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

ST. ANTHONY’S COMMUNITY HOSPITAL

and

1199SEIU UNITED HEALTHCARE WORKERS EAST

Case No. 02-CA-278511

COUNSEL FOR THE GENERAL COUNSEL’S BRIEF
TO THE ADMINISTRATIVE LAW JUDGE

Dated at New York, New York
This 5th day of May 2022

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I. STATEMENT OF THE CASE

Pursuant to charges filed by 1199SEIU United Healthcare Workers East (herein, Union or 1199), against St. Anthony’s Community Hospital (herein, Respondent), on June 10, 2021, and served on June 14, 2021, the Regional Director issued a complaint and notice of hearing against Respondent on November 24, 2021, a first amended complaint and notice of hearing against Respondent on December 9, 2021, and an amendment to the first amended complaint against Respondent on March 2, 2022. GC Exhs. 1(a)-(d), (g)-(h), (m)-(n), respectively.1 The complaint alleges that Respondent violated the National Labor Relations Act (herein the Act) in or around mid-April 2021, when Respondent’s Agent Robert Yates interrogated employees about the union activities of other employees, and on or about May 14, 2021, when Respondent discharged Andrea Roe because she assisted the Union and engaged in protected concerted activities.2

Respondent filed an answer to the first amended complaint on December 23, and an answer to the amendment to the first amended complaint on March 2, 2022, admitting most of the background facts. GC Exh. 1(i) and (o). Respondent denied that Yates interrogated employees, denied that Roe was discharged because she engaged in protected concerted activities, and denied that the Act was violated. Id.

The case was litigated before Administrative Law Judge Benjamin Green on March 29, and March 31, 2022.

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1 References to the transcript shall be “Tr. [page number].” References to Counsel for the General Counsel’s Exhibits shall be “GC Exh. [number].” References to Respondent’s Exhibits shall be “R. Exh. [number].” References to Joint Exhibits shall be “Jt. Exh. [number].”

2 Except as otherwise noted, all dates refer to 2021.
II. ISSUES PRESENTED

1. Whether Respondent violated Section 8(a)(1) of the Act when its Agent, System Director of Radiology Robert Yates, interrogated employee Jeanne Saeli about the union activities of other employees.

2. Whether Respondent violated Sections 8(a)(1) and (3) of the Act by discharging Andrea Roe because she assisted the Union and engaged in protected concerted activities and in order to discourage employees from engaging in these activities.

III. FACTS

A. Background Information Regarding the Hospital System and HIPAA

Respondent is a community hospital located in Warwick, New York (Tr. 116). The campus also includes a nursing home and assisted living facility (Tr. 116). Respondent is part of the Bon Secours Charity Health System (herein Bon Secours), that includes Good Samaritan Hospital (herein Good Samaritan), and Bon Secours Community Hospital (Tr. 116). Bon Secours, in turn, is part of the Westchester Medical Center Health System, that also includes Westchester Medical Center (herein WMC), MidHudson Regional Hospital, and Health Alliance Hospital, among other facilities. (Tr. 116).

Hospitals are subject to government oversight regarding compliance with the Health Insurance Portability and Accountability Act (herein HIPAA), which prohibits certain entities from disclosing the protected health information (herein, PHI) to anyone not involved in the patient’s care or accessing patient medical records without reason (Tr. 21-22, 84, 122, Jt. Exh.3, 4). PHI includes disclosing the name of a patient or that the patient is in the hospital (Tr. 186-187).

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3 The background information provided regarding the hospital system, the relationships between the hospitals, and the locations of each hospital was not the testimony of a witness, but part of the opening statement of Respondent’s counsel and generally adopted by witness Valerie Campbell (Tr. 116, 119, 122). Counsel for the General Counsel accepts the cited background information regarding the hospital system as true for the purpose of making the other substantive testimony more clearly understood.
Hospitals can be fined for HIPAA breaches as well as subject to civil claims or lawsuits by patients (Tr. 122-123).

Respondent provides regular training and education on HIPAA to its employees (Tr. 20-21, 84). Bon Secours also maintains a Code of Conduct as well as a Use and Disclosure of Protected Health Information Policy (Tr. 123; Jt. Exh. 3, 4). The Code of Conduct states that inappropriate or unauthorized access or disclosure of HIPAA protected information could lead to discipline (Tr. 84, 125; Jt. Exh. 3). Unauthorized access means that the employee had no business or clinical purpose for accessing the chart (Tr. 167). If a doctor or a nurse asked a technician a question that required them to access a patient chart, that would qualify as a business purpose (Tr. 167). If a technician were to close out another technicians’ case in the system, that would also be considered a business purpose (Tr. 167).

B. The Job Duties of a Radiology Tech

Jeanne Saeli (herein, Saeli) has worked as radiology tech for Respondent since 2004 (Tr. 10). Saeli works three shifts: Sunday from 7pm to 8am, and Tuesday and Wednesday from 7am to 8pm (Tr. 11). Andrea Roe (herein, Roe) worked as a radiology tech for Respondent from 2005 until her discharge in May 2021 (Tr. 37-38). Roe usually worked three days per week—Monday, Tuesday, and Thursday—from 8am to 8pm (Tr. 39). Bon Secours Charity Health System’s System Director of Imaging Services Robert Yates was the direct supervisor of Saeli and Roe during the

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4 The hospital network has a compliance program that ensures all regulatory requirements are met and investigates potential HIPAA breaches (Tr. 120).

5 The transcript refers to radiologic technologist, radiologic tech or technician, x-ray tech or technician, CAT scan tech or technician, and CT scan tech or technician interchangeably, depending upon the witness. For consistency, “radiology tech” will be used throughout.

6 Until May 2021, Roe had not received a single discipline (Tr. 69). Roe also received good performance appraisals (GC Exh. 9).
relevant time period in 2021 (Tr. 11, 43, 249).\(^7\) Yates split his time between Respondent, Good Samaritan, and Bon Secours hospitals (Tr. 249).\(^8\) He was typically at Respondent’s facility 1-2 days/week, usually Tuesdays and Fridays (Tr. 22, 249).

The main job functions of a radiology tech are to perform x-rays, including portable x-rays, and CAT scans of patients (Tr. 10, 38; Jt. Exh. 11, 12). Radiology techs also perform certain clerical work, such as logging exams into the electronic medical record, sending images, and answering phones (Tr. 10, 38). Roe testified that she received calls almost every day from different floors, from nurses and doctors, asking questions about images that a patient had or was going to have (Tr. 38). To answer such questions, Roe would have to look at the patient’s chart to view the necessary information (Tr. 38). Roe testified that these calls generally came in the morning because that is the time that the nurses were beginning their shifts and doctors were looking at who their patients for the day would be, including what tests were done and what may need clarification (Tr. 38).

On a typical morning, after arriving to work, Roe checked how many other radiology techs were working, checked the schedule for the day, prepped rooms for fluoroscopy procedures, made sure the rooms were stocked and ready, and, if she was working in the OR, got changed and ready for the OR to call (Tr. 41).\(^9\) Additionally, a few times a week when Roe arrived for her morning shift there would be overnight work to complete such as taking x-rays or CAT scans or “tracking”

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\(^7\) Yates appears to have facilitated the hiring of both Saeli and Roe (Tr. 84-85, 253).

\(^8\) Respondent admitted that Yates is a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act during the relevant time period (GC Exh 1(i)). Yates appears to have facilitated the hiring of both Saeli and Roe (Tr. 84-85, 253). Yates no longer works for Respondent, he is currently employed as a full-time radiology technologist at Garnet Health Medical Center (Tr. 248).

\(^9\) Saeli also testified that mornings are usually the busiest time of day (Tr. 32).
through a patient’s studies, meaning logging into the patient’s history, why the test was done, and otherwise complete the electronic medical record (Tr. 39-40). There may also be images to complete if the patient was not ready for the exam during the overnight shift (Tr. 40).

Roe testified that she generally took an x-ray or scan of 20-30 patients per day and was often “hands-on” with more because the radiology techs worked in pairs when possible (Tr. 42, 99). Respondent’s electronic medical system would not show that Roe was hands on with the additional patients if she was the second technician (Tr. 42). Roe testified that while she usually entered information into the system for her patients, if she worked in a pair, her co-worker may do it instead, or vice versa (Tr. 99). Roe also testified that she generally entered the system and clicked on the various subparts of a patient’s chart about 30-50 times in an hour, because she would have to click into the chart itself, then check the various components like history notes, labs, or surgeries (Tr. 98, 100).

In the winter and spring of 2021, Respondent cut the number of radiology techs down from five to four, and sometimes only three or so were working due to quarantines (Tr. 41). At the same time, the number of patients likely increased (Tr. 41). Similarly, Roe testified that the Covid-19 pandemic increased the number of doctors each patient had: in addition to the hospitalist that oversaw all the patients, Covid patients regularly had a pulmonologist coming in to see them every morning as well as specialists to address complications, such as a nephrologist or

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10 There was only one radiology tech assigned to each night shift from 8pm to 8am, so they were very busy trying to handle ER patients, in-patients, and early morning out-patients that arrived at 7am, so they could not always complete all of their work before clocking out (Tr. 39-40).

11 This could happen if the patient did not finish drinking the contrast in time for a CAT scan, the patient had a rough night and a nurse requested the test be postponed, or if the patient could not be turned into the necessary position for an x-ray due to their health or other treatments such as a ventilator (Tr. 40-41).
gastroenterologist (Tr. 43). The Covid-19 pandemic also increased the amount of work for radiology techs (Tr. 42-43).

C. Roe Engages in Union Activity

In 2020, the Respondent’s nursing staff voted to join the New York State Nurses Association (herein, NYSNA) (Tr. 44-45). Shortly after, the nurses began approaching technical workers, including Roe, in the rooms and hallways of the radiology department to find out if they had any interest in joining a union and offered to get them in touch with 1199 (Tr. 44-45). Roe agreed to let the nurses pass along her contact information (Tr. 45-46).

In the Fall of 2020, Union Vice President Anthony Peterson (herein, Peterson) introduced himself to Roe in a group text (Tr. 46). Roe responded in a separate one-on-one text and spoke with Peterson by phone later that day (Tr. 46). Roe expressed interest in the Union and Peterson instructed Roe to find out if her co-workers shared her interest (Tr. 46-47).

Roe began speaking with her co-workers to gauge interest immediately (Tr 48). Her co-workers agreed with her that management had failed them during the pandemic, and that they needed a change and someone to have their backs (Tr 48). Roe testified that she had these conversations with about 15-20 members of the radiology department, and asked co-workers to relay the message to the remaining 5-10 employees that she did not see (Tr. 49). About 90-95% of the radiology department expressed interest and Roe informed the Union (Tr. 49-50).

In January, Peterson reached out to Roe again and suggested Roe begin reaching out to some of the other departments that would be part of a technical unit (Tr. 49-50). Roe testified that she spoke with one or two employees in the respiratory department and about two or three employees in the OR department about forming a union (Tr. 50).

12 Roe is not sure if managers, including Yates, were aware of these conversations (Tr. 85-86).
Roe testified that around January, once word got out that she was the one in contact with
the Union, anyone with questions about the Union began coming to her to talk (Tr. 50). Once the
Union began to hold weekly Zoom meetings in late January or February, a co-worker approached
her nearly every shift (Tr. 51-52; GC Exh. 6). Saeli testified that although she only worked one
shift per week with Roe, she was present for at least ten conversations where co-workers asked
Roe for information about the Union (Tr. 30-31). \(^{13}\) These conversations usually took place in the
breakroom, but sometimes in the hallway (Tr. 33).

The Union’s weekly Zoom meetings usually took place at night and about five to ten other
technical unit members joined the calls (Tr. 52). Roe testified that she and most of the other
technicians always joined the meetings from home, except she recalls that one time an OR tech
joined from the hospital (Tr. 52). Roe felt uncomfortable but could not tell if supervisors were
around (Tr. 52). Roe was out of work for the first three weeks of March but kept in touch with her
coworkers about the campaign by text (Tr. 53-54).

Around April, the service employees decided to try to bring in 1199 too (Tr. 51). A few
times a week, a service employee would approach Roe to ask her questions such as what to expect,
how it works, when are the meetings, etc. (Tr. 51).

D. Respondent Begins an Antiunion Campaign and Interrogates Jeanne Saeli

Responding to rumors of an 1199 organizing campaign, Respondent began trying to figure
out which employee was leading drive (GC Exh. 6). On February 17, Vice President Administrator
Anita Volpe (“Volpe”) emailed Chief Operating Officer of Bon Secours Charity Health System
Patrick Schmicke (herein, Schmicke) and Senior Director HR Operations Kim Hirkaler (herein,

\(^{13}\) At least four or five conversations of these conversations were with co-workers outside the
radiology department (Tr. 31).
Hirkaler), who in turn cc’d Senior Human Resources Manager Yvonne Capone (herein, Capone) that an OR manager reported that one of her technicians said there was an 1199 meeting via Zoom (GC Exh. 6). In a follow up email, Volpe informed Schmicke, Hirkaler, and Capone that she met with nurse managers and would be meeting with non-nursing units to see if they heard anything about this (GC Exh. 6).

On March 24, Volpe emailed Capone to report that a technical unit employee had been spotted at a NYSNA meeting (Tr. 235; GC Exh. 3). Volpe’s email said that she was trying to find out more about that individual’s involvement (Tr. 235, GC Exh. 3). Within the next few weeks, Capone had conversations with Hirkaler about who the potential organizers of the service unit could be, and suggested Cathy Moore (Tr. 236; GC Exh. 7). A few weeks later, Volpe provided Capone and Hirkaler additional individuals that she suspected of being Union organizers and suggested speaking to their managers and asking that no staff be in the administration or nursing offices “unattended” (Tr. 236; GC Exh. 3, 7). Capone replied “The issue with HIM is the Supervisor is only onsite a couple of days per week (GC Exh. 7). There is no indication what or who “HIM” is referring to (GC Exh. 7). Volpe, without explanation, also suggests keeping one of the suspected organizers away from certain areas she had been previously assigned, such as distributing PPE from the float office in Administration (GC Exh. 7). Capone admitted that not

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14 Respondent admitted that Yvonne Capone, Kim Hirkaler, and Patrick Schmicke were agents of Respondent within the meaning of Section 2(13) of the Act during the relevant time period (GC Exh. 1(i), 2).
15 The employee was Respiratory Therapist Don Dinsmore (GC Exh. 3). Capone testified that he has not been disciplined (Tr. 245).
16 Capone testified that Cathy Moore has not been disciplined (Tr. 245).
17 An email shows Hirkaler instructed Volpe not to reach out to the managers (GC Exh. 3, 7). Neither Hirkaler nor Volpe testified and there is no evidence Respondent ceased attempting to discover the Union “ringleaders” at this or any other time.
every conversation about the union organizing campaign was via email, including conversations regarding which employees may have been union organizers (Tr. 241-244).

In mid-April, Saeli was alone in Yates’s office when he asked her how she felt about the Union (Tr. 12-13). Saeli responded that she thought it would be a good thing and Yates gave her the impression that he disagreed (Tr. 13). Yates then asked Saeli who the “ringleader” of the union was (Tr. 13). Afraid to get her co-worker and friend Roe in trouble, Saeli lied and told Yates that she did not know (Tr. 13-14, 24). Yates admits that he probably had conversations about the Union with Saeli in his office, including about dues, the cultures of the organization, and salary, but denied asking her who the ringleader was (Tr. 254-255).

To try to prevent the Union from winning the election, Respondent’s Human Resources department began holding weekly manager meetings (Tr. 209, 251; GC Exh. 5). Attendees for these meetings appear to be the technical unit supervisors such as Bob Yates, Director of Labor Relations for Westchester Health System Allen Liebowitz (herein, Liebowitz), Respondent’s In-House Attorney Barbara Kukowski (herein Kukowski), Volpe, and Human Resources Representatives including Capone and Hirkaler (GC Exh. 4, 5). At the first meeting, Human Resources educated managers on what they can and cannot do during a union campaign (Tr. 210, 251-252; GC Exh. 7). At subsequent meetings, Respondent provided communications to the managers, including flyers with talking points for the managers to relay to their staff (Tr. 210, 229; GC Exh. 3-5). For example, the day before the mail ballot election officially began, managers were told to talk to their staff about how negotiations can take a long time, a union won’t get them

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18 Capone had to remind managers of the Dos and Don’ts again on May 18 after 1199 complained of potential unfair labor practices taking place during the service unit organizing campaign (GC Exh. 8).

19 Yates testified only generally about these meetings but stated that they discussed the various talking points on a handout every week, like dues and negotiations (Tr. 251).
more than they have but will cost them dues, it’s better to deal with each other directly, and, while Respondent can’t make actual promises, they believe they can make things better going forward (GC. Exh. 3). Each week, Capone followed up with the managers to confirm when they had talked to their staff (Tr. 229-230, 271-272; GC Exh. 3-5). Unsurprisingly, Yates testified that he understood that the hospital did not want a union present (Tr. 271).

The antiunion flyers were also provided to employees (Tr. 53, 253). Yates testified that he had informal, voluntary meetings with his employees on a weekly basis, where he would hand out the flyer and try to gather as many people as he could and initiate conversation (Tr. 253, 274). It was hard to get everyone together and away from patient care areas at once, so while some meetings had five or so employees, he admits that some were one-on-one (Tr. 274). He communicated to his staff that Respondent preferred that the hospital remain union-free (Tr. 271-272; GC Exh. 3).

Yates relayed the Respondent’s antiunion talking points to Roe on April 1 or 2, while in the breakroom (Tr. 54, 95). Yates told Roe that he did not agree with unions, felt that they took your money but gave nothing in return, and couldn’t do anything for you (Tr. 54-55, 95). Roe disagreed, listing reasons the technicians needed a union, such as better benefits, pay, and staffing (Tr. 55, 95). Roe argued that they had been asking for more staff for a long time and Yates always said his hands were tied, he couldn’t get them more technicians (Tr. 95). Roe said that she felt like if a union were involved, they would say no, you have to have this number of technicians every day (Tr. 95). Roe also argued that Respondent is one of the lowest paying hospitals in the county and she believed if they got a union in their rates could possibly be raised (Tr. 95). Roe also said

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20 The same or similar flyers were also provided to managers of the service unit when they were about to vote on whether to unionize (Tr. 230).

21 An ultrasound technician, Karen Heller, was present but did not speak (Tr. 55-56).
that she thought a union would bring better benefits without having to pay as much as they do now for Respondent-sponsored benefits and that in the long term they could get a pension, which would be amazing (Tr. 96). Yates said that he didn’t agree with that, he doesn’t think the union could actually give them anything (Tr. 96). Yates admits to speaking with Roe about union representation in early April. While he testified only generally about his conversation with Roe, he concedes that she brought up at least salary, benefits, and concerns over inadequate management (Tr. 265-266). Incredibly, given this admission, Yates testified that he did not view Roe as a Union supporter, only that she was considering it (Tr. 257, 266).

E. Roe is the Only Bargaining Unit Member to Attend the Ballot Count

A virtual ballot count for the technical unit took place on April 30 (Tr. 56). Roe testified that only about 10-15 people joined the call (Tr. 57-58). Capone and Schmicke, along with a few others, participated on behalf of Respondent (Tr. 58; GC Exh. 7). Roe was the only bargaining unit member present at the count (Tr. 58). Roe and Capone had their cameras off but videoconference software showed their full names as participants (Tr. 58). Roe testified that the virtual platform used for the ballot count had an option to click and see a list of everyone on the call (Tr. 86-87). The Union won (Tr. 58).

F. Respondent Barely Investigates an Alleged HIPAA Breach by Roe Before Firing Her

1. Faline Makes a Complaint

On April 28, Chief Compliance, Privacy, and Ethics Officer for Westchester Medical Health Network Valerie Campbell (herein, Campbell) received a call from Christine Faline

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22 Capone testified that she does not recall how many people were on the call and that she did not recall seeing Roe’s name (Tr. 209).

23 Capone testified on direct examination that during the organizing campaign from April 3 through April 30, she was not aware that Roe was a Union supporter (Tr. 211).
Faline told Campbell that she went to a local chiropractor and was greeted by a receptionist, Donna Roe, who asked her the usual Covid questions, then proceeded to ask whether Faline had Covid or was tested. (Tr. 127; Jt. Exh. 5). Faline asked Donna Roe why she asked these questions and Donna Roe replied that she knows all about Faline’s husband, Mr. F (Tr. 127). Faline asked how she knew, and Donna Roe responded that her daughter-in-law worked at the hospital and has been keeping her updated on his status, including that he had been transferred to WMC (Tr. 127). Faline asked Donna Roe for the name of her daughter-in-law, and she said Andrea Roe (Tr. 127). Campbell called then-Director of Compliance for Bon Secours Charity Health Systems Samantha Molleda (“Molleda”) and asked her to begin an investigation of a potential HIPAA violation (Tr. 122, 125-128). Campbell also sent Molleda an email outlining her conversation with Faline (Tr. 128; Jt. Exh. 5).

2. The Initial Investigation is Completed on April 28

Molleda asked the IT department to run an access audit for Andrea Roe’s access into Mr. F’s medical records between February 1 and April 28 (Tr. 129-131; Jt. Exh. 1, 8). An access audit provides an accounting of all the information accessed and every keystroke made by an

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24 Campbell was the Regional Vice President of Compliance in 2021.
25 Faline testified regarding her interaction with Donna Roe at the chiropractor’s office (Tr. 191-204). However, Faline’s testimony on this matter is not relevant, the only pertinent information is what was told to Compliance in April 2021 and what Compliance did with that report. The General Counsel does not argue that the investigation into Roe began for unlawful reasons. Rather, we argue that the Respondent used the investigation as a pretext for discharging Roe.
26 Respondent admitted that Molleda was an agent within the meaning of Section 2(13) of the Act during the relevant time period (GC Exh. 1(o)). Molleda no longer works for the hospital system and did not testify (Tr. 122).
27 Campbell’s April 28 email states that Donna Roe told Faline that she knew Mr. F had been transferred to WMC (Jt. Exh. 5). Faline testified that Mr. F was transferred on April 23 (Tr. 194).
28 To protect patient confidentiality and allow the hospital to comply with HIPAA, Faline’s husband was referred to only as Mr. F in the transcript and will be referred to as Mr. F herein.
employee into an electronic medical record for a specified patient or patients, during a specified time period (Tr. 129). IT provided their report to Molleda the same day, April 28, which said that Roe may have inappropriately accessed or viewed portions of Mr. F’s medical record because a review of patient notes and imaging orders to not indicate that Roe participated in patient care or testing on April 15 (Tr. 131, 153; Jt. Exh 1, emphasis added).29 Campbell testified that the access audit shows that on April 15, between 8:25am and 8:26am, Roe went into Mr. F’s record and accessed a storyboard, patient notes, and lab results (Tr. 131-132, 164; Jt. Exh. 1).30

3. Respondent Suspends Roe on May 4

On May 4, Molleda reached out to Yates by email and asked whether Roe was involved in any imaging orders for Mr. F between April 3 and April 23 (Tr. 135; Jt. Exh. 17). Yates responded that he did not see Roe’s name on any of the imaging orders. (Tr. 136; Jt. Exh. 17). Yates, however, admits this means only that she was not listed as the technician doing the imaging (Tr. 270).31

Around 1pm on May 4, Roe was called into a meeting with Molleda, Capone, and Yates (Tr. 14, 59-60, 212; Jt. Exh. 9).32 Saeli was also present at Roe’s request (Tr. 60). Molleda began the meeting by stating that everything in the meeting was confidential (Tr. 14, 61; Jt. Exh. 9).

29 Campbell admitted that her information regarding what Roe accessed is based solely on what IT told her (Tr. 171).
30 Campbell testified that other dates before and after April 15, show that Roe only accessed a record related to Mr. F., she did not actually access his medical record: Mr. F just appeared on a work list that includes all patients that may need radiology imaging that day (Tr. 131).
31 Campbell testified that Molleda told her she had a verbal conversation with Yates where he said that Roe’s access into Mr. F’s chart was not typical for a technician but admitted that she has no first-hand knowledge of this conversation, and it is not reflected in the investigation summary (Tr. 167, 177). Therefore, Campbell does not know whether Molleda asked Yates if the areas of the chart Roe went into are areas a technician may have accessed if a doctor had questions (Tr. 177).
32 Roe worked the day after the access audit was conducted, which was the day before the ballot count, on Thursday, April 29 (Tr. 58-59). Roe also worked her next scheduled shift after the ballot count on Sunday, May 2 (Tr. 59).
Molleda asked Roe if she knew someone named Donna Roe and Roe said yes, that is her mother-in-law (Tr. 61). Molleda asked Roe if she knew where Donna Roe worked and Roe said yes, in a chiropractor’s office (Tr. 61). Molleda then asked if Roe knew Mr. F and Roe said not personally, but she went to high school with his sister and knows some of his family, they all live in the same community (Tr. 61). Molleda informed Roe that Faline made a report that while at the chiropractor’s office, Donna Roe told Faline that her daughter-in-law was keeping her updated about Mr. F’s condition (Tr. 14, 61, 88). Roe was shocked and said that was absolutely not true (Tr. 61). Roe said she has worked for Respondent for 15 and a half years; she has never violated HIPAA and would never violate HIPAA (Tr. 61). Roe also noted that she barely speaks to her mother-in-law (Tr. 61-62, 88). Roe told Molleda that recently, in the presence of a few family members and friends, her father-in-law told her mother-in-law that Mr. F was in the hospital with Covid and that he was not doing well because he waited too long to go to the hospital (Tr. 62, 88; Jt. Exh. 9). Molleda asked Roe who told her father-in-law this information and Roe responded that she did not know, she thinks someone that he works with, but she could find out (Tr. 62). Molleda told Roe that she could not ask (Tr. 62).

Molleda told Roe that her investigation showed that Roe had clicked into Mr. F’s chart and asked why (Tr. 63). Roe responded that she did not remember accessing his chart, but if Mr. F

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33 Roe testified that while the investigation was ongoing, she did not ask her mother-in-law to find out whether Faline’s accusation was true because she was specifically told not to in the May 4th meetings and did not want to jeopardize the investigation (Tr. 89, 96-97). After Roe was discharged, her husband asked Donna and Donna denied the allegation (Tr. 89).

34 Molleda did not testify. A document Molleda prepared states that she informed Roe that she accessed Mr. F’s chart notes, patient summary, ICU notes, etc. on April 15 (Jt. Exh. 9). Saeli only recalls Molleda mentioning a storyboard and generating a report (Tr. 26). Roe testified that Molleda mentioned the storyboard, generating a report and a patient care summary and/or after visit summary, but specifically denied that Molleda mentioned access of chart notes or ICU notes (Tr. 91).
was a patient in the hospital and she did an x-ray, she probably did (Tr. 1563, 90, 95). Saeli spoke up and said that they go into patient’s charts all the time, such as if they are working in pairs, or because they answer phones and doctors call for reports all the time, floors call to see if a patient had an exam done, and radiologists call with questions about images they are interpreting (Tr. 15, 63).35 Yates agreed and stated that a lot of times, technicians work in pairs, and it’s not always documented if more than one person is working on an x-ray (Tr. 63-64; 259-260). Yates also stated that technicians are always asked to go into patient charts to check for things like isolation precautions, bloodwork, and previous imaging—looking at all of that is part of the job and usually needed to complete an x-ray (Tr. 64; 268-269). Campbell confirmed that Molleda told her that someone indicated during this meeting that technicians go into a patient’s medical record to look at information before procedures and if someone, such as a doctor, calls with questions when reviewing an exam (Tr. 139).36

According to Campbell, after the meeting, Compliance did further investigation to determine whether Roe was involved with Mr. F’s last radiology exam (Tr. 139). Compliance found that an x-ray was ordered for Mr. F on April 14 that was completed on April 15 at 2:25am (Tr. 139-140; Jt. Exh. 2, 6).37 A doctor signed off on the imaging order at 4:00am (Tr. 140; Jt. Exh. 6). Roe did not perform this x-ray or report to work until 8am that day (Tr. 140-141). Despite being told at the 1pm meeting that there are various reasons a technician would access a patient’s

35 Joint Exhibit 9, prepared by Molleda, states that Saeli said technicians typically review a patient’s chart before they do imaging, either to see previous scans, to check if the patient has Covid, reviewing provider notes or lab notes, etc. Molleda did not testify.

36 Despite being present, Capone only testified briefly and summarily about this meeting, providing no specifics of what Roe or anyone else may or may not have said in her defense (Tr. 213-214).

37 In Joint Exhibit 2, if “XR CHEST PORT” is in the “exam” column, it means an image was done on the corresponding service date (Tr. 154).
chart, and despite Mr. F. having additional x-rays the next day, Respondent abruptly concluded the investigation, asserting that Roe had no reason to access Mr. F’s chart at 8:25am on April 15 (Tr. 140, 154; Jt. Exh. 2).\(^{38}\)

Only a few hours later, around 4pm on May 4, Roe was called into a second meeting with Molleda, Capone, Yates, and Campbell (Tr. 64, 214; Jt. Exh. 9).\(^{39}\) Roe brought Saeli again (Tr. 64, 214). Campbell began the meeting by going over the allegations and again Roe stated that she has worked for Respondent for fifteen and a half years, she knows all about HIPAA, has never violated HIPAA, and that she did not do what she is accused of (Tr. 64-65).

Campbell showed Roe a document, told her that it indicates that Roe accessed Mr. F’s chart a number of times on April 15, and asked if she could explain any of it (Tr. 65, 214; Jt. Exh. 1). Roe responded that she has never seen anything like the document before (Tr. 65). Campbell said that if it says “imaging tech worklist” that it doesn’t necessarily mean that Roe clicked on Mr. F’s chart, just that she clicked on a worklist that included Mr. F’s name, but the document also shows Roe clicked on a storyboard and generated a report, and that she accessed a patient summary and an after-visit summary (Tr. 65, 66, 91; Jt. Exh. 1).\(^{40}\) Roe responded that she does not know what a storyboard is or how to generate a report (Tr. 65).\(^{41}\) Campbell did not explain further, nor did

\(^{38}\) Mr. F’s April 15 xray was ordered on the morning of April 14 (Jt. Exh. 6). The “ordered date” column of Joint Exhibit 2 shows that Mr. F’s April 16 x-ray was ordered on April 15 (Jt. Exh. 2). There is no record evidence regarding what time that x-ray was ordered there is no testimony or other evidence that indicates that Compliance looked into it.

\(^{39}\) At the time, Campbell was the Vice President for Compliance (Tr. 120-121).

\(^{40}\) Campbell testified that she went through the different areas of the record Roe accessed but did not testify regarding any specifics (Tr. 142). The summary prepared by Molleda and confirmed as accurate by Campbell does not reference any discussion of the areas of Mr. F’s chart that Roe allegedly accessed (Tr. 144; Jt. Exh. 9).

\(^{41}\) Campbell testified that the storyboard is a snapshot of what’s going on with the patient such as their basic information, diagnosis, or where they are located in the hospital, but also admitted that it is the “initial screen that you see when you bring up the patient…” (Tr. 170)
she explain what most of the other lines on the document meant (Tr. 67, 91; Jt. Exh. 1). Campbell just kept saying Roe clicked on a storyboard and generated a report and wanted to know why (Tr. 68). Roe responded that she did not recall, and if she did, there must have been a good reason (Tr. 68, 90, 95, 214).42

Campbell said that Mr. F had an x-ray at 2:30am, but Roe clicked on the chart around 8:30am and wanted to know why (Tr. 68; Jt. Exh. 1). Saeli and Roe both said that Roe could have gotten a call from a doctor or radiologist regarding the 2:30am x-ray (Tr. 68).43 They explained that they would get calls asking if the x-ray was done in a certain position or because something was wrong with the x-ray and it needed to be repeated (Tr. 68). If so, the radiology tech would have to either try to get in contact with the overnight technician, who was likely sleeping, or click through the chart to review the notes and figure out what happened (Tr. 68). They said that the notes could show that an x-ray was attempted in one way, but the patient’s blood pressure dropped, or various other reasons, but they would investigate then answer the question for the doctor or radiologist (Tr. 69).44 Campbell just kept saying we just don’t understand why you would have accessed this chart (Tr. 69). Roe responded I just told you a possible reason (Tr. 69). Capone said that they would need to do further investigation and Roe was suspended (Tr. 69).45

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42 Again, Capone testified only briefly and summarily about this meeting, providing no specifics of what Roe may or may not have said in her defense other than that Campbell asked Roe why she had accessed the patient’s medical record on April 15 and Roe could not recall (Tr. 214-215).
43 Saeli testified that she is asked to look at the chart of a patient she is not about to x-ray or scan at least three times per shift (Tr. 15). Saeli also specifically testified that a couple times a month she is asked to go into a patient’s chart a few hours after an overnight exam was completed (Tr. 32).
44 Campbell did not specifically deny that Roe shared reasons that radiology techs go into patient charts if they are not about to take an image at this meeting, but when asked, responded that it is her understanding that Roe shared that information with Molleda at the earlier meeting (Tr. 151).
45 The meeting summary prepared by Molleda does not reference Roe’s suspension (Jt. Exh. 9).
Campbell testified that out of everything Roe allegedly viewed in Mr. F’s chart, the only substantive thing that she looked at was a note that contained lab orders (Tr. 172). Campbell testified that lab results did not appear to be areas of the medical record that radiology tech would access (Tr. 143). Campbell admitted that she has never been an x-ray technician or CAT scan technician and does not know everything that the job entails (Tr. 151). When asked on direct examination if, in his 45 years as a radiology technician, the information Roe accessed was the type of information a radiology technician would need or have access to, Yates could not be sure because he never saw the note that she allegedly accessed. (Tr. 249, 261). Yates, however, admitted on cross-examination that he would access a chart to check a pregnancy status or perhaps a blood test (Tr. 267). Roe also testified to the reasons a radiology technician would need to access lab results, such as if a doctor was going to order a CAT scan, the radiology tech would need to review lab work to figure out if the patient could drink contrast by checking whether their kidney levels are in range (Tr. 279). It is undisputed that throughout the investigation, no one asked Roe to explain why she would look at lab orders (Tr. 279).

4. Roe Provides Molleda with Additional Reasons She Would Need to Access Mr. F’s Chart

On May 6, Roe called Molleda because during the May 4 meetings, Molleda had repeatedly said that if Roe thought of anything new or anything came up, to call (Tr. 72). Roe had been thinking about all the reasons technicians are asked to click in patient charts even if it is not their patient, so she called Molleda to go over some of those reasons (Tr. 73). Roe told Molleda that many times, nurses call technicians to ask something about an imaging study that was previously done (Tr. 73). Roe said nurses call if their patient is possibly going to have imaging

46 The job description of a radiology tech lists one of their responsibilities as assessing “data reflective of the patient’s status and interprets the appropriate information needed…” (Jt. Exh. 11).
studies scheduled, for example if a patient is going to be scheduled for a CAT scan, the nurse will ask whether that can be done, and Roe would have to look in the patient’s history to see their surgeries and bloodwork to determine whether the patient can have the contrast solution (Tr. 73). Roe also told Molleda that doctors call the technicians if they are not onsite but need to know if an imaging study can be done on a patient (Tr. 73). For example, the doctor may ask if the patient can lay down flat or stand up (Tr. 73). Again, this would require Roe to go into the patient’s chart to find out the history of the patient (Tr. 73). Questions about images do not always come just before or just after the image was done, they can come weeks or months later (Tr. 99). Roe also told Molleda that the radiology office manager calls technicians a lot with questions (Tr. 73). For example, if the manager gets a call from a doctor, nurse, or other healthcare provider about a specific patient, she will call the technicians since they are hands-on with the patients and they know what is required to do an exam, so she will call and ask the technician to research what happened with a particular study (Tr. 73-74). The questions could about imaging studies from a day, two days, a week, or a month ago (Tr. 74). The technician must read through the notes to see what is going on and figure out what could have happened, in order to call the radiology office manager back to give her the right answer (Tr. 74). Roe also told Molleda that many times, accidentally, technicians leave themselves logged into the system when they walk away from the computer, which could cause another technician to sit down at that workstation and begin completing work under the wrong ID (Tr. 74). Roe repeated that she did not remember going into Mr. F’s chart, but if she did, there must have been a good reason (Tr. 74).

Molleda responded that they reviewed Roe’s access and that they saw Roe always used the same pattern when she went into a patient’s chart, she always clicked on the same things, but
they were still trying to figure out why Roe clicked into Mr. F’s chart (Tr. 74-75).\footnote{Molleda did not testify. Campbell testified Roe’s access into the charts of other patients on April 15 was not consistent with her access of Mr. F (Tr. 144). Campbell did not testify regarding how the access allegedly differed (Tr. 144).} Roe suggested Molleda talk to the doctors and nurses that were taking care of Mr. F, maybe they could recall something since Roe does not remember specifically who called her or why she had to look at Mr. F’s chart (Tr. 75). Molleda then said that she would continue to investigate (Tr. 75).

5. Compliance Does not Look into Roe’s Explanations

Campbell claimed that potential HIPAA violations are thoroughly investigated (Tr. 159). However, Campbell admitted that Compliance did not request an access audit for other radiology technicians to see if they also similarly access the charts of patients they are not about to x-ray (Tr. 151-152, Tr. 164; Jt. Exh. 1, 14). Campbell admitted that Compliance did not bother to ask any of Mr. F’s doctors if they called the radiology department with questions on April 15, claiming it was because Roe could not remember the specific doctor or person that she had a conversation with (Tr. 152). In fact, compliance did not ask any doctors or nurses to confirm whether it is true that they call radiology with questions even after imaging is complete (Tr. 152). Campbell admitted that the Compliance department never spoke to Donna Roe and spoke to only a single person, the targeted Andrea Roe (Tr. 154, 159, 185; Jt. Exh. 14).\footnote{Campbell testified confusingly that when investigating potential HIPAA violations, the compliance department never interviews people that do not work for the hospital, but the reason depends on the situation (Tr. 174). When asked directly whether the staff that reports to her and actually conducts the investigations have ever reached out to the person alleged to have received information in violation of HIPAA, Campbell admitted that she could not answer that question based on her memory, but there are cases, depending upon the situation (Tr. 175). Campbell then testified that if someone sends a text message or email, or if the individual provided the protected information reached out directly to compliance, they could (Tr. 175).} Campbell also admitted that she required confidentiality, so Andrea Roe could not find out on her own how Donna Roe may have gotten information about Mr. F (Tr. 154).
The Compliance department also did not look at Roe’s access over time for other patients (Tr. 164). A memo to Campbell drafted by Molleda dated July 6, states that a review was conducted of Roe’s overall access into the medical record system on April 15, and it was determined that there was a pattern of appropriate access for all other patients: Mr. F was the only patient that Roe accessed without a corresponding image study (Tr. 163; Jt. Exh. 7). Molleda did not testify and there is no other documentary evidence reflecting this alleged review.

The compliance department determined that Roe’s access into Mr. F’s chart was without a business purpose and that she was not involved in his care solely based on the fact that the system did not show that he was x-rayed or canned by Roe on the day she accessed his record (Tr. 165).

G. Respondent Quickly Decides to Terminate Roe Even Though Other Employees Have Not Been Treated as Severely

On May 7, only one day after Roe provided Molleda with specific business reasons she may have looked at Mr. F’s chart, a phone call took place between Molleda, Campbell, Capone, Kukowski, Schmicke, and Volpe (Tr. 145, 215). Campbell and Capone both testified only briefly about this conversation—essentially, Compliance presented the case, and a preliminary decision was made to terminate Roe (Tr. 145-146, 217; Jt. Exh. 10). Roe’s status as a Union organizer

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49 Campbell testified on re-direct that she does not know why this memo to her was done by Molleda (Tr. 181). Then, through a leading question from Respondent counsel, testified that such summaries are done after follow-up training on HIPAA has been conducted, which in this instance was June 2021 (Tr. 181-182).

50 Campbell testified that the Compliance department does not have the authority to terminate employees, they only make recommendations (Tr. 121).

51 Campbell stated that further conversations with the Vice President of HR and the CEO for Bon Secours Charity Health System needed to take place before a final decision (Tr. 146). Compliance was no longer involved with the disciplinary action (Tr. 147). No one testified regarding the conversations that took place with the CEO or Vice President of HR.
was allegedly not discussed (Tr. 148). However, neither Campbell nor Capone provided many specific details of this conversation, and, incredibly, neither could identify the individual(s) that specifically recommended or decided that Roe should be terminated (Tr. 145-147, 157, 215-217, 230; Jt. Exh. 10). The Sanction Meeting Summary of the May 7 call (herein, Sanction Summary) is only four sentences long and also provides no details of the conversation (Jt. Exh. 10).

On cross-examination, Campbell admitted that the Respondent’s Code of Conduct and Standards of Conduct do not require termination for a HIPAA breach (Tr. 156; Jt. Exh. 3, 16). Campbell testified that when determining how to discipline someone for a HIPAA violation, intent is considered (Tr. 180). However, prior disciplines for HIPAA violations do not show that purposeful disclosure always results in termination (Jt. Exh. 13). For example, Beth McDowell made a Facebook post disclosing the admission of a patient and identifying herself as a hospital employee and was only given a final written warning in 2019 (Jt. Exh. 13). Estrella Estelle accessed a co-worker’s medical record to obtain a phone number and was given a final warning/one day suspension without pay in 2022 (Jt. Exh. 13).

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52 Capone testified that she did not know Roe was an organizer until about two weeks after her discharge (Tr. 222). When asked why she would not have believed that Roe was a Union organizer, Capone testified that she always looked at her as a caring and compassionate person, committed to the organization and her team (Tr. 244-245).

53 The Code of Conduct states that employees may be disciplined up to and including termination for violating HIPAA (Jt. Exh. 3, emphasis added).

54 Beth McDowell’s disciplinary form states “Please see attached 2 pages. The facts within this employee’s disciplinary summary are incorrect” (Jt. Exh. 13). There were no attached pages provided with the subpoena production (Jt. Exh. 13).

55 There are also employees that, despite repeated inadvertent disclosures, were not terminated: Regina Kreppel sent patient information to the wrong insurance company on June 4, 2020 and again a month later on July 1, 2020, and Marcias Asiah faxed incorrect patient information to insurance companies on three dates between September and October 2018 (Jt. Exh. 13). There are employees that inadvertently disclosed information of multiple patients at once that were not terminated: Amanda Carscadden sent an email with the information of 17 patients to an outside organization and employees of the hospital not involved in the care of these patients, and Serwatien
Campbell testified that when an employee is accused of both inappropriate disclosure and unauthorized access, that person is terminated (Tr. 182). When asked, Campbell could only recall one employee who was terminated for unauthorized access and inappropriate disclosure, Kathy Taylor (herein, Taylor) (Tr. 178). Campbell did not testify that Respondent actually discussed Taylor at the May 7 meeting, only that they generally discuss similar cases when they meet as a group (Tr. 178). Campbell further admitted that she does not know that anyone actually looked at personnel files to actually review any prior disciplines before the May 7 meeting (Tr. 178). A review would have shown that Sharlyn Serwatien admitted to inappropriate disclosure and unauthorized access—accessing a medical record and sending it to a family member’s physician—but was only given a written warning in 2018 (Jt. Exh. 13).  

sent an email to a Covid positive patient that inadvertently copied five other individuals (Jt. Exh. 13). There are also employees that potentially disclosed information of several patients to a large number of people inadvertently and were not terminated: Jennifer Kreider allegedly left a report containing patient information in the group room and Karen Bua sent out a mailing to physician (sic) that included letters with patient information (Jt. Exh. 13).  

56 It is unclear why Taylor was used as a comparator rather than someone terminated solely for inappropriate access as the Sanction Summary as well as various other documents generated regarding Roe’s discipline state that she allegedly inappropriately accessed a medical record and may have disclosed information to a community member without a final determination on that portion of the allegation (Jt. Exh. 10, R. Exh. 1, 2). Only one other employee was terminated for unauthorized access, Andrea Cedeno, who accessed the medical chart of a co-worker on two dates in 2018 (Jt. Exh. 13). Conversely, Estrella Estelle, who also accessed a co-worker’s medical record, was only given a final warning and one day suspension (Jt. Exh. 13). Additionally, Campbell did not testify regarding the facts of Taylor’s case and her disciplinary summary does not provide context, so it is impossible to whether Roe’s alleged actions were similar in severity to Taylor’s (Tr. 178; Jt. Exh. 13).  

57 There is also a second “first written warning” discipline for Serwatien in 2022 for inadvertent disclosure (Jt. Exh. 13).
H. Roe is Informed of Her Termination and Her Appeal is Denied Without Explanation

On May 14, Roe attended a meeting with Capone and Yates (Tr. 76). 1199 Representative Krystal Shorette (herein, Shorette) participated by speakerphone (Tr. 77). 58 Capone then passed a paper to Yates, which turned out to be Roe’s discharge document, and Yates read it aloud (Tr. 78; Jt. Exh. 15). Capone then gave the discharge paperwork to Roe and asked her to sign the bottom (Tr. 78). Roe refused to sign (Tr. 78). Capone made a copy of the paperwork for Roe, then told her she would be paid for her outstanding vacation hours (Tr. 78). Capone told Yates to walk Roe out of the building (Tr. 78).

Roe filed a timely appeal of her discharge (Tr. 79). Roe joined a teleconference with Hirkaler, Liebowitz, Shorette and 1199 Representative Karen Barrett (herein, Barrett) (Tr. 79, 91). The meeting began with Barrett introducing everyone on the call (Tr. 80). Liebowitz appeared defensive and asked why Roe was on the call, he thought it was just going to be the four of them without her (Tr. 80). Barrett explained that she thought it would be good if Roe was able to tell her side of the story and Liebowitz agreed to allow it (Tr. 80). Roe began to tell everyone that she was accused by Christine Faline of giving information about Mr. F to her mother-in-law (Tr. 80). Roe said she did not do this (Tr. 80).

Roe said that she was told that she accessed Mr. F’s chart inappropriately, but, as stated numerous times before, there are various legitimate reasons a radiology tech would have to go into a patient’s chart (Tr. 80). Roe told everyone on the call that nurses call the technicians to ask for information about images that were done or images that were going to be done (Tr. 81). Roe told them that doctors call technicians for information about a patient, or to see if an imaging study can

58 Shorette initially tried to participate in person but was told 1199 could not be on the premises, allegedly due to Covid protocols (Tr. 76-77, 92-93).
be done, or about a previous imaging study (Tr. 81). Roe also said the radiology manager calls with question (Tr. 81). Liebowitz stopped Roe a few times and said he doesn’t know what she is talking about, he doesn’t know anything about the case (Tr. 80). Shorette and Barrett said they felt it was important that he heard Roe’s side of the story (Tr. 80).

Roe said she wanted to know what kind of investigation was being done: If they didn’t even question her mother-in-law, or the doctor that she works for, she doesn’t see how this is fair (Tr. 80). Hirkaler asked why they would question those people if they don’t work for Respondent (Tr. 80-81). Roe asked if they are automatically going to take Faline’s word about what happened, just because she works for them (Tr. 81). Hirkaler asked if the person that made the complaint works for Respondent (Tr. 81). Roe was then asked to get off the call and she did (Tr. 81).

About a week later, Shorette informed Roe that Respondent wasn’t changing their mind, Roe was going to remain terminated (Tr. 82). No one from the Respondent told Roe why her appeal was denied (Tr. 82). No one from Respondent called Roe to ask any additional questions after her appeal (Tr. 82). No one even told Roe what additional investigation had been done, if any (Tr. 82). In fact, no one had ever told Roe what investigation had been done at any point (Tr. 82).

I. Radiology Techs Refuse to Enter Patient Charts for Fear of Discharge

After Roe was fired, the remaining radiology techs began refusing to go into patient’s charts if they did not perform the x-ray because they were afraid that they would be disciplined or terminated (Tr. 17). In early June, Molleda and Yates met with Saeli and other radiology techs to discuss this refusal (Tr. 17). Molleda began the meeting by stating that she was there because she understood the radiology techs had a lot of questions about going into patient charts (Tr. 18). Monica Zottola referenced a situation where a doctor would call about a report of an ultrasound,
and she would have to go into the chart to pull that report even though she had nothing to do with
the ultrasound (Tr. 17). Molleda responded that it would be best if the ultrasound techs did that,
but Yates and Zottola both noted that there are no ultrasound techs present after hours (Tr. 18).

Saeli asked Molleda what would happen if she went into the chart of a patient that she did
not x-ray (Tr. 19). Molleda responded that it’s fine, as long as it pertains to the job (Tr. 19). Saeli
then asked what happens if two weeks later, someone asks her why she went into that patient’s
chart (Tr. 19). Molleda responded that it’s fine, as long as it pertains to the job (Tr. 19). Saeli
then asked what happens if she gets accused of something and has no recollection of why she was
in that patient’s chart (Tr. 19). Molleda again responded that it’s fine, as long as it pertains to
the job (Tr. 19). Saeli replied that it’s fine, until it’s not (Tr. 19).

J. Respondent Reports Only Unauthorized Access

On June 18, Compliance sent a letter to Mr. F informing him that an employee inappropriately
accessed his medical record and may have disclosed it to a community member (R. Exh. 1,
emphasis added). On February 18, 2022, Compliance submitted a breach notification to the New
York State Office of the Attorney General (R. Exh. 2). Attached to the New York State breach
notification is what appears to be a breach notification or a portion of a breach notification to the
Office for Civil Rights (herein, OCR) (R. Exh. 2). The OCR breach notification was not included
in the subpoena production, nor was it introduced into evidence as a complete exhibit. The OCR

59 Saeli testified that she would not remember why she went into a patient’s chart two weeks ago
(Tr. 34).

60 Saeli and Roe both testified that there is nowhere in the electronic medical record for a radiology
tech to document the reason that they looked at a chart if they were not about to take an x-ray (Tr.
19, 75).

61 Campbell initially testified that Respondent Exhibit 2 was the breach notification to OCR but
confirmed on cross-examination that it was the breach notification to New York State (Tr. 148,
154-155).
breach notification states that a hospital employee accessed a patient’s medical record without permissible work purpose but does not include any indication of a determination that patient information was impermissibly disclosed (R. Exh. 2).

IV. CREDIBILITY OF WITNESSES

A. The General Counsel’s Witnesses Should Be Credited

Saeli and Roe were credible witnesses. Both provided specific, detailed testimony regarding important conversations and meetings that was both routinely corroborated and not contradicted by documents or other witnesses. For example, Saeli provided specific details regarding her conversation with Yates about the Union, including when and where, the exact words that Yates used when asking about the Union activity of her co-workers, and why she lied to him (Tr. 12-13). Yates then confirmed that it was likely that he had a conversation about the Union with Saeli in his office (Tr. 254-255).62 Roe provided significant details regarding specific conversations that occurred during the organizing drive and the May 4 meetings that were both unrebutted and often corroborated by general testimony from Yates, Capone, and Campbell, as well as the documentary evidence. For example, Roe testified that on April 1 or 2, during the last day of campaigning Yates initiated a conversation about the Union with her (Tr. 54). Yates told her that he felt that unions took your money but did nothing in return and she disagreed, listing

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62 Respondent counsel appears to have tried to impeach his own witness, reminding Yates that in his sworn affidavit he said he did not recall any one-on-one meetings with Saeli regarding the Union (Tr. 255-257). However, Yates’s affidavit said he did not recall any conversations, not that he did not have any (Tr. 255-257). Additionally, Yates provided his affidavit to the Board on July 26, prior to his August 6 retirement from Respondent. (Tr. 249; 270). So, to the extent that timing is relevant and Respondent may argue that the statement closer in time should be credited, it is equally plausible that Yates was more forthcoming in his testimony at the hearing since he no longer has an employment relationship with Respondent.
reasons the technicians needed a union, such as salary, benefits, and staffing (Tr. 54-55, 95. Yates, though only testifying generally and briefly, admitted this conversation occurred and that Roe brought up at least salary and benefits (Tr. 265-266). Respondent’s flyers also corroborate this conversation. The “25 Hour” Speech flyer instructed managers such as Yates to remind their employees that “voting in the union doesn’t get you anything besides having them represent you and you having to pay dues.” (GC Exh. 3). Roe also testified consistently and directly, with no evasive answers.

**B. Faline’s Testimony is Irrelevant but Corroborates Roe’s Testimony**

Faline’s testimony regarding her interactions with Donna Roe are irrelevant to the issues in this matter. General Counsel has never argued that the conversation between Faline and Donna Roe did not occur, or that Campbell did not receive a HIPAA breach complaint from Faline. Rather, General Counsel contends that Respondent failed to properly investigate whether the breach occurred and, instead, used the complaint as a pretext to fire Andrea Roe for her union activity.63 Similarly, all testimony about how Faline felt after speaking with Donna Roe is irrelevant as it does not speak to whether Andrea Roe violated HIPAA (Tr. 195).

Faline’s testimony regarding Mike Luciano (herein, Luciano) is only relevant to the extent that it corroborates Andrea Roe’s testimony about Donna Roe’s other sources of information. At the May 4 meeting, Andrea Roe told Molleda that she recently heard her father-in-law tell Donna Roe that Mr. F. was in the hospital with Covid, and she believed her father-in-law got his information from someone he works with (Tr. 62; Jt. Exh. 9). Andrea Roe did not follow-up with her in-laws to find out more specifics while the investigation was ongoing because she was told not to and that it could mess up the investigation if she did (Tr. 62, 88, 96-97). After Andrea Roe

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63 Anyone can claim they received information from a particular source, that does not make it true.
was discharged, her husband finally asked Donna Roe about the incident (Tr. 89). Faline testified that after Roe was discharged, Luciano told her that William Roe, a friend of his from work, said that his daughter-in-law had been terminated because of a complaint Faline had made and would he be willing to tell the attorney that he got the information about Mr. F from him? (Tr. 200-202, emphasis added).64 Faline’s testimony on this matter corroborates both what Roe told Molleda about where Donna Roe received her information as well as Roe’s testimony that she did not tell her in-laws about the investigation until after her discharge.

C. Respondent’s Witnesses Should Not Be Fully Credited

1. Campbell Was Not a Credible Witness

Campbell’s testimony regarding the substantive issues was not credible because she repeatedly testified very briefly and generally about important conversations. For example, Campbell allegedly led the May 7 call where Respondent decided to terminate Roe, but her testimony on direct examination regarding the substance of that call was limited to stating that there was no discussion of Roe’s union activity and the following exchange:

Q: Okay. Okay. So what -- what took place on the call? Did you lead the call?
A: Yes, I did.

Q: Okay. And what happened?
A: And as we -- as we normally do, we present all of the facts of the case, we review the access that the individual made during the -- the date -- the date in question, we provide information as to our investigation and our -- our meeting with the individual and what Ms. Roe shared with us, and then a determination is made as to what the appropriate disciplinary action would be for the individual.

64 Respondent counsel stated on record that Faline’s testimony about Luciano “goes to the credibility of Ms. Roe” (Tr. 201). To the extent that Respondent may try to argue that Roe asked Luciano to lie for her, that is both hearsay and a very stretched interpretation of Faline’s words. There is nothing abnormal about Roe asking for witnesses with information in her favor to come forward.
Q: Okay. And after you did -- after you did that, what happened?

A: A decision was made to terminate Ms. Roe.

(Tr. 146, 149). On cross-examination, Campbell testified that they also discussed other similar cases, then later, upon questioning by the Administrative Law Judge, admitted that an actual review of prior cases was probably not conducted (Tr. 178).

2. Capone Was Not a Credible Witness

The uncorroborated testimony of Yvonne Capone should not be credited. In addition to the specific credibility concerns already noted above, Capone also repeatedly testified very briefly and generally about important conversations. For example, Capone also participated in the leadership meeting where someone decided to terminate Roe and testimony on direct examination of this very important phone call, was simply:

So Valerie Campbell facilitated the meeting. She opens it up, discussed the -- you know, what transpired and the access and the verbal breach of the PHI. And it was discussed about the -- the consistent practice across the organization in cases like this that we would move forward with a dismissal from employment.

(Tr. 215-216). When asked to explain the consistent practice, whether any analysis had been done, Capone provided a confusing and non-responsive answer:

So the team -- so we have a compliance team here within Charity, but there's a compliance team with -- they're part of the Westchester Health network. So whenever there is a compliance investigation, they're always involved from a Bon Secours Charity level. So knowing that there had been other cases, we agreed that this was serious enough to move forward with a dismissal from employment.

65 Campbell testified that the Sanction Meeting Summary created by Molleda was an accurate accounting of the discussion on May 7 (Tr. 146-147). The Sanction Meeting Summary is four sentences long and contains no details about what was actually discussed (Jt. Exh. 10). Capone similarly testified only briefly about this conversation (discussed below) and no other participants, such as Schmicke, were called to testify.
(Tr. 216-217).$^{66}$ On cross-examination, when asked who made the decision to fire Roe or who said it first, Capone could not recall (Tr. 230).$^{67}$ Similarly, when pushed for details regarding potential evidence of animus in emails she that was part of, Capone continually testified that she did not recall or that she receives too many emails to read all of them (Tr. 232, 235-236, 240-241).

Second, Capone repeatedly testified either in contradiction to the documentary evidence, herself, or both. For example, when asked if she first learned that there might be union organizing among the Respondent’s technical employees in February, Capone stated no, not until March 4, when the petition was filed (Tr. 233). However, emails show that on February 17, Capone was part of an email chain discussing an 1199 meeting via Zoom (Tr. 233-234, GC Exh. 6). Capone also testified that she had “no interest in trying to identify who was part of the organizing campaign” (Tr. 237-238). Yet, an April 9 email states “I know Yvonne (Capone) discussed with you the possibility that Cathy Moore is one of the 1199 organizers…” (GC Exh. 7).

Similarly, Capone’s testimony and documentary evidence regarding when she first learned Roe was a Union organizer is contradictory. Capone testified that she did not know that Roe was the Union organizer until about two weeks after Roe’s discharge, when Hirkaler mentioned it in an email (Tr. 222-223). Capone’s response to that email states “OMG I did not know she was an organizer” but also that it “clicked” that Roe was the Union organizer 10 days earlier when Shorette

$^{66}$ Capone also provided other confusing or non-responsive answers. For example, when asked whether anyone responded to Volpe’s email where she said she will check if an employee has been taking off every Monday to attended Union meetings, Capone testified “So to be very honest with you, this was a March 24th email, and I'll refer back to the original email and documentation submitted to the managers about do’s and don’ts about union organizing which was significant in—of March that we started the meetings.” (Tr. 241). When asked whether an email was referring to a discussion Capone had with Hirkaler about Cathy Moore being an 1199 organizer, Capone testified “Again, this is the service unit, so this was April 9th” (Tr. 241-242). It was only after being asked again that Capone finally admitted the conversation was likely by telephone (Tr. 242).

$^{67}$ Capone also testified only briefly, without many specific details, regarding the May 4 meetings (Tr. 212-215).
attended the May 14 discharge meeting with Roe (Tr. 225; R. Ex. 3). The only plausible explanation for Capone’s professed “shock” after the fact is that it was a calculated attempt to cover-up a material element in this matter—knowledge.

Capone also testified confusingly regarding her alleged belief that it was Radiology Tech Christopher Dickinson (herein, Dickinson) that was the Union organizer (Tr. 225; R. Exh. 3). Capone testified that she thought that Dickinson was the organizer because an employee informed her that Dickinson had been seen on the street holding literature (Tr. 225). However, she also testified that she brushed this statement off, because she knows that over the years, Dickinson had personal issues, so she just assumed this was also personal (Tr. 225). It is unclear how Capone could both think Dickinson’s actions were personal and not union-related, but also that these actions meant he was the Union organizer.

3. Yates Was Not a Credible Witness

The uncorroborated testimony of Robert Yates should not be credited over the testimony of Roe and Saeli because, in addition to the specific credibility concerns already noted above, he contradicted himself numerous times. For example, Yates testified that if he had nothing to do with a patient, he didn’t think he would access their chart (Tr. 267-268). When confronted with his affidavit, Yates admitted that if a doctor called to get a report, he would access the chart of a patient he was not otherwise involved with (Tr. 268-269). Yates also testified that Roe accessed a physician’s note that was not imaging related, then admitted that he did not actually see the note, he was only told that is what happened by Compliance (Tr. 260-261, 272-273). His lack of candor and continued attempts to bolster Respondent’s defense demonstrate that while ostensibly a third-party witness, he remained aligned with Respondent.
V. ARGUMENT

The preponderance of the credible evidence establishes that Respondent violated the Act when admitted supervisor Yates coercively interrogated Saeli to discover the Union leader in April 2021—two weeks before election. Saeli’s testimony about the incident was clear and consistent during direct and cross examination. While Yates denied the statement, a simple matter, he repeatedly prevaricated and reversed himself on the reasons a technician might access patient record—the basis for Roe’s discharge. As System Director of Imaging Services, Yates’ inexplicable confusion about the work performed under his direct supervision was not credible and his testimony was permeated with bias. The credible record evidence supports a finding that Respondent interrogated Saeli in violation of the Act.

The preponderance of the credible evidence establishes that Respondent violated the Act when it terminated Union leader Roe days after the election. First, the uncontradicted record establishes that Roe engaged in protected concerted conduct and Union activity and the evidence establishes that Respondent had knowledge of her protected and Union activity. The testimonial and Respondent’s internal irrefutable documentary evidence reveal that Respondent engaged in an exhaustive investigation to identify the Union leaders. Second, the preponderance of the credible record evidence—including the timing of the Roe’s termination, the abruptly curtailed investigation, pretextual reasons forwarded by Respondent, and disparate treatment—establish that Respondent terminated Roe because of her protected activity. Capone apparently grasped the problematic basis for the termination and prevaricated in her testimony as to when she knew of Roe’s central role in the union campaign. Counsel for the General Counsel respectfully submits that the discharge was unlawful under well-established governing precedent.
In addition to the above, Counsel for the General Counsel also respectfully requests and argues in favor of using this case to overrule *Tschiggfrie Properties*, 368 NLRB no. 120 (2019) and *Electrolux Home Products*, 368 NLRB No. 34 (2019). However, Respondent’s discharge of Andrea Roe was unlawful even under the current standards. Counsel for the General Counsel’s argument for the change in law begins at Section VI.

**A. Respondent Unlawfully Interrogated Saeli**

Interrogating employees about union activity is unlawful if, under the totality of circumstances, the questioning reasonably tends to restrain, coerce, or interfere with rights protected by the Act. *Rossmore House*, 269 NLRB 1176, 1177-78, fn. 20 (1984). The factors considered include (1) the background, i.e., whether the employer has a history of hostility toward or discrimination against union activity, (2) the nature of the information sought, (3) the identity of the interrogator, (4) the place and method of the interrogation; and (5) the truthfulness of the interrogated employee's reply. See *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964). The Board also considers whether the interrogated employee is an open and active union supporter. See, e.g., *Southern Bakeries*, LLC, 364 NLRB No. 64, slip op. at 7 (2016), enf’d. in relevant part 871 F.3d 811 (8th Cir. 2017).

The factors are not mechanically applied: The Board takes a case-by-case approach. *Rossmore House*, 269 NLRB at 1178, fn 20; Compare *Toma Metals, Inc.*, 342 NLRB 787, 788-89 (2004) (No violation when supervisor asked employee whether they thought the union would help fix workplace issues because, inter alia, questions were asked by a low-level supervisor during informal conversation on plant floor and employee did not hesitate to answer truthfully) with *Cumberland Farms*, 307 NLRB 1479 (1992) (violation where a low-level supervisor and HR director interrogated open union supporters about the attitude of other employees because of, inter
alia, particularized nature of information sought and repeated, probing, and focused nature of the supervisor’s questioning).

Yates unlawfully interrogated Saeli when he asked her who the ringleader of the union was.\textsuperscript{68} First, the information that Yates sought is coercive in nature as he clearly tried to place Saeli in the position of acting as an informer regarding the union activity of her co-worker. See \textit{Abex Corp.}, 162 NLRB 328, 329 (1966) (Board held even casual questioning regarding union activity of fellow employees may be coercive); see also \textit{Publishers’ Offset, Inc.}, 225 NLRB 1045, 1045 (1976) (supervisor’s question coercive where it called for an answer that encompassed the union activities of fellow employees).

Second, Yates was not a low-level supervisor: he oversaw the radiology techs at three different hospitals and testified that he was responsible for getting both Saeli and Roe hired. (Tr. 84-85, 253). The fact that a high-ranking official perpetrated the questioning serves as accepted evidence of coerciveness. See, e.g., \textit{K-Mart Corp.}, 336 NLRB 455, 469 (2001) (general manager); \textit{Ingram Book Co., Div. of Ingram Indus., Inc.}, 315 NLRB 515, 516 (1994) (vice president of human resources). Yates’s relative authority was magnified by the fact that he, as he testified, was the official who had hired both Saeli and Roe. (Tr. 84-85, 253).

Moreover, the conversation took place in Yates’s office, with no other employees present, at a time when employees were already casting their ballots and campaigning was supposed to be over (Tr. 12-14). \textit{Tradewaste Incineration}, 336 NLRB 902, 909 (2001) (interrogation unlawful, in part, because not casual inquiry in open area but in supervisor’s office). Finally, Saeli lied and

\textsuperscript{68} As noted above, Saeli’s testimony that Yates asked her who the ringleader was is more credible than Yates’s denial.
told Yates that she did not know who the ringleader was (Tr. 13-14). Accordingly, under the totality of the circumstances, Yates’s questioning of Saeli violates Section 8(a)(1) of the Act.

B. Respondent Unlawfully Discharged Roe

While Counsel for the General Counsel respectfully requests and argues in favor of using this case to overrule Tschiggfrie Properties and Electrolux Home Products (below), it is not necessary for finding a violation. Respondent’s discharge of Andrea Roe was unlawful even under the heightened standards.

Section 8(a)(3) of the Act makes it an unfair labor practice for an employer, “by discrimination in regard to hire or tenure of employment to encourage or discourage membership in any labor organization.” 29 U.S.C. §158(a)(3). Therefore, an employer violates Section 8(a)(3) by discharging employees because they engaged in union activity. NLRB v. Transp. Mgmt. Corp., 462 U.S. 393, 397-98 (1983). In evaluating alleged unlawful discharges, the Board applies the analysis set forth in Wright Line, 251 NLRB 1083, 1089 (1980), enf’d., 662 F.2d 899 (1st Cir. 1981), and approved by NLRB v. Transp. Mgmt. Corp., 462 U.S. at 403. Under that framework, the General Counsel must show by a preponderance of the evidence that the employee engaged in union or other protected activity, the employer had knowledge of that activity, and that animus towards the activity was a motivating factor in the employer’s decision to discharge the employee. Tschiffgrie Properties, Ltd., 368 NLRB no. 120, slip. op. at 8-9 (2019).

1. The Evidence Establishes that Andrea Roe Engaged in Extensive Union Activity

The uncontroverted evidence establishes that Roe engaged in protected concerted organizing efforts. Roe credibly testified that beginning in 2020, she began having conversations

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69 An employer’s action that violates Section 8(a)(3) also derivatively violates Section 8(a)(1). See Office & Prof’l Emps. Int’l Union v. NLRB, 981 F.2d 76, 81, n.4 (2d Cir. 1992).
with her co-workers to determine whether they were interested in joining a union (Tr. 46-48). By January 2021, Roe had spoken to most of the employees in the radiology department (Tr. 49-50). In January and February, Roe reached out to technicians in other departments to talk about joining a union, participated in weekly union meetings via Zoom, and generally acted as liaison between the technicians and 1199 (Tr. 48-52). After an extended absence, Roe returned to work and began discussing the Union with the service employees that were beginning to organize in April (Tr. 51-54). Roe answered their questions regarding, among other things, how organizing works, what they can expect, and when the Zoom meetings would take place (Tr. 51).

2. The Evidence Establishes that Respondent Had Knowledge of Roe’s Union Activity

Knowledge of union activity may be established by direct evidence or by circumstantial evidence from which a reasonable inference of knowledge may be drawn. See, e.g., Montgomery Ward & Co., 316 NLRB 1248, 1253 (1995), enf’d. mem. 97 F.3d 1448 (4th Cir. 1996). Such circumstantial evidence can include the timing of the alleged discriminatory actions, the Respondent's general knowledge of its employees' union activities, the Respondent's animus against the Union, and the pretextual reasons given for the adverse personnel actions. North Atlantic Medical Services, 329 NLRB 85, 85 (1999), enf’d. 237 F.3d 62 (1st Cir. 2001). Knowledge may be inferred even where the employer's rationale for the adverse employment action is not patently contrived, but so weak that is raises suspicion of unlawful motive. Montgomery Ward, 316 NLRB at 1253 (internal citations omitted).

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70 Saeli corroborated Roe, testifying that even though they only worked one shift together most weeks, she was present for at least ten conversations where co-workers asked Roe for information about the Union (Tr. 30-31).
Respondent’s documentary evidence establishes that Respondent was aware of the continuing organizing efforts by technical and service employees and went to great lengths to discover the leader of the Union organizing drive. Starting in February 2021, Volpe, Capone, Hirkaler, and Schmicke, among others, were involved in an email thread regarding potential organizing among the technical unit (GC Exh. 6). This surveillance continued after the petition was filed and throughout March, with Volpe reporting that she was trying to find out more about a technical unit employee that was spotted at a NYSNA meeting (Tr. 235; GC Exh. 3). Volpe, Capone, and Hirkaler also showed great interest in discerning the organizer of the service unit, having various conversations and exchanging emails about their top suspects (Tr. 236, 241-244; GC Exh. 7). Yates, who reported to Capone weekly, also asked Saeli point-blank who the ringleader was (Tr. 13). In the unlikely event that Respondent’s efforts did not already reveal Roe as the organizer, it became apparent on April 30, when Roe was the only bargaining unit member to attend the virtual ballot count (Tr. 56-58). At least Capone and Schmicke were also present (Tr. 58; GC 7). Days later, Roe received her first and final discipline, based on a pretextual investigation (discussed further, below). Therefore, a reasonable inference may be drawn that Respondent had knowledge of the prominent role that Roe played in the Union’s organizing campaigns.

In conjunction with the above, the small plant doctrine also supports a finding of knowledge of Roe’s prominent role. The small plant doctrine applies where, along with other indicia of knowledge, “the facility is small and open, the work force is small, the employees make

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71 Respondent also clearly had informants within the tech unit, as this email chain spurred from an employee report of an 1199 Zoom meeting before the petition was even filed.
72 Capone testified that she did not see Roe at the virtual ballot count, but as noted above, Capone’s testimony should not be credited (Tr. 209). Respondent did not call Schmicke to testify.
no great effort to conceal their union activities, and management personnel are located in the immediate vicinity of the protected activity, which increases likelihood of knowledge.” *Roemer Indus., Inc.*, 367 NLRB No. 133 (2019) citing *NLRB v. Mid State Sportswear, Inc.*, 412 F.2d 537, 540 (5th Cir. 1969). *See also American Chain Link Fence Co.*, 255 NLRB 692, 693 (1981) enf’d. in relevant part, 670 F. 2d 1236 (1st Cir. 1982) (knowledge inferred where employees engaged in activity at work, workforce was about 20 people, and management had ample opportunity to observe).

The technical unit, particularly Roe’s department, is a relatively small workforce. Respondent’s flyers urging the techs to vote no state “There are only 38 of you who can vote” (GC Ex. 3). Yates also testified that there were only 15-17 radiology techs on staff. (Tr. 274). Additionally, Roe did not make a great effort to conceal her activities as she engaged in conversations about the Union all around the radiology department, from the breakroom to the hallways (Tr. 33, 44-45).73 In April, she even spoke frankly and directly to her supervisor, Yates, voluntarily telling him the specific reasons she believed the staff needed a union, such as better pay and increased staffing (Tr. 54-55, 95-96, 265-266). Around this time, Respondent also appears to have suddenly stopped looking for the tech unit organizer and began to focus its efforts on the ringleader of the service unit (GC Exh. 3). Finally, Roe was so well-known as the Union organizer for the tech unit that she became a de facto organizer and liaison for the service unit too (Tr. 51). Thus, Respondent knowledge of Roe’s union activity can also be inferred under the small plant doctrine.

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73Additionally, Roe engaged in Union-related conversations with her co-workers during every shift, so even if Yates was not onsite every day, they overlapped at least every Tuesday (Tr. 39, 51-52, 249). Yates, in turn, spoke weekly with Capone, Hirkaler, Volpe, and Liebowitz, among others, about the Union organizing drive (Tr. 209, 251; GC Exh. 5)
Finally, Respondent was fully aware of Roe’s status as the Union organizer when they denied her appeal without explanation and without additional investigation in June (Tr. 79; R. Exh. 3).

3. The Evidence Establishes that Animus Towards Roe’s Union Activity was the Motivating Factor in her Discharge

With regard to motivation, rarely does an employer provide a “smoking gun.” For this reason, circumstantial evidence is sufficient to prove the unlawful motive element of retaliatory acts alleged to violate Section 8(a)(3). *Turnbull Cone Baking v. NLRB*, 778 F.2d 292 (6th Cir. 1985), cert. denied 476 U.S. 1159 (1986). Unlawful motivation may be established by evidence which includes, among other things, (1) the timing of the employer’s adverse action in relationship to when it acquired knowledge of protected activity, (2) the presence of other unfair labor practices, (3) statements and actions showing the employer’s animus, (4) the disparate treatment of the discriminatee(s), (5) departure from past practice, and (6) evidence that an employer’s proffered explanation for the adverse action is a pretext. *National Dance Institute—New Mexico, Inc.*, 364 NLRB No. 35, slip op. at 10 (2016). Employer conduct which reflects hostility toward protected activities may be relied on as evidence of animus, even if that conduct is not itself unlawful. See *Braun Electric Company*, 324 NLRB 1 (1997); *Stoody Company*, 312 NLRB 1175, 1181-82 (1993).

The timing of the adverse action clearly establishes that animus towards Roe’s union activity was the motivating factor for her discharge. Despite completing the access audit on April 28, Roe was allowed to work on Thursday, April 29 (Tr. 58-59; Jt. Exh 1). Roe attended the virtual ballot count on April 30 (Tr. 58). She was suspended on May 4, during the next weekday
shift that she worked (Tr. 58-59, 69). Respondent decided to discharge her three days later (Tr. 145, 215). See, e.g., *Classic Sofa*, 346 NLRB 219, 221 (2006) (discharge one month after election provided evidence of suspicious timing). The message sent to employees in this context is clear—if you bring in a union, we will retaliate against you with discharge.

There is also at least one additional unfair labor practices present: Respondent’s interrogation of Saeli. The Board has long considered the existence of other unfair labor practices, including Section 8(a)(1) violations that do not require intent, as evidence of animus. See, e.g., *The Fremont-Rideout Health Grp.*, 357 NLRB 1899, 1902 (2011) (employer’s animus demonstrated by other violations, including coercive interrogation).

Additionally, there are multiple statements and actions that show Respondent’s hostility and animus toward Roe’s union activity. See *Braun Electric Company*, 324 NLRB 1; *Stoody Company*, 312 NLRB at 1181-82 (1993). First, Respondent’s agents made a concerted effort to find out that Roe was the ringleader of the organizing drive, not only through interrogation of Saeli but surveillance of meetings and sustained discussion of suspected employees. (Tr. 235-236, 241-244, GC Exh. 3, 6, 7). It stands to reason that Respondent sought to uncover the union organizer due to animus and no other justification was proffered. Second, Respondent distributed weekly flyers with antiunion statements such as “unions only get what management agrees to give” and “from our view, voting in a union won’t get you more than you have and will only tie things up in

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74 Roe was informed of her discharge on May 14, but the decision was made on May 7 (Tr. 78, 145-146).

75 While no charge was filed and it is not included in the complaint, the record also demonstrates that Respondent engaged in surveillance of union activities to ascertain the ringleader of both the tech and service units.
Managers were reminded to talk to their subordinates about the talking points in these flyers each week and had to confirm that they did (Tr. 229-230, 271-272, GC Exh. 3-5). Additionally, Volpe suggested re-assigning certain work duties of a suspected organizer (GC Exh. 7). The employee was assigned to distribute PPE, likely putting her in contact with a large number of other unit employees (GC Exh. 7).

There is also ample record evidence of disparate treatment and departure from past practice because Respondent does not discharge every employee that is alleged to have violated HIPAA, even if the breach is intentional (Tr. 156, Jt. Exh. 3, 13, 16). In 2018, Sharlyn Serwatien admitted to inappropriate disclosure and unauthorized access of a medical record and was only given a written warning (Jt. Exh. 13). In 2019, Beth McDowell disclosed the admission of a patient in a Facebook post and was only given a final written warning (Jt. Exh. 13). In 2022, Estrella Estelle accessed her co-worker’s medical record and was only given a final written warning and one day suspension without pay. Campbell could only recall discussing one prior termination—Kathy Taylor—and admitted that she does not think a full analysis was done before discharging Roe (Tr. 178). However, Taylor was discharged for both inappropriate access and disclosure whereas Respondent did not actually conclude that Roe disclosed any information (Jt. Exh. 10, 13).

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76 Yates also testified that he knew Respondent preferred to remain union-free (Tr. 271-272). Even Respondent counsel stated on the record, “obviously, they like to operate without a union” (Tr. 117).

77 While this employee is a member of the service unit, the record establishes that Roe’s union activity extended into that campaign (Tr. 51).

78 In addition, employees with repeated inadvertent disclosures or inadvertent disclosure of several patients to a large group of people were not terminated (Jt. Exh. 13).

79 Respondent also did not even investigate this aspect of Faline’s complaint (Tr. 154, 159, 185; Jt. Exh. 14).
Respondent also deviated from its past practice by failing to thoroughly investigate Roe’s alleged HIPAA breach. The Compliance department’s entire investigation of Faline’s accusation consisted of interviewing Roe, an access audit, and a review of imaging orders (Tr. 159-160).

The Compliance department completely ignored most potential explanations for Roe’s access into Mr. F’s chart on April 15. Roe, Saeli, and Yates all Compliance department that radiology techs have legitimate reasons to go into patient charts even if they are not about to x-ray or scan the patient (Tr. 15, 63-64). Roe specifically told Compliance that nurses call with questions about an imaging study that was previously done or with questions about an imaging study that may be ordered (Tr. 73). Roe told Compliance that doctors call with questions, for example when they are onsite but need to know if an imaging study can be done (Tr. 73). Roe told Compliance that the radiology office manager calls with questions about imaging studies on behalf of doctors, nurses, or insurance companies (Tr. 73-74). Roe explained how this would require her to access the patient’s chart and review the history (Tr. 73-74). However, Compliance did not look into any of this. Campbell admitted that the Compliance department did not look at Roe’s access of other patients over time, they only looked at other patients from April 15 (Tr. 163-164; Jt. Exh. 7). Campbell admitted that the Compliance department failed to request an access audit for other radiology techs to see if they also similarly access the charts of patients they are not about to x-ray (Tr. 151-152, Tr. 164; Jt. Exh. 1, 14). Campbell admitted that Compliance did not ask any of Mr.

80 Compliance appears to have reviewed whether Roe could have been involved with Mr. F’s overnight x-ray on April 15 as either a second undocumented tech or because x-ray had not been interpreted by a radiologist yet (Tr. 139-141; Jt. Exh. 2, 3). Compliance did not look at whether Roe could have had any involvement with Mr. F’s April 16 x-ray that was ordered on April 15 (Jt. Exh. 2).

81 This assertion was also corroborated after Roe was discharged when radiology techs refused to enter the chart of a patient they were not about to x-ray (Tr. 17). Clearly accessing the charts was a common practice since Respondent noticed right away and Molleda held a meeting to discuss the issue (Tr. 17-19).
F’s doctors whether they called the radiology department with questions on April 15 (Tr. 152). Campbell admitted that the Compliance department did not even ask the doctors or nurses whether they ever call radiology with questions after imaging is complete (Tr. 152).

The Compliance department also failed to explore other ways Donna Roe could have received information about Mr. F’s condition. Roe told the Compliance department that she once overheard her father-in-law discussing Mr. F’s condition with Donna Roe and she thinks her father-in-law received his information from someone that he works with (Tr. 62, 88; Jt. Exh. 9). Campbell admitted that the Compliance department never spoke to Donna Roe or Andrea Roe’s father-in-law (Tr. 159). This is particularly troubling given that Faline claims Donna Roe knew that Mr. F had been transferred to WMC, but Mr. F was transferred on April 23 and even Respondent’s witnesses admit that Roe did not access Mr. F’s chart any day but April 15 (Tr. 127, 131, 140, 154, 194, 214-215; Jt. Exh. 5).

There is also no evidence that Respondent did additional investigation after Roe appealed her discharge. Roe was not contacted with additional questions and Respondent produced no evidence that it contacted Donna Roe, spoke with doctors or nurses, reviewed Roe’s access of other patients, or requested access audits of other radiology techs, before deciding to dismiss the appeal (Tr. 82).

Based on the foregoing, the evidence shows that Respondent’s stated reason for discharging Roe, that she violated HIPAA, is merely pretext and that Respondent’s true motivation for discharging Andrea Roe was because she was the Union organizer that brought 1199 into the facility.

82 Campbell also admitted that the Compliance department did not allow Andrea Roe to speak to Donna Roe or anyone else on her own behalf (Tr. 154).
4. The Employer Failed to Establish that it Would Have Discharged Roe in the Absence of Union Activity

Once the General Counsel has established that protected conduct was the motivating factor for the employer’s action, the burden shifts to the employer to produce evidence establishing that the employer would have taken the same action even in the absence of union activity. Septix Waste, Inc., 346 NLRB 496 (2006); Donaldson Bros. Ready Mix, Inc., 341 NLRB 958, 961 (2004). To establish this affirmative defense, the Respondent “cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place if the employee did not engage in union activity. Fremont-Rideout Health Grp., 357 NLRB at 1902 (internal quotations omitted). Additionally, if the evidence has established that the reasons given for the employer’s action are pretextual—that is, either false or not in fact relied upon—discriminatory motive may be inferred. Electrolux Home Products, 368 NLRB No. 34 (2019), slip op. at 3. If a trier of fact finds that the stated motive for a discharge is false, he can infer that there is an unlawful motive the employer desires to conceal where the surrounding facts tend to reinforce that inference. Id (internal citations omitted).

Respondent cannot prove that it would have taken the same action against Roe in the absence of her union activity because they barely investigated the alleged HIPAA breach before discharging her when other employees have not been as severely treated. First, Respondent’s entire investigation of Roe was completed over the course of two days, based solely on interpretation provided by the IT department rather than the expertise of a radiology tech supervisor, and failed to include the barest steps such as interviews of key witnesses like Donna Roe or Mr. F’s doctors. (Tr. 151, 171, 249, 261). Respondent also ignored basic logic. On April

83 Respondent appears to place great weight to the fact that Roe could not recall the specific reason she went into Mr. F’s chart. Given that Roe interacted with over 20-30 patients per day as well as
Roe spent less than 2 minutes in Mr. F’s chart and the only substantive thing she looked at was a note that contained lab orders (which are commonly viewed by radiology techs) (Tr. 172, 267; Jt. Exh. 9). Roe did not access Mr. F’s chart on any other date (Jt. Exh. 1). It is unclear how such limited access could possibly support the contention that Andrea Roe kept Donna Roe updated on Mr. F’s status, particularly when the one significant piece of information Donna Roe had—that Mr. F was transferred to WMC—did not occur until April 23, a week after Roe’s sole access (Tr. 127, 194; Jt. Exh. 1, 5).

Additionally, Respondent’s witnesses testified that Roe’s discharge was consistent with past practice, but even a cursory review of disciplines for HIPAA violations over the last few years shows that this is false (Tr. 178, 215-216; Jt. Exh. 13). For example, Sharlyn Serwatien admitted to unauthorized access and inappropriate disclosure but was only given a written warning (Jt. Exh. 13). And Estrella Estelle, who inappropriately accessed a co-worker’s medical record, was given a final warning and one day suspension (Jt. Exh. 13). Moreover, Respondent’s witnesses admitted that an actual analysis of prior disciplines was not even done before deciding to discharge Roe (Tr. 178).

Finally, it is of no moment that other suspected organizers were not disciplined (Tr. 245). First and most importantly, because Respondent found out that Roe was the organizer there would be no reason to discipline former suspects. Second, there is no record evidence that the other suspected employees were accused of HIPAA or other violations. Again, the General Counsel fielded calls regarding patients she was not involved with, it is not surprising that she could not recall going into Mr. F’s chart or the reason she went into Mr. F’s chart two and a half weeks earlier. (Tr. 38, 42, 68, 90, 95, 99). There is nowhere for a radiology tech to document the reason they went into a chart. (Tr. 19, 75). Conversely, Mr. F’s doctors had significant interaction with him and may have remembered more details or taken notes about what occurred with the patient that day.
does not argue that Faline’s complaint did not occur or that it should not have been investigated. Rather, General Counsel contends that Respondent unlawfully seized upon the complaint as a shield to hide their true motive. Had Roe not been engaged in union activity, the investigation would have been properly conducted and she would not have been discharged.

VI. GENERAL COUNSEL RESPECTFULLY REQUESTS THAT THE BOARD USE THIS CASE AS AN OPPORTUNITY TO OVERRULE TSCHIGGFRIE PROPERTIES AND ELECTROLUX HOME PRODUCTS AND RESTORE THE PRIOR, LONGSTANDING WRIGHT LINE TEST

A. Summary of the General Counsel’s Position

The General Counsel respectfully requests that the Board reconsider its recent decisions in Tschiggfrie Properties, Ltd., 368 NLRB No. 120 (2019), remanded by 896 F.3d 880 (8th Cir. 2018), and Electrolux Home Products, 368 NLRB No. 34 (2019), and restore how the Board, with extensive federal court approval, consistently had applied over a period of four decades the Wright Line test for determining when an employer’s animus toward its employees’ union or protected concerted activities caused an adverse employment action. See Wright Line, 251 NLRB 1083, 1089 (1980), enforced 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in NLRB v. Transportation Management Corp., 462 U.S. 393 (1983). In Tschiggfrie, the Board unnecessarily and inappropriately heightened the showing that the General Counsel must make to satisfy her initial burden under Wright Line. Specifically, the Board modified the Wright Line test to require that the evidence of animus necessary to satisfy the General Counsel’s initial burden be particular to demonstrate a causal relationship between an employee’s protected activity and the employer’s adverse action against that employee. Tschiggfrie Properties, Ltd., 368 NLRB No. 120, slip op. at 1, 8. In Electrolux, the Board for the first time minimized the significance of finding that an employer’s proffered reason for discharging a known union supporter constituted
a pretext, evidence the Board previously had uniformly treated as a determinative indicium of an anti-union motive. The Board reasoned that evidence showing the employer complied with its legal obligations to bargain, or, in other words, the absence of other unfair labor practices by the employer, precluded relying on pretext alone to establish a discriminatory motive. Each case represents a significant and unjustified departure from well-established precedent interpreting and applying *Wright Line*, one of the Board’s most consequential decisions given its routine use in discerning motive for an adverse action. More important, these two cases frustrate the purposes of the Act by undermining the General Counsel’s ability to protect employees who exercise their statutory right to improve their working conditions through collective bargaining from retaliation by their employers. Thus, the General Counsel respectfully requests that the Board overrule both cases.

B. Arguments Addressing Tschiggfrie Properties

1. The Board’s Decision in Tschiggfrie Properties

In *Tschiggfrie Properties*, the Board modified the General Counsel’s initial burden under *Wright Line* by expressly rejecting the statements in prior cases that no causal nexus or additional showing of particularized animus in relation to the employee activity is required. 84 365 NLRB

84 The issue was whether the employer had violated Section 8(a)(3) and (1) by discharging an employee. In setting out the *Wright Line* test to determine the presence of anti-union motive, the administrative law judge stated the General Counsel must establish “union activity on the part of employees, employer knowledge of that activity, and antiunion animus on the part of the employer,” but added that “the General Counsel does not have to prove a connection between the antiunion animus and the specific adverse employment action.” 365 NLRB No. 34, slip op. at 8 & n.2. The Board majority adopted the ALJ’s statement of the *Wright Line* burden, explicitly rejecting the inclusion of a fourth “nexus” element to satisfy the initial burden. *Id*. The Eighth Circuit denied enforcement, concluding that the General Counsel must indeed prove a connection or nexus between the employer’s anti-union animus and the discharged employee’s union activities to establish that unlawful discrimination was a “substantial or motivating factor” for the discharge. *Tschiggfrie*, 896 F.3d at 886. In so concluding, the court adhered to its own precedent in *Nichols Aluminum*, where it stated that “[s]imple animus toward the union is not enough,” and while union
No. 34, slip op. at 1, n.1, 6-7 (2017), enforcement denied in relevant part and remanded, 896 F.3d 880 (8th Cir. 2018), on remand 368 NLRB No. 120 (2019). The Board specifically overruled the statement in *Libertyville Toyota* and similar cases that “proving that an employee’s protected activity was a motivating factor in the employer’s action does *not* require the General Counsel to make some additional showing of particularized motivating animus towards the employee’s own protected activity or to further demonstrate some additional, undefined ‘nexus’ between the employee’s protected activity and the adverse action.”

The Board stopped short, however, of affirmatively requiring a separate showing of causation, or a nexus, as an additional element reasoning that such an element would be superfluous because “[t]he ultimate inquiry” is already whether there is a nexus between the employee’s protected activity and the challenged adverse employment action. *Id.*, slip op. at 7 (citing *Chevron Mining, Inc. v. NLRB*, 684 F.3d 1318, 1327–28 (D.C. Cir. 2012). Thus, the Board settled on requiring evidence affirming the existence of a causal relationship between the hostility is a “proper and highly significant factor for the Board to consider . . . general hostility toward the union does not itself supply the element of unlawful motive.” *Tschiggfrie*, 896 F.3d at 886-87 (citing *Nichols Aluminum LLC v. NLRB*, 797 F.3d 548, 554-55 (2015)). On remand, the Board accepted the Eighth Circuit’s decision as the law of the case and applied its formulation of the *Wright Line* test, concluding that the evidence was indeed sufficient to show a causal nexus. 368 NLRB No. 120, slip op. at 3, 4.

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85 The Board referred to this articulation of the General Counsel’s initial burden, which rejected a nexus requirement, as the *Libertyville Toyota* formulation. In addition to *Libertyville Toyota*, the *Tschiggfrie* Board also discussed *Mesker Door*, where the Board stated that the ALJ “erred by ‘describ[ing] the General Counsel’s initial burden as including a fourth ‘nexus’ element.’” 368 NLRB No. 120, slip op. at 6 (quoting *Mesker Door*, 357 NLRB 591, 592 n.5 (2011)). The *Tschiggfrie* Board noted that ALJs were subsequently admonished if they included a fourth “nexus” element. *Id.*, slip op. at 6 & n.16.
employee’s protected activity and the employer’s adverse action. Id., slip op. at 7, 8. The Board added that the General Counsel “does not invariably sustain his burden by producing—in addition to evidence of the employee’s protected activity and the employer’s knowledge thereof—any evidence of the employer’s animus or hostility toward union or other protected activity.” Id., slip op. at 8. In other words, some degree of particularity vis-à-vis the employee’s protected activity must be shown to establish the requisite showing of animus. Id.

The Board offered two primary reasons for requiring this additional showing. First, it asserted that because the Libertyville Toyota formulation “can easily be interpreted as inconsistent with Wright Line,” it would create difficulties in securing circuit court enforcement of Board orders, as in Tschiggfrie itself. Id., slip op. at 7 & n.25, 8 n.26. Second, the Tschiggfrie Board repeated the Eight Circuit’s characterization that the Libertyville Toyota formulation made it seem that the General Counsel could satisfy the initial burden under Wright Line with any evidence of an anti-Section 7 motive. As to this concern, the Board opined that the Libertyville Toyota formulation did not simply confirm the absence of a fourth “nexus” element in the General Counsel’s initial burden, but rather affirmatively rejected the causality requirement that is the essence of the Wright Line test. Id., slip op. at 8, n.26.

2. The Board Should Overrule Tschiggfrie Properties

The General Counsel urges the Board to overrule Tschiggfrie because it unnecessarily modified the showing the General Counsel must make to satisfy her initial burden under Wright Line thereby unjustly denying the Act’s protections to employees who exercise their Section 7 rights in a wide range of cases. Tschiggfrie limits the relevant analysis to a specific discriminatee’s protected activities, improperly minimizing the import of the employer’s response to various protected activities in discerning motive. Further, Tschiggfrie’s modifications are unnecessary
given that the concerns raised with the Libertyville Toyota formulation, including the Eighth Circuit’s treatment of Board decisions mentioning that formulation, are unwarranted where, regardless of the language used to set out the Wright Line test, the Board’s analysis has consistently focused on whether there is sufficient evidence to conclude that the exercise of Section 7 rights caused the adverse employment action. At most, the Board need only explain, as recognized in Tschiggfrie, how the Libertyville Toyota formulation is consistent with Wright Line principles. Id. In light of the foregoing considerations, the concerns raised in Tschiggfrie for modifying the Wright Line test fail to justify the departure from well-established precedent.

a) Tschiggfrie’s Modification of the Wright Line Test Will Deny the Act’s Protection to Employees Who Exercise Their Section 7 Rights in a Wide Range of Scenarios, and Contravenes Statutory Language

The inquiry into causation under Wright Line should focus on the employer’s motive for an adverse employment action without requiring the General Counsel to prove a connection to a particular discriminatee’s union or other protected activities.86 Although an “employer’s awareness of a targeted employee’s union activity is the most common way of proving ‘actual discriminatory intent’ . . . such individualized knowledge is not always necessary for a violation to be found.” Napleton 1050, Inc. v. NLRB, 976 F.3d 30, 41 (D.C. Cir. 2020) (citation omitted), enforcing 367 NLRB No. 6, slip op. at 1 n.2, 14-17 (2018). “As long as the employer is taking

86 The analysis in this section focuses on the General Counsel’s initial Wright Line burden—i.e., the evidentiary showing required for a decisionmaker to make an initial finding of an unlawful motive—and, accordingly, does not disturb an employer’s opportunity to overcome the inference with its own evidence if and when the burden shifts. Nevertheless, evidence that an employer’s proffered justification for an adverse action constituted a pretext also may be used to satisfy the General Counsel’s initial burden. See, e.g., Wright Line, 251 NLRB at 1088 n.12 (“The absence of any legitimate basis for an action, of course, may inform part of the proof of the General Counsel’s case”). However, we do not address the relevance of pretext evidence here as that issue will be considered more fully below in connection with the discussion of Electrolux Home Products, 368 NLRB No. 34 (2019).
adverse action against an employee or employees for the specific purpose of punishing or
discouraging known union activity in the workplace, the employer ‘cannot cleanse an impure heart
with ignorance of individual employee sentiments.’” *Id.* (quoting *NLRB v. Frigid Storage, Inc.*, 934 F.2d 506, 510 (4th Cir. 1991)). Indeed, Section 8(a)(3) makes it unlawful for an employer to
discourage union activity by discriminating with regard to terms and conditions of employment.
The statutory language hinges the violation on the employer’s intent or motive, not the employee’s
activity. *See id.* at 43. By requiring the General Counsel to establish a connection between an
employee’s protected activity and the employer’s adverse action against that employee, the
*Tschiggfrie* Board completely ignored the foregoing principles and tied requirements for
establishing causation too closely to evidence about a particular employee’s activity, which allows
an employer to evade liability for unlawfully retaliating against its workforce so long as its actions
are not specifically linked to the targeted employee.

The shortcoming of *Tschiggfrie*’s modification of the *Wright Line* test becomes readily
apparent when considering cases where the General Counsel established an employer’s unlawful
motive for an adverse action despite the lack of a nexus to a particular discriminatee’s protected
activity. For example, in situations where an employer discharges employees to discourage its
workforce from engaging in protected activity, the employer may have done so at random,
regardless of each individual employees’ engagement in Section 7 activity. *See, e.g., Napleton 1050, Inc.*, 976 F.3d at 48 (noting the Act does not allow an employer “to fire a randomly chosen
worker for the express and announced purpose of punishing its employees for unionizing—to
‘teach them a lesson’”). In such cases, despite the lack of evidence establishing a causal
relationship between a particular discriminatee’s protected activity and the employer’s adverse
action against that discriminatee, the employer’s unlawful motive may be evident based on, for
example, general statements of animus, the proximity of the adverse action to the employer obtaining knowledge of any protected activity, the number of employees discharged together, or the lack of any legitimate justification for the action taken. This situation could be in the context of a mass discharge, disciplinary actions to punish employees as a group, or discharging one employee in retaliation for the protected activity of others, whether the employee is used as a scapegoat or as a coverup for other adverse actions. See, e.g., American Wire Products, 313 NLRB 989, 994 (1994) (in the context of a mass layoff, noting that “the Board and the courts have long held that, absent a reasonable explanation, the disproportion between the number of union and nonunion employees laid off or discharged may be persuasive evidence of discrimination”); Link Mfg. Co., 281 NLRB 294, 299 n.8 (1986) (finding mass layoff “was thus in the nature of a ‘power display’ in response to the advent of the [u]nion and was unlawful without regard to specific knowledge of the prounion activities of particular employees”), enforced 840 F.2d 17 (6th Cir. 1988); Economy Foods, 294 NLRB 660, 661, 668 (1989) (finding discharge of employee unlawful despite lack of evidence of specific animus aimed at the employee because it was in retaliation for the employees’ general organizing efforts), enforced sub nom. NLRB v. Frigid Storage, Inc., 934 F.2d 506, 510 (4th Cir. 1991) (an employer’s retaliatory action is unlawful “even if the employer wields an undiscerning axe, and anti-union employees suffer along with the their pro-union counterparts”); Napleton 1050, Inc. d/b/a Napleton Cadillac of Libertyville, 367 NLRB No. 6, slip op. at 1 n.2, 14-17 (2018) (finding discharge and layoff of two employees unlawful following successful union organizing drive despite lack of targeted animus evidence), enforced 976 F.3d 30, 33-34 (D.C. Cir. 2020) (concluding Board properly focused on employer’s discriminatory intent to punish employees as a group for unionizing, rather than on employer’s knowledge of targeted employees’ individual pro- or anti-union position).
Tschiggfrie’s modification of the Wright Line test would also be problematic where an employer’s unlawful motive is established through a discernible pattern of unfair labor practices albeit removed to some degree from a discriminatee’s Section 7 activity. The unlawful motive behind an adverse action may be evident from evidence the employer committed the same type of violations in another case even though remote, the same managers or supervisors who carried out the adverse action committed other violations, the same methods of retaliation were involved, or the employer engaged in conspicuous recidivism or had a proclivity to violate the Act. See, e.g., St. George Warehouse, Inc., 349 NLRB 870, 878 (2007) (relying in part on three-year-old unfair labor practices, particularly prior retaliation based on union activity, to find that subsequent discipline of employee was motivated by union animus).

Again, the approach set out in Tschiggfrie interferes with the proper analysis in cases presenting the situations discussed above, where the focus is properly on the motive behind an employer’s adverse action rather than whether it is retaliating against any particular discriminatee’s known Section 7 activity. See, e.g., Link Mfg. Co., 281 NLRB at 299 n.8 (finding mass layoff unlawful without regard to specific knowledge of the prounion activities of particular employees”); Napleton 1050, Inc. 976 F.3d at 43 (distinguishing the issue of whether an employer took an adverse action because of the employee’s activity from the proper inquiry into whether it did so with the intent of discouraging union activity, as mandated by the Act’s “plain statutory text, which focuses on the employer’s anti-union motive, not the views of the affected employees”). The heightened showing required under Tschiggfrie amounts to a technicality that allows employers to avoid liability for retaliating in response to one employee’s protected activity simply by taking action against a different employee. But where the evidence establishes an employer’s unlawful motive, the lack of “particularized” evidence should not preclude finding a
violation. See, e.g., Howard's Sheet Metal, Inc., 333 NLRB 361, 364 (2001) (unlawful discharge of one employee may taint contemporaneous discharge of another despite lack of targeted animus as to the other employee); Marcus Management, 292 NLRB 251, 262 (1989) (evidence revealed employer’s “latent hostility which bides its time and lies in wait, seeking the appropriate occasion to work its will” where it waited six months to discharge union organizer to avoid a lawsuit). Indeed, it would undermine the purposes of the Act to do so. Accordingly, the Board should continue to prioritize using Wright Line to make the appropriate evidentiary inferences based on all the facts, rather than on refinements that tend to truncate the analysis or render the framework less effective at genuinely discerning motive and causation. The General Counsel respectfully requests that Tschiggfrie be reversed to effectuate these priorities.

b) Tschiggfrie’s Modification Was Unnecessary Because Neither Libertyville Toyota nor Mesker Door Had Changed or Lowered the Initial Wright Line Burden

The Tschiggfrie Board’s primary objection to how Mesker Door and Libertyville Toyota set out the Wright Line test is that those decisions may be interpreted as allowing the General Counsel to satisfy the initial burden with “any” evidence of animus against Section 7 activity even if that evidence has little or no connection to the discriminatee’s protected activity. But regardless of how the test has been articulated, the Board has consistently applied Wright Line to find a violation only where substantial evidence established that an employer’s animus toward union or other protected activity caused an adverse action. For instance, although the Tschiggfrie Board emphasized that in Mesker Door the Board corrected the ALJ’s inclusion of a fourth nexus element when describing the General Counsel’s initial burden, the evidence in that case satisfied such an element. Mesker Door, Inc., 357 NLRB at 592 n.4. Specifically, in addition to a backdrop of general animus, the Board relied on the fact that the discipline, which the employer asserted was
for making threatening remarks, was issued just one day after the employee’s protected discussion, and the employer’s significantly more lenient treatment of an employee who engaged similar alleged misconduct of making a threat just a month later. Id. at 592. Adhering to the traditional three-element Wright Line test, the Board reversed the ALJ, who had failed to rely on either the compelling evidence of timing or disparate treatment to support finding an inference of unlawful motivation, despite having found several generalized independent Section 8(a)(1) violations. Id. at 591 n.1, 592. Consequently, the Board considered the entire record in concluding there was a causal relationship between the discriminatee’s union activity and the employer suspending him. See Tschiggfrie, 368 NLRB No. 120, slip op. at 12 (Member McFerran, concurring in the result) (listing the evidence the Board relied on in Mesker Door to find the employer had an anti-union motive).

Similarly, in Libertyville Toyota, in response to the ALJ including a fourth nexus element as part of the Wright Line test and the dissent of then-Member Miscimarra in support of that formulation of the test, the Board stated that this additional showing is not required. 360 NLRB at 1301, n.10. Nevertheless, the causal connection between the discriminatee’s protected activity and the employer’s adverse action in that case was clear. The same day the employer made several anti-union statements, including threats of futility, job loss, and blacklisting within the industry at a captive employee meeting the discriminatee attended, the employer for the first time departed from its past practice of addressing an alleged failure to meet a job requirement, in this case a valid driver’s license, directly with the employee, and instead ran a motor vehicle report on the discriminatee. Libertyville, 360 NLRB at 1329. In concluding that the employer unlawfully discharged the discriminatee three weeks later, the Board found an anti-union motive based on the employer committing contemporaneous unfair labor practices (i.e., the unlawful statements at the
captive audience meeting) and proffering a pretextual defense (i.e., that the discriminatee had abandoned his job). See Tschiggfrie, 368 NLRB No. 120, slip op. at 12 (Member McFerran, concurring in the result) (listing the evidence the Board relied on in Libertyville Toyota to find the employer had an anti-union motive). In short, the Board determined that the General Counsel had established that the employer’s anti-union motive had caused the adverse employment action it took against the employee. Indeed, the Seventh Circuit enforced the Board’s finding of a violation. See Tschiggfrie, 368 NLRB No. 120, slip op. at 7, 12 & n.8 (both the majority and concurring opinions noting that the Seventh Circuit enforced the Board’s findings in Libertyville Toyota).

As the foregoing shows, neither Mesker Door nor Libertyville Toyota lowered the showing the General Counsel must make to satisfy the initial burden under Wright Line. Similarly, the cases the Tschiggfrie Board cited to support the position that the General Counsel does not invariably sustain her burden of proof under Wright Line based on any evidence of employer animus further reinforce that the Board has never strayed from Wright Line’s basic causal inquiry. The Board cited two cases where evidence of the general animus was deemed insufficient to sustain the General Counsel’s initial burden. First, in Roadway Express, the issue was whether the union had violated Section 8(b)(2) by causing the employer to discipline an employee due to his status as a Beck objector. 347 NLRB 1419, 1419 & n.2 (2006). The Board found that the union pressing a prior complaint against the employee after the employer had determined it lacked merit and using an insult to refer to Beck objectors, which was remote in time, was insufficient evidence to establish that the union had an unlawful motive for bringing the employee’s driving-log violations to the attention of an employer. Id. at 1419 n.2. In reaching this conclusion, the Board noted that the union had an established history of bringing perceived driving-log violations to the employer’s attention. Id. Second, in Atlantic Veal & Lamb the issue was whether the employer
had discriminatorily failed to recall a laid-off employee as part of its unlawful response to an organizing campaign. 342 NLRB 418, 418-19 (2004), enforced per curiam 156 Fed. Appx. 330 (D.C. Cir. 2005). The evidence showed only that the discriminatee was qualified for one of several new positions that became available, but it did not show the comparative skills levels or union sentiments of the employees who were hired, except for four recalled employees who had engaged in union activity. Thus, although it found the employer had committed other unfair labor practices in response to the organizing campaign, the Board reversed the ALJ and found the General Counsel had not satisfied the initial burden under *Wright Line* for this allegation. *Id.* at 419 & n.6. In both cases, consistent with its longstanding uniform application of *Wright Line*, the Board declined to find unlawful motivation where the record did not support such a finding. More important, even when finding no violation, the Board adhered to its causation analysis.

Each of the foregoing cases, whether criticized or relied on in *Tschiggfrie*, illustrate that the Board has faithfully adhered to the fundamental *Wright Line* principle of causation in determining whether the General Counsel has met the initial burden of persuasion. Indeed, the Board itself declared that *Tschiggfrie* does not mark a radical shift in the interpretation or application of *Wright Line*. *Tschiggfrie*, 368 NLRB No. 120, slip op. at 8. Nevertheless, *Tschiggfrie* overreaches insofar as it modifies one of the Board’s most notable and oft-applied analytical frameworks without good reason to do so, and more importantly, overbroadly subsumes several categories of cases where there is a lack particularity as to animus but the evidence nevertheless supports the inference of unlawful motivation. As discussed, such an outcome contravenes statutory language holding the employer liable for discouraging Section 7 activity and fundamentally conflicts with the purposes and policies of the Act to protect the right of employees to organize and bargain collectively or engage in other protected activity.
c) The *Tschiggfrie* Board’s reasoning for overruling precedent and modifying the *Wright Line* test is unjustified given how it harms statutory rights

The *Tschiggfrie* Board plainly overstates the “difficulties” in securing enforcement of Board orders. *Tschiggfrie*, 368 NLRB No. 120, slip op. at 7. It concedes that while other appellate courts have questioned or expressed some level of criticism for the *Libertyville Toyota* formulation, namely the Fifth and Seventh Circuits, only the Eighth Circuit has denied enforcement on this ground. *Id.*, slip op. at 7 n.24, 8-9 n.26. However, the *Tschiggfrie* Board recognized that it could have simply explained how the *Libertyville Toyota* formulation is consistent with *Wright Line* principles and served only to correct prior misinterpretations and respond to proposals in dicta to add a fourth element. *Id.*, slip op. at 8 n.26. But rather than take that more limited approach, the Board dutifully accommodated the Eighth Circuit’s inaccurate statement of the law and added a new component to the *Wright Line* test that affects its future application. This modification has the potential to redefine decades of precedent without regard to how it may undermine the Act’s purpose of protecting employees who exercise their Section 7 rights. The Board’s response on remand focused too much on perceived inconsistency and court criticism and not enough on the substantive task of protecting statutory employee rights. Given that *Tschiggfrie* permits the exclusion of several typical situations that would otherwise give rise to the inference of a violation, the public policy that the Act represents compels the Board to overrule it, especially where the employer’s opportunity to avoid liability by rebutting that inference remains undisturbed. Where, as here, the implications of the Board’s holding are so expansive, it must resist hewing to the misinterpretation of one court and ensure that the statutory rights embedded in the Act remain available to employees to exercise.
C. Arguments Addressing Electrolux Home Products

1. The Board’s Decision in Electrolux Home Products

In Electrolux Home Products, the Board for the first time held that the General Counsel had not established an employer’s unlawful motive for an adverse employment action despite finding the employer’s proffered justification for that adverse action to be a pretext. 368 NLRB No. 34, slip op. at 3, 4-5 (2019). The Board set out the principle that when a respondent’s stated reasons for its decision are found to be pretextual—that is, either false or not in fact relied upon—discriminatory motive may be inferred “at least where . . . the surrounding facts tend to reinforce that inference” but such an inference is not compelled. Id., slip op. at 3 (emphasis added) (quoting Shattuck Denn Mining Corp. v. NLRB, 362 F.2d 466, 470 (9th Cir. 1966)). In doing so, the Board noted that precedent existed to both support and undercut the proposition that the General Counsel may satisfy the initial burden under Wright Line based on a finding of pretext alone. Id., slip op. at 3, n.10.

As factual background, employee J’Vada Mason was an open and active union organizer during a campaign that resulted in the union’s certification as the 700-employee unit’s collective bargaining representative. Electrolux, slip op. at 1. Notably, Mason spoke up several times during the employer’s preelection mandatory antiunion meeting and attempted to respond to managers’ antiunion statements for which she was told by two managers to “shut up.” Id. After the union’s certification, Mason was one of six employees on the union’s bargaining team and, during a bargaining session, raised her concern about a supervisor’s hostile response to her complaint about a bathroom sign-up policy. Id. The employer contends it discharged Mason for insubordination when, about two months later, she failed to deliver microwaves to her assembly line as directed. Id., slip op. at 1.

In asserting there is Board precedent for the proposition that the General Counsel cannot satisfy the initial Wright Line burden based on pretext alone, the Board relied solely on College of the Holy Cross, 297 NLRB 315, 316 (1989), wherein the Board adopted the ALJ’s decision. Electrolux, 368 NLRB No. 34, slip op. at 3 n.10. There, the ALJ stated, “the Board and the court require something more than a bare showing of a false reason, i.e., the support of surrounding circumstances” to find an employer’s motive unlawful. College of the Holy Cross, 297 NLRB at 316. The ALJ cited Briarwood Hilton in support, 222 NLRB 986, 991 (1976), where there was no actual finding that the employer’s explanation for discharge constituted a pretext. Briarwood Hilton, 222 NLRB at 990-91. Similarly, despite the ALJ’s statement about the value of pretext
Reversing the ALJ, the Board discounted the employer’s hostility toward Mason’s persistent attempts to challenge the employer’s antiunion position at a mandatory meeting as too remote in time to support causation. *Id.*, slip op. at 4. However, the Board found, in agreement with the ALJ, that the employer’s proffered reason for the discharge was pretextual given that the evidence established the employer treated seven other employees more leniently, having only issued discipline for a similar offense rather than discharge. *Id.*, slip op. at 3. Nevertheless, the Board went on to find that the pretext alone was insufficient to meet the General Counsel’s initial *Wright Line* burden of proving Mason’s union activity was a motivating factor in her discharge. *Id.* In so finding, the Board held that it did not have to infer animus from pretext because the surrounding facts undermined that inference. *Id.* The Board then reasoned that when an employer offers a false or untrue explanation for an adverse employment action, “the real reason might be animus against union or protected concerted activities, but then again it might not.” *Id.*, slip op. at 3 & n.10, 6. The Board added “[i]t is possible that the true reason might be a characteristic protected under another statute (such as the employee’s race, gender, religion, or disability), or it could be some other factor unprotected by the Act or any other law, which would be a permissible basis for action under the at-will employment doctrine.” *Id.*, slip op. at 3. Applying these principles, the Board concluded that although the employer had proffered a pretextual reason for discharging the discriminatee, an open and active union supporter who was serving as a current member of the union’s bargaining team, that evidence alone did not warrant an inference the employer discharged the discriminatee because of anti-union animus. *Id.*, slip op. at 4-5. The Board evidence alone, the ALJ expressly declined to find that the employer’s explanations for its adverse actions were pretextual. *Id.* at 320 (“The reasons proffered by [r]espondent to explain its conduct under scrutiny in this case have not been shown to be false. . . .”). Support for this position is therefore infirm.
found that such an inference was undermined by the surrounding circumstances, including its finding that the employer bore no animus to its employees’ protected activities because it had bargained with the union regularly and in good faith, and the employer had not retaliated against any of the other employee-members of the union’s bargaining team. *Id.*, slip op. at 4-5, 5 n.16, 6.

The Board then distinguished two cases where the General Counsel had satisfied the initial burden under *Wright Line* based on evidence of pretext alone, specifically, *Whitesville Mill Service Co.*, 307 NLRB 937 (1992), and *El Paso Electric Co.*, 355 NLRB 428, 428 n.3 (2010), enforced 681 F.3d 651 (5th Cir. 2012), reasoning that in each case, surrounding circumstances supported the inference of unlawful motivation and there was no countervailing evidence to undermine the inference.89 *Id.*, slip op. at 6.

2. The Board Should Overrule *Electrolux* Because Its Approach to Pretext Denies Employees the Protections of the Act

The General Counsel respectfully requests that the Board reconsider its decision in *Electrolux* and restore its previous reliance on evidence of pretext in *Wright Line* cases to find that adverse employment actions had been motivated by animus toward union or other protected activity. Without any controlling precedential support, *Electrolux* incorrectly set aside the discriminatory motive established by a bona fide finding of pretext simply because the employer

89 The Board distinguished *Whitesville Mill Service Co.* by emphasizing that the Board there did not disclaim the ALJ’s reliance on timing in addition to evidence of pretext. See 307 NLRB 937, 944-45 (1992). But in finding the violation, the *Whitesville* Board stated that it inferred unlawful motivation from the pretextual nature of the employer’s proffered reasons for the discharge, which was supported by evidence that the employer fabricated equipment damage reports after learning the discriminatee was involved with the union, and nothing more. *Id.* at 937. The Board distinguished *El Paso Electric Co.* by emphasizing that in addition to evidence of pretext there was other animus evidence showing the employer had taken adverse actions based on the employee’s protected refusals to make what she perceived to be unsafe drives. See *Electrolux*, 368 NLRB No. 34, slip op. at 6. But the *El Paso* Board explicitly stated it relied only on the pretext finding to conclude the employer had a discriminatory motive. 355 NLRB at 428, n.3. Thus, the Board’s rationale here artificially limits the meaning of each of these cases.
otherwise complied with its statutory obligations to bargain in good faith and not discriminate against additional union supporters. This approach marked the first time, contrary to decades of precedent, that the Board found the General Counsel had not established the employer’s unlawful motive despite having found the employer’s proffered legitimate reason for the discharge was a pretext. By reducing the significance of a finding of pretext in this manner, the Board created a standard that undermines the purposes of the Act by permitting employers who proffer sham explanations for their discriminatory employment actions to avoid liability under the Act.

For decades it has been a bedrock principle of federal labor law that “if [the trier of fact] finds that the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal – an unlawful motive – at least where, as in this case, the surrounding facts tend to reinforce that inference.” Shattuck Denn Mining Corp. v. NLRB, 362 F.2d 466, 470 (9th Cir. 1966), quoted in Electrolux Home Products, 368 NLRB No. 34, slip op. at 3. “Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party’s dishonesty about a material fact as ‘affirmative evidence of guilt’ . . . especially since the employer is in the best position to put forth the actual reason for its decision.” Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 147-48 (2000) (Title VII case), quoted in Electrolux Home Products, 368 NLRB No. 34, slip op. at 8, n.4 (Member McFerran, dissenting in part). These principles are especially true in Board proceedings and practice, where the Board has never before discounted a finding of pretext as insufficient to prove animus. While it is theoretically possible that a respondent would lie or supply a false explanation to avoid disclosing a true but legal reason, in a Board proceeding the respondent is on notice of the adverse inference that will be properly drawn from doing so. In light of this significant disincentive, where a respondent seeks to justify its
adverse action by providing a reason determined to be false or not actually relied on, it defies logic to speculate that the respondent might have had a motive that did not run afoul of the Act rather than draw an adverse inference. The Board should abandon the approach it announced in \textit{Electrolux} because that decision undermines the foregoing well-established evidentiary principles.

Indeed, the shortcoming of the approach announced in \textit{Electrolux} is further demonstrated by the fact that under the \textit{Wright Line} framework, “where ‘the evidence establishes that the reasons given for the \[r\]espondent’s action are pretextual . . . the \[r\]espondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the \textit{Wright Line} analysis.”\textsuperscript{90} \textit{Con-Way Freight}, 366 NLRB No. 183, slip op. at 2-3 & n.8, 9 (2018); see also \textit{Golden State Foods Corp.}, 340 NLRB 382, 385 (2003), cited in \textit{Electrolux Home Products}, 368 NLRB No. 34, slip op. at 8 (Member McFerran, dissenting in part). Alarmingly, the \textit{Electrolux} Board abandoned this principle for the first time and stated that when an employer lies about the reason for disciplining or discharging an employee, it might have done so to conceal an anti-Section 7 motive, “but then again it might not.” \textit{Electrolux}, 368 NLRB No. 34, slip op. at 3. It took the position that an employer’s actual reason might have been one that is illegal under some other statute but nevertheless fails to violate the Act. \textit{Id.} But justifying an employer’s adverse action based on such speculation requires the Board to ignore the record evidence that the discriminatee engaged in protected activity, the employer

\textsuperscript{90} The Board’s comment in \textit{Electrolux} that it was not addressing an employer’s rebuttal burden, i.e., the second part of the \textit{Wright Line} analysis, because it found that the General Counsel had not satisfied the initial burden solely with evidence of pretext did nothing to validate the new analytical approach it set forth. \textit{See} 368 NLRB No. 34, slip op. at 3-4, n.11. An employer’s “failure to present any credible reason at all for [an adverse action] both ‘raises an inference of discriminatory motive’ and precludes any lawful rebuttal” by the employer. \textit{Id.}, slip op. at 8 (Member McFerran, dissenting in part) (quoting \textit{El Paso Electric Co.}, 355 NLRB 428, 428 n.3 (2010), \textit{enforced} 681 F.3d 651 (5th Cir. 2012)).
had knowledge of that activity, and the employer relied on a false reason for its adverse action. After such a showing is made, the legal test for determining whether an employer acted unlawfully should not include considering whether potential lawful reasons could exist for the adverse action, especially where those reasons are hypothetical because the employer did not raise them in defense. Doing so renders the protections of the Act meaningless.

For similar reasons, the Board should not discount the significant probative value of pretext evidence as it did in Electrolux by stressing that the absence of other unfair labor practices by the employer undermines a finding of unlawful motive.\textsuperscript{91} Id., slip op. at 4-6. Specifically, the Board stated that an inference of unlawful motive may be based on pretext evidence where the surrounding facts tend to reinforce that inference. Id., slip op. at 3. It concluded in Electrolux there was countervailing evidence where the employer had bargained in good faith with the union after certification by quickly reaching an interim agreement on discipline and bargaining regularly thereafter, and it had not retaliated against the other employee members of the union’s bargaining team, to which the discriminatee also belonged. Id., slip op. at 4, 6. But that the employer did not unlawfully evade its statutory duty to bargain in good faith, or unlawfully discipline or discharge additional union supporters, is not germane to the causation inquiry as to the alleged discriminatee. See Master Security Services, 270 NLRB 543, 552 (1984) (finding employer’s failure to take

\textsuperscript{91} In support, the Board relied on Wackenhut Corp., 290 NLRB 212 (1988), where it adopted the decision of the same ALJ who imprecisely decided College of the Holy Cross, to support its position that evidence of an employer’s good faith bargaining and lack of retaliation against other pro-union employees may be used to offset the inference of unlawful motivation created by pretext evidence. Electrolux, 368 NLRB No. 34, slip op. at 5 n.16. However, a close reading of Wackenhut shows the ALJ never made an explicit finding of pretext, instead speculating that the employer’s proffered explanation was weak, and concluding no violation based on the lack of other probative evidence. Wackenhut Corp., 290 NLRB at 215. Thus, the ALJ’s consideration of the lack of other unfair labor practices operated as contextual background rather than specifically to undermine a valid finding of pretext.
action against all or some other union supporters does not disprove its discriminatory motive, otherwise established, for its adverse action against a particular supporter), cited in Electrolux, 368 NLRB No. 34, slip op. at 9 n.5 (Member McFerran, dissenting in part).

Such an approach improperly discounts relevant surrounding evidence and minimizes the significance of the sum of the General Counsel’s evidence. In Electrolux, the relevant surrounding facts supporting the inference of unlawful motive included those showing Mason’s prominence as both a union organizer and bargaining representative, and her ongoing refusal to retreat from the employer’s repeated attempts to stifle her from attempting to improve working conditions, from her outspoken challenge during the captive audience meeting to her more recent complaints about working conditions and supervisor hostility to her complaints. Electrolux, slip op. at 1-2. The Board also erroneously discounted direct evidence of animus, managers’ directions to Mason to shut up in response to her attempts to dispute the employer’s antiunion rhetoric during the captive audience meeting, as irrelevant because it was too remote. Electrolux, slip op. at 1. But it is this evidence, combined with the employer’s failure to provide a credible reason for discharging her when it had treated seven other employees more leniently by issuing each of them discipline short of discharge for similar misconduct, which supplies the relevant surrounding information for the initial evidentiary showing under Wright Line. Id., slip op. at 2, 3. See also Shattuck Denn Mining Corp. v. NLRB, 362 F.2d at 470 (noting the “surrounding facts” supporting an inference of unlawful motive based on pretext evidence included the discriminatee, who was an officer, shop steward, and grievance committee member for a newly elected union, actively filing grievances, including on his own behalf against his supervisor). The policies of the Act are undermined by the Electrolux Board’s creation of an implicit presumption that an employer’s failure to retaliate
against additional employees or commit additional violations of the Act disproves an unlawful motive established by evidence of pretext.

In sum, the preceding analysis demonstrates that, despite the statements by the Electrolux Board to the contrary, the approach it announced in that case marked a significant departure from precedent. The Board should overturn Electrolux to ensure that it does not generate confusion on the proper analysis in Wright Line cases and results that conflict with longstanding principles.

VII. GENERAL COUNSEL’S PROPOSED REMEDIES ARE APPROPRIATE

In addition to the standard make whole remedies of reinstatement and back pay, along with a cease-and-desist order and notice posting, the General Counsel respectfully requests Your Honor to order consequential damages, a notice reading—with employees each provided a copy of the notice—and a letter of apology to Roe.

A. Damages Should Be Ordered to Compensate the Charging Party for All Consequential Economic Harms Sustained as a Result of the Respondent’s Unfair Labor Practices

The General Counsel requests that Respondent make Roe whole for reasonable consequential damages incurred due to its unlawful conduct, with interest calculated in accordance with Board policy.

This remedy seeks to ensure that victims of unfair labor practices are provided full relief. The Board has held that “victims of unlawful conduct should be made whole for losses suffered as a result of an unfair labor practice,” and that “the wrongdoer, rather than the victims of the wrongdoing, should bear the consequences of [the] unlawful conduct.” Cascades Containerboard Packaging, 371 NLRB No. 25, slip op. at 3 (2021); Transmarine Navigation Corp., 170 NLRB 389, 389 (1968).
Under the Board’s present remedial approach, some economic harms flowing from a respondent’s unfair labor practices are not adequately remedied. See Catherine H. Helm, *The Practicality of Increasing the Use of Section 10(j) Injunctions*, 7 INDUS. REL. L.J. 599, 603 (1985) (traditional backpay remedy fails to address all economic losses, such as foreclosure in the event of an inability to make mortgage payments). The Board’s standard, broadly worded make-whole order, considered independently of its context, could be read to include consequential economic harm. However, in practice, consequential economic harm is often not included in traditional make-whole orders. E.g., *Graves Trucking*, 246 NLRB 344, 345 n.8 (1979), enf’d as modified, 692 F.2d 470 (7th Cir. 1982); *Operating Engineers Local 513 (Long Const. Co.)*, 145 NLRB 554 (1963). Thus, the Board should issue a specific make-whole remedial order in this case, and all others, to require the Respondent to compensate employees for all consequential economic harms that they sustain, as a result of the Respondent’s unfair labor practices.

The Board and the courts have long recognized that properly effectuating the policies of the Act “requires constant reevaluation of the Board’s remedial arsenal so that the ‘enlightenment gained from experience’ can be applied to the actualities of industrial relations.” *H.W. Elson Bottling Co.*, 155 NLRB 714, 715 & n.5 (1965) (quoting *NLRB v. Seven-Up Bottling Co. of Miami*, 344 U.S. 344, 346 (1953)), enforced as modified, 379 F.2d 223 (6th Cir. 1967); see, e.g., *Jackson Hosp. Corp.*, 356 NLRB 6, 6-7 (2010) (discussing the Board’s “judicially-approved, evolutionary approach to remedial issues”). The role of an administrative agency such as the Board is to maintain “flexibility and adaptability to changing needs,” and recognize, as the D.C. Circuit observed long ago, “[i]n the evolution of the law of remedies some things are bound to happen for the ‘first time.’” *Am. Trucking Ass’ns v. Atchison, Topeka & Santa Fe Ry. Co.*, 387 U.S. 397, 416 (1967). The broad powers granted to the Board by Section 10(c), which must be construed “in light
of ‘the provisions of the whole law, and…[the law’s] object and policy,’” afford significant leeway to devise creative remedies to counteract the harms caused by unfair labor practices. *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 177 (1973) (quoting *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 285 (1956)); see *Phelps Dodge*, 313 U.S. 177 at 199-200 (1941) (discussing “freedom given [to the Board] by Congress to attain just results in diverse, complicated situations”). When crafting remedies, the Supreme Court has cautioned the Board to not “underestimate its administrative resourcefulness.” Id. In practice, the Board has often “revised and updated its remedial policies” over the years to “ensure that victims of unlawful conduct are actually made whole.” *Don Chavas d/b/a Tortillas Don Chavas*, 361 NLRB 101, 102-03 & n.9 (2014) (citing cases).

To fulfill its statutory mandate under Section 10(c) to use its broad discretionary authority to fashion make-whole remedies that will best effectuate the policies of the Act, the Board should require a respondent to compensate employees for all consequential harms they sustain because of unfair labor practices. See, e.g., General Counsel’s Statement of Position to the Board on Remand from the Ninth Circuit Court of Appeals in *Preferred Building Services, Inc., d/b/a Ortiz Janitorial Services*, Case 20-CA-149353, filed December 7, 2021; see also, the General Counsel’s Brief to the Board in *Thryv, Inc.* 20-CA-250250; 20-CA-251105.

Employees should be entitled to recover for all direct and foreseeable harm, such as costs, expenses, or lost investment income, that they suffered as a result of an unfair labor practice. Thus, the Board should require reimbursement of every kind of direct and foreseeable cost that would not have been incurred absent the unfair labor practice—e.g., costs associated with job loss should include restoring a prior health insurance policy or purchasing a new policy providing comparable coverage; any out-of-pocket health expenditures that would have been covered; compensation for penalties assessed for being uninsured or for prematurely withdrawing money from a retirement
account; compensation for damages caused to an employee’s credit rating; compensation for financial losses from having to liquidate a personal savings or investment account; fees and expenses for training or coursework required to renew or obtain a new security clearance, certification, or professional license; legal fees for defending against unpaid bills; expenses related to housing, relocation, transportation, and/or childcare where appropriate; and costs related to providing relief for victims of labor exploitation or employees targeted for their immigration status – as well as other costs directly created by the unfair labor practice itself. See Napleton 1050, Inc., d/b/a Napleton Cadillac of Libertyville, 367 NLRB No. 6, slip op. at 4 (2018), enforced 976 F.3d 30 (D.C. Cir. 2020) (awarding towing and damage-repair expenses incurred because of respondent’s unlawful removal of toolboxes); The Voorhees Care and Rehabilitation Center, 371 NLRB No. 22, slip op. at 4 n.14 (2021).

Furthermore, it is well-documented that job loss, demotion, or a reduction in income sets off a cascade of damages, including distress of a mental or emotional nature. While such damages may be challenging to quantify, it is no less a real, direct, and foreseeable result. See Jennie E. Brand, The Far-Reaching Impact of Job Loss and Unemployment, 41 ANN. REV. SOCIOL. 359-375 (Aug. 2015), available at: https://pubmed.ncbi.nlm.nih.gov/26336327 (discussing direct correlation of job displacement to psychological decline and social stigma, as well as significant disruptive effect of job loss on children, family relationships, social and community involvement). Indeed, “[j]ob loss disrupts more than just income flow; it disrupts individuals’ status, time structure, demonstration of competence and skill, and structure of relations. It carries societal stigma, creating a sense of anxiety, insecurity, and shame. The loss of a job presents a source of acute stress associated with the immediate disruption to a major social role, as well as chronic stress resulting from continuing economic and social and psychological strain.” Id.
In particular, a discharge that is in retaliation for exercising a statutory right sharply exacerbates the mental toll of the event. Myrtle P. Bell et al., *Introducing discriminatory job loss: antecedents, consequences, and complexities*, 28 J. MANAGERIAL PSYCH. 591 (2013), available at www.emeraldinsight.com/0268-3946.htm (psychological distress exacerbated by discriminatory circumstances of job loss). Accordingly, damages to compensate for harm are appropriate and warranted if that harm flowed directly and foreseeably from retaliatory unfair labor practices.

An employee should be made whole for all losses suffered because of an unfair labor practice, including expenses, penalties, legal fees, late fees, or other costs flowing from the inability to make a payment due to job loss or other adverse action. General Counsel’s Brief to the Board in *Thryv, Inc*., above. Employees should also be entitled, as they are under other statutory schemes, to damages for harm such as emotional distress or injury to character, professional standing, or reputation; as well as remedies that are tailored to addressing the public harm and chilling effect, which are the result of the unfair labor practices.

The General Counsel therefore respectfully urges the ALJ order that Respondent compensate Roe for all consequential damages suffered because of Respondent’s unlawful termination. This remedy will ensure that Roe is restored as nearly as possible to the status quo that she would have enjoyed but for the unlawful conduct.

**B. A Notice Reading is an Appropriate Remedy for the Violations in This Case**

As was recently reaffirmed by the Board, the “public reading of the notice is an ‘effective but moderate way to let in a warming wind of information and, more important, reassurance.’” *Gavilon Grain, LLC*, 371 NLRB no. 79, slip op. at 1 (2022), quoting *United States Service*

As noted by Member Prouty, notice readings should be ordered in a wider range of cases as “[t]he Board’s administrative experience demonstrates the greater efficacy of notice reading in achieving the remedial objectives of the Act. Effective vindication of the rights guaranteed by the Act is fundamental to national labor policy in every case before the Board.” Gavilon Grain, above, slip op. at 2 fn. 5 (Member Prouty, concurring), quoting Johnston Fire Services, LLC, 371 NLRB No. 56, slip op. at 6 fn. 23 (2022). Further, distributing a copy of the notice to each employee present before the notice reading would better effectuate the purposes of the Act, as this measure would “facilitate employee comprehension of the notice and enhance the remedial objectives of the notice reading.” Gavilon Grain, above, slip op. at 2 fn. 5 (Member Prouty, concurring), quoting Johnston Fire Services, above, slip op. at 7 fn. 24 (2022).

Here, Respondent’s actions require an “effective but moderate” notice reading remedy to properly effectuate the Act’s remedial purpose and dispel the “chill atmosphere of fear” its unfair labor practices have created. J.P. Stevens & Co., above at 540. The radiology techs were already afraid to do enter patient charts—a basic aspect of their jobs—because they were afraid that they would be discharged like Andrea Roe (Tr. 17-18). That fear would naturally extend into fear to engage in union activity, like Andrea Roe. Respondent has assured the techs, through in-person meetings, that they would not be discharged for entering patient charts (Tr. 18). Respondent should similarly assure the techs, through an in-person notice reading, that they will not be interrogated about or discharged because of union activity.
C. Respondent Should Send a Letter of Apology to Roe

The General Counsel respectfully requests that the Order direct Respondent to send a letter of apology to Roe for her unlawful termination. This make-whole, non-punitive remedy will help to assure the Roe that she is truly welcome to return to the workplace. E.g. *Imperial Diner v. State Human Rights Appeal Bd.*, 417 N.E.2d 525, 529 (N.Y. 1980).

VIII. CONCLUSION

For the foregoing reasons, the Administrative Law Judge should find that Respondent violated Section 8(a)(1) of the Act by unlawfully interrogating Jeanne Saeli and Sections 8(a)(1) and (3) of the Act by unlawfully discharging Andrea Roe because she engaged in union activity. Additionally, the Board should overturn *Tschiggfrie Properties and Electrolux Home Products, supra*, and restore the prior, longstanding *Wright Line* test.

The General Counsel respectfully requests that Your Honor order all appropriate relief. This relief would include a make whole remedy (including back pay and consequential damages, with interest); reinstatement; a cease-and-desist order; a notice posting; a notice reading; a letter of apology; and any other relief necessary and deemed appropriate to remedy these unfair labor practices.

Dated: May 5, 2022
New York, New York

Respectfully submitted,

[Signature]
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