JD–104–16
Ithaca, NY

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

CAYUGA MEDICAL CENTER AT ITHACA, INC.,

Cases **03–CA–156375**
03–CA–159354
and **03–CA–162848**
03–CA–165167
03–CA–167194

1199 SEIU UNITED HEALTHCARE WORKERS EAST.

DECISION
and
RECOMMENDED ORDER

DAVID I. GOLDMAN
Administrative Law Judge

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DECISION

INTRODUCTION

DAVID I. GOLDMAN, ADMINISTRATIVE LAW JUDGE. These cases involve unfair labor practices allegedly committed by managers and administrators of a community hospital in Ithaca, New York, during a union organizing campaign by the nursing staff. The government alleges an assortment of unlawful threats, directives, and prohibitions on union activities. In addition, the government alleges that one employee received an unlawful disciplinary warning, and another was targeted over the course of several months for her union activity and received an unlawful suspension, disciplinary warning, demotion, and an adverse performance evaluation.

As discussed herein, for the most part, I agree with the government that the employer violated the Act, as alleged, although, as discussed below, I dismiss a few of the allegations, and do not need to reach theories of violation advanced by the government that would not materially affect the remedy. In particular, it is clear to me that the hospital, while permitting a significant amount of union activity—which the law requires it to do—took issue with the activism of certain of its nurses. In particular, the hospital's conflicts with the protected and concerted and union activities of Nurse Anne Marshall led to a very real and generalized decline in the relationship between Marshall and the Hospital. Not all of the managerial conflict with Marshall was motivated by antiunion animus. However, the net result of her union activity and her protected and concerted efforts to challenge the hospital on staffing issues was an employer that engaged in unlawfully motivated and discriminatory targeting of her, which led directly to the adverse actions taken against her by the hospital. Finally, I note that although the unfair labor practices engaged in by the hospital were serious, I reject the government's contention that extraordinary remedies are warranted, and find that the Board's traditional remedies will just as effectively redress the breaches of law found herein.

STATEMENT OF THE CASE

On July 21 2015, 1199 SEIU United Healthcare Workers East (Union) filed an unfair labor practice charge alleging violations of the National Labor Relations Act (Act) by Cayuga Medical Center at Ithaca Inc. (the Hospital or CMC) docketed by Region 3 of the National Labor Relations Board (Board) as Case 09–CA–156375. On September 3, 2015, the Union filed another unfair labor practice charge docketed by the Region as Case 03–CA–159354, amended on November 30, 2015. Additional charges were filed October 28, 2015, docketed as Case 03–CA–162848, on December 1, 2015, docketed as Case 03–CA–165167, and on January 7, 2016, docketed as Case 03–CA–167194.

Based on an investigation into these charges, on February 26, 2016, the Board's General Counsel, by the Regional Director for Region 3 of the Board, issued an order consolidating these cases, and a consolidated complaint and notice of hearing alleging that the Hospital had violated the Act. On March 11, 2016, the Hospital filed an answer denying all alleged violations of the Act.

A trial in these cases was conducted on May 2–6, and 24, 2016, in Ithaca, New York. At trial, counsel for the General Counsel moved to amend the complaint, and this motion was granted. See, Tr. 9–16.[1]

Counsel for the General Counsel and the Respondent filed post-trial briefs in support of their positions by July 12, 2016.

On the entire record, I make the following findings, conclusions of law, and recommendations.

JURISDICTION

CMC is and at all material times has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and is and has been a health care institution within the meaning of Section (2)(14) of the Act. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act. Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

UNFAIR LABOR PRACTICES

A. Introduction

CMC is a community hospital located in Ithaca, New York. It has been in operation since the late 1800s. The hospital employs approximately 1,350 employees, including approximately 350 nurses. The Hospital's CEO is John Rudd. Susan Nohelty was the Vice President of Patient Care Services until she retired in September 2015. (Throughout this decision, all dates are 2015 unless otherwise stated.) Linda Crumb is the Assistant Vice President for Patient Services. She reported to Nohelty. Crumb supervised many of the nursing department heads. Alan Pedersen is the Vice President for Human Resources. He reports to Rudd.

[1]These amendments were the subject, on April 27 and 29, 2016, of two separate notices of intention to amend the complaint at trial served by counsel for the General Counsel. Only the April 27 notice was included in the formal papers (G.C. Exh. 1(r)). The later April 29 notice is hereby received into the record as ALJ Exh. 2. Both notices were the basis for the motion to amend the complaint that was granted at trial. The notices provide for a clearer record of the amendments than the oral modification read into the record at trial. Throughout this decision, references to the complaint are to the extant and most recent consolidated complaint, as amended.

I note that the transcript in this matter is rife with misspellings, unusual capitalizations, and other errors. In some cases where I quote from the transcript I make corrections without notation. This is done for the convenience of the reader who does not need to know, for instance, that a simple noun was erroneously capitalized in the transcript for no reason related to the witness' testimony. In some instances I use bracketing to correct simple grammatical errors that may have been made by the witness, but in many cases I am sure were not.

B. Complaint paragraph VI (the challenged nursing code of conduct rules)

Since approximately 2010 or 2011, the Hospital has maintained a three-page nursing code of conduct (COC). The COC was developed by a group of staff nurses chosen for an internal "Nurses Practice Council." By its terms, the COC sets forth "[e]xpected and acceptable communications/ behaviors" for nursing staff. The COC states that its purpose is "[a]wareness and non-acceptance of disruptive behaviors among healthcare workers help to promote safety and wellbeing of both patients and staff." Its various "rules" (approximately 25) are set forth under headings: "Clinical Excellence," "Customer Service," "People," Financial Integrity," and "Community." The full COC is found at General Counsel's Exhibit 3. It is posted in the Hospital, available to employees on the Hospital intranet, and relied upon for disciplinary matters.

The General Counsel challenges the maintenance of the following portions of the COC (under each bolded heading):

Clinical Excellence

Respects confidentiality and privacy at all times, including coworkers, adhering to the Social Networking Policy.

Customer Service

Interacts with others in a considerate, patient and courteous manner.

Is honest, truthful, and respectful at all times.

People

Utilizes proper channels to express dissatisfaction with policies and administrative or supervisory actions and without fear of retaliation.

Community

Inappropriate and disruptive communications/behaviors include but are not limited to:

> Displays behavior that would be considered by others to be intimidating, disrespectful or dismissive.
>
> Criticizes coworkers or other staff in the presence of others in the workplace or in the presence of patients.

Analysis

The General Counsel alleges that the maintenance of the foregoing policies or rules, since April 28, 2015, violate Section 8(a)(1) of the Act.[2]

"In determining whether a work rule violates Section 8(a)(1), the appropriate inquiry is whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights." *Hyundai America Shipping Agency*, 357 NLRB 860, 861 (2011), enfd. in relevant part, 805 F.3d 309 (D.C. Cir. 2015); *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). "Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement." *Lafayette Park Hotel*, supra; see generally Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 853 (1970) ("By definition, an overbroad statute covers privileged activity, and to the extent that the statutory burden operates as a disincentive to action the result is an *in terrorem* effect on conduct within the protection of the first amendment").

The General Counsel concedes that the COC rules at issue do not explicitly restrict Section 7 rights. Thus, a "violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004).

Essentially, the General Counsel confines his argument (GC Br. at 27–30) to the first of these scenarios—the contention that the challenged COC rules are unlawful because "employees would reasonably construe the language to prohibit Section 7 activity."[3]

In considering whether "employees would reasonably construe the [rule's] language to prohibit Section 7 activity," the Board follows certain guidelines that are pertinent here. "An employer rule is unlawfully overbroad when employees would reasonably interpret it to encompass protected activities." *Triple Play Sports Bar*, 361 NLRB No. 31, slip op. at 7 (2014), affd., 629 Fed. Appx. 33 (2d Cir. 2015). The Board has explained that "as in 8(a)(1) cases generally, our task is to determine how a reasonable employee would interpret the action or statement of her employer, and such a determination appropriately takes account of the surrounding circumstances." *Roomstore*, 357 NLRB 1690, 1690 fn. 3 (2011) (citation omitted). "[I]n determining whether a challenged rule is unlawful, the Board must . . . give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights." *Lutheran Heritage*, supra at 646, citing *Lafayette Park Hotel*, 326 NLRB at 827.

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[2]April 28, 2015, is the date six months before the filing of the unfair labor practice charge over the maintenance of unlawful rules in Case No. 03–CA–162848. Thus, maintenance of any unlawful provisions of the COC as of April 28, 2015, constitutes a continuing violation of the Act, regardless of when the rules were first promulgated. *Adriana's Insurance Services, Inc.*, 364 NLRB No. 17, slip op. at 2 fn. 3 (2016).

[3]In a one-sentence reference, the General Counsel argues that the unlawfulness of the rule against "displays" of "intimidating, disrespectful or dismissive" behavior is "highlighted when applied to discipline an employee for discussing a protected issue with management." (GC Br. at 30). However, given my finding that the rule is unlawful on its face, it is unnecessary to consider its application in assessing the unlawfulness of this rule.

Notably, Board precedent is clear that the test is whether a rule reasonably *would* be construed as abridging Section 7 activity. Not whether it "can" or "could" be so construed. *Conagra Foods*, 361 NLRB No. 113, slip op. at 3–4 fn. 11 (2014), enfd. in relevant part, 813 F.3d 1079 (8th Cir. 2016); *Lutheran Heritage*, 343 NLRB at 647 ("Where, as here, the rule does not refer to Section 7 activity, we will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way") (Board's emphasis); but see, *Cintas Corp. v. NLRB*, 482 F.3d 463, 467 fn. 1 (D.C. Cir. 2007). ("Although in some settings a critical difference might exist between 'could' and 'would,' there is no such difference here between the phrases 'could *reasonably*' and 'would *reasonably*.' Both preclude possible, but unreasonable, interpretations of company rules" . . . . We find slippage between 'would' and 'could' inconsequential here given the Board's use of the modifier 'reasonably'") (court's emphasis).

Finally, I note that I agree with the General Counsel that the COC must be considered to be terms and conditions of employment, setting forth rules on a variety of situations that arise in the work context. Contrary to the suggestion of the Respondent, it is far more than a general recitation of ethical or professional standards. Notwithstanding that some of the COC standards are stated in aspirational terms, CMC managers at the hearing confirmed that the COC sets forth mandatory rules and that nurses can be disciplined for noncompliance. Indeed, here the COC played a role in the sanctioning of employee conduct that is alleged to constitute a violation of the Act, as discussed below. These undisputed facts undercut the suggestion that the rules are without force. To the contrary, "[c]ritically, the [COC] informs employees of rules and policies that govern the day-to-day handling of their work duties and may subject them to disciplinary action for noncompliance." *Fresh & Easy Neighborhood Market*, 361 NLRB No. 8, slip op at 2 (2014).[4]

Turning to the specific portions of the COC challenged by the General Counsel, the General Counsel contends that the following rule is unlawfully overbroad:

> **Clinical Excellence**
>
> Respects confidentiality and privacy at all times, including coworkers, adhering to the Social Networking Policy.

The General Counsel argues that this demand that employees respect "confidentiality and privacy at all times, including coworkers" is unlawfully overbroad "because it fails to provide any context for what confidentiality employees need to be maintain." GC Br. at 27–28. I disagree.

There is not, to be sure, a list explaining and clarifying the subjects to which this relates—but the rule is one (of only three) that is part of and relates to "clinical excellence"—the heading under which the rule appears. Moreover, other rules in the section unobjectionably require knowing and following "applicable policies and procedures," "continued personal and professional growth," and "respect[ing] patient's rights and dignity with compassion." While I agree that employees *could,* as the General Counsel argues, read the requirement to respect the privacy

[4] I note that even rules that are phrased as nonmandatory may have a reasonable tendency to chill protected and concerted activity. See *Radisson Plaza Minneapolis*, 307 NLRB 94 (1992), enfd. 987 F.2d 1376 (8th Cir. 1993) (Board rejects judge's conclusion that provision in handbook was lawful because the rule "was not mandatory," finding that rule must be assessed based "on the reasonable tendency of such a prohibition to coerce employees in the exercise of fundamental rights protected by the Act"). See also, *Heck's, Inc.*, 293 NLRB 1111, 1119 (1989) (rule "requesting" that employees not discuss wages was unlawful).

and confidentiality of coworkers in the clinical setting as including certain wages and working conditions, I do not believe that to be a reasonably likely scenario. In the context of clinical excellence, compassionate respect for patients' rights and dignity, and professional and personal growth, more reasonably at issue are the private, intimate, at times life-and-death, legally[5] and by common sense, confidential undertakings that are the focus of the clinical process. Obviously, the inclusion of "coworkers" in the rule animates the General Counsel's concern, but I think its context as part of a concern for "clinical excellence" serves to distinguish this rule from *Flamingo-Hilton Laughlin*, 330 NLRB 287, 288 fn. 3 (1999), cited by the General Counsel.[6] Also close, but distinguishable I believe, is the Board's decision in *Cintas Corp*, 344 NLRB 943, 943 (2005), where the Board found unlawful a rule's "unqualified prohibition of the release of 'any information' regarding" its employees), enfd. 482 F.3d 463 (2007).

Here, the prohibition, not only the context of "clinical excellence," but also the wording, is steps removed from a direct proscription on the release of "any information" or even any "confidential information" as in *Flamingo-Hilton Laughlin*, supra or *Cintas*, supra. Rather, the requirement is the less pointed admonition that the "confidentiality" and "privacy" of coworkers be respected. In my view, the wording of the rule is significantly less likely to be construed by employees as prohibiting concerted activity, focusing as it does on the personal privacy and confidentiality of others, in a setting where such concerns, entirely unrelated to Section 7, are real. I will dismiss this allegation of the complaint.

The next challenged set of rules is composed of the two underlined portions of the following customer service rules (underlining added for emphasis):

> **Customer Service**
>
> Interacts with others in a considerate, patient and courteous manner. Demonstrates a caring and positive attitude: smiles, greets and acknowledges others, make eye-contact, says please and thank you. Gives recognition and praise.
>
> Actively listens to the perspective of others and seek to resolve conflicts promptly, Apologizes when mistakes are made or misunderstandings have occurred.
>
> Is honest, truthful, and respectful at all times.
>
> Holds self and others accountable to the Cayuga Medical Center (CMC) mission, vision and values, meeting their own expectations.

[5]See, the privacy provisions of the Health Insurance Portability and Accountability Act (HIPAA), 42 U.S.C. § 1320d–6 and its implementing regulations at 45 C.F.R. Part 160 and Subparts A and E of Part 164.

[6]In *Flamingo-Hilton Laughlin*, 330 NLRB 287, 288 fn. 3, 291–292 (1999), the Board found unlawful a rule that stated that "Employees will not reveal confidential information regarding our customers, fellow employees, or Hotel business." That rule, it is to be noted was part of a rule against disclosure that stated that the Hotel "considers all information not previously disclosed to outside parties by official Hotel channels to be proprietary," and reasonably, not to be disclosed.

In the section of the COC devoted to "Customer Service," set forth above, the General Counsel contends that the underlined portions of the COC are unlawful. Were they reasonably likely to be read as directed to employees interactions with management or with other employees, or even to nonemployees, unrelated to servicing patients, I would agree. But these rules sit squarely within a section of the COC devoted to "customer service." In particular, the first allegedly unlawful sentence is part of an otherwise unchallenged paragraph that makes clear—at least reasonably so—that the paragraph seeks courtesy, consideration, and patience in nurses' dealings with patients and their families. ("Demonstrates a caring and positive attitude: smiles, greets and acknowledges others, make eye-contact, says please and thank you. Gives recognition and praise.")

The fact that "[t]hat a rule is intended to promote patient care does not mean that it is not overbroad, or that it cannot be applied—perhaps in the name of patient care—to punish employees' protected activity." *William Beaumont Hospital*, 363 NLRB No. 162, slip op. at 2, fn. 8 (2016). Further, employees have a presumptive section 7 right to appeal to nonemployees, including patients, in nonpatient care areas.[7]

However, the provisions at issue here would reasonably be understood by employees as being directed to dealings with patients in the furnishing of "customer" i.e., patient "service", not Section 7 activity. Moreover, while the Act has long condemned rules that penalize employees for making merely "false" statements (as opposed to maliciously untrue statements) (*Casino San Pablo*, 361 NLRB No. 148, slip op. at 4 (2014); *Heartland Catfish Co.*, 358 NLRB 1117, 1117 fn. 3 (2012); *Lafayette Park Hotel*, 326 NLRB at 828), on grounds that such rules will be reasonably likely to chill free discussion about protected and concerted activities, there is no protected right to engage in "customer service" in a less than truthful, respectful, or honest manner. In any event, the issue here is whether a rule directed to "customer service" that requires truthfulness, respect, and honesty would reasonably be read as restricting communications with patients that are protected by the Act. I believe that, at most, the Respondent's rule "could" be read that way, but, reasonably, it would not be. The rules here would reasonably be understood as relating to the furnishing of "customer service" i.e., patient care.[8]

[7]"Employees have a statutorily protected right to solicit sympathy, if not support, from the general public, customers," and others. *NCR Corp.*, 313 NLRB 574, 576 (1993). This includes patients (in nonpatient care areas and absent a showing that a ban is necessary to avoid disruption of patient care). *The Carney Hospital*, 350 NLRB 627, 643–644 (2007).

[8]I recognize that a version of the two cited rules ("*Interacts with others in a considerate, patient and courteous manner"* and "*Is honest, truthful, and respectful at all times*) were cited in a verbal warning issued to Marshall, and discussed below. The application of rules to penalize protected and concerted activity is a factor militating in favor of finding the rules unlawfully overbroad. However, I do not find that in this case the reference to these rules in Marshall's warning letter serves to render the maintenance of these rules unlawful. For the reasons stated, the rules, in context, are lawful. As discussed below, the verbal warning was unlawful quite apart from the rules, and had nothing to do with "customer service." In my view, the rules were deployed pretextually in this instance, as part of a campaign against Marshall. I decline to find that citing to them in that one instance renders their maintenance as part of an employee's "customer service" obligations unlawful.

People

> Utilizes proper channels to express dissatisfaction with policies and administrative or supervisory actions and without fear of retaliation.

The General Counsel alleges that the above-stated rule violates the Act. I agree. The rule concerns "people"—which in CMC nomenclature mean employees and managers (Tr. 471). The directive is to use "proper channels to express dissatisfaction." However, it is axiomatic that Section 7 protects employee efforts to "improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978); *Trinity Protection Services*, 357 NLRB 1382, 1383 (2011) ("the Board has held that employees' concerted communications regarding matters affecting their employment with their employer's customers or with other third parties, such as governmental agencies, are protected by Section 7 and, with some exceptions not applicable here, cannot lawfully be banned").

A rule limiting employees to "proper channels" is unlawful, as it would reasonably be construed to prohibit many informal channels of communication, which employees are entitled to avail themselves of—the existence of such a rule suggests that employees availing themselves of these outside channels of communication would be frowned upon. These include communication with the press, customers, patients, or the government. I find that this rule is unlawfully overbroad in violation of the Act.

Community

> Inappropriate and disruptive communications/behaviors include but are not limited to:
>
> Displays behavior that would be considered by others to be intimidating, disrespectful or dismissive.
>
> Criticizes coworkers or other staff in the presence of others in the workplace or in the presence of patients.

These rules violated the Act, as alleged by the General Counsel. The barring of displays of behavior that would be considered intimidating, disrespectful or dismissive would reasonably be read as requiring that Section 7 activity be conducted in a manner considered—"by others"—as respectful, nondismissive, and nonintimidating. However, the protections of the Act are more robust than that. As the Board explained in *Casino San Pablo*, 361 NLRB No. 148, slip op. at 3 (2014), considering a rule barring "insubordination or other disrespectful conduct,"

> In the typical workplace, where traditional managerial prerogatives and supervisory hierarchies are maintained, employees would reasonably understand this phrase as encompassing any form of Section 7 activity that might be deemed insufficiently deferential to a person in authority—in other words, as referring to something *less* than actual insubordination. For example, the act of concertedly objecting to working conditions imposed by a supervisor, collectively complaining about a supervisor's arbitrary conduct, or jointly challenging an unlawful pay scheme—all core Section 7 activities—would reasonably be viewed by employees as "disrespectful" in and of themselves, regardless of their manner and means, and thus as violating the rule. See *First Transit, Inc.*, 360 NLRB No. 72, slip op. at 2–3

(2014); *2 Sisters Food Group*, 357 NLRB No. 168, slip op at 2 (2011); *Claremont Resort & Spa,* [344 NLRB 832,] 832 and fn. 4 (finding unlawful a rule prohibiting "negative conversations about associates and/or managers"). There is no shortage of Board cases where protected concerted activity was perceived by managers, supervisors, and security personnel as an affront to their authority and dealt with accordingly. See, e.g., *Hawaii Tribune-Herald*, 356 NLRB No. 63, slip op. at 20 (2011); *Noble Metal Processing, Inc.*, 346 NLRB 795, 800 (2006).

Thus, the first rule under Community challenged by the General Counsel is unlawful.[9]

For much the same reasons, the second rule, prohibiting criticism of coworkers or other staff in the presence of others in the workplace or in the presence of patients is also unlawfully overbroad.

The Supreme Court has long recognized that "the right of employees to self-organize and bargain collectively established by § 7 of the [Act] necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite." *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 491 (1978). This is because the workplace "'is the one place where [employees] clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees.'" *Eastex v. NLRB*, 437 U.S. 556, 574 (1978) (court's parenthetical), quoting *Gale Products*, 142 NLRB 1246, 1249 (1963). The Board too recognizes "the centrality of employees' right to communicate with their fellow employees at their workplace on their own time and the 'particularly appropriate' nature of the workplace for exercising that right." *St. John's Health Center*, 357 NLRB 2078, 2081 (2011).

Thus, rules restraining robust discussions between employees, including—and essentially so—negative or critical discussions with one another at work, are not permitted. *William Beaumont Hospital*, 363 NLRB No. 162, slip op. at 2 (2016) (rule unlawful insofar as it prohibits "negative or disparaging comments about the . . . professional capabilities of an employee or physician to employees, physicians, patients, or visitors"). See, *The Dalton School*, 364 NLRB No. 18, slip op. at 1 (2016) ("We reject the notion that professional colleagues, discussing collective action among themselves, can be disciplined or discharged merely for criticizing management in sharp and unequivocal terms"); *Claremont Resort & Spa*, 344 NLRB 832, 832 (2005) ("We find that the rule's prohibition of 'negative conversations' about managers would reasonably be construed by employees to bar them from discussing with their coworkers

[9]Had the prohibition been limited to "intimidating" and similar conduct, the result would likely be different. *Palms Hotel & Casino*, 344 NLRB 1363 (2005) (rule lawful that prohibits employees from engaging in "conduct which is or has the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with" other employees or patrons). But even then, the subjective phrasing—prohibiting conduct that *others* subjectively found offensive—might still leave the prohibition unlawfully likely to chill Section 7 activity, as "[t]he Board has long held that legitimate managerial concerns to prevent harassment do not justify policies that discourage the free exercise of Section 7 rights by subjecting employees to investigation and possible discipline on the basis of the subjective reactions of others to their protected activity." *Consolidated Diesel Co.*, 332 NLRB 1019, 1020 (2000), enfd. 263 F.3d 345, 354 (4th Cir. 2001) ("There would be nothing left of § 7 rights if every time employees exercised them in a way that was somehow offensive to someone, they were subject to coercive proceedings. . . Such a wholly subjective notion of harassment is unknown to the Act.").

complaints about their managers that affect working conditions, thereby causing employees to refrain from engaging in protected activities. Accordingly, the rule is unlawful under the principles set forth in *Lutheran Heritage Village-Livonia")*; *2 Sisters Food Group*, 357 NLRB 1816, 1817 (2011) (finding requirement that employees "work harmoniously" "sufficiently imprecise" that it could reasonably prohibit "any disagreement or conflict among employees," including protected discussions); *Hill & Dales General Hospital*, 360 NLRB No. 70, slip op. at 1 (2014) (rule prohibiting "negative comments about our fellow team members" is unlawfully overbroad); *Beverly Health & Rehabilitation Services*, 332 NLRB 347, 348 (2000) (rule prohibiting "negative conversations about associates and/or managers" found unlawful), enfd. 297 F.3d 468 (6th Cir. 2002).

A flat ban on criticizing employees or management in the presence of others would reasonably—indeed, one could say, unavoidably—be read as striking at the essence of the Act and its protections. "The Act designs a system where . . . it is necessary that discussion among employees and attempts to persuade be robust and vigorous." *Blue Chip Casino*, 341 NLRB 548, 555 (2004). Ill feelings, strong responses, criticism and dialogue are baked into the Act—the right to criticize is elemental, even when it engenders ill feelings and passionate responses. *Consumer Power Co.*, 282 NLRB 130, 132 (1986) ("The protections Section 7 afford would be meaningless were we not to take into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses").

The Respondent's ban on criticism "in front of others" is clearly unlawful.[10]

C. Complaint Paragraph VII

1. VII(a), and (c) (solicitation of employee complaints)

In March 2015, the hospital's management learned of union literature distributions at the facility. By May, the Hospital was actively responding to the union campaign. Beginning May 7, through November 6, 2015, in response to the commencement of the union campaign, Alan Pedersen, VP of Human Resources for the Hospital, issued a series of email/letters to all 350 members of the nursing staff, directed to their work email accounts. (However, the evidence suggests that the first correspondence, dated May 7, was distributed to nurses on May 8, in person in one-on-one meetings that managers conducted with nursing staff.) There are nine such email/letters included in the record. They are fairly characterized as devoted to providing information and argument to employees against unionization.

In his May 7 letter Pedersen included a bullet point that stated:

> If you feel you are being harassed or intimidated feel free to contact your supervisor, director or security.

[10] As discussed below, this rule was also applied to discipline protected and concerted activity. This is also a factor for finding the maintenance of a rule unlawful. *Lutheran Heritage*, 343 NLRB 646, 647 (2004). However, I need not rely on that grounds as maintenance of this rule is unlawful on its face, without regard to its application.

His August 26 email included the following:

> If you feel that you continue to be harassed you have every right to file a complaint in our incident reporting system, and notify your Director so that we can address the behavior with the individual involved.

Analysis

Because of the potential for chilling lawful union activity, the Board finds it unlawful for an employer to invite employees to inform it of protected, albeit unwanted, authorization card solicitation by other employees. When an invitation to report unwelcome union solicitation is phrased over broadly, it will be found unlawful on this rationale. As referenced above, Section 7 activity may be robust—but still protected. The problem the Board is policing is the chilling effect when employers solicit employees to report coworkers for conduct in terms so vague as to invite reports concerning vigorous, insistent, nevertheless legally-protected union solicitations.

For instance, in *Bloomington-Normal Seating Co.*, 339 NLRB 191, 191 fn. 2 (2003), the Board found unlawfully overbroad a production manager's speech to employees that included prompting to tell the employer if they were "threatened or harassed about signing a union card."

In *Niblock Excavating, Inc.*, 337 NLRB 53, 61 (2001), the Board found a violation where the employer's letter asked employees to tell their foreman "if you feel threatened or harassed." The Board pointed out that such letters are held unlawful because they "encourage[e] employees to report to Respondent the identify of union card solicitors who in any way approach them in a manner subjectively offensive to the solicited employees, and of correspondently discouraging card solicitors in their protected organizational activities." Id. See, *Greenfield Die & Mfg. Corp.*, 327 NLRB 237, 238 (1998) ("The Board has held that employers violate Section 8(a)(1) of the Act when they invite their employees to report instances of fellow employees' bothering, pressuring, abusing, or harassing them with union solicitations and imply that such conduct will be punished. It has reasoned that such announcements from the employer are calculated to chill even legitimate union solicitations, which do not lose their protection simply because a solicited employee rejects them and feels "bothered" or "harassed" or "abused" when fellow workers seek to persuade him or her about the benefits of unionization") (footnote omitted).

The May 7 and August 26 appeals to employees fall squarely within the types of entreaties prohibited by this precedent, a conclusion only compounded by the overtly subjective basis for reporting a card solicitor ("If you feel you are being harassed or intimidated"; "If you feel that you continue to be harassed"). *Tawas Industries, Inc.*, 336 NLRB 318, 322 (2001) ("such statements also indicate that the employer intends to take unspecified action against subjectively offensive activity without regard for whether that activity was protected by the Act"); *Arkema, Inc.*, 357 NLRB 1248, 1250 (2011) (the letter also invokes the subjective reactions of employees by inviting them to report conduct simply if they "feel" they have been harassed").

I note further that the May 7 solicitation was prefaced with the warning (three bullet points previously) that "You will at some point be asked or more likely pressured to sign a union authorization card. . . . . You have the right to ask them to leave you alone and not bother you." The allegedly offending statement immediately followed the latter sentence. The August 26 solicitation is a response to a "question" that Pedersen's letter posited was asked: "I feel like I am being harassed and pressured to sign a card, what can I do?" The answer included the assertion

that "You have the absolute right to tell the person you are not interested and you wish to be left alone." The suggestion that employees should equate a feeling of "harassment and intimidation" with being "bother[ed] or "pressured" to sign a card, and the assertion that you have the right "to be left alone" increases the likelihood that employees will understand the employer to be requesting employees to report others for card solicitation activity that is protected by the Act. *J.P. Stevens & Co.*, 244 NLRB 407, 425 (1979) (invitation to report union solicitation unlawful as it sought reports not just of threats but of "pressure"); enfd. 668 F.2d 767 (4th Cir. 1982). Accord, *Lutheran Hospital of Milwaukee*, 224 NLRB 176 (1976), enfd. in relevant part 564 F.2d 208 (7th Cir. 1977); *Poloron Products of Mississippi, Inc.*, 217 NLRB 704 (1975) (employer unlawfully sought to have employees report union solicitation if union solicitors "won't leave you alone").[11]

The distinctions drawn by the Board in this area can seem fine, but the cases relied upon by the Respondent are easily distinguishable. The Respondent cites *Ithaca Industries*, 275 NLRB 1121, 1126 (1985), where it was found lawful for an employer to tell employees that they should report coworkers who "threaten or intimidate" them while soliciting cards. However, in *Ithaca Industries*, unlike here, the solicitation to report did not extend to those who merely, subjectively "felt" intimidated. Moreover, the solicitation to report employees in *Ithaca Industries* extended also to those who were "threatened"—a formulation found lawful by the Board (see, *Liberty House Nursing Homes*, 245 NLRB 1194 (1979)), while here the solicitations also extended to those who felt "harassed," a formulation that has been categorically rejected as overbroad by Board precedent.

The Respondent also cites *First Student, Inc.*, 341 NLRB 136 (2004). There, the Board found lawful the employer's invitation to report solicitation that involved "confrontation," and "force," or "intimidation," reasoning that the "request to report conduct that consists of both confrontation and compulsion or confrontation and intimidation is no more than a request to report threatening conduct, which . . . the Board has found lawful." 341 NLRB at 137. As discussed above, in the instant case, the sole use of the word "intimidate" is linked to "harass"—a word regularly found overbroad in this context—and that is further broadened by the subjectivity of the entreaty ("if you feel you are being harassed or intimidated"). Moreover, the entire instruction is a response to claims that employees are "likely [to be] pressured to sign a union authorization card" although having "the right to ask them to leave you alone." As discussed above, in the careful assessment of wording that the Board engages in when considering such claims, each of these distinguishing factors separates the instant case from the situation in *First Student*, supra.

Finally, the Respondent argues (R. Br. at 6) that the solicitations to report employees were neutral—covering solicitations "by persons favoring the Union and/or by persons opposing the Union." In fact, this is not the case—both the May 7 and the August 26 solicitations to report other employees is about how employees can avoid someone who is seeking to have them sign a

[11]It is notable that Pedersen testified—and the Respondent specifically but erroneously relies on it as justification for telling employees they can report card solicitors—that "a number of people felt as though they were being pressed to sign a card" (R. Br. at 5). It is clearly unlawful for employers to tell employees they can report people for making them feel "pressed." See, *J.P. Stevens*, supra. Pedersen also testified that he had been told that some employees had complained to their department directors that "they had been subject to bullying or intimidation." However, this wording does not appear in Pedersen's solicitation to report union activity and is not at issue. I note that there is no documentary, email, or any other contemporaneous evidence of such complaints.

union card—but, in any event, the Board has rejected this argument, finding it "immaterial." *Tawas Industries, Inc.*, 336 NLRB 318, 322–323 2001).[12]

For all of the above reasons, I find that the May 7 and August 26 solicitations to report coworkers to the employer unlawful under controlling Board precedent.

2. Complaint paragraph VII(b)
(directive to cease distributing union literature in the cafeteria)

On or about July 8, ICU charge nurse and team leader Ann Marshall sat at a table just inside the hospital cafeteria entrance and set out union materials to solicit and distribute to employees. Marshall had been active and open in her support for the union prior to this, but this was the first time she had attempted to "table" in the cafeteria. Marshall had been there for about 20 minutes when Vice President for Human Resources Pedersen, who had been in the cafeteria eating, walked by and approached Marshall. Pedersen had been eating with and was accompanied by Hospital CEO John Rudd and another member of hospital's management.[13] Pedersen saw Marshall sitting there with all her union materials. The three approached Marshall and Pedersen told Marshall she should not be sitting in the cafeteria with her materials. He said, "Gee, Anne, you shouldn't really be doing that here." Marshall testified credibly that she was told she was not allowed to be "in there with my information and that I had to leave." Marshall responded by picking up her materials and leaving. Pedersen testified that this was the first time he had seen any employees "tabling" for the Union in the cafeteria.

The next day or the day after (July 9 or 10), Pedersen saw emergency room nurses Scott Marsland and Aaron Bell in the cafeteria with two tables pulled together and union material spread out on the tables. Pedersen was upset and told Marsland, "Scott you can't do this. You can't set up a table here in the cafeteria. You can't set up a fixed base. You're going to have to leave." According to Marsland, he and Pedersen went back and forth, with Marsland arguing that "it's within our federal rights to do this." After a few minutes, Pedersen left, but returned in approximately five minutes and spoke to Bell and Marsland. Pedersen told them: "so the situation is you're not allowed to set up a fixed presence in the cafeteria. You can, if you want to talk and solicit and have conversations with people, you can do that. You are not allowed to do this." Marsland told Pedersen that "we checked with our union representatives. Our understanding is this is . . . a federally protected activity." At one point, Pedersen said, "So I'll have security come and take this away then." Bell protested: "They certainly can't take our possessions." Marsland said, "that [it] sounds like a clarification of law that maybe we need." Pedersen reiterated his position that "You don't have the authority to set up a fixed solicitation within the cafeteria or fixed distribution." Pedersen left. Marsland remained for about an hour and continued to table. No one attempted to stop him. Pedersen testified that he did not call security, and by all evidence, he did not.

[12]The Respondent also stresses that some of its correspondence contained statements recognizing employees' right to advocate in favor of the union (as well as against it). The presence of lawful statements does not mitigate the impact of an unlawful solicitation requesting that employees report the protected activities of other employees to management. See, e.g., *Liberty House Nursing Homes,* 245 NLRB at 1197 (finding both lawful and unlawful invitations to report coworkers' activities).

[13]Marshall said it was Tony Votaw, Vice President of Information. Pedersen testified that it was Vice President of Public Relations John Turner. Neither Votaw nor Turner testified. It is an immaterial conflict.

After these two incidents, and after talking to counsel, neither Pedersen nor anyone else in the hospital ever challenged employees' "tabling," i.e., distributing union literature from a table in the cafeteria. However, neither Pedersen nor anyone else from management made an announcement to employees or otherwise affirmatively told employees that they were permitted to "table" in the cafeteria. The tabling continued sporadically, but repeatedly over the course of the next few months into December 2015.

Analysis

In the context of a hospital, the Board presumes that prohibitions against employee solicitation and distribution during nonworking time in nonworking areas such as a hospital cafeteria are unlawful infringements on protected employee rights, where the "facility has not justified the prohibitions as necessary to avoid disruption of health-care operations or disturbance of patients." *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773, 779–791 (1979), citing *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978); *The Carney Hospital*, 350 NLRB 627, 643–644 (2007). The burden is on the employer to show that the banning of activity is necessary to avoid disruption of health care operations or disturbance of patients.

Here, the Respondent has not shown, indeed, does not contend, that a prohibition on the tabling engaged in by Marshall, Marsland, and Bell, would be justified in this case. Clearly, by all evidence, the Respondent's employees had a protected right to solicit and distribute in the cafeteria during nonworking time. Pedersen's directive to Marshall on July 8, and to Bell and Marsland on July 9 or 10, are violative of Section 8(a)(1) of the Act.

The Respondent's defenses are without merit. The fact that Marsland (and assumedly Bell), did not leave the cafeteria as directed to by Pedersen is no defense. Neither is the fact that Marsland, Marshall, and other employees, subsequently tabled in the cafeteria without incident many times after the events of July 8 and July 9 or 10. It is also of no consequence that, as suggested by the testimony, Pedersen had a good faith but mistaken belief that he was entitled to prohibit the tabling in the cafeteria at the time he confronted Marshall and then Marsland and Bell. It is well-settled that in evaluating the remarks, the Board does not consider either the motivation behind the remarks or their actual effect. *Miller Electric Pump & Plumbing*, 334 NLRB 824, 825 (2001); *Joy Recovery Technology Corp.*, 320 NLRB 356, 365 (1995), enfd. 134 F.3d 1307 (7th Cir. 1998). Rather, "the basic test for evaluating whether there has been a violation of Section 8(a)(1) is an objective test, i.e., whether the conduct in question would reasonably have a tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights, and not a subjective test having to do with whether the employee in question *was actually intimidated*." *Multi-Ad Services*, 331 NLRB 1226, 1227–1228 (2000) (Board's emphasis), enfd. 255 F.3d 363 (7th Cir. 2001).

Here, a top management official—in one case, in the company of the CEO of the employer—confronted employees and directed them that they were not permitted to engage in union solicitation and distribution from a fixed place in the cafeteria. In one instance he even threatened to have security remove the materials. That the reasonable tendency of such directives is to coerce employees is beyond legitimate cavil.

Moreover, contrary to the Respondent's contention, these violations are not remedied in any way by the Respondent's failure to interfere with future exercise of rights in the cafeteria by these and other employees. The mere future abiding of employee rights is wholly inadequate to relieve oneself of liability for unlawful conduct. That would requires affirmative repudiation of the unlawful conduct in the manner prescribed in *Passavant Memorial Area Hospital*, 237 NLRB 138

(1978). Here, there has been no affirmative repudiation of these unfair labor practices, much less in a manner consistent with or even approximating that prescribed in *Passavant*, supra. Finally, I reject the contention that these violations are de minimis. The principles at stake are significant. These employees had a right protected by federal law to solicit for the union and distribute literature. These rights were abridged on July 8 and on July 9 or 10, in straightforward fashion. It is far from inconsequential that thereafter employees participated in cafeteria solicitation and distribution in the shadow of the unremedied and unlawful directives from July 8–10. These directives violate Section 8(a)(1) of the Act.[14]

3. Complaint paragraph VII(d) (informing employees that it is inappropriate to discuss their salaries and/or wages)

The General Counsel alleges that the Respondent, by Pedersen, informed employees that it was inappropriate to discuss their salaries and/or wages and to refrain from doing so.

Nurse Marshall testified credibly that sometime between the Fall of 2015 and early Winter 2016, Pedersen walked by a group of approximately five nurses (including Marshall) who were standing at the nurses' station in the ICU talking about employees' wage rates and told them what they were talking about was "inappropriate." Pedersen testified that while there is not a policy prohibiting employees from discussing their pay rates and salaries with one another, "[w]e encourage individuals not to do that." As to the specific incident testified to by Marshall, Pedersen testified that he does "not recall that conversation," and added that he "round[s] through the hospital on a weekly basis and interact[s] with staff on a weekly basis."

Pedersen testified extensively for the Respondent. As a general matter, I found him to be a credible witness, willing to admit what he remembered, as he remembered it, willing to correct counsel's paraphrase or characterization if he thought it not accurate. In this instance he testified that he did not recall this (or any similar) conversation. Both in terms of the literal meaning and in terms of the impression that his demeanor made on me, I believe that he was saying that he could not recall it, but was unwilling to state that it did not happen.[15] This is not surprising. He talks to staff weekly and this informal and brief encounter would have held no significance or importance for him. However, it would have been more significant for the nurses involved to have been told by a top management official that the subject of their conversation was "inappropriate." Moreover, Pedersen admitted "It's a generally accepted practice" that employees are not to discuss their salary information because it is confidential, and the Hospital "encourage[s] individuals not to" have the very type of conversation alleged, thus increasingly the likelihood that, although he doesn't recall offering this encouragement, it happened. Based on this, and the

[14]Having found that the employees had an unrebutted presumptive right to solicit and distribute union materials in the cafeteria during nonworking time, I do not reach the suggestion of the General Counsel—or the arguments of the Respondent—regarding the issue of whether Pedersen's directives constituted a discriminatory application of a ban on cafeteria solicitation or distribution. See, *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 203 (2007), enfd. 519 F.3d 373 (7th Cir. 2008).

[15]Asked "Would you ever have a conversation like that," Pedersen maintained his answer, responding "Not that I can recall I've ever done that." I accept that Pedersen does not remember this incident.

credible and consistent demeanor with which Marshall testified to this event, I credit her testimony.[16]

Analysis

The directive is violative of the Act. See *Triana Industries*, 245 NLRB 1258, 1258 (1979) (unlawful to tell employees "[n]ot to go around asking the other employees how much they were making, because some of them were making more than others."); see, *Parexel Int'l, LLC*, 356 NLRB 516, 518 (2011) ("our precedents provide that restrictions on wage discussions are violations of Section 8(a)(1)"); *Coosa Valley Convalescent Center*, 224 NLRB 1288, 1289 (1976). Further, it does not matter whether the directive is embodied in a "rule the breach of which would imply sanctions." *Triana*, supra (overruling ALJ who found directive not to discuss other employees' pay lawful because it did not rise to the level of a "rule"). See also, *W.R. Grace Co.*, 240 NLRB 813, 816 (1979) ("as a supervisor's 'request' or expression of 'preference' that an employee comply with a policy of confidentiality nevertheless implies that employees run the risk of supervisory displeasure and possible adverse consequences for noncompliance to a degree sufficient to constitute interference, restraint, and coercion under the Act").

Accordingly, I find that Pedersen's statement to the nurses that their discussion, which was about their wages, was "inappropriate," was a violation of the Act.[17]

D. Complaint paragraph VIII

1. Complaint paragraph VIII(a) and (b) (interrogation and threat in the one-on-one meeting)

Norman Joel Brown was the interim director of the hospital's ICU department from approximately the second week of April 2015, through mid-July 2015. Brown replaced the longtime ICU director, Sean Newvine, who left in April 2015.

Brown's tenure at the Hospital was rocky. In particular, he blamed Nurse Anne Marshall for the Hospital's failure to renew his three-month contract as interim director. Brown described an excellent relationship with Marshall in his first weeks at the Hospital. He testified that Marshall was "very welcoming," "[v]ery collaborative, very collegial," and she "had been there for quite a while and knew everybody, knew the lay of the land, per se, and I was able to glean some of that information from her." However, this changed, "drastically" according to Brown. "It became adversarial . . . . it just wasn't a good relationship any longer."

[16]I have considered the fact that no other nurse—for instance one of the others involved in the conversation—was called to testify about this event. However, I do not find that of significance here, and indeed, it cuts both ways: either party could have attempted to find corroborating witnesses for their position. Marshall's testified credibly and satisfactorily as to the incident.

[17]The General Counsel also argues on brief that the Hospital unlawfully maintained (and enforced) an unlawful rule or policy that prohibited employees from discussing pay with each other. Evidence was offered in support of this claim, and there is testimony denying it as well. The matter is unalleged in the complaint, and no amendment to allege this was offered. No argument is offered as to it being closely connected to the pled allegations and fully litigated, and the matter is arguable, but far from certain, in my view. Consequently, I decline to consider this unpled contention. However, much of the evidence relied upon for this unpled claim may be—and is here—relevant to the alleged unfair labor practice concerning complaint paragraph 7(d).

Brown dated the change to the time in early June when a sexual harassment charge was filed against him with the New York State Human Rights Division. The charge stemmed initially from a "team leading" video that Brown showed the ICU staff during a staff meeting on or about April 23, just after his arrival as interim director.

The video was created by a friend of Brown's that Brown met when they were in the military together. Brown identified the creator of the video by "code name" Sargent Grouchy. Brown testified that "I can't divulge his true name because he's still in the service."

The video consisted of a variety of military combat and other rescue missions by different branches of the Armed Forces. The soundtrack was a song written and performed by Marilyn Manson, the controversial singer and songwriter. The song was the Marilyn Manson song "This is the New Shit." Brown agreed that the song has "colorful" language:

> Yes, sir, the word 'bitch' is used throughout it. The word 'sex' is used throughout it. And the word 'shit' is used throughout it.[18]

The video presentation was not well-received by many of the nurses. Within a couple of weeks, Marshall approached Brown and told him that "certain individuals were offended by the video and I should apologize." Marshall told Brown that "there were individuals in the audience that were offended, including a combat veteran and several members of the female staff." Nurse Marsland sent an email to the hospital's "leadership team," alerting management about the video that Brown had shown the staff. (Brown claims that Marsland sent the leadership team the lyrics from the wrong Marilyn Manson song.)

Soon thereafter, Brown was notified that as a result of his showing of the video, a sexual harassment complaint had been lodged against him both internally within the hospital's grievance system and then externally with the NY State Human Rights Division. Brown understood (although it is unclear from the record when he knew this) that Marshall had filed the NY State Human Rights complaint.[19]

Brown felt that after Marshall complained that staff members took offense to his video presentation, the situation with him and Marshall, and on the floor in general, began to change. After the sexual harassment complaint was filed employees distanced themselves from him. According to Brown, "I had basically been made an ineffective leader."

In any event, along with this background, the union drive at the facility began in earnest shortly after and coincidental to Brown's arrival at the Hospital. He was aware of the union drive

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[18] "This is the New Shit" is a single from Marilyn Manson's 2003 album "The Golden Age of Grotesque." The song includes lyrics such as "sex, sex, sex, and don't forget the violence" and "Are you motherfuckers ready for the new shit?" The full lyrics of the song are available on line. See, e.g., http://www.metrolyrics.com/this-is-the-new-shit-lyrics-marilyn-manson.html

[19] There is the suggestion in the record that the sexual harassment claim ultimately concerned not only the showing of the video but more personal accusations by Marshall against Brown on or about May 8, in a meeting between the two that is also the subject of an unfair labor practice allegation described below. Brown denied any wrongdoing. Both Brown and Marshall agreed that the State claims were determined to be unfounded by the Human Rights Division.

about two weeks after he arrived, around the same time that he showed the video in the staff meeting. As discussed above, on May 7, Hospital HR VP Pedersen initiated the communication campaign to nurses. In addition to the May 7 letter, managers who were part of the "leadership team" at the Hospital were provided "talking points" about unions and the unionization process to discuss with the nursing staff. The managers were instructed to provide each nurse a copy of the May 7 letter and to meet with each nurse individually.

On or about May 8, Brown met with each ICU nurse in a one-on-one meeting to discuss the talking points and the union drive. Marshall testified that Brown asked her to go into his office. Suspecting that the meeting was about the union, Marshall and another nurse asked Brown if they could meet together, but Brown said he was going to meet with the nurses, one at a time. The first member of the ICU staff that Brown met with was Marshall.

According to Brown, his meeting with Marshall was uneventful. He gave her the May 7 letter, she read over it. He asked if there were any questions. She asked if he had ever been through a unionization or had worked at a union facility, to which Brown answered yes. According to Brown it was during this meeting that Marshall told Brown that he might want to apologize for the video that he had shown in his initial staff meeting.

Marshall gives a different account of the meeting. Marshall testified that Brown "told me that he knew I was the ring leader and I was the one promoting all this union stuff, and if it didn't stop he was going to get HR involved." Marshall testified that "I said this is something that I can't discuss with you, and I got up and walked out." Brown denied saying anything like this.

In addition to Marshall's testimony, ICU nurse Terrie Ellis testified that in her individual meeting with Brown he asked her if she "knew about the union campaign." Brown asked her if "she had been approached about it at work." Brown asked Ellis if she "had felt pressured or bullied about the Union in any way." He told Ellis, "The Union is not what you think that it is. It's a business. They're here to make money, just like every other business." According to Ellis, Brown said, "if we actively try to bring the Union in that it would tie the hospital's hands and they would not be able to fix problems, hire additional staff, etc." and "words to the effect that the Hospital had to be very careful about looking like they were trying to keep the Union out." Ellis testified that at the end of the meeting Brown asked her not to discuss the meeting with the other employees as he wanted "to talk to them when they were unbiased."[20]

I credit Ellis' account. Brown testified that he did not recall asking Ellis any questions about the Union in the meeting but did not otherwise contradict her testimony. He suggested that in all of the one-on-one meetings, he handed the employee the May 7 Pedersen letter and asked employees if they had questions—he did not testify to asking any specific questions about union activities of the nurses. I credit Ellis, who testified in a highly credible manner.

Moreover, I also credit Marshall's account of her one-on-one meeting with Brown. Marshall also testified with credible demeanor, but I am cognizant that the record is clear that neither is a fan of the other, and each might be thought to have reasons to testify adversely to the other. But in assessing their credibility, in addition to demeanor, I note that I was not impressed with Brown's insistence that he was indifferent to unionization at CMC, did not take a position on

[20]On cross-examination, Ellis agreed that she testified that she did not remember the exact wording that Brown used in his statements and questions at the meeting, but she reaffirmed on cross-examination the substance of her direct testimony.

the matter, and that he had no stake in the outcome. This testimony, an effort to buttress his credibility, failed in that purpose as it is highly misleading. It is inconsistent with the aggressive, repeated, and what can only be called enthusiastic manner in which he admitted, and which the record shows, that he removed posted union literature. He described removing union flyers as many as four times a day from posted places and from the break room and bringing them to the HR department. He also admitted in his sworn pretrial affidavit that "I had my Department Team take the flyers down that were posted in the department and give them to me."[21]

Brown's email correspondence with other management personnel, and other management emails in the record, demonstrate that in May and June, Brown set about, with enthusiasm, removing Marshall's postings and monitoring her activities. Indeed, by June 2, Pedersen was seeking "specifics" on Marshall, to which Brown responded with a note that included the complaint that "While on shift and in a leadership position she continues to post, call and have conversations about unionization." Contrary to Brown's testimony, the union activities of Marshall and the employees appeared to be of great interest and concern to Brown (and other managers). I discredit his testimony to the contrary, and it does influence my decision to credit Marshall's version of what happened in their one-on-one meeting, as does my crediting of Ellis, which only increases the likelihood that, contrary to his claims, Brown engaged in questioning about union activities with Marshall, as alleged.[22]

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[21]This is a nonhearsay admission pursuant to Federal Rule of Evidence 801(d)(2). Brown first denied on cross-examination that he asked his employees to take down the union flyers. However, I credit his sworn pretrial statement that "I had my Department Team take the flyers down that were posted in the department and give them to me." On redirect, the witness was led to deny that this means that he instructed his staff to take the posters down but, instead, meant that it was just "something that had taken place." I discredit that fantastic characterization of Brown's statement, which was the product of leading questioning. (Tr. 1054.)

[22]I specifically reject the Respondent's assertion that Marshall's account should be discredited because, as the Respondent puts it, Marshall "has a history of distorting and/or falsifying information involving Mr. Brown to support her own personal agenda." (R. Br. at 14.) The sole record basis for this characterization is the fact that, as testified to by Marshall and Brown, the New York Human Rights Division found the sexual harassment charges filed by Marshall "unfounded." The mere rejection of the charges by the State of New York hardly provides evidence of distortion or falsification of information, much less that the matter has been undertaken in pursuit of a personal agenda. It is a remarkable characterization to base on the mere fact that a charge was found "unfounded," particularly when the record demonstrates that the initial charge was prompted by Brown's (admitted) screening for ICU employees of the combat training video set to the music and lyrics of "This is the New Shit" by Marilyn Manson.

If this attack on Marshall came from Brown's mouth—it did not—it would at least, while still unsupportable, perhaps be understandable as a personal response to having one's conduct called into question. But as an employer's explanation for a dismissed charge of sexual harassment, it speaks volumes about the animus towards Marshall. It certainly would be reasonably likely to intimidate any future employee considering whether to file a sexual harassment charge against this employer. The Marilyn Manson-scripted video was directed to the entire ICU nursing staff, and Marshall had discussions with a number of nurses concerned about it. The filing of the sexual harassment charge over the showing of this video to nursing staff was clearly protected and concerted activity under the Act. See, *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 4–5 (2014). I do not reach the issue of whether the attack in the Respondent's brief on Marshall for filing the sexual harassment charge constitutes affirmative evidence of animus toward Marshall's protected and concerted activity.

Analysis

The General Counsel argues (GC Br. at 34) that Brown's statements to Marshall in the one-on-one meeting about being the union "ringleader," and threatening to bring in HR if she did not cease her union activities, constitute an unlawful interrogation and threat of reprisal.

While the assertion by Brown that "he knew" Marshall was "the ring leader" and "the one promoting all this union stuff" might also be understood as providing an unlawful impression of surveillance of union activity, the nature of the statement would reasonably be understood as an interrogation, an opportunity for Marshall to confirm or deny her role as a "promoter" of the union activity in the Hospital. Of course, not every interrogation is unlawful. Whether the questioning constitutes an unlawful coercive interrogation must be considered under all the circumstances and there are no particular factors "to be mechanically applied in each case." *Rossmore House*, 269 NLRB 1176, 1178 (1984), enfd. 760 F.2d 1006 (9th Cir. 1985); *Westwood Health Care Center*, 330 NLRB 935, 939 (2000). However, in general it is unlawful for an employer to inquire as to the union sentiments of employees. *President Riverboard Casinos of Missouri*, 329 NLRB 77 (1999).

In this case, considering all the circumstances, the unlawful nature of the statement is hard to deny. Marshall's interlocutor was the department head, the conversation took place outside the regular routines of work, it was a formal one-on-one meeting, in the department head's office, and the request to have another employee present was denied. Moreover, the incident also involved a second comment, almost in the same breath, in which Brown made an unvarnished threat of retaliation to "bring in HR" if Marshall did not cease her union activity." Thus, the "ring leader" comment was part and parcel of a threat of retaliation against Marshall if she did not cease her union activities. I find that both comments are unlawful as alleged in the complaint.[23]

2. Complaint paragraph VIII(c) (prohibiting the posting and distributing of union literature)

The General Counsel alleges that from May until mid-July, 2015, the Respondent unlawfully prohibited employees from distributing and posting union literature around the facility while permitting employees to distribute and post other literature.

Employees supportive of the Union regularly posted prounion literature on hospital bulletin boards and left literature in the break rooms. Pedersen agreed that employees have a right to post nonhospital related material on the bulletin boards, a matter which the Hospital does not dispute in these cases (Tr. 173, 179).

Notwithstanding, the evidence is clear that there was a concerted effort by the Respondent to remove union literature, known to and encouraged by upper management. As Crumb put it in two emails she sent on June 20: "They have the right to put up and we have the right to take down."

[23] I note that the Respondent confines its defense on these allegations of the complaint to the claim, which I have rejected above, that the comments were not made by Brown. I further note that the General Counsel does not argue that Brown's comments to Ellis were unlawful and, hence, I do not consider the matter.

Brown agreed that he removed prounion postings many times "over the course of many days," sometimes four times a day. He also took union flyers from the break room. After removing prounion postings, Brown would turn them into the HR office, thus, providing upper management with incontrovertible evidence of his conduct. In any event, based on Crumb's emails, and Pedersen's testimony, upper hospital management was aware of the efforts to remove the union postings.[24] So were employees, who noticed that union literature was removed from bulletin boards but information unrelated to the union postings remained. Marshall witnessed a coworker, PICC nurse Cynthia Sullivan—a nurse who had reveled in reporting to Crumb and Brown how much of Marshall's union literature she had thrown out (GC Exh. 45 and 46)—take down and throw out flyers from the break room. Moreover, Marshall's unrebutted testimony was that just days before the hearing in this matter, the Respondent's current ICU Director Patty Florentino and a patient relations advocate, Jackie Barr, continued to remove union literature and to tell Marshall that she could not post. (Tr. 265; 417).

Analysis

As discussed above, employees have the presumptive right under the Act to distribute union literature in employee breakrooms. *St. Margaret Mercy Healthcare Centers*, 350 NLRB at 203; *NLRB v. Baptist Hospital, Inc.*, 442 U.S. at 779–791. Moreover, it is unlawful discrimination, without regard to the employer's motive, to prohibit the posting of union literature—even in areas of the hospital where a ban on postings or distributions could lawfully be maintained—while permitting employees to post about nonunion activities. *Honeywell, Inc.*, 262 NLRB 1402 (1982), enfd. 722 F.2d 405 (8th Cir. 1983); *Container Corp. of America*, 244 NLRB 318, 318 fn. 2 (1979), enfd. 649 F.2d 1213 (6th Cir. 1981).

Here, the Hospital admits and does not contest that employees have a right to post nonhospital related material on the bulletin boards. "In these circumstances, an employer may

[24]GC Exh. 47 (June 1 email Brown to Pedersen, copied to "Leadership Team": "I came in Saturday to do staffing calls and removed a ton of Union material from the restroom again"); GC Exh. 45 (June 19 email from employee Cynthia Sullivan to Crumb and Brown, forwarded to Pedersen: "Must be I threw out enough of hers because now she's using hospital paper & green paper is in our copier right now"; Brown followed up with an email at the top of the exhibit that makes clear that Sullivan was referring to Marshall); GC 46 (June 19 email from employee Cynthia Sullivan to Brown, forwarded to Pedersen, on the subject of "union propaganda": "it's really annoying that Anne has to spend her time hanging up union postings instead of doing her job as the charge RN. . . . As fast as they are thrown away off the breakroom table she puts out new ones"); See, e.g., GC Exh. 24 (June 20 email from employee DiBartolo to Crumb telling her that she "walked through [emergency department] 3 times took down union info all 3 times in break room—with one of the notes saying 'It is illegal to remove union information from non-patient care areas" I am seeking your further guidance"; Crumb responded, copying Hospital CEO Rudd and Pedersen: "They have the right to put up and we have the right to take down"); GC Exh. 22 (June 20, email from Crumb to House Supervisors, copied to Pedersen, regarding the subject "Union material" and directing that "When you make your rounds please remove Union material at time clocks and break rooms or anywhere else you find them. Security has been instructed to do the same. They have the right to put up and we have the right to take down"); GC Exh. 23 (October 12, 2015 email from the Hospital's Chief Patient Safety Officer, forwarded to Pedersen: "You probably already know but just in case there are SEIU newsletters posted at timeclocks. Polly grabbed what she saw, I will check the other timeclocks").

not remove union notices." *Wal-Mart Stores*, 340 NLRB 703, 709 (2003); *Container Corp. of America*, 244 NLRB 318, 318 fn. 2 (1979), enfd. 649 F.2d 1213 (6th Cir. 1981).

The, Hospital is forbidden from discriminating against Section 7-related postings and distributions. And the evidence demonstrates that this was precisely what the employer did. The testimony and internal employer emails demonstrate that the Hospital engaged in a concerted effort to remove prounion postings. This included supervisor removing materials. *Jimmy John's*, 361 NLRB No. 27, slip op. at 24 (2014), 818 F.3d 397 (2016); *Eaton Technologies, Inc.*, 322 NLRB 848, 854 (1997). But also, in some instances, the encouragement of employees to do the same (see , e.g., GC. Exh. 24). See, *Jimmy John's*, 361 NLRB No. 27, slip op. at 7–8 fn. 26.[25]

The Hospital's defense (R. Br. at 15) on this issue is meritless. It points out that employees were permitted to post and distribute union materials throughout the facility, as if, having allowed employees to post, the Respondent's campaign to remove the union material is not a denial of that right. In fact, this did seem to be the Hospital's view of the law, as articulated by Crumb ("They have the right to put up and we have the right to take down") but it is obviously not a tenable position. *Container Corp. of America*, 244 NLRB at 2.

The discriminatory removal of the posted union materials violates the right to post protected by the Act in these circumstances, and is a discriminatory refusal to permit posting of union literature.

E. Complaint Paragraph XI
(threats of reprisal and job loss on Facebook postings)

The General Counsel alleges that certain Facebook posts made by Hospital House Supervisor Florence Ogundele constitute unlawful threats of reprisal against employees in retaliation for protected and/or union activities.

As a house supervisor, Ogundele is in charge of placing patients who have been admitted or are being transferred between hospital departments. In this capacity she works with the various hospital department heads and charge nurses. She reports to Linda Crumb, the Assistant Vice President of Patient Services. It is admitted that Ogundele is an agent and supervisor of the Hospital within the meaning of the Act.

As discussed above, in June of 2015, a state sexual harassment charge was filed by Marshall regarding alleged actions by Brown. A hearing in that matter was conducted on November 10, in Binghamton, New York. The afternoon of the hearing, Nurse Marsland testified that he received a text from Nurse Marshall, who was in Binghamton to be a witness in the hearing. Marsland testified that in the text, Marshall told him that Ogundele had arrived at the hearing, in addition to Pedersen and Crumb. Marsland posted the following on his Facebook page on November 10:

> Please send Anne Marshall your words of encouragement and love. She is standing up for what is right, facing down Flo Ogundele, Linda Crumb, Alan Pedersen and a nasty POC lawyer representing CMC in a hearing

[25] I point out that the internal emails and the testimony refute the suggestion of the Respondent that the union materials were only removed in nondiscriminatory fashion as part of a weekly removal of dated items from the bulletin boards.

with the NYS Human Rights Commission right now. FB PM and text her.[26]

Ogundele was quite upset and "responded back" with the following Facebook post:

> Just so you know Scott, I thought you have class am very surprised about your comments, well maybe am not. I am not your enemy or anyone enemy but I will not compromise my integrity to lie for anyone. To tell you the truth you don't want to make me your enemy I can go from nice to a bitch in 20 second flat. You cannot bully me or intimidate me, you want to fight let's do it face to face don't hide behind your wife name. Maybe it is time to start telling people the real truth. This is my advice for you, don't mess with me and tell your disciples the same. I am not afraid of any one of you

Thereafter, the following day, under the tagline "feeling fed up," Ogundele posted the following:

> So I was told to put my post down, that they understood my concern and anger, well I did that in respect for my boss. I have freedom of speech and not on company time I will say what I feel like saying.
> To my fellow CMC who is tired of all the bullshit going on at work and the people supporting them this is what I want to say
> I want you to look at the people who are sending you e mail, sending letters to your home and calling you to join[ ] their cause after you told them to leave you alone. I want you to take a good look at them, you will see that if you follow any one of them it will lead you to unemployment, these people have nothing to lose. Now the only thing that make them relevant is bullying, intimidating and downright mean. They are not happy unless there's drama going on everywhere.
> They will not tell you the truth because that will be the right thing to do, and their followers are like monkey see monkey do. They don't have their own mind. So this people think they are liked not knowing what has been saying behind their back. I want you to take a look at their lives, I want you to think of how they are making coming to work unbearable because their voice is so loud like an empty barrel that is rolling down the street. I am not telling you not to give 2% of your earning to them but you need to think about what that 2% mean to your families.
> They've decided to attack[ ] me because I refused to compromise[ ] my dignity to lie for them. When you decided to attack me you just opened a can of worm that you [cannot] close. You pick the wrong qirl

Crumb testified that when she learned about the Ogundele's Facebook post—the first one—she immediately contacted Ogundele and told her that it "wasn't acceptable" and that "she needed to take the posting down." Ogundele was resistant, telling Crumb that "I was in my own home" and "I was being attacked, and I have the right to defend myself." Crumb insisted that the posting be removed and Ogundele told Crumb she would do so immediately because Crumb "asked her to."

[26]Marsland uses the name "Charlie Green" as his screen name for Facebook. The profile picture is of Marsland and there does not seem to be any question but that all the relevant people involved in this issue understood that Marsland "was" Charlie Green."

When Ogundele returned to work, “a day or two later” she was called to Crumb’s office and given a verbal warning by Crumb for “posting inappropriate comments” with the expectation that there would be “no further postings of this nature.” The discipline was for the first Facebook post. Crumb was unaware of the second one. The disciplinary notice was dated November 13, 2015, and signed by Ogundele November 18, 2015.[27]

Analysis

The General Counsel alleges that the Ogundele’s Facebook posts contained or constituted unlawful threats in violation of Section 8(a)(1) of the Act.

The test to determine if a statement violates Section 8(a)(1) is whether "under all the circumstances" the remark "reasonably tends to restrain, coerce, or interfere with the employee's rights guaranteed under the Act." *GM Electrics*, 323 NLRB 125, 127 (1997). It is well-settled that in evaluating the remarks, the Board does not consider either the motivation behind the remarks or their actual effect. *Miller Electric Pump & Plumbing*, 334 NLRB 824, 825 (2001); *Joy Recovery Technology Corp*., 320 NLRB 356, 365 (1995), enfd. 134 F.3d 1307 (7th Cir. 1998); *GM Electrics*, supra (The test "does not depend on the motive or the successful effect of the coercion").

Moreover, when analyzing alleged unlawful statements the Board "view[s] employer statements from the standpoint of employees over whom the employer has a measure of economic power." *Mesker Door*, 357 NLRB 591, 595 (2011) (internal quotation and citation omitted); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 580 (1969) (in determining whether employer pronouncements violate Section 8(a)(1), the assessment "must be made in the context of its labor relations setting," and "must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear").

[27] I note that the record is not particularly clear as to when Ogundele’s posts were removed, or even, precisely when they were made. However I conclude, as follows: Marsland testified credibly that his post was made the day of the hearing, which he believed to be November 10. This is corroborated by the date on the Facebook post (GC Exh. 8). Marshall testified credibly that Ogundele’s first post was made the day of the hearing (i.e., November 10) and the second post the day after that hearing. This is consistent with Crumb’s testimony that she saw the first Ogundele post, never saw the second, and called Ogundele and told her to take down the first post. The second post suggests that the first post has been or is being taken down, which, crediting Marshall, means that the first post stayed up only a day. I note that Ogundele’s testimony suggests that the first post was not taken down until after she returned to work and met with Crumb, which could have been as much as a week later, on November 18. But given Crumb’s testimony, I do not credit Ogundele on this, and in addition, Ogundele’s testimony was very confused on this subject. Ogundele also testified, with more certainty, that the second post remained posted for only two to four hours before she took it down. I credit this, which is unrebutted, and in addition, is consistent with a timeline that has Crumb calling Ogundele on November 11, and having her take down the first post, which is consistent with Marshall’s testimony. It is plausible that Ogundele, who was upset about the whole incident and only reluctantly took her first post down at Crumb’s insistence, posted again, but then thought better of it after two to four hours.

Here, to begin with, there can be no question but that Marsland's post seeking messages of support for Marshall was protected and concerted activity under the Act.[28]

Ogundele, for her part, was clearly upset to have been mentioned or identified in Marsland's post as being at the state hearing. And contrary to the Respondent's suggestion on brief, her remarks were explicitly directed to Marsland and his "disciples."[29]

Indeed, Ogundele opened her remarks by addressing (Scott) Marsland and telling him that she was reacting to his post: "Just so you know Scott, I thought you have class am very surprised about your comments, well maybe am not." She then continued with what can only be reasonably understood as some kind of a warning to Marsland and those allied with him (his "disciples"):

> To tell you the truth you don't want to make me your enemy I can go from nice to a bitch in 20 second flat. You cannot bully me or intimidate me, you want to fight let's do it face to face don't hide behind your wife name. Maybe it is time to start telling people the real truth. This is my advice for you, don't mess with me and tell your disciples the same. I am not afraid of any one of you

This is a threat of unspecified reprisals. Although I assume that the challenge to fight and the "advice" not to "mess with me" were not actual threats of violence, the implied threat of retaliation of some kind is implicit but unmistakable. Indeed, Ogundele's warning that she "can go from nice to a bitch in 20 seconds flat" is a warning that she can quickly make things tougher should she be crossed. Of course, these comments were not made out of the blue or in the abstract—but in express response to Marsland's post rallying employee support for Marshall in the sexual harassment case she had filed. In this context, Ogundele's comments would reasonably be read as a not so subtle implied threat of retaliation for Marsland's protected and concerted activity. See, *Alterman Transport Lines, Inc.*, 308 NLRB 1282, 1286 (1992) (responding to question about drivers' loss of work, supervisor unlawfully implied retaliation when he replied "No more Mr. Nice Guy"); *Warehouse Groceries Mgmt., Inc.,* 254 NLRB 252, 258 (1981) (in context of discussing suspected union activity at facility manager referred to job loss

[28]*Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 5 (2014) (employee engaged in protected and concerted activity by seeking coworker support for sexual harassment charge). That Marsland was seeking to rally employee support for *another* employees' sexual harassment charge only intensifies—it does not detract from—the concerted and hence protected nature of his activity. Contrary to the characterization of Marsland's remarks by the Respondent in its brief, there is nothing in Marsland's comment that can reasonably be understood as attacking Ogundele's "integrity" (R. Br. at 17) or making "defamatory statements toward her." (R. Br. at 19.) And contrary to the contention in the Respondent's brief, Marsland testified credibly that this was his only post referencing Ogundele's participation in the state hearing (Tr. 516–518).

[29]Ogundele was clear in her testimony that she was responding to Marsland and his post (Tr. 76, 78, 79, 748–749). She also, at times, claimed that she was responding to comments beyond that shown in GC Exhibit 7, including issues at work. See, e.g., Tr. 727, 730–731. It is possible there were comments following Marsland's post that were not reproduced, although the final comment on GC Exhibit 7 was made at 9:46 a.m. November 11, which I believe to be after Ogundele's first post. In any event, the introduction to Ogundele's first post makes clear that she is responding to Marsland. Her second post references her first post. The chief point is that an employee reading these posts would reasonably view Ogundele's postings as a response to Marsland's post, based on the references in Ogundele's post.

occurring after union activity at other store was “squashed” and unlawfully added, “I can be a nice guy, but I can be nasty”); *Montgomery Ward & Co.*, 160 NLRB 1729, 1735 (1966) (in context of antiunion remarks statement that “I can be a nice guy” but “I don’t have to be” is unlawful).

Ogundele’s second post was also unlawful. Leaving aside the unalleged issue of disparagement of the union and its supporters, the post warns that following “the people who are sending you email, sending letters to your home and calling to join[ ] their cause . . . will lead you to unemployment.” In the context of an ongoing union organizing campaign, and in the context of her post generally, an employee reading her post would reasonably conclude—indeed, it may be said that it would be unreasonable not to conclude—that Ogundele was referring to union activists. The warning is an explicit threat of job loss for those following the union activists. *Burke-Parsons Bowlby*, 288 NLRB 956, 959–960 (1988) (unlawful threat of job loss for supervisor to respond to employee’s statement that it was “union time” by stating that “you[ ] all are going to wind up in the soup line”), enfd. 905 F.2d 803 (4th Cir. 1990).[30]

The Respondent’s defense is without merit. Essentially, it argues (R. Br. at 19) that Ogundele’s postings were a personal “lashing out” motivated by personal offense, do not explicitly mention the word union, and do not expressly state that she was going to take actions against people at work. However, Ogundele’s intentions and motivations are beside the point.[31] Moreover, her failure to explicitly use the word union or to explicitly state that her threats would be carried out through use of her supervisory authority at work does not constitute a defense. The issue is the reasonable implications of Ogundele’s remarks. Their reasonable implication is coercive. See, e.g., *Leather Center, Inc.* 308 NLRB 16, 27 (1992) (manager unlawfully told employee he knew she was talking to employees about union “and that she should be careful” and manager unlawfully told another employee that “he was messing up by becoming involved with the Union” which was “not only jeopardizing his own job, but also the jobs of the people in his family who worked for the Respondent”); *Print Fulfillment Services*, 361 NLRB No. 144 (2014 (manager’s anger and statement that he was “disappointed” in employee for supporting union found to be unlawful threat). As an agent of the Respondent, Ogundele’s threats of reprisals against employees for union and protected activity are properly attributable to the Respondent, without regard to the “personal” capacity in which she made her threats.[32]

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[30] I do not reach the question of whether Ogundele’s concluding statement in her second post, that employees have “opened a can of worm[s] that you can not close. You pick the wrong qirl” is a threat of unspecified reprisal. Given that the finding of a violation based on it would not materially affect the remedy, I decline to consider it.

[31] *GM Electrics*, supra (The test "does not depend on the motive or the successful effect of the coercion"), and cases cited supra.

[32] *Glenroy Construction Co.*, 215 NLRB 866, 867 (1974) (employer violated Act based on supervisor's unauthorized and "personal**"** statement to employee that "he**"** did not want employee back to work because of Board charges filed by employee, even though employer was willing to reinstate employee and was waiting for employee to return to work), enfd. 527 F.2d 465 (7th Cir. 1975). Accord, *Ideal Elevator Corp.*, 295 NLRB 347 (1989) ("the Board continues to hold that under Sec. 2(13) of the Act 'an employer is bound by the acts and statements of its supervisors whether specifically authorized or not.'" (quoting *Dorothy Shamrock Coal Co.*, 279 NLRB 1298, 1299 (1986), enfd. 833 F.2d 1263 (7th Cir. 1987)); *Triangle Sheet Metal Works, Inc.*, 238 NLRB 517, 520 (1978)("even though Biegler's comments were not authorized by higher management, he plainly was a supervisor and an agent of Respondent within the meaning of the Act and, therefore, his conduct is legally attributable to Respondent").

Finally, while the Respondent disciplined Ogundele for her remarks, nothing approaching timely repudiation of her unlawful conduct was conveyed to the employees. Hence, the Respondent cannot avoid liability for Ogundele's remarks based on a theory of repudiation. See, *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978).[33]

F. Complaint paragraph X (Marsland's Discipline for the September 24 staff meeting incident)

a. The emergency room; staffing for breaks

The hospital's emergency room has 19 rooms with 24 in-room beds, and six additional beds in hallways or a waiting room. There are a total of approximately 30–40 nurses who work in the emergency room (including part-time and per diem nurses).

The first two rooms of the emergency room department are used as "fast track" rooms, devoted to treatment of "lower acuity" patients, i.e., patients with less severe injuries, such as an ankle sprain, or medication refills. Patients assigned to fast track usually have a problem akin to what is dealt with in a nonemergency "urgent care" medical facility. Rooms three through six have a variety of patients, and often patients with mental health diagnosis are placed in rooms five and six because they are across from the charge desk and easily observed. Rooms seven, eight and ten also tend to have patients with mental health issues. Room nine has its own bathroom and oncologic patients or patients having sexual assault exams are often assigned to that room. Rooms 11–15 typically house the most critical or "high acuity" patients, such as trauma or burn patients, or someone about to imminently give birth. Rooms 16–19 were described as "a mixed bag" in terms of who is assigned there.

Amy Mathews is the nursing director of the emergency department. The unit manager reports to Mathews. In the summer and fall of 2015, the unit manager was Kevin Harris. There is a charge nurse on duty, and the remaining nurses are staff nurses.

Scott Marsland, who has been referenced earlier in this decision, is a staff nurse in the hospital's emergency department. He transferred there from elsewhere in the Hospital in 2007. He has worked as a charge nurse in the emergency room, a preceptor, and worked with a group of physicians and pharmacists to develop software applications used in the department. He was known to management to be supportive of the union drive. In addition to his encounter with Pedersen in the cafeteria, Marsland was listed in an April 28 email from Mathews to Pedersen as one of about ten emergency room employees "Known Pro" union. (Approximately 11 employees were listed by name as "Anti" union).

Marsland, testified that based on his 15 years of experience "the biggest issues that's persisted through that time has been the difficulty of nurses in all departments getting breaks

[33]A third post (GC Exh. 10) by Ogundele had "nothing to do" with the other two, according to Ogundele. There is no testimony from Marsland, Marshall, or anyone, identifying the date of this third post, or providing more context. It does concern the union and Marsland, as Ogundele admitted. It is similar in many respects to the two posts discussed above. It certainly contains additional threats of unspecified reprisals. However, given the uncertainty surrounding the date and circumstances of its posting, and given that the finding of a violation based on it would not materially affect the remedy, I decline to consider the third post.

consistently," a problem Marsland and his coworkers discussed in terms of "what we felt were unsafe staffing ratios." Marsland has spoken with his director Mathews about it in the past and in 2013, wrote a letter on the subject to Hospital CEO Rudd, which led to a formal meeting on the subject with Rudd and Mathews.

More recently, Marsland wrote to the New York State Department of Labor in June 2015 about the break issue. Marsland estimated that "[h]istorically" nurses get their lunch breaks "less than 50 percent of the time." However, since the advent of the union organizing campaign, Marsland testified that he received lunch breaks more than 50 percent of the time. Indeed, the record includes an email dated April 28, from Susan Nohelty to Crumb and Mathews stating that

> One of the major complaints by staff in the ED is their inability to take meal breaks. In light of the union activity, John would like a plan to be place as to how we can get staff to take their meal breaks.

Mathews testified that getting staff to leave their patient assignments to take a break is a frequent problem in the emergency department. According to Marsland, "the discussion of not getting breaks is part of the air that we breathe in at Cayuga Medical Center." A chief problem for the nurses in trying to take their breaks was their concern that there was not adequate coverage for their patients during the breaks.

When an emergency nurse takes a break, "coverage" for the patients under the nurse's care is provided in different ways, with the charge nurse playing a large role in determining how the break will be covered. Sometimes the charge nurse can cover a staff nurse's break. Sometimes a nurse from another department can cover. Often a nurse working in the Fast Track section of the emergency room is free to cover an emergency room nurse on break if there are no patients in the Fast Track section. This is one method used to cover breaks.

However, according to Marsland, relying on Fast Track nurses to cover breaks for the rest of the emergency department nurses is problematic:

> Historically the nurses work in the Fast Track Section are nurse[s] that are either kind of burnt out and coasting towards retirement or nurses that are neophytes that don't have a high level of critical skill. And they're kind of getting [ ]up to speed in the Emergency Department.

Marsland testified that there was "disgruntlement" and repeated discussion among the emergency room nurses, as often as weekly, about a nurse named "Deb [Scott's] abilities and whether or not she was capable of covering breaks." Deb Scott has taken on a role as a nurse educator but spends about 50 percent of her time working in the Fast Track section of the emergency department. Marsland had been told Cheryl Durkee that concerns regarding Scott had been brought to emergency room director Amy Mathews on a multiple occasions. Durkee confirmed that the competency of some of the Fast Track nurses to care for the more critically ill patients in the emergency room during breaks was discussed on multiple occasions with the charge nurse, and that she had discussed it with unit manager Kevin Harris.

In this regard, Marsland testified that another nurse, Gayle Peck, who had been out of the work force for many years and who came back to nursing about a year before the hearing, had been floating to the Fast Track section of the emergency room when the unit was shortstaffed. Marsland testified that Peck sometimes—not as frequently as Scott—was assigned to cover

emergency room nurses' breaks, and that her ability to adequately provide break coverage was a subject of conversation among the nurses.

b. The September 24 staff meeting

Mathews holds "bi-weekly" staff meetings with the emergency department staff. Mathews testifies that at the meeting she "expect[s] feedback and I expect for us to talk about certain things in the department. Things that can make it better. Challenges we have." There is "dialogue" between employees and management at every meeting. The subject of breaks has been a topic of a number of meetings.

A staff meeting was held on September 24, 2015, at approximately 7:15 a.m., with the approximately eleven nurses then at work gathering at the charge nurse's station. In addition, a provider, such as a physicians' assistant, would have been in the vicinity of the meeting. However, the meeting was held out of the earshot of patients, according to Mathews. As director of the emergency room, Mathews convened and conducted the meeting.

Mathews began the meeting by talking about the issue of covering lunch breaks. She praised the nurses for taking more of their breaks in the last couple of weeks. She stressed the need for nurses "to take care of one another" and for the nurses to "get out to breaks." Mathews mentioned, as an example, that the day before, nurses from Fast Track, specifically Deb Scott and Gayle Peck, had covered several staff nurses' breaks.

Marsland had previously refused to take a lunch when Deb Scott was assigned to cover his break. Marsland gave a couple of examples where Scott had covered his patients where there were "important things that should have been done that weren't." Marsland testified that the day before this meeting he had a conversation with a nurse uncomfortable with the coverage situation mentioned by Mathews. When the nurse and Marsland met on break in the cafeteria, the other nurse told him that she was "really uncomfortable" because of the nurse covering her patients. This nurse "had several unstable patients. And she was concerned about Deb's capacity to care for those patients."

Hearing Mathews' comments lauding the break coverage provided by Scott and Peck, Marsland blurted out that he was "not comfortable with Deb taking care of my patients, that I didn't think that she was competent to care for critical patients." Marsland said, "You know, if you're going to have nurses cover breaks, they need to be capable of handling critical unstable patients."

Mathews responded, telling Marsland, "I don't think this is the right forum for this to be addressed. If you have concerns you should come see me." Marsland persisted in his comments regarding Scott. Mathews, who testified that she was "trying to move it along" to avoid these kind of statements about another employee, asked Marsland to stop, "I think it was like three times." Marsland went on to make comments about Peck, to whom Mathews had also referred in her earlier comments. Marsland said that Peck, who was new to the floor and had been there only a day or two, "is like a nursing student. And she should not be by herself in Fast Track. She doesn't even know how to mix up a banana bag," which Marsland explained was an IV bag with vitamins "that's probably one of the first things that you learn as an emergency nurse." Mathews told Marsland that "it's inappropriate" and "we need to move on." She said, "That's it. That's enough. This isn't the place. . . . we need to move on." Mathews then switched the topic of the meeting to her next item on the agenda, and that was the end of Marsland's comments.

Marsland's account of the incident was similar. As Marsland put it, Mathews "tried to shut down my comments. And I persisted and she tried to shut it down." Marsland testified that before he stopped talking he said, "we're all aware that there is a complaint within the New York State Department of Labor about breaks at this point. And sooner or later the hospital is going to have to follow the New York State labor law."

Neither Deb Scott nor Gayle Peck was in attendance at the meeting.

However, after rounding, Mathews returned to her office to find the phone ringing. It was Deb Scott, "beside herself," saying that she had heard what had happened at the staff meeting.

c. Marsland is issued a disciplinary warning

Mathews testified that she viewed Marsland's comments as violating the Nursing COC rule, discussed above, prohibiting the criticizing of coworkers or other staff in the presence of others in the workplace. This is because, as Mathews testified, Marsland "was saying in front of a group of a total of 11 people, plus providers that were sitting nearby that this nurse is incompetent. So he wasn't going to take a break." Mathews testified that Marsland was "publicly ridiculing her competence in front of other people. . . . [I]f he had a concern, he should have come and addressed it privately, not . . . openly ridicule her in front of other people that don't know whether its real or not." Mathews testified that she had never previously "disciplined anybody in the past for voicing a legitimate concern. But nobody has voiced a concern that has torn down another person in front of a group of people. . . . [T]hat's not the forum to be tearing somebody else apart. I wouldn't let them do it to him. I wouldn't let them do it to anybody else."

Mathews determined that she would issue discipline to Marsland for the incident. The evidence shows that Mathews consulted with Pedersen, and she says she might have talked also to Crumb about the discipline before it was issued to Marsland. Mathews asked Pedersen in an email, "is there anything more than the code of conduct that we can use with Scott's incident. Does it only get a written verbal for his actions?"

However, in the end, the basis of the discipline was Marsland's COC violation, specifically, according to Mathews, for violating the COC rule against criticizing coworkers or other staff in the presence of others in the workplace. Mathews testified that she took action against Marsland because "I had thought about it and we have a Nursing Code of Conduct and you need to hold everybody to that."

On October 5, 2015, Mathews told Marsland that she needed to talk to him. Marsland told her, "if this is about the Union, I am not going to go talk to you anywhere." Mathews told Marsland, "No, it's not about the Union. It's about what you said during the staff meeting the other day."

Marsland and Mathews then went back to Mathews' office. In the meeting, he was issued a "verbal written warning" for his conduct at the September 24, 2015 meeting. The warning is the first in a multistep disciplinary procedure. The notice cited the following "code of conduct violations":

- Criticizes coworkers or other staff in the presence of others in the workplace or in the presence of patients.
- Publicly shames others

As the "Reason for Counseling" the disciplinary notice stated:

> In the 0715 staff meeting on 09/24/2015 the Emergency Department Team was discussing strategies used to successfully implement lunch breaks during the previous days in the department.
>
> In front of 11 team members during this staff meeting Scott verbally and in a bullying manner criticized ED team member, Deb Scott, who was not present at the meeting. Scott was openly verbalizing that Deb Scott was "not a competent Emergency Department RN to care for his patients"
>
> Scott was instructed that his comments were inappropriate and that the staff meeting was not the forum for such conversation. Scott continued repeatedly in a persistent manner to openly criticize and verbally ridicule Deb Scott regardless of being instructed to stop his behavior. Scott then began to openly criticize another RN, Gail Peck who has just begun cross training in the ED because she needed significant help mixing a patient medication.
>
> **Expectation:**
>
> The expectations are that you will:
>
> • Follow the Nursing Code of Conduct.
> • You will not criticize staff in the presence of others in the workplace.
> • You will not publicly shame others
>
> Failure to comply with the Nursing Code of Conduct and further incidents will result in progression of the disciplinary process. A written copy of the Nursing Code Conduct has been provided to you and is also available via the Maxima eLibrary Policy and Procedure web server.

Reviewing the "Reason for Counseling" portion of the disciplinary notice from the witness stand, Marsland testified that he did not disagree with the factual recitation of what had occurred, except that he did disagree that he acted in a "bullying" manner or that he had "ridiculed" anyone.

The meeting between Marsland and Mathews was recorded by Marsland. The recording and an agreed-to transcript of the recording were admitted into evidence as General Counsel Exhibits 34(a), and (b).

The disciplinary meeting involved, in addition to the issuance of the verbal warning, a candid but respectful exchange of views between two people who had worked together for some time. Mathews, to a large extent, reiterated the same points she made in her testimony: the issue was "talking about somebody outright in front of an open group of people" and that Marsland "continued" when she asked him to stop. Marsland expressed somewhat terse, but straightforward agreement with Mathews' points—although he seemed surprised when Mathews mentioned his comments about Peck, he contended that his comments about Peck were "benign."

However, while he "acknowledged my mistake," he seemed incredulous that it was being treated as a disciplinary event. Marsland told Mathews that "we all know the context of this" and when Mathews asked, the "context of what," Marsland replied, "of the union attempt." Mathews said "it has nothing to do with the union. Marsland said, "I have trouble believing that because you and I have worked together as long as we have, and there have been plenty of things that have come up with me, and this is the first time you're giving me a verbal warning." Mathews reiterated that it had nothing to do with the Union.

Marsland refused to sign the verbal warning disciplinary notice, and argued that the code of conduct was not enforced against many others—and he offered some examples---of people who gossiped and acted inappropriately. Mathews said she was unaware of the examples he was giving. Marsland also argued that the COC, while it is supposed to apply to management, "it's not applied to management": "You know, the reason they finally got rid of that—that bastard who was in the ICU, who was—who violated every single line on that code of conduct. You know, who—who engaged in sexual harassment, who engaged in intimidation"—Mathews told Marsland, "This isn't about Joel."

They talked further, Marsland saying, "I think the message you're telling me, I'm not supposed to use anybody's name in a staff meeting. Pro or con. You just don't want people talking about"—Mathews added, "not when you're talking openly about people in a derogatory sense . . . . in front of other people." Marsland added, "You know, we need—we need to be able to talk to each other, not just me talk to you. Like—I mean, that's part of why we want a union. Like, nurses need to be able to talk to each other, exactly. That's what I'm saying about Deb."

Marsland then gave some specific examples of his concerns about the employee in question, in more detail than he went into in the staff meeting.

On cross-examination Mathews agreed that every month she sends out the results of monthly patient surveys to the entire department—including to doctors, nurses, and aides. These patient surveys include all patient comments, including some that criticize nurses by name.

Analysis

The General Counsel alleges that the Respondent's discipline of Marsland violates Section 8(a)(1) of the Act. More specifically, the General Counsel alleges two independent albeit related theories of violation. First the General Counsel argues that Marsland's discipline is unlawful because it was imposed pursuant to an unlawful rule—i.e., the COC rule against criticizing coworker or staff in front of others. Second the General Counsel argues that, apart from the COC rule, the conduct for which Marsland was disciplined constitutes protected and concerted activity, and therefore disciplining him for it is unlawful. I will consider the second theory first, and then turn to the theory of violation based on the unlawful rule.

The General Counsel alleges that Marsland was disciplined for protected and concerted activity, and that any misconduct he engaged in during the course of that protected activity is insufficient to cause him to lose the Act's protections.

Certainly, the issues of breaks and staffing are at the core of Section 7's concerns, as they are issues "intimately related to the conditions under which the employees worked." *Misericordia Hospital Center*, 246 NLRB 351, 356 (1979), enfd. 623 F.2d 808 (2d Cir. 1980); *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007), enfd. 358 Fed. Appx. 783 (9th Cir. 2009); *Chipolte Mexican Grill*, 364 NLRB No. 72, slip op. at 1 fn. 3 (2016) (petition over breaks protected by Act); *William Beaumont Hospital*, 363 NLRB No. 162, slip op. at 1 fn. 2 (2016).

As a threshold matter, I agree with the General Counsel that in making his comments at the meeting, Marsland was acting in concerted fashion for purposes of the Act. The Respondent argues that Marsland acted alone, and thus, his actions were not concerted and, therefore, not protected. However, the concept of "mutual aid or protection" focuses on the goal of concerted activity; chiefly, whether the employee or employees involved are seeking to "improve terms and

conditions of employment or otherwise improve their lot as employees." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). "[T]he analysis focuses on whether there is a link between the activity and matters concerning the workplace or employees' interests as employees." *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 3 (2014). In this case, at a meeting of employees, Marsland raised an issue that had repeatedly been a subject of previous employee meetings, and that had been repeatedly discussed among the employees themselves and, indeed, had just been raised to Marsland by a coworker the day before, had been the subject of a Department of Labor charge, and was recognized by upper management as "One of the major complaints by staff in the ED." As Marsland so vividly put it: "the discussion of not getting breaks is part of the air that we breathe in at Cayuga Medical Center."

The fact that Marsland was the only employee to respond to Mathews' raising of the subject at an employee meeting does not undercut the concerted nature of Marsland's conduct. As the Board has recently reiterated, "concerted activity includes cases 'where individual employees seek to initiate or to induce or to prepare for group action*, as well as individual employees bringing truly group complaints to the attention of management*.'" *Fresh and Easy Market*, supra at slop op. 3 (emphasis added), quoting *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*), affd. 835 F.2d 1481 (D.C. Cir. 1987). That is what Marsland did. See, *Consumers Power Co*., 282 NLRB 130, 131–132 (1986) (finding that even if employee had acted alone, his individual complaint would have been concerted because it was a continuation of his and his coworkers' earlier concerted complaints raised at the employer's weekly meetings"); *JMC Transport*, 272 NLRB 545 fn. 2 (1984), enfd. 776 F.2d 612 (6th Cir. 1985) (finding an employee's pay protest concerted because it was "a continuation of protected concerted activity" involving a meeting wherein two employees jointly complained to management about wage payments); *Mike Yurosek & Sons, Inc.*, 306 NLRB 1037, 1038 (1992) ("We will find that individual action is concerted where the evidence supports a finding that the concerns expressed by the individual are logical outgrowth of the concerns expressed by the group.").

The Respondent also argues that it did not discipline Marsland for speaking up on the issue of providing employees adequate break coverage, but rather, for his criticism of coworkers and having to be asked, perhaps three times, to stop. However, as far as Board precedent goes, this argument is a red herring. "Where, as here, the conduct at issue arises from protected activity, the Board does not consider such conduct as a separate and independent basis for discipline." *Goya Foods Inc.*, 356 NLRB 476, 477 (2011). The aspect of Marsland's conduct to which the Respondent objects—his persistence in making negative comments about two other employees' performance—was part of the res gestae of Marsland's protected conduct of bringing to Mathews the concerns on the subject of employees taking their breaks. His comments were inextricably linked with and directly related to this oft-discussed and protected subject. Even assuming, arguendo, that Marsland should not have made the comments he made about other employees, even assuming that it constituted misconduct to continue in the face of Mathews' direction for him to stop, the comments were inextricably part of—indeed, they make no sense apart from—Marsland's and the employees well-known concerns about the Hospital having the staffing on hand to enable them to take their breaks.

Given this, the issue is whether Marsland may be subjected to discipline for his actions made in the course of engaging in protected and concerted activity. When an employee is disciplined for conduct that is part of the res gestae of protected concerted activities, "the pertinent question is whether the conduct is sufficiently egregious to remove it from the protection

of the Act." *Stanford Hotel, LLC*, 344 NLRB 558, 558 (2005); *Roemer Industries, Inc.*, 362 NLRB No. 96, slip op. at 6 (2015).[34]

To the extent that Marsland's offense was criticizing coemployees in front of others, his actions cannot reasonably be found to have cost him the protection of the Act. The Board has explained, quoting the Seventh Circuit in *Dreis & Krump Mfg. v. NLRB*, 544 F.2d 320, 329 (7th Cir. 1976), that "the standard for determining whether specified conduct is removed from the protections of the Act [is] as articulated by the Board: communications occurring during the course of otherwise protected activity remain likewise protected unless found to be so violent or of such serious character as to render the employee unfit for further service." *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 204–205 (2007) (internal quotes omitted) (Board bracketing).

In terms of Marsland's criticism of the two other employees, it may have been impolite or more forward and direct than was comfortable. It was not well-received by at least one employee who was not present. But it also must be said that it was nonprofane, and nonthreatening, and did not involve direct confrontation, much less a physical confrontation. Far worse has been found not grounds for losing the protections of the Act.[35]

Of course, this is a hospital, not a factory or a restaurant kitchen. But in full context that also cuts in favor of Marsland, in my view. Most significantly, Marsland was not engaged in criticism in the sense of gossip or lewd demeaning jokes. This was a serious matter about a subject of central concern to management and the employees. In other words, the comments, whatever else they were, were on topic and about a profoundly protected and concerted subject. Indeed, the Hospital routinely circulates to employees, patient survey responses that include criticism of nurses by name. As with the survey responses, with Marsland's comments one cannot, one must not, forget that the employees and the Hospital, in an emergency department no less, are engaged routinely in matters of life and death. The stakes are high and whatever

[34]I note that the mildness or the severity of the discipline is not at issue. Where an employee is engaged in misconduct during the course of protected activity, either he loses the protection of the Act because of the misconduct, and may be disciplined, or he does not and may not be. *Eagle-Picher Industries*, 331 NLRB 169 (2000) (lack of severity of discipline not a determining factor in whether discipline lawful; rejecting judge's reliance on his finding that employer issued only "mild discipline" to employee as factor in finding discipline lawful).

[35]See e.g., *Roemer Industries*, 362 NLRB No. 96, slip op. at 9 (unlawful to discharge employee union griever who calling coemployee a "backstabber"); *Nor-Cal Beverage Co.*, 330 NLRB 610 (2000) (employer violated Section 8(a)(3) by disciplining employee pursuant to antiharassment policy for calling another employee "a scab" to his face during protected activity); *Tillford Contractors*, 317 NLRB 68, 69 (1995) (union steward did not lose protection of the Act for confronting employee over concern that contract was being breached, threatening to file internal union charges against him, and telling him "You've got no goddamn business being here," and "The best thing you could do is get the hell away from us"); *Postal Service*, 250 NLRB 4 (1980) (employer violated the Act by disciplining union griever who called supervisor "stupid ass" during discussion of possible grievance); *Union Carbide Corp.,* 331 NLRB 356, 359–360 (2000) (employee engaged in protected activity did not lose the protection of the Act by calling his supervisor a "f-g liar."); *St. Margaret Mercy Healthcare Centers*, 350 NLRB at 204–205 (nurse did not lose Act's protection by speaking critically with other nurses about newly implemented managerial policies and, in a statement overheard by a supervisor, telling a colleague that management had "not [been] truthful" with employees and that their new evaluation process "was just part of a management ploy").

one thinks of Marsland's comments, they were not of a petty nature or on an unimportant matter, or unrelated to employee terms and conditions of employment.[36]

The point is not that Marsland is right—the merits of his opinion are beside the point and beyond my ken. The point is that if the Act protects emotional, vigorous and robust discussions among employees, and it does,[37] then Marsland's criticisms of employee performance, rooted as they were in the protected and concerted issues of staffing and breaks, must remain protected. Under the circumstances, it is a stretch to accept that they constitute "misconduct" at all.

The other objection to Marsland's comments was rooted in his persistence in making the comments over the objection of Mathews. Viewed as a confrontation with a supervisor, "the proper inquiry in this case is whether [Marsland's] conduct was so egregious to lose the protection of the Act under *Atlantic Steel*." *Public Service Co. of New Mexico*, 364 NLRB No. 86, slip op. at 7 (2016), referencing *Atlantic Steel Co.*, 245 NLRB 814 (1979). "Typically, the Board has applied the *Atlantic Steel* factors to analyze whether direct communications, face-to-face in the workplace, between an employee and a manager or supervisor constituted conduct so opprobrious that the employee lost the protection of the Act." *Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 4 (2014), enfd. 629 Fed. Appx. 33 (2d Cir. 2015).

The first *Atlantic Steel* factor looks to the place of the discussion. In this case, the incident took place at an employee meeting, a meeting where Mathews "expects feedback" and "dialogue." The Board has held that this warrants the first factor weighing in favor of protection. *Datwyler Rubber & Plastics, Inc.*, 350 NLRB 669, 670 (2007) ("With respect to the first factor, the place of the discussion weighs in favor of protection. [The employee's] outburst occurred during an employee meeting, where employees were free to raise workplace issues"). Moreover, while the incident occurred in front of other employees, it was outside the earshot of patients, and did not entail a risk of disruption of production as the employees who could hear were assembled at the meeting. *Datwyler Rubber & Plastics*, supra at 670 (location "would not disrupt the Respondent's work process").

The subject matter of the comments is the second *Atlantic Steel* factor. Here, as discussed above, the subject matter of Marsland's comments was employee coverage so employees could take breaks, and more generally an issue of staffing. This must be considered

[36]This is driven home, in gripping fashion, by some of the incidents shared by Marsland privately with Mathews during his disciplinary meeting, where he elaborated on his concerns in far more detail than he did at the group meeting. See, GC Exh. 34(b) at 9–11.

[37]"Labor relations often involve heated disputes likely to engender ill feelings and strong responses. Accordingly, an employee's right to engage in concerted activity permit[s] some leeway for impulsive behavior." *Iovan Health Systems v. NLRB*, 795 F.3d 68, 86 (D.C. Cir. 2015) (internal citations omitted) (court's brackets); *Consolidated Diesel Co. v. NLRB*, 263 F.3d 345, 354 (4th Cir. 2001) ("There would be nothing left of § 7 rights if every time employees exercised them in a way that was somehow offensive to someone, they were subject to coercive proceedings"); *Blue Chip Casino, LLC*, 341 NLRB 548, 555 (2004) ("The Act designs a system where . . . it is necessary that discussion among employees and attempts to persuade be robust and vigorous. A necessary consequence of such robust discussion is that some employees may feel annoyed or otherwise upset by the efforts to persuade them. But employees may have to endure some level of annoyance if the Act's goals are to be achieved").

a subject at the heart of the Act's protection and indeed, the subject was addressed at the meeting in response to management raising the subject.

The third *Atlantic Steel* factor is the nature of the outburst. In this regard Marsland's offending conduct was to continue to talk about the issue, and more specifically to continue his criticism of two other employees, after Mathews repeatedly told him to stop, or, as Marsland put it "tried to shut down my comments." While I fully agree that an employee does not have the right to take over or disrupt a staff meeting, and while Marsland might have been "out of line" to persist over Mathews objections, I find that his actions fall far short of the type of "opprobrious conduct" (*Atlantic Steel*, 245 NLRB at 816) that would weigh against continued protection of the Act. The Board distinguishes between true insubordination and behavior that is only disrespectful, rude and defiant. At most, Marsland's was the latter. *Goya Foods, Inc.*, 356 NLRB at 478 (employee who initially refused supervisor's instruction to punch out and go home but then complied, was found to have engaged in disrespectful, rude, and defiant behavior, and thus, to fall under the Act's protection). Unlike so many "*Atlantic Steel*" cases, Marsland's conduct involved no profanity, no threats—there is not even evidence of yelling. Moreover, it is of significance to assessing the scope of disruption represented by Marsland's comment that this was a meeting where Mathews "expect[s] feedback" and gets it "every staff meeting." The meetings are designed for employees to weigh in. Thus, if Marsland went too far and ignored the directive to cease his commenting, it was in the context of a meeting where employees were encouraged to speak up. Thus, Marsland's offense was not raising the issue but rather, not cutting off his commentary immediately as directed. Moreover, it is clear from Mathews' testimony, the disciplinary meeting, and the write-up of the discipline, that the weight of Mathews' concern and decision to discipline Marsland was his criticism of coemployees and their ability to safely cover breaks. Marsland's unwillingness to stop speaking when told to, played a minor role in this disciplinary event. And as discussed above, the criticism of coemployees, where, as here, it was firmly rooted in a subject directly related to employee terms and conditions of employment, is protected activity. In other word, when you remove the protected subject matter from the equation, you are left with an offense of continuing to address a legitimate subject after being told to stop, a portion of the offense that even Mathews did not emphasize. I am sure that if he had not criticized coworkers, there would be no issue at all. There was no estimate given for how long after Mathews asked him to stop that Marsland continued, but based on all the testimony it was not an extended event, perhaps a minute, perhaps two. His continuing to speak after Mathews asked him not to, has all the earmarks of an impulsive and not premeditated event, another factor weighing in favor of continued protection under the Act. *Kiewit Power Constructors, Co.*, 355 NLRB 708, 710 (2010) (observing that the employee's conduct consisted of a brief, verbal outburst in finding factor weighed in favor of protection), enfd. 652 F.3d 22 (D.C. Cir. 2011); *Kingsbury, Inc*., 355 NLRB 1195, 1204 (2010) ("A line must be drawn between situations where employees exceed the bounds of lawful conduct in a moment of exuberance or in a manner not activated by improper motives and those flagrant cases in which misconduct is violent or of such serious character as to render the employees unfit for further service") (internal quotations omitted).

Finally, the fourth *Atlantic Steel* factor cuts against protection. There was no unfair labor practice by the employer that provoked the outburst.

In sum, there is one *Atlantic Steel* factor, the fourth, that weighs against protection of the Act. Three *Atlantic Steel* factors weigh in favor of protection. This suggests that Marsland's conduct remain protected. See *Noble Metal Processing, Inc*., 346 NLRB 795, 795 fn. 2 (2006) (lack of provocation "clearly outweighed by the initial three factors" which weighed in favor of continued protection of Act).

Having said that, the Board properly rejects the concept "that the final outcome is determined simply by counting the number of factors favoring and disfavoring protection." *Tampa Tribune*, 351 NLRB 1324, 1327 fn. 19 (2007), enft. denied on other grounds, 560 F.3d 181 (4th Cir. 2009). See, *Trus Joist MacMillan*, 341 NLRB 369, 371–372 (2004) (Board has found that the severe nature-of-the-outburst factor alone may carry enough weight to cause forfeiture of the Act's protection). Apart from counting of the factors, I find that the second and third factor most strongly weigh in favor of the protection of the Act. The subject is central to the purpose of the Act. The misconduct is slight, for all the reasons stated. In sum, I believe it would be unprecedented—completely unmoored from precedent—for the Board to find that in these circumstances Marsland has lost the protection of the Act. I am unaware of any case in which such a brief, nonthreatening, nonprofane incident led to the loss of the Act's protection. Applying *Atlantic Steel*, *I* would find that Marsland did not lose the protection of the Act.

Accordingly, I find that Marsland was disciplined for conduct engaged in during the course of protected and concerted activity. His comments and actions in the course of this protected activity do not warrant loss of the Act's protections. His discipline violated Section 8(a)(1) of the Act.

Although that ends the matter, I note that the General Counsel's other theory of liability—that Marsland was unlawfully disciplined under an unlawful rule—has also been proven. The Board holds that,

> discipline imposed pursuant to an unlawfully overbroad rule violates the Act in those situations in which an employee violated the rule by (1) engaging in protected conduct or (2) engaging in conduct that otherwise implicates the concerns underlying Section 7 of the Act.

Continental Group, Inc., 357 NLRB 409, 411–414 (2011), clarifying standard set forth in *Double Eagle Hotel & Casino*, 341 NLRB 112, 112 fn. 3 (2004), enfd. 414 F.3d 1249 (10th Cir. 2005).

Even when it has been shown that the employee violated the rule by engaging in protected conduct or conduct that otherwise implicates Section 7 concerns, Board precedent provides that the employer has an affirmative defense available to it to avoid liability:

> Nevertheless, an employer will avoid liability for discipline imposed pursuant to an overbroad rule if it can establish that the employee's conduct actually interfered with the employee's own work or that of other employees or otherwise actually interfered with the employer's operations, and that the interference, rather than the violation of the rule, was the reason for the discipline. It is the employer's burden, not only to assert this affirmative defense, but also to establish that the employee's interference with production or operations was the actual reason for the discipline.

Continental Group, 357 NLRB at 412.

Given this standard, there can be no question but that the discipline of Marsland violated the Act. As I have found, supra, the rule which Marsland was disciplined for violating unlawfully overbroad. I have found that Marsland was disciplined under the rule by engaging in protected activity, as required by prong 1 of the *Continental Group* theory of liability. Even assuming, arguendo, that Marsland's conduct was not protected, his actions "otherwise implicate" Section 7 concerns—the issue was breaks and staffing---and accordingly, use of the overbroad rule to

discipline Marsland would violate prong 2 of *Continental Group*. The Respondent has not asserted an affirmative defense, as required by *Continental Group*. Moreover, given that the incident occurred during a staff meeting, any effort to show that Marsland's conduct "actually interfered with [Marsland's] own work" would be unavailing, as would any effort to "establish that the employee's interference with production or operations was the actual reason for the discipline." 357 NLRB at 412. Accordingly, I find that Marsland's was unlawfully disciplined under an unlawfully broad rule, in violation of Section 8(a)(1).

G. Complaint paragraph XII and IX (Marshall's suspension, warning, demotion, adverse evaluation, and confidentiality of disciplinary meeting)

1. Complaint paragraph XII(a)

a. Team leaders, charge nurses, and the ICU

As discussed, Anne Marshall was a nurse in the hospital's intensive care unit (ICU). Marshall began at the Hospital in 2007 as a per-diem employee. In 2011, she became a full-time staff nurse. Soon thereafter she became a charge nurse in ICU. In August 2013, she became a team leader. Until her suspension on June 26, 2015, Marshall had an unblemished disciplinary record, and an unbroken record of superlative annual personnel reviews dating back to the first annual review in May 2008, issued after her hire in 2007.

The team leader role was created in ICU in 2011. Nurses interested in the position applied through an internal application process. Christine Mancelli was a team leader and charge nurse, along with Marshall, in the ICU from 2011 when the position was first established until she resigned in October 2015. Mancelli testified that from the inception of the team leader position efforts were made through meetings, discussions, and draft documents, to establish the parameters of responsibilities and duties for employees in this new leadership role. However the Hospital "never seemed to be able to get anything formalized." Rough drafts of a job description were discussed but never adopted. As Mancelli testified, "we worked very hard to establish a specific job role, duty, and expectation list or some type of policy. And we were never able to get that. And there was a whole lot of responsibility and accountability for the job with no clear guidelines and formal description of duties."

Despite the lack of formal job description, in practice both team leader and charge nurse are "lead" positions with significant responsibility for daily operations including patient flow, leadership of other staff nurses, interface with other department charge nurses at twice-a-day inter-departmental bed meetings, oversight of nurse-to-patient assignments, unit admissions and discharges, and other responsibilities beyond direct patient care. Charge nurses and team leaders also played an active role in staffing, anticipating "holes" in the schedule and contacting off-work nurses in an effort to have them come in work as needed. Team leaders have some responsibility for quality assurance and payroll functions that charge leaders do not typically have.[38]

[38]As Marshall explained it, "Every team leader is a charge nurse, but not every charge nurse is a team leader."

Many of these responsibilities overlap with responsibilities of unit and departmental heads. The departmental directors also have staffing responsibility and are the final departmental authority. They ultimately oversee the department, from budgeting to discipline, and serve as the liaison between the hospital's administration and the unit.

Among the nurses, the team leader is in charge when he or she is working, but sometimes a charge nurse is used when there are no team leaders. However, it is also accurate that formally the nurses report to the department director, not to the team leader.

The role of the team leader changes with changes in the department director. As Mancelli testified, particularly in the ICU, which had a series of interim directors beginning in April 2015, each director has "a different management style, a different idea of how things should be run and how things should flow, and kind of the expectations of us and other nurses."

The hospital's ICU has 16 beds. As the name "intensive care unit" suggests, the Hospital's most acutely sick patients are assigned to ICU. Staffing ratios are necessarily low in ICU: typically two patients to one nurse, although sometimes one nurse to one patient is necessary for some critically ill patients. Approximately 20–25 nurses work in the ICU. The standard schedule is three 12-hour shifts per week. Up to six nurses work per 12-hour shift.

Staffing and the nurse-to-patient ratio were signal issues in the union drive. Specifically, ICU nurse Mancelli, testified that "we frequently almost chronically function with not enough nurses to the patient ratio." Within certain guidelines, nurses self-schedule for their shifts. However, once the schedule is completed and approved and posted by the director, there are almost always unfilled slots in the schedule. Off-duty nurses are regularly telephoned or texted and asked to come in to work beyond their standard scheduled hours. The issue of staffing, and the need to "fill holes" in the schedule by calling in nurses is a subject well known to the nurses and managers in the ICU department. Marshall testified that as team leader and charge nurse she (and other team leaders and charge nurses) would spend time, multiple times a week, contacting nurses to come in on days where the schedule had unfilled slots and the number and acuity of patients warranted more nurses at work. Calls are made days in advance and as little as four hours before a shift that needs to be filled. Sometimes directors offer nurses incentives to work additional hours to fill scheduling holes. Team leaders do not have authority to offer such financial incentives. Perhaps for this reason, Mancelli's view was that directors had more success at convincing nurses to come in and fill shifts than the team leaders.

Mancelli testified that as a team leader she has made calls to fill holes and also that she received calls from the director and from the other team leader, Marshall, seeking to have her come in to work. Marshall has called or texted Mancelli to fill holes multiple times when Marshall was team leader. Mancelli estimated she received calls/texts from Marshall asking her to fill in once or twice a week. During these same times that she received calls from Marshall she also received calls from the director, and occasionally from the unit secretary.

b. Marshall's June 26 suspension

As referenced above, Marshall was active in the union campaign, a fact known to management no later than April 2015. She was known to be a source of the prounion postings appearing in the hospital, and, as discussed above, management engaged in and condoned among employees a concerted and aggressive countereffort to remove postings that were put up

by Marshall and others. Marshall testified that her position as team leader helped her with her union activity:

> I was seen as a leader. I was visible. I was at the bed meeting with all charge nurses from the other units twice a day. And also I was able to travel to all different parts of the hospital to see people on different units.

As also referenced above, Marshall's relationship with the new ICU interim director, Joel Brown deteriorated within a few weeks of his arrival in early April. This was, as discussed above, in part explicitly related to her union activities, in part related to Marshall's bringing to Brown the concerns of other nurses about the Marilyn Manson song he played for the nurses, which resulted in complaints to management and a sexual harassment charge filed by Marshall with the state. Indeed, it is hard to separate out Marshall's union activity from other sources for the mutual dislike between Brown and Marshall. But clearly union activity was a large part of the issue, and the matter of Marshall's union activity was a source of complaint by Brown to upper management. By June 2, Pedersen was asking Brown for "some specifics regarding Anne that I can share with Ray"[39] Brown responded:

> Asking people to not follow my leadership regarding evaluation, scheduling and telling them that 'we are trying to get him fired.'
>
> While on shift and in a leadership position she continues to post, call and have conversations bout unionization. She is also rude to those that are loyal to CM and to any leadership that she come[s] in contact with (i.e., Cindy Williams, Cynthia Sullivan, and Ms. Barr.)

Complaints about Marshall's union activity were also forwarded to Pedersen by Brown on June 19—this note originally went to Crumb and Brown from a PICC nurse, Cynthia Sullivan. Brown also forwarded a second note to Pedersen on June 19, apologizing for Marshall's union activity, and stating: "Seems that Ms. Marshall really ramps up when I am away. I apologize for her behavior."

On June 26, Marshall was called into a meeting with Crumb, Brown, and Ogundele, sometime between 2 p.m. and 3 p.m., and told that she was being suspended for the remainder of the shift and the next day's shift.

According to Crumb, the problems with Marshall leading to the disciplinary action began on Wednesday, June 24. There was a problem that day when there was a delay getting an ICU nurse to take over from the cardiac department nurse for a patient transferred from the cardiac department into ICU.[40] Jessica Miller, the head of the cardiac department, testified that she could not say that the delay was directly Marshall's fault, but that it was an interaction that took place under Marshall's leadership.

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[39]Ray is not identified on the record but is likely the Hospital's labor attorney, Raymond Pascucci.

[40]Formally, the entity I refer to as the cardiac department is called the Cayuga Heart Institute, which is a part of CMC. The record does not speak to the precise relationship between the entities.

Miller also described another incident later that day. A dispute about whether ICU or the heart department personnel would remove a patient's sheath led Miller to go to the ICU to resolve the issue. While there, House Supervisor Cindy Brown asked Marshall about the staffing problem in ICU. According to Miller, Marshall told Brown, "Nobody's coming," and, asked by Brown who she had called, Marshall said "nobody." This is what Miller wrote in a June 25 email to Joel Brown complaining about Marshall. However, it is notable that Cindy Brown's June 24 email to Joel Brown, copying Crumb, complaining about this very same incident *does not* state that Marshall told Brown that she did not call anyone. To the contrary, Cindy Brown's email states that Marshall told her that "all calls had been made and emails sent no one is coming." (R. Exh. 7). There is nothing in Cindy Brown's email indicating that Marshall said that she had made no phone calls.[41]

Later, as the staffing problems continued, Marshall was accused by various supervisors of being "disrespectful" and "confrontational" and other such inappropriate reactions. In particular, House Supervisor Cindy Brown urged in an email "severe consequences" for Marshall's refusal—with Marshall citing safety concerns relating to staffing—to accept a directive from Joel Brown that three patients be assigned to one nurse in order to free ICU staff to take further patients.

More generally, in her testimony Miller complained about Marshall, testifying that "just in general," the cardiac department staff has had "a more challenging time interacting with the ICU under [Marshall's] leadership versus any other team leader." Miller dated the "increasingly more challenging" interactions with Marshall to "maybe two months prior" to these late June incidents.

On Friday June 26, in the early afternoon, Marshall was accused of misstating whether she had phoned people to come in to relieve the staff problems. Crumb testified that Ogundele, the house supervisor, told her that Marshall had told her [Ogundele] that Marshall said she made phone calls to try to shore up staffing, but that later admitted to Joel Brown that she did not actually call anyone. According to the email (R. Exh. 3) Ogundele sent to Brown at 1:38 p.m. (copied to Crumb, Nohelty, and Pedersen), Ogundele came to ICU after a 12:30 p.m. call from Marshall concerned about upcoming staffing levels at 3 p.m. During the call Ogundele asked Marshall "if there was anyone that she can call[ ] in for overtime she said she called everyone and no one called back." Ogundele came to ICU where she, Marshall, and Brown, stood together in front of the board in ICU listing patients and staff, and Marshall and Brown bickered about staffing. Brown went to his office to call a nurse (Goldsmith) to see if he would come in that evening, and the nurse said he would. "Joel then asked Anne to give him the names of the nurses she had called so that he doesn't have to call them again, then she said she did not call anyone after she told me she called everyone."[42]

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[41]Cindy Brown's email indicates that "Jess [Miller] the cath lab manager was present along with Cynthia Sullivan witnessing this conversation." Neither Cindy Brown nor Sullivan testified. Crumb claimed in her testimony that she talked to Cindy Brown about the incident and Brown reported that Marshall "had told us that she had made phone calls to bring staff in when, in actuality, she had not." As referenced above, the contemporaneous email from Cindy Brown does not state this. Contrary to Crumb's testimony, there is no evidence that she was told by Brown that on June 24, that Marshall misstated whether she had called staff.

[42]I note that at trial, Ogundele told the story differently, and the trial version included numerous internal discrepancies as well as discrepancies with her pretrial affidavit, sworn to on September 8, 2015, where she indicated that these events took place much later in the day, and

Brown also called Crumb to discuss the issue with her. According to the email (R. Exh 12) Brown sent to Nohelty and Pedersen, copied to Crumb, at 1:25 p.m. June 26, Brown contacted Ogundele and told her to come to the ICU to assist with the staffing problem that Marshall had just advised him about. According to Brown's email, in front of Ogundele, Brown and Marshall had a testy exchange about whether a particular nurse was considering calling off sick and whether Marshall would be calling her again to find out if she was, in fact coming in. Brown's email stated that Ogundele had "earlier asked if calls had been made and [Marshall] had told her that she had called." Brown then advised Ogundele that an emergency bed meeting was needed, and then Brown contacted Crumb to request an emergency bed meeting. At that point, according to Brown, before the emergency bed meeting and before he went into his office to call a nurse, Scott Goldsmith to come in, Marshall stated "that she did not make any calls."[43]

Notwithstanding the discrepancies regarding events, after Brown and Ogundele sent their emails, Marshall was suspended within about an hour or an hour and a half. But the record and timing is murky. Pedersen admitted that the decision to suspend Marshall was made in a meeting he attended on June 26, although he said that he did not make the decision. He testified that the CEO of the Hospital, John Rudd was also in attendance, "and involved in the conversation." In addition, the Medical Director and Vice President of Nursing was at the meeting. It is unclear when this meeting took place, and given the time line of events, it is a little mysterious. No testimony about this meeting appears in the record.[44]

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that Brown—not Ogundele—had first asked Marshall if she had called nurses to come in, and did so while the three stood at the board. According to the affidavit, after Brown left to call the nurse to come in, he returned and asked Marshall who she had called and Marshall then said she had not called anyone. Ogundele's affidavit also stated that she was summoned to the meeting at which Marshall was suspended just ten minutes after the encounter with Brown and Marshall. Her trial testimony was different still. She first testified that the encounter with Marshall happened after the 2 p.m. bed meeting, and that Marshall told Brown that she had called everyone but a few minutes later told Brown "I didn't call anybody." She added while standing at the Board with Brown that Marshall twice said that "it's not my job." However, when presented with the 1:38 p.m. email, Ogundele corrected her testimony to say that she received a call from Marshall around 12:30 p.m., and that there was an emergency bed meeting around 1 p.m. to discuss the staffing problems where Marshall stated (allegedly in front of Crumb and other managers) that she had called all the nurses and no one was willing to come in. According to Ogundele, the incident where Marshall then told Brown she had not called any nurses occurred after that.

[43]In his testimony, Brown testified that he (not Ogundele as stated in his June 26 email) asked Marshall if she had made calls to shore up staffing "and she assured me that she did. That calls had been made and she sent texts and emails and no one had responded to her." According to Brown, after he called a nurse and got him to come in—offering to make him charge nurse for the shift—the nurse told Brown he had not been contacted before. According to Brown's testimony, Brown went out to the desk with Ogundele and Marshall and asked Marshall who she had called so that he would not duplicate calls—and Marshall told him she did not make calls.

[44]As noted, above, I generally found Pedersen to be a credible witness. A possible exception is this suspension-decision meeting. I find it hard to believe that it occurred on June 26, in the midst of a busy day and just hours or even minutes after Crumb learned of Marshall's incident with Brown and Ogundele. In any event, as discussed below, the Respondent has offered almost no evidence on this meeting.

Crumb testified that she made the decision to suspend Marshall. She admitted conferring with Nohelty and Pedersen—Nohelty to "let her know what was going on and for [Pedersen] to be sure that were following the disciplinary process appropriately." Crumb did not mention attending a meeting where the decision was made, although that is possibly what was meant by "confer." She did not mention "conferring" with the CEO or the Medical Director.

As noted, this was Marshall's first disciplinary action in her employment with the Hospital. Up to this date, her annual evaluations had been exemplary. Crumb testified that the employer's general practice with respect to disciplinary action is "a progressive process." According to Crumb:

> Usually there's a verbal warning that can be presented in writing as a verbal warning; then a written warning; then suspension -- and that can be various lengths of time – and then termination.

Marshall's suspension ignored this "usual" process.

Sometime between 2 and 3 p.m. that afternoon Marshall was called into the ICU conference room for a meeting with Crumb, Joel Brown and Ogundele. Crumb told Marshall that someone had told her that Marshall had not made phone calls to bring in staff that she had previously indicated she had made. Marshall told Crumb and Brown that "I did make phone calls." She told them "I did not call every single person on the list but that I did make calls. And that they were aware that there were holes in the schedule."

Marshall was told that she was suspended for the remainder of the shift (approximately four hours, from 3 PM to 7 PM and for the next day (Saturday 7 a.m. to 7 p.m. shift). Marshall left at about 3 p.m., Friday and served her suspension for the remainder of the day and for the Saturday shift. Her first scheduled day back to work was Wednesday July 1.

Marshall met with Crumb and Brown again on July 1. As in the suspension meeting of the previous Friday June 26, Crumb did most of the talking. Crumb began stating that "we wanted to get back together . . . to talk about what your plans are to be successful in charge nurse role." Marshall pointed out that in eight years, "I've had excellent evaluations. . . . I've been promoted. I've never had a disciplinary action. . . . And I take care of my patients and the staff to my best ability."

Crumb told Marshall her concern was that Marshall told "your director or our house supervisor that your role that day that you were too busy in order to make phone calls." Marshall responded, "I did make phone calls that day. . . . I stated to Cindy Brown that I had made phone calls and that nobody was coming. She was aware of it. I had said it in the morning in the bed meeting. Chrissy brought it up to Joel Tuesday, before that day. I made calls. . . . I made as many calls as I possibly could while taking care of patients."

In the face of Marshall's insistence that she made calls, Crumb said, "Well, well, all I know is that the information that I got from an outside employee outside of ICU, said that there was a conversation that she heard you say, no, I did not make any calls."

Marshall said, "Well, that's not what I said. I did make calls. . . . I even came in on Thursday evening, on my own time, to make sure there would be enough staff for Friday morning, and that calls were made." Marshall reiterated this, and stated that there were only so many calls

that she can make if she is to take care of patients too. Crumb said, "Well, obviously there was a big communication . . . . issue here. So going forward, my expectation would be that you will communicate with your director or the house supervisor."

Crumb then turned the conversation to Marshall's demeanor, telling her that "there are times where you—you come across kind of, I don't know what the right word is, Ann, but I don't want to say 'antagonistic' but that's what it feels like sometimes." Marshall said she was "sorry that's people's interpretation. That's not how it's meant to sound." Crumb said that "we're not working well together as a team" and "the more we can stick to the code of conduct . . . all of us, the better off that we're going to be." Marshall agreed with these sentiments.

They then talked about the procedure for filling "holes" in the schedule, and Crumb agreed ("That's fair") with Marshall's statement that "It's not just my responsibility or any other team leaders' responsibility to make sure they're filled. Everybody has to make sure they're filled." Brown expressed agreement with this. ("Absolutely"). Crumb and Marshall talked about the challenges of "filling holes" in the schedule, and that calls can be made even before the schedules come out. But Crumb directed the conversation back to "collegiality" and suggested that Marshall's tone in bed meetings when she told others at the meeting that additional patients could not be taken at ICU was "not helpful." Marshall replied that at the bed meetings she says "this is where we are, I can take this many more until I have more staff." Crumb said, "I just really would appreciate if we could work closer together . . . as a team. And not against each other." Marshall agreed with this. ("Absolutely"). Asked if he had "any other expectations" for Marshall, Brown said, "Just the code of conduct . . . . And the professional demeanor. Me and you, you know, we seem to be at odds; we need to be seen as a cohesive team." Marshall agreed with this. The meeting turned to immediate scheduling issues that needed to be handled, and the meeting ended soon after.

On July 8, Crumb met with Marshall regarding the June 26–27 suspension. Crumb asked Marshall why she felt that the suspension "should be lifted." Marshall said that in the July 1 meeting Crumb had "said that it was a miscommunication" and Marshall did not think a miscommunication warranted a suspension. Crumb denied using that term and said that "I think that the issues that we talked about were not only the issue of finding staffing" but also "that you stated that you made phone calls." Crumb told Marshall that "you admitted to three different people that you had not made phone calls." Marshall denied that she admitted this. She said, "And people will tell you I made phone calls. They will tell you that I called them. Did I call every single person on the list. No." Crumb responded, "That's where . . . I may have said 'miscommunication." That you did not make it clear that you had not made calls to everyone, because that's . . . what they heard." But Crumb added, "but that's not the only thing that was concerning. . . . [Y]our behavior throughout the whole process. You know, you were confrontational. You were less than helpful in problem solving." Marshall disagreed, stating that she had "brought up numerous times that we had staffing holes. I had made calls. I came in on my day off to make calls to make sure the next day was completely staffed. . . . So I don't know what more I can do. We put out that schedule. Joel approved it. He knew days ahead that we were in a crisis as far as staffing. He let five day people go on vacation at the same time. That's crazy. So there's nobody to call if they're not working." Crumb agreed that all the vacations were "[n]ot helpful" but stated, "I believe that your approach and your less than professional conduct are more the reason why that you were suspended." Marshall disagreed, contending that Browns' scheduling had led to the staffing crisis, and indicating that "nothing's fixed. Tomorrow there's no charge nurse and there's four nurses off."

Crumb said, "Okay. Well, I'm going to uphold the suspension. I believe your behavior was inappropriate at times, confrontational, and disrespectful." Marshall said she disagreed. Crumb said, "you can disagree. Going forward, we looked at talking about upholding the code of conduct, like we discussed it at the team leader meeting." Crumb then produced a letter documenting the suspension. The letter was dated July 1, and stated, in part:

> This memo will confirm our decision to suspend you without pay for your scheduled shifts on Friday June 25 and Saturday June 27 due to your performance as a Team Leader and Charge Nurse, where your actions regarding placement of patients in the ICCU was not appropriate. In addition, your interactions with other staff members was not professional and you purposely were not truthful regarding the contact other staff members to determine availability

Marshall wrote a note at the bottom indicating she did not agree with the document.

Analysis

The General Counsel alleges that Marshall's June 26 suspension was unlawful. In her brief, counsel for the General Counsel alleges, first, that the suspension was unlawful because it was based on unlawfully overbroad rules. However, that allegation is not contained in the complaint—indeed, while it is alleged in the complaint as to other actions taken against Marshall, it is specifically omitted as to the suspension. See, complaint paragraph XII(g), as amended by the notices of intent to amend (GC Exh. 1(r) and ALJ Exh. 2 and Tr. 9–16), omitting complaint paragraph XII(a) from reference in complaint paragraph XII(g) and XIII. Hence, I do not consider that argument.

The complaint does allege, as also argued by the counsel for the General Counsel, that Marshall's suspension constituted unlawful antiunion discrimination in violation of Section 8(a)(3) of the Act. See, complaint paragraphs XII(a), (g) and XIV. I turn now to that argument.

The Supreme Court-approved analysis in 8(a)(1) and (3) cases turning on employer motivation was established in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395, (1983) (approving *Wright Line* analysis).

The *Wright Line* test, while applicable to pretext cases in which the employer has no legitimate motive for the action taken against an employee, was chiefly adopted as a mode of analysis in the "dual motive situation where the legitimate interests of the parties most plainly conflict." Id. at 1083:

> In such cases, the discipline decision involves two factors. The first is a legitimate business reason. The second reason, however, is not a legitimate business reason but is instead the employer's reaction to its employees' engaging in union or other protected activities. This latter motive, of course, runs afoul of Section 8(a)(3) of the Act. [Id.].

In *Wright Line*, the Board determined that the General Counsel carries his burden by persuading by a preponderance of the evidence that employee protected conduct was a motivating factor (in whole or in part) for the employer's adverse employment action. Proof of such unlawful motivation can be based on direct evidence or can be inferred from circumstantial

evidence based on the record as a whole. *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004), enfd. 184 Fed. Appx. 476 (6th Cir. 2006); *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003).

Under the *Wright Line* framework, as subsequently developed by the Board, the elements required in order for the General Counsel to satisfy its burden to show that an employee's protected activity was a motivating factor in an employer's adverse action, "are union or protected concerted activity, employer knowledge of that activity, and union animus on the part of the employer." *Adams & Associates, Inc.*, 363 NLRB No. 193, slip op. at 6 (2016); *Libertyville Toyota*, 360 NLRB No. 141, slip op. at 4 (2014); enfd. 801 F.3d 767 (7th Cir. 2015).

Such showing proves a violation of the Act subject to the following affirmative defense: the employer, even if it fails to meet or neutralize the General Counsel's showing, can avoid the finding that it violated the Act by "demonstrat[ing] that the same action would have taken place in the absence of the protected conduct." *Wright Line*, supra at 1089. For the employer to meet its *Wright Line* burden, it is not sufficient for the employer simply to produce a legitimate basis for the adverse employment action or to show that the legitimate reason factored into its decision. *T. Steele Construction, Inc.*, 348 NLRB 1173, 1184 (2006). Rather, it "must persuade that the action would have taken place absent protected conduct by a preponderance of the evidence." *Weldun Int'l Inc.*, 321 NLRB 733 (1996) (internal quotations omitted), enfd. in relevant part 165 F.3d 28 (6th Cir. 1998). See *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983) (approving *Wright Line* and rejecting employer's claim that its burden in making out an affirmative defense is met by demonstration of a legitimate basis for the adverse employment action).

If the employer fails to prove that the same action would have taken place in the absence of protected activity, then the General Counsel's initial showing that unlawful motive was a part of the reason for the adverse action proves the violation. In such cases, the Board will not weigh the relative quantity or force of the unlawful motive compared to the lawful motive: the violation is established if the employer fails to prove it would have taken the action in the absence of protected activity.[45]

Applying *Wright Line* to Marshall's June 26 suspension, the General Counsel's prima facie case is easily met. Marshall was a vigorous and open supporter of the union drive at the Hospital. The Respondent's knowledge of this is not in doubt. She was identified as "a ringleader" by management as of May 8, and her activities were reported to management, and indeed, a report on her activities was solicited on June 2, and the response included reference to her union activities. The Respondent's knowledge of Marshall's union activity is not a disputed issue in this litigation. See, R. Br. at 24; Tr. at 161.

[45]As the Board explained in *Wright Line*:

> in those instances where, after all the evidence has been submitted, the employer has been unable to carry its burden, we will not seek to quantitatively analyze the effect of the unlawful cause once it has been found. It is enough that the employees' protected activities are causally related to the employer action which is the basis of the complaint. Whether that "cause" was the straw that broke the camel's back or a bullet between the eyes, if it were enough to determine events, it is enough to come within the proscription of the Act.

Wright Line, supra at 1089 fn. 14.

Finally, the element of union animus on the part of the employer is firmly established. I note that in evaluating the element of union animus in the *Wright Line* test, the Board holds that it is unnecessary for the General Counsel to make a "showing of a 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." *Libertyville Toyota*, 360 NLRB No. 141, slip op. at 4, fn. 10; *Adams & Associates, Inc.*, 363 NLRB No. 193, slip op. at 6 ("we emphasize that such a showing is not required"). However, in this case, there is significant evidence of animus directed like a laser on Marshall and her union and protected activities.

Marshall's extensive posting of union materials in the hospital and distribution of union materials in the break room were met with a vigorous, concerted, and unlawful effort to remove that literature. Crumb rallied employees and managers with the admonition: ""They have the right to put up and we have the right to take down"—this was in direct response to a report of Marshall's union activity. Brown took down Marshall's postings as many as four times a day and he testified that he turned in the confiscated union materials to the HR office. Moreover, Marshall was personally threatened—told that management knew she was the "ringleader" of the union movement and threatened that if she did not stop, the HR department would get involved.

In addition to this documented animus, there are additional suspicious features surrounding the suspension that raise an inference of discrimination under the circumstances. For one thing the process of deciding on the suspension was unusually hasty, and shrouded from view. Crumb testified that she made the decision to suspend Marshall. However, Pedersen testified that the decision was made in a meeting he attended on June 26 where the Medical Director and the Vice President of Nursing and the CEO were present. According to Pedersen, the CEO of the Hospital was there and "involved in the conversation." The involvement of these people in a disciplinary decision is itself, unusual, as Pedersen's testimony made clear.

While we have no details about what was discussed at this meeting, or when on June 26, it was conducted, what is clear is that if the story is true then in the middle of a hectic day otherwise devoted to a staffing crisis in the ICU, this group of top administrators found time to meet and in that meeting to make a decision to suspend Marshall. Marshall's encounter with Brown and Ogundele occurred sometime between 1 p.m. and after 2 p.m., depending on which of the conflicting management testimony is accurate. In between the staffing crisis in ICU, the emergency bed meeting, the regular bed meeting at 2 p.m., time was made to make a decision to suspend Marshall, and this news was delivered to her in a meeting with Crumb, Ogundele, and Brown sometime before 3 p.m. Alternatively, as I suspect is possible, the decision to suspend Marshall was made earlier in the week, and the meeting of June 26, merely confirmatory, the incident on June 26, seized upon to justify a decision already made.

Importantly, the resort to suspension for an employee who had no prior disciplinary record is—we know from Crumb—"unusual" and at odds with normal practice. Crumb testified that the employer's general practice with respect to disciplinary action is "a progressive process." According to Crumb:

> Usually there's a verbal warning that can be presented in writing as a verbal warning; then a written warning; then suspension -- and that can be various lengths of time – and then termination.

As noted, before the suspension Marshall had an unblemished disciplinary record, and as discussed below, an unbroken record of superlative annual reviews. For reasons unexplained, in

Marshall's case the disciplinary process began with suspension. The Respondent did not follow its "usual" process with regard to Marshall's initial discipline. Of course, the Respondent is not bound by any progressive discipline system, but it offered no explanation (credible or otherwise) for ignoring the "usual" process here. This unexplained failure to abide by the progressive discipline is a factor raising an inference of discriminatory treatment under the circumstances. *AdvoServ of New Jersey*, 363 NLRB No. 143, slip op. at 33 (2016).

Further, it is notable that Crumb's "investigation" of Marshall did not involve getting Marshall's side of either the June 24 or June 26 incidents before the decision to suspend her was made. The array of emails that poured into Crumb's office in the 40 hours before she was suspended appear to be an obvious effort to document Marshall's misconduct. But the significant discrepancies in these accounts, the known antiunion bias against Marshall of Joel Brown, who zealously collected, cut and pasted and forwarded these emails to Pedersen (R. Exh. 6) and the complicated, fluid, and ambiguous dynamics of each situation for which Marshall was punished, only add to the suspicion raised by the fact that neither Crumb nor anyone else in management showed interest in getting Marshall's side of the story before deciding to suspend her. Nor did Crumb make any effort, for instance, to check with off-duty nurses or otherwise attempt to verify whether or not Marshall made the staffing calls she claims she made—the issue which the Respondent situates as the heart of her offense.[46]

Thus, the General Counsel has demonstrated and I find that antiunion animus was a motivating factor—and a significant one—in Marshall's June 26 suspension. Under *Wright Line*, this proves a violation of the Act, subject to the Respondent's defense. The Respondent can avoid a finding that it violated the Act by demonstrating by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. *Boothwyn Fire Co. No. 1*, 363 NLRB No. 191, slip op. at 7 (2016); *Willamette Industries,* 341 NLRB 560, 563 (2004); *Wright Line*, supra.

The Respondent has not met its burden on this record. First of all, as mentioned above, the decision to suspend Marshall is shrouded. However, we know from Pedersen's testimony that the involvement of so much senior management is unusual. The Respondent chose not to explain for the record what happened at this meeting. Given the *Wright Line* evidentiary burdens, the unusual and the opaque nature of this meeting must weigh against the Respondent's claims that it would have taken the same action against Marshall in the absence of her activity.

[46] *Diamond Electric Mfg.*, 346 NLRB 857, 860 (2006) ("the failure to conduct a meaningful investigation or to give the employee [who is the subject of the investigation] an opportunity to explain may, under appropriate circumstances, constitute an indicia of discriminatory intent. The Board has considered this factor in several recent cases to find discharges unlawful where employees were denied the opportunity to provide a potentially exculpatory explanation prior to being discharged, and to dismiss allegations of unlawful discharge where such an opportunity was provided") (Board's bracketing) (footnotes omitted) (quoting *K&M Electronics*., 283 NLRB 279, 291 fn. 45 (1987) ("failure to conduct a meaningful investigation or to give the employee an opportunity to explain has been regarded as an important indicia of discriminatory intent"); *Amptech, Inc*., 342 NLRB 1131, 1146 (2004) (failure to inquire of [disciplined employee] as to what had occurred constituted a rush to judgment attributable to Respondent's unlawful motivation to take adverse action against the leading pro-union employee on the premises"), enfd. 165 Fed. Appx. 435 (6th Cir. 2006); *Southern Electronics Co., Inc*., 175 NLRB 69, 72 (1969), enfd. 430 F.2d 1391 (6th Cir. 1970) (investigation ... was a one-sided affair with the purpose not being to determine precisely what occurred in the stockroom that morning, but rather to secure sufficient reasons to justify a discharge").

Second, there is no evidence at all that the Respondent has ever suspended or taken action against an employee for anything remotely similar to charges levied against Marshall. The Respondent relies (R. Br. at 29) on what it denominates as "five other similarly-situated employees who were similarly disciplined for engaging in roughly comparable violations"—but this evidence is undermining to the Respondent's case.

What is the comparator evidence offered by the Respondent? 1. In April of 2016, an employee (probably a pharmacy tech) received a verbal warning for "verbally abusing" another employee or manager (the name is redacted), calling them an "ass hole" and "using curse words loudly enough to be heard from the hall." 2. In October 2016, an RN employee was suspended for two days "after counseling, coaching, written warning, and [an] improvement plan with goals," the employee engaged in "threatening behavior toward other peers" and "criticiz[ed] coworkers and uses rudeness." 3. In May 2012, an RN employee from the emergency department received a final written warning after "repeated . . . explosive and aggressive behavior, hollering profanity, and slamming of patient charts in the patient care area . . . witnessed by patients and their families." The employee had been "counseled numerous times in the past following the disciplinary process for this exact behavior . . . . The explosive behavior and rage that [name deleted from record exhibit] demonstrates makes the entire interdisciplinary team in the Emergency Department and support services feel threatened and unsafe." 4. In July of 2009 an employee was suspended for three days—the offending conduct is not described in the disciplinary letter of this six-year old incident. 5. In February 2006, an employee—Scott Marsland, in fact—received a written warning for "lost temper" "foul language" "angry, 'hateful'" ineffective feedback.

Marshall's suspension for a first ever offense stands in stark contrast to the historical record provided by the Respondent for the purposes of buttressing its case. There was no counseling for Marshall. No "written warning," no improvement plan preceding suspension. Rather, the Respondent, in an apparent unprecedented action, went straight to suspension for Marshall. I will not consider this evidence, offered by the Respondent as evidence of disparate treatment which would add to the weight of the General Counsel's case,[47] but it stands there unexplained, strongly undermining the Respondent's claim (and burden to show) that it would have taken the same action against Marshall in the absence of protected activity. *AdvoServ of New Jersey*, 363 NLRB No. 143, slip op. at 33 (2016).

The Respondent's position is that Marshall's conduct on June 24 and June 26 was so egregious that it would have taken the same action against her even in the absence of her record of union activity. At bottom, the argument amounts to the contention that, although once a stellar employee, since the advent of the union drive, and since Brown played the Marilyn Manson song to the nurses—prompting a sexual harassment charge filed by Marshall—this previously heralded employee had been difficult to work with, "outspoken" and "condescending," "aggressive" "disrespectful" and even dishonest about resolving the staffing shortfalls. And that this misconduct would have prompted the suspension even in the absence of her protected activities.

I think it clear that there was a concerted effort to document incidents about Marshall. We know that a report on her activities was requested from Pedersen, for "Ray," as early as June 2. It is hard to believe that the panoply of emails sent to Crumb regarding events on June 24 and June 26 were all independently initiated. In particular, Brown's June 25 afternoon email (R. Exh.

[47] *Avondale Industries*, 329 NLRB 1064, 1066 (1999).

6) sent to Pedersen with the subject line “Timeline” is a remarkable compilation of every complaint about Marshall from the previous day and stretching into the previous weekend, including the overly-exacting complaint that Marshall did not correct other employees’ conversations (see R. Exh. 6, page 3). Although not included with the exhibit, the document states that it has attached emails, hand copy of letters, code of conduct violations, and an outline. This compendium of complaints about Marshall and reports on her from managers and coemployees was provided to Pedersen before the events of June 26.

It is unexplained why Brown provided this to Pedersen. Clearly, Marshall was in the sights of the Respondent. Her actions were being documented with great care.

That is easy. But why? This is where, even giving the Respondent the benefit of the doubt, the *Wright Line* burdens of proof leave the Respondent’s case foundering. I do not and do not need to defend all of Marshall’s conduct. I *assume* that this is a “dual motive” case. In other words, I *assume* that the Respondent had legitimate grounds for their frustration with Marshall.

But the issue is whether the Respondent has proven that it would have taken the same action—i.e., it would have suspended Marshall on June 26—in the absence of her union and protected activity. *ManorCare Health Services*, 356 NLRB 202, 228 (2010) (employer's *Wright Line* burden requires it to prove "it would have taken *the same* action against" employees in the absence of union activity) (Board's emphasis), enfd. 661 F.3d 1139 (D.C. Cir. 2011).

The record leads me to disbelieve this defense. The unexplained and admittedly “unusual” resort to suspension for a first time offense, the zealous effort to “paper” the record with inconsistent management accounts of Marshall’s failings, but with no real interest by Crumb in determining what actually happened, the affirmative inconsistency of the comparator evidence with Marshall’s offense, and the unexplained top level meeting where the decision to suspend Marshall was made, all undermine the Respondent’s claims that Marshall would have been suspended for her conduct in the absence of union activity. I find that Marshall’s suspension violated Section 8(a)(3) of the Act.[48]

Finally, and independently, I note a further and glaring additional problem for the Respondent’s defense, even if it’s claimed motive for the suspension was accepted. While I have heretofore assumed that Marshall’s alleged misconduct presented a legitimate grounds for dissatisfaction with Marshall, in fact, Marshall’s alleged misconduct on June 24 and June 26 directly related to her efforts to challenge the Hospital on their methods and practices with regard to staffing.

The misconduct attributed to her—from the claim by Cindy Brown that there should be “severe consequences” for Marshall’s refusing to assign three patients to one nurse for reasons of safety, to the claims that she was belligerent, uncooperative, and “difficult” about solving the ICU’s staffing problems—is all conduct deeply rooted in protected and concerted activity. Even the conflict over whether and how many times she represented that she called off-duty staff is, in its essence, part of the res gestae of Marshall’s fight for enough staff. The record is one of Marshall—albeit with discord and defensiveness—advancing an issue that was central to the nurses concerns and to the union drive. As one nurse told Crumb—in comments discussed more

[48]As any conduct found to be a violation of Sec. 8(a)(3) would also discourage employees' Sec. 7 rights, any violation of Sec. 8(a)(3) is also a derivative violation of Sec. 8(a)(1). *Chinese Daily News*, 346 NLRB 906, 934 (2006), enfd. 224 Fed. Appx. 6 (D.C. Cir. 2007).

below—Marshall "fights for enough staff" and "the Adm doesn't listen about the true staffing needs."

The point is not whether Marshall was wholly right or wrong. The point is not whether Marshall engaged in misconduct, or acted defensively and at times antagonistically. The point is that the source of the conflicts *reported by management* to Crumb on June 24 and June 26 involve as their res gestae protected and concerted activity by Marshall. Marshall's "misconduct" must be considered through that lens. *Goya Foods Inc.*, 356 NLRB 476, 477 (2011) ("Where, as here, the conduct at issue arises from protected activity, the Board does not consider such conduct as a separate and independent basis for discipline." As to this misconduct, "the pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act." *Stanford Hotel, LLC*, 344 NLRB 558, 558 (2005); *Roemer Industries, Inc.*, 362 NLRB No. 96, slip op. at 6 (2015).

"[T]he standard for determining whether specified conduct is removed from the protections of the Act [is] as articulated by the Board: communications occurring during the course of otherwise protected activity remain likewise protected unless found to be 'so violent or of such serious character as to render the employee unfit for further service." *St Margaret Mercy Healthcare Centers*, 350 NLRB 203, 204–205 (2007), quoting *Dreis & Krump Mfg. v. NLRB*, 544 F.2d 320, 329 (7th Cir. 1976). None of Marshall's misconduct meets that standard. In short, the Respondent's *Wright Line* defense is based on actions that are themselves violative of the Act. Thus, even if the Respondent's argument that it would have suspended Marshall in the absence of her union activity is accepted, it would not provide the Respondent a defense. Instead it would prove that the Respondent had disciplined Marshall for conduct that, at its core, was protected and concerted activity. However, this issue need not be reached, as I have found, for the reasons set forth above, that the Respondent would not have suspended Marshall on June 26, in the absence of her union activity.

2. Complaint paragraph XII(b) and (c) (The verbal warning)

a. The QA incident filed by Brown

On July 3, there was another incident between Brown and Marshall. This incident resulted in a verbal warning being issued to Marshall on July 10.

On July 3, the ICU was particularly short-staffed, and was missing a clerk who had transferred, and her replacement had not yet begun work at ICU. A new patient was being admitted and a nurse, Robert Stires, asked Brown if he would take his patient for a scheduled testing procedure because the admission needed to be handled. Brown said no. Marshall went to Brown and said, "we need some help" but Brown again said that he could not assist. Marshall appealed to him, explaining the predicament the unit was in. Marshall told Brown, "If you can't take the patient I need to take the patient because Robert had another one on multiple drips that was intubated and he couldn't leave that patient." Marshall asked Brown, "can you at least get me a ward clerk so somebody can be up here entering orders." According to Marshall, she stood in the hall by the doorway to the floor's kitchen while Brown used the phone on the desk in the hall opposite the kitchen door to call for a ward clerk. This would mean that Brown and Marshall were 3–4 feet apart (based on review of the photo of the area in General Counsel's Exhibit 26). Brown said, "you don't have to stand there." Marshall said, I want to know what's going on before I leave [to take the patient for the test].

Brown's account is different. He testified that he rejected Marshall's request that he take the patient for a scan and asked Marshall to do it. Brown testified that Marshall said she could not because she was acting as the ward clerk. Brown asked the PICC nurse Sullivan to watch the phones while Marshall took the patient for the scan. Brown got on the hallway desk phone to call for a unit clerk to assist and said that "when I turned [Marshall] was almost nose to nose with me." Brown said he asked her to "step back" and she said, "I can stand anywhere I want." Brown testified that Marshall refused to step back and so he stepped back to the desk, hung up the phone, and went around her.

A few minutes later Brown filed an incident report into the hospital's QA system, an internal system for reporting incidents that occur with staff or patients, or anyone else. While there was conflicting testimony by Brown and Marshall about the incident (describe above), the QA report filed by Brown stated, in pertinent part:

> I was asked by Ms. Anne Marshall to get a ward clerk to assist her. At this point I took two steps back and picked up the phone to call the house supervisor. While it was ringing Ms. Marshall had entered my personal space. I looked at her and told her "you do not have to stand there" [.] Her response was "I can stand where I want." I then turned my back to her and secured a UC from the house supervisor. I hung up the phone and advised Ms. Marshall, who was still in my personal space that a clerk was on their way.

Later that day Marshall received an email indicating that Brown had filed the internal complaint (the QA) against her. Marshall approached Brown in his office, and standing in his office doorway, asked Brown if they could talk about the QA. According to Marshall, Brown said, "absolutely not. Get out of my office or I'll have you removed by security." Brown's account varied only in that he testified that he threatened to call security after Marshall repeatedly refused to move out of his doorway. Brown also told Marshall that she could "talk to Dr. Hannon"—a doctor working on the ICU—about the QA, because Hannon had witnessed the incident that was the basis of the QA. Marshall asked for an administrator on call. Brown left and met with the administrator, Tony Votaw, and they discussed the issue. Votaw then came up to the floor after Marshall called him again. Votaw told Marshall that she "was picking on Joel."

Crumb received the incident report and Brown called her and told Crumb not just about the "personal space" incident in the QA but also the aftermath. According to Crumb's notes, Brown said "he felt trapped" by Marshall when she stood in the doorway and after he asked her to leave repeatedly he asked to her to "stop harassing him" and "told her he would call security."

b. Crumb's investigation

Crumb decided to conduct an investigation of the matter. She called or saw each staff member working that day in the area to "ask if they had either heard or seen or witnessed any behaviors [or[interactions between Joel and Anne." Crumb made notes of her conversation. None of the notes Crumb took reveal anything remotely resembling Brown's account.

According to Crumb's notes of her investigation, one nurse "heard them talking about staffing with no negativity." Two nurses had heard about the incident only from Marshall and one nurse advised Marshall to try to talk to Brown. However, after Marshall did so she came back and told the nurse that it "wasn't any help b/c Joel asked her to leave + if she didn't he was going to claim harassment." The physician, Dr. Hannon, was in his office next to Brown's. "[H]e heard

Anne say can we talk about this and Joe's response was stop harassing me. He could not hear anything else and the conversation was brief." The ICU educator, Newton told Crumb that "Joel just wants to find a way to fire h[er]."[49] Some of the interviewees were critical of Brown: saying that he "holds grudge," that Marshall asked Brown "for help + he refused," and that he offers extra money to some nurses and not others. One nurse told Crumb that Marshall "fights for enough staff" and that "the Adm doesn't listen about the true staffing needs." Crumb's notes state that Cynthia Sullivan told her that "interaction with Joel + Anne is unprofessional [and] embarrassing." Crumb also took a report from Marshall, which mirrored her testimony, cited above.

Notwithstanding these reports, "based on my investigation" Crumb concluded that Marshall violated the COC and Brown's "personal space" and deserved a verbal warning for being confrontational. Crumb said she based this on Brown's account and the account she says she received from PICC nurse Sullivan. Brown's account, essentially, is set forth above and in the QA report. Sullivan's supposed account of events warrants a few remarks.

Crumb testified that she talked to Sullivan and Sullivan told her it was "an unpleasant situation" between Brown and Marshall, and that Marshall was "real close" to Brown, and that Brown "asked [Marshal] to step back because she was in his personal space, and he felt uncomfortable." According to Crumb, Sullivan also told Crumb that Marshall thought . . . that she was not in his personal space."

Sullivan did not testify. Crumb consistently relied on documents and leading questioning to assist in her testimony. That is of particular concern here.

General Counsel's Exhibit 41 is a typewritten document created by Crumb. She identified (Tr. 964) this document as the notes she took about her conversations when she interviewed the nurses about the Brown/Marshall incident. (The document begins: "Interview with staff about the incident with Joel Brown and Anne Marshall.")

However, it turned out that this typed document was a condensation, derived from handwritten notes of the conversations she had with the nurses (and others). The typed notes were created perhaps a week after Crumb took the handwritten notes. The existence of the original handwritten notes came to light only at trial through questioning of Crumb, after extensive testimony by her about the investigation, using GC Exhibit 41 as an aid to her testimony. The original handwritten notes were not produced pursuant to subpoena. Asked their whereabouts, Crumb testified "I think they are in Alan's car." The handwritten notes were retrieved, produced to the General Counsel, and placed into evidence as General Counsel's Exhibit 42.

There are differences between the typed document that Crumb created and first presented as the notes of her investigatory conversations and the handwritten originals. These differences raise serious concerns. The handwritten notes contain far more critical comments about Brown. These are not found in the typed notes. Also excised from the typed document are comments that "Anne fights for enough staff" and that the "Adm doesn't listen about the true staffing needs. etc" and that "Joel just wants to find a way to fire h[er]," among other comments. Also missing from the typed document is Crumb's note: "Interviewed 8 staff on that day. Asked if they saw or heard any interaction between Joel + Anne? Were they aware of any? All 8 did not witness anything."

[49]Crumb wrote "him" about this incident which involved Brown and Marshall. I find that Crumb meant to write "her."

The omission of these notes from the typed version of the notes provided in response to the subpoena and presented at trial as the notes of the investigation, is highly suspicious. No explanation was provided. Perhaps most suspicious, given Crumb's testimony that she ignored the comments of the staff whose input she solicited, and relied on Brown and Sullivan's opinions in determining to issue discipline to Marshall, is the fact that Crumb's contemporaneously taken handwritten notes do not contain Sullivan's indictment of Marshall's conduct to which Crumb testified. The handwritten notes of her conversation, from which Crumb claimed to have created the typed document, state as to "Cynthia": "interaction with Joel + Anne is unprofessional [and] embarrassing."

However, the typed notes do not contain that neutral statement from Cynthia Sullivan. Rather, inexplicably, the typed notes refer to Sullivan as having "Reviewed her rewritten statement." There is no statement, written or rewritten from Cynthia Sullivan in the record. There is no explanation offered for how or why Sullivan's interview on the issue appears to have been conducted differently, and at a later time, than the interview of the other staff found in the original notes. Given Crumb's testimony on how she went about her investigation and the creation of the typewritten investigation notes, and given the record evidence of Sullivan's dislike for Marshall's union activity and her active engagement, with Crumb's support, in "thr[owing] out" Marshall's union postings and complaining about Marshall's union activities, and, given that, unlike Marshall, Sullivan was considered "loyal" to the Respondent, this is all painfully suspect.[50] Suffice it to say that the notes Crumb claims to have made of her interviews with staff do not include the indictment of Marshall's conduct by Sullivan that Crumb claimed was made to her. The reference in the typed version of the notes to Sullivan reviewing a "rewritten statement" suggests that the Respondent has not revealed the full or real process used to discipline Marshall. The weight of the evidence is that the results of this investigation were rigged.[51]

[50]GC Exh. 45 (June 19 email from employee Cynthia Sullivan to Crumb and Brown, forwarded to Pedersen: "Must be I threw out enough of hers because now she's using hospital paper & green paper is in our copier right now"; Brown followed up with an email at the top of the exhibit that makes clear that Sullivan was referring to Marshall); GC 46 (June 19 email from employee Cynthia Sullivan to Brown, forwarded to Pedersen, on the subject of "union propaganda": "it's really annoying that Anne has to spend her time hanging up union postings instead of doing her job as the charge RN. . . . As fast as they are thrown away off the breakroom table she puts out new ones"); GC Exh. 48 (June 2 email from Brown to Pedersen, describing Marshall as "continu[ing] to post, call and have conversations about unionization. She is also rude to those that are loyal to CMC and to any leadership that she comes in contact with (i.e., . . . Cynthia Sullivan").

[51]Crumb claimed that she relied upon Sullivan because Sullivan was "the witness who had witnessed the whole situation." This appears to be untrue. There is no indication that Sullivan witnessed the encounter between Brown and Marshall where Marshall stood in the doorway of Brown's office. This was part of the basis of the disciplinary warning, and was overheard by others interviewed with Crumb, including witnesses that corroborated Marshall's account. See, e.g., notes of Dr. Hannon interview by Crumb. In any event, contrary to Crumb's testimonial account of Sullivan's statement, the account in Crumb's original handwritten notes of Sullivan's account does not cast blame. Of course, we do not know what is in Sullivan's "rewritten statement," referenced but not disclosed in the typed version of the interview notes created by Crumb.

c. Crumb's July 8 meeting with Marshall

During the July 8 meeting at which Marshall had been issued her suspension letter (discussed above) Crumb turned the discussion to the previous Friday, July 3, and the incident that Brown reported to the QA. Marshall explained her version of events regarding the staffing issues that led to her dispute with Brown, as described above. Crumb asked Marshall if she blocked the doorway of Brown's office. Marshall stated, "No. And Dr. Hannon was right there, and I'm sure if you ask him he'll tell you exactly what happened and how nasty Joel was to me." Crumb indicated that was "going to call everybody that was on shift that day" and "I'll try to get hold of Dr. Hannon."

d. Crumb's July 10 meeting with Marshall; issuance of warning

Another meeting was held July 10, two days later, to talk about the incident Brown reported to QA and its aftermath. Crumb declared that it was "more of a he said/she said . . . sort of situation. I think that after we talked the other day, we talked about the code of conduct. . . . And I think that I'm going to give you a verbal warning, that I know—the code of conduct—happened. . . . . People find you to be confrontational and disrespectful." Marshall said she had followed the code of conduct and Crumb replied, "maybe we need to work on why others don't feel that." Marshall interjected, "I think we need to look at who the others are that feel I don't." Crumb said, "Okay, That's fair." Marshall continued, "Because if you asked the people that I work with directly, my peers, they will tell you I do [follow the code of conduct]."

Crumb then asked Marshall for assistance in scheduling and integrating some new ICU employees into the upcoming schedules. They discussed that for several minutes and the meeting ended.

At this meeting, Crumb provided Marshall a memo dated July 10, confirming the verbal warning. Crumb stated that she assumed Marshall would not want to sign it.

The memo stated:

> Anne, this memo will confirm our conversation today. As you know, an incident report was submitted regarding an interaction that you have with Joel Brown on Friday July 3. I have completed my investigation of this incident having interviewed all staff that were working that day.
>
> As a result of that investigation I have determined that your interactions with the Director Friday afternoon were not in accordance with our Nursing Code of Conduct.
>
> On Wednesday June 30 you met with Joel and me to determine how you will more appropriately fill your responsibilities as Team Leader and Charge Nurse. During our conversation it was agreed that you would follow and uphold the Nursing Code of Conduct and participate collaboratively with leadership and staff on problem solving. We reiterated that it was our objective to function as a team to do the right things for our patients, and it is not acceptable to behave in a manner that is confrontational and not in accordance with professional standards as discussed.

According to the QA, it was reported that your behavior and interactions with the Director were not respectful but aggressive and confrontational in nature. These behaviors included

- A confrontational dialogue where you were requested numerous times to leave the door of the director's office but refused to leave -until you were advised that security would be called.

- Following the director within his personal space and in the opinion of another staff member of harassing him about getting ward clerk help

While we understand that there can be varying opinions regarding the actions that took place, it is important to again reinforce the necessity to interact professionally and in accordance with the Nursing Code of Conduct. Key elements are:

- Interacting with others in a considerate, patient and courteous manner
- Being honest, truthful, and respectful at all times.
- Avoiding inappropriate and disruptive communications/behaviors that include but are not limited to;
    - o Displaying behaviors that would be considered by others to be intimidating, disrespectful or dismissive
    - o Disregards or is insensitive to the personal space or boundaries of others,

This letter will be considered a verbal warning reinforcing the need to follow the Code of Conduct in your interactions with others.

I am confident that there will not be any additional violations in the future. However, in the event that there are, appropriate disciplinary action will need to be taken.

In mid-July, Brown's contract was not renewed and he left the Hospital's employ.

Analysis

The General Counsel alleges that the July 10 verbal warning given to Marshall was unlawful on a number of theories: a violation of 8(a)(3) as retaliation for Marshall's union activities (complaint paragraph XII(c), (g), and XIV); an independent violation of 8(a)(1) on a theory that verbal warning penalized her for violating unlawfully overbroad rules and on a separate theory that verbal warning penalized protected and concerted activity. (Complaint paragraph XII(b), (c), (f) and XIII.)

The General Counsel chiefly argues that the verbal warning enforced unlawfully overbroad rules against Marshall in violation of Section 8(a)(1). I decline to reach that theory. In the first place, contrary to the allegations of the General Counsel, I have found that two of the three rules cited in the verbal warning memo were not unlawfully maintained. More importantly, I

think that viewing Marshall's July 10 verbal warning as an unlawful application of rules misses the gravamen of the problem. With the June 10 warning, the Respondent, on its face, punished Marshall for an incident that occurred during the course of protected and concerted activity. However, even that is pretextual—the Respondent's pressing of this matter against Marshall constitutes retaliation against Marshall for her union activity.

As discussed above, the Supreme Court-approved analysis in discrimination cases turning on employer motivation was established in *Wright Line*, 251 NLRB 1083 (1980). The standard is discussed at length, above. With regard to the General Counsel's prima facie case under *Wright Line*, most of the factors discussed with regard to the suspension also satisfy the General Counsel's prima facie burden with regard to the verbal warning issued against Marshall a few days later. Marshall was a vigorous and open supporter of the union drive at the Hospital and the Respondent's knowledge of this is not in doubt. The element of union animus is established, as with the suspension, based on the Respondent's ongoing unlawful effort to remove Marshall's union literature, and the personal threat made against Marshall if she continued in her union activity. In addition, as I have found, just two weeks before the verbal warning issued against Marshall, she had been unlawfully suspended. The evidence of discriminatory animus is additive. The finding that the suspension was the production of unlawful animus adds even more weight to the General Counsel's prima facie on the verbal warning.

In addition, the investigation undertaken by Crumb was relied upon in a patently suspicious way, a suspicion only accentuated by the Respondent's initial failure to produce the actual handwritten notes from the investigation pursuant to subpoena, which, as discussed, contained a number of differences from the typed notes that Crumb initially identified as "the notes that [she] took." Unlike with the suspension, in the case of the verbal warning, Crumb undertook an investigation, but she ignored what it uncovered, relying instead on the known-to-Crumb-to-be-biased Brown, and the known-to-Crumb-to-be-biased Sullivan, the latter whose alleged "statement" indicting Marshall was "rewritten" and "revised" although neither the original or revised statement made its way into evidence, and although Sullivan was not called to testify. This rigged investigation not only adds to the weight of the General Counsel's showing of discriminatory animus, but provides convincing evidence that the Respondent's reasons for the verbal warning were pretextual.

In this instance, the complaint against Marshall was lodged by Brown, a manager known to be hostile to Marshall on many grounds, including her union activity. The Respondent took it and ran with it, without regard to the fact that the investigation did not support Brown's claims. Crumb reached the conclusion she wanted to reach, not for the reasons she claimed. It is well-settled that a finding of pretext "defeats any attempt by the Respondent to show that it would have discharged the discriminate[e]s absent their union activities." *Rood Trucking Co.*, 342 NLRB 895, 898 (2004); *Austal USA*, 356 NLRB 363, 363–364 (2010) *La Gloria Oil and Gas Co.*, 337 NLRB 1120, 1124 (2002). The Respondent's July 10 verbal warning of Marshall violated Section 8(a)(3) and, derivatively, 8(a)(1) of the Act.[52]

[52]Given my conclusions, I do not reach the General Counsel's alternative Section 8(a)(1) theory that Marshall was disciplined for protected and concerted activity, or that Marshall was unlawfully disciplined for violating an unlawfully overbroad rule.

3. Complaint paragraph XII(d) and IX
(Marshall's demotion; notification of confidentiality in disciplinary meeting)

a. Interaction with new ICU interim director

The following week after Marshall's July 10 verbal warning, Brown's contract was not renewed and he lost his job at the Hospital. In mid-August 2015, Sandra Beasley became the interim director of ICU. Beasley left in the fall of 2015, perhaps in October, and was replaced by Gloria Prince.

When Beasley assumed her duties as interim director Marshall was on vacation and she did not meet Beasley until the morning of August 28. Marshall estimated that Beasley had been working about a week at that time. About 6:30 a.m. on August 28, Beasley came into the back hallway where Marshall was getting a charge report from another nurse, Scott Goldsmith. Beasley introduced herself to Marshall. They shook hands, and then Marshall continued speaking with Goldsmith about the charge report. A little later in the morning Beasley asked Marshall to come find her before the 8:30 inter-departmental bed meeting so they could go together to it.

Marshall said that 8:25 she realized she needed to go to the bed meeting and did not want to be late. She looked in Beasley's office and in the back hallway, but did not see her. Marshall went alone to the bed meeting. Afterwards, Beasley approached Marshall and told her that she was upset that Marshall had not taken her with her to the bed meeting. Marshall told Beasley that she looked for her and did not see her. Marshall told her, "I knew you'd been here before." (when Marshall was on vacation). "You'd been brought there before. You knew what time it was held every day. I didn't want to be late, so I went ahead and went without you."

At some point in the day, the nurse in charge of maintaining the schedules, Crystal Root, mentioned to Marshall that there were holes in the schedule for the upcoming weekend. According to Marshall's unrebutted testimony, she came to Marshall and said, "do you know there are holes?" Marshall said, "yes, I'm well aware. Everybody is aware. Sandra knows about it." Marshall told Root to go to talk to Beasley about the holes, "because I had already made calls and had nobody who was willing to come in. There was nothing more I could do." Marshall testified that she made calls the day before and "I had made some that morning too. This is a continuous thing with these phone calls." At some point thereafter Beasley asked Marshall to make additional calls, and Marshall testified that she did.

Beasley emailed Crumb telling her that she had decided to have a disciplinary meeting that day with Marshall, and that she would have Kansas Underwood, a nursing director who oversees the hospital's fourth floor palliative care unit, sit in on the meeting.

Beasley's complaints, as she put it in the email to Crumb that afternoon, were four: One that morning Marshall had "pretty much flipped me away when I informed her that I would like to meet with her sometime today so that we can get to know one another." Two, Marshall left for the bed meeting without Beasley. Three, Marshall responded to a concern expressed by Sharon [last name not given, perhaps Sharon Newton, ICU educator] about upcoming staffing issues by telling

the employee who expressed concern "to take it to Sandra" instead of calling staff herself. Finally, Beasley wrote that Marshall "became argumentative" during a conversation they were having over proper staffing levels.

Crumb responded that "Anne's behavior today is the same we have been seeing for months." She encouraged Beasley to meet with Marshall and to have Underwood there, and to review expectations and go over the events of the day as examples of "what you don't expect from a Team Leader." Crumb told Beasley to "[g]ive Alan an update when the meeting is over. Good Luck. Call me after." Beasley met with Marshall, with Underwood at the meeting. Beasley did not testify at the hearing. (She no longer works for the Hospital and the representation was made that her whereabouts are unknown to the Respondent.) Underwood testified that the meeting began with Beasley telling Marshall that Underwood was present as a witness, and then Beasley addressed "a few specific incid[ents] with her that happened earlier in the day."

Underwood testified: "If I recall it was that, when Sandra said hello to Anne, she was sort of flippant about it and not kind."[53] Then Beasley asked Marshall why she went to the bed meeting without her, and Marshall told her, Well, you know, I'm not your babysitter. You can find it there yourself. Then Beasley mentioned the staffing situation "that there [were] too many [nurses] on Sunday, not enough nurses on Tuesday." Beasley stated that it was her expectation that Marshall would make the calls to nurses to see if they would come in on Tuesday and Marshall became angry and said that it was not her role and that she had never had a job description for the job. Beasley said that "I think it's clear that you know your role as a charge nurse and as a team leader." Marshall turned to Underwood and expressed that she knew Underwood was there as "an intimidation tactic." Underwood denied this, saying that she was here "for a third party witness." According to Underwood, Marshall said "I am not going to have this conversation with you" and that she was being "intimidated" or "bullied" because "of the union." Beasley said that she had worked in both union and nonunion environments, but "[t]his is about your professionalism." Underwood testified that Marshall then stood and left angrily declaring that "I'm not going to talk to you any longer." She refused to sit back down when Beasley asked her and then left, ending the meeting.[54]

[53]On cross-examination Underwood recalled that "Anne was very flippant with Sandra when they first encountered each other."

[54]I do not credit Marshall to the extent that Marshall testified that Beasley mentioned the Union first. Her pretrial affidavit on this point (read into the record) is essentially consistent with Underwood's account of how the subject of the union was introduced into the conversation. At trial, Marshall appeared to agree with her affidavit testimony after it was read to her.

After the meeting, Beasley wrote a lengthy email to Pedersen, Nohelty, and Crumb, copying Underwood, stating that "[i]t was a necessity to meet with Anne Marshall today based on her behavior and work performance throughout the day." The letter provides a lengthy account of the meeting, purporting to set forth Beasley's comments and Marshall's comments in the meeting, as they debated their respective versions of the days' events.[55]

Nohelty responded 12 minutes later, thanking Beasley and stating:

> This is the behavior that Ann has displayed all along. It certainly did not take her long to show her true colors. We will have to address her behavior first thing Monday morning when Alan returns. If you need me over the weekend, you now have all my numbers. If you need me to come in, I can do that as well.

Beasley responded: "Thank you. We haven't resolved the shortage for Sunday. So we'll have to see how the weekend goes. Have a[ ] great weekend and I will see everyone on Monday."

Some time, either over the weekend or on Monday, Crumb says she spoke with Beasley, Pedersen, Nohelty, and Underwood about these emails and about Marshall. There is no record account of what was stated in these discussions. Neither Underwood nor Pedersen testified about these conversations at all. Nohelty and Beasley did not testify.

According to Crumb, in consultation with Pedersen and Nohelty, "We reached a decision that Anne's behavior wasn't what we expected to see in a Team Leader or Charge Nurse and that we would demote her back to registered staff nurse." Nohelty did not testify. Pedersen did not testify about his involvement in this decision, or any involvement in the late August events. Indeed, he did not seem familiar with the details of Marshall's discipline from June and July. Crumb did not speak with Marshall. There is no evidence that Crumb spoke with Goldsmith, the nurse with whom Marshall was working the morning when Beasley first approached Marshall. Crumb testified that it was the combination of the summers' events that resulted in the decision:

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[55] I note that this document contains the first claim that Marshall "'flipped' Beasley off during their introduction that morning, a claim endorsed and relied upon by Crumb. Beasley wrote: "I shared with Anne my perception of that she 'flipped' me off during our morning introduction which I found to be unkind, disrespectful, and unprofessional." I note that Underwood did not support this claim in her testimony. Underwood testified—twice—that Beasley accused Marshall of being "flippant," a very different accusation. Crumb and Underwood were intelligent and articulate. They know the difference between "flippant" and the obscene gesture known as "flipping someone off." I presume Beasley knew the difference too. Beasley's premeeting email informed Crumb that Marshall "pretty much flipped me away," is different than the assertion that Marshall "flipped me off." Notably, and probatively, Crumb's pretrial affidavit does not assert that she believed that Marshall "flipped [Beasley] off" or "gave her the middle finger," although at trial Crumb testified—remarkably in my view—that she interpreted Beasley's complaint that way. Instead, her affidavit states that "Sandra told me about how she was treated by Anne, about the treatment, how she was dismissive and disrespectful." Crumb agreed with counsel's representation that in her affidavit the word "flippant" is crossed out (as originally drafted by the Board agent) and Crumb wrote in the word "dismissive." It strikes me as highly unlikely that something as provocative as raising the middle finger at a supervisor would be left out of an affidavit discussing the very episode. The prevalence of the word "flippant" in this record is interesting. Like a plant grows when watered, the fabrication that Marshall "flipped off" Beasley took root over the course of the demotion.

> Because of a series of behaviors that Anne had been having from June—two incidents in June, incident in July; now here we are with a new interim [director] and its starting off being the same behavior from—it's just that it wasn't the behavior we expect to see in a Team Leader and Charge Nurse—confrontational, not following through on requested—like going to a bed meeting. She didn't follow through on getting Sandra, and just her unprofessional behavior during the meeting with Anne, her storming out of the meeting; it just all added up in the—into a package.

b. The August 31 demotion meeting

On Monday, August 31, Beasley asked Marshall to come with her to Crumb's office. Marshall asked for a witness. Although several proposed witnesses were rejected, Marshall and management finally agreed to have a social worker named Kim Pacquin attend as a witness. Thus, the meeting consisted of Crumb, Beasley, Pacquin, and Marshall.

Crumb began by indicating to Marshall that Marshall had met with Beasley already, and Marshall acknowledged that Beasley had shared her concerns in that meeting.

Marshall said, referring to Pacquin: "can I just start by saying that I requested to have you here because I didn't feel comfortable." Beasley followed up by saying, "let me second that by saying that whatever is said in this room, please keep it confidential." Pacquin responded, "Oh absolutely."[56]

The meeting turned to Marshall's offenses. Beasley stated,

> But based on the level of the concerns and the—and from my standpoint the egregiousness of the continuation of that day, and how you stormed out of the room ending the conversation, when the conversation was totally appropriate.

Marshall interrupted to say that "I don't agree it was appropriate. You can't ask me questions about the union or my involvement." Beasley denied asking Marshall that, saying, "you jumped to that conclusion and you didn't listen to what I said." Marshall argued about what was

[56]The question of to whom the "confidentiality" warning was made was considered by all parties to be of significance in this litigation. Here, I note the issue of *by* whom the confidentiality warning was given. The stipulated-to recorded audio and transcript of the meeting shows that Beasley made the comment, as stated in the text. This warrants discrediting of Crumb's testimony that "basically" she (Crumb) said, "Kim, you're here as a witness to this conversation between myself, Sandra and Anne; and this information is confidential, and do you feel that you can keep this information confidential?" Although I agree and find that Beasley's comment about "confidentiality" was directed to Pacquin and, appropriately, Pacquin responded, Crumb's inaccurate testimony about this remark illustrates what I perceived to be a tendentious tendency in her testimony generally. Her account of her comments is tailored to burnish the Respondent's litigation interest in showing that the remarks were directed to Pacquin, and not to the meeting attendees generally. In this case, Crumb's account is disproven by the stipulated-to recorded audio and transcript of the meeting—she didn't make any comments about confidentiality, Beasley did. But I believe, as demonstrated here, that a litigation-inspired gloss covered much of her testimony, albeit there is not always a tape recording available to so clearly demonstrate it.

stated at their previous meeting, with Marshall insisting that Beasley brought up the union, and "that's when I ended the conversation."

> Based on the lack of professionalism that you showed that day, and also based on the lack of—the poor job performance you did when I asked you about scheduling and you had another nurse to come to you and point out that there was an issue, that you weren't: even willing to follow—up and to ask specifically, because you directed them back to me, and I specifically had to come to you as a team leader to ask you to call staff—

At that point, Marshall interrupted to say that this "had already been done. Nobody was coming. I informed you of that." Marshall and Beasley went back and forth about whether the calls she made the previous day needed to be repeated the following day in an effort to obtain enough staff. Marshall pointed out that when "the same people were called and the no's were all exactly the same."

Beasley then said: So what we're going to do at this point is we're going to step you down out of the team leader position into a staff position."

Marshall protested that "I know this is complete retaliation and bullying. That's what this is. It's evident."

Beasley denied this, stating that "you know, there is some history there with the behaviors that you presented to me, not even knowing me, you flipped me off." Based on the record, this was the first time this accusation had been made to Marshall. Marshall vehemently denied it: "I never, ever did that." Beasley said, "Yeah, you did. You did."

Beasley told Marshall that Marshall's first meeting with her, the new director, that first morning "wasn't customer service friendly at all." Beasley raised that Marshall left without her for the bed meeting, saying that Marshall "[d]idn't even come to see whether I was ready, not ready. 8:30 I walk on the unit, you were already gone." Marshall replied, "That meeting is at 8:30. I had to go. I was busy that day. There was a lot going on." Then Beasley raised their subsequent conversation where Marshall told Beasley, "I don't have to hold your hand, you're not a baby." Marshall said, "you knew where it was. You had been escorted there previously" and Marshall stated that she looked for Beasley in her office at 8:25 but she was not there, and Beasley suggested she had been there then, or maybe shortly thereafter.

Beasley said that "we're not going to continue going around in a circle, I'm just going to let you know that effective immediately we're going to step you down out of the team leader position and back into a staff nurse." Marshall said, "Okay. And I know exactly what this is about, so that's all that has to be said." Beasley replied. "Well, I'm sorry that's your perception, but it's not retaliation." Marshall stated, "Well I find that hard to believe when you're the one at the first meeting who brought up union, and now this is happening. So that's all I need to know." Crumb added at this point that it's the "charge, as well . . . . [b]ecause that's part of a charge nurse's responsibility . . . . to follow through on staffing changes." Beasley added, "It's not appropriate at any time, whether you feel like the conversation is not right, you don't just jump and storm out of a room. You don't." Marshall replied, "I gave you two instances to stop talking about the union. I told you [you] couldn't talk to me about it." Beasley denied that she ever asked Marshall about the union. The meeting ended.

Several days after the meeting, Crumb and Beasley prepared and gave to Marshall a letter, dated September 2, headed "Letter of Expectation—Transition to Staff Nurse," stating:

> On August 31, 2015. you were informed that based on repetitive unacceptable behaviors which include but not limited to the failure to follow the provisions of the Nursing Code of Conduct and Mutual Respect through professional leadership. that you were being transitioned into a Clinical Staff Nurse position *effective* immediately. Therefore officially, at the end of your shift on August 31, 2015, you are no longer to assume the role of a Team Leader nor as a Charge Nurse within Cayuga Medical Center.
>
> As you move forward you are expected to follow the Nursing Code of Conduct & Mutual Respect Provision. In addition, you are required to follow all applicable policies, procedures provisions and guidelines within Cayuga Medical Center.
>
> Anne, you are a valuable member of our organization and we want you to be successful in your new role. Therefore the requirements of your new role are inclusive of the expectations that are listed below.
>
> Expectations:
>
> - Serve as the initial point of contact for internal and external customers.
> - Upholding the Nursing Code of Conduct and Mutual Respect Provision.
> - Respond to internal and external customer needs promptly and professionally.
> - Maintain a professional demeanor when speaking with someone over the telephone and/or when seen in person.
> - Maintain professionalism at all times.
> - Maintain a positive attitude and be aware of verbal and nonverbal behavior (Body language is 55% of the communication process) and tone of voice.

Analysis (demotion)

The General Counsel contends that Marshall's demotion was a continuation of the Respondent's unlawful actions toward Marshall. He argues that the demotion was based on the application of unlawfully overbroad rules and continued retaliation for Marshall's union activities.

I agree that Marshall's demotion was unlawful. Beasley's complaints with Marshall that prompted the discipline appear particularly trumped up. As Marshall put it, "you don't get demoted for not bringing someone to a bed meeting." Particularly odd—and particularly undermining to the Respondent's defense—is the Respondent's invention of and reliance on the claim that Marshall "flipped off" Beasley upon their first introduction—that she, "gave her the middle finger." As discussed above, this fabrication took root from the initial and very different contention that Marshall was "flippant" when she met Beasley. I think that Marshall's "flippancy" was transformed into an obscene gesture precisely because the legitimate grounds for demoting Marshall were so thin.

Beasley did not testify. But it appears that Beasley was primed and ready for Marshall to return from vacation and moved immediately to discipline her for invented and minor slights, with upper management poised to guide the matter to completion. I do not think that we know the full story. The decision to demote Marshall was made in consultation with Pedersen and Nohelty. Nohelty did not testify. Pedersen testified extensively, but not about this decision. In any event, the day Marshall returned from vacation, Beasley was loaded for bear, and the bear was Marshall. I suppose Marshall can be faulted for getting angry and leaving the disciplinary meeting, but she understood what was happening. It hardly provides believable grounds for the demotion.

The *Wright Line* analysis does not have to be repeated in depth. The General Counsel's prima facie case is rock solid, and the demonstrated animus towards Marshall only grows with each subsequent violation. And in this case, the Respondent's effort to show that it would have demoted Marshall in the absence of her protected conduct is unavailing. The pretextual nature of the reasons for the demotion are demonstrated by its invention of the claim of Marshall's obscene gesture, not to mention the trivial nature of the offenses attributed to her. Moreover, the Respondent has not shown that it would have demoted her without reliance on the unlawful warnings issued to Marshall earlier in the summer. Indeed, Crumb specifically testified that the demotion was the result of "a series of behaviors" including the "incidents in June" and the "incident in July." It is well settled that a decision to discipline an employees is tainted if the decision relies on prior discipline that was unlawful. *Care Manor of Farmington, Inc.*, 318 NLRB 725, 726 (1995); *Dynamics Corp.*, 296 NLRB 1252, 1253–1254 (1989), (discharge based on previously issued unlawful warnings violates Section 8(a)(3)), enfd. 928 F2d 609 (1991). Marshall's demotion violated Section 8(a)(3).[57]

Analysis (confidentiality directive)

I reject the General Counsel's contention that the instruction to the disciplinary witness Pacquin to keep matters stated in the meeting confidential violated the Act.

As I have found, this direction was given to the witness to the meeting, social worker Pacquin—not to Marshall. And I have found that Pacquin, not Marshall, responded to the directive. Marshall surely had reason to be upset about this meeting, but I reject the claim that she *reasonably* understood this to be a directive to her that *she* should keep the matter confidential. There is no evidence, based on any events other than at this meeting that the Hospital ever communicated a policy to employees that discouraged them from discussing their own or other coemployees' disciplinary actions. The only evidence is that the Hospital had a policy of not broadcasting an employee's discipline to other employees. Based on the evidence, I reject the contention that Crumb (as alleged in the complaint) or Beasley (as the facts show was the one to mention confidentiality) "informed employees that the contents of the meeting were to be kept confidential." I will recommend dismissal of paragraph IX of the complaint.[58]

[57]Given my finding, I do not reach the General Counsel's alternative claim that the demotion constituted an unlawful application of an unlawfully overbroad rule.

[58]The General Counsel relies (GC Br. at 15) upon "admissions" that Pedersen testified that Crumb told him that she told Marshall and Pacquin that the meeting should be confidential, and a position statement submitted by the Respondent that states that Crumb asked that the conversations be kept confidential "because CMH considers individual personnel actions to be private matters." However, as the General Counsel recognizes, the record evidence

4. Complaint paragraph XII(e)
(The negative annual performance evaluation)

Hospital employees receive annual performance appraisals. According to the employee handbook, the appraisals "are used to determine pay increases and become part of your employee personnel file." Typically the department directors perform annual evaluations for the staff nurses under their direction between mid-April and the end of June of each year. Evaluations affect raises and bonuses, and are considered when an employee seeks to transfer to another job within the Hospital. The evaluations are a combination of objective (i.e., maintenance of certifications, attendance, educational requirements) and more subjective assessments of performance. Items are rated on a 5 point scale with different weighting given to different areas. An overall score is given at the end.

Marshall's evaluations and scores from 2008 through 2015 were entered into the record. From 2008 to 2014, her overall evaluations were 4.46 (2008), 4.62 (2009), 4.61 (2010), 4.83 (2011), 4.76 (2012), 4.78 (2013), 4.73 (2014). Each evaluation contains many comments, and they are uniformly laudatory. Reading through them, one cannot help but be struck by how highly valued Marshall was and the consistent positive regard for Marshall's work ethic and skills. The summary statements by the Hospital for these years are as follows:

> **2008**
> Anne is a valuable member of our department. She has shown what a positive impact one person can make in the ICU Anne demonstrates the highest level of professionalism and teamwork and is always there for her coworkers. She always brings a smile and a positive attitude to the workplace and maintains this even during the toughest of shifts. Her work is thorough and of top notch quality.
>
> Anne has been mentioned by patients and families for her outstanding care and positive attitude. She is positive role model for her peers and an ambassador of team work and positive attitude, for our unit.
>
> **2009**
> Anne is a valuable member of our department. Her positive attitude and smile can brighten a difficult day. Anne brings a lot of experience to the bedside and is always willing to share her knowledge with others and is always willing to help train new staff. Anne is flexible with her schedule and is willing to do what it takes to help the team. She is also one to stay calm when things get very busy which contributes to keeping the team relaxed and on task.
>
> Anne is often mentioned by patients and families for her outstanding care and positive attitude. We are very fortunate to have Anne on our team.

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demonstrates that Crumb did not make the statement at issue, Beasley did. Thus whatever Crumb told Pedersen and whatever the Respondent admitted in a position statement that Crumb said, is beside the point.

2010

Anne is a valued member of our team, She brings a positive attitude to the workplace and has a very strong work ethic. Although in a per-diem position, she has been working on a very regular basis and brings a nice skill mix to the team. Anne has demonstrated time and again the ability to take care of the most critically ill patients without becoming unglued. She is very poised and professional in her approach to nursing.

Over the past year Anne bas done some charge for us, and is currently active in precepting and mentoring new employees, and is doing an exceptional job. We are very fortunate to have someone like Anne on our team and we hope to maintain her employment here for many years to come.

2011

Anne is very self directed and provides her patients and their visitors/families with the highest quality care, She is always among the first to complete assigned education and is consistent in maintaining her ongoing education. She takes on difficult assignments without complaint and always does a great job. Anne has .also proven to be a great resource to her coworker & I look forward to working with Anne for a long time into the future. Anne is simply an outstanding nurse and employee.

2012

Anne is an excellent employee. She is honest and straight forward. She does an excellent job when in charge and because of this earned a team leader position recently. She is a strong ICCU nurse who is always willing to share her knowledge. She maintains a calm positive attitude and is a good role model for others. Overall she does a great job and I look forward to working with Anne in her new role.

2013

Anne is becoming a strong team leader and has adapted well to her new role over the past year. She does an excellent job with following upon CMS indicators, QA's and kronos needs. As a team leader I want to see Anne work on being more positive about organizational structure and hospital leadership. Overall she is Doing an outstanding job and I am fortunate to have her as part of my leadership team.

2014

Anne is a good team leader and charge nurse. She has strong clinical skills, is reliable, and has strong work ethic. She does a nice job of assisting with payroll and following up on issues. She is helpful and always looking out for the staff. One thing I would like her to work on is the example she sets with her cell phone and texting throughout the day. Overall I think *Ann does a* great job and I am pleased with her performance.

In 2015, Marshall was issued a score of 3.73, one full point less than in 2014, and a significant drop in a five point scale.

Crumb testified that in 2015, with an interim director in ICU at evaluation time, and with the Hospital unsure how much longer it would take to find a permanent director, the Hospital decided to wait until fall for the evaluations of the ICU staff.

In April 2015, employees in ICU asked how their evaluations would be done since no one who had witnessed them working over the course of the year would be there to do the evaluation. During a staff meeting an administrator told them "we'll probably use last year's." In the summer, Crumb confirmed to employees that last year's evaluations would be used for the current year.

According to Crumb's testimony: "the message was given at a staff meeting that we would be using the rating for the 2014 evaluation for the 2015 evaluation," with the exception that the "personal accountability" section of the evaluation would be rescored for 2015.

The personal accountability section did not add to an employee's score, but failure to meet any item in it reduced the final evaluation score by 1 full point. Crumb testified that she told the nurses the personal accountability section would be redone for 2015 because "I didn't think it was fair if someone had lost a point in 2014 they could have earned it back in 2015." In other words an attendance or academic deficiency in 2014 could be demonstrated to be corrected. The procedure for 2015, then, as explained by Crumb, was:

> I would take their rating . . . [f]rom 2014. I'd look at their rating, and then I would look at the personal accountability section in 2014 to see if they had lost a point; and if they had lost a point, then I would do an investigation to see if they earned that point back, such as if they had not done their mandatories [educational requirements] in 2014 and did in 2015[,] they would earn that point back.

In fact, this is not what Crumb did, and what she did do was not explained on the record and is highly suspicious.

In 2015, Marshall's evaluation, signed by Crumb, is dated October 30, 2015. The summary page lists her 2014 score, 4.73, and subtracts a point, giving her a 2015 score of 3.73.

The loss of the point is directly attributable to Marshall receiving a negative mark, for the first time, for an item in the personal accountability section of the evaluation.

The only evaluations in the record are Marshall's, for the years 2008–2015. The personal accountability of these evaluations (Section E) in 2011, 2012, 2013, and 2014, consist of four items to be checked (or left blank, in Marshall's case they were always checked). These four items were:

> Maintains all appropriate certifications and licenses for position
>
> Completes all required competencies/Mandatory Education by established deadline dates
>
> Meets the expectations of the attendance policy
>
> Is compliant with all Red/Rules.

Before 2011, in 2008, 2009, and 2010, there were additional criteria in Section E personal responsibility. In those years there were eight items to be assessed, and a space to mark Yes or No to the left of each item. The items were as follows:

Follows laws and regulations applicable to the operations of department and organization

Demonstrates a sense of right and wrong by exhibiting honest, ethical behavior

Brings concerns forward to management, human resources or Compliance Officer

Preserves confidentiality of patient and employee information "written or electronic" and observes patient rights

Maintains all appropriate certifications and licenses appropriate for position

Has completed minimum level of competency defined for the position

Completes all required competencies/Mandatory education by established deadline dates

Meets the expectations of the attendance policy

At least in Marshall's case—the record does not speak whether the change was applied to other ICU employees—in 2015, Section E returned to an eight-item Yes/No (with one item omitted and an entirely new one added). Marshall was assessed a "No" on "Demonstrates a sense of right and wrong by exhibiting honest, ethical behavior," a criterion that had not been part of the personal accountability section (or found anywhere else on the evaluations) since 2010. This is the reason that Marshall lost a full point in 2015 compared to 2014. Crumb testified that as far as she knew, no other ICU employee lost a point for this item in 2015. Crumb testified that a few nurses lost a point for failing to complete mandatory education, and one for an attendance issue. However, these were criteria included in the 2014 (and previous years') evaluations.

Notably, the evaluation used for Marshall in 2015 appears different in another way. Section F, the section that follows Section E personal accountability on the page, is a new item, "Medical Center Performance Objectives" that is not found in any previous evaluations in the record.

All of this suggests that a different evaluation sheet was used in 2015, at least for Marshall. Again no explanation is made for this, and it is contrary to the testimony that the personal accountability section from 2014 would be reviewed to see if they could earn back a point lost. In Marshall's case, at least, the personal accountability section used for 2015 contained items not used since 2010, and it was used against her, in a way unique to her—no one else lost a point based on subjective factors newly introduced to the personal accountability section.

Crumb testified that her reason for downgrading Marshall in the evaluation was:

> For all the behavior issues that had happened throughout the year, from the June—the June issues with not being truthful about calling staff in, twice; and her behaviors as far as not being truthful.

Analysis

The General Counsel alleges that Marshall's negative 2015 evaluation was unlawful. In 2015, Marshall was singled out and given a lower ranking on the subjective portion of the evaluation. This was contrary to the procedure for 2015 that Crumb testified she would use. Moreover, as noted above, inexplicably, the Respondent used a new evaluation form in 2015. Marshall was downgraded based on a criterion in this new form that had not been on the evaluation form in recent years. Moreover, according to Crumb, the negative downgrade in evaluation was based on the incidents from the summer that I have found to be unlawfully motivated.

In terms of a *Wright Line* analysis, Marshall's union activity, the employer's knowledge, and its animus are obvious. Given the irregular and unexplained criterion on which Marshall's negative evaluation was based, and the fact that in downgrading Marshall the Respondent failed to comply with the process for 2015 evaluations that Crumb testified was the process to be used, the pretextual nature of the Respondent's actions are transparent. This further supports an inference of discriminatory motive and negates the claim that the Respondent would have taken the same action in the absence of the employee's protected activity. *El Paso Electric Co.*, 355 NLRB 428, 428 fn. 3 ("we rely only on the judge's finding that the Respondent's reasons for its actions were pretextual, raising an inference of discriminatory motive and negating the Respondent's rebuttal argument that it would have taken the same action in the absence of [the employee's] protected activities"); *All Pro Vending, Inc.*, 350 NLRB 503, 508 (2007); *Rood Trucking Co.*, 342 NLRB 895, 897–898 (2004), citing *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 230 (D.C. Cir. 1995) ("When the employer presents a legitimate basis for its actions which the factfinder concludes is pretextual . . . . the factfinder may not only properly infer that there is some other motive, but that the motive is one that the employer desires to conceal—an unlawful motive . . . .") (internal quotation omitted); *Whitesville Mill Service*, 307 NLRB 937 (1992) ("we infer from the pretextual nature of the reasons for the discharge advanced by the Respondent that the Respondent was motivated by union hostility"), citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966).

Independently, the Respondent makes no bones about the fact that the lower evaluation was causally linked to the previous disciplinary incidents meted out to Marshall. As those were unlawful, the unlawfulness of the negative evaluation is established. *Parkview Hospital, Inc.*, 343 NLRB 76, 76 (2004). The Respondent's unfavorable performance evaluation of Marshall for 2015 was unlawful in violation of Section 8(a)(3) of the Act.

CONCLUSIONS OF LAW

1. The Respondent Cayuga Medical Center is an employer within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act, since about April 28, 2015, by maintaining a Nursing Code of Conduct that includes the following provisions:

> **People**
>
> Utilizes proper channels to express dissatisfaction with policies and administrative or supervisory actions and without fear of retaliation.
>
> **Community**
>
> Inappropriate and disruptive communications/behaviors include but are not limited to:
>
> > Displays behavior that would be considered by others to be intimidating, disrespectful or dismissive.
> >
> > Criticizes coworkers or other staff in the presence of others in the workplace or in the presence of patients.

3. The Respondent violated Section 8(a) (1) of the Act, on or about May 7, 2015, and August 26, 2015, by issuing unlawfully overbroad solicitations to employees to report coworkers.

4. The Respondent violated Section 8(a)(1) of the Act, on or about July 8, and within a couple of days thereafter, by directing employees to cease distributing union literature.

5. The Respondent violated Section 8(a)(1) of the Act, on a date in the fall of 2015, or early winter 2016, by informing employees that it was inappropriate to discuss their salaries and/or wages.

6. The Respondent violated Section 8(a)(1) of the Act, on or about May 8, 2015, by interrogating an employee about her union activities and threatening an employee with unspecified reprisals unless she ceased her union activities.

7. The Respondent violated Section 8(a)(1) of the Act, from May 2015 through July 2015, by prohibiting employees from distributing and posting union literature around the Respondent's facility while permitting employees to distribute and post other literature.

8. The Respondent violated Section 8(a)(1) of the Act, on or about November 10 and 11, 2015, by threatening employees on Facebook with unspecified reprisals and with job loss in retaliation for employees' protected and concerted activities.

9. The Respondent violated Section 8(a)(1) of the Act, on or about October 5, 2015, by issuing employee Scott Marsland discipline in the form of a "verbal written warning" because of his protected and concerted activities, and disciplining Marsland pursuant to an unlawfully overbroad rule.

10. The Respondent violated Section 8(a)(3) and (1) of the Act, on or about June 26, 2015, by suspending employee Anne Marshall in retaliation for her union activities.

11. The Respondent violated Section 8(a)(3) and (1) of the Act, on or about July 10, 2015, by issuing a verbal warning to employee Anne Marshall in retaliation for her union activities.

12. The Respondent violated Section 8(a)(3) and (1) of the Act, on or about August 31, 2015, by demoting employee Anne Marshall from her charge nurse and team leader position in retaliation for her union activities.

13. The Respondent violated Section 8(a)(3) and (1) of the Act, on or about October 30, 2015, by issuing Marshall an adverse performance evaluation for 2015, with a point subtracted for the "personal accountability" section, in retaliation for her union activities.

14. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

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

The Respondent, having maintained unlawful provisions in its Nursing Code of Conduct, shall be ordered to revise or rescind the unlawful rules, notify employees of the rescissions, and republish the code of conduct without the unlawful rules.[59]

The Respondent, having issued unlawful disciplinary warnings to employees Anne Marshal and Scott Marsland, must rescind the warnings. The Respondent, having unlawfully demoted employee Anne Marshall, shall offer Marshall full reinstatement to her former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to her seniority or any other rights or privileges previously enjoyed. The Respondent, having unlawfully suspended employee Anne Marshall for 1-1/2 days, and subsequently unlawfully demoted her, shall make Marshall whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful suspension and demotion of her. The make whole remedy shall be computed in accordance with *Ogle Protection Service, Inc.,*183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interested at the rate prescribed in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas,* 361 NLRB No. 10 (2014), the Respondent shall compensate Marshall for the adverse tax consequences, if any, of receiving lump sum backpay awards, and, in accordance with *AdvoServ of New Jersey, Inc.,* 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 3 a report allocating backpay to the appropriate calendar year for Marshall. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

[59]In *Guardsmark, LLC*, 344 NLRB 809, 812 fn. 8 (2005), enfd. in relevant part 475 F.3d 369 (D.C. Cir. 2007), in recognition of the potential costs of republishing an entire 211-page employee handbook, the respondent was given the option of supplying employees with inserts for the handbook stating that the unlawful rules have been rescinded, or with new and lawfully worded rules on adhesive backing to cover the old unlawful rules until the handbook was republished without the unlawful provisions. Such temporary accommodations are unnecessary here, as the Nursing Code of Conduct is an unbound three-page document that appears printed from a conventional office computer file with an office printer.

The Respondent, having issued Marshall an adverse performance evaluation for 2015, shall correct the evaluation by removing the negative assessment for the criterion "Demonstrates a sense of right and wrong by exhibiting honest, ethical behavior," and by removing the one point reduction for 2015 and reissuing the evaluation with a point score of 4.73. The Respondent shall provide Marshall with a copy of the corrected 2015 performance evaluation.

The Respondent shall also be required to remove from its files any references to the unlawful suspension and demotion of Marshall, the unlawfully calculated 2015 performance evaluation, and the unlawful warnings issued to Marshall and Marsland, and to notify each of them in writing that this has been done and that the suspension, adverse evaluation, and warnings will not be used against them in any way.

The Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted at the Respondent's facility wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that during the pendency of these proceedings the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 7, 2015. When the notice is issued to the Respondent, it shall sign it or otherwise notify Region 3 of the Board what action it will take with respect to this decision.[60]

[60]The General Counsel also seeks an order requiring that the attached notice be read to employees during working time by a high-ranking management official at the facility or by an agent of the Board. The reading aloud of a notice is an "extraordinary" remedy ordered in egregious circumstances. *Federated Logistics & Operations*, 340 NLRB 255, 258 (2003), enfd. 400 F.3d 920 (D.C. Cir. 2005). I do not intend to suggest that the unfair labor practices committed by the Respondent were not serious. They were. However, here we do not consider an organizing drive where the employer responded with multiple—indeed with any—discharges. The targeting of Marshall was the most egregious of the violations, yet I believe that her demotion and 1-1/2 day suspension will be as effectively remedied by the traditional remedies ordered as they would by a notice reading. The warning issued Marsland was an unlawful but honest reaction by management to the friction caused by the stance he took in the staff meeting. It did not reflect a calculated attack on employee organizing rights. The other violations are not to be minimized, yet they are well within the ambit of the type of violations to which traditional remedies apply. I conclude that under these circumstances, the General Counsel has failed to make the case that traditional remedies are insufficient to remedy the effects of the unfair labor practices. See, *Perry Brothers Trucking*, 364 NLRB No. 10, slip op. at 3 fn. 6 (2016) (denying General Counsel request that notice be read in case finding unlawful layoff and discharge, two instances of instructing employees not to discuss terms and conditions of employment, and unlawfully indicating that it was futile to engage in protected and concerted activity); *Checkers and Fast Food Workers Committee*, 363 NLRB No. 173, slip op. at 2 fn. 2 (2016) (denying General Counsel request that notice be read in case involving two unlawful discharges, threats of unspecified reprisals, and unlawful decreasing of employees' hours).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[61]

ORDER

The Respondent Cayuga Medical Center at Ithaca, Inc., Ithaca, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

   (a) Maintaining unlawfully overbroad employee rules including the following rules found in the Nursing Code of Conduct:

   People

   Utilizes proper channels to express dissatisfaction with policies and administrative or supervisory actions and without fear of retaliation.

   Community

   Inappropriate and disruptive communications/behaviors include but are not limited to:

   Displays behavior that would be considered by others to be intimidating, disrespectful or dismissive.

   (b) Soliciting employees to report coworkers or file a complaint against them "If you feel you are being harassed or intimidated" or "If you feel that you continue to be harassed."

   (c) Directing employees to cease distributing union literature.

   (d) Informing employees that it is inappropriate for them to discuss their salaries and/or wages.

   (e) Interrogating employees about union activities.

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

(f) Threatening employees with reprisals if they do not cease union activities.

(g) Discriminatorily prohibiting employees from distributing and posting union literature throughout the Respondent's facility, or from distributing union literature in nonpatient care areas, including by removing and/or confiscating posted or distributed union literature.

(h) Threatening employees with unspecified reprisals and with job loss in retaliation for employees' protected and concerted activities.

(i) Disciplining any employees for engaging in protected and concerted activities.

(j) Disciplining any employees pursuant to an unlawfully overbroad rule.

(k) Discriminatorily disciplining or demoting or issuing an adverse performance evaluation to any employees in retaliation for union or other protected and concerted activities.

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

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

(a) Rescind or revise the following provisions of the Nursing Code of Conduct, notifying employees of the rescissions, and republishing the code of conduct without the following rules:

People

Utilizes proper channels to express dissatisfaction with policies and administrative or supervisory actions and without fear of retaliation.

Community

Inappropriate and disruptive communications/behaviors include but are not limited to:

Displays behavior that would be considered by others to be intimidating, disrespectful or dismissive.

Criticizes coworkers or other staff in the presence of others in the workplace or in the presence of patients.

(b) Rescind the unlawful disciplinary warnings issued to Scott Marsland and to Anne Marshall.

(c) Correct the adverse performance evaluation issued to Anne Marshall for 2015 by removing the negative assessment for the criterion "Demonstrates a sense of right and wrong by exhibiting honest, ethical behavior," and by removing the one point reduction for 2015, and reissuing the evaluation with a point score of 4.73.

(d) Provide Marshall with a copy of the corrected 2015 performance evaluation.

(e) Within 14 days from the date of this Order, offer Anne Marshall full reinstatement to her job as charge nurse and team leader, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(f) Make Anne Marshall whole for any loss of earnings and other benefits suffered as a result of her unlawful suspension, and/or her unlawful demotion, in the manner set forth in the remedy section of this decision.

(g) Compensate Anne Marshall for the adverse tax consequences, if any, of receiving a lump sum backpay award, and file with the Regional Director for Region 3, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

(h) Within 14 days from the date of this Order, remove from its files any reference to the unlawful warnings given to Anne Marshall and Scott Marsland, and to the unlawful suspension, demotion, and adverse 2015 evaluation given to Anne Marshall, and within 3 days thereafter, notify them in writing that this has been done and that the warnings, suspension, demotion, and adverse evaluation will not be used against them in any way.

(i) Within 14 days after service by the Region, post at its facility in Ithaca, New York copies of the attached notice marked "Appendix."[62] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices in each language deemed appropriate shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice in each appropriate language, to all current employees and former employees employed by the Respondent at any time since May 7, 2015.

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

(j) Within 21 days after service by the Region, file with the Regional Director for Region 3 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. October 28, 2016

David I. Goldman
U.S. Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT maintain unlawfully overbroad employee rules, including in the Nursing Code of Conduct, that restrict you from the exercise of the rights set forth above.

WE WILL NOT solicit you to report coworkers or file a complaint against coworkers “if you feel you are being harassed or intimidated” or “If you feel that you continue to be harassed.”

WE WILL NOT direct you to cease distributing union literature.

WE WILL NOT inform you that it is inappropriate to discuss your salaries and/or wages.

WE WILL NOT interrogate you about your union activities.

WE WILL NOT threaten you with reprisals if you do not cease your union activities.

WE WILL NOT discriminatorily prohibit you from distributing and posting union literature throughout the Hospital, or from distributing union literature in nonpatient care areas, and WE WILL NOT remove or confiscate posted or distributed union literature.

WE WILL NOT threaten you with unspecified reprisals and with job loss in retaliation for your participation in protected and concerted activities.

WE WILL NOT discipline you for engaging in protected and concerted activities.

WE WILL NOT discipline you pursuant to an unlawfully overbroad rule.

WE WILL NOT discipline or demote or issue you an adverse performance evaluation in retaliation for your union or other protected and concerted activities.

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

WE WILL rescind or revise the Nursing Code of Conduct and republish the code of conduct without the following rules:

> **People**
>
> Utilizes proper channels to express dissatisfaction with policies and administrative or supervisory actions and without fear of retaliation.
>
> **Community**
>
> Inappropriate and disruptive communications/behaviors include but are not limited to:
>
> Displays behavior that would be considered by others to be intimidating, disrespectful or dismissive.
>
> Criticizes coworkers or other staff in the presence of others in the workplace or in the presence of patients.

WE WILL rescind the unlawful disciplinary warnings issued to Scott Marsland and to Anne Marshall.

WE WILL correct the adverse performance evaluation issued to Anne Marshall for 2015.

WE WILL offer Anne Marshall full reinstatement to her jobs as Charge Nurse and Team Leader, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Anne Marshall whole for any for any loss of earnings and other benefits suffered as a result of her unlawful suspension and/or her unlawful demotion.

WE WILL remove from our files any reference to the unlawful warnings given to Anne Marshall and Scott Marsland, and to the unlawful suspension, demotion, and adverse 2015 evaluation given to Anne Marshall, and within 3 days thereafter, notify them in writing that this has been done and that the warnings, suspension, demotion, and adverse evaluation will not be used against them in any way.

CAYUGA MEDICAL CENTER AT ITHACA, INC.

(Employer)

Dated _____ By _____

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the

Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Niagara Center Building, 130 S. Elmwood Avenue, Suite 630, Buffalo, NY 14202-2465
(716) 551-4931, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/03–CA–156375 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (716) 551-4160.