JD-47-10
Fairfax, VA

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

INOVA HEALTH SYSTEM

and

THE NURSES ASSOCIATION FOR PATIENT SAFETY — Case 5-CA-35104

CATHY GAMBLE, AN INDIVIDUAL — Case 5-CA-35331

Mary Anastasia Hermosillo and Paula Sawyer, Esqs., for the General Counsel.
H. Tor Christensen and John Doran, Esqs. (Littler, Mendelson, P.C. Washington, D.C. and Boston, Massachusetts) for Respondent.
Paul M. Tyler and Brian Connolly, Esqs., (Gromfine, Taylor and Tyler, P.C., Alexandria, Virginia), for the Charging Parties.

DECISION

Statement of the Case

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Washington D.C, on 14 days between April 21, 2010 and June 18, 2010. The Nurses Association for Patient Safety (NAPS), a group of nurses working in the Ambulatory (Outpatient) Surgical Center (ASC) of Respondent's hospital in Fairfax, Virginia, filed an initial charge on July 14, 2009 by its representative, attorney Paul M. Tyler. NAPS filed an amended charge on August 25, regarding the suspension and termination of nurse Donna Miller in February and March 2009, and a final written warning issued to nurse Judy Giordano[1] in March 2009. The General Counsel issued a complaint on October 30, 2009.[2]

On October 14, 2009, Cathy Gamble filed a charge concerning Respondent's failure to promote her to the position of Clinical Nurse Leader (CNL) in the ASC. On January 15, 2010, the General Counsel issued a complaint consolidating Ms. Gamble's allegations with those of NAPS.

On the entire record, [3] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent and the Charging Party, I make the following

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[1] Ms. Giordano is also referred to in this record by her former name, Judy Blood.

[2] Respondent's assertion that NAPS must be a "labor organization" in order to file a valid charge is contrary to long standing Board law. There is no limitation as who or what type of entity may file a charge, *Bagley Produce, Inc.,* 208 NLRB 20, 21 (1973).

[3] Each page of every document produced by Respondent in response to the General Counsel's subpoena has a unique number in the lower right corner of each page. These are

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Findings of Fact

I. Jurisdiction

Respondent, Inova Health System is a corporation, which operates several hospitals, including the one involved in this case, Inova Fairfax Hospital in Fairfax County, Virginia. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Alleged Unfair Labor Practices

The Complaint alleges that Respondent violated Section 8(a)(1) of the Act:

(a) in suspending and terminating Donna Miller because she engaged in concerted activities by sending an email to management on behalf of herself and other nurses, on February 13, 2009, four days before she was suspended (or placed on administrative leave). This email was sent approximately three weeks before Respondent terminated Miller. The General Counsel also alleges that Respondent suspended and then terminated Miller in order to discourage employees from engaging in other concerted activities;

(b) in telling Ms. Miller that she could not discuss her discipline with anyone;

(c) in suspending and then giving a final written warning to Judy Giordano because Giordano and other employees concertedly protested Donna Miller's discharge;

(d) in failing to promote Cathy Gamble because she concertedly told another employee not to accept unscheduled late surgeries because nurses would be expected to work late.

As explained below, I find that Respondent violated the Act as alleged with regard to Ms. Giordano and Ms. Gamble and in terminating Donna Miller. I conclude that Respondent would not have terminated Ms. Miller in 2009 but for protected activity she engaged in and was disciplined for in 2005. I find that this issue was tried by the consent of the parties and that Respondent has not been prejudiced by my basing my conclusion on these facts. I also find that the General Counsel has made a prima facie case that the termination decision was related to Miller's February 13, email, and that Respondent failed to adequately rebut this prima facie case.

I also find that Respondent violated the Act in telling Donna Miller that she could not discuss her suspension with any coworkers other than her husband.

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called "Bates numbers," e.g., INOVA 01471. When I cite to these numbers I will omit INOVA and the zero.

There are some errors in the transcript. I have noted some of the more significant errors in Appendix B to this decision.

The suspension and termination of Donna Miller

Donna Miller's work history prior to December 22, 2008

At the time of her termination on March 3, 2009, Donna Miller had worked at Inova Fairfax Hospital as a nurse for over 22 years. She was hired in October 1986. For many years, Miller worked in the Main Operating Room as a staff nurse, assistant patient care director and patient care director. In 2002, she transferred to the ASC (outpatient surgery) where the work hours were more regular and where there wasn't any weekend work, as a staff nurse.

On April 15, 2005, Miller's then supervisor in the ASC, Sherre Lopez, issued Miller a "decision-making" disciplinary notice for insubordination.[4] This notice, a step more serious that a written warning, but less serious than a suspension in Respondent's progressive disciplinary system, remained in Miller's personnel file until her discharge. It was considered by Respondent's management in deciding to terminate her employment in February and March 2009.

On April 12, 2005, Miller took issue with Lopez's decision to proceed with a scheduled operation after 6:00 p.m. The next day, according to Lopez, Miller became verbally abusive and disrespectful to Judy Rumensky, then Respondent's Senior Director for Clinical Services. Rumensky had decided to move a surgery from the Main Operating Room to the ASC. Miller, according to reports received by Lopez, "yelled, repeatedly pointed her finger, made inappropriate comments about Judy's treatment of her department, and was argumentative and demanding…"

Lopez then noted:

> Additionally, it has been reported to me that these incidents have been discussed openly with other staff, which leads to distrust of management and low staff morale.

G.C. Exh. 17 p. 30.

Rumensky's account of the April 12 incident was that Miller yelled at her "about me not doing anything for them and letting the Main get by with everything…we've stayed late 2 nights this week already… what was I going to do for them…this happens all the time…"

G.C. Exh. 17 p. 34.

Miller appealed her Decision-Making Suspension. She wrote to, and then met with Dr. Russell Seneca, the Chairman of Inova Fairfax's Department of Surgery, on June 7, 2005. Miller wrote to Seneca that the issue about transfers from the Main Operating Room to the ASC had continued to fester. Dr. Seneca upheld the suspension.

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[4] This discipline is also referred to as a "decision-making suspension." It is unclear whether Miller missed work as a result or lost any pay.

Id. pp. 35-43.

From October 2007 until being placed on administrative leave on February 17, 2009, Miller worked exclusively in the pediatric surgery room of the ASC, Room 10. Respondent concedes that Miller performed her duties well. Miller is, according to the head of the ASC during Miller's tenure, "an excellent clinician," "a fabulous nurse." Tr. 259, 1007, 1727.

Respondent did not issue any written discipline to Miller between the summer of 2005 and February 2009.[5] However, the issues surrounding the 2005 discipline continued to fester between the nurses in the ASC and Respondent's management. Particularly when most pediatric surgeries were moved to the ASC in late 2007 and early 2008, the nurses in the ASC were asked to work later and later without relief from the Main Operating Room. This became a huge issue amongst the nurses, particularly those who had been working in the ASC for several years and were accustomed to shorter hours, Tr. 718, 1146, 1604-06. However, there is no evidence in this record linking this issue to the termination of Donna Miller, apart from the 2005 discipline, and no evidence that she engaged in any protected activity between 2005 until February 13, 2009, four days before she was placed on administrative leave.

In early 2007, Eileen Dobbing became the Senior Director of Perioperative Services at Inova Fairfax in charge of all the operating rooms.[6] Shortly thereafter, Respondent started performing most of certain types of children's surgeries, inpatient and outpatient, in Room 10 of the ASC. Previously, most children's inpatient operations had been performed in the main operating room, Tr. 1498-99. Donna Miller was assigned to Room 10 as the circulating nurse in 2007, working primarily with two pediatric surgeons, Dr. Alexander "Sam" Soutter and Dr. Allyson Askew. In the spring of 2008 she also began to work with Dr. Stephen Kim.

After these pediatric cases were transferred to the ASC, the discord amongst the nurses in the ASC increased over the issue of staying late to assist in pediatric surgeries, Tr. 1146. It was Respondent's practice until sometime in 2009 or 2010 to perform pediatric surgeries after 6:00 p.m. in the Main Operating Room. Sometime in 2009 or 2010, Respondent began to schedule pediatric surgeries in the ASC until 7:30 p.m. This was done most likely to prevent pediatric patients, who generally could not ingest anything by mouth, from having to wait any longer than necessary for their surgeries, Tr. 1498.

On September 18, 2008, the Patient Care Director of the ASC, Paula Graling, Miller's immediate supervisor, gave Miller her yearly evaluation.[7] Graling wrote that, "Donna is a

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[5] Paula Graling testified that on December 22, 2008 she gave a verbal coaching to Miller. Miller testified that while Graling advised her of complaints about her language, Graling did not tell her that their discussion constituted a coaching. I find that Miller was not disciplined.

[6] Although Dobbing is the Interim Senior Director of Perioperative Services, she had held this position for three years at the time of the instant hearing.

[7] The chain of command relevant to this case is as follows: staff nurses reported directly to Mary Lou Sanata, a management coordinator, and Paula Graling, interim Patient Care Director. Sanata reported to Graling. Graling reported to Eileen Dobbing. Dobbing reported to Dr. Patrick Christiansen, PhD, Inova Fairfax's Administrator, and also to Pat Conway-Morana, the Chief Nursing Executive and Dr. Russell Seneca, the Chief of Surgery. Dr. Christiansen, Dr.

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tremendous asset to the ASC as an experienced clinician delivering care to patients and as a unit leader." G.C. Exh. 34, Bates # 00098. In 32 categories in which Miller was rated on a scale from 1 to 5, she received a 5, "distinguished: exceeds all standards" in 24 categories. Her overall performance rating, 463 points out of a possible 500, was considerably higher than the ratings given by Graling to other nurses whose evaluations are in this record, G.C. Exh. 34 Bates # 00097.

Events leading to the termination of Donna Miller[8]

Miller was promoted to Registered Nurse 3, from Registered Nurse 2 on December 5, 2008, G.C. Exh. 33. Two and a half weeks later, on December 22, 2008, Miller went to see her immediate supervisor, Paula Graling, concerning an issue regarding the movement of children following surgery. Graling raised a complaint she had received about the language used by Miller in the ASC. According to a memo authored by Graling, but not signed nor apparently seen by Miller:[9]

> I took the opportunity to ask Donna about the climate of teamwork in room 10 and told her I had received several concerns from staff members, old and novice, about the language and unprofessional atmosphere in Room 10. She became very offended and asked why the staff did not come to her. I told her that I had referred staff members back to her but that it was exactly her challenging attitude that perhaps made it difficult for staff to confront her. She told me that they should all "fu.." off and I had ruined her day. She also told me that she didn't give a "fu.." anymore because it didn't matter how much you did no one measured you by your performance. I stated that this was not true and that she was a valued staff member who had done wonders to develop the pediatric service line. I appreciated her work, but wanted to coach her on what was being said about her behavior in hopes that she would be more cognizant if this was occurring (since I was not a direct observer). I also told her I would ask staff to confront her in person in the future if they had concerns but that I was thankful they could come to me and give us an opportunity to address the situation without escalating it out of the department. She did not seem at all soothed by my remarks and left my office angry.

G.C. – 17, pg. 29.[10]

Seneca and Ms. Conway-Morana reported directly to Dr. Reuven Pasternak, the CEO of Inova Fairfax.

In Respondent's human resources department Leanne Gorman, a human resources manager, reported to another human resource manager, Julie Reitman. Julie Reitman reported to Kenneth Hull, the director of human resources. Hull reported to Dr. Christiansen.

[8] The testimony of management witnesses, Gorman, Graling, Dobbing, Drs. Christiansen and Pasternak regarding the process by which Respondent terminated Donna Miller is generally unreliable insofar as its supports Respondent's case. This testimony is riddled with inconsistencies, clearly inaccurate statements and materials gaps regarding the process by which decisions were made.

[9] The text of Graling's memo suggests that it was written after Miller left Graling's office.

[10] Graling did not testify under oath that Miller said the things Graling attributed to her in the memo. Miller denied telling Graling that her critics could f-off, etc., but it is not entirely clear

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Graling testified that she considered this a verbal warning. However, Graling's boss, Eileen Dobbing, testified that Miller was not written up, Tr. 1505, as did HR Manager Leanne Gorman, Tr. 1721-22.[11] I find that Miller was not disciplined in December 2008.

Graling also testified that she called HR Manager Leanne Gorman the next day and this document went into Miller's personnel file. Eileen Dobbing testified that she directed Graling to report her meeting with Miller to HR manager Gorman, Tr. 1504.[12] This procedure is inconsistent with Respondent's Progressive Discipline Policy. That policy, G.C. Exh. 4, B # 1367, mandates, for example, that any "reminder" or "warning" be given to the employee to sign. This was not done with regard to Graling's notes of the December 22, 2008 meeting. A "verbal reminder" is not forwarded to the Human Resources Department under this policy. Graling's call to HR and sending her notes to Gorman on December 22, suggests that management began to build a case against Miller beginning in December 2008.

There was no follow-up to Graling's discussion with Miller on December 22. Graling testified that she planned to meet again with Miller, but did not do so after Damika Evans, a student nurse who had complained about Miller, told her that Miller had spoken with Evans, Tr. 248. Eileen Dobbing, on the other hand, testified that when Graling told her that Miller wanted to speak to Damika Evans, Dobbing told Graling that would not be a good idea, Tr. 1503. Miller testified that she decided not to approach Evans, Tr. 1198. Evans testified in this proceeding and did not mention any discussion with Miller resulting from Miller's December 22 meeting with Graling. From this I conclude Miller never talked to Evans, and that Graling did not follow-up on Evans' complaints.

On January 14, 19, and February 10, 2009, anonymous phone calls were made to the Inova System hotline complaining about Miller. There is no evidence of any specific offensive conduct by Miller after December 22, 2008. The record establishes that Miller's conduct, including her use of profanity and discussing her sex life had been unchanged for at least several years if not longer. Thus, there is no explanation for why four calls about Miller were made to the Inova hotline within six weeks in January and February 2009.

At least one of these calls was apparently made by Paige Migliozzi, the nurse in charge of the training of student nurses in the ASC. In its Answer to the Consolidated Complaint,

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that her denial goes to the December 22, meeting or a subsequent meeting with Graling, Tr. 1201. I'm inclined to believe that Graling's account of the December 22 meeting is fairly accurate.

[11] I discredit the testimony of Dobbing and Gorman to the extent that they suggest that Graling was instructed to discipline Miller in December. I consider Dobbing's testimony at Tr. 1505 very ambiguous on this point.

[12] Gorman testified that Graling called her first and that she advised Graling to call Dobbing, Tr. 1720-22. Regardless, of which one Graling called first, her unprecedented step of escalating a nondisciplinary incident leads me to believe that the December 22, 2008 meeting was the beginning of an orchestrated campaign by Respondent regarding Miller's employment. One thing that is clear is that the initiative for this escalation did not come from Graling. Somebody higher up in Respondent's management had begun to look for a reason to build a case against Miller.

Respondent admitted that Migliozzi was a supervisor within the meaning of Section 2(11) of the Act and its agent pursuant to Section 2(13) of the Act at all times material to this case.

Nurse Lynda Engquist and Surgical Technician Brynn Lackey made two of the other calls to the hotline about Miller. A fourth call was received on February 27, ten days after Miller was placed on administrative leave, but before she was terminated.

The caller on January 14, complained that Miller was vindictive to employees she does not like by changing their schedules and giving them few hours of work. The record in this case establishes that Miller had no ability to change other employees' schedules or limit their hours of work, e.g. Tr. 559-63, 1567. The caller also said that Miller and her husband [Terry Miller], who also works as a nurse in the ASC pediatric operating room, did not follow certain procedures, such as counting instruments after surgery. While Miller had a dispute with nurse Paige Migliozzi about counting instruments, she did not violate Respondent's policies in not counting instruments for surgeries in which the surgeon did not enter the peritoneal cavity. However, this policy was changed after a discussion between Miller and Paula Graling. This first caller apparently did not complain about Miller's use of profanity and making obscene statements, an allegation that was relied upon by Respondent in terminating Miller.

Five days later, on January 19, another anonymous call was made to the Inova hotline about Miller. The hotline employee taking the call recorded the complaint as follows:

> Caller stated that for "years," Donna Miller, RN, has been using profanity at work. Caller stated Ms. Miller uses profanity in the operating room while children are under anesthesia. Caller stated Ms. Miller also talks about sexual situations. Caller stated employees are uncomfortable with Ms. Miller's language and subjects of conversation. Caller stated employees are "terrified" Ms. Miller will retaliate against them for reporting these concerns. Caller was reminded of the non-retaliation policy. Caller had no additional information to provide.
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> Caller stated management (declined to name) is aware of the concern.

Miller used profanity, openly talked about her sex life, made off-color statements and told off-color and possibly even obscene jokes in the workplace and in the operating room. It is unclear however, how frequently she did so. Based on the testimony of Dr. Steven Kim, who I regard as a neutral witness, it was rare that Miller said anything in the operating room that stood out in terms of its sexual or offensive nature. Dr. Kim worked with Ms. Miller at least once a week for an entire day from May 2008 until February 2009. He could only recall one comment by Miller that stood out in his mind as inappropriate and that comment was made in the early part of his association with her, Tr. 2236-38.

Miller's conduct in this regard was consistent with the culture of the ASC, G.C. Exh. 16, Bates # 3419, Tr. 1472-73.[13] I find that the use of profanity and off-color and even obscene

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[13] I fully credit the testimony of Paula Hay, a current employee of Respondent, including her testimony regarding the "culture of the operating room" cited above. Board law recognizes that the testimony of current employees that contradicts statements of their supervisors is likely to be

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language was commonplace in the ASC. According to the uncontradicted testimony of Cathy Gamble, Dr. Russell Seneca, the Chief of Surgery at Inova Fairfax, "could cuss like a sailor," Tr. 670. Respondent was well aware that cursing and off-color jokes and conversation were commonplace in its operating rooms before it launched its investigation of Donna Miller, as well as during its investigation of the allegations against Miller, e.g. Tr. 1976-77, G.C. Exh. 16, B# 3416.

A third hotline call was made on February 10, 2010. This caller, who I infer was Lynda Engquist, stated that Miller "is intimidating, bullies her coworkers, and "tends to throw her weight around." Also the caller stated that "Miller acts very authoritative but does not have any authority." Thus, the third caller contradicted the assertions made by the first caller regarding Miller's vindictive changing of other employees' schedules.

The third caller also related that Miller frequently used profanity and sexual innuendos while conversing with coworkers. The caller related that Miller talked openly and very graphically about her sex life. The caller mentioned comments that Miller made about sexual relations with Miller's husband, Terry Miller, who worked with her as a nurse in ASC pediatric operating room.

Donna Miller denies making these graphic statements. Nevertheless, I generally credit the testimony of Lynda Engquist that she did so. The most graphic comment was overheard by Engquist in an employee lounge about two months prior to Miller's discharge, Tr. 2008-09. However, I find that the use of profanity and sexual banter was not as limited to Donna Miller as suggested by Engquist. Rather, I find, as related to Leanne Gorman by Bobbie MacDonald (see page 12 herein), who apparently was not one of Miller's friends, that the language used by Miller was pervasive in the ASC and MOR and had been for many years. I also find that based on MacDonald's account that Donna Miller discussed sex more often than most nurses in the ASC, but no more than some physicians who worked in the ASC. I am also uncertain that Miller said everything attributed to her by Engquist. The two women clearly had a mutual antipathy towards each other dating back to the 1990s.

Finally, the third caller relayed comments attributed to nurse Cathy Gamble regarding Miller's plans to rearrange nurse's work schedules. The caller also complained about the length of the breaks being taken by Donna and Terry Miller and complained that Donna Miller bullied the charge nurse into changing Terry Miller's assignments. None of these accusations are supported by this record except the length of the breaks taken by the Millers.

Leanne Gorman, an Inova Fairfax human resources manager, conducted an investigation of Miller based on the compliance calls. She interviewed 8 employees on February 11, three more on February 12, and four on February 17. Vivian Stancil, another HR representative, interviewed five employees on February 12. There is no credible evidence that Respondent has conducted an investigation of this magnitude with regard to any other employee.

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particularly reliable. *Flexsteel Industries*, 316 NLRB 745 (1995), enfd. mem. 83 F.3d 419 (5th Cir. 1996). The testimony of current employees that is adverse to their employer is "… given at considerable risk of economic reprisal, including loss of employment … and for this reason not likely to be false." *Shop-Rite Supermarket*, 231 NLRB 500, 505 fn. 22 (1977).

Four of the eight employees interviewed by Gorman on the 11th were selected randomly by choosing every fifth person on the active employee roster of the ASC; the other four were not selected randomly. The two employees interviewed by Gorman on February 12 were selected randomly. Vivian Stancil interviewed five employees on February 12, all of whom were selected randomly, except for Teresa Ford. Ford was the only employee interviewed by Stancil who provided Respondent with significant negative comments about Miller, none of which concerned profanity or sexual banter. Rita Martin, who was the 40th person on the roster, was not interviewed.

I infer that it is not coincidence that that the vast majority of comments relied upon by Respondent in terminating Miller came from employees who were not selected randomly and were interviewed by Gorman, rather than by Stancil. The interview process was done precisely to build a case against Miller. The random selection was done to give the investigation the appearance of objectivity.

Paula Graling testified that after the investigation was completed, two nurses, Lynda Engquist and Bobbie MacDonald, approached her and asked if they could speak to Gorman. This is not true. Engquist and MacDonald were interviewed the first day that Gorman conducted interviews. Engquist, a witness called by Respondent, testified that she was asked to speak to Gorman; she did not volunteer, Tr. 1983-84, 2010. Margaret Donegan was also interviewed the on February 11 despite the fact that she was not one of the nurses selected by Gorman at random. Donegan, like Engquist, did not volunteer to be interviewed. She was told by management to talk to Gorman, Tr. 1324.[14]

Gorman testified that Paula Graling asked her to interview three of these employees and that Paige Migliozzi was interviewed because she asked Graling to speak to Gorman. Graling, on the other hand, testified that she told Migliozzi that Gorman would like to speak to her, Tr. 2213. The investigation was supposed to be a secret, but Gorman conceded that she didn't ask Migliozzi how she found out about it, Tr. 1900.

I find Gorman's testimony of how employees were selected to be incredible. Gorman interviewed eight employees of the first day of her investigation, only four of whom were selected by random. Three of the four non-random selections, Lynda Engquist, Paige Migliozzi and Bobbie MacDonald provided most of input most detrimental to Miller. I conclude this was not coincidental. If Gorman was conducting an impartial investigation I conclude she would have interviewed all the random interviewees before talking to Miller's known enemies.

Gorman testified that the interviewees were told not to talk about the interviews and that she tried to obscure the fact that the investigation was the result of complaints about the Millers. Given the fact that the non-random interviewees were the employees from whom the most damaging information to the Millers was elicited, I conclude that Engquist, Migliozzi, MacDonald and Donegan were selected for interviews on the assumption that they would be most likely to provide information to build a case against Donna Miller. In fact, I find that

[14] Bobbie MacDonald, Paige Migliozzi and Teresa Ford, the other three non-random interviewees on February 11 and 12, 2009 did not testify in this proceeding.

Gorman knew or suspected before she started her interviews that Migliozzi and Engquist had made at least some of the calls to the hotline about Miller.

Gorman asked each employee ten questions, most relevant to this case are questions about:

1. violations of Inova policy;
2. violations of Inova's standards of behavior;
3. whether the employee had been made uncomfortable by another employee;
4. unfair treatment by the ASC Scheduling Committee. Although Miller was not mentioned, she was one of four members of the scheduling committee;
5. Had the interviewee experienced retaliation by anyone or did they fear retaliation by anyone;
6. Had the interviewee experienced or witnessed unethical or inappropriate behavior in the workplace.

Of the 11 employees picked at random and interviewed, Gorman and Vivian Stancil, another HR representative, recorded complaints about Donna Miller by three of these employees; Cathy Gamble, Brynn Lackey and Damika Evans.

The HR investigators reported that Cathy Gamble (also an alleged discriminate in this case) reported that Terry Miller, and to a lesser extent, Donna Miller, took longer breaks than they were allotted. Gamble was also reported as saying that Donna Miller intimidates the charge nurse into changing her husband's assignments. Guna Perry, a former charge nurse in the ASC, testified in this proceeding that Donna Miller asked her to change Terry Miller's schedule on one occasion and that other nurses asked her to change their assignments on a regular basis. There is no first hand evidence that Miller intimidated the charge nurses into changing Terry's schedule.

Brynn Lackey, a surgical technologist, accused Donna Miller of being vindictive and holding grudges. Lackey complained about vulgar conversation in the pediatric operating room (Room 10) and Miller's telling sexual jokes. She mentioned one particular comment made by Miller about being naked with her husband in her hot tub. Lackey repeated these accusations under oath at this instant proceeding. I credit her testimony regarding the coarse nature of Miller's conversation.[15] Lackey also accused Donna Miller of retaliating against staff members who complained about her husband. This truth of this accusation has not been established.

Damika Evans, a nursing fellow (student nurse), related a disagreement with Miller about counting instruments. Evans complained about Donna Miller cursing and what she considered to be sexually suggestive banter between Miller, on the one hand, and pediatric surgeons Alexander "Sam" Soutter and Allyson Askew, on the other. At the hearing, Evans testified that her principal complaint to Gorman concerned her treatment by Anita Holland, rather than by Miller. Respondent did not investigate this complaint or a complaint made by Holland about Evans after Miller's termination.

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[15] Paula Graling testified that Lackey never complained to her about Donna Miller's behavior, and that Lackey complains regularly about a lot of things, Tr. 2198-99. When being interviewed by Gorman, Lackey also complained about Terry Miller and Cathy Gamble.

The HR representatives interviewed eight other staff members not picked at random. They did not interview the nurses who worked most regularly with Donna Miller; her husband Terry, Jon Hurwitz, Ruby Dizon and Judy Giordano, Tr. 1401. They also did not interview the two surgeons for whom Donna Miller worked as much as 90% of the time, Dr. Alexander "Sam Soutter and Dr. Allyson Askew. In fact, Respondent rejected a request from Dr. Soutter that it talk to him about Miller's conduct, Tr. 837-38.

From five of the eight employees not selected at random, Paige Migliozzi, Lynda Engquist, Bobbie MacDonald, Desiree Hensley and Teresa Ford, Respondent obtained the most negative comments and serious allegations against Donna Miller. Thus, the investigation was not an impartial search for the truth; it was effort to build a case against Donna Miller.[16]

Teresa Ford complained about Miller being intimidating and taking long lunches. However, Room 10, the pediatric surgery room in which Miller worked was generally self-sufficient and the length of breaks and lunches taken by Room 10 nurses had minimal, if any impact of the working conditions of nurses in other operating rooms, Tr. 1401. Moreover, ASC management was well aware of the extent that the Millers took longer breaks than other staff and did nothing to change this situation.

Lynda Engquist related that Miller talked openly about her love life with Miller's husband Terry, including one very graphic comment she stated was made in the lounge two months prior to her interview. She encouraged her interviewers to talk to nurse Anita Holland. Holland was also a non-random interviewee. Holland, a friend of Miller's, did not corroborate Engquist's comments about graphically obscene comments on the part of Miller.[17] Engquist complained about Miller having an intimidating demeanor, but seemed to doubt Miller's ability to affect employees' schedules. In fact, as stated previously, it is clear from Respondent's management witnesses that Miller had no ability to affect the schedules of other employees.

Desiree Hensley indicated that other nurses were afraid that Miller could change their work schedules.[18] If true, there is no basis in this record for this concern.

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[16] Respondent places great emphasis on the fact that the HR interviewers did not mention Donna Miller's name in the interviews. However, they made the fact that they were investigating Miller apparent in subtle ways e.g., Tr. 1382, and by selecting employees to interview on the basis of suspected animus towards Miller.

[17] Prior to her interview with Gorman, Margaret Donegan had complained to management about employees taking excessive breaks, and I infer that Gorman expected to obtain negative comments from Donegan and Cathy Laing, another nonrandom interviewee, about Miller in this regard and Miller's role on the scheduling committee.

[18] Leanne Gorman testified that:

> So, they [the scheduling committee, to which Miller belonged] did have the ability to change the schedule, or at least there was at least a perception from what was conveyed to me that the committee had the ability to change the days off for the employees that did not have a fixed schedule.

Whatever perception was conveyed to Gorman was inaccurate, a fact she could easily have determined by talking to Respondent's management coordinator, Lou Sanata, who did control the nurses' schedules, Tr. 559-63, 592, or to Eileen Dobbing, Tr. 1567.

HR interviewed Paige Migliozzi, the primary nurse educator in the ASC. Since Migliozzi did not testify at this proceeding I decline to find that any of the statements made by her are necessarily true unless corroborated by first-hand testimony. Respondent's explanation as to how Leanne Gorman came to interview Migliozzi is not credible, see page 9 herein. I infer that Gorman knew before she started the interviews that Migliozzi had made one or more of the compliance line calls and also knew that she would make serious allegations about Miller. Gorman did not ask Migliozzi the questions she asked other interviewees, but rather solicited negative comments about Donna Miller.

Migliozzi reported to Gorman that she heard Miller make a very graphic comment regarding how Miller and her husband engaged in sexual intercourse. Whereas Engquist and a hotline caller related that this comment was made in the lounge, G.C. Exh. 11, G.C. Exh. 16, Bates # 03407, Migliozzi told HR that she overheard the statement in the pediatric operating room and that Miller was talking to Dr. Soutter in the presence of Damika Evans. While Evans told HR about cursing and sexual innuendos in the pediatrics operating room, she did not mention this incident.

Migliozzi also stated that Miller talked openly in the lounge about sex and screwing, that other employees were afraid of Miller and related some disagreements she had with Miller about counting instruments before and after certain types of surgery. Migliozzi also told the interviewers, but not in specific reference to Miller that, "down at the lunch table sexual comments are prevalent." G.C. Exh. 16 Bates # 03420.

In response to Gorman's question about inappropriate behavior, Charge Nurse Bobbie MacDonald, another non-random interviewee who also did not testify in this proceeding, was reported as saying:

> Nothing that is atypical of environment. Suggestive language is part of the culture. Innuendos go on between doctors and staff in general including anesthesia but it's playful banter. It's not everyone---others are more prevalent crossing the line—it's both doctors and staff but certain people. More out of urology, ortho and podiatry it's the doctors. Certain staff outside of those services (named above) that get a little raunchy—graphic in description of things. Sexual comments; there are so many I can't say what. It goes on in the lounge when people are relaxed—people are laughing along with you. It's Donna Miller. She does have exceptional clinical skills. She just thinks she's a clown and thinks she's entertaining but people would take exception to what she's saying and others egg her on. I feel there has been manipulation to change assignments…No one person stands out as manipulating over the others.

G.C. Exh. 16, Bates # 03419.

Guna Perry, a former Inova employee, who rotated with MacDonald as charge nurse during the latter stages of Miller's employment, testified at trial that the atmosphere in room 10 was no different than that in other operating rooms. She also testified that she heard Donna Miller tell jokes of a sexual nature, Tr. 1425. I fully credit Perry's testimony. Respondent made no attempt to attack Perry's credibility.

On the basis of the testimony of Perry, Paula Hay, the statement taken from Bobbie MacDonald, and Chief Nursing Executive Pat Conway-Morana's email to Dr. Pasternak on February 25,[19] I infer that at least some of Respondent's managers were well aware of suggestive culture of the operating rooms long before it began its investigation of Donna Miller.

Moreover, if Bobbie MacDonald was aware that sexual innuendo and banter was most common in urology, orthopedics and podiatry, I infer that management personnel who were routinely present in the ASC, such as Dr. Russell Seneca, Dobbing, Graling and Lou Sanata were also aware that this was the case.

There was nothing new about Donna Miller's behavior in late 2008 and 2009. ASC management was had tolerated her use of profanity and sexually explicit conversation for years, Tr. 1992, 2028-30.

Miller's February 13, 2009 email

On Friday, February 13, 2009, at 3:19 p.m., Miller sent an email to Paige Migliozzi, with a cc to their supervisor, Patient Care Director Paula Graling. The email stated that it was from Miller and four other ASC nurses: Martha Porta, Paula Hay, Anita Hungate and Laila Bailey. In typing the email, Miller confused Hungate, who did not authorize Miller to use her name, with Anita Holland, who did so.

The email stated:

> Paige,
>
> We are [word omitted] regarding the coordination of the fellows and follow up evaluations for each service. We haven't received any packets with the objectives/evaluations for each fellow as they rotate through our service in quite a while. In order to be better prepared for a comprehensive rotation in each service, it would be helpful to know who is coming, the learning objectives and the length of the rotation. We need a tool to evaluate the fellows and a way to document their progress in a timely fashion. We have not been asked for any feedback on the fellows on their progress and we feel that is an important piece of the fellowship program that we need to pay attention to. I know in peds that we need a break for a week before we have another fellow. The surgeons need it and we do too. Can you provide some assistance or guidance to us to help us with out concerns? We are committed to giving these fellows the best possible educational experience with all of our combined experience and guidance!

G.C. Exh. 62.

Paige Migliozzi emailed HR Manager Leanne Gorman at 3:48 p.m. stating:

> I want to send you this email I just received from Donna. I am quite furious she decided to appoint herself as spokesperson for this group. She has had lot to say but hasn't said

[19] Resp. Exh. – 25 at B# 15336.

> anything to me and been talking behind me. I am leaving now because I am quite furious, can we please talk Monday…

R. Exh. 21.

At 4:42 p.m., the same day, Paul Graling replied to Miller and Migliozzi, with a cc email to Porta, Hay, Bailey and Holland.

> It was my understanding that when Paige came on board she communicated with each of you and that some subsequent attempts at orientation modules were in the works. So far I have seen a sample Peds checklist and in fact I have seen a completed ENT orientation packet from Martha. I don't know who is the owner of each of these pieces of information but would welcome some discussion about how we would all like to proceed in the future to look at orientation and service rotation needs.
>
> I would also like to emphasize that proactive communication which take place in a collaborative problem solving forum is much more effective than a one dimensional group signed e-mail which puts everyone of the defensive. In the future, I would hope that each of you would use the direct method of coming to me that most of you are used to for solving issues such as that demand my immediate attention.

G.C. Exh. 62.

Migliozzi not only emailed HR manager Gorman, she also complained to nurses Anita Holland and Paula Hay that the signers of the email were ganging up on her. She asked Holland and Hay if Miller was the leader of the group.

Graling testified that she did not remember having a conversation with Gorman about "that e-mail," Tr. 2190. Gorman testified that Graling called her and that she told Graling there was nothing wrong with Miller's email, Tr. 1740. Regardless of whether Graling was referring to G.C. Exh. 62 or R. Exh. 21, I infer that she did talk to Gorman between the time she received Miller's email at 3:19 and her response to Miller at 4:42. In fact I infer that it was a discussion with Gorman that led Graling to respond to Miller.

I also infer that higher level managers and agents of Respondent were aware of the email and Migliozzi's belief that Miller was the leader of a group of nurses seeking to undermine her. I find the testimony of Respondent's witnesses that nobody other than Gorman and Graling were aware of Miller's email to be incredible. Given the fact that Respondent was considering discharging or disciplining Miller in part for bullying other Inova employees, I infer that Gorman told other human resource managers, such as Julie Reitman and/or Ken Hull, about the email and Migliozzi's reaction to it, and that either she or Reitman or Hull informed other Inova managers about the email as another example of Miller's alleged bullying. I discredit Gorman's testimony to the contrary and find her to be generally a witness whose testimony cannot be credited when supporting Respondent's theory of the case.[20]

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[20] Gorman consulted with Reitman with respect to many of the details of her investigation. She obtained advice on formulating her interview questions from Reitman and Hull, Tr. 1730.

Continued

Monday, February 16, 2009 was the first workday for Migliozzi after the day she complained to Leanne Gorman about Miller's February 13 email and Miller appointing herself as spokesperson for her group. I infer that Gorman and Migliozzi spoke about the February 13 email and Miller, as Migliozzi requested. Gorman did not deny speaking with Migliozzi about "the email," she testified that she did not recall talking to her, Tr. 1740.

On February 16, Gorman spoke to Dr. Russell Seneca, Respondent's Chief of Surgery. She denied mentioning to Dr. Seneca the email she received from Paige Migliozzi on February 13, or the relationship between Migliozzi and Miller. I discredit her denial and infer that Ms. Gorman did discuss the email with Dr. Seneca and Migliozzi's complaints about Miller.[21]

Ms. Gorman's notes indicate that she spoke to Dr. Seneca about the compliance calls. Gorman knew that Migliozzi had made one or more of the hotline calls complaining about Miller. It defies credulity to believe that Gorman talked to Dr. Seneca on the first workday after she received another complaint from Migliozzi about Miller and did not mention it to Dr. Seneca and possibly others—particularly since, as I infer, she had talked to Migliozzi that morning about Miller's email.

Gorman testified that she had one or two conversations with Dr. Seneca, but did not take contemporaneous notes of the conversation(s). However, she made notes of this conversation on February 19, or later, Tr. 1764-66. Gorman's notes are as follows:

> On 2/16/09 I spoke with Dr. Seneca about the compliance calls since two physician names were mentioned. He felt there was no reason to involve the physicians. He knows the history of **Donna Miller** delt (sic) with her over her Decision Making Suspension for unprofessional behavior in the past. He stated that **Donna** is a vindictive person and needs to go. Although her clinical skills are excellent we can't retain someone that displays this kind of behavior. He said that if we were to keep someone that displays this kind of behavior then the Studer Principles mean nothing and he fully supports her termination. He says he would handle the physicians since they would not be happy about the decision.

R. Exh. 22, B# 1522.

I conclude that Dr. Seneca, who did not testify in this proceeding, was heavily involved in the decision to terminate Donna Miller.[22] There is no other credible explanation for Gorman's

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She terminated her fact-finding pursuant to direction from Reitman, Tr. 1754. It defies credulity that she failed to mention the February 13 email and Paige Migliozzi's reaction to that email to Reitman, as the most recent example of Miller creating a hostile work environment, and/or Miller becoming a spokesperson for nurses who were disenchanted with working conditions in the ASC.

[21] At Tr. 173, Gorman denied recalling what Dr. Seneca said to her about Donna Miller.

[22] Respondent's counsel objected to the General Counsel's inquiry regarding Dr. Seneca's role in the termination of Donna Miller on the grounds that Eileen Dobbing had not testified that Dr. Seneca was involved in the decision and that there was "no allegation" that he was involved, Tr. 1560.

Continued

call to him on February 16, or Eileen Dobbing's testimony that she kept Dr. Seneca updated during the whole process concerning Donna Miller's employment, Tr. 1558-64. From Dobbing's testimony I infer that she discussed with Dr. Seneca whether or not Miller should be fired. There is no evidence that Dr. Seneca discussed Miller's employment or Respondent's investigation of Miller with the physicians that worked with her.[23] I infer that Dr. Seneca communicated his opinion to Dr. Pasternak and/or others that Miller should be fired. I infer his views were taken into account in Dr. Pasternak's decision to fire Miller.

In this record there is no basis for Dr. Seneca's opinion that Miller was "a vindictive person and needs to go," apart from his involvement in the 2005 discipline and the knowledge that I infer he had regarding Miller's email to Migliozzi on February 13. I also note that Gorman's notes do not indicate that she discussed Miller's use of profanity or talk about sex, only her vindictiveness, which would also indicate that they discussed Miller's email to Migliozzi.

Respondent places Donna Miller on administrative leave

On February 17, 2009, the day after Gorman talked to Migliozzi and Dr. Seneca, Donna Miller was summoned to a meeting with Patient Care Director Paul Graling and Human Resources Manager Gorman. Gorman informed Miller of the accusations made against her during Gorman's investigation. Miller denied them all except that she admitted she talked about spending New Year's Eve naked in a hot tub with her husband. She was placed on administrative leave pending completion of Gorman's investigation of her conduct.

Respondent terminates Donna Miller's employment

There is very little evidence as to what transpired between February 17, and February 26, when Inova's CEO Dr. Reuven Pasternak decided to terminate Miller. I infer that there were many discussions among management personnel regarding Miller's fate that are not in this record. Other deliberations are mentioned in passing without any specific testimony about what was discussed.

Graling and her supervisor, Eileen Dobbing, met with Gorman, Julie Reitman, Gorman's supervisor in the Human Resources Department, and Patricia Conway-Morana, Inova's Chief Nursing Executive, on February 25, 2009, Tr. 274, 1785. There is very little evidence as to what was discussed. Of those in attendance, Graling, Gorman and Dobbing testified; Reitman and Conway-Morana did not. Other than recalling that she asked Conway-Morana to consider transferring Miller, Dobbing could recall little about the meeting, Tr. 1555. Graling recalled

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Leanne Gorman testified that her notes regarding her conversation with Dr. Seneca were omitted from several versions of her investigative report. The reason for excluding these notes from versions of report provided to certain management officials is not convincingly explained in this record.

[23] Dr. Askew testified that she talked to Eileen Dobbing as to whether she could do anything on behalf of Miller, but did not testify to any contact with Dr. Seneca. Dr. Soutter's testimony about Dr. Seneca relates only to Respondent's discipling him for protesting Miller's discharge in late March.

little else. Reitman may have reviewed a short memo, G.C. Exh. 7, which summarized the results of Gorman's investigation.[24] The fifth bullet point of this memo states:

> Donna has previously received a Decision Making Suspension in April '05 for inappropriate conduct in the workplace. She was counseled in December '08 by Paula Graling regarding her inappropriate behavior and language that had been brought up by other staff members. Donna became very upset in the course of the conversation with Paula and began to use profanity again and left the office angry.

Prior to the February 25, meeting with Conway-Morana, Reitman and Gorman had spoken with Respondent's in-house counsel, Houeida Saad. Reitman's memorandum mentions two recommendations regarding Donna Miller's fate, either termination or a final written warning and transfer to another Inova facility. The memo does not indicate who proposed these two alternative courses of action. Neither Reitman nor Saad testified in this proceeding and there is absolutely no evidence as to how they arrived at these recommendations or what role their recommendation had in Respondent's decision to terminate Miller.[25]

Gorman testified that "the February 13 Donna Miller e-mail" was not discussed at the meeting with Conway-Morana. Regardless of whether this is technically true, I infer that Miller's email and Migliozzi's reaction to it were discussed for the same reasons I find it incredible that Gorman did not mention this to Dr. Seneca. This is particularly so because Conway-Morana cited Miller's intimidating behavior as a reason she believed that Miller should be terminated. It defies credulity to believe that the most recent example of Miller's alleged vindictiveness was not discussed.

Paula Graling testified that Miller's intimidating behavior was one of the subjects discussed at the meeting she attended with Conway-Morana, Tr. 274, 314. I infer that the latest example of Miller's intimidating behavior, the February 13, email was discussed.

Dobbing investigated the possibility of transferring Miller to another Inova facility and having her go into Respondent's Employee Assistance Program (EAP). Dobbing called Inova's Alexandria Hospital to inquire as to whether Miller could be transferred to Alexandria. She terminated her efforts in this regard after being informed on February 26, that Dr. Reuven Pasternak, the CEO of Inova Fairfax, was "pushing" for Miller's termination, R. Exh. 9, Tr. 1509-10.

At 6:04 p.m. on February 25, Conway-Morana sent an email to Dr. Pasternak and others.[26]

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[24] Since Reitman did not testify, I am not certain that G.C. – 7 was drafted on or about February 25.

[25] Gorman testified that she was not involved in the decision to terminate Donna Miller but that she made a recommendation to Julie Reitman, Tr. 99-100. Having found Ms. Gorman not to be a credible witness, I do not conclude that these recommendations originated with her.

[26] Respondent contends that the task of determining the level of discipline was assigned to the Hospital Administrator, Dr. Patrick Christiansen because Eileen Dobbing was a contract employee. Since Dobbing signed a written warning for Judy Giordano, I infer that this

Continued

> Just wanted you to know that Julie Reitman from HR met with Eileen and me today about an employee issue. We have a 20+ year nurse that we have had several hotline calls about- profanity, vindictive with schedule, sexual innuendos, etc, but a great OR Nurse…Also, her husband works in the same department and the interactions between them are not appropriate (I thought we had a policy against that!!). She has been warned in the past about her intimidating and inappropriate behavior-4 years ago-and recently. Personally, I think she should be terminated, but Eileen wants to salvage an OR nurse, but not here. She grieved her last disciplinary action and I am sure she would again and I'm not convinced that we have enough documentation to support this decision.
>
> We have conferred with legal and have agreed that she can not work on this campus (she is on administrative leave). Eileen will talk to her counterparts at the other Inova ORs and see if anyone is willing to take her if she has a mandatory EAP referral and is put on a PIP with a final written warning that they will accept the responsibility of following through on. If, and this is a big IF, there is another OR director that is willing to take a chance on her, we would allow a transfer. If not, we will terminate her.
>
> …We also feel that we need to do education on appropriate behavior to all the OR staff as Eileen agrees it is too prevalent (I know from my clinical days, that the OR teams sometimes get a little too chummy)…
>
> R. Exh. 25.

Conway-Morana did not testify in this proceeding. Thus, there is no evidence as to why she believed that Miller should be fired apart from what she mentioned in the email and no evidence as to why she did not believe Respondent did not have enough documentation to support termination or involuntary transfer.

Dr. Pasternak responded to Conway-Morana on February 26, at 8:16 a.m. In this response he effectively decided to terminate Miller:[27]

> We need to talk about this case. We are moving to a zero tolerance attitude toward of physicians who violate a good citizen policy with regard to their behavior on the premise, which I fully support, that being a good physician and abusive individual are mutually exclusive descriptions…I believe the same is true of a nurse. Describing a nurse as someone using profanity, being vindictive with the schedule, and acting/speaking with sexual innuendos with multiple documented episodes of intimidating and inappropriate behavior cannot also include describing them as a "great OR nurse." She may be a good technician, but she is not a good professional. Keeping them on sends a message of desperation and acceptance of this conduct that I cannot support, and I don't think the other CEOs would want this either…

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explanation is false. Moreover, it is clear that Dr. Pasternak, not Dr. Christiansen, made the decision to fire Miller.

[27] I discredit Dr. Pasternak's testimony at Tr. 2085 & 2102 suggesting that someone other than he made the decision to terminate Donna Miller.

R. Exh. 25.

Given the text of this email I infer that someone had informed Dr. Pasternak of the latest example of Miller's intimidating behavior, her February email to Migliozzi. It is beyond belief that in informing Dr. Pasternak about Miller's intimidating behavior, that someone did not tell him about the latest example, her email to Migliozzi on February 13.

At 8:23, Conway-Morana emailed Eileen Dobbing that, "Just wanted you to know that Reuven is pushing termination."

R. Exh. 9.

At l:46 p.m., HR Director Ken Hull emailed Julie Reitman. He stated, "We need to close the loop with Pat tomorrow with respect to her follow-up with Reuven…"

G.C. Exh. 71.

This email establishes that Hull did not know yet whether a decision had been made to terminate Miller and was certainly not waiting for Dr. Christiansen to make this decision, as Respondent suggests. He was waiting to hear from Pat Conway-Morana.

At 2:42 p.m. Conway-Morana emailed Dobbing, Reitman, Ken Hull, the head of Respondent's Human Resources Department and Dr. Patrick Christiansen, the Administrator of the Inova Fairfax campus, "I think we need to move forward with termination."

R. Exh. 25.

On the basis of Respondent's exhibits 9 and 25, I find that the decision to terminate Donna Miller was made between 8:23 and 2:42 on February 26, 2009 by Dr. Pasternak. I infer that Dr. Pasternak and Ms. Conway-Morana communicated during this period, possibly by telephone. Indeed, G.C. Exhibit 71, the email from HR Director Ken Hull to HR manager Julie Reitman, suggests as much.

This record also establishes that Dr. Pasternak decided to terminate Donna Miller without reviewing any of the documents of Respondent's investigation. In fact, the only basis for his decision was the email sent to him by Pat Conway-Morana on February 26, at 6:04 p.m. and oral conversations about which there is nothing in this record. There is no evidence that he heard or was aware of Miller's defense of her conduct when he effectively decided to fire her. What is clear is that Dr. Pasternak was aware of the 2005 discipline, cited by Conway-Morana in her recommendation that Miller be terminated. Moreover, I infer that he was aware of the February 13 email.

At 3.29 p.m., Dr. Christiansen instructed Ken Hull to move forward with Miller's termination. The email chain in Respondent's exhibit 25 establishes that Dr. Christiansen was merely communicating a decision that had already been made by Dr. Pasternak.[28]

Dr. Pasternak testified that he rarely is involved in personnel decisions. In fact, there is no evidence that Dr. Pasternak has been involved with or made the decision to terminate any other nonsupervisory employee. Respondent has offered no convincing nondiscriminatory explanation why he effectively made the decision to terminate Miller.

As noted previously, Dobbing also kept Dr. Russell Seneca "updated" during the period that termination of Donna Miller was under consideration in February and March 2009. Seneca had upheld the disciplining of Miller in 2005 for raising complaints about the treatment of the ASC nurses in transferring surgeries from the Main OR to the ASC. Dobbing met with Seneca at least once in person and discussed Miller's discipline or discharge. There is no evidence as to why Dobbing met with Seneca, what was said, or the extent of Dr. Seneca's involvement in the termination decision. Dr. Seneca did not testify in this proceeding. Thus, there is no evidence as to whether or not Seneca talked to Pat Conway-Morana before she recommended to Dr. Pasternak that Miller be terminated.

I infer that Seneca's opinion that Miller should be terminated and his reliance on the 2005 discipline played a role in the Respondent's decision to fire her. I also infer that Seneca's awareness of Miller's email to Migliozzi on February 13, and Migliozzi's reaction to that email, played a role in Seneca's recommendation to higher level management that Miller be fired.

I draw adverse inferences from Respondent's failure to call as witnesses several management witnesses, who are still employees of Respondent and who have knowledge about the reasons for Donna Miller's termination and the process by which Respondent decided to terminate her.

Neither Dr. Seneca, Conway-Morana, Ken Hull nor Reitman testified in this proceeding. I draw an adverse inference that their testimony, if truthful, would have been damaging to Respondent's case, *International Automated Machines,* 285 NLRB 1122 (1987) enfd. 861 F. 270 (6th Cir. 1988). All four individuals certainly had knowledge regarding the process by which Respondent decided to discharge Miller and the reasons for her termination that do not appear in this record. Respondent is not absolved from its responsibility for presenting a persuasive case by the exchange its counsel had with me at the June 10, session of this trial at Tr. 2076-77:

> [MR. DORAN] We did want to talk just a little bit more about what might happen from this day going forward because it seems to us there could be an opportunity that this is

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[28] I do not credit any of Dr. Christiansen's testimony. First of all, it is perfectly clear that he did not make the initial decision to terminate Donna Miller as he testified.

Dr. Christiansen also testified that he met with Leanne Gorman and reviewed her investigative file before deciding to terminate Miller, Tr. 1347. Gorman testified she did not send any materials to Dr. Christiansen until the week prior to Donna Miller's appeal meeting on March 18. Thus, Dr. Christiansen's testimony that he made the initial decision to terminate Miller and the reasons for the termination are inaccurate.

the last day of hearing, which I imagine might be advantageous. Thinking about this and keeping in mind your comment about the long [law of] diminishing marginal returns --

JUDGE AMCHAN: Whatever it is.

MR. DORAN: -- exactly, we spoke about this, and we want to make sure you have all the evidence you think is necessary to make a decision on the record. So we thought about other witnesses, and we put those into two groups.

The first group I characterize as management witnesses. Just so you know, and I'm not sure if it's clear now, but what our thinking was is that we've presented management witnesses in Ms. Miller's direct chain of command. So it's Paula Graling, her direct supervisor Eileen Dobbing, and then up to Patrick Christiansen, and then Dr. Pasternak, the CEO, who you will hear from today. There's obviously other people who were aware of this situation and who weighed in, like Pat Conway-Morana, the chief nursing executive, Julie Reitman, who Ms. Gorman consulted with in HR and Ken Hull in HR. As we see it, those individuals are not essential because while they participated or in some way they weren't making the decision in the line of command, so we didn't intend to call them, but we didn't know if you thought it was essential that we do call them.

JUDGE AMCHAN: Well, I think it's up to you.

A similar discussion occurred regarding Paige Migliozzi. A judge has the authority to exclude evidence that is needlessly cumulative, or wastes time. However, it is the parties' responsibility, not the judge's, to determine what evidence should be introduced in order to present a persuasive case. As the Board noted in Appendix B to its decision in *Otis Elevator,* 255 NLRB 235, 239-40 (1981):

> We note at the outset that the purpose of a hearing is to give all parties an opportunity to present such evidence that will allow an administrative law judge to make certain findings of fact. The responsibility of "making a record" supporting one's position not only devolves upon the parties, but particularly devolves upon them during the hearing and before the record is closed. Thus, it is then that each party must make its own judgment as to whether it has presented the best possible case, so that, in the event of a possible "misapprehension" or adverse credibility resolution by an administrative law judge, the requisite evidence has already been placed in the record so as to allow the Board to consider a party's legal arguments on appeal.

Respondent informs Donna Miller that her employment has been terminated

Miller was summoned to another meeting with Paula Graling and Leanne Gorman on March 3, 2009. Graling read from a document and informed Miller that she was being terminated. Graling told Miller that she was being terminated for creating a hostile work environment, excessive sharing of the details of her personal life and using inappropriate language. I infer that part of the hostile work environment that Miller allegedly created in the minds of Respondent's decisions makers was the February 13 email that made Paige Migliozzi "furious."

Miller requested a copy of the document from which Graling had read to her. Leanne Gorman informed her that it was Respondent's policy not to give it to her.

Respondent upholds the termination in two appeals proceedings

On March 18, 2009, Miller attended a meeting to appeal her termination with Dr. Patrick Christiansen, the Administrator of Fairfax Inova Hospital, who is also a Vice-President of Inova Health Systems. Dr. Christiansen upheld her termination.

On April 7, 2009, Miller attended another meeting to appeal her termination with Dr. Reuven Pasternak, the Chief Executive Officer of Inova's Fairfax campus and an Executive Vice-President of Inova Health Systems. Dr. Pasternak also upheld her termination. There is no evidence that Miller was aware that it was Dr. Pasternak who had decided to fire her in the first place.

Analysis

Respondent violated Section 8(a)(1) in terminating Donna Miller

In order to establish that an employer violated Section 8(a)(1) in discharging or disciplining an employee, the Board generally requires the General Counsel to make an initial showing sufficient to support an inference that the alleged discriminatee's protected conduct was a 'motivating factor' in the employer's decision. Then the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct, *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (lst Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399-403 (1983) ; *American Gardens Management Co.*, 338 NLRB 644 (2002). Unlawful motivation and animus are often established by indirect or circumstantial evidence.

The Board will not seek to quantitatively analyze the effect of the unlawful cause once it has been found. "It is enough that the employees' protected activities are causally related to the employer action which is the basis of the complaint. Whether that 'cause' was the straw that broke the camel's back or a bullet between the eyes, if it were enough to determine events, it is enough to come within the proscription of the Act." *Wright Line,* 251 NLRB 1083, at 1089 fn. 14; accord: *Bronco Wine Co.*, 256 NLRB 53, at 54 fn. 8 (1981).

In the instant case, all the reasons, and possibly the principal reason, for Respondent's discharge of Miller are not apparent from the record. However, I find that there is a causal relationship between the decision to discharge her and both the February 13 email and her 2005 protected activity. In this regard, it is important to note that while Respondent was obviously building a case against Miller before February 13, no decision was made to terminate her until after Respondent was aware of the email, which I infer was known and discussed at the highest levels of Respondent's management, as a further example of Miller's alleged vindictiveness and creation of a hostile work environment.

Protected Concerted Activity

Section 8(a)(1) of the National Labor Relations Act provides that it is an unfair labor practice to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7. Section 7 provides that, "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own

choosing, and *to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection*… (Emphasis added)"

In *Myers Industries (Myers I),* 268 NLRB 493 (1984), and in *Myers Industries (Myers II)* 281 NLRB 882 (1986), the Board held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." However, the activities of a single employee in enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity. Individual action is concerted so long as it is engaged in with the object of initiating or inducing group action, *Whittaker Corp.,* 289 NLRB 933 (1988); *Mushroom Transportation Co.,* 330 F.2d 683, 685 (3d Cir. 1964).

Additionally, the Board held in *Amelio's,* 301 NLRB 182 (1991) that in order to present a prima facie case that an employer has discharged an employee in violation of Section 8(a)(1), the General Counsel must establish that the employer knew of the concerted nature of the activity.

Donna Miller engaged in protected concerted activity in April 2005 and again on February 13, 2009 by sending the email to Paige Migliozzi and Paula Graling on behalf of herself and other nurses. The portion of the email asking for a week's hiatus between the assignment of student nurses to the various service lines is particularly relevant to the terms and conditions of employment of the nurses who authorized Miller to send this email. Respondent was aware of this protected activity and displayed animus towards it.[29]

Respondent's animus towards the 2005 protected activity is established by the discipline it issued to her as a result. The casual relationship between the 2005 protected activity and Miller's discharge is established by Respondent's documents and testimony.

There is also direct evidence of Respondent's animus towards Miller as a result of the February 13 email in Paula Graling's responsive email and the email from Migliozzi, a supervisor and agent of Respondent, to Leanne Gorman. Additionally, I infer animus on the part of Respondent's management and a causal relationship between the email and Miller's discharge from a number of other factors. One of these is the clearly pretextual nature of the reasons given for her termination, which are set out in great detail below. Another factor is the timing of Miller's suspension. Miller was suspended (or placed on administrative leave) on February 17, the day after Migliozzi spoke to Gorman about the February 13 email and Gorman spoke to Dr.

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[29] Respondent's assertion at page 38 of its brief, that the General Counsel must establish direct knowledge of Miller's protected activity on the part of those managers who made the decision to terminate Miller, is contrary to Board precedent, *Rogers Electric, Inc.,* 346 NLRB 508, 516 (2006). Normally, the knowledge of a supervisor or agent is imputed to a corporate entity. However, where credible evidence establishes that the decision-maker was not aware of protected activity, the Board may find that an employer did not have that knowledge. That is not the case here. I do not credit the testimony of Respondent's witnesses that nobody other than Graling, Gorman and Migliozzi aware of the February 13 email, and/or that Miller had sent a group email that offended Migliozzi. In fact, I infer that those who decided on Miller's termination were aware of the February 13 email, or its contents, as well as Miller's 2005 discipline.

Seneca about Donna Miller. As mentioned previously, I infer the February 13 email was discussed by Gorman and Dr. Seneca on February 16.

I find that the General Counsel has made a prima facie case that Donna Miller's termination was causally related to both her April 2005 protected activity in complaining about the working conditions of ASC nurses and her February 13 email to Paige Migliozzi and Paula Graling. Respondent has failed to rebut the General Counsel's prima facie case.

Donna Miller's 2005 protected activity and its relationship to her 2009 discharge were fully litigated by the parties, although not pled

A causal relationship between Miller's April 2005 protected activity is established by the emails of Respondent's managers citing it as a consideration for her termination. Although, the April 2005 protected activity is not mentioned in the Complaint, its relevance to Miller's discharge was fully litigated. There is no reasonable way this issue could have been tried any differently had the Complaint alleged that Miller's discharge was related to the 2005 protected activity. *Pergament United Sales,* 296 NLRB 333, 335 (1989); *Garage Management Corp.,* 334 NLRB 940, 941 (2001). The evidence establishing the protected nature of Miller's April 2005 conduct entered this record via Respondent's documents and Respondent's exhibits, G.C. Exh. 17, p. 30, R. Exh. 22, B# 1522, R. Exh. 25.

Respondent also established the relationship of the discipline imposed as a result of this conduct to Miller's 2009 discharge. Respondent never objected to testimony about Miller's prior discipline[30] and elicited testimony on this subject from its own witnesses, Eileen Dobbing, Tr. 1515, and Leanne Gorman, Tr. 1785-86, and from Donna Miller, Tr. 1605-07. Respondent also mentioned the 2005 discipline and Dr. Seneca's reliance on it in recommending Miller's termination in its post-trial brief at pages 11, 20 and 37at footnote 12.

Respondent's documents conclusively establish that Miller engaged in protected activity, that her activity was not such as to forfeit the protections of the Act and that Respondent considered this protected activity in discharging Miller in February 2009. Even had the 2005 activity been mentioned in the pleadings, Respondent could not have credibly contended that Miller's conduct was something other than that set forth in its documentation, or that her outburst did not pertain to the working conditions of herself and other ASC nurses. Her 2005 complaints were clearly concerted and for the mutual aid and protection of herself and her colleagues.

Pursuant to *Atlantic Steel Co.,* 245 NLRB 814, 816–817 (1979), an employer violates the Act by discharging or disciplining an employee engaged in the protected concerted activity unless, in the course of that protest, the employee engages in opprobrious conduct, costing him or her the Act's protection. In assessing the conduct, the Board assesses four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by the employer's unfair labor practices.

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[30] For example, at Tr. 2101-02, Respondent did not object when Dr. Pasternak, in responding to a question from the General Counsel, indicated that Miller's 2005 discipline was a factor in her discharge.

Consideration of these factors leads me to conclude that Miller's 2005 protected conduct does not come close to that which would forfeit the Act's protection. This is established by Respondent's documentation of Miller's conduct. Merely speaking loudly or raising one's voice while engaging in protected concerted activity generally will not deprive an employee of the Act's protection. *Alton H. Piester, LLC.,* 353 NLRB No. 33, slip op. at 6 (2008); *Firch Baking Co.,* 232 NLRB 772 (1977). The fact that the April 2005 protected conduct was not sufficient to forfeit the protections of the Act is established by the fact that Respondent did not terminate Miller for this conduct; it gave her a "decision-making" disciplinary notice.

Respondent could not have contradicted its own documents in an effort to prove that Miller's 2005 conduct was not protected by Section 7. Similarly, it is Respondent's evidence that establishes the causal relationship between Miller's 2005 protected conduct and her 2009 discharge.

The Reasons advanced by Respondent for Miller's Discharge are clearly pretextual

As noted by the Court of Appeals for the Ninth Circuit in *Shattuck Denn Mining Corp. v. NLRB*, 366 F.2d 466, 470 (9th Cir. 1966):

> Actual motive, a state of mind, being the question, it is seldom that direct evidence will be available that is not also self-serving. In such cases, the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise no person accused of unlawful motive who took the stand and testified to lawful motive could be brought to book. Nor is the trier of fact-here a trial examiner-required to be any more naïf than is a judge. If he finds that the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal-an unlawful motive-at least where, as in this case, the surrounding facts tend to reinforce that inference.

Accord, Fast Food Merchandisers, 291 NLRB 897, 898 (1988), *Fluor Daniel, Inc.,* 304 NLRB 970, 971 (1991).

I find that Respondent's stated reasons for Miller's discharge are pretextual for a number of reasons. However, the motive for Respondent's investigation of Miller cannot be gleaned from this record since the investigation started and was mostly completed before Miller engaged in any protected activity that has been established on this record, other than that in 2005. I do not infer that the investigation was motivated solely or even primarily by Miller's 2005 activities.

However, I infer the stated reasons for her discharge, other than her 2005 discipline, are not the real reasons for her discharge on the basis of the following factors;

One of the reasons is the unprecedented and unsatisfactorily explained involvement of Respondent's highest levels of management. Dr. Pasternak is usually involved in personnel decisions only if it involves an individual directly reporting to him, such as the chief financial officer or the department chairs, Tr. 2082. In fact there is no evidence of Dr. Pasternak's

involvement in the discipline or discharge of any other rank and file employee.[31] Respondent has not established any persuasive non-discriminatory explanation for Dr. Pasternak's involvement in the termination of Donna Miller.

A second reason I find most of the reasons advanced by Respondent for Miller's discharge to be pretextual is the biased investigation conducted by Respondent to build a case against her and the inconsistent and in some cases deliberately false testimony of Respondent's witnesses as to how this investigation was conducted.

A third reason is Respondent's failure to discipline Miller or warn her that she might be disciplined for her behavior prior to terminating her employment. Eileen Dobbing clearly had authority to give Miller a Final Written Warning on the basis of Gorman's investigation, yet the decision regarding discipline was given to higher level management without giving Miller an opportunity to modify her behavior. Written discipline of this sort would have been far more likely to get Miller's attention than the nondisciplinary discussion she had with Paula Graling in December.

A fourth reason is the disparate treatment of Miller compared with the discipline issued to employees exhibiting similar conduct. For example, in July 2007, Respondent issued a Final Written Warning to a surgical technician for showing sexually explicit photographs of herself to other employees. Three weeks before that the employee was issued a written warning for not being accessible when she was on call on two different occasions within two weeks. Two months earlier, in April 2007, the employee had been counseled for not showing up for work on one day and not being on time three days later, G.C. Exh. 85.

A fifth reason for finding Respondent's reasons for the discharge to be pretextual is the absence of any evidence of "inappropriate" conduct by Miller between her meeting with Paula Graling on December 22, and her suspension on February 17,--apart from the February 13, email.

A sixth reason is the departure from Respondent's policies and practices, such as Paula Graling's call to Leanne Gorman after her meeting with Miller on December 22, and Graling's forwarding of her notes of that conversation to Respondent's human resources department.

A seventh reason is the fact that Miller's behavior prior to her discharge was no different than it had been for years and had been tolerated by Respondent.

An eighth reason is the fact that Miller's behavior was consistent with the culture of Respondent's operating rooms and that Respondent tolerated the same behavior by a number of physicians who performed surgery at its facility and possibly similar behavior on the part of other staff members. Indeed, there is no evidence that Respondent did anything after its investigation of Miller to change the behavior of the physicians working in the ASC—apart from disciplining Dr. Soutter for protesting Donna Miller's discharge.

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[31] Dr. Christiansen, when testifying inaccurately that he made the initial decision to terminate Donna Miller, also testified that he could not recall making an initial termination decision with respect to any other employee, Tr. 1364.

A ninth reason is Respondent's failure to call as witnesses the following individuals who were involved in the deliberations and/or decision to terminate Miller: Pat Conway-Morana, Ken Hull, Julie Reitman and Dr. Russell Seneca.

A tenth reason is the gaps in the decision making process relating to the termination, i.e., an explanation as to what transpired between Dr. Pasternak's email to Pat Conway-Morana and her email instructing other managers to move forward with termination. There is also a general absence of relevant evidence regarding conversations that I infer took place among the managers involved in Miller's termination, including Dr. Pasternak, Pat Conway-Morana and Dr. Seneca, Ken Hull and Julie Reitman.

A final reason is the inconsistency of Respondent's testimonial evidence and in some cases, its clearly inaccurate nature.

In view of my finding that Respondent's reasons for investigating Miller and discharging her are pretextual, I find that it has not met its burden of rebutting the General Counsel's *prima facie* case. It failed to prove that it would have fired Miller had she not engaged in protected activity in April 2005 and sent the February 13, 2009 email to Migliozzi and Graling. I thus find that Respondent violated Section 8(a)(1) in discharging Miller in part due to both her 2005 protected activity and the February 13, 2009 email.

Final Written Warning Issued to Judy Giordano

On March 18, 2009,[32] Judy Giordano and six other nurses from the ASC went to the human resources office to show their support for Donna Miller. Miller met with the Dr. Patrick Christiansen, the Administrator of Inova Fairfax Hospital, that day to appeal her termination. Vivian Stancil, a human resources employee, told the six nurses they could not wait for Miller in the HR office. The six left and proceeded down a hallway where they encountered Miller and Michelle Melito, another HR representative.

Michelle Melito's notes of this incident relate the following:

> The meeting concluded at approximately 4:30 pm. Donna and I walked back to the Support Services Building. As we approached the elevator lobby, we were greeted by a group (approximately seven) of her former coworkers with ASC. They were waving at her and saying that they were just kicked out of HR. We came closer to the group and someone extended a hug to Donna. One staff member took her hand an firmly pushed me on my left shoulder as I was passing her, seemingly as a gesture to turn me around so she could make a statement to me. She didn't introduce herself, but said "listen, we *love* her" pointing at Donna. She went on to talk about how many years of experience they have combined on the unit…She said that Fairfax is making a big mistake and continued to say that they love her. She was visibly agitated and gestured at me with a pointed finger. I was caught off guard by the physical contact and wasn't clear on all that was being said, but I did say that "there is a way to do this, but not here/like this…" and

[32] The surveillance video, G.C. – 30, is erroneously labeled March 19. All parties agree that the incident occurred on March 18.

> shook my head. I continued to acknowledge their collective frustration, but gestured that this isn't the time or place and headed back to HR.

G.C. Exh. 22, Bates # 01471.

These notes were written after Melito discussed her encounter with her supervisor, Julie Reitman and HR manager Vivian Stancil, possibly several hours after the event, Tr. 2053-54. Melito's relevant testimony at trial is as follows, Tr. 2049-51:

> A. Okay. Donna and I walked back toward the support services building. That's where the elevator lobby is and the exit to the garage. As we were walking down the hall and basically turning the corner to where the elevators were, there was a group of I'm assuming nurses coming through, former coworkers of Donna, coming toward us. They saw Donna. They were excited to see her. They were waving, saying things like, oh, there you are, saying that they were being kicked out of HR, and, you know, they all just started gathering around us. And I could tell, well, you know, I don't really have a place here anymore. So someone came, I remember someone went to hug Donna, and then I was just basically going to walk through them and go back to human resources, but one individual approached me, took her hand and basically pushed my shoulder. I don't know if it was to stop me or turn me around, and then proceeded to say a number of things to me. But she was pretty animated. I remember she was pointing her finger, telling me things like we love her, you know, you don't know what you're doing, we have however many years of experience among all of us, you can't get that anywhere, you're making a mistake, we love her again, just basically being animated, emotional. And I remember just being taken off guard and putting my hands up and saying something like, you know, not here, like not the place or something like that, and then walking back.

I find that Giordano did not "push" Melito. The surveillance video, G.C. Exh. 30, CD 2, of this incident shows that the entire encounter lasted no more than one minute.[33] The video is inconclusive but shows that Giordano may have touched Melito, who was talking to another nurse, in order to get her attention. From the video, it appears the Melito turned to her right to talk to another nurse. At this point, Melito's back was turned to Giordano. Melito then turned around to speak with Giordano for less than one minute.

I discredit statements, such as that made in Leanne Gorman's affidavit, that Giordano "shoved" Melito or that Melito was "shaken up" by the encounter. I discredit Eileen Dobbing's testimony at Tr. 1526 that Melito was visibly upset by the encounter or that Melito told her she was upset.[34] Dobbing's testimony that, "Michelle was pretty afraid of Judy," Tr. 1530, is an

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[33] I have watched the surveillance video, G.C. Exh. 30, CD #2, several times. The encounter between the nurses and Melito is visible only on camera 8. It starts after 16:42:10 (4:42:10) and is over by 16:43:10. The area in which the encounter takes place is very dark.. Eileen Dobbing, who viewed the video, testified that the video was not even clear enough to identify Giordano as the person addressing Melito, Tr. 1526-29.

[34] Dobbing may have learned about Melito's encounter with Giordano from H.R. Manager Vivian Stancil, who had already displayed tremendous animosity towards the group of nurses who came to the human relations office to show their support for Donna Miller on March 18, as

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outright fabrication, and is further evidence of Respondent's determination to make Giordano's behavior appear worse than it actually was. The surveillance video conclusively establishes these statements to be false.

Melito's facial expression, as she walked towards the camera and away from the nurses does not indicate that she was shaken or upset by the incident at all. In fact, her expression and gait suggests that nothing unusual or upsetting to her had occurred. Moreover, Melito did not testify that she was, "shaken up," upset or afraid of Giordano.

Melito's notes and testimony are in part the product of her conversations with Reitman, Stancil, and perhaps others. That Respondent sought to depict Giordano's conduct in the worst possible light is established by the discipline it issued her, which is way out of proportion to anything she might have done and the embellishment of the incident by Leanne Gorman and Eileen Dobbing.

Giordano did not express any animus or hostility towards Melito or Respondent. The statements taken by Respondent from the other six nurses who were present makes that quite clear, G.C. Exh. – 28. Moreover, Respondent knew this was the case.

A draft of Giordano's disciplinary form, G.C. Exh. 27, stated, "From reviewing the surveillance video, it is apparent that you did touch the left should[er] of the HR Rep. This touch was not done in an aggressive manner, ..." In the final version of the warning, which was presented to Giordano, G.C. Exh. 26, this language was omitted. There is no explanation for its deletion and I conclude that this language was deleted because Respondent was determined to discipline Giordano in such a way as to intimidate her and Donna Miller's other supporters.

Giordano was placed on administrative leave and was given no information as to the level of discipline she was to receive until March 23, 2009. I find this was done with the intent of intimidating her and the other nurses supporting Donna Miller. On March 23, Paula Graling, Giordano's immediate supervisor, called her and told her that she was not being fired and would be paid for the days of she was off from work.

On March 24, Eileen Dobbing in the presence of Inova's Human Resources Director Kenneth Hull, presented Giordano with a Final Written Warning, the last step in Respondent's progressive discipline program short of termination. The decision to issue this warning was made by Hull or someone above him. From Eileen Dobbing's testimony that she took Hull's suggestion to issue a final written warning, I infer that she did not play any significant role in deciding to discipline Giordano, Tr. 1531-2.[35]

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well as those who questioned the fairness of Respondent's investigation of Miller at a March 4 staff meeting.

[35] On the other hand, the Final Written Warning is signed by Dobbing, which seems to belie Respondent's contention that Dobbing could not determine the discipline for Donna Miller because she is technically a contractor rather than an employee of Inova, G.C. Exh. – 26. If Dobbing could administer a final written warning, the involvement of higher level management, particularly, CEO Dr. Reuven Pasternak, Dr. Seneca and Pat Conway-Morana indicates that

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The warning concluded that "inappropriate physical and verbal behavior, such as these behaviors exhibited in the workplace, is unacceptable and falls outside the Inova Standards of Behavior," G.C. Exh. 26.

In issuing a Final Written Warning to Giordano, Respondent relied on an incident in 2008 in which Giordano raised her voice at Dobbing during a staff meeting.[36] In that staff meeting Giordano and other nurses complained about higher pay being given to new nurses than to nurses that had been at Fairfax Inova for several years.

Respondent violated the Act in disciplining Judy Giordano for engaging in concerted protected activity

When Judy Giordano and other nurses went to Respondent's HR office to show their support for Donna Miller and persuade Respondent to reverse its decision to terminate Miller, they were engaged in activity protected by Section 8(a)(1) of the Act, *Central Valley Meat Co.,* 346 NLRB 1078, 1079 (2006). Judy Giordano's attempt to talk to HR representative Michelle Melito on behalf of Miller was part of this concerted protected activity

Pursuant to *Atlantic Steel Co.,* 245 NLRB 814, 816–817 (1979), an employer violates the Act by discharging or disciplining an employee engaged in the protected concerted activity unless, in the course of that protest, the employee engages in opprobrious conduct, costing him or her the Act's protection. In assessing the conduct, the Board assesses four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by the employer's unfair labor practices.

As noted previously, merely speaking loudly or raising one's voice while engaging in protected concerted activity generally will not deprive an employee of the Act's protection. No different result follows from the fact that Giordano may have touched Melito. The Board has consistently found an employee's conduct to be unprotected when he or she strikes, fights or even slaps a supervisor. However, even assuming that Giordano touched Melito, she did not exhibit hostility towards Melito or Respondent. The physical contact, if it occurred, was extremely brief and was intended simply to get Melito's attention, see *E. I. Dupont De Nemours,* 263 NLRB 159 (1982).

Respondent decided to terminate Miller after Leanne Gorman talked to Dr. Seneca on February 16.

[36] Dobbing also testified that Giordano pointed her finger and gritted her teeth, Tr. 1584-5. She also testified that afterwards in her office, Giordano sat close to her and put her face close to Dobbing's face. However, Dobbing did not document any of this behavior and I therefore do not credit her testimony on this point. I would also note that if Dobbing "verbally coached" or "verbally reminded" Giordano as she claims, it should have, per Respondent's progressive discipline policy been documented on a form signed by Giordano, G.C. Exh. 4, B# 1367. I credit Giordano's testimony at Tr. 492 that she was never told that she was being verbally warned or being disciplined.

Applying the *Atlantic Steel* factors, I place great weight of the fact that the encounter between Giordano, her fellow nurses and Melito was happenstance. Giordano and her colleagues went to HR to show their support for Miller, they did not seek a meeting with Melito, who they happened to see after being told to leave the HR office. Giordano's behavior was not premeditated; it was simply a spontaneous expression of her concern for Miller.

Factor # 1, the place of discussion weighs in Giordano's favor. The encounter with Melito occurred in a non-work area and did not cause any disruption whatsoever.

Factor #2, the subject matter of the discussion, weighs heavily in favor of finding that that Giordano did not lose the protection of the Act. The subject of the discussion was the termination of the six nurses' long-time friend and colleague, Donna Miller, who they believed had been unjustly terminated by Respondent. Thus, the nurses' concerted protest of Miller's termination and Giordano's role in the protest was activity protected by Section 7 of the Act.

Factor 3, also weighs heavily in favor of finding that Giordano did not lose protection of the Act. If Giordano touched Melito, she did so simply to get her attention, not to hurt her or even to display anger at Melito or Respondent. Giordano's "discussion" was merely a plea for Donna Miller's job. That Respondent knew that Giordano did not touch Melito in an aggressive or hostile manner is established by the draft of its disciplinary notice, G.C. Exh. 27.

As to factor 4, I find that Giordano's "outburst" was clearly a response to Respondent's pretextual discharge of Donna Miller. As discussed, herein, I find that Miller's discharge violated the Act.

Finally, I find that Respondent's decision to give Giordano a Final Written Warning, with its attendant threat of termination for any other conduct Respondent found objectionable was motivated by a generalized animus towards concerted activity by the ASC nurses. It was also intended to intimidate them from engaging in any sort of concerted activity in the future.[37]

Failure/Refusal to Promote Cathy Gamble to the Clinical Nurse Leader position

In February 2009, Respondent announced that it intended to create a Clinical Nurse Leader (CNL) position in the ASC and it encouraged the Senior Nurse Specialists (SNS) in the ASC to apply for this position. Eileen Dobbing told the SNS nurses that the CNLs would get a one dollar an hour raise from what an SNS was receiving. Three of the five SNS nurses applied for the position, two, Paula Hay and Marta Porta were promoted to CNL; one, Cathy Gamble, was not.

Hay and Porta's names appear on the February 13, 2009 email that Donna Miller sent to Paige Migliozzi and Paula Graling; Gamble's does not. For this reason, Respondent argues that its failure to promote Gamble to CNL cannot possibly be discriminatory in violation of Section

[37] I would also note that Respondent in giving Giordano a final written warning relied on a prior incident in which Giordano's conduct was activity protected by Section 7 of the Act. She complained about wages in concert with other nurses at a staff meeting. By raising her voice in doing so, she would not have lost the protection of the Act, *see cases cited herein*.

8(a)(1). It is well established that an employer's failure to take adverse action against all union supporters does not disprove discriminatory motive, otherwise established, for its adverse action against a particular union supporter, *Master Security Services, 270 NLRB 543, 552 (1984)*; *Volair Contractors,* Inc., 341 NLRB 673, 676 fn. 17 (2004). The same principle applies to an employer's failure to take adverse action against all employees exercising Section 7 rights in a non-union context.

Only two other nurses applied for the CNL position, Britta Devolder and Deeb Oweis. Both were hired. Devolder had previously worked at Georgetown University Hospital and Oweis worked at Inova's Alexandria, Virginia hospital. Thus, four of the five applicants for the CNL position were awarded the position.[38] The CNLs were hired for specific service lines in the ASC. Oweis was hired to be a CNL for general surgery and urology, the position that would have been most appropriate for Gamble. Respondent admits that Gamble is a good nurse and was qualified for the CNL position. However, it submits that she did not get the CNL job because Oweis was better qualified, Tr. 416, 2126, 2185.

The General Counsel alleges that Gamble was not promoted because she engaged in protected concerted activity. The specific incident at issue occurred on June 2, 2009. In September 2009, Mary Lou Sanata told Gamble that one of the reasons that she did not get the CNL position was that she did not support management. As an example, Sanata cited Gamble's conduct at a staff meeting on June 2, 2009, Tr. 580-81, 2184, G.C. Exh. 96 at pg. 12. At that meeting, Patient Care Director Paula Graling thanked nurse Guna Perry for volunteering to stay late the night before to assist Dr. Soutter in performing an appendectomy in the ASC., Tr. 580-81, 714-15.

The previous evening, a laparoscopic (minimally invasive) appendectomy for an approximately ten or eleven year-old girl was added to Dr. Alexander Soutter's surgery schedule. It was originally scheduled to be performed in the Main Operating Room. At about 7:40 p.m., twenty minutes before Perry was scheduled to leave work, Dr. Soutter asked Perry to call the Main Operating Room (MOR) to determine whether they were ready for him. The charge nurse in the MOR informed Perry that Dr. Soutter would not be able to perform this appendectomy until much later in the evening. Dr. Soutter asked Perry and the scrub technician if they could stay late so that he could perform the appendectomy in the ASC. Perry agreed. Had Perry not agreed to stay late, the MOR would have had to find staff to assist Dr. Soutter, Tr. 1419.

The next day, at a staff meeting, after Paula Graling thanked Perry for volunteering to stay late, Graling and Lou Sanata observed Gamble and nurse Margaret Donegan talking to Perry. Gamble told Perry that she should not have volunteered to stay late because it would create a precedent and that the Main OR would now expect the ASC nurses to stay late to assist in surgeries scheduled for the MOR. Perry later met with Graling and Sanata. Perry was crying and she told Graling and Sanata she did not want working conditions in the ASC to change as the result her decision to stay late the night before. Sanata and Graling became aware of what Gamble and Donegan said to Perry either on June 2 or June 3.

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[38] A sixth applicant, Sheila George, withdrew her application prior to the August 2009 interviews.

Gamble's statements to Guna Perry were did not violate Section 8(g) of the Act.

Respondent argues that Gamble's statements to Guna Perry were unprotected because they violated Section 8(g) of the Act, which provides in pertinent part:

> [a] labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention. . . . The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

I reject this argument for a multitude of reasons. First of all, Section 8(g) applies to "labor organizations" as that term is defined in Section 2(5) of the Act. It does not apply to individual employees, *Walker Methodist Residence,* 227 NLRB 1630 (1977). Gamble and Donegan are not a labor organization, they are individuals acting in concert, who belong to an organization, NAPS, which is not a "labor organization." Their comments to Perry were spontaneous reactions to the news that Perry had volunteered to work late; they were not directed to make these comments by NAPS. Finally, Gamble and Donegan did not engage in any activity prohibited by Section 8(g). They did not engage in a strike, picket or engage in a concerted refusal to work.

NAPS is not a labor organization

Under the statutory definition set forth in Section 2(5), the organization at issue is a labor organization if (1) employees participate, (2) the organization exists, at least in part, for the purpose of ''dealing with'' employers, and (3) these dealings concern ''conditions of work'' or concern other statutory subjects, such as grievances, labor disputes, wages, rates of pay, or hours of employment.

The Limits of ''dealing with''

The Supreme Court held in *NLRB v. Cabot Carbon Co*. that the term ''dealing with'' in Section 2(5) is broader than the term ''collective bargaining.'' The term ''bargaining'' connotes a process by which two parties must seek to compromise their differences and arrive at an agreement. By contrast, the concept of ''dealing'' does not require that the two sides seek to compromise their differences. It involves only a bilateral mechanism between two parties. That ''bilateral mechanism'' ordinarily entails a pattern or practice in which a group of employees, over time, makes proposals to management, management responds to these proposals by acceptance or rejection by word or deed, and compromise is not required. If the evidence establishes such a pattern or practice, or that the group exists for a purpose of following such a pattern or practice, the element of dealing is present. However, if there are only isolated instances in which the group makes ad hoc proposals to management followed by a management response of acceptance or rejection by word or deed, the element of dealing is missing, *E. I. Dupont & Co.,* 311 NLRB 893, 894 (1993).

There is no evidence that NAPS "deals with" Respondent.

The General Counsel made out its prima facie case of discrimination

I conclude that Respondent violated Section 8(a)(1) in failing to promote Cathy Gamble to CNL. The General Counsel has made a prima facie case that this decision was made to retaliate against Gamble for her concerted activity regarding Guna Perry on June 2, 2009. Gamble and Margaret Donegan criticized Perry for accepting voluntary overtime and attempted to discourage her from doing so in the future. A refusal to perform voluntary work does not constitute an unprotected partial strike, *St. Barnabas Hospital,* 334 NLRB 1000 (2001). Thus, it follows that is not unprotected conduct for one employee to discourage another from accepting voluntary work, particularly when the first employee has a reasonable belief that acceptance of voluntary work will impact the terms and conditions of other employees.

Respondent, by Mary Lou Sanata, has conceded that Gamble's discussion with Guna Perry on June 2, was a factor in the decision not to promote Gamble to CNL, Tr. 580-81. I find that Gamble and Margaret Donegan engaged in concerted protected activity in their discussion with Perry. They believed that Perry's action would encourage Respondent to shift more operations from the Main Operating Room to the ASC and force them to work longer hours. Respondent, by its observation of Gamble and Donegan, knew that they were engaged in protected concerted activity. Respondent's animus towards that activity and the prima facie case for a causal connection between Respondent's animus and its decision not to promote Gamble is established by Sanata's testimony.

Respondent has failed to rebut the General Counsel's prima facie case

Once the General Counsel made out his prima facie case that Gamble's protected conduct was a factor in its decision not to promote Gamble, the burden of proof shifted to Respondent to prove that it would not have promoted Gamble to CNL even if she had not engaged in protected activity. Respondent has not met this burden. It has not established that it would not have hired 5 CNLs, rather than four, in the absence of Gamble's protected activity and has not proven that it would have hired Oweis, or the very inexperienced DeVolder, rather than Gamble, if it had decided on a nondiscriminatory basis to hire only four.

Respondent did not decide the hire four CNLs until August or September after it knew that there were only five applicants for the position. There is no evidence as to why it decided to hire four instead of five or some other number of CNLs, Tr. 342-45, 571. Furthermore, Respondent has not established that either DeVolder or Oweis was a superior candidate to Gamble.

DeVolder was much less experienced than Gamble. Oweis' résumé shows a six-year gap in employment between 1983 and 1989 and eleven years in a field unrelated to nursing from 1996 to 2007. Oweis' management experience on which Respondent's witnesses relied was very brief--about 10 months when he was hired as a CNL. Prior to being a management coordinator, Oweis was a charge nurse for approximately 16 months, G.C. Exh. 42.

I also find that Gamble's alleged shortcomings are merely post-hoc and pretextual rationalizations on the part of Respondent to cover-up its discriminatory motive. Respondent relies on the fact that Gamble functioned as the scrub nurse on only a few occasions in the year prior to the selection of CNLs. In almost every surgery on which she worked, Gamble

functioned as the circulating nurse. Circulating nurse is a much more skilled function than scrub nurse. A circulating nurse must be a RN; the scrub function can be performed by a technician who is not a nurse. Respondent has not shown how the paucity of Gamble's recent experience as a scrub nurse would adversely affect her ability to function as a CNL. For example, the precepting in scrub technique can be performed by a scrub technician rather than a CNL, Tr. 571.

Respondent also relies on one occasion that Gamble stayed late and did administrative work rather than work in the operating room. I credit Gamble's testimony that she was unaware that Respondent needed help in the operating rooms that day and find this is a pretextual reason advanced by Respondent to justify not promoting Gamble.[39] Additionally, it had been established that some parts of Respondent's assessment of Gamble are simply false, such as the assertion that she is "prone to gossip," Tr. 581-82.

Another reason that I find the reasons advanced by Respondent to be pretextual is the disparate nature of its examination of Gamble's qualifications. Respondent went to great lengths to determine the number of times that Gamble worked as a scrub nurse after January 2009. There is no evidence indicating such scrutiny with regard to Devolder's and/or Oweis' qualifications.

Respondent, by Leanne Gorman, violated Section 8(a)(1) by telling Donna Miller not to discuss her suspension and the investigation of her conduct with anyone other than her husband

Donna Miller testified that on February 17, 2009, HR Manager Leanne Gorman told her that she was not to discuss Respondent's investigation of her or her suspension with anyone other than her husband, Tr. 1212. Gorman testified that she did not recall telling that to Miller, Tr. 1746. I credit Miller in part because her testimony in this regard is consistent with G.C. Exh. 71. This exhibit is an email from Kenneth Hull to Julie Reitman and Gorman stating that Terry Miller was counseled by Paula Graling at a staff meeting on February 26, 2009 when he informed other employees why his wife was no longer coming to work.

As a general proposition, employees have a Section 7 right to discuss discipline or disciplinary investigations involving fellow employees or their own discipline. However, in determining whether an employer violates Section 8(a)(1) in prohibiting or limiting such discussions, the Board balances the interests of the Respondent's employees in discussing this aspect of their terms and conditions of employment with the Respondent's asserted legitimate and substantial business justifications. *Jeannette Corp. v. NLRB*, 532 F.2d 916 (3d Cir. 1976), *Caesar's Palace,* 336 NLRB 271, 272 (2001); *Westside Community Mental Health Center,* 327 NLRB 661, 666 (1999).

Respondent has not demonstrated any legitimate justification for prohibiting Miller from discussing her suspension with her coworkers. I find that by doing so, it violated Section 8(a)(1).

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[39] Respondent has not alleged or established that a CNL is a "supervisor" within the meaning of Section 2(11) of the Act. Thus, as a remedy for its violation of Section 8(a)(1), must offer Cathy Gamble a CNL position. Even assuming that the CNL positions were "supervisory," Respondent violated the Act in failing to promote Gamble, *Georgia Power Co.,* 341 NLRB 576 (2004).

Conclusions of Law

1. Respondent violated Section 8(a)(1) of the Act in discharging Donna Miller on March 3, 2009.

2. Respondent violated Section 8(a)(1) in telling Donna Miller that she could not discuss her suspension with other employees.

3. Respondent violated Section 8(a)(1) in disciplining Judy Giordano in late March 2009.

4. Respondent violated Section 8(a)(1) in refusing to promote Cathy Gamble to Clinical Nurse Leader in September 2009.

Remedy

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

The Respondent having discriminatorily discharged Donna Miller, it must offer her reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[40]

The Respondent having discriminatorily disciplined Judy Giordano, it must rescind this discipline.

The Respondent having discriminatorily failed to promote Cathy Gamble to Clinical Nurse Leader must promote Cathy Gamble to Clinical Nurse Leader retroactive to the date that the first nurses were promoted to this position and must make her whole for any loss of earnings and other benefits from that date until she is promoted, plus interest as described above.

The Respondent shall also be required to remove from its files any and all references to the unlawful discharge of Donna Miller and the unlawful discipline of Judy Giordano, and must notify them in writing that this has been done and that Miller's discharge and Giordano's discipline will not be used against them in any way.

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[40] Respondent must also pay Miller for the time between the day she was placed on administrative leave and March 3, since it was Respondent's practice to pay employees who were placed on administrative leave and then exonerated and recalled, for the workdays missed, Tr. 1742. At this point, it is purely speculative as to what, if any, discipline Miller would have received apart from Respondent's discrimination for her protected activities.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[41]

ORDER

The Respondent, Inova Health System, Inc., Fairfax County, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or disciplining or otherwise discriminating against any its employees for engaging in protected concerted activity.

(b) Restricting employees' conversations concerning their wages, hours and other terms and conditions of employment.

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

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

(a) Within 14 days from the date of the Board's Order, offer Donna Miler full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Within 14 days from the date of the Board's Order, offer Cathy Gamble the position of Clinical Nurse Leader.

(c) Make Donna Miller and Cathy Gamble 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.

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of Donna Miller and the unlawful discipline of Judy Giordano, and within 3 days thereafter notify these employees in writing that this has been done and that Donna Miller's discharge and Judy Giordano's discipline will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records

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[41] 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.

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.

(f) Within 14 days after service by the Region, post at its Fairfax County, Virginia facility copies of the attached notice marked "Appendix."[42] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 17, 2009.

(g) 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.

Dated, Washington, D.C., August 18, 2010.

_____
Arthur J. Amchan
Administrative Law Judge

[42] 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."

APPENDIX

NOTICE TO EMPLOYEES

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT discharge you, discipline you or otherwise discriminate against you for engaging in concerted activity for your mutual aid or protection.

WE WILL NOT prohibit or interfere with your right to discuss your wages, hours and other terms and conditions of employment with other employees.

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

WE WILL, within 14 days of the Board's Order, offer Donna Miller full reinstatement to her former job, or if that job no longer exists, to a substantially equivalent position without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days of the Board's Order, promote Cathy Gamble to Clinical Nurse Leader, retroactive to the first date that any nurse became a Clinical Nurse Leader.

WE WILL make Donna Miller and Cathy Gamble whole for any loss of earnings and other benefits plus interest, resulting from Donna Miller's discharge and our discriminatory refusal to promote Cathy Gamble to Clinical Nurse Leader, less, in Donna Miller's case, any net interim earnings.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to the unlawful discharge of Donna Miller and the unlawful discipline of Judy Giordano, and WE

WILL within 3 days thereafter, notify them in writing that his has been done and that Donna Miller's discharge and Judy Giordano's discipline will not be used against them in any way.

INOVA HEALTH SYSTEM
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

103 South Gay Street, The Appraisers Store Building, 8th Floor
Baltimore, MD 21202-4061
Hours: 8:15 a.m. to 4:45 p.m.
410-962-2822.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 410-962-3113.

APPENDIX B

TRANSCRIPT ERRORS NOTICED BY THE ADMINISTRATIVE LAW JUDGE

Tr. 29, line 21 (hereinafter recorded as 29:11) Tyler should be (hereinafter should be will be indicated by >) Doran.

31:6 Tyler>Doran

31:17 Tyler>Doran

66:19 > Deeb Oweis

245:9 “adverse” witness is omitted.

246: 20: change> chance

300: 23 should be witness Graling, not the judge.

386:14 GC-21 > G.C. 41

407:5 wasn’t > was

1141: 24 DeVolder>Oweis

1142:1 DeVolder>Oweis

1839: 4 GC-21>R-21

1859: 11 & 12: File>Final

2244: 4 The name omitted from the transcript is that of Paige Migliozzi.