UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FREDERICK J. CALATRELLO, REGIONAL DIRECTOR, REGION 8 OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD	
Petitioner	
and	**CIVIL NO.**
DHSC, LLC, D/B/A AFFINITY MEDICAL CENTER	
Respondent	

UNITED STATES DISTRICT COURT
PETITIONER'S MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF PETITION FOR INJUNCTION UNDER SECTION 10(J) OF
THE NATIONAL LABOR RELATIONS ACT, AS AMENDED

I. STATEMENT OF THE CASE

This proceeding is before the Court on a petition filed by the Regional Director for Region 8 of the National Labor Relations Board, (the Board), pursuant to Section 10(j) of the National Labor Relations Act, as amended [61 Stat. 149; 73 Stat. 544; 29 U.S.C. Sec. 160 (j)], (the Act), for an injunction until final disposition of the matters involved pending before the Board on charges filed by National Nurses Organizing Committee, herein called the Union, alleging that DHSC, LLC, D/B/A Affinity Medical Center, herein called the Respondent has engaged in, acts and conduct in violation of Section 8(a)(1) and (3) and (5) of the Act (29 U.S.C. § 158(a)(1) and (3) and (5).[1] The

[1] The Act provides, *inter alia*,
Section 8(a) -- It shall be an unfair labor practice for an Employer --
(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;. . .

petition is predicated on Petitioner's conclusion that there is reasonable cause to believe Respondent has engaged in the unfair labor practices charged and that injunctive relief is just and proper in order to effectuate the purposes of the Act.

This matter was heard by Administrative Law Judge Arthur J. Amchan in Cleveland, Ohio on April 29- May 3, 2013. References to the official transcript of this proceeding will be referred to as Tr. __. Petitioner's exhibits will be referred to as G.C. Ex. __. Respondent's exhibits will be referred to as Resp. Ex. __. The Administrative Law Judge's Decision will be referred to as ALJD. ____. On July 1, 2013, the Administrative Law Judge issued his decision finding that Respondent has violated:

(i) Section 8(a)(5) of the Act by failing to recognize and bargain with the Union;

(ii) Section 8(a)(1) of the Act by denying the Union and Union organizer Michelle Mahon access to all areas of its property;

(iii) Section 8(a)(1) by threatening to plaster Assignment Despite Objection (ADO) forms on the forehead of any employee who submitted a form; more closely scrutinizing patient charts; stating how much she would enjoy disciplining a prominent union supporter; and by retaliating against employees by reducing the number of nurses in the ICU.

(iv) Section 8(a)(3) and (1) of the Act by disciplining Ann Wayt, terminating her employment and reporting Ann Wayt to the Ohio State Board of Nursing.

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(3) to discriminate in regard to hire or tenure of employment or any term or condition of employment…

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization…

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

II. THE STATUTORY SCHEME PURSUANT TO WHICH RELIEF IS SOUGHT

Section 10(j) of the Act,[2] authorizes United States district courts to grant temporary injunctions pending the Board's resolution of unfair labor practice proceedings. Congress recognized that the Board's administrative proceedings often are protracted. In many instances, absent interim relief, a respondent could accomplish its unlawful objective before being placed under any legal restraint, and it could thereby render a final Board order ineffectual.[3] Thus, Section 10(j) was intended to prevent the potential frustration or nullification of the Board's remedial authority caused by the passage of time inherent in Board administrative litigation.[4]

Indeed, Petitioner anticipates that Respondent will appeal Administrative Law Judge Amchan's decision to the National Labor Relations Board. Furthermore, in accordance with the Board's Rules and Regulations, Petitioner has the right to file an answering brief opposing Respondent's and/or Intervenor's appeal, and Respondent and/or Intervenor could then file a reply brief. In view of the numerous states remaining

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[2] Section 10(j) (29 U.S.C. Section 160(j)) provides:

> The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

[3] Schaub v. West Michigan Plumbing & Heating, Inc., 250 F.3d 962, 970 (6th Cir. 2001); Levine v. C & W Mining Co., Inc., 610 F.2d 432, 436-437 (6th Cir. 1979), quoting S. Rep. No. 105, 80th Cong., 1st Sess., 27 (1947), reprinted in I Legislative History of the Labor Management Relations Act of 1947 433 (Government Printing Office 1985). Accord: Fleischut v. Nixon Detroit Diesel, Inc., 859 F.2d 26, 28-29 (6th Cir. 1988).

[4] See, Kobell v. United Paperworkers Int'l Union, 965 F.2d 1401, 1406 (6th Cir. 1992).

in this administrative proceeding, Petitioner anticipates the possibility of many more months of administrative litigation. See, e.g. *Levin v. Fry Foods. Inc*., 108 LRRM 2208, 2209 (N.D. Ohio 1979), aff'd. 108 LRRM 2280 (6th Cir. 1981) (issuance of administrative law judge decision does not terminate 10(j) decree); *Fleischut v. Nixon Detroit Diesel, Inc*., 859 F.2d 28, 28 and 31, 129 LRRM 2660 (6th Cir. 1988) (error for district court to limit duration of 10(j) decree to commencement of hearing before administrative law judge).

To resolve a Section 10(j) petition, a district court in the Sixth Circuit considers only two issues: whether there is "reasonable cause to believe" that a respondent has violated the Act, and whether temporary injunctive relief is "just and proper."[5]

A. The "Reasonable Cause" Standard

The Regional Director bears a "relatively insubstantial" burden in establishing "reasonable cause."[6] In determining whether there is reasonable cause to believe that the Act has been violated, a district court may not decide the merits of the case.[7] Instead, the Regional Director's burden in proving reasonable cause is "relatively insubstantial."[8] Thus, the district court must accept the Regional Director's legal theory as long as it is "substantial and not frivolous."[9] Factually, the Regional Director need only "produce

[5] See, Ahearn v. Jackson Hospital Corp., 351 F.3d 226, 234 (6th Cir. 2003); Schaub v. West Michigan Plumbing & Heating, Inc., 250 F.3d at 969; Gottfried v. Frankel, 818 F.2d 485, 493 (6th Cir. 1987). See also Glasser v. ADT Security Systems, Inc., 188 LRRM 2805, 2807, 2010 WL 2196084, at *2 (6th Cir. 2010)

[6] Ahearn v. Jackson Hospital Corp., 351 F.3d at 237.

[7] Id. See also, Schaub v. West Michigan Plumbing & Heating, Inc., 250 F.3d at 969; Gottfried v. Frankel, 818 F.2d at 493.

[8] Schaub v. West Michigan Plumbing & Heating, Inc., 250 F.3d at 969; Kobell v. United Paperworkers Int'l Union, 965 F.2d 1406; Levine v. C & W Mining Co., Inc., 610 F.2d at 435.

[9] Fleischut v. Nixon Detroit Diesel, Inc., 859 F.2d at 29; Kobell v. United Paperworkers Int'l Union, 965 F.2d at 1407.

some evidence in support of the petition."[10] The district court should not resolve conflicts in the evidence or issues of credibility of witnesses, but should accept the Regional Director's version of events as long as facts exist which could support the Board's theory of liability.[11] Further, Courts have repeatedly found that favorable ALJ decisions bolster the Board's showing of reasonable cause to believe in or likelihood of success on the merits.[12]

B. The "Just and Proper" Standard

Injunctive relief is "just and proper" under Section 10(j) where it is "necessary to return the parties to the status quo pending the Board's processes in order to protect the Board's remedial powers under the NLRA."[13] Thus, "[i]nterim relief is warranted whenever the circumstances of a case create a reasonable apprehension that the efficacy of the Board's final order may be nullified or the administrative procedures will be rendered meaningless."[14]

III. THERE IS REASONABLE CAUSE TO BELIEVE THAT THE RESPONDENT VIOLATED SECTION 8(A)(1) AND (3) AND (5) OF THE ACT

This case arises from the unlawful response of Respondent to the NNOC's organizing campaign at Affinity Medical Center in Massillon, Ohio.

A. The Certification of Union Representation

[10] Kobell v. United Paperworkers Int'l Union, 965 F.2d at 1407.
[11] *See* Ahearn v. Jackson Hospital, 351 F.3d at 237; Schaub v. West Michigan Plumbing & Heating, Inc., 250 F.3d at 969; Gottfried v. Frankel, 818 F.2d at 493 and 494.
[12] *See* Ahearn v. Jackson Hospital, 351 F.3d 226, 238 (6th Cir. 2003); *see also*, e.g. Lineback v. Spurlino Materials, LLC., 546 F.3d 491, 502-03 (7th Cir. 2008); Overstreet v. El Paso Disposal, LP, 668 F.Supp.2d 988, 1005 n. 28 (W.D. Tex 2009), aff'd. 625 F.3d 844 (5th Cir. 2010); Pye v. Excel Case Ready, 238 F.3d 69, 73 n.8 (1st Cir. 2001).
[13] Kobell v. United Paperworkers Int'l Union, 965 F.2d at 1410, quoting Gottfried v. Frankel, 818 F.2d at 495. Accord: Schaub v. West Michigan Plumbing & Heating, Inc., 250 F.3d at 970.
[14] Sheeran v. American Commercial Lines, Inc., 683 F.2d 970, 979 (6th Cir. 1982), quoting Angle v. Sacks, 382 F.2d 655, 660 (10th Cir. 1967). Accord: Fleischut v. Nixon Detroit Diesel, Inc., 859 F.2d at 30-31.

The Union filed an election petition on August 20, 2012. On August 22, 2012, the Regional Director approved a consent election agreement[15] and the election was held on August 29, 2012 in a unit composed of Respondent's RNs. Out of some 213 eligible voters, 100 cast ballots for the Union, 96 cast ballots against the Union, and there were 7 challenged ballots. On September 5, 2012, Respondent filed timely Objections.

On September 21, 2012, the Regional Director issued a Report on Challenged Ballots and Objections in which he overruled four challenges, sustained three challenges and overruled the objections. On October 5, 2012, the Director issued a Certification of Representative.[16]

On various dates in October and November 2012, by e-mail, letter and/or in person, the Union demanded that Respondent meet and bargain with it as representative of the RN's in the appropriate unit. (GC Ex. 3, 4; Tr. 20-27)

B. The Unlawful Discipline, Discharge and Reporting of Ann Wayt to the State Board of Nursing

Ann Wayt worked for Respondent Affinity Medical Center for almost 25 years. She was a well-known, well-respected nurse, who had received numerous awards for exemplary patient care. Tr. 208; 212-15; 429. Based on her credentials and performance,

[15] 29 CFR 102.62 - Consent-election agreements. (a) Where a petition has been duly filed, the employer and any individual or labor organizations representing a substantial number of employees involved may, with the approval of the Regional Director, enter into a consent-election agreement leading to a determination by the Regional Director of the facts ascertained after such consent election…Such consent election shall be conducted under the direction and supervision of the Regional Director. The method of conducting such consent election shall be consistent with the method followed by the Regional Director in conducting elections pursuant to 102.69 and 102.70 except that the rulings and determinations by the Regional Director of the results thereof **shall be final**, and the Regional Director shall issue to the parties a certification of the results of the election, including certifications of representative where appropriate, with the same force and effect, in that case, as if issued by the Board, provided further that rulings or determinations by the Regional Director in respect to any amendment of such certification shall also be final.

Wayt was recruited to work in the orthopedic unit when it opened in 2011. Tr. 98; 166; 180.

In June 2012, Wayt learned about the NNOC's organizing campaign. Tr. 216. Wayt became a vocal Union supporter and regularly spoke about the Union with her co-workers in the orthopedic unit and in other units. Tr. 216. Many of these conversations took place in the break room. Wayt did nothing to hide her support for the Union. She openly attended union luncheons which took place at the hospital. Tr. 217-18. Wayt's photograph appeared prominently on a Union pamphlet which was circulated at the hospital a few weeks before the August 29, 2012 election. Tr. 220; G.C. Ex. 11. The front of the pamphlet shows Wayt giving two-thumbs up with a quote, "we are voting yes for NNOC to work towards a contract that improves our standards, including staffing, on-call pay, wages and working conditions." G.C. Ex. 11. Several of Respondent's witnesses, including chief nursing officer, Bill Osterman, director of the orthopedic unit, Jason McDonald, and director of the pharmacy, John Perone all admitted that they knew Wayt supported the Union. Tr. 79, 151-2 (Osterman); 116 (McDonald); 117-24, (Union Pamphlet discussed at managers meeting); 424 (poster board of Union supporters in cafeteria); 497 (Perone).

The Patient Care Incident

On August 28, 2012, the day before the Union election, an emergency room nurse called the orthopedic unit to notify the unit about a new patient. Tr. 224. The new patient, described as confused and combative, required a "sitter." Tr. 224. Wayt, who answered the call, told the ER nurse that the admitting physician needed to complete an order for a sitter because the unit was at capacity and there was no one available to sit with the patient. Tr. 224.

In her attempt to secure a sitter, Wayt contacted cardiovascular manager Sue Kress who, in Paula Zinsmeister's absence, was acting as the clinical manager of the orthopedic department, Tr. 226. Kress made the appropriate arrangements for a sitter and volunteered to sit with the patient until the sitter arrived. Tr. 227.

At 9:15 a.m., Kress, ER nurse Rhonda Smith and patient care technician Sam Burgett settled the patient into her room. Wayt, who was working with two other patients, did not enter the new patient's room until after 10:00 a.m. Tr. 227. Wayt checked the patient to ensure the patient's comfort and spoke with Smith. Smith told Wayt that she and another nurse, Jonalee Lesjak, would take turns serving as the sitter. Tr. 228. Wayt left the patient's room and began compiling the patient's chart. Wayt paged the admitting physician to obtain the orders for the patient. Tr. 228-29. Shortly after 11:00 a.m., Wayt rounded on the patient and noted that Lesjak was sitting with the patient. Wayt spoke briefly with the patient's family about the patient's medical history and placed an IV bag into the pump to regulate the fluids. Tr. 229. Wayt then left the patient's room to get her stethoscope to perform the patient's head-to-toe assessment. Tr. 230. Upon returning to the room, Wayt noted that the patient's family had left and Lesjak asked Wayt to relieve her for a moment for a restroom break. Tr. 230-31. Wayt gave Lesjak directions to the restroom, then started the head-to-toe assessment. Wayt testified that during the assessment she noticed that the patient was very thin and that the patient's rib cage was poking up. Tr. 231-32; 297. She admits that she did not perform the skin assessment at that time. Tr. 231. As Wayt was finishing the assessment, Lesjak returned to the room. Tr. 233.

Shortly after noon, Wayt checked the patient. Noting the patient's restlessness, Wayt administered morphine through the IV site. Tr. 233. Shortly after 1:00 p.m., Wayt

rounded again on the patient. The patient's family had returned to the room and Wayt discussed the patient's diet with them. Tr. 234. On Wayt's next round, shortly around 2:00 p.m., Smith was sitting with the patient. Wayt asked Smith if patient care technician Sam Burgett had assisted in changing the patient. Tr. 234. Wayt checked on the patient at about 3:15 p.m. when Smith, appearing annoyed, pointedly told Wayt that her shift was over. Tr. 235. Wayt informed Smith that she had already called a coordinator to get a sitter to relieve Smith. Tr. 235. At 4:00 p.m. on Wayt's round on the patient, Vicky, a patient care technician, told Wayt that she would be the sitter until 11:00 p.m. Tr. 236. At this time, noting that the patient was getting restless, Wayt again administered morphine to the patient. Tr. 236. Between 5:00 p.m. and 6:00 p.m., Wayt sent patient care technician Burgett to relieve Vicky for her dinner. Wayt rounded on the patient and noticed that after the 4:00 p.m. morphine, the patient appeared relaxed. Tr. 237. Shortly after 6:00 p.m., Wayt rounded on the patient again and observed Burgett sitting by the window. Wayt noted that other sitters routinely sat on the other side of the patient's bed. Tr. 238. Wayt performed the bedside reporting to the night nurse, Pricilla Harrison, and completed her charting for the day. Tr. 238-39.

Wayt testified that as she was charting, she intentionally did not check the 7:00 a.m. to 7:00 p.m. box because she realized she had forgotten to perform the skin assessment. Tr. 245; (G.C. Ex. 7 page 21). Wayt testified that when she started completing the section entitled "Community Cares Rounding", she mistakenly marked 7:00 a.m., 8:00 a.m. and 9:00 a.m. in the row "position." Realizing her error because the patient had not yet been admitted to the unit, she marked the 10:00 a.m. time for the remaining rows on that page, and the following two pages of the head-to-toe assessment. Tr. 245-48.

Smith testified that she normally worked until 3:00 p.m., but on August 28, 2012, she was required to stay later because she was serving as the sitter. Tr. 549;649. Her supervisor, Jeremie Montabone, had volunteered Smith to serve as the sitter.[17] Smith testified that Wayt properly attended to the patient anytime the patient appeared in to be pain. Tr. 625-28. Smith further testified that under the Ohio Nurse Practice Act, it was appropriate for Wayt to document any patient care that was provided by her, by other nurses and by patient care technicians. Tr. 623-25.

On August 29, 2012, Smith approached supervisor Montabone to tell him of her concerns about not being relieved in a timely manner. Tr. 610. Smith testified:

> I told him that I was concerned because no one was there to relieve me at time and had I been on call for open heart, no one would have known where I was to get in touch with me cause [sic] my phone was down in the locker, my locker, and I was up on the floor. And, but no one was really coming in to see the patient other than the people that were sitting. [sic]

Clearly Smith's intent was to complain about not being relieved in a timely manner. She made only a passing comment about patient care. Tr. 610.[18]

Montabone responded that he would talk to Kress because Kress was covering the orthopedic unit in Zinsmeister's absence. Tr. 610-11. Smith repeated to Kress her concerns about not being relieved on time. Tr. 612. Montabone's testimony cannot be used to corroborate Smith's as Montabone conceded that he did not have a clear recollection of the events. Tr. 739.

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[17] Montabone testified that because there were no surgeries scheduled in his unit, the nurses were given the opportunity to take the day off. Tr. 727. He asked Smith to serve as a sitter because she was familiar with the layout of that unit. Before Lesjak left for the day, Montabone asked Lesjak to relieve Smith for lunch. Tr. 730.

[18] Smith admitted that she and her coworkers in the cardiovascular unit actively opposed the Union, that she did not disagree with the views of her co-workers and that she saw anti-union campaign materials on her unit. Tr. 616-18; 622. Smith testified that she saw the Union pamphlet with Wayt's photograph. Tr. 616-18

Smith admitted that while she was sitting with the patient, she elected not to say anything to Wayt about any alleged concerns about patient care. She admitted that in her absence from the patient's room at lunchtime, Wayt might have performed the head to toe assessment. Smith did not know. Tr. 614. Smith testified that she observed Wayt take proper care of the patient's pain that she did not know whether Wayt conducted the head-to-toe assessment because she was not in the room, and that her initial complaint to Montabone was about not being timely relieved of her sitting duties.

Montabone relayed Smith's message to Kress, who told Montabone that she would present the issues at a safety meeting.[19] Tr. 733. Without conducting any investigation, confirming with Smith or discussing any concerns with Wayt, Kress then repeated what Montabone told her to director of the orthopedic unit, McDonald. Tr. 668. Notwithstanding that Kress' job was the manager of the cardiovascular unit, and not the orthopedic unit, Kress volunteered to start her own investigation into the matter and proceeded to the orthopedic unit to pull the patient's assessment and hourly rounding sheet. Tr. At 668-69; (Resp. Ex. 5). Kress testified that she reviewed the patient's twenty-four hour assessment and noticed there was nothing documented about skin integrity or a "harsh" cough.[20] Kress also noted that the chart indicated that hourly rounding began at 7:00 a.m. Tr. 671-72. Kress testified that Wayt failed to chart that the patient had a skin tear in the crease of her elbow and a severely bruised heel, but admitted that the night shift nurse noted that the patient's skin was intact and there was no indication of a severely bruised heel. Tr. 672; (Resp. Ex. 18). Kress admitted that she

[19] Montabone testified that he was in surgery that day and did not attend that safety meeting. Tr. 735.

[20] Kress admitted that a patient could have a cough at one point in the day and then not have a cough later that day. Tr. 149.

never considered reviewing the charting performed by the night shift nurse because she was only interested in Wayt. Tr. 147-48; 166. After reviewing the patient's chart and again without talking to Wayt or any of the sitters, Kress advanced her claims against Wayt with chief nursing officer Osterman, stressing her concerns that there were conflicting times on the patient's chart regarding the time the patient was admitted to the unit. Tr. 920.

The Pharmacy Incident

On August 30, 2012, the day after the Union election, Wayt observed the director of the pharmacy, Perone, on the floor working on the Pyxis medication machine. Tr. 250. Wayt asked Perone what was wrong and Perone replied that he found a discrepancy on the Pyxis that needed to be fixed immediately. Tr. 250. Wayt testified that the Hospital's policy is that when a discrepancy is found, it can be resolved either at the time it is found or at the change of shift with another RN. Tr. 252. Perone admitted that under the Pyxis policy, he, as the director of the pharmacy, has the ability to resolve discrepancies and that he did not require Wayt's assistance. Thus, under the policy, Wayt's suggestion that it could be resolved at a later time was correct. Tr. 502; 513-14. Clearly then, Wayt did not violate any policy when she told Perone that she was busy and would resolve the discrepancy later. Wayt, believing that she would have time to fix the discrepancy at the end of her shift, told Perone that she did not have time at that moment. Perone, however, insisted that they fix the discrepancy immediately. He later lodged a complaint against Wayt with Zinsmeister by email. Tr. 508-15; (GC Ex. 18)

Respondent Decides to Discharge Wayt and then Conducts its Investigation

On September 4, 2012, Kress met with Zinsmeister and McDonald to discuss Kress' concerns about Wayt's August 28 charting. Tr. 677. Osterman testified that later

that day, he, McDonald and Zinsmeister reviewed the emergency room's documentation on the patient and concluded that Wayt falsified the chart and neglected the patient. Tr. 927. Osterman believed that Wayt never performed the patient's head-to toe-assessment. Tr. 926-27. At that point, no one had interviewed Wayt, Rhonda Smith or Jonalee Lesjak.[21] Tr. 963-65. Osterman admitted that the hospital's policy provides that the head-to-toe assessment is to be performed within a twenty-four hour shift. Thus, the night nurse who relieved Wayt had as much responsibility for completing the assessment as Wayt did. Notwithstanding the absence of any investigation, Osterman, McDonald and Zinsmeister concluded that Wayt should be discharged. Tr. 929;961.

Zinsmeister testified that after reviewing the chart, she spoke with the night nurse about her incorrect notation that the patient's skin was intact. Tr. 191-92. Zinsmeister further testified that the night nurse had simply made a charting error, which did not warrant any discipline. Tr. 191-92; 854.

On September 5, 2012, Wayt attended a meeting in Zinsmeister's office. At the beginning of the meeting, McDonald showed Wayt a written warning over the incident with Perone, asserting that Perone had complained. Wayt was not given a copy of the written warning. Tr. 862;(Resp. Ex. 16). Wayt testified that she had no idea why she was being disciplined and that she had apologized to Perone the day of the incident. Wayt wrote a note to on the write up to this effect.

At the end of the meeting, McDonald casually told Wayt that Affinity was performing a chart audit and asked her to confirm areas of the patient's chart to indicate accuracy. Tr. 768-70; (Resp. Ex. 5). While chart audits are routine, neither Zinsmeister

[21] Lesjak was not interviewed until September 19, 2012. Tr. 963-65.

nor McDonald told Wayt that she was suspected of falsifying the patient's chart. Tr. 822-23. At that time, no one from the hospital had spoken with Smith or Lesjak.[22] Tr. 825-26; 829.

Zinsmeister, McDonald and Osterman met and concluded that Wayt had falsified the patient's records. Tr. 775. Osterman instructed Zinsmeister and McDonald to contact human resources. Tr. 776. Osterman contacted human resources manager Boyle, who, in turn, emailed the corporate regional quality department stating that: Wayt had documented that she performed a head-to-toe assessment at 9:00 a.m. when the patient did not arrive in the unit until 9:15 a.m. and there were three witnesses who stated that Wayt never conducted an assessment or even entered the patient's room until noon. Tr. 1092-95; (GC Ex. 19 at 8-9). Notably, at the time of Boyle's email to corporate, no one had confirmed any facts with Smith or Lesjak. Tr. 206; 1088-89; 1097. Kress, the third "witness" referred to in Boyle's email, had stopped sitting with the patient when Smith arrived in the orthopedic unit early that morning. The only documentation attached to the e-mail was the twenty-four hour assessment form. (G.C. Ex. 19); Tr. 1091.

Respondent's Regional Quality Director, Veronica Benson, replied to Boyle's email:

> **it is not uncommon** to have some time discrepancies such as 9ish, 9:30 or so….I'd be interested to (sic) know the **details on this nurse including age, tenure and prior disciplinary action.** If we determine this is falsification…(sic) how has the facility handled this in the past? **Seems a weak case for termination** without more information. G.C. Ex. 19 at 6-7. (emphasis added)

[22] McDonald and Zinsmeister did not speak with Rhonda Smith until September 13, 2012. Tr. 829.

Boyle forwarded Benson's e-mail to McDonald and Zinsmeister, who never responded to Benson's questions. Tr. 1092-92

Interestingly, only after Respondent's September 5 decision to terminate Wayt, did Respondent contemplate talking to her. On September 12, 2012, Zinsmeister, and McDonald called Wayt at home and notified her of a meeting regarding a patient safety issue. Tr. 869-870. Wayt testified that she was blindsided and had no idea what Zinsmeister was referencing. Tr. 254. In reply, Zinsmeister volunteered, "this has nothing to do with the Union." Tr. 254. Notably, there had been no discussion about the Union in the conversation before Zinsmeister's disclaimer.

Wayt stated that she believed she could have union representation at the meeting. Tr. 99, 254-255. McDonald responded that the meeting was disciplinary and she was permitted to have union representation in an investigatory meeting. Wayt asked McDonald "how did it get that far when I am just finding out about it?" Tr. 255.[23] When Wayt insisted on having a representative present for the meeting, McDonald told her "you will be here tomorrow at 1:00 p.m. with no representation or I will fire you over the phone." Tr. 99-101, 255, 872.

While McDonald denies that he threatened to fire Wayt, he admits that he asked Wayt if she was refusing to come to the meeting and also admits that he told Wayt that if an employee "refuses to attend a meeting requested by management, the employee should be considered insubordinate." Tr. 100,785-86. Union representative Bob McKinney testified that Wayt called him immediately after the phone call with Zinsmeister and

[23] Boyle testified that her first impulse was to proceed immediately to termination and thus forgo the investigatory meeting to avoid Weingarten rights. Tr. 1061-62. Additionally, Boyle, Director testified that prior to McDonald's phone call with Wayt, Boyle directed both McDonald and Zinsmeister that Wayt's meeting was disciplinary and that the decision was already made to proceed straight to discipline and to terminate Wayt. Tr. 1060-61; GC. Ex. 19.

McDonald and told him that McDonald told Wayt he would fire her over the phone. Tr. 1203.

On September 13, McDonald and Zinsmeister met with Wayt for the first time to discuss the events of August 28, 2012. Notably, in the interim, Wayt had continued to work in the orthopedic unit, caring not only for other patients, but also caring for the particular patient in controversy. During the meeting, McDonald and Zinsmeister expounded on the allegations that had yet to be investigated. Zinsmeister's notes of the meeting show that McDonald told Wayt that the Hospital had four witnesses who reported that Wayt was not in the room from the time the patient was admitted until sometime around noon. Tr. 187; (G.C. Ex. 7 at 11-12). Indeed, at the time of the meeting, Respondent had not yet interviewed Sam Burgett or Jonalee Lesjak. Tr. 793-94. The only management person who had spoke with Smith was Susan Kress. Furthermore, Smith testified and wrote in her late-secured statement that Wayt had, in fact, been in the patient's room around 10:00 a.m. and that later, sometime before noon, Smith relayed to Wayt a code word so that Wayt could communicate with the patient's son over the phone. (G.C. Ex. 7 at 14).

Respondent suggests that at the end of the September 13, 2012 meeting Wayt was told that she could respond to the allegations and submit a defense. However, support for this claim is conspicuously absent from Zinsmeister's notes of the meeting. Tr. 790, 1070-71; (G.C. Ex. 7 at 11-12). And Wayt disputes that she was told at this meeting that she had an opportunity to submit a defense. Tr. 258-60.

Wayt testified that on September 17, 2012, she received a voicemail message from Boyle notifying her that another meeting was scheduled for September 18, 2012 at 10:00 a.m. Boyle's message also asserted that Wayt had failed to submit any rebuttal or

defense. Tr. 258-59. Wayt contacted Bob McKinney who confirmed Wayt's recollection that she had not been told at the meeting that she could submit a defense. Tr. 259. Wayt then contacted union representative Mahon to review the patient care incident so Mahon could prepare a defense letter. Tr. 259-60; (Resp. Ex. 8). Mahon submitted the letter on September 18, 2013.

The September 18 meeting was rescheduled to September 24. Tr. 259. On September 24, Boyle and compliance officer Pat Kline met with Wayt and Mahon to discuss the defense letter. Tr. 437. Kline accused Wayt of violating HIPAA by releasing sensitive patient information in her defense letter. Kline testified that she had concerns that certain patient identifiers were included in the letter. Tr. 1132-37. When asked at hearing to identify the HIPAA violation in the letter, Kline noted the date the patient was admitted, the fact that the patient came through the ER, the admitting physician's name and the room number and the fact that the patient had a fractured hip. Tr. 1132-27. However, Kline admitted on the record that one would not be able to determine the identity of the patient unless the reader had other information. Tr. 1153-1160. Kline further testified that in the normal case, the hospital would issue a verbal warning to the person involved. Tr. 1160. Mahon requested 24 hours to respond to the new allegation. Tr. 260. The next day, Boyle told Wayt she had a meeting in human resources on the following day for the disciplinary phase of her suspension. Tr. 261.

Thereafter, Mahon received an e-mail from attorney Bryan Carmody stating that based on Mahon's alleged violation of HIPAA, Mahon was permanently excluded from all areas of the facility, including the cafeteria and parking lot. (GC. Ex. 16). Mahon was the only union representative servicing the unit. Tr. 470.

On September 26, 2012, McDonald discharged Wayt. Tr. 263. That same day, Osterman filed a complaint form with the Ohio Board of Nursing. (GC Ex. 7). In this complaint, Osterman alleged that Wayt falsified documentation by documenting that certain assessments were performed at times prior to the patient's admission to the unit and that a head-to-toe assessment was performed. (GC Ex. 7 at 7; GC. Ex. 7(1)(a)). Osterman attached a copy of Wayt's disciplinary action form, investigatory suspension form, several witness statements, meeting notes from the September 13, 2012 meeting with Wayt and a copy of the patient's chart. (GC Ex. 7; 7(1)(a)). On October 31, 2012, Wayt was contacted by the State Board of Nursing and she subsequently hired counsel to defend herself against those allegations. (GC Ex. 12).

In light of the above, Petitioner has reasonable cause for it to believe that the reasons asserted by Respondent for Wayt's discipline, discharge and report to the State Board of Nursing are pretextual and that Respondent would not have taken these unlawful actions had Wayt not engaged in protected Section 7 activities.

IV. APPLICATION OF THE STANDARDS TO THIS CASE

A. There is Reasonable Cause to Believe that Respondent Violated Section 8(a)(1) and (5) of the Act by Refusing to Recognize and Bargain with the Union.

Petitioner has reasonable cause to believe that the Respondent has failed and refused to recognize and bargain collectively and in good faith with the Union in violation of Sections 8(a)(1) and (5) of the Act. The emails between the parties demonstrate that the Respondent is refusing to bargain unless and until the Union agrees to submit the objections issue to an arbitrator. Respondent argued (pre-trial) that the Union was bound by the pre-election agreement providing that any challenges and

objections would be arbitrated. This argument is without merit. The Board, not an arbitrator, has authority to decide the representation question of whether conduct impaired the election. *See* Advanced Architectural Metals, 347 NLRB No. 111 (2006); Avery Dennison, 330 NLRB 339, 339-340 (1999). The Respondent has no legal ground for challenging the Region's ultimate disposition of its objections, challenges and the certification of representative.

By entering into a consent agreement, the Respondent waived any right to Board review of the Regional Director's actions with regard to post-election matters, including the disposition of objections.[24] Simply stated, Section 102.79 and 102.62(a) of the Board's Rules and Regulations makes it clear that the Director's "rulings and determination" in the context of conducting a consent election and thereafter issuing an appropriate certification "shall be final." Having entered into a valid consent election agreement and thereafter participated in the election conducted pursuant to that agreement, as well as participating in the Regional proceeding that disposed of post-election issues, Respondent clearly cannot now complain about the legitimacy of those proceedings.

Additionally, the Respondent failed to file any request for review or appeal of the Region's dismissal of its objections and challenged ballots. Unlike a case in which the employer seeks to challenge the scope or composition of the unit as determined by a pre-election decision of the Regional Director, which notably is the only vehicle to gain appellate review of a Board decision, here the Respondent alleges that it is privileged to

[24] [24] Respondent freely entered into a consent election agreement. It is worth noting that, in any event, Board review of a unit composition issue, even when properly raised after a consent election agreement has been entered into, is extremely limited. See, in this connection Baker and Taylor Co., 109 NLRB 245 (1954); American Finishing, Co., 90 NLRB 1786 (1950); Clark Shoe Co., 88 NLRB 989 (1950); and West Texas Utilities, 106 NLRB 859 (1953).

refuse to bargain based on the alleged breach of a side agreement between the parties. Any remedy for an alleged breach of contract would be actionable under Section 301 of the LMRDA, and would simply be irrelevant to an 8(a)(5) unfair labor practice charge. Where in a similar context, the Board has granted summary judgment when a refusal to bargain was based on objections filed after a consent election. *Compare NHE Michigan*, 219 NLRB 833 (1975) and *TLB Plastics Corporation*, 273 NLRB 1835 (1985).

B. There is Reasonable Cause to Believe that Respondent Violated Section 8(a)(1) and (3) of the Act by its Discriminatory Discipline, Termination and Reporting of Wayt to the State Board of Nursing.

Petitioner has reasonable cause to believe that the Act had been violated. The Board has long-standing precedent setting forth the standards for determining whether negative employment actions are motivated by anti-union animus.[25] In the administrative hearing, the Petitioner bears the initial burden of establishing that an employer's disciplinary actions were motivated, at least in part, by anti-union considerations. In meeting this burden, the Petitioner can present evidence that: (1) Wayt engaged in union or other protected concerted activities; (2) the Respondent knew of such activities; and (3) the Respondent harbored animosity towards the union or union activity.[26]

[25] Wright Line, A Division of Wright Line, Inc., 251 NLRB 1083, 1089 (1980), *enfd.*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1989), *approved in* NLRB vs. Transportation Mgt. Corp., 462 U.S. 393 (1983).

[26] Senior Citizens Coordinating Council, 330 NLRB 1100, 1105 (2000); Regal Recycling, Inc. 329 NLRB 355, 356 (1999).

Direct or circumstantial evidence can be used to establish that an employer's knowledge of protected activity and its anti-union animus was the motivating cause of an adverse disciplinary action. [27]

> Discriminatory motivation may reasonably be inferred from a variety of factors, such as the company's expressed hostility towards unionization combined with knowledge of the employees' union activities; inconsistencies between the proffered reason for the discharge and other actions of the employer; disparate treatment of certain employees compared to other employees with similar work record or offenses; a company's deviation from past practices in implementing the discharge; and proximity in time between the employees' union activities and their discharge. W.F. Bolin Co. v. NLRB, 70 F.3d 863, 871 (6th Cir. 1995), *cited in* NLRB v. General Fabrications Corp., 222 F.3d 218, 226 (6th Cir. 2000).

General employer knowledge of protected activity as well as the timing and circumstances surrounding the adverse action are factors that are considered in making this determination. [28] Disparate treatment further supports an inference that an employer's disciplinary action was motivated by animus toward the protected activity.[29]

Once discriminatory motive is established, a respondent has the burden of demonstrating that it would have taken the same disciplinary action in any event and absent the protected conduct.[30] This burden is not met by a mere showing that the disciplinary action was supported by a legitimate reason. Rather, a respondent is required to show that the legitimate reason would have resulted in the same disciplinary action been in the absence of the employee's union and/or other protected activity.[31]

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[27] *See, e.g.*, NLRB v. Vemco, Inc., 989 F.2d 1468, 1477 (6th Cir. 1993) *cited in* Ahearn v. Jackson Hospital, 351 F.3d at 237.
[28] *See*, American Cyanamid Co., 301 NLRB 253 (1991); Abbey's Transp. Sycs, 284 NLRB at 700.
[29] Citizens Investment Services Corp., 342 NLRB 316 (2004).
[30] NLRB v. Gen. Sec. Servs. Corp., 162 F.3d 437, 442 (6th Cir. 1998).
[31] Monroe Mfg., 323 NLRB 24, 27 (1997).

In this case, there is reasonable cause to believe that Respondent disciplined, discharged and then reported Wayt to the State Board of Nursing because of her Union activity. Insofar as the first prong of the Board's test, it is clear that Wayt engaged in union activity and other protected concerted activities and that Respondent had knowledge of that activity and her support for the Union. The record is replete with Wayt's union and protected concerted activities, which were admittedly known by the Respondent. She was an open Union supporter; she regularly spoke with her co-workers about the union; she participated in union luncheons in the Respondent's cafeteria; she attended union meetings, and she appeared prominently in the union's campaign pamphlet with a quote stating that she was voting for the Union. Wayt also asserted her right to have a union representative present for what she reasonably believed was an investigatory interview.

In this record, there is ample evidence of Respondent's anti-union animus. Respondent threatened Wayt because she demanded union representation. Respondent excluded Mahon from the entire hospital premises on a vacuous and unsubstantiated HIPAA breach. After Wayt's termination, Respondent interrogated a new employee about her union activities; threatened physical harm to employees for submitting ADO forms, a protected Section 7 activity; threatened employees with more onerous working conditions because of their protected activities; forced employees to work short-staffed because of their protected activities, and coercively scrutinized employees' work in retaliation for employees' protected activities. Notably, the unit that Kress directly manages was openly anti-union and she played a role in many of Respondent's unlawful acts and was a key player in Wayt's discharge.

The Discipline

Petitioner has presented a strong prima facie case: Wayt engaged in numerous union activities, those activities were known to Respondent, and the evidence of Respondent's animus for those activities is overwhelming. While Respondent may argue that Perone had no relationship with Wayt and had no knowledge of her union activity,[32] that argument is irrelevant because it is undisputed that McDonald and Zinsmeister, not Perone, made the decision to issue the written warning. Tr. 758, 762;(Resp. Ex. 16). McDonald and Zinsmeister knew about Wayt's union sympathies and that she was featured prominently in the Union's campaign pamphlet. Additionally, McDonald and Zinsmeister were both on the telephone when Wayt asserted her Weingarten rights. The incident with Perone occurred the day after the Union election on August 30. Wayt was not given the written warning until September 5, after the decision had already been made to terminate Wayt for the patient care issue.

The discipline states that Wayt failed to comply with hospital policy and exhibited an unprofessional attitude. (Resp. Ex. 16). The record evidence does not support the discipline. Perone admitted that as the director of the pharmacy and under the Pyxis policy, he had authority to resolve the discrepancies without other assistance. Under the policy, Wayt's suggestion that it could be resolved at a later time was correct. Tr. 502; 513-14. Perone admits that Wayt was busy at the time he was attending the Pyxis machine and Zinsmeister admitted that patient care has a higher priority than resolving a Pyxis discrepancy. Tr. 501; 879. There was no policy violation when Wayt told Perone she was busy and would resolve the discrepancy at a later time. Respondent's claim that Wayt was disciplined for "failure to comply with hospital policy" is unsubstantiated. (Resp. Ex. 16 - Violation noted- Failure to Comply with Hospital Policy).

[32] Perone admitted that he knew Wayt supported the Union. Tr. 497.

Wayt was also disciplined for "unprofessional conduct." Perone testified that other employees have been rude to him and that he has reported this behavior to their supervisors. Tr. 503. There are no records to show that Respondent has disciplined any employee for "unprofessional conduct" or rudeness to Perone. Additionally, Respondent has no records of any employee disciplined for refusing to resolve a medication discrepancy. Tr. 1080-83. Furthermore, Wayt testified, and Perone corroborated, that shortly after the encounter, Wayt apologized to Perone for her perfunctory response. It is extraordinary for an employer to discipline an exemplary employee like Wayt when there is no violation of the employer's rules or policies, but that is exactly what happened here. *See*, In re Norton Healthcare, Inc., 341 NLRB 143 (2002).

Respondent cannot show that it would have issued Wayt this discipline absent her protected activities. Thus there is reasonable cause to believe that Wayt was disciplined because of her Union activity.

The Discharge:

Likewise, there is reasonable cause to believe that Wayt was discharged would not have occurred absent her participation in union activities. Notably, Wayt had a commendable[33] 25-year employment history with Respondent and received numerous awards for her excellent patient care. Indeed, Petitioner has presented a strong prima facie case: Wayt engaged in numerous protected activities, which were known to Respondent, and Respondent's animus is overwhelming. All of the critical dates in question are close in time: the August 28 patient care incident, the August 29 union

[33] Respondent suggests that Wayt was disciplined in February of 2012, by Jan Kassanga (who allegedly signed the document in March of 2010) for an incident that occurred in November of 2009. Charging Party counsel spoke with Ms. Kassanga who stated that she had no recollection whatsoever of issuing Wayt discipline. Tr. 1044.

election, the August 29 commencement of the preliminary investigation, the August 30 incident with Perone, the September 5 written warning, the September 13 suspension and the September 26 discharge.

Respondent's investigation was faulty, superficial and disingenuous. Respondent's claim that the investigation into Wayt's conduct was based on concerns from a nurse who was upset by the insufficient level of patient care is belied by the clear testimony that Smith's real concern was that her shift did not end on time. Despite the lack of any legitimate investigation, the record shows that as early as September 4, Respondent concluded that Wayt had falsified the chart and had failed in her patient care duties. Respondent relied solely on Kress' word and the patient's chart. Notwithstanding Respondent's asserted need for quality patient care, there is no evidence to show that the Respondent had any follow-up with the patient or the patient's family. Respondent further admitted that it had little to no concern about the care given to the patient by the night nurse who relieved Wayt. That nurse also made charting errors, but these it appears were of no moment to Respondent.

Respondent's own corporate quality director questioned Respondent's quick decision to terminate Wayt. Notably, Benson's questions about Wayt and how Respondent had handled falsification in the past went unanswered. While the Hospital then gave the appearance that it was conducting an investigation, the record shows that the decision to terminate was already made. Respondent casually raised the patient chart with Wayt in the September 5 disciplinary meeting concerning Perone and the Pyxis machine, but concealed that it was investigating her for falsifying the document. At the time of the September 13 suspension meeting, one of the sitters, who allegedly witnessed Wayt's misconduct, had not been interviewed. Respondent did not take witness

statements until after the September 13 suspension meeting and then refused to consider probative facts showing that Wayt performed proper patient care. [34] Smith's statement that Wayt had been in the room at 10:00 a.m. contradicts McDonald's assertions that Wayt did not check on the patient until noon. Smith also stated that Wayt properly addressed the patient's pain and admitted that Wayt had the opportunity to perform the head-to-toe assessment when Smith was not in the room. However, these facts were given no weight in the Respondent's decision to terminate. Respondent's assertion that it gave Wayt the opportunity to submit a defense is not corroborated by Respondent's own notes of the meeting. Respondent never conducted a thorough and fair inquiry into the allegations prior to reaching the decision to terminate Wayt.

There is ample Board precedent holding that the failure to conduct a thorough and fair investigation into alleged misconduct is evidence of unlawful motivation. Midnight Rose Hotel and Casino, 343 NLRB 1003 (2004). In this connection, an employer's refusal to consider all of the facts objectively and its reliance on a flawed investigation are also strong indicators of improper motive. Alstyle Apparel, 351 NLRB 1287 (1997). The Board has also held that concealing from the employee the details of an accusation, coupled with the failure to give the employee the opportunity to explain his or her conduct evidences improper motive. Windsor Convalescent Center of North Long Beach, 351 NLRB 975, 984 fn. 40 (2007).

In addition to Respondent's failure to conduct a proper investigation prior to making the termination decision, the record evidence of disparate treatment is overwhelming. Respondent's personnel records show that it has limited its firing

[34] Zinsmeister admitted that she only had one witness for fifteen minutes, and one witness for the other two hours. Tr. 195.

decisions to situations involving serious misconduct, situations wholly distinguishable from Wayt's alleged misconduct. Employee Rick Shapiro was fired only after committing a second patient care offense. Not only was Shapiro guilty of a second offense but his new offense clearly was more serious than the single offense charged to Wayt. Thus being ordered by a doctor to perform an EKG when a cardiac patient arrived, Shapiro failed to do the EKG for his entire shift. (GC Exs. 6, 9). Similarly, employee Rebecca Bowser was not fired until after multiple patient care issues. Bowser infused blood without the appropriate training and created a fire risk when she left the blood warmer on with an empty bag. Bowser refused to administer necessary drugs to patients. She lied to an oncoming nurse about medication arriving from the pharmacy to avoid administering the medication which could have resulted in a lethal arrhythmia. She incorrectly circled the time for medication to avoid giving the medication. She failed to record IO, failed to properly dispose IV bags and failed to notify an attending physician of a rapid response in one of her patients. (G.C. Ex. 6).

Employee Justine Sackman was discharged for taking a photograph of a patient's eye that was harvested after death and Lori Woods was terminated for walking off the job and leaving her patients unattended. (G.C. Ex. 6).

As shown above, Wayt's alleged misconduct pales in comparison to the conduct of Shapiro, Bowser, Sackman and Woods. In fact, Respondent's records show that for infractions similar to Wayt's alleged misconduct, Respondent issued verbal and/ or written warnings. The record shows nineteen separate examples when Respondent issued a verbal and/or written warning for substandard patient care, failure to round on a patient, serious medication errors and/or inadequate charting. (G.C. Ex. 9).

McDonald admitted that nurse Elizabeth Blair was merely issued written warnings when she falsified documents and performed substandard patient care. (G.C. Ex. 9 at 2-4); Tr. 1211-17. Blair was disciplined on four separate occasions for medication errors (Verbal Warning issued G.C. 9 at 1); missed dosage of medication (Verbal Warning issued G. C. Ex. 9 at 2); failure to round on a patient, poor attitude, documenting that rounding was complete and medication was administered (Written Warning issued G.C. Ex. 9 at 4); and failure to perform hourly rounding, no stethoscope, deficit in care, lack of charting and charting that rounding was performed (Written Warning issued G.C. Ex. 9 at 4). With all of these infractions, Blair was never suspended, never discharged and never reported to the State Board of Nursing. Additionally, nurse Nina Vazquez was issued five separate verbal and written disciplines for entering a patient's room only once during a shift, neglecting patients, failure to round on patients (on more than one occasion), rudeness towards patients, failure to administer medication and failure to respond to a patient in respiratory distress. (G.C. Ex. 9 at 5-9). Similarly, nurse Sara Falanga was issued a verbal counseling when she failed to complete the required charting and as a result, the patient's medication was not administered for twelve hours. (G.C. Ex. 9 at 10). Nurse Kellyn Diller was issued a written warning for failing to chart and neglecting her nursing duties. (G.C. Ex. 9 at 12).

Respondent cannot meet its burden to show that it would have fired Wayt even in the absence of her protected activity. Respondent's assertion that the alleged falsification of the patient chart and the alleged improper patient care supports its decision to terminate Wayt is belied by its superficial and deficient investigation and by the overwhelming evidence of disparate treatment. As noted by in the ALJD, the record establishes that Respondent never terminated a nurse for a first offense that had no

bearing on the patient's health and it also treated many nurses more leniently for far more serious misconduct and for repeated misconduct. ALJD at 21. There is reasonable cause to believe that Wayt's discharge clearly violates Section 8(a)(1) and (3) of the Act.

The Referral/Report to the State Board of Nursing

After discharging Wayt, Respondent reported her to the Board of Nursing, thus jeopardizing her nursing license and her future employment prospects.[35] Respondent had previously reported to the Nursing Board only one other nurse terminated for patient care and/or falsification issues. Respondent reported nurse Sackman, who was terminated for photographing a harvested eye. Respondent concluded that Wayt's alleged misconduct warranted a report to the Board of Nursing, yet the conduct of Bowser, Ford, Shapiro and Woods did not. Based on Respondent's own disciplinary records, the performance issues related to employees Bowser and Shapiro endangered patient's lives. And none of the employees who received verbal and/or written warnings for charting failures and failing to round on patients have been reported to the Board of Nursing.

Respondent's decision to report Wayt to the Ohio Board of Nursing was unlawfully motivated. Respondent's failure to report nurses who risked patients' lives contradicts any claim it might make about being duty-bound to report Wayt. There is reasonable cause to believe that Respondent's action was discriminatory and violates Section 8(a)(1) and (3) of the Act.

C. There is Reasonable Cause to Believe that Respondent Violated the Act by Denying the Union Access to Public Areas of its Facility.

[35] Again refusing to consider any evidence to support Wayt's proper performance, McDonald told the State Board of Nursing that Wayt did not enter the patient's room until noon despite Smith's statement that Wayt entered the patient's room at 10:00 a.m. Tr. 67.

Petitioner submits that Respondent violated Section 8(a)(1) of the Act by unlawfully changing its practice of permitting the Union to access the public cafeteria and parking lot of the Hospital because the exclusion was motivated by anti-union animus.

It is undisputed that the Hospital granted the Union access to its parking lot, cafeteria and other areas of the hospital. After the Union prevailed in the representation election, along with making unlawful threats and issuing pre-textual discipline, suspension and discharge to Wayt, the Respondent discriminatorily excluded the Union from its facility. And it did so based on a thinly supported claim of a HIPAA violation.

Board precedent is clear that an employer may lawfully prohibit non-employee union organizers access to its property, absent a showing that on-site employees are otherwise inaccessible through reasonable efforts. Lechmere, Inc. v. NLRB, 502 U.S. 527, 534 (1992); NLRB v. Babcock & Wilson Co., 351 U.S. 105, 112 (1956); and Intercommunity Hospital, 255 NLRB 468, 469-470 (1981). To establish a *Babcock*-type discrimination, the private property owner must have treated a nonemployee seeking to communicate on a subject protected by Section 7 less favorably than those seeking to communicate with employees about other matters. Republic Aviation Corp. v. NLRB, 324 U.S. 793, 797 (1945); Be-Lo Stores v. NLRB , 126 F.3d 268, 284 (4th Cir. 1997). To overcome an employer's right under Babcock to bar union organizers access, a union bears the burden of showing an inability to communicate reasonably with workers without access, **OR** that the employer's access rules discriminate against union representation. Sears, Roebuck, & Co. v. San Diego Council of Carpenters, 436 U.S. 180, 205 (1978).

It follows that lawful non-solicitation / no-access rules cannot be promulgated and maintained for purposes of effectively limiting union or other protected activity. The timing of the new rule and the reason for its adoption, if unrelated to discipline and production or business, or other legitimate business reasons is significant evidence of discriminatory promulgation. Whether the rule encompasses on-duty employees, off-duty employees, or non-employees, a rule promulgated with the intention of hindering union activity violates Section 8(a)(1) of the Act. In Southern Maryland Hosp. Ctr., 293 NLRB 1209 (1989), the hospital enforced its no-distribution/access rule selectively and disparately by denying the organizers access to the hospital cafeteria. Id. at 1211. It was undisputed in that case that the hospital did not prohibit union organizers from entering or remaining in the hospital cafeteria to communicate with employees about the ongoing organizing campaign. Id. As its animus towards that union developed, the hospital began to single out union organizers who were then excluded from the cafeteria. Id. at 1216. The rule barring non-employees from the cafeteria was not enforced until after the union prevailed in the election. The Board held that the hospital violated Section 8(a)(1) of the Act by selectively and disparately denying nonemployee union organizers access to its cafeteria. Id.

Here, it is undisputed that the Union had access to certain non-public and public areas of the hospital, including various conference rooms, the cafeteria and the parking lot. Tr. 423. Any argument Respondent might make that it is privileged to exclude Mahon from the parking lots, cafeterias, and other public spaces and that access to those public areas is limited exclusively to patrons, their families and friends, and those individuals doing business with the hospital is belied by the fact that Respondent voluntarily permitted Mahon and the Union on its premises prior to the election.

Furthermore, the record evidence shows that in addition to patrons, families, friends and individuals doing business with the hospital, Respondent permits public access to its facility. Respondent hosts pancake breakfasts, donates conference rooms for Relay for Life meetings and hosts a craft show for outside vendors and the public. Tr. 266-68; (GC Ex. 13). [36]

Respondent seized on an opportunity to prevent the Union from accessing its facility by alleging that the Union's letter in Wayt's defense amounted to a violation of HIPAA. Compliance officer Kline admitted that the letter did not identify the patient and that without additional information, the patient could not be identified based on the information contained in the letter. While Kline had "concerns" about the letter, she admitted that, in the normal course, the Hospital would issue a verbal warning to the involved individual. Notably, in the meeting with Mahon, and Wayt, when Kline asked how the letter should have been written to avoid a HIPAA issue, Kline replied "it was up to Wayt to figure out for herself how she could talk about the incident without violating what the hospital perceives as the HIPAA law." Tr. 440.

Notwithstanding the lack of sufficient identifiers to warrant a HIPAA violation, Respondent permanently excluded Mahon from all areas of the facility, including the cafeteria and parking lot. Assuming *arguendo* that the Union's letter was a HIPAA breach, the Board has found that in certain situations, a union's need for information, which might otherwise violate HIPAA, outweighs a patient's privacy concerns. *See*,

[36] There is no violation of section 8(a)(1) if the solicitations approved by the employer relate to the employer's business functions and purposes. In the hospital context, these activities have included "blood drives" that constituted an integral part of the hospital's necessary functions. *See, e.g.*, Rochester General Hospital, 234 N.L.R.B. 253, 1978 WL 7193 (1978); George Washington University Hospital v. Pomerantz, 227 N.L.R.B. 1362, 1374 n. 39, 1977 WL 8273 (1977).

Salem Hospital, 359 NLRB No. 83 (2013). There the Board noted that some individually identifiable health information, including a patient's identity, may be subject to disclosure.

There is no viable, non-discriminatory reason to justify excluding Mahon from Respondent's premises. The timing of her exclusion, coupled with a record replete with Respondent's anti-union animus, and against a background of Respondent's unlawful refusal to recognize and bargain with the Union all show that there is reasonable cause to believe that the rule was discriminatorily adopted and violates Section 8(a)(1).[37]

D. There is Reasonable Cause to Believe that Respondent Violated the Act when it Threatened, Imposed More Onerous Working Conditions and then More Closely Scrutinized the Work of Employee Kelley Sawyer.

Registered nurse Kelly Sawyer began working in the intensive care unit in October 2012. Tr. 405. From the beginning of her employment, Sawyer supported the Union and regularly attended union meetings. Tr. 407. In mid to late October 2012, when Sawyer and Kress, Manager of the CVS-ICU, were alone in the hallway, Kress asked Sawyer if she voted in the union election. Tr. 406. Sawyer responded that she was not employed at the time of the vote. Tr. 407. Sawyer voluntarily left Respondent's employ and has nothing to gain from this proceeding.

Under the Ohio Nurse Practice Act, if a nurse believes in his or her professional judgment that an assignment or situation is unsafe or potentially unsafe, the nurse has a legal and professional obligation to notify the employer so that the problem can be corrected and injury or harm to the patient avoided. (GC Ex. 17); Tr. 444. If the

[37] *See*, Cannondale Corp., 310 NLRB 845, 849 (1993) (showing a Section 8(a)(1) violation for discriminatory adoption when an employer promulgates a non-solicitation rule shortly after a union campaign, with evidence such as anti-union speeches given to employees and the employer giving no indication the rule was created for discipline and production).

employer makes a decision not to correct the situation, the response must be documented to protect the nurse in the event of an adverse outcome for the patient or the staff. (GC Ex. 17); Tr. 444. Assignment Despite Objection (ADO) forms are widely used in unionized hospitals as a method for nurses to document these situations. The most common usage of the form is when nurses are required to work short-staffed. Tr. 476. Completing an ADO form documents that employees have notified their supervisor of an unsafe or potentially unsafe situation and also gives their employer the chance to correct the situation. (GC Ex. 17); Tr. 408. Here, after the Union's certification as the exclusive collective bargaining representative of the Unit, the Union provided the nurses in the unit with ADO forms to complete if the occasion arose.

The Threat of Physical Harm

Sawyer testified that on January 3, 2013, she heard Kress loudly complaining that employees had written her up. Tr. 408. Kress approached the nurse's station and told the nurses, including Sawyer, "if you think you guys are going to write me up and get away with it, you will now work short." Tr. 409. Sawyer further testified that Kress threatened to smash the ADO form into the forehead of the person who filled it out. Tr. 409. Kress testified that she had a breakdown and said that she "felt like slapping these on your foreheads." Tr. 684. Kress admitted that after her "breakdown" she sent male nurse, Ryan Chismatea, to work in the cardiovascular intensive care unit. Tr. 684. While on direct examination, Kress portrayed her "breakdown" as an isolated incident caused by frustration due to a long shift. However, Kress later testified on cross examination that she had, in fact, refused ADO forms in the past, and indeed had ripped up the forms and

thrown them in the shredder.[38] Tr. 684; 715. Kress also admitted that she was told not to accept ADO forms. Tr. 716-19.

Sawyer testified with good recollection that after the incident involving the ADO form, Kress began reviewing patient files with close attention and began noting any charting errors, regardless of significance. Sawyer testified that this was unnerving because she could hear Kress loudly tapping a pen on the charts and rustling the chart pages. Tr. 409-10, 414.

In the course of reviewing patient charts, Kress brought a chart to Sawyer and asked Sawyer to identify the signature on the chart.[39] Sawyer testified that she told Kress the signature belonged to nurse Pam Gardner. Tr. 410. Kress replied, "oh really, I'm going to have a lot of fun writing this one up." Tr. 410.

Sawyer testified that even early in her employment, she was aware of the identity of the Union supporters. Tr. 407, 411. It was widely known that Pam Gardner was a lead union supporter. Sawyer knew Gardner supported the union because Gardner offered Sawyer a union button and invited her to a union meeting. Tr. 411. At the hearing, Kress also admitted that she knew that Gardner was a union supporter. Tr. 154.

Kress admitted that while holding an ADO form, she told the nurses at the station that she "felt like slapping these on your foreheads." Tr. 684. Kress also admitted that she had previously removed, ripped up and shredded ADO forms. Kress was evasive and non-responsive when asked if she removed, ripped up and shredded ADO forms in the presence of employees.

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[38] Kress was evasive and non-responsive when asked if she ripped up the ADO forms and shredded them in the presence of employees. Tr. 716-719.

[39] Kress initially admitted that she spoke to Sawyer about a chart but claims it was Sawyer's chart. Tr. 153. Kress then contradicted her testimony and stated that she never confronted Sawyer about any patient chart. Tr. 687.

It is well-settled that an employer who uses or threatens violence against employees because of their union or other protected concerted activities violates Section 8(a)(1). *See* Northwest Graphics, Inc., 342 NLRB 1288 (2004); Corporate Interiors, Inc., 340 NLRB 732 (2003); Garvey Marine, Inc., 328 NLRB 991 (1999). Additionally, an employer who confiscates union literature in the presence of employees violates Section 8(a)(1) of the Act. Alle-Kiski Medical Center, 339 NLRB 361 (2003); *See e.g.* Crossing Recovery Systems, Inc. 2006 WL 2784186 (Sept. 25, 2006) in which the ALJ found that shredding union literature in front of employees violated Section 8(a)(1). Accordingly, there is reasonable cause to believe that Respondent violated the Act when it unlawfully threatened physical harm.

Onerous Working Conditions

The imposition of more onerous working conditions in retaliation for union activities violates Section 8(a)(1) and (3). Laminates Unlimited, 292 NLRB 595, 599-600 (1989). *See e.g.* Chinese American Planning Council, Inc., 317 NLRB 202 (1995) (e.g. requiring an employee to maintain the same level of performance in three hours in which he previously managed in seven hours); Yale New Haven Hospital, 309 NLRB 363 (1992) (assigning an employee to the same post on consecutive days when previously that assignment was rotated).

It is unrebutted that Kress threatened employees that if they submitted ADO forms, thereby "writing her up," she would make them work short-staffed. Kress' transfer of Chismatea imposed additional work on the remaining nurses. The clear testimony shows that Kress retaliated against the nurses for submitting the ADO forms by forcing them to work short-staffed. In Edmund Homes, Inc. 255 NLRB 809, 815 (1981), the employer, who was motivated by anti-union animus, violated Section 8(a)(1) and (3)

when it directed employees to discontinue assisting a union supporter in her job duties to make her job more onerous. It is well-settled that when the concerted protected actions are the motivating reasons for an employer's adverse action against employees connected with the protected activity, then the adverse action violates Section 8(a)(1) of the Act. Peter Vitalie, 313 NLRB 971, 975 (1994).

Kress testified that the Respondent's goal is for each intensive care unit nurse to have no more than two patients at a time. Tr. 1257-58. Kress admitted that after she transferred Chismatea to the cardiovascular intensive care unit, Sawyer was "tripled" because she was required to cover three patients, exceeding the hospital's goal for patient care. Tr. 1257-58. Indeed, Kress admitted that *she* created a triple in the ICU by transferring Chismatea. Tr. 1259. Petitioner submits that Respondent violated Section 8(a)(1) and (3) when Kress, who was clearly motivated by anti-union animus and particularly by her anger because employees continued to submit ADO forms, imposed more onerous working conditions by forcing the nurses to work short-staffed. Thus there is reasonable cause to believe that Respondent violated the Act when it imposed more onerous working condition.

Closer Scrutiny

An employer violates Section 8(a)(1) when it more closely scrutinizes employees' work because of employees' union and/or protected concerted activities. *See,* Beach Lane Management, Inc., 357 NLRB No. 30 (sl. op. July 29, 2011); Saipan Hotel Corp., 321 NLRB 116 (1996). An employer violates Section 8(a)(1) by threatening or enacting stricter workplace rules in response to protected activities. Performance Friction Corp., 319 NLRB 859 (1995). It is also well-settled Board law that a threat to discipline an

employee which is motivated by their union activity violates Section 8(a)(1). Publix Super Markets, Inc., 347 NLRB 1434, 1435 (2006).

Here, Sawyer clearly and credibly testified that Kress began reviewing patient charts more frequently and with increased intensity and did so within the view and hearing of the nurses at the station. Kress' conduct coincided with her anger over the continuing submission of the ADO forms, her threat of physical harm directed towards a nurse who submitted an ADO form, her threat that nurses thought they were getting away with "writing up" Kress, and her decision to make the nurses work short-handed. As noted previously, Kress asked Sawyer to identify the signature of nurse Pam Gardner, who was a well-known union supporter, and then announced that she would "enjoy writing up" the nurse who completed the chart. This incident perfectly illustrates the extent of Kress' animosity towards the Union and its supporters. There is reasonable cause to believe that Respondent violated the Act when Kress more closely scrutinized the work of employees.

V. THE RELIEF SOUGHT IS JUST AND PROPER

An interim injunction will serve the purposes of the National Labor Relations Act because an injunction will help to insure the employees' unfettered choice of a bargaining representative. Employees' free choice is a fundamental principle behind the Act. Injunctive relief is "just and proper" under Section 10(j) where it is "necessary to return the parties to the status quo pending the Board's processes in order to protect the Board's remedial powers under the NLRA." Kobell v. United Paperworkers Intern., 965 F.2d 1406, 1410 (6th Cir. 1992), quoting Gottfried v. Frankel, 818 F.2d at 495 (6th Cir. 1987).[40]

[40] The "status quo" referred to in Gottfried v. Frankel is that which existed before the charged unfair labor practices took place. See Fleischut v. Nixon Detroit Diesel, Inc., 859 F.2d at 30 n. 3.

Accord: Schaub v. West Michigan Plumbing & Heating, Inc., 250 F.3d at 970. Thus, "[i]nterim relief is warranted whenever the circumstances of a case create a reasonable apprehension that the efficacy of the Board's final order may be nullified or the administrative procedures will be rendered meaningless.'" Sheeran v. American Commercial Lines, Inc., 683 F.2d 970, 979 (6th Cir. 1982), quoting Angle v. Sacks, 382 F.2d 655, 660 (10th Cir. 1967). Accord: Fleischut v. Nixon Detroit Diesel, Inc., 859 F.2d 28, 30-31 (6th Cir. 1998).

Here, the Respondent's action in discharging Wayt and reporting her to the State Board of Nursing served to reinforce employees' fear that not only would they lose their jobs if they persisted in union activity or showed support for the Union but that they might risk the loss of future employment in their profession. As noted by the Administrative Law Judge,

> **[h]er discharge was also intended to coerce all the union supporters in the bargaining unit in the exercise of their Section 7 rights. Indeed it is hard to imagine a more effective coercive message to the union supporters in the bargaining unit than the termination of a long-time employee with no (or no known) prior disciplinary record**.

ALJD at 27. Further, since the discharge of Wayt, the Respondent has continued to threaten, coerce and interrogate employees and to discriminate against them because of their union and/or protected concerted activities.

In light of the Respondent's refusal to recognize and bargain with the Union in an initial contract year, couple with the Respondent's continued unfair labor practices and its discrimination against employees for their protected activities, Section 10(j) injunctive relief is necessary both to prevent erosion of employee support for the Union and to protect employee free choice as evidenced by their selection of the Union as their bargaining representative.

Inaction would irreparably interfere with the employees' fundamental Section 7 right to bargain collectively through representatives of their own choosing. Interim injunctive relief will send a message to employees that they can and do have the support of the union of their choice, thus returning the parties to the status quo. Without an interim reinstatement order, there is a greater likelihood that the Employer will effective accomplish its unlawful objective of permanently ridding its work place of union supporters. Clearly with the passage of time and in the absence of immediate relief, employee are less likely to support the union.[41]

It is evident that in these circumstances there is a substantial risk of employee disaffection that could destroy any possibility of the Union ever succeeding in representing the employees who selected it. Indeed, employee Kelly Sawyer testified in her affidavit that she left Affinity after working only 3 months and did so due to the anti-union and hostile work environment. Additionally, Petitioner has affidavit testimony from several witnesses that also show employee disaffection from the Union.

Interim relief is necessary. By the time the Board issues a final order, Respondent's unfair labor practices will have caused damage that a Board order will be unable to remedy. It is well-settled in the context of a violation of Section 8(a)(1) and (3) of the Act that the longer a union is disregarded, the less likely a union will be able to organize and represent those employees.[42] When faced with the time required to complete the administrative process, employee interest in a union can wane, thus compromising employees' free choice.[43] While the absence of temporary injunctive relief

[41] *See*, Bloedorn v. Francisco Foods, Inc. d/b/a Piggly Wiggly, 276 F.3d 270, 299 (7th Cir. 2001); Pye v. Excel Case Ready, 238 F.3d at 75 (1st Cir. 2001).
[42] See Levine v. C &W Mining Co., Inc., 465 F. Supp. 690, 694 (N.D.Ohio 1979).
[43] *See*, Asseo v. Pan American Grain Co., Inc., 805 F.2d 23, 26-27 (1st Cir. 1986).

would undoubtedly cause harm to employee's Section 7 rights, the interim reinstatement of the discriminate will pose little or no harm to the Employer. Rather, the Employer will benefit from the work of an experienced and skilled nurse.[44] And, moreover, it is well settled that the Section 7 rights of an alleged discriminate to interim reinstatement under Section 10(j) outweighs the job right of any replacement.

In sum, interim relief is clearly just and proper on the facts of the instant case. A failure to provide such relief would make a mockery out of the employees' effort to exercise their statutory rights, would deprive their freely selected bargaining representative of its entitlement to represent them, and would undercut the Congressional scheme that employers the National Labor Relations Board to vindicate the Statutes goals and objectives. As a final matter, Petitioner requests that any order issued by the Court require that the Employer read the Court's order to its registered nurse employees. Such provision is necessary to make clear to employees not only that the Employer had openly recognized that its employees possess statutory rights but also that the vindication of those rights can be secured under the aegis of the Court's order.

VI. CONCLUSION

Based on all of the foregoing, the Petitioner respectfully requests that this Court determine that reasonable cause exists to believe that Respondent violated the Act as alleged and submits that the relief requested by the Petition is equitably necessary herein, and is just and proper within the meaning of Section 10(j) of the Act.

Dated at Cleveland, Ohio this 10th day of July 2013.

[44] *See*, Eisenberg v. Wellington Hall Nursing Home, Inc., 651 F.2d 902, 906 (3rd Cir. 1981); Scott v. Pacific Custom Materials, Inc., 939 F. Supp. 1443, 1456-57 (N.D. Cal. 1996).

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of July 2013, a copy of the foregoing Petition was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by U.S. mail. Parties may access this filing through the Court's system. Additionally, a copy of the foregoing Petition was mailed this 10tht day of July 2013 to the following:

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