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Dignity Health d/b/a Mercy Gilbert Medical Center and Service Employees International Union—United Healthcare Workers West. Cases 28–CA–229160 and 28–CA–238137

January 6, 2021

DECISION AND ORDER

BY MEMBERS KAPLAN, EMANUEL, AND MCFERRAN

On March 19, 2020, Administrative Law Judge Ariel L. Sotolongo issued the attached decision. The Respondent filed exceptions and a supporting brief, the Charging Party filed an answering brief, and the Respondent filed a reply brief. The General Counsel filed cross-exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.¹

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,² cross-exceptions, and briefs and

¹ In its answering brief, the Respondent argues that the General Counsel's exceptions, which were filed and served on April 16, 2020, were untimely because the order transferring this case to the Board issued on March 18 and provided that exceptions were due, pursuant to Board rules, 28 days after that date, which was April 15. See Sec. 102.46(a) of the National Labor Relations Board's Rules and Regulations. However, we find that the General Counsel's exceptions qualify as cross-exceptions and, as such, were timely filed under Sec. 102.46(c). Cf. *Holly Manor Nursing Home*, 235 NLRB 426, 426 fn. 1 (1978).

² No party has excepted to the judge's dismissal of the allegations that the Respondent discriminated against employee Jon Paul Placencio in violation of Sec. 8(a)(3), (4), and (1) by imposing more onerous responsibilities on him with respect to duties, check-off lists, and triage assignments.

³ The Respondent has 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 finding that the Respondent unlawfully gave the impression of surveillance when Dawn Kimball, the Respondent's Emergency Department director, pointed at employee Placencio during an August 28, 2018 pre-shift meeting and stated she knew that the Union had contacted him, the judge correctly observed that Kimball did not identify an independent source of her knowledge concerning Placencio's activity that might dispel any impression of surveillance. In affirming this finding, we further observe that Kimball singled out Placencio and identified him as a union contact even though he had not yet openly declared his union involvement. Those circumstances further support finding that a reasonable employee would conclude that the Respondent's knowledge of his personal union activity was gained through surveillance, and was not attributable to mere general awareness of the Union's organizing efforts. In this respect, Placencio's mere participation in union meetings also would not

has decided to affirm the judge's rulings, findings,³ and conclusions and to adopt the recommended Order as modified and set forth in full below.⁴

ORDER

The National Labor Relations Board orders that the Respondent, Dignity Health d/b/a Mercy Gilbert Medical Center, Gilbert, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Creating the impression that its employees' union or other protected concerted activities are under surveillance.

(b) Interrogating its employees about their union or other protected concerted activities.

(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.

(a) Post at its Gilbert, Arizona facility copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 28,

have explained how the Respondent knew about such a specific individual interaction with the Union.

Because we are adopting the judge's conclusions that the Respondent violated Sec. 8(a)(1) by giving the impression of surveillance at the August 28, 2018 pre-shift meeting and by interrogating Placencio during a September 27, 2018 encounter at a health-unit desk, we find it unnecessary to pass on the judge's dismissal of the allegations that the Respondent unlawfully gave the impression of surveillance and interrogated Placencio during a February 7, 2019 meeting in Emergency Department Director Kimball's office, as finding these additional violations would not materially affect the remedy.

Contrary to her colleagues, Member McFerran would reverse the judge's dismissal of the allegation that, during Kimball's February 7, 2019 meeting with Placencio, the Respondent unlawfully discouraged employees from engaging in protected conversations when Kimball expressed concern about "rumors" and instructed Placencio that employees should bring concerns about the elimination of tech positions to management rather than discuss such matters among themselves. In Member McFerran's view, although an employer may possess a legitimate interest in quelling demonstrably false rumors about job loss, the Respondent's directive here swept far too broadly and inhibited clearly protected conversations about job loss.

⁴ We have modified the judge's recommended Order to conform to our standard remedial language and in accordance with our recent decision in *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020). We shall substitute a new notice to conform to the Order as modified.

⁵ If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if

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, 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. If 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 August 28, 2018.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 28, 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. January 6, 2021

Marvin E. Kaplan, Member

William J. Emanuel, Member

Lauren McFerran, Member

(SEAL) 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.

the Respondent customarily communicates with its employees by electronic means. 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

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 create the impression that we are engaged in surveillance of your union or other protected concerted activities.

WE WILL NOT interrogate you about your union or other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

DIGNITY HEALTH D/B/A MERCY GILBERT MEDICAL
CENTER

The Board's decision can be found at www.nlr.gov/case/28-CA-229160 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.



Judith E. Davila, Esq., for the General Counsel.
Frederick E. Miner, Esq. (Littler Mendelson, P.C.), for the Respondent Employer.
Bruce A. Harland, Esq. (Weinberg, Roger & Rosenfeld), for the Charging Party Union.

DECISION

STATEMENT OF THE CASE

ARIEL L. SOTOLONGO, Administrative Law Judge. At issue in this case is whether Dignity Health d/b/a Mercy Gilbert Medical Center (Respondent or the Employer) violated Section 8(a)(1) of the Act by coercively interrogating employees, engaging in surveillance and creating the impression of surveillance, and directing employees not to discuss working conditions among themselves, but instead come to management with their concerns; and

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."

whether Respondent violated Section 8(a)(1), (3), and (4) of the Act by assigning an employee more onerous duties because the employee engaged in union activities and/or because said employee cooperated with the Board's investigation of a charge filed by Service Employees International Union–United Healthcare Workers West (Union).

I. PROCEDURAL BACKGROUND

Based on a charge filed by the Union in Case 28–CA–229160 on October 11, 2018, and an amended charge filed on January 17, 2019, and on a charge in Case 28–CA–238137 filed by the Union on March 19, 2019, the Regional Director for Region 28 of the Board filed a consolidated complaint on May 31, 2019, alleging that Respondent had violated the Act as described above. Thereafter, Respondent filed a timely answer denying the substantive allegations of the complaint. I presided over this case in Phoenix, Arizona on July 23–24, 2019.

II. JURISDICTION AND LABOR ORGANIZATION STATUS

The complaint alleges, and Respondent admits, that at all material times Respondent has been a corporation with and office and place of business in Gilbert, Arizona, where it operates a hospital providing in-patient and out-patient medical care. The complaint further alleges, and Respondent admits, that during the 12-month period ending on October 11, 2018, Respondent purchased and received at its Gilbert facility goods valued in excess of \$50,000 directly from points outside Arizona, and during the same time period it derived gross revenues in excess of \$250,000. Accordingly, I find that Respondent is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

The complaint also alleges, Respondent admits, and I find that the Union has been, at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. FINDINGS OF FACT

A. Respondent's Operation and Other Background Facts

In this Section, I will discuss some background facts that are not in dispute. As briefly described above, Respondent operates a hospital and healthcare facility (the facility) in Gilbert, a suburb of Phoenix, Arizona. The events at issue in this case involve the employees and managers in the Emergency Department (ED), where approximately 80 employees work. ED personnel, other than management, include physicians and physician assistants, nurses (which include registered nurses, certified nurse assistants, and charge nurses) techs, paramedics, and scribes. Dawn

⁶ Curiously, although the evidence suggests that charge nurses, who played a role in some of the alleged conduct herein, may also be statutory supervisors, they were not alleged as such in the complaint. For reasons that will be discussed below, however, such omission is ultimately inconsequential.

⁷ All dates hereafter shall refer to calendar year 2018 unless otherwise indicated.

⁸ These communications, introduced into the record as General Counsel's (GC) Exhibit 4 (GC Exh. 4), certainly did not paint the union solicitors or solicitation activities in a glossy manner, and indeed sometimes portrayed those activities (or solicitors) as potentially "suspicious," warning employees to be careful about giving out personal information or clicking on links from unknown sources. On the other hand, it also

Kimball is the ED director, who supervises the department. Reporting to Kimball is Dawn Reh, the nursing manager, who in turn supervises the charge nurses. Both Kimball and Reh (sometimes collectively referred to in the record as "the Dawns" because both are named Dawn) are admitted Section 2(11) supervisors. Charge nurses direct and assign the work of the "techs," which also include paramedics.⁶ In addition to Kimball and Reh, other management officials who were involved in events surrounding Placencio and the allegations of the complaint were Joshua Harrison, Respondent's East Valley cardio-pulmonary manager, and Brian Biggs, Respondent's director of medical-surgical floors. Both Harrison and Biggs are admitted Section 2(11) supervisors, although neither actually works in the ED.

There are four (4) areas where employees work in the ED: "Triage," the patient intake area also known as PCT Screening; "HUC" (health unit clerks), who basically answer phones; the "Psychiatric Sitter" area, where psychiatric patients in need of observation are located; and the 3 "floor" zones where floor techs are assigned to work, which are the red, yellow and green zones, correspondingly named based on the intensity of treatment and patient attention required.

The events at issue in this case involve employee Jon Paul Placencio, also known as "JP," who has worked for Respondent as an ED "tech" for 13 years. He began engaging in organizing activities for the Union in July 2018, which Respondent became aware of soon thereafter.⁷ Indeed, Kimball admitted that Respondent first received reports of union activity by employees in July, and also admitted that sometime in August she received a video from a colleague in another facility showing Placencio engaging in union activity. In the wake of learning that the Union was conducting organizational activities and contacting its employees, Respondent, beginning in July, began publishing and distributing (via email) a series of newsletters addressed to its employees under the heading of "Let's Talk." These communications, inter alia, informed employees about their options if they received unwelcome communications or solicitations on-line, on the phone, or by personal visits at home, presumably by union organizers or solicitors.⁸

B. The Allegations in the Complaint

1. The events on August 28

In is undisputed that on August 28, Kimball and Charge Nurse Ryan Sutton conducted a pre-shift meeting at the ED breakroom attended by about 10 employees.⁹ Placencio, who attended the meeting, testified that Kimball stated that the Union was passing

informed employees that Respondent respected employees' rights to choose representation. None of these communications were alleged as unlawful in the complaint, most likely because these expressions are protected under Sec. 8(c), not to mention the First Amendment. For this reason, I see no need to discuss or detail these communications at length. I would note, however, that the GC apparently believes that they are relevant because they allegedly reflect animus, which in turn is a predicate to finding a violation under the *Wright Line* analysis (citation omitted). For the reasons I will discuss below, I am not persuaded that these communications are ultimately relevant.

⁹ Preshift meetings are regularly held by the ED staff, during which work-related topics and events of the day are discussed.

out flyers to workers at the facility, and that the workers had a right to form an union, adding that her husband belonged to one. She also said that the Union was making promises it could not keep, and that it needed dues because workers in California were not paying theirs in light of a recent Supreme Court decision. According to Placencio, Kimball then pointed in his direction (at the head of the table where he was sitting) and said she knew the Union had contacted him.

Kimball testified that she told those at the August 28 pre-shift meeting that staff had come to her to complain that union organizers had contacted them at home and were upset. She told them that Respondent had not provided the Union their personal information and explained to them what they could do if they did not wish to be contacted at home. Kimball did not identify those who had complained to her, and specifically denied singling anyone out as being involved in the union organizing.¹⁰

I credit Placencio's version of events, and specifically his testimony that Kimball pointed at him and stated that she knew the Union had contacted him. In so doing, I note that Placencio gave a detailed account of the meeting, including statements that might seem helpful to Respondent's case—such as the fact that Kimball stated that Respondent respected its employees' right to engage in union activities. I also note that Kimball never denied pointing at Placencio, and that this meeting occurred shortly after Kimball learned that Placencio was one of the union organizers, which makes it more likely that she singled him out at this meeting.

2. The events of September 27 and October 3.

It is undisputed that on September 27, Kimball and Harrison were "rounding" in the ED, and spoke to various employees, including Placencio.¹¹ What is disputed in this case is what Kimball and Harrison said to Placencio.

Thus, Placencio testified that on the date in question he was working in his capacity as a health unit clerk (HUC) and had just helped with a patient in critical condition in room #18, who had just passed away. As he was heading to the HUC desk to answer a phone, Placencio was approached by Kimball and Harrison, who were on the other side of the HUC desk. According to Placencio, Harrison introduced himself, then asked if he had heard anything about the Union. Placencio answered that the only thing he had heard was what he had read in the "Let's Talk" emails from management. Harrison then said that the Union was making promises they couldn't keep, telling people they will get free family health care, then asked "how's the company going to pay for that?" At this point, Placencio testified, the phone rang (at the HUC station) and he answered it, while Kimball and Harrison waited. When the phone call ended, Harrison again asked Placencio if he had heard about the Union, then asked what his name was. When Placencio pointed at his name tag, Harrison asked Placencio if he went by "JP" or "Jon Paul." Placencio responded that he goes by both names. Harrison then said that it

¹⁰ Kimball, who was called as an adverse witness under FRE 611(c) by GC, initially testified before Placencio did, and did not specifically deny pointing at anyone during the meeting, even when she was recalled to the stand after Placencio had testified.

was funny that he hadn't heard anything about the Union, because the people in the Respiratory Department were saying that they were being organized by a "JP" from the ED. According to Placencio, Harrison kept asking him if it was "JP" or "Jon Paul," and kept repeating that employees in the Respiratory Department had identified a "JP" as the culprit in the union organizing. Harrison and Kimball then walked away, heading to the room where EKG machines were kept. Then they called Placencio over, and Harrison showed Placencio the proper technique to perform EKGs, which Placencio thought was puzzling, since no one had complained about him using the wrong technique.

Kimball testified that she and Harrison used the "Let's Talk" bulletin about wages (GC Exh. 4, No. 4), a copy of which they had printed out, as reference to talk to ED employees about wages, including Placencio, during this occasion. She recounted that she told Placencio about Respondent's merit pay program, and how Respondent was very competitive in Arizona regarding wages and benefits and stressed that Respondent valued its employees and can share things with them openly. According to Kimball, Harrison told Placencio that he had been getting concerns from employees about wages in California, and that no one could promise employees any particular wage, since that is something that was subject to bargaining. He also stressed that employees could come to them with any questions they might have. Kimball denied that she or Harrison asked Placencio whether he was involved with the union organizing or supported the Union.

Harrison's recollection of this event wasn't nearly as detailed or clear as that of Placencio, or even Kimball. Thus, when asked what he said to Placencio during their encounter on this day, he testifies as follows:

Basically the same talking points as the wages. I did bring up the information regarding personal experience; my staff have been contacted by several representatives through Dignity Health showing them wages. Just want to clear the air and make sure that staff have a—sorry, I'm losing train of thought here. Staff have an open, informed decision regarding the wages and that we're not trying to pull one over. I forget exactly what I stated exactly. But it was to that degree. (Tr. 107)

Harrison also testified that he did not know who Placencio was, or that he was a union organizer, and said that he repeated the same thing he said to Placencio—as described immediately above—to others.

A few days later, on October 3, Placencio sent out a group email to most of the staff at the facility, including management, in which he accused Kimball and Harrison of asking him, "point blank," whether he was spearheading the Union's organizing efforts. In the email, Placencio admits that he indeed has been actively supporting the Union's organizational drive, something that he acknowledges he denied when confronted by Kimball and Harrison, "given the circumstances." (GC Exh. 5).¹²

¹¹ "Rounding" is a common term used in the healthcare industry that is short for "making the rounds," whether by physicians, nurses, managers, or others.

¹² In the email, Placencio labels the "interrogation" by Kimball and Harrison as "unacceptable and illegal," and expresses his remorse at not having been honest about his union activities when confronted by

Neither Kimball nor Harrison ever responded to Placencio's email, in writing or otherwise. Kimball testified that she consulted with Respondent's HR Department in order to seek guidance on the matter.¹³ HR's response was to come up with a series of "Talking Points," distributed to all the managers and supervisors, to be used in case any employees asked about Placencio's allegations. These Talking Points, inter alia, directed supervisors to state that the employee in question (Placencio) had not submitted a formal complaint through "appropriate channels," and that publicly "defaming or demeaning any coworker is not consistent with our values." According to Kimball, she used the "Talking Points" whenever any employee asked her about Placencio's allegations.

For the following reasons, I credit Placencio's version of events, and conclude that Harrison repeatedly questioned him as to whether he was involved in the union organizing. First, I note that Placencio gave a detailed, blow-by-blow account of his encounter with Kimball and Harrison on this date, including the sequence of events as they occurred—a more detailed account than Kimball's, who generally described how she and Harrison stuck to the "Talking Points;" and a vastly more detailed account than Harrison's befuddled account, as cited above.¹⁴ The richness of the details provided makes it less likely that it was a fabrication, and thus more trustworthy. Second, I note that Harrison, in his testimony, never specifically deny and indeed never addressed Placencio's accusations. While it is true that Harrison's testimony preceded Placencio's, he could have easily been recalled to the stand, as Kimball was. Third, while Kimball denied that she or Harrison had asked Placencio anything about his union activities, she had to be coaxed to include Harrison in her denials, and thus I do not find such denial very convincing.¹⁵ Finally, I find it curious, indeed odd, than in the face of a very public accusation by Placencio (in his October 3 email) of coercive and possibly unlawful behavior, neither Kimball nor Harrison (or Respondent) ever publicly issued a denial, but rather stuck to a "script" of talking points prepared by the HR department—which never directly addressed the accusation made.

Kimball and Harrison. In his testimony, Placencio explained that he had decided to come clean and publicly acknowledge his union involvement because he had felt uncomfortable not telling the truth to Kimball and Harrison. Placencio also testified that he informed the Union about this incident at the time he sent the email, which became the basis for the Union's filing of a Board charge in Case 28-CA-229160 on October 11.

¹³ According to Kimball, after she read Placencio's October 3 email, she spoke to HR Director Deb Sunman on the phone, who advised her to do nothing. Kimball testified that HR "investigated" the incident, and that Sunman directly asked her if *she* had asked Placencio if he was spearheading the union drive, which she denied she did. The record is silent as to whether the HR Department ever asked Harrison if he had asked Placencio if he was spearheading the union drive. Indeed, Harrison never specifically addressed Placencio's testimony in that regard.

¹⁴ The details provided by Placencio included the fact that a patient had just passed away in nearby room moments before his encounter with Kimball and Harrison, which Kimball later confirmed; the things said, in the sequence they were said, before and after he had to answer a phone call during the encounter; the specific nature of Harrison's questions, including whether he was known as "Jon Paul" or simply "JP;" and the conversation that immediately followed thereafter in another area regarding EKG techniques.

While this may be a case of "staying on message" gone extreme, it simply runs contrary to normal human behavior, which is to forcefully deny a very public false accusation of improper and unlawful behavior.

Accordingly, I credit Placencio's testimony in this regard over Kimball's or Harrison's.

3. The events at the facility's north entrance in November

Placencio testified that sometime in November, the exact date uncertain, he was distributing union leaflets with fellow employees in the parking lot near the north entrance of the facility, near the facility's chapel.¹⁶ According to Placencio, the leafletting took place between 7:30 p.m. and 9 p.m., after the end of his (and the other's) shift.¹⁷ While he was distributing leaflets and talking to some employees, Placencio spotted Managers Brian Biggs and Dawn Reh standing outside under the cover (awning), about 15 feet away. They were "just standing there," according to Placencio, not speaking on their cell phones or doing anything else. He asked them if they wanted a flyer, but they laughed and declined, and then returned back inside the facility. According to Placencio, the whole encounter lasted 1 to 3 minutes.

Biggs testified that sometime in November, just before he was scheduled to start "rounding" with Reh, when he received 2 phone calls from charge nurses complaining that people in uniforms were passing out flyers outside the administrative entrance near the chapel. He reported these phone calls to Reh when she converged with him before the start of their rounding and told her that they needed to check this out. Biggs and Reh proceeded to look out of a window that was near the entrance in question, but could not see anything, since it was dark outside. Biggs then walked out the north entrance, while Reh stayed inside, and he approached a group of about 4–5 staffers in uniform, who were standing about 20 feet from the entrance (door) to the facility. According to Biggs, he told this group that he had received complaints that they were delaying staff coming in and told them not to do that. He also asked them if they were "on shift," and they

¹⁵ Thus, Kimball testified as follows:

Q. Did you or Mr. Harrison ask Mr. Placencio whether he was involved in an organizing campaign?

A. I did not.

Q. Did you or Mr. Harrison ask him whether he supported the Union in an organizing campaign?

A. I did not.

Q. You did not. Did Mr. Harrison?

A. Nope. I did not hear him say anything.

Q. Anything like what?

A. Accusing Jon-Paul of any type of union organization. (Tr. 58. Emphasis supplied)

¹⁶ Three aerial photographs of the area (courtesy of Google) where the leafletting took place were introduced into the record by the General Counsel (GC Exh. 9/1–3)

¹⁷ Placencio testified that there still was some remaining sunlight at the time, although it was beginning to get dark, which cannot be accurate. In that regard, I take judicial notice that in the month of November the sun sets around 5:30 p.m., so by 7 p.m., when the leafletting started, it should have been fully dark. I do note, however, that Placencio also testified that the facility's parking lot is well illuminated.

replied that they were not.¹⁸ He then started walking back to go inside the facility, when he heard a male voice asking if he wanted to know anything about the Union, and offering him a flyer. Biggs declined, and went back inside, where he encountered Reh, and they went on to do their rounding. According to Biggs, the entire encounter with the staffers in the parking lot lasted about 20 seconds.

Reh offered a very similar account as Biggs, testifying that Biggs reported to her that charge nurses had phoned him to complain that staffers were uncomfortable about the activities of individuals distributing leaflets outside. She confirmed that she and Biggs went to look out of a window near the entrance, but could not see anything, and confirmed Biggs' testimony that she stayed inside the building while Biggs went outside to check out what was occurring. According to Reh, Biggs returned back inside after about 2 minutes, and reported to her that the staffers outside were distributing union flyers. Biggs told her this was "OK," so long as they were off duty, which he confirmed they were. She and Biggs then went ahead and started their rounding, as had been planned.

As reflected above, the account of Placencio regarding this incident differs somewhat from that proffered by Biggs and Reh. The main difference in their accounts is that Placencio placed Reh outside with Biggs, while both Biggs and Reh testified that she stayed inside at all times, never venturing outside. Additionally, in Placencio's version, neither Biggs nor Reh engaged in conversation with the employees distributing the union flyers, whereas Biggs admitted he had a brief conversation with these employees. Finally, both Placencio and Reh testified that Biggs' encounter with the employees lasted anywhere from 1 to 3 minutes, whereas Biggs testified that it lasted about 20 seconds.

For the reasons that I will discuss below, I conclude that I need not resolve these differences in testimony or make credibility resolutions in that regard, because ultimately these differences will be immaterial in applying the legal analysis of whether unlawful surveillance took place, as alleged in the complaint. Nonetheless, I will note that Placencio's and Reh's estimate that this encounter lasted about 1 to 3 minutes is a far more realistic and reliable estimate than Biggs' estimate of 20 seconds, given what transpired, and my legal analysis will thus presume Placencio's and Reh's estimate to be accurate.

4. The alleged change in Placencio's working conditions from October (2018) to January 2019

As briefly described above, Placencio works as an ED tech, which involves working in different capacities or areas within

the department. As described above, these areas, which involve different duties and responsibilities, are the "Triage" area, also referred to as the "intake" area or "PCT Screening;" "HUC;" the "Psychiatric Sitter" assignment; and the "floor zones," which are the red, yellow, and green zones. Kimball testified that the daily assignments to work in one of these areas are made by the charge nurses, and that these assignments are to be rotated among the techs, to the extent charge nurses are able to do so.

Placencio testified that normally, he was assigned to the "Triage" position, a position he considers more onerous than his other assignments, very "seldom," or about 1 to 3 times per month. After he sent out his group email on October 3 announcing his involvement in the union organizing, Placencio asserted that he was "disproportionally" assigned to the Triage position. He thus testified that after his email, and thru December, he was assigned to this position from 30 percent to 50 percent of the time.¹⁹ In answer to my questioning as to why he considered the Triage assignment more onerous than other ED tech duties, Placencio testified that in Triage he had to receive incoming patients and take them to their rooms. According to Placencio, this meant that he had to walk about twice the normal distance(s) that he would otherwise.²⁰ Additionally, this duty includes interviewing the intake patients in detail, and on occasion, assisting non-ambulatory patients by physically lifting them in or out of their wheelchairs or beds. According to Placencio, these duties, which involve "tons of different patients that come through the door," make the Triage job more emotionally draining.

Besides the above-described testimony by Placencio, the General Counsel, in support of its allegation that Placencio was disproportionately—and discriminatorily—assigned additional Triage duty, introduced into evidence a very voluminous exhibit comprised of over 2 years of daily assignment sheets for the ED, produced by Respondent under subpoena.²¹ Notably, the General Counsel, apparently confident that the voluminous exhibit would support its allegation of discriminatory or retaliatory conduct toward Placencio, asked no questions of any witness regarding the contents of these documents, but simply introduced them into evidence, apparently choosing to save its "coupe de grace" argument for its post-hearing brief. In its brief, however, this argument consisted of only one sentence, thus summarizing the contents of this 4000+ page exhibit: "Although, between January 2017 and September 2018, Placencio was assigned to the triage position for an average of 3.4 shifts per month, he was assigned 5 triage shifts in October 2018, 5 in November 2018, and 6 in

¹⁸ According to Biggs, this occurred around 7 p.m., which is when the shifts change.

¹⁹ Initially, Placencio testified that he was assigned 2–3 times a month to this position, but then testified that it was about once per month. (Tr. 127–129). As discussed below, however, this assessment is not supported by documentary evidence introduced by the General Counsel. Indeed, the documents in evidence shows Placencio's testimony that he was assigned to Triage up to 50 percent of the time during the 3–4-month period in question to be a significant exaggeration, which diminishes his credibility. Additionally, I would note, Placencio testified that when he complained to Kimball in January 2019 that he had been unfairly assigned to Triage more often, Kimball checked the assignment sheets and agreed with him. Kimball, on the other hand, testified the opposite, that

her review of the assignment sheets did not reveal a disproportionate number of Triage assignments. I credit Kimball's testimony in that regard, because as discussed below, the assignment sheets do not support Placencio's testimony.

²⁰ Thus, Placencio testified that he wears a "Garmin" GPS tracker, which measures the number of steps he takes on a given day. On a normal day, Placencio testified, he typically walks 7 to 8 thousand steps during the course of his shift, whereas on Triage duty it is double that amount. (Tr. 131–133).

²¹ The exhibit, GC Exh. 14, consists of 34 separate electronic files consisting of approximately 4400 pp., covering the period from January 2017 through July 2019.

December 2018.”²²

The problem with this exceedingly short summary of an argument, given the amount of evidence introduced, is that it is highly misleading, because it focuses on a very narrow statistic that fails to take many factors—and a broader picture—into account, and thus discounts and ignores exculpatory evidence that undermines its theory. In so doing, the General Counsel falls very short of meeting its burden to establish a violation by the preponderance of the evidence. For example, while it may be true that the “average” number of Triage assignments for Placencio between January 2017 and September 2018, before he came out as a union supporter, was 3.4 times per month, the records show that during the same time period he was sometimes assigned to Triage as much as 6 times per month.²³ Indeed, at other times, Placencio was assigned to Triage 4 to 5 times per month, certainly more often than the 1 to 3 times a month he claimed. Additionally, the record shows that other ED techs sometimes worked as often as 7 to 9 times per month in Triage, significantly more often than the 5–6 times per month which the General Counsel claims was discriminatory and disproportionate in the case of Placencio.²⁴ Moreover, by selecting a very narrow time frame—the months of October, November, and December alone—to argue that Placencio was disproportionately being assigned to Triage more than during his “average” of the previous 20-month period, the General Counsel mathematically skews the results in its favor. It is likely that Placencio’s “average” would be about the same if the 3 months in question were made part of and included in the 20-month group from which the average was derived. In any event, it is the General Counsel’s burden to show otherwise, but it failed to do that in its very limited—and significantly flawed and skewed—analysis.

In sum, the facts simply do not support the allegation that Placencio’s Triage duty was significantly increased during the

²² Unfortunately, this practice of the wholesale and automatic introduction of vast amounts of records produced under subpoena, sight unseen and no questions asked—what I refer to as a “document dump”—appears to be a growing and unwelcome practice by the General Counsel. There are significant and often fatal problems with this approach. First, given the General Counsel’s burden of proof, any lack of clarity, any ambiguity, any entries difficult to read or decipher, any lack of obvious relevance, will be held against the General Counsel. Introducing these records, without first carefully analyzing them, is the football equivalent of throwing a “Hail Mary” pass without first ascertaining if there are any receivers downfield. As a representative of the government, the General Counsel has an obligation to be fair and impartial, and to make certain that the records clearly support its case—before such documents are introduced. This, of course, would likely require some old fashioned hard and speedy work by the General Counsel after receipt of the documents, i.e., the proverbial “burning of the midnight oil” on the first or subsequent days of the trial, in order to properly analyze the evidence before it is introduced. This effort could result in having to call, or re-call, witnesses to the stand, and might necessitate asking the judge for additional time or even for a short postponement if necessary. In this scenario, it is the General Counsel’s obligation and duty, should the evidence negate or contradict its allegations, to bring it to the attention of the Regional Director and ultimately the judge, and to move to dismiss the allegations if the documents fail to support the allegations in the complaint. As of late, with its “document dump” practice, the General Counsel appears to be relegating this task to the judges, as if saying “we have no idea at this time if the vast number of documents we are introducing actually support

period in question.

5. Respondent’s alleged imposition of more onerous work conditions by instructing Placencio to complete check-off lists

The General Counsel alleges that beginning about November 15, Respondent repeatedly instructed Placencio to complete check-off lists, therefore imposing more onerous working conditions on him, because of his protected activity.²⁵ The facts are as follows:

It is undisputed that on November 15 Respondent introduced check-off lists for ED techs working at the HUC positions to complete whenever possible. According to the testimony of both Kimball and Reh, these lists were introduced at a meeting held in November, in response to a survey of employees, some of whom had expressed concern that techs working in prior shifts were not completing all their duties during their shifts. According to Kimball and Reh, the lists were a way to standardize practices and provide consistency and guidance to techs regarding their duties, none of which were new.²⁶ It was not mandatory for the techs to fill out the check-off lists, which they were expected to do when they had some “down time” while working at the HUC desk, and the lists were not used for evaluations. There is no evidence or any allegation that any tech, including Placencio, was ever disciplined or reprimanded for failing to fill out the check-off list.

Placencio testified that on six (6) to ten (10) occasions, Kimball told him to fill out the checkoff lists, and further testified that other techs only “sporadically” filled them out. The completed lists were kept in a binder at the HUC desk and were thus accessible to anyone who wanted to see them. Kimball, who did not contradict or deny Placencio’s testimony that she had repeatedly asked him to fill out the lists, testified that she encouraged other techs (besides Placencio) to fill out the check-off lists.²⁷

our case, and we don’t have the time or inclination to make such assessment, but we will hope for the best, make our best argument in our brief, and let the judge decide.” Given the General Counsel’s burden of proof and obligation to fairness and impartiality, this is simply the wrong approach to prosecuting unfair labor practice cases. While the General Counsel must give its charging party witnesses the benefit of the doubt, once it has in its possession records that may support or contradict their allegations, it must examine them thoroughly, and not blindly introduce these records into evidence hoping for the best. In this instance, I erred in allowing the General Counsel to do just that. In the future, I give General Counsel notice, I will not allow for the introduction of such documents on a wholesale basis, as it only unnecessarily burdens the record.

²³ For example, in September 2018.

²⁴ These employees include Andrew, Jenna, Kim, and Lucas (all first names, as they appear on the timesheets). Other ED techs often worked in Triage 6 times a month. Thus, as discussed below, it is difficult to imagine in these circumstances how Placencio was being singled out unfairly for this duty when in fact others were assigned this allegedly more onerous duty more often.

²⁵ Complaint par. 6(a).

²⁶ A copy of the check-off list was introduced as GC Exh. 10.

²⁷ Respondent introduced copies of all the check-off lists filled out between December 19 (2018) and July 16, 2019 (R Exh. 5). This record indicated that Placencio filled out 12 check-off lists during this time period. At least 2 other employees, however, appear to have completed the lists more often, an employee whose initials are “JCH,” who completed 19 lists, and another whose initials are “NB,” who completed 14. The

Accordingly, I credit Placencio’s testimony in that regard, and find that he was asked by Kimball on 6 to 10 occasions to fill out the check-off lists. Whether such conduct amounts to a violation of the Act will be discussed below.²⁸

6. The allegation regarding Respondent’s conduct on or about February 7, 2019

It is undisputed that Kimball met with Placencio in her office on February 7, 2019, along with Brian Biggs.²⁹ According to Placencio, after initially discussing an entry that Placencio had made in one of the check-off lists (as briefly described above), the topic turned to things that Placencio had allegedly been telling—or discussing with—other employees. Placencio testified that Kimball told him that other employees had reported that Placencio was spreading rumors that they should “watch their backs” because Respondent was going to eliminate (do away with) the ER tech positions. Placencio denied doing so, saying that he did not know where this was coming from, but admitting that people had been coming to him with concerns. Additionally, Placencio testified that Kimball told him there is a lot of “whispering” going on in the nurses station, that if he needed to whisper something, that should be done in the breakroom, adding that Kimball stated that she had overheard him talking on the phone in one of the stations, and that the conversation was not work-related. Finally, Placencio testified that Kimball asked him who was coming to him with concerns, and what the concerns were about—and told him that he and others should come to her if they had concerns. With regard to Briggs, Placencio testified that he asked Placencio if he felt comfortable telling people to come to “Dawn” (referring to either Kimball or Reh), and that he replied that he had in fact done that.

For her part, Kimball testified, regarding the February 7 meeting, that she held this meeting with Placencio, among other reasons, to discuss a “rumor” that he had been telling other employees that the ER tech positions were going to be eliminated. She testified that she asked him if he had any questions because

record is silent as to whether these were among the other employees whom Kimball testified she had encouraged to fill out these lists. Although Placencio testified that he never witnessed Kimball tell any other tech to fill out the checklists, this testimony is devoid of relevance or significance—unless Placencio could assert that he was always present any time Kimball spoke to any other tech, something that is simply not possible.

²⁸ Placencio also testified that he was “accused” by Kimball, during a meeting with her in February 2019, of providing false information in one of the check-off lists that he had submitted (Tr. 146). Kimball, on her part, testified that she noted that Placencio had indicated in one of the check-off lists that he had performed an “Accucheck” that had in fact not been performed, and brought it to Placencio’s attention. I would note, however, that this incident is not alleged in the complaint as a violation, as thus it merits no further discussion.

²⁹ As described earlier, Biggs is Respondent’s Director of Medical-Surgical floors.

³⁰ Such statement, if accurate, reflects that techs had concerns about not getting scheduled, which makes it more likely that a rumor was floating that Respondent was planning to do away with their position—something that Placencio was accused of doing, which he denied. Indeed, although Placencio denied spreading such rumors, I credit Kimball’s testimony that she had received such reports from other employees and conclude this is the reason she brought the subject up. I do not imply that

others were reporting that he was saying this, and he should come to her to get his facts—and to tell others to do the same if they had any concerns or questions. Briggs did not testify about this meeting.

In addition to presenting Placencio’s testimony about the February 7 meeting, the General Counsel also introduced into evidence Placencio’s contemporaneous notes that he took during the meeting (GC Exh. 12). While these notes generally support and confirm Placencio’s testimony about what occurred, the notes contain many more details that help provide context to some of the statements made—and also reveal some additional statements Placencio made which were not included in his testimony. For example, the notes reflect after Kimball told Placencio that some of his peers were reporting that he was telling them to “watch out” because Respondent was “doing away” with the tech positions, Kimball said “You need to come to me. I don’t want people afraid. Cohesive. I want to clear it up.” The notes also reflect that Placencio told Kimball that his coworkers were asking “why are we not being scheduled and why we are being made to stay home.”³⁰ Additionally, with regard to the testimony about Kimball telling Placencio about not “whispering,” the notes reflect that Kimball said the following: “I want to make sure people aren’t spreading rumors to create animosity. There is a lot of whispering going on. People are uncomfortable. These convos need to be done in the breakroom.”

Accordingly, while I generally credit Placencio’s testimony, I conclude that to the extent his notes amplify the nature of the conversation, or clarify the context of what was said, I give the notes more weight, since they were taken contemporaneously with the events in question.³¹

IV. ANALYSIS

A. *The Allegation of Creating the Impression of Surveillance on August 28*³²

As discussed in the Facts section, I credited Placencio’s

Placencio was in fact spreading these rumors, but conclude that Kimball had a good faith reason to believe that he—or someone else—was doing so.

³¹ The General Counsel offered Placencio’s notes under FRE 803(1) (Present Sense Impression), and I admitted them under such rule. In retrospect, this was an error on my part. FRE 803(1) is normally used to admit a statement or utterance verbally made by a person (usually not on the witness stand), rather than to admit the recorded notes of the person who is actually testifying. In order to admit the latter, the proper rule is FRE 805 (Recorded Recollection). The catch under FRE 805, however, is that it is used when the witness—who recorded the matter by taking the notes—cannot recall the events and must therefore rely on the notes to refresh his/her memory. The rule provides, however, that if admitted, the record (i.e., the notes) may be read into evidence, but may be received as an exhibit only if offered by an *adverse party*, in this case, Respondent. In other words, the witnesses’ own notes cannot be admitted to buttress his/her own testimony, unless that witness cannot recall the events in question—which was not the case with Placencio. Nonetheless, given the fact that under the Board’s practice, the rules of evidence need not be rigidly followed, this error is harmless. Indeed, inasmuch the notes provide context that may be beneficial to Respondent’s case, I can assume that Respondent will no longer object to their admission and may actually wish it had offered them instead.

³² Complaint ¶ 5(a).

testimony that on August 28, during a staff meeting, Kimball, who spoke about the Union, pointed at Placencio and stated that she knew the Union had contacted him. I note that this occurred long before Placencio publicly “outed” himself as a union supporter, which he did on October 3, when he sent out an email to the medical center’s staff. The General Counsel alleges and argues that Kimball’s conduct unlawfully created the impression that Placencio’s protected activity was being monitored. In so doing, it argues that although Kimball had learned of Placencio’s union activity through a video it had received from a colleague, she did not point this out but rather left Placencio to wonder how she knew, thus leading to the reasonable conclusion that his activities were being monitored. Respondent, on the other hand, argues that Kimball’s alleged act of pointing at Placencio was at best a vague gesture, and that Placencio’s “subjective” belief of being singled out could not reasonably have created the impression that Respondent was engaged in unlawful surveillance. For the following reasons, I conclude that the General Counsel has the better argument, and that Respondent’s conduct violated Section 8(a)(1) of the Act.

The test of whether an employer has unlawfully created the impression of surveillance is an objective one, that is, whether under all the circumstances an employee could reasonably conclude from the statement or conduct in question that his/her protected activities had been placed under surveillance. *Bridgestone Firestone South Carolina*, 350 NLRB 526, 527 (2007), quoting *Flexsteel Industries*, 311 NLRB 257, 257 (1993).³³ Thus, when an employer tells employees that it is aware of their protected activities, but fails to identify the source of this information, an unlawful impression of surveillance is created because employees could reasonably surmise that employer monitoring has occurred. *Conley Trucking*, 349 NLRB 308, 315 (2007). In this instance, I credited Placencio’s testimony that Kimball directly pointed at him and stated that she knew he had been contacted by the Union. Contrary to Respondent’s argument that this gesture was somehow vague and that Placencio’s reaction to that conduct was “subjective,” I conclude that any reasonable employee under the circumstances would have concluded that he/she was being singled out and that his/her protected activities was being monitored. This is particularly true since Kimball did not identify the source of her knowledge, and any employee in such circumstances could reasonably assume that surveillance was the source. Accordingly, I conclude that Respondent violated Section 8(a)(1) of the Act in this instance.

B. *The Allegation of Unlawful Interrogation on September 27*³⁴

As described in the Facts section, I found that on September 27, while rounding with Kimball, Harrison asked Placencio if he had heard about the Union, and when Placencio denied knowing much about it, repeatedly asked him whether he was known as “JP,” whom the employees in the Respiratory Department (where Harrison was the manager) had reported was the culprit

in the union organizing effort. The General Counsel alleges this was an unlawful interrogation, while Respondent argues that there was no unlawful interrogation. I agree with the General Counsel.

In determining whether an unlawful interrogation has occurred, the Board looks at whether under all the circumstances, the interrogation reasonably tends to restrain, coerce, or interfere with the rights guaranteed by the Act. Relevant factors in that determination include: the nature of the information sought; the identity of the questioner; the place and method of the questioning; and the truthfulness of the employee’s reply to the questioning. *Rossmore House*, 269 NLRB 1176, 1177–1178 (1984), citing *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964); *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985); *Westwood Health Care Center, A Division of Medicare Associates, Inc.*, 330 NLRB 935, 939 (2000). In this instance, I note that the interrogation was conducted by Harrison, in the presence of Kimball, both high-level managers for Respondent, and in the case of Kimball, Placencio’s department head. Harrison repeatedly sought Placencio to admit his complicity, if not guilt, about spearheading the union organizing campaign, something that Placencio falsely denied—a clear indication of his concern about the consequences if he revealed the truth.³⁵ Although the interrogation took place at Placencio’s workstation (at the HUC desk), as opposed to a supervisor’s office, I find that this less formal location did not diminish the coercive impact of the interrogation, given the totality of the circumstances. In that regard I note that Harrison engaged in insistent and repetitive pressing of Placencio to admit his complicity in the Union organizing campaign, in the presence of his department head. I conclude that any employee in Placencio’s shoes would have reasonably felt coerced under the circumstances, and therefore I find that Respondent violated Section 8(a)(1) as alleged in the complaint.

C. *The Allegation that Respondent Engaged in Surveillance in November 2018*³⁶

As discussed in the Facts section, it is undisputed that sometime in November 2018, the exact date unknown, Brian Biggs left the building and went to the parking lot at the north entrance of the facility, and briefly engaged in conversation with employees who were distributing union leaflets. I concluded, based on the credited testimony of Placencio and Reh, that this encounter lasted from 1 to 3 minutes, and that Biggs then returned inside the building.³⁷ Additionally, I note that Biggs admitted engaging the employees distributing flyers in conversation, asking them if they were “on shift” (that is, on working time), whereas in Placencio’s version, Biggs did not address the employees, a different version that I conclude is ultimately irrelevant. The General Counsel alleges that by walking outside at “watching” the employees distribute union leaflets, albeit for only less than 3 minutes, Respondent engaged in unlawful surveillance. As

³³ See, also, *Consolidated Communications of Texas Co.*, 366 NLRB No. 172, slip op. at 1 fn. 1 (2018), citing these cases.

³⁴ Complaint ¶ 5(b).

³⁵ I note that by this time, Respondent had issued numerous communiques to its employees, through its “Let’s Talk” newsletters and e-mails, indicating its vigorous opposition to the Union.

³⁶ Complaint ¶ 5(c).

³⁷ As noted in the Facts section, Placencio also testified that Reh also went outside along with Biggs, which both Biggs and Reh denied. For the reasons discussed below, I conclude I need not resolve this discrepancy, since Reh’s presence outside will make no difference to the legal conclusion ultimately reached.

would be expected, Respondent begs to differ. This time, I conclude Respondent is correct.

It is well settled that where employees are conducting their (union or protected) activities openly on or near company premises, open observation of those activities by an employer is not unlawful. *Roadway Package System, Inc.*, 302 NLRB 961, 961 (1991); *Wal-Mart Stores*, 350 NLRB 879, 883 (2007); *Metal Industries, Inc.*, 251 NLRB 1523 (1980). In other words, employers need not avert their eyes nor wear blinders where employees are openly and publicly engaging in protected activity on the employers' premises. I note that in this case, the employees were openly and publicly distributing union literature at the employer's parking lot, and that the alleged observation by Briggs (and perhaps Reh) was neither prolonged (less than 3 minutes) nor repeated.³⁸ Nor was there anything coercive in Briggs' asking the employees if they were off the clock, since the employer can lawfully restrict protected activity of this nature to nonworking time. Indeed, the exchange appears to have been polite, with the employees even offering Biggs some union literature. In these circumstances, I do not see how this conduct could be found to be unlawful, and therefore conclude that this allegation should be dismissed.

D. The Allegations Stemming from the Meeting on February 7, 2019

The complaint alleges that on February 7, 2019, during a meeting with Placencio, Kimball directed him not to discuss working conditions with other employees at the workstation(s); directed Placencio (and other employees) to send any questions to her; interrogated Placencio about his protected activities and those of others; and created the impression of surveillance by telling Placencio that she knew about his protected activities.³⁹

As described above in the Facts section, during the February 7 meeting, Kimball informed Placencio that she had received reports from other employees that he was spreading rumors that Respondent was about to do away with the ED tech positions—something Placencio denied, although he admitted that people were asking why they weren't being scheduled. Placencio's contemporaneous notes of the meeting, which I have found to be the most accurate rendition of what occurred, indicate that Kimball said "You need to come to me. I don't want people afraid . . . I want to clear it up." In this context, Kimball asked Placencio who was coming to him with concerns, told him to tell them instead to come to her, and also said "I want to make people aren't spreading rumors to create animosity. There is a lot of whispering going on. People are uncomfortable. These convos need to be done in the breakroom."

Thus, in analyzing the statements made by Kimball, as described above, the context in which these statements were made

is crucial, as the Board never applies the test as to whether a statement is coercive in a rigid or mechanical manner. The facts, and credited testimony, indicate that Kimball had received reports from other employees that Placencio was spreading rumors that the ED tech positions were going to be eliminated, thus prompting Kimball's statements to Placencio. I can find no authority or discern any logic for the proposition that spreading false rumors—particularly rumors of such significant consequences, the loss of many jobs—is automatically protected activity, nor is it reasonable to conclude that even if that activity was somehow protected employers would be defenseless to stop such rumors or prevent their further spread. In these circumstances, and given such context, I find that Kimball's words to Placencio to come to her—and tell others to come to her—for clarification, rather than keep spreading information that was false and causing consternation, cannot be found to be coercive and thus unlawful. I find that it would not be reasonable, in this context, to interpret Kimball's words as a directive to stop engaging in all "protected" activity, rather than what it actually was: a directive to stop spreading false or misleading information. Likewise, Kimball's statement about "whispering" in the workstations should be viewed through the same contextual lens. Indeed, it is notable that Kimball told Placencio not that such "whispering" should never take place, but rather that such discussions should take place in the breakroom, not in a workstation. The General Counsel, in an over-reaching analysis, would have me conclude that (a) "whispering" necessarily referred to union or protected activity, rather than spreading false rumors, and (b) that prohibiting such activity in a workstation, during working time, is unlawful. Even if I were to make a leap of faith and assume that (a) is correct, since when is prohibiting union activity during working time unlawful, particularly since there is no evidence that the employer permits discussions of other nonwork related topics during working time?⁴⁰ The simple answer is that such analysis by the General Counsel is deeply flawed. Respondent was within its rights, even assuming that the "whispering" referred to union or other protected activity, to direct that such activity take place in the breakroom, during nonworking time. This is particularly true in the context of a healthcare facility, where stricter restrictions on engaging in union activity in patient-care areas are applicable. See, e.g., *Casa San Miguel*, 320 NLRB 534, 540 (1995); *Mesa Vista Hosp.*, 280 NLRB 298, 299 (1986).

In the above context, I conclude that when Kimball asked Placencio about who was coming to him with concerns—after Placencio had denied spreading rumors about the elimination of tech positions, but after admitting that others were raising questions about why they were not being scheduled—she was not engaged in a coercive interrogation about protected activities, but

³⁸ The General Counsel, in an apparent desperate attempt to bolster its weak case, argues in its brief that while Placencio testified that he only saw Respondent's representatives in the parking lot for 1 to 3 minutes, "they could have been there for some time," and then—displaying considerable chutzpah—argues that this imagined "sustained presence" was coercive. "Could have been," however, is not good enough, given the General Counsel's burden of proof. As the old saying goes, "if my grandmother had wheels she'd be a bicycle," but it is ultimately General Counsel's burden to prove bicycle status. It is therefore not surprising

that the General Counsel cited no cases in support of its contention that Respondent's conduct in this instance was unlawful.

³⁹ Complaint ¶¶ 5(d)(1); (2); (3); and (4), respectively.

⁴⁰ To establish a violation, the General Counsel would not only have to establish that union-related conversations during working time were prohibited, but that other nonwork related conversations were routinely tolerated during working time. No such evidence exists, and it would be improper to presume such, reasonable as such presumption might be.

rather trying to stop a false rumor about the elimination of tech positions. Similarly, by telling Placencio that other employees had reported that he was spreading rumors about the elimination of tech positions, Kimball did not create the impression that Respondent was engaged in surveillance. Indeed, the very use of the words that others have reported the activity in question, legally and logically forecloses the suspicion that the source of the information is the employers' surveillance, and thus no reasonable employee could come to that conclusion. See, e.g., *Bridgestone Firestone South Carolina*, 350 NLRB 526, 527 (2007); *North Hills Office Services*, 346 NLRB 1099, 1104 (2006); *Conley Trucking*, supra. (failure to disclose the source of the information is the key to creating the impression of surveillance).

Accordingly, and for the reasons discussed above, I conclude that Respondent did not violate the Act as alleged in paragraph 5(d)(1) through (4) of the complaint, and that such allegations should be dismissed.

E. The Allegations that Respondent Discriminated Against Placencio by Imposing More Onerous Working Conditions on Him

The complaint alleges that Respondent violated Section 8(a)(1), (3), and (4) of the Act by repeatedly instructing him to complete daily check off lists, and by disproportionately assigning him more often to the Triage area.⁴¹ The General Counsel alleges that Respondent engaged in this conduct because Placencio engaged in union activities and/or because he filed charges or gave testimony in Board proceedings. Citing *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the General Counsel asserts that it has met its initial burden to prove, by preponderance of the evidence, that Placencio engaged in protected activity, that the employer knew about it, that the employer had animus resulting from such protected activity, and the adverse employment action at issue was motivated, at least in part, by such animus. If the General Counsel is able to make such a showing, the burden of persuasion shifts to the employer "to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra at 1089; see also *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). The employer cannot carry this burden merely by showing that it also had a legitimate reason for the action, but must persuade, by a preponderance of the evidence, that the action would have taken place absent the protected activity. *Dentech Corp.*, 294 NLRB 924, 956 (1989).⁴²

I disagree with the General Counsel that it has met its initial burden under *Wright Line*, for the following reasons. It is clear that Placencio was engaged in protected activity—indeed he was one of the main union organizers. It is also clear that Respondent was aware, as of early August 2018, that Placencio was engaged in union activity, as Kimball admitted receiving a video showing Placencio engaged in such activity. Additionally, the evidence suggests that Respondent harbored animus toward Placencio because of his protected activity, as indicated by Harrison's

coercive interrogation. The evidence fails to show, however, that Respondent took an *adverse* employment action against Placencio, and this factor fatally undermines the General Counsel's case.

With regard to the allegation that Placencio was directed to fill out the check-off lists on six (6) to ten (10) occasions, as he testified, it is truly mystifying as to how such directive was onerous or, more importantly, resulted in an adverse employment action, as required under the *Wright Line* analysis. Onerous, the term used in the complaint, is defined as oppressively burdensome, something that is difficult to conceive would fit the description of occasionally—even repeatedly—being reminded to fill out a 1-page check list, something that other employees did even more often than Placencio. More importantly, in order to constitute an "adverse employment action," General Counsel would need to show that the employer did something that *harmed* the employee. *Newcor Bay City Division*, 351 NLRB 1034, 1037 (2007). I note that Placencio, who obviously often ignored Kimball's repeated requests to fill out the check-off lists (hence the repeated requests), was not disciplined, nor even received a warning of any kind for his failure to do so. Accordingly, I fail to see how Placencio was harmed by Kimball's requests (or "directives," as the General Counsel calls them), or how an adverse employment action resulted. In light of this, I find no merit to the allegation, and recommend that it be dismissed.

With regard to the allegation that Respondent disproportionately assigned Placencio more often to the Triage position, the evidence also fails to show that an adverse employment action took place, albeit for a slightly different reason. Thus, it might be argued that the Triage position was more onerous than other assignments that techs were tasked with, because it involves more rigorous, fast-paced, and physically demanding work than the other assignments. If so, to the extent that General Counsel could show that Placencio's assignments to that position significantly increased during the relevant time period, a valid argument might exist that an adverse employment action took place. Nonetheless, even assuming the Triage assignment was indeed a more onerous one—something that is far from clear—the evidence failed to show that Placencio's assignment to that role increased in frequency in any appreciable manner during the time period in question. Thus, as thoroughly discussed in the Facts section, the allegation by General Counsel that the number of Triage assignments during the 4-month period in question was higher than the *average* of the preceding 20-month period is supported by neither the evidence nor the math. Not only is the statistical evidence used by the General Counsel highly misleading, and indeed skewed, with the *average* cited being totally dependent on the time period chosen for the statistical analysis, but the actual evidence shows that in other time periods Placencio had worked the Triage position just as often than during the suspect 4-month period alleged in the complaint.⁴³ Moreover, the evidence also shows that several other employees were assigned to Triage far more often than Placencio. Thus, contrary to what is

⁴¹ Complaint ¶¶ 6(a) & (b); 7; and 8, respectively.

⁴² The same analysis is applicable to Sec. 8(a)(1)(4) violations.

⁴³ Thus, it is not surprising that the large number of documents introduced by the General Counsel ostensibly to support this allegation

merited nothing more than a single sentence in its posthearing brief summarizing its supposed findings.

alleged by the General Counsel, the evidence fails to show that Placencio was *disproportionally* assigned to Triage—because he was not assigned to that task significantly more than he had been in prior occasions, and because other employees were in fact assigned to that task more often.⁴⁴ In light of the above, I conclude that the General Counsel has not met its *Wright Line* burden under to establish that Placencio suffered an adverse employment action. Accordingly, I recommend that this allegation be dismissed.

CONCLUSIONS OF LAW

1. Dignity Health d/b/a Mercy Gilbert Medical Center (Respondent) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Service Employees International Union-United Healthcare Workers West (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. By creating the impression that its employees' union activities were under surveillance, and by interrogating an employee about his union activities, Respondent has interfered with, restrained, and coerced employees in their exercise of their Section 7 rights, in violation of Section 8(a)(1) of the Act.

4. Respondent did not violate the Act in any other manner alleged in the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that Respondent violated Section 8(a)(1) of the Act by creating the impression that its employees' union activities were under surveillance, and by interrogating an employee about his union activities, I shall recommend that Respondent be ordered to cease and desist from such conduct. Additionally, Respondent will be required to post a notice to employees assuring them that Respondent will not violate their rights in this or any other related manner in the future. Finally, to the extent that Respondent communicates with its employees by email or regular mail, it shall also be required to distribute the notice to employees in that manner, as well as any other means it customarily uses to communicate with employees.

Accordingly, based on the forgoing findings of fact and conclusions of law, and on the entire record, I issue the following recommended⁴⁵

⁴⁴ Even if an argument could be made that Placencio was in fact assigned to the task more somewhat often following his protected activity than in the past—something the evidence does not support—the increase in question would likely not be significant enough to be truly characterized as an adverse employment action. Moreover, there is an additional and potentially fatal flaw in the General Counsel's allegations in this regard. The evidence clearly established that Charge Nurses were exclusively responsible for making the daily assignments for ED techs, yet the General Counsel never alleged them to be Sec. 2(11) supervisors or Sec. 2(13) agents of Respondent—as they likely were. Indeed, the record suggests that Kimball was not even aware of the daily assignment issue until Placencio complained about it in January 2019, at which time she

ORDER

Dignity Health d/b/a Mercy Gilbert Medical Center, Gilbert, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) creating the impression that its employees' union activities are under surveillance;

(b) interrogating its employees about their union activities;

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

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

(a) Within 14 days after service by the Region, post at all its facilities in Gilbert, Arizona, where notices to employees are customarily posted, copies of the attached notice marked "Appendix."⁴⁶ Copies of the notice, on forms provided by the Regional Director for Region 28, 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 facilities 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 August 28, 2018.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 28, 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. March 19, 2020

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.

proceeded to check these assignments and concluded that Placencio's allegation lacked merit. In light of my findings above, however, this omission by the General Counsel is ultimately irrelevant.

⁴⁵ 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.

⁴⁶ If this Order is enforced by a judgment of the 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."

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.

In recognition of these rights, we hereby notify employees that:

WE WILL NOT create the impression that our employees' union activities are under surveillance.

WE WILL NOT interrogate our employees about their union activities.

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

Section 7 of the Act.

DIGNITY HEALTH D/B/A MERCY GILBERT MEDICAL CENTER

The Administrative Law Judge's decision can be found at www.nlr.gov/case/28-CA-229160 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.

