or report it or say anything. It won't be held against you. But if I have to, you need a delegate, then I'm going to have to pull your file, and that could open a whole can of worms.

Davis said she did not say anything in response to Simmons' comments and that no one else said anything (Tr. 122, 123). Davis stated that Simmons then walked away. Davis did not testify if Guzman said anything in response to Simmons' comments. Davis believed that Kiffin and Asamaoa were present at the nurses' station when Simmons made her remarks to Guzman (Tr. 108).⁷

⁷ The counsel for the General Counsel wanted to examine Davis over a *Weingarten* meeting dealing with another nurse named Dishesha Kellogg

that occurred in April 2018 to show Simmons' animus towards the nurses when they request union representation at investigative meetings. Upon

Kiffin testified that she walked away after giving the *Weingarten* notice to Guzman but returned to the nurses' area about a "minute later" and observed Guzman and Simmons by the station (Tr. 151). Kiffin said she then heard Guzman telling Simmons (Tr. 150, 172, 173).

. . . [s]he wanted to get a delegate for was happening; she wanted to get a delegate and Ms. Simmons said, "Are you sure you want a delegate?" Ms. Guzman says, "Yes." After that, Ms. Simmons said, "Well, if you get a delegate, I'll be forced to pull your files," and then with her hand she opened up and said, "This could open up a can of worms."

Kiffin said that nurses Davis and Asamaoa were present when the comment was made by Simmons (Tr. 150, 173, 174).⁸ Kiffin said that she went on her patient rounds after hearing the threat made by Simmons. Kiffin did not say anything to Guzman or Simmons after the comments were made. Kiffin did not testify if Guzman said anything to Simmons in reaction to the comments. Kiffin did not recall if anyone else said anything when Simmons made her alleged threat (Tr. 150, 151, 174, 175).

On July 5, Kiffin sent an email to Guzman (R. Exh. 1). The email stated

Subject: GUZMAN

As I approached the nurses station in step down unit June 25th , I heard Ms. Guzman saying to Ms. Simmons that I would feel more comfortable speaking with you with my union delegate present. Ms Simmons asked Guzman are you sure you want your (sic) a delegate? Guzman replied, "Yes"

Ms Simmons then responded with if you get a delegate them (sic)

I will be forced to pull your file which could open a whole can of worms. After hearing that I walked away (open hand gesture was used by Ms. Simmons which indicates an abundance).

Kiffin did not receive an email response from Guzman. Guzman then forwarded Kiffin's email to Fontes on that day.

Guzman testified that she did not speak to Simmons for the rest of the day on June 25. Guzman stated that there was no interview and she was never instructed to complete a midas report over the patient care incident. It is undisputed that Guzman was never disciplined when she did not complete the midas report and for refusing to meet with Simmons over the patient care incident (Tr. 77).

Simmons testified that she approached the nurses' station and met with Guzman. Simmons noticed that Davis was sitting nearby a computer desk. Simmons asked Guzman why she had given her a copy of the *Weingarten* rights. According to

objection by the Respondent, I denied this line of questioning. This allegation was initially raised in a charge filed by the Union and rejected as untimely by the Region. I noted that nurse Kellogg was not involved or a witness in the June 25 with Guzman. I also noted that this allegation was not in the complaint and to allow it in at this time would require the Respondent to rebut the allegation. And, if the parties were permitted to fully litigated an allegation not in the complaint, I would have to decide the merits of an untimely and unalleged charge. *Irving Ready-Mix, Inc.*, 357 NLRB 1272, 1285 fn. 13 (2011) (finding that certain unalleged but admitted statements by a manager violated Sec. 8(a)(1) where the

Simmons, Guzman responded "I want you to know, I want a delegate" (Tr. 214). Simmons responded that Guzman was not in trouble and that she did not need a delegate. Simmons said that Guzman repeated that she wanted a delegate and Simmons replied "Okay, then you can—if you want to bring your delegate, here's Una (Davis). Una can come in and come into the office with us" (Tr. 214).

Simmons knew that Davis was a delegate because she was present at the June 13 grievance meeting when Guzman was taken off the charge nurse rotation after Simmons received the harassment complaint from patient-care technician Grant over the February incident. Davis confirmed that she was present with Fontes and another manager at the June 13 meeting to discuss the February incident (Tr. 214, 215).⁹

Simmons said that Guzman insisted that she wanted to bring her own delegate and Simmons responded affirmatively but told her that she would like see Guzman sooner rather than later. Simmons explained that she was concerned about the grievance that the family may file about the bleeding and wanted to prepare a complete answer with Guzman's side of the story because Simmons would be asked if she had spoken to the nurse responsible for the patient on the day of the bleeding incident (Tr. 217, 239).

Simmons testified that Guzman never returned with a delegate and Simmons did not pursue the matter with Guzman after June 25 because Simmons became aware that Guzman did not cause the patient bleeding after her review of the patient's charts and talking to other nurses. Simmons concluded that Guzman did not make an error with the patient (Tr. 217, 218, 237–239). Simmons denied threatening Guzman or anyone else on June 25 (Tr. 219).

Discussion and Analysis

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act when Simmons made a threat of unspecified reprisal that interfered, restrained and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

Section 8(a)(1) of the Act provides that it is an unfair labor practice to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. Section 7 provides that, "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ." A threat of unspecified reprisal is a violation of Section 8(a)(1) of the Act. "The Board's well-established test for interference, restraint, and coercion under Section 8(a)(1) is an objective one and depends on 'whether the employer engaged in conduct which, it may reasonably be

complaint alleged that other statements by the same manager violated Sec. 8(a)(1)). For these reasons, the objection was sustained (Tr. 88–101). I would further note that a proffer was made as to what occurred with Kellogg and the testimony by Davis was entered into the transcript but not considered in my deliberations of this complaint (Tr. 140–143).

⁸ Nurse Lydia Asamaoa did not testify at the hearing.

⁹ Davis testified that she sat in a meeting involving a harassment complaint against Guzman by the two patient-care technicians but denied that she was Guzman's union delegate (Tr. 115).

said, tends to interfere with the free exercise of employee rights under the Act.” *ITT Federal Services Corp.*, 335 NLRB 998, 1002 (2001) (quoting *American Freightways Co.*, 124 NLRB 146, 147 (1959)). Applying this test, the Board has held that an employer violates Section 8(a)(1) by threatening employees with unspecified reprisals for engaging in discussions protected under the Act. See, e.g., *Alaska Ship & Drydock*, 340 NLRB 874, 878 (2003). Employees asserting and discussing their *Weingarten* rights or demanding a representative before an investigatory interview is a protected activity.

To be sure, this complaint does not involve the deprivation of an employee’s *Weingarten* rights.¹⁰ I have no doubt that the Guzman’s meeting with Simmons was an investigatory interview. Simmons testified that she wanted to find out what happened with the patient’s bleeding episode. Simmons needed to determine whether there was any error on the part of Guzman’s procedure with the patient. An employee would have a reasonable belief that this interview may result in potential disciplinary action if an error was found. However, the meeting never occurred; Simmons did not repeatedly instruct Guzman to attend an investigatory interview without a union representative after receiving Guzman’s *Weingarten* notice; and Guzman was never disciplined for any medical infractions. These facts are not in dispute.

Credibility Determinations

A credibility determination may rely on a variety of factors, including the context of the witness’ testimony, the witness’ demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), *enfd.* 56 Fed.Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness’ testimony. *Daikichi Sushi*, 335 NLRB at 622. Such is the case here.

In my opinion, I find that Simmons did not make a threat of reprisal to Guzman or other employees on June 25 for invoking their *Weingarten* rights in violation of the Act. The counsel for the General Counsel proffered as background information the events of June 25 leading to the alleged threat to demonstrate Simmons’ proclivity to interfere and coerce the exercise of employee rights. However, I find otherwise.

With regard to the reassignment of the charge nurse duties from Guzman to Davis, I credit the testimony of Simmons when she stated Guzman’s name was placed in error as charge nurse

for June 25 by the nightshift coordinator and that everyone already knew that Guzman was not the charge nurse on that date. This testimony was confirmed by nurse Kiffin, who testified that she was aware that Guzman was taken out of the rotation months ago (Tr. 146).

Even Guzman knew she was not supposed to be the charge nurse on June 25. Guzman testified that nurse Davis informed her at approximately 7:15–7:30 a.m. on June 25 that Simmons had already asked Davis to be charge nurse for the day (Tr. 20–22). So, it cannot come as a shock to Guzman when Simmons allegedly embarrassed Guzman in front of other employees since Guzman already knew she was removed as the charge nurse well before the 8 a.m. huddle. Additionally, Guzman knew that she should not be a charge nurse because she was removed over the February incident with patient-care technician Grant. That matter was resolved when Respondent agreed to place Guzman in the charge nurse rotation if Guzman takes a class and a 3-day orientation with another nurse (Tr. 48–50). Guzman may have been embarrassed and upset that Simmons announced that Davis was the charge nurse, but there was nothing coercive or restraining on employee rights when the announcement was made or that it demonstrated any animus by Simmons towards Guzman.

With regard to the incident with patient-care technician Grant that morning, I also credit Simmons’ testimony that she did not tell Guzman to use 8th grade level language when speaking to Grant. Davis testified that there was nothing inappropriate for a supervisor to discuss the manner of communication between employees (Tr. 122). Although Davis testified that she heard Simmons making this comment, Davis initially testify that Simmons told Grant

I did not hear the first part, but when I entered, I heard the part where Mr.—Ms. Simmons was explaining to Ms. Guzman how she should communicate with the PCT in simple, basic terms without using medical terminology (Tr. 102).

Davis did not testify that the 8th level language was used until I prompted her if there was anything else to add

JUDGE CHU: What else did you hear?

THE WITNESS: I just heard, as you said, she asked her how she should speak to her. She said, “Use common eighth-grade level.”

JUDGE CHU: I couldn’t hear you.

THE WITNESS: She used and -- speak to her at the eighth-grade level.

JUDGE CHU: But you didn’t testify that earlier, you just said simple, basic terms.

THE WITNESS: Yes (Tr. 103).

¹⁰ The Supreme Court’s decision in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), held that an employer violates Sec. 8(a) (1) of the Act when it denies an employee’s request for union representation at an investigatory interview that he or she reasonably believes may result in his or her discipline. See also *Kohl’s Food Co.*, 249 NLRB 75 (1980); *Lennox Industries, Inc.*, 244 NLRB 607 (1979); *Baton Rouge Water Works Co.*, 246 NLRB 995 (1979). In determining whether an employee’s belief is reasonable, the Court set forth an objective standard, considering all of the surrounding circumstances. *Weingarten* at 257. Once an

employee requests that a union representative be present during an investigatory interview, the employer may grant the request, discontinue the interview or offer the employee the choice to either continue the interview without a representative or not having the interview at all. *Weingarten* at 258–259; *YRC Inc.*, 360 NLRB 744, 745 (2014); *Consolidated Freightways Corp.*, 264 NLRB 541, 542 (1982); *General Motors Co.*, 251 NLRB 850, 857 (1980), *enfd.* in relevant part 674 F.2d 576 (6th Cir. 1982); *USPS*, 241 NLRB 141 (1979).

Given the seriousness of Guzman's contention that she was instructed to use 8th grade language with Grant, Davis did not recall that comment until later in her testimony. In my opinion, more likely than not, Simmons told Guzman to speak in a simple language and use basic medical terminology, exactly in the manner as in Davis' initial testimony noted above and nothing more.¹¹

Turning to the alleged threat, it behooves me to question if the threat of reprisal was made at all by Simmons. Allegedly, Simmons told Guzman in front of nurses Davis, Kiffin, Asamaoa, and perhaps, other medical staff that ". . . if we talk to each other one-on-one, I won't be able to do or report it or say anything. It won't be held against you. But if I have to, you need a delegate, then I'm going to have to pull your file, and that could open a whole can of worms" (Tr. 31). Nurses Davis and Kiffin allegedly heard the comment made by Simmons. Nurse Asamaoa did not testify.¹²

Simmons testified that Guzman did not need a delegate, but if she wants one, Simmons suggested Davis attend as the charge nurse along with a union delegate. This testimony by Simmons is consistent with her email to Justine Huffaker, the director of nursing, on June 25 (GC Exh. 5). In that email, Simmons stated to Huffaker,

Today, I asked her if we can meet today to discuss and if the charge nurse is available they can join. She gave me a sheet of paper indicating her *Weingarten* rights to representation. I went back to her and said that she does not need a delegate and that the charge nurse Una can be in the room with us. She decided that she should have a delegate. I then said that it again it's not needed but if this is what you want to do I would like to meet with your delegate sooner because of the nature of issue.

Obviously, the contemporaneous statement made by Simmons on the day of the incident outweighs the memory of other witnesses made several months later. More significantly, it behooves me to question why no one spoke up when Simmons allegedly made this threat. Davis, without dispute, is a union delegate and has attended investigatory interviews in the past. Davis, as a union official, is well aware of employees' rights. Davis never spoke up or commented when the alleged threat was made. Kiffin, who was responsible for giving Guzman a copy of the *Weingarten* rights, is also well aware of employees' rights, but did not speak up. Instead, she left the area without saying a word.¹³ Perhaps, the nurses were afraid to confront Simmons over her alleged threat, but no one testified to that. More significantly, while nurses Guzman, Davis and Kiffin were quick to talk among themselves about the removal of Guzman as charge

nurse and their *Weingarten* rights, no testimony was proffered that they spoke afterwards about the threat. In my opinion, the nurses did not speak among themselves after the threat was allegedly made because no threat was uttered by Simmons.

In contrast, Simmons, as the nurse manager for 3 years and engaged in previous investigatory interviews and discipline with collective-bargaining employees, was well aware and knowledgeable of employees' *Weingarten* rights and the need to refrain from uttering comments and threats that may interfere, restrain, or coercive employees over the exercise of their Section 7 rights. It is reasonable to believe that Simmons would not make a notorious and open threat in front of the nurses and other medical employees. I note that Nurse Davis never testified that Simmons made any coercive statements to other employees that she had represented at previous investigatory interviews conducted by Simmons. Davis never testified that Guzman was threatened by Simmons at the June 13 grievance meeting (Tr. 40-46).

As such, I find that Simmons never made a threat of unspecified reprisal to Guzman and other employees on June 25 and accordingly, I recommend that the complaint be dismissed in its entirety.

Dated: Washington, D.C. May 30, 2019

¹¹ Without dispute, this complaint does not involve a violation of the Act when Guzman's charge duties were reassigned to Davis or when Simmons allegedly instructed Guzman to speak in an 8th grade level to patient-care technician Grant. Even assuming that the events occurred as described by Guzman and the other witnesses for the counsel for the General Counsel, I find that mere indignities and embarrassment allegedly suffered by Guzman is not a violation of the Act.

¹² The counsel for the Respondent request that I draw an adverse inference when the General Counsel failed to call Asamaoa as a witness (R. Br. at fn. 6). Bystander employees are not presumed to be favorably disposed toward any party and no adverse inference is drawn against a

party for not calling them. *Torbitt & Castleman, Inc.*, 320 NLRB 907, 910 fn. 6 (1996), affd. on point 123 F.3d 899, 907 (6th Cir. 1997). I find sanctioning the General Counsel as unnecessary.

¹³ Kiffin did write an email to Guzman on July 5, summarizing what she heard on June 25, which was forwarded by Guzman to Fontes (R. Exh. 1). However, no action was taken by the Union over this alleged threat until the charge was filed on October 9. Although, I indicated at the hearing that the charge was timely filed, it is significant to question why the charge was not filed much earlier if indeed this was a severe threat of reprisal made by Simmons to Guzman and to other union member nurses.