

St. Barnabas Hospital and United Salaried Physicians and Dentists. Case 2–CA–31504

August 9, 2001

DECISION AND ORDER

BY MEMBERS LIEBMAN, TRUESDALE, AND WALSH

On February 24, 2000, Administrative Law Judge Steven Fish issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings¹ as explained below, and conclusions and to adopt the recommended Order.²

We agree with the judge that the Respondent violated Section 8(a)(1) of the Act by terminating four physicians for engaging in protected concerted activity when they threatened to stop performing voluntary on-call work.

Facts

The relevant facts are discussed in detail in the judge's decision. In essence, they are as follows: On July 1, 1997, the Respondent began providing health care services at Lincoln Hospital pursuant to an "affiliation agreement" that was executed between Respondent and the New York City Health and Hospital Corporation. The Respondent, which replaced New York Medical College as the provider of services, hired most of the physicians employed by New York Medical College, including the four discriminatees. The Respondent continued the New York Medical College practice of paying physicians an annual salary for working set hours during the week and an hourly rate for on-call work (work performed after regularly scheduled hours or any weekend hours) that they chose to perform.

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² In its brief to the Board, the Respondent argues that the Board should reopen the record to examine the supervisory status of the discriminatees. We do not agree. As the judge stated, the Respondent presented no evidence at the hearing to support the contention that the discriminatees are supervisors. Nor does the Respondent's brief to the Board present any evidence to support its contention. The Respondent had the burden to establish that the alleged discriminatees were statutory supervisors and it failed to meet this burden. *NLRB v. Kentucky River Community Care, Inc.*, 121 S.Ct. 1861 (2001).

In June 1998, the Respondent discharged the discriminatees after it received a letter from them in which, responding to the Respondent's proposed policy changes regarding patient care procedures, they threatened to stop performing the voluntary on-call work.

Discussion

The judge found that the physicians the Respondent employs at Lincoln Hospital performed on-call work on a voluntary basis. We agree. Dr. William Stahl implemented the on-call program when he served as New York Medical College's chief surgeon.³ As the judge explained, Dr. Stahl "was adamant" that the on-call system was "entirely voluntary and not a condition of employment, and that any physician has the right to refuse to perform on-call work at any time." When the Respondent took over the affiliation contract in July of 1997, it made no changes in the on-call program. As the judge explained, "the discriminatees credibly testified that they believed . . . that the performance of on-call work was voluntary, and that they had the right to decline to perform such work, if they so chose." In fact, the record reflects that on several instances physicians chose not to perform any on-call work. As one discriminatee, Dr. Prakashchandra Rao, testified, on several occasions he did not perform on-call work for a particular month because he "just didn't want to do it."

Dr. Kenneth Schwartz, the Respondent's network chief of surgery, testified that he believed the on-call work was mandatory. His view, however, was based on experience at other hospitals, none of which followed the Respondent's practice of paying physicians on a separate basis for performing on-call work. We also find it significant, as did the judge, that, after Schwartz became the Respondent's chief of surgery, he never informed the employees that the on-call work would henceforth be mandatory. To the contrary, the Respondent considered, but specifically rejected, increasing physician salaries to incorporate a set number of on-call hours per month.

In sum, the judge was well warranted in finding that the discriminatees performed on-call work on a voluntary basis. Because the on-call work was voluntary, we also agree with the judge that the discriminatees' concerted threat to stop performing on-call work was protected activity. The Board has long held that a refusal to perform voluntary work does not constitute an unprotected partial strike. *Dow Chemical Co.*, 152 NLRB 1150, 1151–1152 (1965); *Jasta Mfg. Co.*, 246 NLRB 48, 49 (1979), enfd. mem. 634 F.2d 623 (4th Cir. 1980). See also *Riverside Cement Co.*, 296 NLRB 840, 841 (1989).

³ Dr. Stahl later became the Respondent's chief surgeon.

Finally, we agree with the judge that the physicians' concerted threat not to take on-call work was a substantial factor in the Respondent's decision to discharge the discriminatees. As Dr. Schwartz testified regarding his reaction to the discriminatees' letter, "I was threatened, and I had demands made of me by a group of surgeons, acting, you know, 'we the undersigned.'" As Dr. Schwartz further acknowledged, "I could certainly understand if . . . one of them or four of them separately wanted to [disagree with my policies]," but "I'm being threatened by a group."

In conclusion, we agree with the judge that the General Counsel established that on-call work was voluntary for the discriminatees, their threatened refusal to perform such work was protected conduct, the Respondent terminated them for engaging in this protected concerted conduct, and the Respondent failed to show that it would have terminated them absent their protected conduct.⁴

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, St. Barnabas Hospital, New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Gregory B. Davis, Esq., for the General Counsel.
 Joel E. Cohen, Esq. and Jonathan Stoler, Esq., of New York, New York, for the Respondent.
 Ralph DeRosa, Esq., of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

STEVEN FISH, Administrative Law Judge. Pursuant to charges and amended charges filed by the United Salaried Physicians and Dentists (the Union) the Acting Director for Region 2, issued a complaint and notice of hearing on December 28, 1998,¹ alleging that St. Barnabas Hospital (Respondent) had violated Section 8(a)(1) and (3) by discharging Drs. Joseph Z. Kazigo, Yilmaz Gunduz, Soula Priovolos, and Prakashchandra Rao. (the discriminatees.)

The trial with respect to the allegations set forth in the complaint was held before me in New York, N.Y. on March 17, 18 and 19, 1999. Briefs have been filed by Respondent and General Counsel, and have been carefully considered. Based upon the entire record, including my observation of the demeanor of the witnesses, I make the following

⁴ Given our findings above, we find it unnecessary to pass on the judge's alternative theories for finding a violation.

No exceptions were filed to the judge's dismissal of the allegations that the Respondent also violated Sec. 8(a)(3) when it discharged the four discriminatees.

¹ Unless otherwise noted, all dates refer to 1998.

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Respondent is a New York corporation that operates a hospital with its principal place of business at Third Avenue and 183rd Street, Bronx, New York. Annually, Respondent derives gross revenues in excess of \$250,000 and purchases and receives at its facility goods, supplies, and materials valued in excess of \$50,000 directly from points located outside the State of New York. Respondent admits and I so find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and has been a health care institution within the meaning of Section 2(14) of the Act.

It is also admitted and I so find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

The Representation Case 2-RC-21912

On November 13, 1997, the Union filed a petition in Case 2-RC-21912, seeking to represent all regular full-time and regular full-time and part-time physicians and dentists employed by Respondent at its Lincoln Hospital location at 149th Street, Bronx, New York. Thereafter a representation hearing was conducted over the course of 15 days from December 4, 1997, through May 6, 1998.

During the course of this hearing, two of the discriminatees, Drs. Gunduz and Kazigo testified on behalf of the Union. Respondent took the position at the hearing and in its brief, that all of the employees sought to be represented by the Union, including the discriminatees were managerial employees. This issue was fully litigated. During the hearing Respondent also sought to subpoena and present evidence seeking to establish that "many of the physicians and dentists sought to be represented will be statutory supervisors if a pending petition by USPD's sister Union, the committee on interns and residents (CIR) which seeks to represent residents as employees," is granted by the Board, see *Boston Medical Center Corp.*, Case 1-RC-20574. The hearing officer rejected such evidence.

Respondent specifically asserted and litigated at the hearing the supervisory status of a number of classifications, primarily "Section Chiefs." It also claimed that the position of president of the medical staff, which was filled by Dr. Kazigo was supervisory under Section 2(11) of the Act, as well as managerial.²

On September 30, 1998, the Acting Regional Director issued a Decision and Direction of Election (DDE). He rejected Respondent's assertion that the physicians and dentists were managerial employees, and most of its contentions as to supervisory status. The DDE made no reference to the assertion made by Respondent on one page of its brief, but not in other pages where the status of supervisory were referenced, that the

² However, it must be noted that while Respondent made this assertion on p. 81 of its brief, in the representation case, on p. 80 of its brief where it lists disputed supervisors in the surgery department, where Dr. Kazigo worked, Dr. Kazigo's name is not listed. Further Respondent's Brief contained an Appendix A which listed stipulated and disputed supervisors. Dr. Kazigo's name is not listed in that document as a disputed supervisor, nor are the names of any of the other discriminatees.

position of president of the medical staff, held by Dr. Kazigo was supervisory, and warranted his exclusion on that basis.

In a footnote, the DDE dealt with Respondent's claim that the hearing officer was in error by rejecting evidence seeking to establish that employees will be statutory supervisors if a pending petition by CIR is granted by the Board. He concluded that such argument is speculative, not ripe for decision, and will not be addressed.

Thereafter the Respondent filed a request for review with the Board. However, the record herein does not reflect what specific issues Respondent requested that the Board reverse the Regional Director. Thus it is not clear whether or not Respondent requested that the Board find all or most physicians and dentists to be supervisors or that it reverse the hearing officer and permit it to adduce evidence of their supervisory status vis a vis interns and residents.

On February 8, 1999, the Board denied Respondent's request for review, with Member Brame dissenting in part.

On February 11, 1999, an election was held, and the results were 129 votes yes, 8 no with 10 challenges. Thus, a majority of votes were cast for the Union, resulting in a certification of representatives on February 19, 1999.

III. THE STATUS OF THE DISCRIMINATEES

In its answer, Respondent alleges as affirmative defenses that the discriminatees were supervisory and or managerial employees and thus not employees within the meaning of the National Labor Relations Act. In that connection, Respondent did not seek to introduce any additional evidence in this proceeding, and was content to rely on the record in the underlying representation case which was made a part of the record in the instant matter.

In its initial brief to me, Respondent made no reference whatsoever to the alleged supervisory status of the discriminatee, but did assert that dismissal of the complaint is required given that doctors are managerial employees. Respondent attached a copy of its brief in the representation case, and added that this position was argued and briefed in that matter.

By letter dated December 14, 1999, Respondent asserts that the Board's recent decision in *Boston Medical Center Corp.*, 330 NLRB 152 (1999), requires a finding that the discriminatees are supervisors under the Act. Respondent contends that since the Board, found therein that a hospital's staff of interns and residents were employees under the Act, and "the undisputed fact that the four doctors in question exercised a substantial degree of supervisory control over such employees" requires a finding that the discriminatees were supervisors within the meaning of the Act. Respondent also notes that the Region did not address this issue in its decision, finding it to be "premature" since *Boston Medical* had not been decided.

Charging Party responded by letter dated December 17, 1999, which position was concurred in by the General Counsel by letter dated December 23, 1999. In that regard, Charging Party notes that Respondent's claim that it argued and briefed the position in the representation case that the discriminatees were supervisors is simply not true, and points to Respondent's brief which failed to list these employees as supervisors. Moreover, Charging Party disputes Respondent's assertion that

the doctors exercised a substantial degree of supervisory control over residents, noting particularly that no record evidence from the "ULP" or "R" case was cited by Respondent to support this proposition.

Finally, Charging Party notes that the record establishes that residents in the Surgery Program at Lincoln Hospital, who the discriminatees allegedly supervise, were employees of the New York City Health and Hospital Corporation (HHC). Therefore, since to be deemed a supervisor, the Act requires that supervisory authority be exercised over other employees of the same employer, *McDonnell Douglas v. NLRB*, 655 F.2d 932, 936 (9th Cir. 1981); *Douglas Aircraft Co.*, 238 NLRB 668, 671 (1978); *Illinois State Journal Register, Inc. v. NLRB*, 412 F.2d 37, 43-44 (7th Cir. 1969); *Mourning v. NLRB*, 559 F.2d 768, 770 fn. 3 (D.C. Cir. 1977), the discriminatees cannot be found to be supervisors.

While Respondent is precluded from relitigating issues which have been decided in the representation case in any "related unfair labor practice proceeding, that rule does not prohibit Respondent from relitigating the supervisory or managerial status of the discriminatees herein, since the resolution of the issues in this proceeding turns on the individuals' status, rather than representation issues relevant to 8(a)(5) violations. *Union Square Theatre Management*, 326 NLRB 70 (1998); *Serv-U-Stores*, 234 NLRB 1143, 1149 (1978).

With respect to the issues of managerial status of the discriminatees, that matter was clearly litigated fully in the representation case, to which review was denied by the Board. Respondent has made no attempt to supplement the record on this issue by introducing any additional evidence. In these circumstances I shall accord the decision of the Acting Regional Director "persuasive relevance", a kind of "administrative comity," *Amalgamated Union v. NLRB*, 305 F.2d 898, 905 (D.C. Cir. 1966), and conclude that in the absence of any new evidence, that Respondent has failed to establish that any of the discriminatees were managerial employees. *Cabinet MFG. Co.*, 140 NLRB 576, 585 (1963); *Security Guard Service*, 154 NLRB 8, 13 (1965); *National Freight*, 154 NLRB 621, 628 (1965).

With respect to the issue of supervisory status, it does not appear that the Acting Director's decision can be accorded any relevance or comity, since he made no findings on these issues. Nonetheless, Respondent has the burden of establishing supervisory status, and in that regard it relies solely on the record in the representation case.

While Respondent did appear to assert that the position of president of the medical staff, filled by Kazigo was supervisory as well as managerial,³ the Decision although finding the position not to be managerial, made no reference to the supervisory status of that job. I have examined the evidence cited by Respondent in its brief in the representation case in support of its position that the president of the medical staff is a supervisor. This evidence consists solely of the bylaws rules and regulations of the medical staff of Lincoln Medical Center, which includes provisions that permits the president of the ~~medical staff along with the medical~~ director to recommend

³ As noted above, Respondent's brief was not consistent on that issue.

staff along with the medical director to recommend appointments for medical staff membership to the executive director, as well as a role in the investigation and corrective action for physicians accused of impairment by alcohol, drugs, or other disability. However, no evidence was adduced as to whether Dr. Kazigo in his role as president of the medical staff ever exercised any of these responsibilities, or any other actions that would establish that he was a supervisor under Section 2(11) of the Act. Indeed, to the contrary, the record tends to show, as reflected in the DDE with respect to managerial status, that these "by laws" were rarely followed, and consistently ignored in practice. Indeed, the DDE rejected Respondent's contention that the attendings exercise managerial authority through the president of the medical staff, by finding that most of the time the views of the staff, as expressed by the president, are either ignored or rejected. Indeed, Dr. Kazigo was specifically informed by Dr. Kenneth Cohen, medical director of Respondent in writing, that the agenda of the medical staff, "do not extend to matters of employment or compensation." Further the DDE found and the record supports the conclusion that the president of the medical staff "cannot exercise independent discretion of his own." Accordingly, I conclude that Respondent has not established that Dr. Kazigo, by virtue of his position of president of the medical staff was a supervisor under the Act.

As for Respondent's contention, that all of the discriminatees are supervisors, in light of the Board's recent decision in *Boston Medical Center*, I agree with both the General Counsel and Charging Party that these assertions should be rejected. Although Respondent claims that it is "undisputed" that the discriminatees exercised a substantial degree of supervisory control over the residents, it furnished no record support for such a contention. Moreover, I agree with Charging Party that the record establishes that the residents, who Respondent asserts are "supervised" by the discriminatees, are employees of HHC, and not Respondent. I also agree, based on the cases cited above, that in order to be considered a supervisor under the Act, he or she must supervise other employees of the same employer. Therefore, I find that Respondent has not met its burden of establishing the supervisory status of any of the discriminatees, and they are therefore employees under Section 2(3) of the Act.

IV. FACTS

In 1996, HHC sought bids from health care organizations to provide physician and other related services at Lincoln Hospital, which had previously been performed by New York Medical College on an affiliate basis. Respondent was the successful bidder, and began providing services at Lincoln Hospital on July 1, 1997, pursuant to an "affiliation agreement" that was executed by HHC and Respondent. Respondent agreed to hire most of the physicians who had been employed by New York Medical College at Lincoln Hospital, including all four of the discriminatees.

The president and CEO of Respondent is Dr. Ronald Gade. Dr. Kenneth Cohen is Respondent's medical director, who is the onsite affiliate official in charge at Lincoln Hospital of Respondent's employees employed at that location. Dr. Lillian

Barrios-Paoli is the executive director of HHC at Lincoln Hospital.

The physicians and doctors employed by Respondent at Lincoln Hospital are referred to as "attendings," who are physicians and dentists who have finished their post graduate training or residency, and are licensed to practice as specialists. Physicians known as "interns and residents," are MDs who are completing postgraduate training requirements, and are referred to as "residents" or "housestaff." As noted above, the residents at Lincoln Hospital are employed by HHC, and not Respondent.

The physicians and dentists employed by Respondent at Lincoln Hospital are divided into departments, such as medicine, pediatrics, radiology, dentistry, obstetrics-gynecology, emergency medicine, surgery, and psychiatry. Many of these departments are further divided into various specialty sections, with attendings that hold the titles of "Section Chiefs."

All of the discriminatees were employed by Respondent in the department of surgery, as general surgeons. Some of the other surgical specialists known as "subspecialties" include hand/plastic, orthopedics, ear, nose and throat, ophthalmology, critical care radiothoracic and urology.

Dr. William Stahl, who had also previously been employed by New York Medical College as director of the department of surgery, was hired by Respondent in that position when it took over the operation of Lincoln Hospital. He resigned in October 1997. Thereafter, Dr. Joseph Edwards who had been assistant chief of surgery at St. Barnabas, replaced Dr. Stahl on a temporary basis until January 1, 1998. At that time, Dr. Kenneth Schwartz took over Dr. Edwards' responsibilities, also on a temporary basis. Dr. Schwartz had previously been employed at Respondent's St. Barnabas location as a surgeon and chief of surgery. In July 1997, when Respondent began its affiliation agreement at Lincoln Hospital, Dr. Schwartz was given the title of network chief of surgery, which encompassed supervision of the surgery departments at Respondent's two locations, St. Barnabas and Lincoln.⁴ Thus in effect, both Dr. Stahl and Dr. Edwards reported to Dr. Schwartz. Dr. Schwartz was therefore temporarily filling in as chief of surgery at Lincoln Hospital as of January 1998, until a permanent chief of surgery was hired.⁵

When the discriminatees were hired by Respondent, they were notified that they would be paid a salary of \$165,000 and that their hours of work would be a minimum of 80 hours over a 2-week pay period.⁶ Their hours were 8 a.m. through 4 p.m., Monday through Friday. The discriminatees performed surgery 2 days a week, were assigned to various clinics for 2 other days, and on the fifth day (Wednesdays) they participated in educational or administrative matters.

The hours after 4 p.m. during the week, and all day Saturday and Sunday are known as "on-call" hours. During these hours, there is no dispute, that a surgeon is required to be available

⁴ Respondent in January 1998, also took over providing doctors to Rikers Island, and Dr. Schwartz as network chief of surgery was also in charge of that operation's surgical department as well.

⁵ In fact Dr. Lawrence Bordan was hired as chief of surgery for Respondent at Lincoln Hospital on November 1, 1998.

⁶ While they were employed by New York Medical College they worked 70 hours over a 2-week period.

within 20 minutes to respond to a trauma situation. Therefore, the practice has been that a surgeon performing "on-call" work at Lincoln Hospital is present at the hospital during these "on-call" hours." The surgeons who perform "on-call" work are paid \$50.00 per hour for the performance of "on-call" work.

It is undisputed that all of the discriminatees regularly performed "on-call" work for the entire period of their employment, as well as for most of their previous employment by New York Medical College at Lincoln Hospital.

However, the discriminatees credibly testified that they believed for various reasons to be described fully below, that the performance of on-call work was voluntary, and that they had the right to decline to perform such work, if they so chose. Dr. Schwartz on the other hand, also testified credibly that he believed, also for reasons described below, that the performance of on-call work was mandatory for all the discriminatees, and that they were required to perform such work as part of their employment conditions.

The specific hours for on-call work was 4 p.m. to 8 a.m. the following morning during the week, and 8 a.m. to 8 p.m. the following day, on weekends and holidays.

Since when Respondent took over the employment of the employees at Lincoln Hospital in July 1997, it made no changes in the on-call system or procedures, it is necessary to trace the development of on-call assignments at Lincoln Hospital. In that connection, Dr. William Stahl, the former chief of surgery for New York Medical College's surgeons at Lincoln furnished testimony as to how the on-call system evolved for the department of surgery. Dr. Stahl began his employment in that capacity in December 1980. When he assumed that position, the majority of the on-call work was being performed by part-time employees who worked during the day at other hospitals. The full-time surgeons on staff only occasionally took call, except for one surgeon, who Dr. Stahl concluded was incompetent.

Dr. Stahl was not happy with this system, primarily because he believed that it was preferable to have full-time surgeons performing the on-call work, since he had no control over the part-time or as Dr. Stahl referred to them as "itinerant" surgeons, who were performing most of the on-call work. Therefore Dr. Stahl decided to attempt to implement a new system. He began by terminating the one full time surgeon who was incompetent, and then began to hire additional full-time surgeons. He also suggested to part-time surgeons that they become full time. Finally, sometime in mid 1981, when there were approximately five full-time surgeons on staff, he had a meeting with them. At that time, Dr. Stahl proposed to them that he wanted full-time surgeons to do most of the on-call work, because he wanted those surgeons doing on-call work to have a commitment to the hospital. Dr. Stahl told the employees that he would like to achieve this result, and asked them if they were willing to consider his system. Dr. Stahl made it clear that he was not ordering this system to be effectuated. All of the surgeons present agreed with Dr. Stahl that his proposal was appropriate and agreed to perform on-call work as Dr.

Stahl had suggested.⁷ Dr. Stahl delegated the responsibility to the surgeons to work out the on-call schedule amongst themselves. Because he was unable to fill all the available slots for on-call work with full-time general surgeons, Dr. Stahl would continue to use some part-time surgeons who worked at other hospitals or some full-time surgeons who were not general surgeons to fill these slots. An example of the latter category was Dr. Rohmann who as a full-time thoracic surgeon, performed on-call work as a subspecialist but this on-call work consisted of being on-call at home, and not at the hospital. This on-call work was clearly mandatory and was part of his job as a thoracic surgeon, for which he received no additional compensation. However, Dr. Rohmann also volunteered to participate in the on-call system for general surgeons, which required his presence in the hospital, and for which he received the same additional compensation as the other surgeons who performed on-call in the hospital.

Dr. Stahl was adamant that he viewed the on-call system that he implemented as entirely voluntary and not a condition of employment, and that any physician had the right to refuse to perform on-call work at any time. He added that he was unsure if he had the authority to order full-time physicians to take call, but even if he did, he would not have done so, even if they all had refused at the same time. He then would have simply returned to the old system of using primarily part-time or "itinerant" surgeons to perform call.

When Dr. Stahl would interview subsequent applicants for employment, he would inform them of the system at the hospital. He told them that the surgeons were covering the nights and that there were eight surgeons involved. Dr. Stahl did not indicate to these applicants whether on-call work was voluntary or mandatory, or whether it was a requirement of the job. He told them that they have to speak to the doctors who were responsible for scheduling the calls as to the amounts of call that would be performed. In fact, no applicant ever informed Dr. Stahl that they did not want to take call, and indeed for the most part the applicants were anxious to take call, because it would enable them to make extra money. Moreover, according to Dr. Stahl most applicants were aware that Lincoln Hospital was a trauma center, and was very busy in the evenings, when most trauma cases arise. Thus they are generally eager for the experience that the surgeons would obtain when they would be performing on-call work.⁸

Various surgeons assumed the responsibility of scheduling on-call hours over the years. From 1989 to the date of the discriminatees' termination, Dr. Gunduz performed that function. The procedure has remained essentially the same since 1981,

⁷ Dr. Rao, who was hired by New York Medical College as a full-time surgeon in 1980, was apparently one of the employees present at this meeting. Dr. Gunduz was employed as a surgeon by New York Medical College at Lincoln Hospital sometime in 1981. Thus the record is unclear as to whether he was employed at Lincoln Hospital at the time of the meeting. Dr. Kazigo began in October 1981, so it appears that he was not present at this meeting. Dr. Priovolias started as a full-time surgeon in 1993. Thus she was clearly not present at the 1981 meeting conducted by Dr. Stahl.

⁸ In that connection, Dr. Stahl testified that 80 percent of trauma admissions occur after 4 p.m.

with the exception of the use of more advanced computer skills utilized by Dr. Gunduz when he formulated the schedule.

The surgeons who participated in the call system included the full-time attendings, as well as number of part-time surgeons, who generally worked at other hospitals or in other departments in the hospital who were willing to take call in the department of surgery. All of these individuals would submit to Dr. Gunduz a calendar with from 10–15 dates to indicate their availability for on-call work. He would then assign an average of 4–6 dates per month to each surgeon, but not necessarily an equal amount to each. Thus some surgeons desired to take more calls and some less, and Dr. Gunduz would try to accommodate their requests as much as possible. Additionally, the part-time surgeons would generally be assigned fewer calls than the full-time surgeons in the department. Dr. Gunduz then prepares a schedule based on this information, which is then published and distributed throughout the hospital. Dr. Gunduz conceded, that once a surgeon's name is placed on the schedule that represents a commitment on that surgeon's part to be on-call at the hospital on those dates.

However, if there is a problem with a surgeon meeting this commitment, the surgeons are free to arrange a switch or a substitution with another surgeon. If the surgeon is unable to arrange for a substitute, the practice has been for the surgeon to inform Dr. Gunduz, who will in turn find someone else to cover, or if necessary do it himself. The record discloses no incidents, where a surgeon could not take his assigned call, could not find a substitute, and was ordered to perform the on-call assignment. The record discloses that a substitute was always found, where a last minute problem required a surgeon to decline to perform an on-call assignment. Indeed, as Dr. Stahl testified, on-call work was generally in great demand as a source of extra income, particular among younger surgeons.

The record also reflects several instances, where full-time attendings did not accept on-call assignments for substantial periods of time. Dr. Gunduz himself for a 3-month period from November 1996 through January 1997, did not perform call because of the illness of his wife. At that time he informed Dr. Stahl that he would not be taking call because his wife was ill. Dr. Stahl replied that he understood and he did not care as long as the night calls were covered. In fact, Dr. Gunduz' colleagues had already agreed to cover for him during this period of time.

Similarly, Dr. Priovolos, due to the illness of her father, informed Dr. Gunduz that she would be unable to take call sometime in the fall of 1995. Dr. Gunduz told her not to worry and he would see to it that whatever calls she would normally be assigned to, would be assigned to others. Dr. Priovolos neither notified, nor received permission from Dr. Stahl, when she declined call for this period of time.

Dr. Guadino had been a full-time surgeon for many years, and he regularly participated in the on-call system for the department of surgery. Sometime in 1994, due to his own illness, he notified Dr. Stahl that he could no longer perform call. Dr. Stahl replied, that that was reasonable, and as long as the remaining surgeons were willing to work out coverage, that's fine. Dr. Stahl asserts that this conversation was merely informational, and not a question of Dr. Guadino asking permission

to be relieved on the responsibility for taking call. Dr. Stahl contends that he had no authority to order Dr. Guadino or any doctor to accept call, and that he was not concerned as long as call was covered. He conceded that if all full-time attendings refused call at once, he would have had a problem, but insists that in that event he would have had to revert to the old system that existed prior to his taking over, of using part-time or "itinerant" physicians to cover the call.

As noted above, Dr. Michael Rohmann was a thoracic surgeon, who when Dr. Stahl took over had been part of the group that also performed on-call work in general surgery.⁹ Dr. Rohmann liked to continue to perform some general surgery, so he volunteered to perform on-call work in the surgery department. He continued to do so for nine years, until he informed Dr. Stahl that he was not interested in doing it any more. Dr. Stahl replied that it was okay, just work it out with other surgeons.¹⁰

Finally, Dr. Rao testified, without contradiction that on several occasions in the past, he would inform Dr. Gunduz not to put him on the schedule for a particular month, and Dr. Gunduz would comply. These occasions were not for vacations, but merely because for those particular months, Dr. Rao "just didn't want to do it."

As noted above, Respondent began its affiliation with Lincoln Hospital in July 1997, and hired all of the discriminatees. Dr. Stahl, who was also retained by Respondent as chief of surgery, informed the discriminatees that their hours would increase from 35 to 40 hours a week (or 80 hours over 2 weeks). Dr. Stahl also negotiated the salaries for the discriminatees with them and it was agreed to be \$165,000 per year.

Dr. Stahl also indicated that on-call work would continue as in the past. Employees would be paid on an hourly basis for on-call work, and a pool of physicians would continue to be used to cover the slots. Dr. Stahl also indicated that Respondent was interested in having compensation for on-call work incorporated into the general pay received by the doctors. The surgeons opposed this idea, because they wanted the flexibility that they had previously had to set their own schedule for call, and some wanted more and some less. Dr. Stahl agreed with the employees, and that proposal was not implemented.

In that connection, Dr. Schwartz testified that when Respondent took over, Dr. Stahl, as chief of surgery reported to him, Respondent's network chief of surgery. Accordingly, they discussed various matters. They worked out a budget, discussed the salaries that Dr. Stahl would offer the surgeons, and also had a discussion about the on-call system. Dr. Schwartz indicated that he thought it would be a good idea if Respondent took on-call money and put it into the base salary. For example, instead of paying the surgeons \$165,000 per year, Respondent would offer an annual salary of \$205,000 "with the understanding that that mandates twenty-four hours a day, seven days

⁹ Dr. Rohmann also took call as part of his job as thoracic surgeon, but this type of call, did not require his presence at the hospital. He would merely have to be available, at home or elsewhere, during these on-call hours. There is no dispute that this type of on-call work was mandatory and part of Dr. Rohmann's job.

¹⁰ Respondent concedes that Dr. Rohmann's participation in on-call work in general surgery was voluntary.

a week coverage.” Dr. Stahl replied that he felt that some of the doctors wanted to do more call, and some less, and he would prefer to let the doctors increase their income if they wished. Thus under Dr. Schwartz’ proposal each employee would have to work on-call four times a month, while under the old system sometimes they would work three times a month and sometimes five. Dr. Schwartz stated he believed that a better system would be for each physician to know how much money they would be making each year, and that everyone would know how often they would be taking call. Thus he envisioned having seven surgeons, each one taking one call per week, which he believed was “humane,” and not “burdensome,” Dr. Stahl preferred to keep the system the way the surgeons had been doing it, because it was working well, and it gives junior people a chance to make more money. While Dr. Schwartz testified that he could have overruled Dr. Stahl, and insisted on his “system,” he chose not to, and decided to respect Dr. Stahl’s opinion on this subject.

As related above, the Union filed its petition to represent the physicians and dentists employed by Respondent on November 12, 1997. Prior thereto, the discriminatees and other doctors distributed “polling cards” to the staff to determine interest in the Union. After determining interest in the Union, a steering committee was formed, consisting of approximately 20 physicians, including all four of the discriminatees. On November 12, 1997, the steering committee, including the discriminatees hand delivered a copy of a demand for recognition on the part of the Union to Dr. Cohen. The letter was signed the USPD Lincoln Steering Committee, and contained signatures of some 20 physicians, including all the discriminatees. Thereafter the Steering Committee sent a letter to Dr. Paoli, urging her to “help” the Union get recognition from Respondent.

On March 12, 1998, a letter from the USPD Lincoln Chapter was sent to Respondent. The letter reflects that the USPD Lincoln Chapter attending physicians passed two resolutions. One resolution contends that the Respondent’s system of at will employment was unacceptable, and demanded that no physician be terminated without just cause and due process. Resolution two demanded that employment for all physicians be presumed to continue for the duration of Respondent’s affiliation with Lincoln Hospital. Finally, the letter again demanded recognition from Respondent, and attached a copy of petitions signed by approximately 103 physicians, including all 4 discriminatees demanding recognition of the Union from Respondent.

On April 23, 1998, Respondent distributed employment agreements to the medical staff, and requested that the agreements be reviewed, signed and returned by May 6. The proposed employment agreement makes no reference to on-call hours or on-call work. The only reference to hours is section 2 which is entitled hours. It states, “during the term of this Agreement, you shall be expected to provide a minimum of 80 hours per pay period to fulfill your duties at Lincoln.” On April 30, on emergency meeting of the medical staff, presided over by Kazigo, was held. By letter dated May 5, from Dr. Kazigo to Dr. Gade, the medical staff rejected the proposed employment agreement, and attached a copy of a resolution opposing the agreement and the reasons for the rejection. Both the letter

and the resolution recommends and requests that Respondent recognize the Union as the collective-bargaining representative of the staff, and indicates that such action would permit the acceptance of a contract mutually negotiated and acceptable.

On May 18, the Union distributed a flyer at the hospital, which contained a copy of a letter to Dr. Luis Marcos, president of the HHC. The letter complained about Respondent publishing a large help wanted ad in the New York Times, which the Union viewed as an attack against its present staff because of the objections to Respondent’s proposed employment agreements. The letter makes reference to Respondent’s failure to recognize the Union, although most of HHC’s doctors are already represented by Union’s. It accuses Respondent of “radical union-busting tactics,” and asked Dr. Marcos for a meeting to discuss “this escalating problem.”

Dr. Cohen sent a letter dated May 20, in response to this letter and to the prior correspondence to him from the staff concerning the employment agreements. Dr. Cohen’s letter responded to some of the concerns raised by the staff, and asserted that the ad in the New York Times “was not intended to replace physicians offered contracts. The ad was deemed necessary to assure continuity of care in the event of threatened sudden resignations.” The letter also stated that Respondent “will not consider the employment contracts binding in the event of a collective bargaining agreement, if a bargaining agent is eventually recognized through the legal process. St. Barnabas Hospital does, however, have serious concerns about the legality of USPD representing the Lincoln physicians. It is also my understanding that, unfortunately, these complex legal issues may take more than two and a half years to finally resolve.”

Subsequently, some physicians signed the employment agreements, but a majority of them did not sign. No disciplinary action was taken against any of the physicians for their failure to sign the agreements.

During the months of their employment with Respondent from July 1997 through mid-June 1998, all four discriminatees regularly performed on-call work an average of 4–5 times per month. For most of this period, on call work was also performed by three other doctors. They were Dr. Guignade, who was a part-time surgeon, who worked twice a week in the clinics for Respondent, and who chose to also participate in the on-call system with the full-time surgeons. Additionally, Doctors Kapoor and Kigongo were both full-time surgeons working in the emergency room. In that capacity, they did not have call, but they were obligated to work 12-hour shifts. However, both of these physicians volunteered to take call in the department of surgery pool. The record reflects that Doctors Kigongo and Kapoor performed slightly fewer calls than the full-time surgery department attendings, averaging from 2–3 calls per month. Dr. Guignade however, performed about the same number of calls on average than the full-time attendings.

In May 1998, Respondent hired Dr. Robb as a full-time attending surgeon. At that time, Dr. Gunduz credibly testified that Dr. Schwartz informed him that Dr. Robb was to be scheduled a specific number of calls per month, because Dr. Robb’s on-call responsibilities were part of his full-time commitment. I note that Dr. Schwartz did not deny Dr. Gunduz’ testimony in

this regard, and in fact, appeared to corroborate it. According to Dr. Schwartz, when he hired Dr. Robb, he explained to Dr. Robb that his goal was to have seven full-time attendings take call once a week. Thus he would be expected to take call at least once a week, although he might do more based on the schedule.

Dr. Schwartz also testified that he recruited two other doctors prior to the discharge of the discriminatees, Doctors Eachampati and Daly, but did not recall any discussions with these doctors about call. They were not scheduled to start work for Respondent until after the termination of the discriminatees.

Dr. Dennis Bordan, who replaced Dr. Schwartz as chairman of the department of surgery for Respondent at Lincoln Hospital, on November 1, 1998, testified about his practice in recruiting new full-time surgeons. According to Dr. Bordan he tells all applicants that they are required to take call on a regular basis, and in fact the new employment contracts that these surgeons sign has a reference to the obligation to take call. Moreover, Dr. Bordan asserts that at least since he began, new surgeons now receive a flat salary, with no extra pay for on-call work.

Both Dr. Bordan and Dr. Schwartz testified concerning industry practice with respect to on-call work. Both physicians testified that based on their experience working at several different hospitals, on-call is always considered mandatory for full-time physicians, with the exception of the department chairmen, or illness, or some other valid excuse such as advanced age. This obligation extends according to Dr. Schwartz, even to physicians who merely have privileges to admit patients to hospitals, and who receive no salary from the hospital. In that regard, Dr. Rao conceded that he had admitting privileges at St. Joseph Hospital, and although he received no compensation from that hospital, he does take call. However, Dr. Rao denied that it is a requirement that he take call at St. Joseph. Dr. Rao further testified that it varies from hospital to hospital as to whether call is required in order to obtain admitting privileges.

However, both Dr. Schwartz and Dr. Bordan admitted that they had never worked at hospitals where physicians were paid salaries and received extra money for on-call work, as was the practice at Lincoln Hospital.¹¹

When Respondent began its affiliation agreement with Lincoln Hospital, Dr. Schwartz noticed that the involvement of attending surgeons in patient care was not to the level he thought was appropriate. In short, he believed that the attending surgeons were not getting involved early enough in patient consultations, and were leaving too many areas of responsibility to residents, particularly the responsibility for telephoning subspecialists.

In January 1998, after Dr. Schwartz assumed the interim position of chief of surgery, he began to implement his views in a series of meetings with the staff, wherein they would be discussing specific cases. Dr. Schwartz informed the staff during these meetings that he felt that the attendings should be more involved in the consultation process, and that they should be

making the call to the subspecialists. Dr. Schwartz informed the group that he believed that it was better for the attending surgeon to make the call, because of their greater experience in being able to describe symptoms and the patient's condition, and because if the attending surgeon requested the subspecialist to come in,¹² it would have more force or effectiveness. All of the discriminatees, at one or another of these meetings, disagreed with Dr. Schwartz on this subject. They informed Dr. Schwartz that their past practice at the hospital had always been for the resident to make the call to subspecialists, and that this practice had worked well. Further they felt that Dr. Schwartz' view would inhibit the proper training for residents. Finally, the discriminatees told Dr. Schwartz that they were not subspecialists, but general surgeons, and were not qualified in these subspecialty areas. While Dr. Schwartz made it clear during these meetings, that he wanted the attending surgeon to call the subspecialist, he never phrased it in terms of an order, or threatened any discipline if his desires were not followed.

While the discriminatees expressed disagreement with Dr. Schwartz' views, as detailed above, they did not expressly refuse to carry out these instructions. Nor did they state that they would agree to make such calls at all times. In fact, the discriminatees would sometimes call the sub-specialist directly and sometimes would allow the resident to do it, depending on their best medical judgment. Dr. Schwartz was aware that the discriminatees would not always follow his instructions, but he took no action against them. Nor did he warn them of disciplinary action if they continued not to follow his instructions in this area.

Finally, another incident occurred in early June. A patient came in with head trauma to the emergency room in the evening. He was seen by the resident, who in turn called the general surgeon on call in the hospital. The general surgeon instructed the resident to telephone the neurosurgeon, who was on call at home. The resident then called the neurosurgeon and gave him information about the patient that was not entirely accurate. Therefore based on that inaccurate information, the neurosurgeon determined it was not necessary to come to the hospital that day. Although the patient's treatment was not affected, Dr. Schwartz felt it could have been a serious problem, and his policies were again violated. Thus here the surgeon not only did not call the subspecialist, but also did not examine the patient, violations of two of his rules. When Dr. Schwartz brought this matter up at the weekly meeting, he again asserted his position, and indicated that had the surgeon examined the patient, he was more likely to have given accurate information to the subspecialist, and been able to persuade the subspecialist to come in that evening, which Dr. Schwartz believed to have been better for the patient. Once again the reaction from the discriminatees at the meeting was negative, with their position being that the neurosurgeon should have been able, with probing questions for the resident, to have elicited the correct information.

¹¹ In fact Dr. Schwartz testified that he had never even heard about this type of system before he started working at Lincoln Hospital.

¹² Most of these incidents occur while the surgeons were on-call, when the subspecialists were not physically in the hospital.

Immediately after this meeting, Dr. Schwartz decided that he wanted to go on record and be specific and clear about his position, and wrote a memo, which he sent, to all surgeons, and to the medical director. The memo dated June 10, reads as follows:

As I have emphasized many times in the past, the attending surgeon is the responsible physician for all LMMHC patients on the surgical service. The proper usage and obtaining of consults is also the attending surgeons' responsibility. In the same manner that a radiological consult is obtained attending to attending, all other consults are to be done in this manner.

For example, if a patient with potential neurosurgical injuries is seen, and a neurosurgical consult is needed, the surgical attending needs to personally speak with the Neurosurgeon. This will avoid the scenario of the resident (in training) misrepresenting a patient's injury to the consultant who may then make a judgmental error and in turn blame the resident. The same principle applies to patients with trauma who need to be "cleared" by the trauma surgeon prior to another procedure being performed (for example, ORIF by the orthopedist.) The attending surgeon must personally evaluate the patient and discuss the findings with the other involved attendings.

This is not done to undermine the training of the residents, but rather to ensure that our patients receive the best care possible and our residents get the best training possible.

Dr. Schwartz also contended that the memo applied to all consultations around the clock, and not just on-call situations, since there is not always a neurosurgeon or pediatric surgeon present during the day. Nonetheless, Dr. Schwartz conceded that most of the problems that arose, where his policies were not followed, did in fact occur during on-call hours.

On June 12, the discriminatees received the above memo. They were alarmed, because they felt that Dr. Schwartz was ordering them to call subspecialists directly, something they did not feel was medically appropriate in each and every circumstance.¹³ They believed that if they followed Dr. Schwartz' directives all the time (1) patient care would be delayed inasmuch as they would have to be summoned to the emergency room, examine the patient and then telephone the subspecialist; (2) they would be called upon to assume primary responsibility for patients with injuries which fell outside their area of expertise; and their involvement would subvert the training of the residents.

The four discriminatees met, and at first decided to try to seek out Dr. Schwartz and discuss their concerns with him. However, Dr. Schwartz was not present at his office at Lincoln Hospital, so they decided to draft and sign a response to his memo. They left a copy with his secretary and faxed a copy of their response to Dr. Schwartz at St. Barnabas.

The discriminatees all testified that they expected to have a dialogue with Dr. Schwartz as a result of their response to his

memo. At that time, the June schedule for on-call work had been made up and all four of the discriminatees were on the schedule for that month.¹⁴ All of the discriminatees credibly testified that they intended to meet their commitments to take call for the month of June for which they had been scheduled. They were hopeful that by then they would have had a dialogue with Dr. Schwartz and resolved the matter, or that Dr. Schwartz would capitulate to their demands and rescind the dictates of his prior memo.

The response sent by the discriminatees was as follows:

In response to your memo of June 12, 1998, we the undersigned would like to make the following observations:

1. None of us accepts the responsibility of being, "the responsible physician for all LMMHC patients on the surgical service." For all the years we have been taking call, we never did and do not plan to assume that responsibility. Simply put, we are not House Officers or residents. The sub-specialists are responsible for the patients on their services.

2. We categorically refuse to be made the scapegoats of the sub-specialists' failures to fulfill their obligations to the patients when the residents call them under the pretext that the information given to them by the residents is incorrect. We fulfill our obligations to the patients based on the information the residents give us; the sub-specialists should be able to do the same. If they feel the information given to them by the resident is incorrect, they should be able, as specialists, to ask the residents relevant questions that would lead them in the right direction. That is what we do. Of course, if we agree to your mandate we will have the scenario of a sub-specialist alleging that he or she did not fulfill his or her obligations to the patient because the information given by the attending general surgeon was incorrect. Therefore, we will not call the consultants. They should come and see the patients or choose a course of action based on the resident's information. We are attendings of equal rank and if we do not require her attendings to describe the patients to us before we accept our responsibility, we do not see why the sub-specialists should be treated differently.

3. If you should insist on the dictates of your memo, we will have no choice but to stop taking call.

Sincerely yours,

On Friday, June 12, between 11 a.m. and 12 noon in his office, Dr. Schwartz found a copy of the memo. According to Schwartz' testimony when he read the letter the first thing he noticed was the phrase "we the undersigned," and he seethed and became upset with the letter and the threat. Dr. Schwartz elaborated with respect to his reaction:

I was outraged. I was outraged that they didn't come to me. We had chatted about it. We talked about it. We disagreed about it, but to place a letter on my desk without

¹³ The discriminatees felt that the memo was primarily concerned with on-call hours, although it was sent to all surgeons.

¹⁴ Dr. Gunduz was scheduled for call on June 14, 20, and 29, Dr. Kazigo June 19, 21, and 27, Dr. Rao June 30, and Dr. Priovolos for June 16 and 23.

talking to me and addressing me really with demands and threats, I was threatened, and I had demands made of me by a group of surgeons, acting, you know, “we the undersigned.”

It’s not an individual letter from an individual to me as a professional or an individual surgeon complaining about my policy to me whether they did it in writing or in person. I certainly could understand if they wanted to – if one of them or four of them separately wanted to say, we disagree with your policy. Here’s our reasons why we disagree. Can’t we do something to change it.

After reading the letter, Dr. Schwartz immediately called his direct superior, Dr. Cohen, after faxing him copies of both memos. After Dr. Cohen read the response of the discriminatees, he told Dr. Schwartz that “they can’t work here any more.” Dr. Cohen gave Dr. Schwartz three reasons. They were, the attending physician has to be responsible for the patients, they cannot refuse to do what Dr. Schwartz says, and they cannot not take call. Dr. Schwartz replied that he agreed with Dr. Cohen’s recommendation of termination. During this discussion, Dr. Schwartz also indicated to Dr. Cohen that he could not understand why the employees made such a vehement and drastic response to a relatively benign letter, which merely reminded the employees of his previous instructions. Thus Dr. Schwartz testified that while in the past the employees had disobeyed his instructions, they had not done so categorically as they did in the letter. He viewed that as insubordination. That and the employees telling him and his boss, that they are not going to do what he (Dr. Schwartz) is saying, compounded by the threat not to take call, convinced Dr. Schwartz that the conduct of the employees warranted discharge.

Dr. Cohen instructed Dr. Schwartz to telephone, Dr. Gade, the president of Respondent to obtain his approval. Dr. Schwartz spoke to Dr. Gade on the phone, after faxing him the memos as well. Dr. Schwartz informed Dr. Gade that in his view he could not have these employees working in the hospital, because “they cannot be responsible and they cannot take call.” Dr. Schwartz elaborated further on his discussion with Dr. Gade.

It was . . . I felt it to be a nasty letter. We categorically refuse. I guess the catch words for me that bothered me besides the substance, was the, we the undersigned, that I’m being threatened by a group that they could because of their numbers give me no choice.

Dr. Gade then questioned Dr. Schwartz whether he had a plan to adequately cover the hospital, if the four discriminatees were to be terminated on Monday, June 15 as planned. Dr. Schwartz assured Dr. Gade that he could provide sufficient coverage by temporarily transferring surgeons from Respondent’s primary location on 183th Street. Dr. Gade concurred in Dr. Schwartz’ recommendaton, but instructed Dr. Schwartz to discuss the matter with Dr. Paoli, Lincoln executive director, before carrying out the decision to discharge the doctors.

On Sunday June 14, Dr. Gunduz was scheduled to perform call at the hospital. In that connection, Dr. Schwartz knew that Dr. Gunduz was scheduled for call-on Sunday, but he did not arrange for a substitute, notwithstanding the discriminatees

threat not to take call in the memo. Dr. Schwartz explained that he believed based on the memo that the discriminatees would continue to take call as long as he didn’t insist on the dictates of his memo. Thus since he didn’t have any contact with the employees over the weekend, he fully expected Dr. Gunduz to perform his call as scheduled on Sunday. In fact, Dr. Schwartz further admitted that he believed that as long as he didn’t insist on his memo, the discriminatees would continue to perform call as scheduled. Therefore he did not discuss with either Dr. Cohen or Dr. Gade the fact that Dr. Gunduz was scheduled for call on Sunday, or whether he expected Gunduz to perform this function at that time. There was also no discussion between Dr. Schwartz and Dr. Cohen or Dr. Gade about the possibility of speaking to the discriminatees to see precisely when or if they intended to refuse call.

Dr. Schwartz further testified that whether or not Dr. Gunduz took call on Sunday made no difference in his decision, because he believed that the discriminatees thought that he would not insist on the dictates of his memo and therefore rescind his memo. They didn’t know that there was no way that either he or Dr. Gade was going to tolerate their conduct. Dr. Schwartz conceded that he took no steps to insist on the dictates of his memo on Friday, Saturday, Sunday or Monday. However, he contended that, although he didn’t know when the discriminatees were going to start not taking call, he believed that, had he on Monday morning said that the policy was in effect and he was insisting on his instructions being followed, he then expected that from that moment on, they would refuse to take any more calls.

As previously ordered by Dr. Gade, Dr. Schwartz met with Dr. Paoli on Monday morning June 15. He showed her the two memos and indicated that Respondent intended to terminate the four doctors. Dr. Paoli questioned how the discriminatees could write such a memo and agreed that they can’t really work at the hospital any more. Dr. Paoli also asked whether Dr. Schwartz could cover the loss of four surgeons. Dr. Schwartz assured her that coverage would be provided unabated; and gave her a written schedule of how he intended to cover the hospital from that point forward. They also discussed terminating the privileges that they discriminatees had at Lincoln Hospital, and other housekeeping details such as the retrieval of IDs and keys.

Dr. Schwartz then prepared a memo of termination dated June 15, which he personally handed to each of the discriminatees. The memo reads as follows:

I am in receipt of your signed letter dated June 12, 1998. Given your categorical refusal to follow departmental policy and your refusal to “take call” or be available to the patients on the surgical service or in the Emergency department in the hospital on designated days and nights, your employment at LMMHC in the department of surgery is terminated. This is effective immediately.

Dr. Schwartz testified further concerning the decision to terminate and the letter of termination that he prepared. He asserted that in his mind the decision to terminate the discriminatees was based primarily on their failure to accept responsibility for patients under their care and their insubordinate refusal to

follow his directions. The third paragraph of the letter, according to Dr. Schwartz, the threatened refusal to take call, “only added to the immediacy.” Dr. Schwartz was asked specifically whether even if the discriminatees had not threatened not to take calls, that the other conduct would have been sufficient to warrant termination? Dr. Schwartz answered, “[I]n my view yes, but now whether Dr. Gade would agree or Dr. Cohen would agree, I don’t know. But I would have gone with my recommendation. And perhaps they would agree and that it would be sufficient for them. I can’t speak for them.”

Analysis

The Alleged 8(a)(3) Allegation

The complaint alleges, and General Counsel argues that the record establishes that Respondent has violated Section 8(a)(3) of the Act by terminating the employment of the discriminatees because of their activities on behalf and in support of the Union. In assessing this allegation, it must first be determined whether or not General Counsel has adduced sufficient evidence to establish that the union activities of the discriminatees was a “motivating factor” in Respondent’s decision to discharge them. *Wright Line*, 251 NLRB 1083, 1089 (1980), enf. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

In that regard, the evidence reveals that all four discriminatees were active supporters of the Union, inasmuch as all four of them were on the Union Steering Committee. More importantly, Dr. Kazigo, one of the discriminatees was the acknowledged leader of the Union movement amongst the physicians and dentists,¹⁵ and both he and Dr. Gunduz, another one of the discriminatees testified at the representation hearing as witnesses for the Union.

Additionally, the union activity extended beyond the representation hearing, since Dr. Kazigo on behalf of the Medical Staff, protested Respondent’s employment contract in a letter dated May 5, in which he also requested that Respondent recognize the Union as the collective-bargaining representative of Respondent’s employees. This letter was followed up by a distribution of a flyer by the Union at the hospital, which contained a copy of a letter from the Union to Dr. Marcos of HHC, complaining about among other things the proposed employment contracts, Respondent’s decision to place a help wanted ad in New York Times, which the Union characterized as an attack against the staff, and “radical union-busting tactics,” and Respondent’s failure to recognize the Union.

Thus the union activities of the employees continued late as May 18, less than a month before the discharges. In fact, it could be argued that union activities implicitly continued even past May 18, since a majority of the physicians refused to sign the proposed employment contracts, which Respondent in all probability attributed at least in part to the influence of the Union. It is also likely that Respondent was not pleased about the Union’s influence in persuading some physicians to refuse to sign the agreements. It is also not unreasonable that Respondent might have retaliated against the leaders of the union drive, because of such a belief on Respondent’s part.

However, on balance I am not convinced that the above evidence is sufficient to establish a causal connection between union activities in general, or the union activities of the discriminatees in particular, and the discharges of the employees on June 15. I note particularly the absence of any animus by Respondent towards the Union or the activities of the employees in support of the Union. Although Dr. Cohen felt compelled to reply to the Union’s and the employees’ correspondence to him, by letter of May 20, the reply was restrained, reasonable and conciliatory, and was devoid of any evidence of animus towards the Union or any of its employees. He explained the reasons for the ad in the paper that the Union believed was threatening and disavowed any such intention. Dr. Cohen also explained that it would not consider the proposed employment contracts binding in the event of a collective-bargaining agreement, if such an agreement is eventually reached. While Dr. Cohen did indicate that Respondent had serious concerns about the legality of the Union, representing the physicians, and that it might take 2-1/2 years to resolve the issue, these comments are no more than a statement of Respondent’s legal position, and an accurate assessment of the time it could take to adjudicate the matter. I do not view either of these comments as reflective of animus towards the Union or its employees.

I also note that it is undisputed that based on the election results, nearly all of Respondent’s physicians supported the Union,¹⁶ and a majority of the physicians refused to sign the proposed employment contracts. Yet, no disciplinary action was taken against any of the other physicians. While the timing of the terminations is somewhat suspicious (3 weeks after the last union action), this suspicion is overcome by the fact that the terminations occurred immediately after the discriminatees wrote their memo of June 12. The General Counsel argues in that regard that “based on the flawed reasoning and abrupt nature of their terminations, it is not credible that Dr. Gade and Dr. Cohen would not have counseled Dr. Schwartz to meet with the discriminatees, or take some lesser action, if they were not anxious to rid themselves of Dr. Kazigo and the discriminatees because of their support for the Union.” I disagree. General Counsel’s argument is little more than speculation, unsupported by record evidence. I see no basis for any assertion of “flawed reasoning” for the terminations, and as for the admittedly abrupt nature of the discharges, I find it likely that Drs. Gade and Cohen, as testified by Dr. Schwartz had the same view as Dr. Schwartz of the letter written by the discriminatees. They all believed strongly that the letter constituted sufficiently serious misconduct, that their employment could no longer be tolerated at the hospital. I therefore conclude that Respondent’s decision to terminate the discriminatees was based solely on their participation in the June 12 memo. Thus General Counsel has not met its burden of proving that the union activities of the discriminatees was “a motivating” or indeed any factor in the decision to discharge them.

¹⁶ I also note that 103 physicians signed the March 12 letter to Respondent, which in part demanded that Respondent recognize the Union.

¹⁵ Dr. Schwartz admitted being aware of this fact.

Moreover, even if it is concluded that the above evidence is sufficient to establish that a motivating factor in the decision to terminate was the union activities of the employees, I find that Respondent has met its burden under *Wright Line* of establishing that it would have terminated the discriminatees, absent such union activities.

As detailed above, Respondent discharged the discriminatees immediately after their seeing the memo of June 12, and I am thoroughly convinced that it would have terminated any group of physicians who wrote such a letter, regardless of the Union or lack of union activities of such employees. Respondent in my view, believed that physicians who wrote such a memo did not deserve to continue their employment with Respondent, and would have been terminated in any event, whether or not they were supporters of the Union.

In such circumstances, I recommend that the 8(a)(3) allegation in the complaint be dismissed.

V. The Alleged 8(A)(1) Allegation

The complaint also alleges alternatively that Respondent terminated the discriminatees, because they engaged in protected concerted activities in violation of Section 8(a)(1) of the Act. In that regard the General Counsel asserts that the memo that the discriminatees wrote, dated June 12, which admittedly, and as I have found above, constituted the sole basis for the terminations represented the exercise of protected concerted activity. It is to that contention that I now turn.

Once again it is necessary to utilize the *Wright Line* analysis to assess the legality of Respondent's conduct. It must therefore first be decided whether a motivating factor in Respondent's decision to terminate the discriminatees was their exercise of protected concerted activities. In that regard, the actions of the employees of jointly protesting Respondent's consultation policy by sending the memo is clearly concerted activity. *New York University Medical Center*, 324 NLRB 887, 906 (1997); *Mainmark Co.*, 307 NLRB 1059, 1061 (1998); *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986).

Thus conduct also meets the general definition of protected conduct, which encompasses activities that can reasonably be seen as affecting the terms or conditions of employment, sufficiently related to mutual aid or protection. *NLRB v. Mike Yurosek & Son*, 53 F.3d 261, 266 (9th Cir. 1995); *PALCO*, 325 NLRB 305 (1998), enfd. denied on other grounds 163 F.3d 662 (1st Cir. 1998); *Blue Circle Cement*, 311 NLRB 623, 624 fn. 9 (1993). However, Respondent asserts that the discriminatees were terminated because of the unprotected nature of the protest, i.e., their conduct amounted to insubordination and engaging in a partial strike.

Without considering Respondent's arguments as to the alleged unprotected aspects of the employees protest, I conclude that the evidence establishes that a motivating factor in Respondent's decision to terminate was protected conduct of the discriminatees. I base this finding primarily on the testimony of Respondent's own witness. Dr. Schwartz testified that when he first read the memo from the discriminatees he seethed, and the first thing he noticed was the phrase "we the undersigned." Dr. Schwartz then elaborated on his concerns, emphasizing his objections to the demands made on him by "a group of sur-

geons," acting as "we the undersigned," rather than an individual letter to him complaining about his policy. Further when Dr. Schwartz discussed the discharge with Dr. Gade, he again emphasized his objection to the discriminatees use of the words "we the undersigned," which he viewed as a threat by a group which could do so because of their numbers. It is therefore apparent that at least part of the motivation for Dr. Schwartz' decision was the concerted nature of the discriminatees protest. That is an unlawful factor for Respondent to have considered. *PALCO*, supra at 306; *Sun City Center*, 299 NLRB 549, 552 (1990). Indeed, Schwartz' testimony suggests that, had the four discriminatees wrote separate letters to him or had separate conversations with him, during which they made the same threats, i.e. not to follow his policy or to take call, that he would not have been so disturbed, and may not have fired them. It was only when they banded together and made the same threats in a joint memo, did Dr. Schwartz become so upset that he recommended their terminations, in part because of their group action. Therefore a prima facie case under *Wright Line* has been established, shifting the burden to Respondent to establish that it would have terminated these employees absent their protected conduct, or put another way, that it would have fired them in any event because of the unprotected nature of their memo.

Respondent makes two related, but essentially separate contentions in this regard. One argument made by Respondent is that the discriminatees engaged in a partial strike, by threatening to refuse on-call work, because of their dissatisfaction with Respondent's insistence on its consultation policy being followed. *Yale University*, 330 NLRB 246 (1999); *Audabon Hospital Care Center*, 268 NLRB 135, 136-137 (1983); *Honolulu Rapid Transt*, 110 NLRB 1806, 1809-1810 (1954); *Valley City Furniture*, 110 NLRB 1589, 1594-1595 (1954), enfd. 230 F.2d 947 (6th Cir. 1956).

These cases do hold that in certain circumstances, a partial strike becomes unprotected activity. The rationale for this conclusion is set forth in *Valley City*, supra, and has been frequently cited.

The vice in a such a strike derives from two sources. First, the Union sought to bring about a condition that would be neither strike nor work. And second, in doing so, the Union in effect was attempting to dictate the terms and conditions of employment. [Id. at 1594-1595.]

Employees do not retain their statutory protection when they perform only part of their job functions while accepting their pay and avoiding the risks of and disadvantages of a complete strike action. They must choose between working and striking, and if they strike must be willing to assume the status of strikers, contemplating the risk of replacement and loss of pay. An employee may not continue to work and at the same time strike. *Yale*, supra, and cases cited therein.

However, it is well settled that where the duties that the employees refuse to perform are voluntary or discretionary, the refusal to perform them cannot be deemed a partial strike. *Yale*, supra; *Central Illinois Public Service*, 326 NLRB 928 (1998), *KNTV*, 319 NLRB 447, 452 (1995); *Riverside Cement*, 296 NLRB 840, 841 (1989); *Paperworkers Local 5 (Internation-*

tional Paper), 294 NLRB 1168, 1171 (1989); *Jasta Mfg. Co.*, 246 NLRB 48, 49 (1979), enfd. 634 F.2d 623 (4th Cir. 1980); *Dow Chemical Co.*, 152 NLRB 1150, 1152 (1965). This is because where an employer has permitted employees to decide for themselves whether they wish to perform the work in question, it cannot be said that employees by refusing to volunteer for such work, lost the protection of the Act, because they sought to impose on their employer their own conditions of employment. *Dow Chemical*, supra. Therefore it is important to determine whether on-call work for the discriminatees was voluntary or mandatory.

In my view, the answer to this question must be viewed primarily through the eyes of the employees. Thus the primary vice of a partial strike is the employees electing to both strike and work at the same time, and not subject them to the risk of replacement. Also, employees cannot be allowed to unilaterally impose their own terms of employment. However, in both instances employees must be aware of the mandatory nature of the particular job, so that they can be said to have chosen to “both strike and work,” at the same time, and that they can be said to have imposed their own terms of employment.

Here the evidence demonstrates that on-call work had been voluntary for employees while they were employed by New York Medical College, and that when Respondent took over the affiliation contract in July 1997, it made no announcement of any changes in the nature of on-call work for the discriminatees or any other former employee of New York Medical College. In that regard, while Respondent did indicate its intention to change the prior system, by folding the on-call payments into the regular salary of surgeons, it did not institute the change for the discriminatees or any other former employee. While the evidence discloses that when it hired Dr. Robb as a surgeon, after it took over, Respondent may have instituted this system with him, thereby evidencing an intent to do so with new hires, that cannot be construed as applicable to the discriminatees, since they were not affected. In fact, this fact demonstrates that for these former employees of New York Medical College, Respondent was content to allow them to retain the prior system, which was voluntary, as far as the employees were concerned, as well as in the view of Dr. Stahl, the prior director of surgery for New York Medical Hospital, who instituted the system that the employees utilized for on-call.

It is also significant that when Respondent took over, it made a change in employees hours from 70 to 80 hours over a 2-week period, but made no changes in on-call work, and that in its proposed employment agreement that it distributed to physicians, it made specific reference to this change in hours, and made no reference at all to on-call work, or any obligation on the part of physicians to perform such work.

Most importantly of all is the fact that neither Respondent, nor New York Medical College, ever informed the employees that on-call work was considered mandatory. This has been deemed to be a critical and crucial factor, in numerous Board cases finding a particular assignment to be voluntary, rather than mandatory. *KNTV*, supra (employer never told employee that job of substitute anchor was a required element of his job, or that he could not refuse anchoring requests); *International Paper*, supra (employer never informed employees that they

were required to remain in nonunit positions once they entered program of employer where employees occupy these jobs); *Coast Engraving Co.*, 282 NLRB 1236, 1252 (1987) (no evidence that employer ever informed employees that overtime work was mandatory); *Jasta Mfg.*; supra (although employees were told that overtime work was “expected,” even this was insufficient to establish that work was voluntary, in absence of warning that failure to work overtime would result in discipline); *Central Illinois*, supra (Employer did not tell applicants that overtime was mandatory. While applicants were told that overtime was “part of the job”, administrative law judge concludes that this “begs the question, since the fact that overtime is part of employees work,” does not necessarily mean that individuals had an obligation to perform overtime work.).

Another factor indicating the voluntary nature of the on-call system is the method of payment to the surgeons. While not conclusive, it does demonstrate that employees had a choice of whether to accept or reject on-call work, particularly coupled with the fact surgeons did not perform equal amounts of on-call work, and had for various period of time been permitted to refuse overtime without any penalty.¹⁷

I note additionally, the system that Respondent kept in place, of allowing the physicians to compile and administer the scheduling of on-call hours of physicians. This factor has been held to be further reflective of the voluntary nature of the overtime, as has the fact that the record reveals differences in the amounts of overtime taken by employees over the years, for various periods of time. *Central Illinois*, supra.

Respondent places substantial reliance on the fact that the four discriminatees all worked between 4–6 days of on-call for the entire time of their employment with Respondent, and that even when they worked for New York Medical College, they performed such work on a regular basis, except for instances of personal illness or of a family member. However, I find such evidence unpersuasive, since the record demonstrates that on-call work was considered both a vehicle for career development (giving surgeons the additional opportunity to perform surgery in trauma cases), and an opportunity for physicians to make extra money, which for many was important since they had loans to pay off. Thus the fact that the discriminatees have regularly performed on-call work can viewed as attributable to these factors, rather any belief on their part that they were obligated to perform this work. See *KNTV*, supra (that employee “had previously agreed to requests to substitute as news anchor is a reflection of his interests and career goals, not his obligations to the Respondent”). *Id.* at 452.

Respondent also relies on the testimony of Drs. Schwartz and Bordan, that on-call work is a “universally expected job function of attending surgeons.” However, a close examination of their testimony reveals that it can be given little weight in the circumstances herein. Both physicians admitted that their testimony based on their experience at other hospitals, did not

¹⁷ I note in this connection, that when Dr. Priviolos refused to accept call for an extended period, she merely notified Dr. Gunduz, the physician in charge of scheduling. Thus she never even notified Dr. Stahl, much less requested permission not to take call, which Respondent asserts is required.

involve any other hospital where extra payment was made to physicians for on-call work. Thus in all of the experience that they testified about, on-call work was “folded” into physicians regular salary. While I recognize that this factor is not conclusive as to the voluntariness of the work,¹⁸ it is an indication of same, particularly since the system is so unusual among hospitals. In any event, it does severely detract from the significance of the testimony concerning “industry practice.”

Respondent also argues that even if on-call work was considered voluntary, it was understood that once a physician volunteers, and is scheduled, it in effect becomes mandatory, and their refusal to perform such work is therefore unprotected. *Dow Chemical*, supra at 151–152. However the problem with Respondent’s argument is that there is no evidence that the discriminatees ever threatened to or refused to perform “scheduled” on-call work. To the contrary, the evidence reveals as I have found that the discriminatees intended to fulfill their commitments to perform on-call work for the month of June, as per the schedule already published. This position was confirmed by Dr. Gunduz in fact performing his on-call assignment on Sunday, June 14, the day before the terminations. While Dr. Schwartz testified that he believed based on his reading of the memo that the physicians intended to refuse call at a somewhat earlier time, such testimony is hardly sufficient to establish unprotected conduct. Since Dr. Schwartz knew prior to the terminations, that Dr. Gunduz had performed call the day before, notwithstanding the prior memo, such knowledge, at the very least, should have created an ambiguity in his mind as to the actual intentions of the discriminatees. It would not have been difficult for Dr. Schwartz to at least meet with the discriminatees before discharging them to determine precisely when or even if they were going to refuse call. Since Respondent failed to take that action, it cannot now rationally argue that the discriminatees intended to refuse scheduled on-call time, and thereby engaged in unprotected conduct.

Finally, Respondent relies on *Audubon Health Care Center*, 268 NLRB 135, 136–137 (1983), allegedly for the proposition that the refusal to perform call by the discriminatees is unprotected, whether such work is voluntary or not. I do not agree. In *Audubon*, employees at a nursing home concertedly, refused to perform work in “open sections,” caused by the absence of other employees. The Board found that though initially, the performance of this work may have been voluntary, it became a practice so routine that no assignment was needed. Further it found that both the employees and their supervisors assumed that the employees would cover the work in question. Thus the Board concluded that the performance of this work became part of their job duties. Based on that finding, the Board found that the employees engaged in a partial strike, by refusing to perform this work while continuing to perform their regular duties of working in their regularly assigned sections.

¹⁸ Indeed, in the normal industrial setting, overtime is generally compensated for by payment of extra money, and still can be considered mandatory in certain situations. Once again however the critical factor in such cases, absent here, is clear evidence that employees were informed by the Employer that overtime was mandatory.

However, in my view *Audubon* does not hold as Respondent asserts that the refusal to perform on-call work whether voluntarily or not is unprotected. It merely concludes that work originally considered voluntarily, can be transformed to a regular part of employees’ job by practice, and therefore in effect becoming mandatory. The critical finding in *Audubon*, not present here, is the conclusion that the employees therein assumed that they would do the work, and that although they might have not been happy about it, they believed that it was part of their job. Here, on the contrary, I have found that the discriminatees believed, supported by the numerous factors detailed above, that on-call work was always and continued to be voluntary for Respondent, and that they had the option of declining to participate in the on-call system if they so chose.

Moreover and equally as significant, in *Audubon* unlike Respondent here, the employer served notice on the employees that it considered this assignment to be mandatory, by informing the employees several times that they would be discharged if they did not perform the work in the open section. Here, the discriminatees were never so informed by Respondent, and therefore were not given the option, as were the employees of *Audubon* of withholding all their services or engaging in a partial strike. Since they were not aware that Respondent considered on-call work mandatory, they cannot be considered to have engaged in a partial strike.

Accordingly, based on the above analysis and authorities, I conclude that on-call work was voluntary for the discriminatees. In such circumstances, their threatened refusal to perform such work is protected conduct, and Respondent’s decision to terminate them for this reason is violative of Section 8(a)(1) of the Act.

General Counsel argues alternatively that even if on-call work was considered mandatory, the conduct of the discriminatees would still be protected, since at the time of the discharge, Respondent had no reason to believe that the employees would engage in the type of intermittent strike prohibited by the Act. *E. B. Malone*, 273 NLRB 78, 81 (1984); *Polytech*, 195 NLRB 695 (1972); *Serv-Air*, 162 NLRB 1369, 1376–1378 (1967). I agree.

Thus where employees refuse to perform a particular assignment, whether the work is voluntary or mandatory, this is not necessarily considered a partial strike, unless it is part of plan of recurring or repeated, intermittent strikes. Thus the Board views such action as a one time spontaneous work stoppage, which is protected by the Act. *Sawyer of Napa*, 300 NLRB 131, 137 (1990); *Regency Service Carts*, 325 NLRB 617, 621 (1998); *Mike Yurosek & Sons*, 310 NLRB 831 (1993); *J. P. Harner*, 241 NLRB 613, 619–620 (1979); *First National Bank of Omaha*, 171 NLRB 1145, 1147–1151 (1968), enf. 413 F.2d 921, 923–925 (8th Cir. 1969).

The question of whether a particular work stoppage is a one time spontaneous stoppage or part of a plan of recurring or repeated stoppages is dependent on the facts of each case. The Board does utilize a presumption in such an analysis that a single refusal to work overtime or other job function “is protected strike activity, and that such presumption should be deemed rebutted when and only when, the evidence demonstrates that the stoppage is part of a plan or pattern of inter-

mittment action which is inconsistent with a genuine strike or genuine performance by employees of the work normally expected of them by the employer.” *Polytech*, supra at 695.

Here, the discriminatees did not engage in any work stoppage, but instead merely threatened to do so, by stating that they would not take call, if Dr. Schwartz “insisted on the dictates of his memo.” It seems to me that a similar presumption should apply in this instance. Thus if an actual work stoppage should be presumed to be a single one time spontaneous time stoppage, then a spontaneous threat to engage in a stoppage, as here, should be entitled to the same characterization. The constant use of the word “spontaneous” in the characterization of one time stoppages, suggests that employees are entitled to a certain amount of exuberance in protesting working conditions, which includes the ceasing of work, even where it includes mandatory assignments. Thus even though the refusal to work mandatory overtime once or ten times has the same general effect of permitting employees to determine their own conditions of employment for some period of time, employees are in effect given one “spontaneous” opportunity to cease work, without transforming the conduct into an unprotected partial strike. Therefore this reasoning should surely apply to a mere threat to engage in a stoppage.

It is not entirely clear whether a mere threat to engage in a partial strike, can in and of itself be considered unprotected conduct. While there are cases that so suggest, *Sawyer*, supra, I have found no case where a finding has been made that the mere threat to engage in a partial is unprotected by itself. Indeed, while many cases,¹⁹ including *Yale* have relied on the expressed intent to engage in a partial strike, to support a finding of unprotected conduct, these cases included an actual stoppage as well. Indeed in *Yale*, supra, dissenting Member Liebman, citing *Hotel Holiday Inn*, 259 NLRB 496, 500–501 (1981), enfd. 702 F.2d 268 (1st Cir. 1983), concluded that “unexecuted future plans cannot be relied on to determine whether actual, transpired conduct is protected.” While the majority disagreed with this assertion, it did make reference to the case cited by Member Liebman which had held that conduct was protected despite the Union’s plans to stage an unprotected sit down strike, because the plan for the unprotected conduct was forestalled. The majority did not overrule *Hotel Holiday*, supra, but distinguished the case on the grounds that the plan for the unprotected conduct there was forestalled. However in *Yale*, by contrast, the activity occurred, i.e., a grade strike in one semester, while also threatening to engage in another grade strike the next semester. Therefore, the Board consistent with prior authority, combined the intent to engage in a partial strike, with the actual occurrence of a partial strike, to comprise unprotected activity.

Here, as noted there has been no strike, partial or otherwise. However, I shall assume based on at least the dicta in cases such as *Sawyer*, supra, that in certain circumstances, the threat or an intent to engage in a partial strike can be sufficient in itself to constitute unprotected activity. However, I do not believe that the facts here are sufficient to establish that the

discriminatees intended to engage in a recurring or repeated partial strike. Indeed, an analysis of the facts reveal a substantial ambiguity as to the intentions of the discriminatees.

In that regard, the letter states that they would “stop taking call,” if Dr. Schwartz insists on the dictates of his memo. It does not say whether they would stop taking call one time, or more than once, or whether they would continue to take call for the month of June for which they were already scheduled. Further, as detailed above, the employees had decided to in fact continue to take call through at least the end of June, a position which was confirmed by Dr. Gunduz performing his call on Sunday, June 14. Moreover, the statement “if you should insist on the dictates of your memo,” is also ambiguous and susceptible of a number of meanings, some of which would clearly result in no work stoppage at all. One such reasonable interpretation of that phrase would be if Dr. Schwartz took no further action with respect to his memo, i.e., neither rescinding it or reaffirming it, the employees would take no action, and continue to take call.

Therefore, the above facts simply “cry out” for Dr. Schwartz to have simply spoken to the discriminatees in order to determine their true intentions, before discharging them. Indeed, Board cases deem this factor to be crucial, in assessing whether or not a stoppage was intended to be recurring. In *First National Bank of Omaha*, supra, the administrative law judge detailed the then current law on the subject, and concluded that the critical areas of inquiry was whether the employer had sought to determine what the intentions of the employees were to as the future, as well as whether the employer had warned the employees that it would regard future refusals to work scheduled overtime as grounds for disciplinary action. Thus the administrative law judge found, affirmed by the Board, that based primarily on the absence of such action by the employer, the strike was not a partial recurrent strike that would deprive employees of Section 7 protection.

Subsequent cases have continued to rely on those factors to conclude that the strike involved was not a partial strike. *Aviation-Construction*, 248 NLRB 649, 661 (1980) (employer made no attempt to ascertain what the employees intentions were with regard to future Saturday work before discharging them); *E. B. Malone*, supra (employer did not even attempt to find out about whether there would be any other disruptions). See also *Serv-Air*, 162 NLRB 1369, 1377 (1967) (employer’s refusal to discuss grievance with employees, deprived them of the opportunity or occasion to make clear what they would have done).

Therefore, based on the foregoing, I conclude that the substantial ambiguity that existed in the memo of the discriminatees, as to their true intentions with regard to taking call, coupled with the fact that Dr. Gunduz performed call on June 14, in these circumstances required Respondent to have made some attempt to ascertain their true intentions, and or to warn them of possible discipline, should they engage in a partial strike. In the absence of such action, Respondent cannot prevail in its assertion that the mere threat by the employees here to refuse call amounts to unprotected conduct.

Therefore, the discriminatees have engaged in protected activity by threatening to refuse call, and a termination for their engaging in such conduct is violative of the Act. Respondent

¹⁹ *Valley City*, supra; *John Swift Co.*, 124 NLRB 394, 396 (1959), enfd. 277 F.2d 641 (7th Cir. 1960).

argues however, that even if this activity is considered protected, Respondent has not violated the Act, since it has established that it would have discharged the discriminatees in any event, absent such conduct, because they engaged in “unquestionably unprotected activity,” of refusing to follow Respondent’s consultation policy. I cannot agree. In that regard, Respondent argues that Dr. Schwartz’ testimony establishes that the “primary reason” for discharging the discriminatees was not their refusal to take on-call assignments, but rather their unqualified refusals to assume ultimate responsibility for patients under their care or to follow his consultation policy.” Even assuming that the record supports the above contention, which it does not, that would not be sufficient to meet Respondent’s *Wright Line* burden. Whether alleged unprotected conduct is the “primary reason” or not is not the test of *Wright Line*. As long as protected conduct, as here, is one of the reasons for the discharge, it is unlawful, regardless of whether there is another “primary reasons” for the termination. What Respondent must demonstrate in order to meet its *Wright Line* burden is that, it would have terminated the discriminatees whether or not they refused to take call, or put another way, whether the refusal to follow its consultation policy and/or to accept responsibility for patients, would have been sufficient by themselves to have caused their terminations. Respondent has fallen far short of establishing such a contention.

In that regard, Respondent relies on the testimony of Dr. Schwartz that in his view the alleged other unprotected conduct (paragraphs one and two in the discharge letter), would have been enough to warrant termination. However, in that same testimony, Dr. Schwartz conceded that he did not know whether Dr. Gade or Dr. Cohen (his superiors) would agree, adding, “I can’t speak for them.” Moreover, neither Dr. Cohen nor Dr. Gade testified herein, so there is no confirmation of Dr. Schwartz’ view by the ultimate decisionmakers.²⁰

Additionally, the record reveals that during the discussion between Dr. Cohen and Dr. Schwartz about the memos, Dr. Cohen immediately stated that the employees can’t work there any more, and gave three reasons for his position, one of which was “they cannot not take call.” Further, Dr. Schwartz mentioned the refusal to take call to Dr. Cohen as one of the factors that persuaded him to concur with the discharge recommendation by Dr. Cohen. Dr. Cohen then instructed Dr. Schwartz to speak to Dr. Gade. When he recounted the events to Dr. Gade, Dr. Schwartz recommended discharge and again made specific reference to the discriminatees threat not to take call. He further elaborated by telling Dr. Gade that he was bothered by the phrase “we the undersigned,” and the fact that he was being threatened by a group that they could because of their numbers gave me no choice.”²¹

²⁰ Indeed, the absence of their testimony on these crucial matters, permits an adverse inference to be drawn that if they had testified, their testimony would have been unfavorable to Respondent with respect to this issue. *Reddy Mix Concrete*, 317 NLRB 1140, 1143 fn. 16 (1995); *International Automated Machines*, 285 NLRB 1122, 1123 (1987).

²¹ The reference to “gave me” no choice, could only have referred to no choice but to rescind his directive concerning consultations, or else the employees would refuse call.

It is therefore clear from the above evidence, that contrary to the testimony of Dr. Schwartz, the threat by the employees not to take call was a substantial factor in Respondent’s decision to discharge them. Indeed, while Respondent now seeks to emphasize the employees refusal to obey Respondent’s consultation policy as the alleged “primary reason” for the terminations, the record reveals that all four discriminatees had been failing to adhere to this policy for months, Dr. Schwartz was aware of it, and took no action against them for their failure to do so.

Moreover, it is significant to note the constant reference by Dr. Schwartz to his objection to “we the undersigned” as a factor in his decision. He mentioned it several times in his testimony as something that bothered him greatly, and as outlined above, specifically mentioned this to Dr. Gade, as well as his objection to being “threatened by a group.” This suggests, consistent with the aforementioned fact that Dr. Schwartz never disciplined or even warned any of the discriminatees for failing to adhere to his directives for months or for publicly disagreeing with him at meetings about such policy, that Dr. Schwartz was concerned not so much with the discriminatees failure to follow his policies, but rather their decision to band together, and make their protest in writing with a copy to his superior. As I have set forth above, it is unlawful for Respondent to penalize employees for the concerted aspects of their conduct, and that is what Respondent has clearly done here. *PALCO*, supra; *Sun City*, supra. See also *E. B. Malone*, supra (Employer seemed as interested in the fact that the employees had a meeting. The essence of concerted activity as in the walkout itself.).

Accordingly, based on the foregoing, I conclude that Respondent has not met its *Wright Line* burden of proof, and that Respondent has violated Section 8(a)(1) of the Act by its termination of the four discriminatees, for their participation in protected concerted conduct.

In view of any conclusion in that regard, I need not, and do not decide whether the discriminatees conduct consisting of their refusing to follow Dr. Schwartz’ directives concerning consultations amounts to unprotected conduct. However, I do deem it appropriate to discuss the issue, principally because I view Board law as unsettled and somewhat inconsistent in this area. Respondent cites a number of cases in support of its argument, that the discriminatees by refusing to obey Dr. Schwartz’ directives concerning consultation policy was engaged in unprotected conduct, because it was an attempt by employees to remain on the job and determine for themselves which terms or conditions of employment they would observe, and which is insubordination and or a partial strike. *Bird Engineering*, 270 NLRB 1415 (1984) (employees refused to obey Employer’s directive not to leave premises during lunch. Held to be insubordination and attempt to set their own rules in deliberate defiance of management’s authority); *Highlands Hospital*, 278 NLRB 1097 (1986) (Refusal by guards to clean up nails or transport individuals through picket line. Held to be within their job duties, and their refusal to perform this work to be a partial strike, since employees refused to work on terms lawfully prescribed by their employer.); *Audubon*, supra (Employees refusal to work in “open section,” to fill in for absentees held to be an unprotected partial strike. Employees “cannot pick and choose the work they will do or when they will do

it. Such conduct constitutes an attempt by the employees to set their own terms and conditions of employment in defiance of their employer's authority to determine those matters and is unprotected." Id. at 137); *Interlink Cable Systems*, 285 NLRB 304, 306–307 (1987) (employees refused to obey order of supervisor to sign warning slip, held unprotected insubordination); Accord, *Lake Development Management*, 259 NLRB 791, 797 (1981) (employees refusal to follow employer's assignment to take beepers constitutes unprotected partial strike); *Carolina Freight Carriers*, 295 NLRB 1080 (1989) (employee's assertion of right under contract by persistently refusing direct order to clock out, unprotected insubordination); *Mead*, 275 NLRB 323, 324 (1985) (Employee refused a direct order to perform certain work. Although based an interpretation of the contract, held by Board to be unprotected insubordination and an attempt by employee to dictate the terms of his employment); *Yellow Freight System*, 247 NLRB 177, 181 (1980) (Employee protested job assignment by refusing to perform extra run, based on his interpretation of contract. Held unprotected insubordination and an attempt by employee to work only on his own terms.).

The General Counsel makes two arguments, specifically directed to this issue. Initially, he argues that Respondent condoned the unprotected nature of the conduct, by virtue of having tolerated the discriminatees prior failures to follow his instructions. *United Parcel Service*, 301 NLRB 1142, 1144 (1991); *General Electric*, 292 NLRB 843, 844 (1989). While these cases do establish that once an employer condones unprotected conduct of employees, it cannot use any unprotected aspect of that activity as a basis for discharge, they are not controlling herein. "The doctrine of condemnation applies when there is clear and convincing evidence that the employer has agreed to wipe the slate clean and resume or continue the employment as though no misconduct occurred. The doctrine prohibits an employer from misleadingly agreeing to return its employees to work and then taking action for something apparently forgiven." *General Electric*, supra at 844. Additionally condonation "is not to be lightly inferred." *Yale*, supra; *International Paper*, 309 NLRB 31, 38 (1992).

Here there are no statements made or other conduct by Respondent which constitute such clear and convincing evidence that Respondent would "wipe the slate clean," or anything misleading about its conduct. The fact that Respondent may have overlooked previous instances of the discriminatees failing to comply with Dr. Schwartz' directives, is insufficient to establish such intent of forgiveness, since in their June 12 memo, the discriminatees categorically refused to comply, which is somewhat different from merely at times, failing to do so in the past.²²

Additionally, the General Counsel argues that since the memorandum of June 12 was intended to apply to on-call situations, and therefore since on-call work was voluntary, the re-

²² However, as I have related above, I do deem it appropriate to consider Dr. Schwartz' failure to even warn the discriminatees about their prior refusals to comply with his directives as probative of his motivation in discharging them, and Respondent's inability to meet its *Wright Line* burden of proof.

fusal to comply with the consultation policy cannot be considered unprotected. I do not agree. Initially, I note that the record supports the inference that the memo of the employees was primarily directed towards on-call situations, inasmuch as all the incidents described by Dr. Schwartz which motivated his memo dealt with on-call situations, and the response of the employees specifically referred to "taking call," in connection with their arguments. However, Dr. Schwartz' memo is not restricted to on-call work, was addressed to all attendings, and the evidence reveals that there are some situations during the work day when subspecialists are not available, and Dr. Schwartz' instructions would be applicable.

Moreover, even if the response of the discriminatees could be said to apply only to on-call work, that would still not eliminate Respondent's argument that the refusal to comply with Dr. Schwartz' instructions was unprotected. The refusal to perform a discretionary duty is plainly distinguishable from striking while continuing to do it. *Yale*, supra. Employees cannot seek to maintain the benefit of remaining in a paid employee status, while refusing nonetheless to perform all of the work they were hired to do. *Polytech*, supra at 696. Therefore, whether on-call work is voluntary or not, once the discriminatees agree to and actually perform such work, (and receive pay for it), they must complete this work in the manner directed by Respondent. *Yale*, supra.

However, while I have rejected the General Counsel's arguments for finding the refusal to comply with Respondent's directives protected, I must note that although the cases cited by Respondent and others that I have cited in accord seem to support Respondent's position, there also exists a substantial body of cases which do not. These cases, in one form or another find actions of groups of employees or a concerted refusal of a single employee based on a alleged contract violation, to be protected even though the conduct encompasses a refusal to obey an order or instructions from the employer. *PALCO*, supra (employees refusal to drive truck that they believed to be unsafe protected. Board ads that as long as complaint not made in bad faith, reasonableness of belief is irrelevant); *Springfield Air Center*, 311 NLRB 1151, 1155 (1993 (refusal by two employees to install undocumented engine that they believed would violate FAA regulations); *Hi-Tech Corp*, 309 NLRB 3, 11–12, (1992) (employees refused to drive truck they believed to be unsafe); *Cintran, Inc.*, 297 NLRB 178, 180 (1989) (employees refuse to comply with employer's driving schedule, because they believed the orders violated DOT regulations); *Ryder Truck Line*, 287 NLRB 806, 808–909 (1987) (individual employee's refusal to drive truck based on belief that truck unsafe and violative of contract); *Wheeling Pittsburgh Steel*, 277 NLRB 1388, 1394 (1985), enfd. 821 F.2d 342, 346 (6th Cir. 1987) (refusal of employee to work on equipment based on his belief that contract allowed him to refuse until union safety representative inspected the equipment); *Quality C.A.T.V.*, 278 NLRB 1281, 1283 (refusal to install utility poles because they were wet, and employees believed work was dangerous); *Marlene Industries*, 255 NLRB 1446, 1461–1462 (1981) (employees refusal to perform assignment made by supervisors protected even though it embraced the disobedience of an order by management); *Bob Henry Dodge*, 203 NLRB 78 (1973)

(Employee refused to obey order of management with regard to days off. Board concludes that “protections accorded employees under the Act are not dependent upon the merit of the concerted activity in which they engage, even though such activity embraces the disobedience of an order of management.”) See also *City Disposal Systems*, 465 U.S. 822, 104 S.Ct. 1505 (1984), decision on remand 766 F.2d 969, 973–974 (6th Cir. 1985) (employee’s refusal to drive truck based on reasonable belief that contract permits such action, protected concerted activity).

Thus based on this line of cases, one could argue that the discriminatees had a reasonable belief based on their interpretation of appropriate medical practices, and based on their prior practice, that Dr. Schwartz’ consultation practice was not appropriate.²³ Therefore, even though their conduct clearly encompassed the disobedience of an order or insubordination, or the unilateral determination by the employees of their own terms and conditions of employment, it could still be construed as protected.

However, fortunately I need not attempt to reconcile these two seemingly inconsistent lines of cases, or attempt to fit the facts herein into one or the other of the holdings therein. I have concluded above, that Respondent has fallen far short of establishing that it would have terminated the employees, absent their protected conduct of refusing call and protesting Respondent’s policies, or put another way that the refusal to follow Respondent’s consultation policy alone, would have caused Respondent to terminate them. Therefore, I need not and do not decide, whether the discriminatees refusal to follow Respondent’s policies constitutes unprotected conduct.²⁴

Therefore, based on the foregoing analysis and authorities, I conclude that Respondent has violated Section 8(a)(1) of the Act by terminating the discriminatees.

CONCLUSIONS OF LAW

1. Respondent is an Employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By discharging Drs. Joseph Kazigo, Yilmaz Gunduz, Soula Priovolos, and Prakaschanda Rao because they engaged

²³ It is clear that the employees do not have to be correct in this assertion, and under *PALCO*, supra, it is sufficient if the assertion is not made in bad faith.

²⁴ While Respondent makes some reference in its brief and Dr. Schwartz emphasized in his testimony, the discriminatees “declining to accept responsibility” to patients, I agree with General Counsel that this issue is essentially “a non starter,” that does not form an independent basis for Respondent’s action. The statement by the employees in their memo clearly had reference only to on-call situations and did not reflect on overall threat not to be responsible for patients. It merely reflected a disagreement with Dr. Schwartz concerning when the responsibility for patients commences, vis a vis subspecialists, and relates to their disagreement with his instructions that subspecialists be called by the discriminatees and not the residents. Moreover, it is clear as detailed above, that Respondent has not shown that it would have terminated the discriminatees solely for their “refusal to accept responsibility for patients.”

in protected concerted activities, Respondent has violated Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondent has not violated the Act in any other manner as alleged in the complaint.

THE REMEDY

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

Having found that Respondent discriminatorily discharged the discriminatees, I shall recommend that Respondent offer them immediate and full reinstatement to their former job or a substantially equivalent position without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them. All backpay provided shall be computed with interest on a quarterly basis, in the manner described by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest computed in the manner and amount prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See also *Isis Plumbing Co.*, 138 NLRB 716 (1962).

Additionally, I shall recommend that Respondent expunge from its files any reference to the discharges of the discriminatees, and to notify them in writing that this has been done and that evidence of same will not be used as a basis for future personnel actions against them.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁵

ORDER

The Respondent, St. Barnabas Hospital, Bronx, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Discharging employees because they engage in protected concerted activities.
 - (b) 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) Within 14 days from the date of this Order, offer Drs. Joseph Kazigo, Yilmaz Gunduz, Soula Priovolos, and Prakaschanda Rao, full reinstatement to their former job or, if that job no longer insists, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.
 - (b) Make Drs. Kazigo, Gunduz, Priovolos, and Rao whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

²⁵ 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.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Drs. Kazigo, Gunduz, Priovolos, and Rao and within 3 days thereafter notify them in writing that this has been done and that the discharge will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Bronx, New York facility, copies of the attached notice marked "Appendix."²⁶ Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained by it for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. 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 this proceeding, 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 as any time since June 15, 1998.

(f) Within 21 days after service by the Region, file with the Regional Director 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.

²⁶ 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."

IT IS FURTHER ORDERED that the complaint insofar as it alleges violations not found above be dismissed.

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 the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge our employees because they have engaged in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL within 14 days from the date of the Order, offer our employees Drs. Joseph Kazigo, Yilmas Gunduz, Soula Priovolos, and Prakaschandra Rao immediate and full reinstatement to their former position or, if that position no longer exists, to a substantially equivalent one, without prejudice to their seniority or any other rights or privileges previously enjoyed by them and make them whole for any loss or pay they may have suffered as a result of the discharge.

WE WILL remove from our files any reference to the and discharge of Drs. Kazigo, Gunduz, Priovolos, and Rao, and notify them in writing that this has been done and that discharge will not be held against them in any way.

ST. BARNABAS HOSPITAL