Parkview Hospital, Inc. *and* Ohio Nurses Association–United American Nurses. Case 25–CA–28821

September 30, 2004

DECISION AND ORDER

BY MEMBERS SCHAUMBER, WALSH, AND MEISBURG

On April 9, 2004, Administrative Law Judge William G. Kocol issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief and limited exceptions. The Respondent filed an answering brief to the General Counsel's limited exceptions.

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

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions, and to adopt the recommended Order as modified.[3]

We adopt the judge's findings that the Respondent violated Section 8(a)(1) by interrogating employees about their union activities and threatening employees with reprisal if they continued to engage in those activities, and violated Section 8(a)(3) and (1) by disciplining employees and issuing a lower evaluation to staff nurse, Sheri Mulligan, because she had engaged in union activities.

Mulligan was among four union organizing committee members who were disciplined and coercively interrogated after they drafted and distributed a flyer advising employees on how to participate in the union campaign. Mulligan was open about her union activity, and it is undisputed that the Respondent was aware of her union support. When called into Vice President of Nursing Services Pamela Bland's office to justify her signature on the flyer, Mulligan told Bland that it was her right under the National Labor Relations Act to gather information for the purpose of organizing. As found by the judge, the Respondent informed her that it considered her activities a breach of the Respondent's confidentiality policy, and it disciplined her for it.[4]

Our dissenting colleague takes issue solely with the judge's finding that the Respondent violated the Act by lowering Mulligan's evaluation in response to her protected activity. In our view, the lower evaluation is inextricably intertwined with the unlawful discipline Mulligan received for her involvement with the flyer. As part of that discipline, Mulligan was required to meet four times over a period of 2 months with ICU Director Laura Wegner to discuss the Respondent's confidentiality policy. During that 2-month period, Wegner prepared Mulligan's annual performance evaluation, and she reduced the ranking that Mulligan had received the prior 2 years in the category covering confidentiality (dignity/privacy) from a two to a one, resulting in Mulligan's receiving a smaller pay increase.[5] In the circumstances, we are satisfied that the General Counsel established a causal link between the unlawful discipline and the evaluation. In addition, we affirm the judge's findings that the Respondent's asserted reasons for lowering Mulligan's rating were pretextual. Accordingly, we adopt the judge's finding that the Respondent thereby violated Section 8(a)(3) and (1).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Parkview Hospital, Inc., Fort Wayne, Indiana, its officers, agents, successors, and as-

[1] The Respondent's request for oral argument is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

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

[3] The General Counsel has excepted to the judge's failure to provide for the mailing of the notice to employees. We find no merit to this exception. The Board provides for the mailing of individual notices when posting will not adequately inform the employees of the violations that have occurred and their rights under the Act. See *Indian Hills Care Center*, 321 NLRB 144 (1996) (when the record indicates that a Respondent's facility has closed, the Board routinely provides for the mailing of notices to employees). There is no indication here that our standard notice-posting provision is inadequate.

The judge inadvertently confuses discriminatee Sherri Mulligan with Kylie Knox. Specifically, in his statement of facts, the judge correctly identifies Mulligan as the discriminatee who received a lower performance evaluation, but then in his analysis, conclusions of law, recommended Order, and notice to employees, the judge incorrectly identifies discriminatee Kylie Knox as the one who received the lower evaluation. We shall modify his Order to rectify these errors. We shall also substitute a new notice to conform to the Order as modified.

[4] Our dissenting colleague contends that the judge's credibility rulings in this case are questionable in light of the judge's "mixing up employees Knox and Mulligan." Although the judge's decision reflects his inadvertent transposition of those names in several places, we are satisfied, upon review of the record, that the judge knew which witness he was talking about at all times.

[5] Had Mulligan scored a two, as she had received in prior years in that category, her point total would have increased from 173 to 183, and she would have received a larger pay increase. Thus, the Respondent's discriminatory action against Mulligan had a tangible effect on her pay, and we therefore reject our dissenting colleague's view that the effect of Respondent's action was de minimis. Cf. *Assn. of Apartment Owners*, 255 NLRB 127 fn. 2 (1981). We have adopted the judge's recommendation of a make-whole remedy for this violation.

signs, shall take the action set forth in the Order as modified.

1. Delete paragraph 2(a) and substitute the following.

"(a) Within 14 days from the date of the Board's Order, correct the evaluation given to Sheri Mulligan and provide her with a corrected copy."

2. Delete paragraph 2(b) and substitute the following.

"(b) Make Sheri Mulligan whole for any loss of earnings suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision."

3. Delete paragraph 2(c) and substitute the following.

"(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful disciplines, including the performance improvement plans, issued to Carrie Price, Stacey Seiler-Brown, Kylie Knox, and Sheri Mulligan, and within 3 days thereafter notify these employees in writing that this has been done and that the disciplines will not be used against them in any way."

4. Substitute the attached notice for that of the administrative law judge.

MEMBER SCHAUMBER, dissenting in part.

Contrary to my colleagues, I find that the General Counsel failed to prove that Respondent violated Section 8(a)(3) and (1) of the Act by issuing nurse Sheri Mulligan a lower score in one subcategory of her 2003 performance evaluation. Specifically, the General Counsel failed to satisfy his burden under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 415 U.S. 989 (1982), of proving that Section 7 animus was a substantial or motivating factor in what was effectively a de minimis change in a single subcategory of an otherwise positive performance appraisal.

First, the judge erred in concluding that the timing of the appraisal, which followed Mulligan's Section 7 activity, demonstrated animus. In fact, the appraisal occurred when it was supposed to, so its timing suggests no more than adherence to Respondent's established procedure. Second, although Mulligan received a lower score in one subcategory of her 2003 performance appraisal (dignity/privacy), her total score *exceeded* her evaluation scores in the previous 2 years, belying any inference of a retaliatory intent. Mulligan's evaluation was not "downgraded," as the majority asserts; it was upgraded despite her participation in protected activities, conduct patently inconsistent with purported Section 7 animus. Third, Mulligan's score on the section of her evaluation of which dignity/privacy was a subcategory was *exactly the same* in 2001, 2002, and 2003—i.e., there was no demonstrable detriment. Fourth, the judge offered no explanation (other than a cursory nod to "demeanor") for discrediting Supervisor Wenger's legitimate nondiscriminatory reasons for the evaluation scores, while crediting Mulligan's denial that she had done anything in contravention of Respondent's patient confidentiality standards. Unexplained demeanor rulings are of questionable value in the best of circumstances, but where, as here, the judge was impressed by the *wrong* witness' demeanor (mixing up employees Knox and Mulligan), no deference is appropriate. Finally, the General Counsel failed to show a causal nexus between Mulligan's Section 7 activity and the alleged adverse employment action. See *Shearer's Foods, Inc*., 340 NLRB 1093, 1094 fn. 4 (2003) (in which Member Schaumber states his belief, shared by a number of reviewing courts, that the *Wright Line* causation analysis must include proof of a causal nexus between the demonstrated union (i.e., Sec. 7) animus and the alleged adverse employment action). See also *Town & Country Supermarkets*, 340 NLRB 1410, 1412 fn. 13 (2004). The fact that the same supervisor who issued Mulligan an unlawful written warning also gave her the performance evaluation hardly establishes such a nexus because that supervisor, Wenger, was the person charged with doing Mulligan's performance appraisal (exactly as she was in 2002).

My colleagues argue that Mulligan's "lower" evaluation is "inextricably intertwined" with the unlawful written warning she received because Mulligan's performance improvement plan required her to meet with Wenger to discuss Respondent's confidentiality policy four times over the next 2 months, a period that coincided with Wenger's preparation of Mulligan's evaluation. However, the performance improvement plan actually only provides that Wegner was "to be available" to meet with Mulligan, and there is no record evidence that any such meetings in fact occurred. Moreover, the written warning related solely to the disclosure of confidential material, whereas the "dignity/privacy standards" section of the performance appraisal covered a far broader spectrum of patient confidentiality concerns. Thus, the General Counsel failed to establish any inextricable connection between the evaluation criteria and the written confidentiality policy Mulligan was disciplined for violating.

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 interrogate employees about their union activities.

WE WILL NOT threaten employees with unspecified reprisals if the employees continue to engage in union activity.

WE WILL NOT discipline employees because they engaged in union activity.

WE WILL NOT issue lower evaluations to employees because they engaged in union activity.

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

WE WILL, within 14 days from the date of the Board's Order, correct the evaluation given to Sheri Mulligan and provide her with a corrected copy.

WE WILL make Sheri Mulligan whole for any loss of earnings suffered as a result of the discrimination against her, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful disciplines, including the performance improvement plans, issued to Carrie Price, Stacy Seiler-Brown, Kylie Knox, and Sheri Mulligan, and within 3 days thereafter notify the employees in writing that this has been done and that the disciplines will not be used against them in any way.

PARKVIEW HOSPITAL, INC.

Michael T. Beck, Esq., for the General Counsel.
Stephanie L. Dodge and *K. Bruce Stickler, Esqs. (Stickler & Nelson*), of Chicago, Illinois, for the Respondent.
Kelly Christian, for the Charging Party Union.

DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was heard in Columbia City, Indiana, on February 2, 2004. The charge and first, second, and third amended charges were filed August 12 and 13, September 23, and October 22, 2003,[1] respectively by the Ohio Nurses Association–United American Nurses (the Union). The complaint was issued November 25.

The complaint alleges that Parkview Hospital, Inc. (Respondent) unlawfully interrogated employees concerning their union and protected concerted activity, unlawfully threatened employees with unspecified reprisals because of those activities, enforced a confidentiality policy to prevent employees from engaging in those activities by unlawfully issued written warnings to four employees and placing them on work improvement plans because they engaged in those activities, and issued a performance evaluation to an employee that resulted in a reduced wage increase because that employee engaged in those activities. Respondent filed a timely answer that, as amended at the hearing, denied only the allegations that it has committed unfair labor practices.

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

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, operates an acute-care hospital providing health care services at its facilities in and around Fort Wayne, Indiana, where it annually derives gross revenues in excess of $250,000, and purchases and receives goods valued in excess of $50,000 directly from points located outside the State of Indiana. 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 and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

As indicated, Respondent operates an acute-care hospital in Fort Wayne, Indiana, and branches in nearby areas. It employs about 3200 employees. Duane Erwin is Respondent's president. At relevant time in this case Pamela Bland was vice president of nursing services and Todd Tallon was director of the surgical trauma intensive care unit (ICU). Laura Wenger served as director of the cardiac and medical ICU and EICU.

Respondent prepares work schedules for the nurses and the schedules are kept in a book that is available in designated locations such as charge-nurse offices. Nurses examine the schedules and record their work schedules for that time period. If the nurse is unable to work on a day that he or she is scheduled, it is the nurse's responsibility to find a replacement. Typically under those circumstances the nurse will examine the schedule and arrange to trade times with another nurse. This is done by direct contact from one nurse to another.

[1] All dates are in 2003 unless otherwise indicated.

The names and telephone numbers of Respondent's employees, including nurses, are kept in a book and made available to employees to facilitate the schedule changing process described above. Some employees have unlisted numbers or do not want their telephone number to be given out to nonemployees. For those employees notations such as unlisted number or do not give out are placed next to the telephone number. When a nonemployee calls Respondent seeking the telephone number of an employee, Respondent's practice is not to provide the number, but instead, take a message for the employee that the person wanted their telephone number.

Carrie Price has worked as a nurse for Respondent for about 4 years. In December 2002, she contacted the Union. After talking with several employees, a meeting with the Union was held in June. By July Respondent became aware of the union organizing effort. On July 11, Respondent distributed a memorandum to employees indicating that it was aware that two unions were attempting to organize the employees. Respondent expressed the view that there was no need for a union and gave reasons why it felt that way.

Sometime in June or July, Tallon approached Price in the nurses' unit in the hospital and told her the date, time, and place of the next union meeting; he asked her if she was familiar with that information. Price said that she was.[2]

Price continued to be actively involved in supporting the Union. She prepared the letter described below after employees suggested that it would be helpful to have a list of things they needed to do to support the organizing effort. Price showed the completed letter to Kylie Knox, another registered nurse, who agreed to allow her name to be placed on the letter. Knox did not help write or distribute the letter. Likewise Price asked Stacey Seiler-Brown and Sheri Mulligan for their permission to allow their names to appear on the letter and they agreed.

Price distributed the letter to employees who attended a union meeting and who wanted to help the union organizing effort.

It read:

> What to do. . . .
>
> 1. Obtain a list of all of the nurses that work on your unit including addresses and phone numbers. This needs to be done as soon as possible, as Parkview will be making it very difficult for us to obtain this information.
>
> 2. Every month until we vote we need a copy of the schedules to prove which nurses currently work at the time of the vote.
>
> 3. Come to all the meetings you can to keep up with what is going on with the campaign.
>
> 4. Educate the nurses on (sic) your unit about their rights and benefits of collective bargaining. Inform them of all of the upcoming meetings.
>
> Please turn in everything you can into Carrie Price . . . Stac[e]y [S]eiler-Brown . . . Kylie Knox . . . or Sher[]i Mulligan.

On August 8 or 9, Respondent found a copy of the letter posted on a bulletin board in a breakroom. Thereafter Price, Knox, Seiler-Brown, and Mulligan each received a written warning. Knox, Seiler-Brown, and Mulligan received a first written warning while Price received a final written warning. Price received the harsher penalty because Respondent concluded that she authored the letter. As Bland admitted in her testimony the only reason these employees received the warnings was because of the "what to do" letter. Respondent's policy is that whenever an employee receives a written warning the employee is also placed on a performance improvement plan. As part of this plan the employee is required to meet with a designated supervisor periodically for a certain period of time.

Respondent has a written confidentiality policy that prohibits employees from disclosing confidential materials. That policy provides that

> [C]onfidential information means patient information, peer review records, clinical information, medical records, business strategies, financial data, strategic and business plans, computer programs, market research, marker plans, personnel files, and any other documents designated or deemed confidential or proprietary.

That policy does not specifically identify employee's telephone numbers or work schedules as confidential information. The policy provides that confidential information used at meetings will be clearly marked as confidential.

Bland testified that it was against policy for an employee to copy the schedule. She explained that employees have been the victim of domestic violence and those employees do not want their schedules to become known. Bland testified that for the same reason, copying the list of telephone numbers would not be permissible under Respondent's confidentiality policy.

Respondent met with each of the four employees to give them the written warnings. Wenger and Bland met with Price on August 11 and showed her a copy of the "what to do" letter, and asked, if she was aware of it. Price stated that she was. Wenger asked if she had written the letter, and Price replied, that there were several of them who worked on that project. Wenger and Bland explained that they were concerned with items one and two on the letter. They showed Price a copy of the confidentiality statement that she had signed when she began working there, and asked, if Price remembered signing it. Price said that she did. They discussed the telephone list and Price asked if it was wrong for her to ask the nurses for their telephone numbers. Wenger answered that if Price was obtaining the numbers to call about a cookout or social gathering it would be fine, but Price was not planning to use the telephone numbers for such a purpose.[3] They discussed the work schedules and Price explained that she had made a copy of her own work schedule and asked if that was wrong. Wenger and Bland did not directly answer. Instead, Bland stated that the schedule constantly changes, and so, the copy of the schedule could become inaccurate over time. Price answered that the copy of the

[2] This conversation is not alleged to be unlawful in the complaint.

[3] Jacqueline Doctor, a nurse, accompanied Price to this meeting and corroborated this testimony. Bland did not deny that this was said. Based on these facts and on my observation of the relative demeanor of the witnesses, I do not credit Wenger's denial.

schedule was a good place to start. Bland and Wenger explained the warning and performance improvement plan to Price.

Wenger and Bland also met with Knox on August 11 to give her the written warning. They showed Knox the confidentiality agreement that she had signed when she was hired. They told Knox that items 1 and 2 in the letter breached that agreement. Knox replied that it was not their intent to breach the confidentiality agreement. Knox explained that they needed a copy of the work schedule to prove who was actually working for Respondent so as to determine who would be eligible to vote in the representation election. Bland responded that Knox's explanation was not what was portrayed in the letter, and that, Knox needed to be more careful of what she put her name to; Bland patted Knox on the back and said that they did not want Knox to get in trouble. Knox asked if the warning would effect her evaluation and Wenger and Bland assured her that it would not. During the meeting Wenger and Bland explained that Knox had the right to engage in the conduct described in items three and four. Like Price, Knox was also placed on a performance improvement plan.

Seiler-Brown was called to meet with Wenger and Bland on August 12. Seiler-Brown often made a copy of the work schedule for her own use. Wenger and Bland reviewed the confidentiality statement and showed Seiler-Brown a copy of the letter; they asked if she had seen it before. Seiler-Brown asked where they got the letter. They answered that it was found hanging on the wall in the breakroom. Bland asked for Seiler-Brown's interpretation of the first two items of the letter. Seiler-Brown explained that they needed that information for the union effort and that they did not intend for anyone to copy the entire lists but rather of interested employees only. Bland then suggested that they should have worded the letter differently if that was their intent. Seiler-Brown received the written warning and was also placed on a performance improvement plan.

Mulligan also met with Wenger and Bland on August 12. Bland asked Mulligan if she had ever seen the letter and Mulligan said that she had. Bland then asked if Mulligan wrote the letter and Mulligan said that she had not. Bland explained that she had issues with the first two points of the letter. She said that they were in breach of the confidentiality agreement. Mulligan replied that she disagreed and said that the National Labor Relations Act gave her the right to gather information and contact other employees for the union effort. Mulligan explained that she never took or photocopied any business documents. Bland or Wenger read the confidentiality agreement and explained that they thought other employees might interpret the letter differently. Mulligan again expressed her disagreement. Mulligan was given the written warning and was place on a performance improvement plan. Bland advised Mulligan not to put her name on any more letters.[4]

[4] The facts concerning these four meetings are based on the credible testimony of Price, Knox, Seiler-Brown, and Mulligan, respectively. Except as specifically indicated, the content of these meetings is largely undisputed.

As part of Respondent's employee appraisal process, employees are evaluated on their adherence to Respondent's confidentiality policy. Points are given to specific items in the appraisal and the points are then added for a total score. The score is then used to determine the amount of wage increase the employee will receive.

Mulligan received an annual performance appraisal in September 2003. She received a total score of 173. In the dignity/privacy category Wenger gave Mulligan a one indicating that Mulligan met and sometimes exceeded expectations. In the evaluation given to Mulligan there was a line placed next to the printed item that read, "Do not post customer information in public areas." Had she received the higher evaluation of a 2, her point total would have increased to 183 and she would have received a bigger wage increase. As part of the appraisal process employees do a self-evaluation. Mulligan gave herself a two in that category. Peer review is also part of the evaluation process. Two coworkers evaluated Mulligan. One likewise gave her a two in that category and the other did not do a numerical rating. In both 2001 and 2002, Mulligan received a two in the same category.

About a week after she received her performance evaluation Mulligan approached Wenger and asked about her rating in the privacy category. Wenger raised the matter of Mulligan's not logging off of the computer. Mulligan explained that Wenger is not present when she logs on and off the computer and also explained that she has special computer access and, therefore, makes a special point to log off the computer. Wenger also mentioned Mulligan's leaving charts in the open where other people can read them. Mulligan explained that she does all her charting in a private area. Mulligan told Wenger that neither of those examples had anything to do with posting information in public areas, referring to the line appearing on the evaluation described above.[5]

III. ANALYSIS

In their briefs both parties agree that the legal analysis in this case begins with *Ridgely Mfg Co.,* 207 NLRB 193 (1973). In that case the Board adopted the judge's decision that stated, "The applicable rule of thumb seems to be that employees are entitled to use for organizational purposes information and knowledge which comes to their attention in the normal course of their work activity and association but are not entitled to their Employer's private or confidential records." Id. at 196–

[5] Wenger denied that the discipline that she had earlier given to Mulligan played any part in her evaluation of Mulligan. She testified that the line placed next to the "Do not post customer information in public areas," meant only that Mulligan met expectations in that area. She testified that Mulligan's self-evaluation gave no specific examples of how she exceeded expectations in the privacy category, and therefore, she gave Mulligan a one in that category. Based on the entire record and on my observation of the relative demeanor of the witnesses, I do not credit Wenger's testimony. Wenger's evaluation of Mulligan's performance came in the month following the written warning that she gave to Mulligan; that alone makes it unlikely that the warning would be so quickly forgotten. I also conclude that the justifications that Wenger gave to Mulligan during this discussion were created after the fact and were not the real reasons for the lower rating. Rather, I credit Mulligan's rebuttal that she gave to Wenger during this meeting.

197. That case involved an employee who was disciplined for taking information from employee timecards.

In this case the work schedules and telephone numbers at issue clearly were available to employees in the normal course of their duties. So the issue is whether that information was confidential. The work schedules and telephone numbers are not explicitly included in Respondent's written confidentiality policy, nor are they similar in nature to those documents specifically described in Respondent's definition of confidential information. Of course, Respondent's written policy provides that it may designate or deem other documents as confidential. However, there is no evidence that Respondent designated the work schedules and telephone numbers as confidential records prior to the advent of the union organizing campaign. *Gray Flooring,* 212 NLRB 668 (1974). Even after the Respondent announced to the four employees that it now deemed these records to be confidential, Respondent nonetheless undermined that policy by allowing that the documents could be used for nonwork related matter such as organizing barbeques with friends from work.

Respondent has established a legitimate interest in assuring that the telephone numbers and work schedules do not get into the hands of abusive ex-spouses and like. To that end Respondent and employees have made indications next to certain telephone numbers that were not to be disclosed to nonemployees. It also established that it had a practice of not giving out the telephone numbers of employees to nonemployees who requested that information. But Respondent's action against the four employees was not narrowly tailored to deal with this legitimate interest. There is no evidence that the four employees had or even intended to use the information in a manner contrary to that concern. Moreover, Respondent banned the use of all telephone numbers and work schedules; it did not merely prohibit the use of those numbers that it and the employees had indicated could cause concern. Under these circumstances I conclude that Respondent has not established that the telephone numbers and work schedules are truly confidential documents for purposes other than described above. It therefore follows that under *Ridgely,* the employees are able to use the telephone numbers and work schedules in the union organizing effort if the information is not used in a manner that contravenes Respondent's legitimate interests described in this paragraph.

In its brief, Respondent cites *Lafayette Park Hotel,* 326 NLRB 824 (1998), and *Super K-Mart,* 330 NLRB 263 (1999). Those cases involved challenges to the facial validity of rules prohibiting the disclosure of confidential information. However, no such challenge is made in this case. By disciplining Carrie Price, Stacey Seiler-Brown, Kylie Knox, and Sheri Mulligan because they engaged in union activity, Respondent violated Section 8(a)(3) and (1).

The complaint also alleges that Respondent unlawfully interrogated these same four employees. I have concluded above that the letter was union activity protected under the Act. During the discussions that Wenger and Bland had with the four employees, they asked about the connection they had with the letter. Whether questioning of an employee concerning union activity is unlawful depends on whether the questioning reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Emery Worldwide,* 309 NLRB 185, 186 (1992). In making that determination the Board examines the totality of circumstances. *Sunnyvale Medical Clinic,* 277 NLRB 1217 (1985). On the one hand, the four employees were open about the union activity to the extent that they signed a letter that was circulated to other employees and that found its way to a bulletin board. Also, Respondent questioned the employees under color of a concern that the employees may have violated its confidentiality policy. But those factors are outweighed by the fact that discipline followed after the questioning ended, so there was no doubt that the questioning was for the purpose of imposing discipline on the employees. Respondent cites *Caesar's Palace,* 336 NLRB 271 (2001), to justify its questioning of the four employees. In that case the employer suspected that illegal drug dealing was going on in its workplace, and, management officials might have been involved in covering up the matter. It therefore required that employees subject to the investigation keep the matter confidential and thereafter questioned an employee about the matter. Respondent here has made no showing that it keeps the telephone numbers and work schedules completely confidential, and therefore, was not justified in questioning the employees. Under these circumstances I conclude that Respondent violated Section 8(a)(1) by interrogating employees about their union activities.

The complaint also alleges that Respondent violated the Act by unlawfully threatening employees with unspecified reprisals. I have found above, that Bland told Knox that Knox should be careful about where she puts her name and that Bland did not want to see Knox get into any more trouble. This was a clear indication that if Knox continued to engage in the same type of protected union activity described in the first two items in the letter, she would again be in "trouble." By threatening an employee with unspecified reprisals if the employee continued to engage in union activity, Respondent again violated Section 8(a)(1).

Finally, the complaint alleges that Respondent unlawfully issued a performance evaluation to an employee that resulted in a reduced wage increase because that employee engaged in union activities. In assessing whether Respondent violated the Act by giving Knox an unlawful evaluation, I apply the shifting burden analysis set forth in *Wright Line.*[6] The Board has restated that analysis as follows:

> Under *Wright Line*, the General Counsel must make a prima facie showing that the employee's protected union activity was a motivating factor in the decision to discharge him. Once this is established, the burden shifts to the employer to demonstrate that it would have taken the same action even in absence of the protected union activity.[7] An employer cannot simply present a legitimate reason for its actions but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct.[8] Furthermore, if an employer does not assert any business reason, other than one found to be pretextual by the

[6] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

judge, then the employer has not shown that it would have fired the employee for a lawful, nondiscriminatory reason.[9]

[7] *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400 (1983).

[8] See *GSX Corp. v. NLRB*, 918 F. 2d 1351, 1357 (8th Cir. 1990)[.] ("By asserting a legitimate reason for its decision and showing by a preponderance of the evidence that the legitimate reason would have brought about the same result even without the [i]llegal motivation, an employer can establish an affirmative defense to the discrimination charge.")

[9] See *Aero Metal Forms*, 310 NLRB 397, 399 fn. 14 (1993).

T & J Trucking Co., 316 NLRB 771 (1995). This was further clarified in *Manno Electric*, 321 NLRB 278 (1996).

As set forth above, Knox's evaluation in the area of confidentiality was lower than it had been in the prior 2 years. I have concluded above, that Knox engaged in union activities and Respondent knew of those activities. In response to those activities Respondent unlawfully interrogated and disciplined Knox and others. The evaluation was given close in time to the earlier unlawful conduct and by the same supervisor who had engaged in the unlawful conduct. Having established the elements of union activity, knowledge, animus, and timing, I conclude that the General Counsel has met his initial burden under *Wright Line.* I now examine the record to determine whether Respondent would have given Knox the same evaluation even absent her union activity. In that regard Respondent relies on Wenger's testimony and argues that the lower evaluation was justified because Knox was careless in logging off her computer and leaving charts. But I have specifically discredited these assertions and have credited Knox's testimony instead. It follows that Respondent has failed to meet its burden. By issuing Knox a lower evaluation because she engaged in union activity, Respondent violated Section 8(a)(3) and (1).

CONCLUSIONS OF LAW

1. By the following conduct, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

(a) Disciplining Carrie Price, Stacey Seiler-Brown, Kylie Knox, and Sheri Mulligan because they engaged in union activity.

(b) Issuing Knox a lower evaluation because she engaged in union activity.

2. By the following conduct, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(1) and Section 2(6) and (7) of the Act.

(a) Interrogating employees about their union activities.

(b) Threatening an employee with unspecified reprisals if the employee continued to engage in union activity.

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. Having found that Respondent unlawfully disciplined employees, I order that it must rescind that discipline and notify the employees that it has done. Having found that Respondent unlawfully gave an employee a lower evaluation, I shall order Respondent to correct the evaluation, issue it to the employee, and make the employee whole for the loss of earnings she suffered plus interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987). As part of the remedy the General Counsel asks that the notice be mailed to all employees, citing *Cappricios Restaurant, Inc.,* 249 NLRB 685 (1980). However, in that case it appears that the employer was purchased by another business and that business might not be required to post a notice. Here, it appears that Respondent will be able to post the notice. The General Counsel also points out that Respondent here, sent a letter to all employees on August 13 referring to the fact that charges had been filed concerning its discipline of the employees and proclaiming itself to be innocent of the charges. But I conclude that notice posting will nonetheless adequately inform employees of the violations that have occurred and their rights under the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The Respondent, Parkview Hospital, Inc., Fort Wayne, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union activities.

(b) Threatening an employee with unspecified reprisals if the employee continued to engage in union activity.

(c) Disciplining employees because they engaged in union activity.

(d) Issuing a lower evaluation to employees because she engaged in union activity.

(e) 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, correct the evaluation given to Kylie Knox and provide her with a corrected copy.

(b) Make Kylie Knox whole for any loss of earnings suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful disciplines, including the performance improvement plans issued to Carrie Price, Stacey Seiler-Brown, Kylie Knox, and Sheri Mulligan, and within 3 days thereafter notify the employees in writing that this has been done and that the disciplines will not be used against them in any way.

(d) 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

[7] 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.

or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities in and around Fort Wayne, Indiana, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 25, 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 August 11, 2003.

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

[8] 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."