Wilshire at Lakewood *and* Lisa Jochims. Case 17–CA–21564

September 30, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On July 18, 2002, Administrative Law Judge Gregory Z. Meyerson issued the attached decision. The General Counsel filed exceptions and a supporting brief.[1]

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 brief and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order.

1. The judge found that the Respondent did not violate Section 8(a)(1) of the Act by telling employees, at a February 22, 2002[3] meeting, that Nurse Lisa Jochims had been terminated for circulating a petition, and that the Respondent "did not ever want to see them do anything like that again." In dismissing this allegation, the judge found that the sole witness to testify in support of this allegation, Angela McLain, was not credible. The judge further found that, even assuming McLain had credibly testified in support of this allegation, the allegation should still be dismissed because it was not included in the complaint and was raised too late in the proceeding (i.e., in the General Counsel's posthearing brief) to constitute a basis for finding a violation.

We adopt the judge's dismissal of this allegation, but we rely solely on the judge's determination that the testimony of McLain was not credible. We find it unnecessary to pass on his additional finding that the allegation was not timely raised.

2. The judge found that Registered Nurse (RN) Lisa Jochims was a statutory supervisor and, therefore, that the Respondent did not violate Section 8(a)(1) of the Act by (a) terminating Jochims for circulating a petition protesting a proposed change in working conditions; (b) telling Jochims that she was terminated for circulating the petition; (c) disparately prohibiting Jochims from telephoning nurses at the facility; (d) asking Jochims about the petition and thereby creating the impression of surveillance; and (e) disparately enforcing a no-solicitation/no-distribution rule against Jochims. As set forth in the judge's decision, these findings turn on whether Jochims is a supervisor excluded from the Act's protections.[4] Contrary to the judge and our dissenting colleague, we find that Jochims was a statutory employee engaged in protected activity when circulating the petition, and accordingly the Respondent's conduct towards Jochims, including her termination, violated Section 8(a)(1) of the Act as alleged.[5]

Relevant Facts

The record shows that Jochims, the Respondent's "weekend supervisor," was primarily involved with pa-

[1] On September 9, 2002, the Board, through its Executive Secretary, granted the General Counsel's motion to strike the Respondent's answering brief and brief in support of the judge's decision, because they were untimely filed.

[2] The General Counsel 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.

For the reasons set forth in his decision, we adopt the judge's findings that the Respondent did not violate Sec. 8(a)(1) of the Act by maintaining a rule in its employee handbook prohibiting rumors and gossip in the facility and, as discussed below, that the Respondent did not violate Sec. 8(a)(1) by maintaining a rule in its employee handbook prohibiting employees from walking off their shift without permission of the employees' supervisor or administrator.

Contrary to his colleagues, for the reasons set forth in his attached partial dissent, Member Walsh finds that the Respondent did violate Sec. 8(a)(1) by maintaining a handbook rule prohibiting employees from walking off their shift without permission of a supervisor or administrator.

There are no exceptions to the judge's findings that the Respondent violated Sec. 8(a)(1) of the Act by maintaining rules in its employee handbook that prohibit employees from misrepresenting a fact to obtain a benefit, that prohibit making false or malicious statements about a resident, employee, supervisor, or the Company, that prohibit paycheck disclosure, and that prohibit soliciting and distributing written material during working time or in any work area or residential care area.

There are also no exceptions to the judge's finding that the Respondent violated Sec. 8(a)(1) of the Act by interrogating employee Christine Brackenbury about her protected concerted activity. In view of this finding, we find it unnecessary to pass on the judge's finding that the Respondent did not violate Sec. 8(a)(1) by interrogating another employee, Nancy Slackard, about her protected activity, because a finding of an additional interrogation violation would be cumulative and would not affect the remedy.

[3] All dates hereafter are in 2002, unless stated otherwise.

[4] The Respondent stipulated that it discharged Jochims for circulating a petition protesting the Respondent's plan to institute a "role reversal plan" whereby nurses would periodically spend an 8-hour shift performing the work of nursing assistants. With respect to the other allegations, i.e., the Respondent's disparate enforcement of the rules against Jochims, its telling Jochims that she was terminated for circulating the petition, and its asking Jochims about the petition she circulated and thereby creating the impression of surveillance, there is no dispute as to the underlying facts. These allegations, like Jochims' discharge, turn solely on whether Jochims was an employee entitled to the protections of Sec. 7 of the Act.

[5] Chairman Battista does not join this portion of the decision. For the reasons set forth in his partial dissent, Chairman Battista adopts the judge's findings that Jochims is a supervisor, and that the Respondent's conduct toward Jochims, including her termination, did not violate Sec. 8(a)(1).

tient care and interaction with patients' families. In addition, Jochims attended management meetings and was paid more than the Respondent's charge nurses. Although Jochims was the highest ranking employee at the facility on the weekend, the Respondent provided the weekend staff with the telephone numbers of various managers to contact in case of an emergency.

The record further shows that Jochims would check to see whether employees did their tasks correctly, and could correct employees if they did something wrong. If there was a gross infraction of residential care, Jochims—as well as other nursing employees not alleged to be supervisors—could write up the employee on a disciplinary form. Jochims decided whether to document an employee's infraction on the disciplinary form. If she did so, the completed disciplinary form would be subsequently reviewed by the Respondent's managerial officials—Administrator Jim Harrelson or Director of Nursing Wendy Gibson. They would determine whether the infraction warranted disciplinary action.

On two occasions, Jochims made an oral report that an employee was unfit for work. On one occasion, Jochims called the Respondent's administrator, Jim Harralson, and reported that a licensed practical nurse (LPN) had come to work intoxicated. On the other occasion, Jochims told the Respondent's assistant director of nursing, Sheila Littrell, that a certified nursing assistant (CNA) was taking extended breaks and was failing to respond to patient call lights. In both instances, Jochims was instructed to send the employee home.

In addition, on two occasions, employees came to Jochims and expressed a need to leave work early because of severe health problems experienced by their young children. On both occasions, Jochims—without first checking with her superiors—told the employees to leave work early.

The record also reveals that, on one occasion, Jochims prepared a performance evaluation of one employee. In this particular circumstance, the Respondent's director of nursing, Wendy Gibson, asked Jochims to fill out an employee's 90-day evaluation, because Gibson was not familiar with that employee. Jochims complied with Gibson's directive, and filled out the portions of the evaluation form that reflected her own observations of that employee. Jochims also signed the evaluation.

The Judge's Decision

From these facts, the judge concluded that Jochims was a statutory supervisor, and accordingly that the Respondent did not violate the Act by discharging her—or by taking the other action against her—for circulating a petition protesting a change in working conditions of the nursing staff. The judge found that Jochims exercised independent judgment in directing the work performance of the Respondent's weekend employees, in instituting employee discipline, in permitting employees to leave work early, and in evaluating employees. The judge further found that Jochims' supervisory title, her higher salary, and her presence at managerial meetings were secondary indicia of supervisory status.

Discussion

Contrary to the judge, we find that the record fails to establish that Jochims possessed supervisory authority within the meaning of Section 2(11) of the Act. Thus, the Respondent's discharge of Jochims, as well as the other action taken against her for circulating the petition, violated Section 8(a)(1) of the Act as alleged. Here, it was the Respondent's burden to prove that Jochims was a statutory supervisor, see *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001), and the Respondent has failed to carry that burden.

First, we disagree with the judge's finding that Jochims exercised independent judgment in connection with her purported supervisory duties. The judge's findings were conclusory, based on scant evidence. They were premised largely on Jochims' testimony that she was hired on as a "supervisor," "had the authority to oversee the employees," "supervised" on the weekends, and had responsibility and authority to "correct them if they did something wrong." Jochims testified, for example, that she would "correct" a nursing aide if she found dried human waste on a patient's bed sheets, or if she found that a patient's briefs had not been changed. Jochims also testified that employees would come to her with complaints or problems, and she would "counsel them" and give "some direction on how to handle the situation." This evidence of authority to "correct" is, however, insufficient to satisfy the Respondent's burden to show that Jochims exercised independent judgment to responsibly direct employees in the performance of their duties, as required by Section 2(11).[6]

We also find that the record fails to establish that Jochims had the authority to discipline employees. Rather, the record merely shows that Jochims, like other nonsupervisory nurses, had the ability to document an observed infraction on a disciplinary form. Aside from the fact that other nonsupervisory nurses were similarly permitted to document observed misconduct, the fact remains that these "writeups" are reviewed by the Respondent's managerial officials and that this made the determination whether discipline is warranted, if at all. It

[6] Thus, we find that supervisory status has not been established under any interpretation of *NLRB v. Kentucky River Community Care*, supra.

is well settled that the mere issuance of a written warning to an employee, without evidence that the warning affects an employee's employment status, is insufficient to establish supervisory authority. E.g., *Azusa Ranch Market*, 321 NLRB 811, 812–813 (1996); *Passavant Health Center*, 284 NLRB 887, 889 (1987).[7] Here, the record is devoid of evidence showing that these "writeups," standing alone, affect an employee's job status.[8]

Similarly, the incidents of Jochims orally reporting infractions by two employees, and subsequently sending them home, do not show supervisory authority. Jochims simply telephoned managerial officials and reported the facts. She made no disciplinary recommendations.[9] In the first incident, Jochims reported that an employee had reported to work intoxicated; in the second incident she reported that another employee was taking extended breaks and not responding to patient call lights. Jochims did not independently make the decision to send either employee home. Rather, she merely followed the orders of her superiors who instructed her to tell the employees to leave, and, thus, exercised no disciplinary authority within the meaning of Section 2(11) of the Act. See *Ryder Truck Rental*, 326 NLRB 1386, 1387 (1998) (issuance of a disciplinary warning pursuant to superior's directive insufficient to confer supervisory status).[10]

We also find, contrary to the judge and our dissenting colleague, that Jochims did not exercise supervisory authority by permitting employees to leave work early. In both instances at issue, an employee told Jochims that she had to leave because the employee's child had a medical emergency,[11] and Jochims merely voiced her agreement with each employee's assessment of her need to leave early. These isolated and exigent circumstances, involving compelling medical emergencies, show nothing more than the mere acquiescence by Jochims in the obvious need of these employees to go home. They do not show that their ability to leave work in emergency circumstances was dependent upon Jochims' approval. In these circumstances, Jochims did not display the kind of independent judgment necessary to establish supervisory status. See generally *Alois Box Co.*, 326 NLRB 1177, 1178 (1998), enfd. 216 F.3d 69 (D.C. Cir. 2000) (single occurrence of sending an employee for medical assistance insufficient to establish supervisory status).

Similarly, and also contrary to the judge and our dissenting colleague, we find that Jochims' participation in the 90-day evaluation of a single employee does not demonstrate supervisory status. First, it is clear that this was an isolated occurrence; there is no contention that Jochims had ever before evaluated employees or would have been likely to do so in the future. Further, Jochims did not fill out the entire evaluation form; she completed only those portions relating to activity she had observed. Indeed, Jochims made no recommendation regarding the retention of this 90-day employee. Thus, it is not entirely clear whether Jochims' participation in this evaluation could have affected this employees' job status. The authority to complete evaluations that do not contain recommendations and that have not otherwise been shown to affect job status is insufficient to establish supervisory status. See *Waverly-Cedar Falls Health Care,* supra at 393. However, even assuming Jochims' conduct could have affected the employee's job status, it was at most a single isolated occurrence. In these circumstances, "the exercise of some 'supervisory authority' in a merely . . . sporadic manner does not confer supervisory status on an employee." *Bowne of Houston, Inc.*, 280 NLRB 1222, 1223 (1986).

We also find that supervisory status is not established by the fact that Jochims attended management meetings, had a higher salary than other unit employees, and had a supervisory title. These are, at most, secondary indicia. "When there is no evidence presented that an individual

[7] The dissent's attempt to distinguish *Passavant Health Center* is unsuccessful, as that case clearly set out the standard that

> for the issuance of reprimands or warnings to constitute statutory supervisory authority, the warning must not only initiate, or be considered in determining future disciplinary action, but also it must be the basis of later personnel action without independent investigation or review by other supervisors.

Id. at 890. That standard has not been met in the present case.

[8] We, thus, find no significance to our dissenting colleague's reliance on the fact that Jochims would decide on her own whether to write up an employee's infraction. Any exercise of independent judgment used by Jochims in determining whether to write up the employee has not been shown to have affected that employee's terms and conditions of employment.

[9] It is well established that simple reporting of misconduct does not constitute supervisory authority within the meaning of Sec. 2(11). See, e.g., *Ken-Crest Services,* 336 NLRB 777, 778 (2001) (program managers "limited role in the disciplinary process is nothing more than reportorial"); *Fleming Cos.,* 330 NLRB 277 fn. 1 (1999) (supervisory status not found where employee communicated discipline only pursuant to management's directive; employee's role as a "mere conduit" for management was insufficient evidence of independent judgment).

[10] Even had Jochims sent the employees home without prior discussion with or instruction from managerial officials, the Board has ruled that sending employees home for flagrant misconduct, such as appearing at work drunk, does not evidence supervisory status. See *Phelps Community Medical Center*, 295 NLRB 486, 492 (1989). If such suspensions occur in connection with patient care and the action is then reviewable by other managerial officials, such authority is not evidence of supervisory authority. *Waverly-Cedar Falls Health Care*, 297 NLRB 390, 393 (1989).

[11] In the first instance, the employee told Jochims that her son had fallen on his head and probably needed to go to the emergency room. In the other instance, the employee told Jochims that she had to leave because her child was having an asthma attack.

possesses any one of the several primary indicia of statutory supervisory status enumerated in Section 2(11) of the Act, secondary indicia are insufficient by themselves to establish supervisory status." *Ken-Crest Services*, 335 NLRB 777, 779 (2001).

In sum, we find that the record fails to establish that Jochims' possesses the requisite authority to establish that she is a supervisor within the meaning of Section 2(11) of the Act. Thus, it follows that her circulation of a petition among employees protesting a change in working conditions constituted activity protected by Section 7 of the Act. Consequently, by discharging Jochims for circulating the petition, by telling Jochims that she was discharged for circulating the petition, by creating the impression that the Respondent was surveilling Jochims' petition activity, and by disparately enforcing against Jochims rules pertaining to solicitation, distribution, and telephoning employees at work, the Respondent violated Section 8(a)(1) of the Act as alleged.

3. The judge found that the Respondent did not violate Section 8(a)(1) of the Act by maintaining a rule in its employee handbook that prohibits employees from "[a]bandoning your job by walking off the shift without permission of your [s]upervisor or [a]dministrator." We agree.

As the judge discussed, "the Respondent is operating a nursing home with many elderly patients who are sick or infirm." Considering the rule in this context, we find that employees could not reasonably read the rule as prohibiting them from engaging in all strikes or similar protected concerted activity. Rather, in context, employees would necessarily read the rule as intended to ensure that nursing home patients are not left without adequate care during an ordinary workday. We, therefore, do not agree with the dissent's contention that the rule, on its face, would reasonably tend to chill the exercise of Section 7 rights.

Moreover, the Board has made clear that strikers may lose the protection of the Act if they fail "to take reasonable precautions to protect [the employer's operations] from foreseeable imminent danger due to sudden cessation of work." See *Bethany Medical Center,* 328 NLRB 1094 (1999) (catherization laboratory employees). Our colleague concedes this point. Considering the fact that the Respondent's mission is to ensure adequate care for its patients, employees would necessarily read the rule as intended to avert such imminent danger, not to prohibit protected conduct.

Nor is there any record evidence that the rule has been applied against the exercise of Section 7 rights. Had there been such evidence, we would, of course, likely reach a different conclusion. In that case, the past practice would necessarily color employees' reasonable reading of the rule. Absent such evidence, however, we will not condemn the rule as facially unlawful.

ORDER

The National Labor Relations Board orders that the Respondent, Wilshire at Lakewood, Lee's Summit, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Terminating employees for engaging in protected concerted activities.

(b) Telling employees that they are terminated for engaging in protected concerted activities.

(c) Interrogating employees concerning their own or others' protected concerted activities.

(d) Creating an impression among its employees that their protected concerted activities are under surveillance.

(e) Disparately prohibiting employees from telephoning nurses at the facility.

(f) Disparately enforcing its no-solicitation/no-distribution rule.

(g) Maintaining in its employee handbook a disciplinary rule prohibiting the misrepresentation of a material fact in an attempt to obtain a benefit or advantage.

(h) Maintaining in its employee handbook a disciplinary rule prohibiting making a false or malicious statement about a resident, employee, supervisor, or the Company.

(i) Maintaining in its employee handbook a disciplinary rule prohibiting paycheck disclosure.

(j) Maintaining in its employee handbook a disciplinary rule that prohibits soliciting or distributing material during working time or in any work area or resident care area.

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

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

(a) Within 14 days from the date of this Order, offer Lisa Jochims 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) Make Lisa Jochims whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, computed on a quarterly basis from the date of discharge to the date of a 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).

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful termination of Lisa Jochims, and within 3 days thereafter, notify Lisa Jochims in writing that this has been done and that the termination will not be used against her in any way.

(d) Rescind the disciplinary rules quoted above, remove them from the employee handbook, and within 14 days from the date of this Order, advise employees in writing that the rules are no longer being maintained or enforced.

(e) Preserve and within 14 days of a request, or such additional times 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 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 Lee's Summit, Missouri facility copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 17, 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 22, 2002.

(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.

CHAIRMAN BATTISTA, dissenting in part.

My colleagues find, contrary to the judge, that the Respondent's "weekend supervisor," Lisa Jochims, is not a statutory supervisor. They, therefore, conclude that the Respondent violated the Act by terminating Jochims for engaging in protected activity. Contrary to my colleagues, I find that the record establishes that Jochims possessed supervisory authority, and, thus, Jochims' activity was not protected under Section 7 of the Act.

As the judge found, Jochims exercised supervisory authority in several ways. Jochims was the Respondent's weekend supervisor, and in that capacity had the authority to correct employees if they did something wrong at work.[1] Further, she had the authority to make an independent determination of whether to take the step of a disciplinary writeup. If she decided to do so, the writeup would be placed in the employee's file. These writeups are the first step in the disciplinary process, and become a permanent part of the employee's personnel file.

The cases of *Azusa Ranch Market*, 321 NLRB 811, 812–813 (1996), and *Passavant Health Center*, 284 NLRB 887, 889 (1987), cited by my colleagues, are distinguishable. In *Azusa Ranch*, supra, there was no evidence showing the significance of the written warnings at issue. By contrast, in the instant case, the warnings constitute the first step in the disciplinary process. In *Passavant*, surpa, the evidence failed to show anything more than the fact that after an employee received an unspecified number of written warnings, the employer's director of nursing might consider whether disciplinary action was warranted.

My colleagues also seek to diminish the significance of these writeups because of the fact that certain charge nurses, not alleged to be supervisors, may have also written up employees' infractions. Since there is no contention that these nurses are statutory supervisors, we do not pass on whether they too are supervisors. However, this does not render irrelevant the point that Jochims' acts of writing up employee infractions is a further indicium of her supervisory status.

Additionally, the record contains two examples of situations where Jochims actively participated in discussions with other managers about incidents of employee misconduct. In both situations, the discussion involved the decision to send home the employee who had engaged in the misconduct.[2]

The record also establishes that Jochims has the authority to permit employees to leave their shift early. This was demonstrated on two occasions. Both times,

[12] If the 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 Stated Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] My colleagues say that Jochims did not use independent judgment in this respect. There is nothing to suggest that Jochims checked with anyone before directing that corrective action be taken.

[2] My colleagues suggest that Jochims simply reported the facts of the misconduct, and made no recommendation. However, Jochims exercised independent judgment to inform higher management about the problem. Her decision prompted that which followed.

My colleagues also say that a determination of "flagrant" misconduct does not involve use of independent judgment. I believe that it does. That is, what one person views as flagrant, another may not.

the employee involved came to Jochims and informed her of a family emergency at home. On each occasion, the employee asked Jochims for permission to leave work early, and Jochims independently decided to grant the request.[3]

In addition, the record shows that Jochims evaluated an employee's performance. This evaluation determined that the employee had successfully completed her 90-day probationary period. My colleagues contend that the evaluation is of little significance, finding it to be a mere isolated occurrence. That may be if it stood alone. However, it is at least another piece of evidence which, when added to the others, supports the proposition that Jochims is a supervisor.[4]

Finally, the record demonstrates that Jochims additionally possessed secondary indicia of supervisory authority. Jochims had a supervisory title, was the highest ranking employee when she worked at the Respondent's facility, was paid more than the other personnel who worked with her at the Respondent's facility, and attended managerial meetings. Clearly, these facts—when considered together with the other indicia discussed above—add further support to the finding that Jochims is a supervisor.

In sum, the record establishes that Jochims played a significant role in the disciplinary process, had the authority to send employees home early, was involved in employee evaluations, and possessed several secondary indicia of supervisory status.[5] These facts warrant a finding that Jochims was a statutory supervisor, and that her circulation of the petition did not constitute protected activity. Consequently, her termination, and the Respondent's other conduct taken in response to her circulation of the petition, did not violate Section 8(a)(1) of the Act as alleged.

MEMBER WALSH, dissenting in part.

Contrary to my colleagues and the judge, I agree with the General Counsel that the Respondent's handbook rule prohibiting "[a]bandoning your job by walking off the shift without permission of your [s]upervisor or [a]dministrator" violates Section 8(a)(1) of the Act.

The judge dismissed this allegation because he found that the rule is "not intended as a prohibition against strikes or concerted activity" but rather is intended to protect nursing home patients from employees who might leave them to fend for themselves. The judge opined that the Respondent would be negligent not to maintain such a rule. He added that employees who leave a nursing home patient without adequate care are guilty of conduct that is "indefensible." My colleagues adopt the judge's findings. I agree that a nursing home must be permitted to protect its patients against neglect, but I disagree with my colleagues' finding that the Respondent's rule is lawful. Instead, I agree with the General Counsel that this rule, even if it was promulgated to protect patients, goes beyond ensuring that the nursing home's operations are protected against foreseeable imminent danger, and, therefore, is an unlawful restriction on employee strike activity.

"The Act protects the right of employees to engage in concerted activities, including the right to strike without prior notice." *Bethany Medical Center*, 328 NLRB 1094 (1999). The right to strike is not absolute, but a strike does not lose its protection merely because adequate advance notice is not given. *International Protective Services,* 339 NLRB 701, 702 (2003); *Mc-Clendon Electrical Services,* 340 NLRB 613 (2003). Although advance notice of a strike is not required by the NLRA, strikers may lose the protection of the Act if they fail "to take reasonable precautions to protect the employer's operations from such imminent danger as foreseeably would result from their sudden cessation of work." *International Protective Services*, supra. Thus, a strike, even without advance notice, would be protected unless imminent danger would foreseeably result from it and the strikers do not take reasonable precautions to prevent such danger.

The Respondent's rule on its face requires not only advance notice of any walkout but also managerial permission to participate, even if the walkout would not result in "imminent danger." Because strikes without advance notice may be protected by the Act, a general rule prohibiting walking off the job without permission (regard-

[3] Thus, the cases cited by my colleagues, *Alois Box Co.*, 326 NLRB 1177, 1178 (1998), enfd. 216 F.3d 69 (D.C. Cir. 2000), and *Bowne of Houston, Inc.,* 280 NLRB 1222, 1223 (1986), are clearly distinguishable. In *Alois Box*, the employee whose supervisory status was at issue did not engage in any conduct rising to the level of that exercised by Jochims. The employee served only as a "conduit for management instructions" and had no authority to make independent decisions affecting other employees. Thus, although the employee once told an injured employee to seek medical assistance, that was something that any senior employee of that employer was expected to do. Further, although this employee told a fellow employee that if he did not do his job properly he would be sent home, the remark was at most evidence of what could happen to the employee. It did not show that the alleged supervisor had the power to send the employee home or the power to effectively recommend same. In *Bowne*, supra, the Board found that the record evidence failed to demonstrate that the exercise of authority involved independent judgment sufficient to establish supervisory authority. For example, there was no evidence, as there is here, of the exercise of independent judgment in the disciplinary process.

[4] Contrary to the views of my colleagues, a determination that an employee has passed or failed her probationary period has employment consequences.

[5] In view of these findings, I find it unnecessary to pass on the judge's finding that Jochims exercised independent judgment in directing the work of other employees.

less of whether such walkout would "foreseeably" result in "imminent danger") can reasonably be read to prohibit protected strike activity.

The judge and my colleagues focus on the intent of the rule rather than its likely chilling effect. I agree that the rule may have been well intentioned. However, in evaluating the legality of such rules, intent is not the appropriate inquiry. Rather, "the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). Because the Respondent's rule can reasonably be read to prohibit protected strike activity, it has a reasonable tendency to chill employees in the exercise of their Section 7 rights. Accordingly, the rule violates Section 8(a)(1) of the Act.

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 terminate you for engaging in protected concerted activities.

WE WILL NOT tell you that you are terminated for engaging in protected concerted activities.

WE WILL NOT interrogate you concerning your own or others' protected concerted activities.

WE WILL NOT create the impression that your protected concerted activities are under surveillance.

WE WILL NOT disparately prohibit you from telephoning nurses at the facility.

WE WILL NOT disparately enforce our no-solicitation/no-distribution rule.

WE WILL NOT maintain in our employee handbook a disciplinary rule that prohibits the misrepresentation of a material fact in an attempt to obtain a benefit or advantage.

WE WILL NOT maintain in our employee handbook a disciplinary rule prohibiting making a false or malicious statement about a resident, employee, supervisor, or the Company.

WE WILL NOT maintain in our employee handbook a disciplinary rule that prohibits paycheck disclosure.

WE WILL NOT maintain in our employee handbook a disciplinary rule that prohibits soliciting or distributing material during working time or in any work area or resident care area.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in their activities protected by the Act.

WE WILL, within 14 days of this Order offer Lisa Jochims 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 make whole Lisa Jochims for any losses of earnings and other benefits she may have suffered because of her unlawful discharge.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful termination of Lisa Jochims, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the termination will not be used against her in any way.

WE WILL rescind the disciplinary rules quoted above, remove them from the employee handbook, and within 14 days from the date of the Board's Order, advise you in writing that the rules are no longer being maintained or enforced.

WILSHIRE AT LAKEWOOD

David A. Nixon, for the General Counsel.
Stanley E. Craven, of Overland Park, Kansas, for the Respondent.

DECISION

STATEMENT OF THE CASE

GREGORY Z. MEYERSON, Administrative Law Judge. Pursuant to notice, I heard this case in Overland Park, Kansas, on May 7, 2002. Lisa Jochims, an individual (Jochims or the Charging Party), filed an original, an amended, and a second amended unfair labor practice charge in this case on February 25 and April 9 and 15, 2002, respectively. Based on that charge as amended, the Regional Director for Region 17 of the National Labor Relations Board (the Board) issued a complaint on April 9, and an amended complaint on April 15, 2002, respectively. The complaint as amended alleges that Wilshire at Lakewood (Respondent or the Employer) violated Section 8(a)(1) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint as amended denying the commission of the alleged unfair labor practices.

All parties appeared at the hearing, and I provided them with the full opportunity to participate, to introduce relevant evi-

dence, to examine and cross-examine witnesses, and to argue orally and file briefs. Based on the record,[1] my consideration of the briefs filed by counsel for the General Counsel and counsel for the Respondent, and my observation of the demeanor of the witnesses,[2] I now make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, the answer admits, and I find that the Respondent is a corporation, which has maintained residential care facilities providing long-term nonacute health care services to residents at various locations in metropolitan Kansas City, including a facility located in Lee's Summit, Missouri (the Respondent's facility), which is the only facility involved in this case. During the 12-month period ending December 31, 2001, the Respondent, in the course and conduct of its business operations, derived gross revenues in excess of $100,000; and during the same period of time, the Respondent purchased and received at its facility in Lee's Summit, Missouri, goods and materials valued in excess of $10,000 directly from points outside the State of Missouri.

Accordingly, I conclude that the Respondent is now, and at all times material has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Dispute

It is alleged in the complaint that the Respondent discharged Jochims on February 22, 2002,[3] because she engaged in protected concerted activity. Specifically, the General Counsel alleges that the Charging Party was discharged because she circulated a petition among her fellow nurses complaining about a management proposal to have the nurses periodically perform the duties of nursing assistants. The Respondent acknowledges terminating Jochims because of her involvement with the petition. However, the Respondent contends that Jochims was a supervisor within the meaning of the Act and, therefore, her actions in circulating the petition did not constitute protected activity. It is the position of the General Counsel that Jochims was a statutory employee. The General Counsel also alleges in the complaint that the Respondent interrogated Jochims and other employees, treated her in a disparate fashion, and created the impression that she and other employees were under surveillance, all as a result of their activity in circulating the petition.

While the principal dispute in this case involves the issue of whether the Charging Party was a supervisor or not, the complaint also alleges that a number of the provisions in the Respondent's employee handbook are either unlawful on their face because they curtail employee statutory rights, or have been disparately applied and enforced in order to prevent employees from engaging in protected concerted activity. Counsel for the Respondent does not deny that the employee handbook provision that prohibits "paycheck disclosure" is unlawful. However, he denies that there is anything unlawful about any of those provisions dealing with employee access to the facility, "rumors and gossip," job abandonment, misrepresentation, malicious statements, or solicitation and distribution.[4]

B. Facts and Analysis

1. Background

The Respondent operates a long-term care facility, providing both residential care and skilled nursing care to its residents and patients. On the "nursing home" side of the facility, there are 120 skilled nursing beds. According to Administrator Jim Harralson, the Respondent provides any level of skilled nursing care needed, including physical therapy, occupational therapy, speech therapy, nutritional feeding, administration of medication, and total assistance care. During the time period in question, the Respondent employed between 110 and 120 employees at the facility. Of course, the facility operates 24 hours a day, 7 days a week. The nursing department is led by a director of nursing, Wendy Gibson, who is responsible for the entire nursing staff, including charge nurses, registered nurses (RNs), licensed practical nurses (LPNs), certified medication technicians, certified nursing assistants (CNAs), nursing assistants (NAs), and restorative therapists.

The skilled nursing area of the facility has four "halls," each of which is under the direction of a charge nurse. The charge nurse is either a RN or LPN, and the Respondent typically hires its RNs and LPNs as charge nurses. Harralson testified that a charge nurse is "in charge" of a hall, meaning that she is "responsible for the oversight of the CNAs" on her hall and "responsible for the resident care" on that hall. Of course, RNs and LPNs are highly skilled professional nurses. CNAs are much less skilled and typically assist patients with what is referred to as "activities of daily living." These would include feeding, bathing, dressing, and help with the toilet.

Lisa Jochims is a RN who was employed by the Respondent from August 1999 until February 22, 2002. According to Jochims, she was hired by Wendy Gibson as a "weekend supervisor." Jochims testified that Gibson said that "until the census grew in the facility" that she would also be working as a charge nurse. Originally, she was scheduled to work every Saturday and Sunday, from 6:30 a.m. to 2:30 p.m. However, in November 2000, at her request, her workdays were increased to include Wednesday and Friday, with the same schedule of hours on each day. For the most part, Gibson's testimony was

[1] Counsel for the General Counsel's unopposed motion to correct the record, attached as an appendix to his posthearing brief, is granted and received into evidence as GC Exh. 15.

[2] The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits, with consideration given for reasonable probability and the demeanor of the witnesses. See *NLRB v. Walton Mfg. Co.,* 369 U.S. 404, 408 (1962). Where witnesses have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

[3] All dates are in 2002, unless otherwise indicated.

[4] In his posthearing brief, counsel for the General Counsel moves to formally withdraw the complaint allegation at par. 4(b)(i), which alleges the Respondent's "No Access Rule" to be violative of the Act. I grant the motion to withdraw this complaint allegation.

similar to that of Jochims. Gibson acknowledged that at the time Jochims was hired she was told her position was that of weekend supervisor and charge nurse. As a charge nurse, she would be assigned a floor, but with increased patients and staff she would ultimately be relieved of the charge nurse duties and would be exclusively the weekend supervisor. According to Gibson, this change occurred in early February 2001.

On February 1, 2002, a meeting was called by Jim Harralson and Wendy Gibson specifically for the nurses employed on the weekend. Apparently, the CNAs who worked on the weekend had been complaining about a perceived lack of support they received from the nurses. Harralson informed the nurses that in an effort to correct this perception, management was discussing instituting a "role reversal plan." Under this plan, nurses would periodically spend an 8-hour shift performing the work of CNAs, including assisting patients with their activities of daily living (ADLs). A number of nurses expressed concern about this plan, particularly with having to perform the physical aspects of assisting patients with their ADLs. Lisa Jochims was one of the nurses present at this meeting.

Wendy Gibson testified that on February 18 she learned from Sheila Littrell, assistant director of nursing, that Lisa Jochims had circulated a petition among the nurses concerning the nurses having to "work the floor."[5] Later that same day, Gibson called nurse Christine Brackenbury and informed her that Gibson had heard about a petition being circulated by Jochims concerning nurses working the floor, and wanted to know specifically what was in the petition. At first, Brackenbury indicated a reluctance to get "in the middle of it," but when told by Gibson that if she had signed the petition she was already involved, Brackenbury agreed to tell Gibson about the matter. According to Gibson, Brackenbury indicated that Jochims had said that management intended to have each nurse work the floor 1 day a month, and that extra nurses had been hired to perform CNA functions. Gibson informed Brackenbury that this was not going to happen, after which Brackenbury said that if she had known there was no truth to the story that she would not have signed the petition.

Following her conversation with Brackenbury, Gibson informed Jim Harralson that Lisa Jochims was circulating an employee petition protesting any effort to have the nurses work the floor. According to Harralson, he was "in shock" as he considered Jochims to be a "part of the management team." He directed Gibson to call Jochims and find out what the petition was all about. Gibson called Jochims at her home on February 18, and told her that Gibson had heard that Jochims had circulated an employee petition among the nurses who worked the weekend, and asked her to bring the petition in to work for Gibson to see. For several days thereafter, Jochims was not scheduled to be at work. However, at Gibson's request, Jochims had the petition brought to the facility, apparently by her husband.

Harralson admitted being very upset by the petition, as management had not decided to implement the plan being complained about in the petition. He was "disappointed in the nurses" because they had chosen to sign the petition, rather than first come to talk with Gibson or himself. In particular, he was upset with Lisa Jochims because "as a weekend supervisor" she needed "to be supportive of the management team," which he felt she had not been. In fact, he held her responsible for the petition as, "she had taken the petition around and really caused some ruckus amongst the weekend staff." Harralson concluded that Jochims had created a rift between management and the nurses, "putting up a wall" to separate them.

After reviewing the petition, Harralson, in consultation with Gibson, decided to fire Jochims. They met with Jochims on February 22, at which time they informed her of their decision to terminate her and gave her an employee disciplinary form which listed certain specific reasons for the termination. (GC Exh. 3.) However, it is important to note that the parties stipulated at the hearing that the dispositive issue regarding the legality of the Respondent's discharge of Lisa Jochims is whether or not she was a supervisor within the meaning of the Act, and they agreed that if she was not a supervisor then the Respondent's discharge of her was violative of the Act. Therefore, the reasons listed on the termination form are not relevant in determining the legality of Jochims' discharge. Rather, based on the stipulation of the parties, I conclude that Jochims' discharge was the direct result of her action in circulating the petition. However, the issue that remains is whether her action constituted protected concerted activity and, thus, covered by the Act. Ultimately, this depends on her status as either a statutory supervisor or employee.

On February 22, following the discharge of Jochims, Harralson, and Gibson held a meeting with the nurses that had been previously scheduled. According to Harralson, he told the nurses that he was upset with them for refusing to work the floor and help out the CNAs if necessary. He explained that no decision had yet been made about the role reversal proposal, and that they were making an issue out of something that might never happen. He testified that his only reference to the petition was his stated disappointment that the nurses did not first come to either Gibson or himself if they had a problem with a management policy. The only employee witness who testified about the meeting of February 22, was nurse Angela McLain, who was called to testify by counsel for the General Counsel. Unfortunately, I found McLain to be a very poor witness. Her testimony about the events in question was confusing, contradictory and, to a large extent, incomprehensible. Therefore, I accord no weight to her testimony.

Harralson testified that following the meeting with the nurses on February 22, he was approached by Nurse Rebecca Slankard. She informed him that she was sorry for signing the petition, and had done so only because she had allegedly been given "false information" regarding wages. Harralson acknowledged asking Slankard "where all this took place," presumably meaning the location at which she had signed the petition. She told him that "it happened around the nurses station."

Counsel for the General Counsel and counsel for the Respondent entered into a written stipulation that the past practice at the Respondent's facility was to permit employees to receive telephone calls during worktime, as long as there was no abuse of such privilege by an excessive number or length of calls. Attached to the stipulation and received into evidence in lieu of

[5] This was a reference to the performance of CNAs' work.

testimony was the signed statement of Sherry Zans, staffing coordinator. According to Zans, on February 27, Jochims telephoned the facility asking to speak with nurse Rebecca Russi. Russi was busy at the time and did not take the call. Russi then asked Zans to tell Jochims when she called back that Russi did not want to talk with her and not to call again. Zans informed Jochims that Russi did not want to talk with her, and further that she should not call the nurses at work. That was the end of the conversation. (Jt. Exh. 2.)

In another written stipulation, the parties agreed that it was the past practice at the Respondent's facility for employees to openly engage in solicitation and distribution activities during worktime and in work areas of the facility in the sale of various products, including "Avon" products. Further, the parties agreed that the Respondent was aware of this past practice at the time of the discharge of Lisa Jochims. (Jt. Exh. 1.)

Finally, it should be noted that the parties stipulated that it is the Respondent's practice to distribute its employee handbook to all employees at or about the time that they are hired. (R. Exh. 1.)

2. The discharge of Lisa Jochims

As noted above, the parties stipulated that the dispositive issue regarding the legality of Jochims' discharge is whether or not she was a supervisor within the meaning of Section 2(11) of the Act. They further stipulated that if Jochims is found not to be a supervisor, then the Respondent's discharge of her was a violation of the Act. It is the Respondent's burden to establish that Jochims was a supervisor within the meaning of the Act. The Board has long held that the burden of establishing that an individual is a statutory supervisor without the protection of Section 7 is to be borne by the party asserting such status. The Supreme Court approved the Board's evidentiary allocation, in its recent paramount decision on the subject of supervisory status in *NLRB v. Kentucky River Community Care,* 532 U.S. 706, 710–712 (2001).

The Respondent hires all its nurses, both RNs and LPNs, as charge nurses. In this capacity, the charge nurse is "in charge" of a hall, meaning she is responsible for the patient care on that hall, and is also responsible for directing the CNAs who work on that hall in the performance of their job duties. Counsel for the Respondent repeatedly indicated at the hearing and in his posthearing brief, that the Respondent was specifically not going to take a position as to whether its charge nurses were supervisors within the meaning of the Act. He declined to do so even after the undersigned suggested to him that it would be appropriate for the Respondent to take a position. In any event, the Respondent has clearly taken the position that Lisa Jochims was a supervisor by virtue of her duties and responsibilities as the "weekend supervisor."

In my view, there may well be significant evidence to establish that the Respondent's charge nurses are in fact supervisors, as it appears that they responsibly direct the CNAs. *Kentucky River Community Care,* supra. However, I need not decide that issue as the Respondent is not making such a claim. Rather, I need only decide whether Jochims was a supervisor by virtue of her job as the "weekend supervisor." On this basis alone, I conclude that she was a statutory supervisor.

Section 2(11) of the Act reads as follows:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

It is well established that the enumerated functions in Section 2(11) are to be read in the disjunctive, and the existence of any of them, regardless of the frequency of their performance, is sufficient to confer supervisory status. *NLRB v. Yeshiva University,* 444 US 672 (1980); *Queen Mary,* 317 NLRB 1303 (1995); and *Allen Services Co.,* 314 NLRB 1060 (1994). In my view, Lisa Jochims exercised a number of the indicia of supervisory authority, but most certainly responsibly directed the weekend nursing staff in the performance of their job duties. Further, I conclude that her exercise of such authority was not of a merely routine or clerical nature, but, rather, required the use of independent judgment. *Kentucky River Community Care,* supra.

As the "weekend supervisor," Jochims was one step above the charge nurses in the Respondent's hierarchy. She testified that on the weekends she "supervised" 15 employees, including 9 CNAs, 2 certified medication technicians, and 4 LPNs, who were themselves, charge nurses. It is undisputed that on the weekends, Jochims was the highest ranking of the Respondent's employees at the facility. While the weekend staff was provided with the telephone numbers of various managers, in case of an emergency, it is clear from the testimony of the witnesses, that Jochims was responsible for managing the facility on the weekend. This included not only patient care and interaction with patients' families, but also issues involving proper employee staffing, time and attendance, direction of employees in the performance of their job duties, and reprimanding them for poor performance. As testified to by nurse Angela McLain, on the weekends she regarded Jochims as her supervisor.

The most significant evidence of Jochims' exercise of supervisory authority comes from her own testimony. She acknowledged being hired as a "supervisor," and admitted that on the weekends she "had the authority to oversee the employees." Regarding the nine employees that she "supervised" on the weekends, Jochims had the responsibility and authority to "correct them" if they did something wrong. The charge nurse working the shift might also correct the CNAs. However, the fact that charge nurses, who might also be supervisors, exercised this authority does not detract from the authority exercised by Jochims. Additionally, she had the authority to correct the work performed by the charge nurses. Although I found Jochims to be a generally credible witness, she did have a tendency to try and establish distinctions where none existed. This in an effort to portray herself as having little genuine authority. Still, on cross-examination she was forced to acknowledge that where there was a "gross infraction" of residential care, she had the authority to report the employee's conduct on a "disciplinary form," even if this employee was a charge nurse. Further,

she admitted that she would determine on her own whether or not an infraction was severe enough to warrant "writing up" an employee on a disciplinary form, or just letting the matter "slide." In fact, numerous disciplinary forms, with various titles, where Jochims had reported employees for improper behavior, were admitted into evidence. (See R. Exhs. 11, 12, 14–20.) It is, therefore, apparent to the undersigned that not only did Jochims have the authority to responsibly direct employees in the performance of their job duties, but to also discipline them for infractions by writing up a report on their improper behavior.

Jochims' actions clearly constituted more than the exercise of "ordinary professional or technical judgement in directing less-skilled employees to deliver services in accordance with employer specified standards." To the contrary, Jochims exercised "independent judgment" on a regular basis when directing the work performance of weekend employees, and in deciding whether to issue, what were essentially, written warnings to employees. As such, she clearly exercised several of the indicia of supervisory authority. *NLRB v. Kentucky River Community Care,* supra.

There were further examples of Jochims' exercise of supervisory authority. On two occasions she orally reported two weekend employees as being unfit for work. In the most recent instance, she called the Respondent's administrator, Jim Harralson, and reported that a LPN had come to work drunk. After explaining the situation to Harralson, Jochims was instructed to send the employee home. On the earlier occasion, Jochims reported to the assistant director of nursing, Sheila Littrell, that a CNA was taking extended breaks and lunch and was failing to respond to patient call lights. In this instance, as well, after explaining the situation to Littrell, Jochims was instructed to send the employee home. While Jochims did not make the final decision to send the offending employees home, she exercised independent judgment in deciding to immediately report the employees' misconduct in detail to higher management.

While Jochims testified that she did not have the authority to allow employees to leave work early, she gave several examples where she did exactly that. On two occasions, employees came to her expressing a need to leave work early because of health problems with their young children. In each instance, Jochims permitted their early departure without first having to check with higher management. Further, although Jochims did not normally prepare employee evaluations, she did so on one occasion for employee Jamie Shatto, a certified medicine technician, who worked weekends. Wendy Gibson asked Jochims to prepare the employee's 90-day evaluation, because Gibson was not familiar with Shatto. Jochims filled out those portions of the evaluation she was able to, based on her observations of Shatto's job performance, and she signed the form as Shatto's supervisor. (R. Exh. 13.)

It is interesting to note, that while Jochims acknowledged that as the "weekend supervisor" she was required "to make sure that [employees] were doing their designated tasks under their job description;" she also admitted that management criticized her on a number of her performance reviews for not exercising her authority as strongly as management would have liked her to have done it. (R. Exhs. 8, 9, and 10.) While the perception of others is certainly not dispositive of the issue of supervisory status, it is instructive to consider that apparently all those involved with her viewed Jochims as a supervisor. The weekend employees interacted with her as their supervisor. Management gave her supervisory responsibility, and was concerned that she did not always exercise the authority that she possessed to the extent they wanted her to. Even Jochims continually referred to herself with the title of supervisor. While a title by itself proves little, I am of the opinion that she did believe herself to be a true supervisor, at least until she realized that a finding of supervisory status would leave her unprotected for her actions in circulating the petition. It then became convenient for her to be an employee, rather than a supervisor. After all, Jochims testified that she attempted on a number of occasions to obtain specific direction from management on how to better perform her "supervisory duties." She even went so far as to write Wendy Gibson that, "I would appreciate any suggestions on how I can be a more effective supervisor." Clearly, this was the comment of someone who, at the time, genuinely believed herself to be a supervisor.

In addition to the perception of supervisory status and the title of "weekend supervisor," there are other so-called "secondary indicia" which the Board sometimes looks to in determining whether a particular individual is a supervisor within the meaning of the Act. In the case at hand, these include the evidence that Jochims attended management meetings (GC Exh. 9), and was paid more than any other charge nurse. *NLRB v. Chicago Metallic Corp.,* 794 F.2d 527 (9th Cir. 1986), enf. in part 275 NLRB 871 (1995); *Typographical Union Local 101 (Columbia),* 220 NLRB 1173 (1975); and *Liquid Transporters*, 250 NLRB 1421 (1980).

Therefore, for the reasons set forth above, I conclude that Lisa Jochims was a statutory supervisor at the time that she circulated the petition regarding nurses working the floor. While this action was obviously concerted, Jochims was not protected by Section 7 of the Act because of her supervisory status. It is clear from the evidence and the parties' stipulations that Jochims was discharged principally because of her involvement with the petition. Never the less, since she was a statutory supervisor, the Respondent's discharge of Jochims was not a violation of the Act. Accordingly, I shall recommend dismissal of paragraph 5 of the amended complaint.

3. Interrogating employees

Paragraph 4(a)(i) of the amended complaint alleges that on February 18, on two separate occasions, Wendy Gibson interrogated employees concerning their or other employees' activities in the solicitation of employees to sign a petition. This, of course, refers to the petition in protest of the proposal that nurses work the floor. However, in his posthearing brief, counsel for the General Counsel indicates that the second reference in this complaint paragraph to Wendy Gibson should actually be to Jim Harralson, and the date of this alleged second interrogation should actually be February 22. Counsel argues that "the error entails a mere ministerial matter concerning names." I am in agreement, as the Respondent is in no way prejudiced by substituting the names of these management officials, and by moving the date of the alleged second incident by 4 days.

The Respondent is not prejudiced because the matter has been fully litigated, with Jim Harralson actually testifying about the event in question. The allegations in the amended complaint are certainly broad enough to encompass these changes.

As was noted above, Wendy Gibson called nurse Christine Brackenbury on February 18. Gibson informed Brackenbury that she had heard about a petition being circulated by Lisa Jochims concerning nurses working the floor, and Gibson wanted to know specifically what was in the petition. Brackenbury indicated a reluctance to get involved, but was told by Gibson that if she had signed the petition that she was already involved. At that point, Brackenbury informed Gibson that Jochims had said that management intended to have each nurse work the floor 1 day a month, and that extra nurses had been hired to perform CNA functions. Gibson told Brackenbury that this was not going to happen, after which Brackenbury said that if she had known there was no truth to the story that she would not have signed the petition.

It is clear that the employees who circulated, signed, and/or solicited other employees to sign the petition were engaged in protected concerted activity under Section 7 of the Act. In questioning Brackenbury about her involvement with the petition, Gibson was interfering with, restraining and coercing Brackenbury in the exercise of her Section 7 rights. This conversation was particularly coercive, as Brackenbury had expressed a desire not to get involved (meaning not to furnish information), only to be told by Gibson, the director of nursing, that she was already involved. Under the circumstances surrounding this conversation, I am of the view that Gibson's interrogation of Brackenbury, as alleged in paragraph 4(a)(i) of the amended complaint, constituted a violation of Section 8(a)(1) of the Act. *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985); and *Rossmore House*, 269 NLRB 1176 (1984).

However, I do not believe that Harralson's conversation with nurse Rebecca Slankard on February 22, constituted unlawful interrogation, as alleged by counsel for the General Counsel. Slankard approached Harralson, following the meeting management held with the nurses. According to the unrebutted testimony of Harralson, Slankard told him that she was sorry for signing the petition, and had done so only because she had allegedly been given "false information" regarding wages. The only question Harrslson acknowledged asking Slankard was, "where all this took place," apparently meaning the location at which she had signed the petition. She replied that "it happened around the nurses station." In my view, this conversation, which was initiated by Slankard, did not rise to the level of "interrogation." There was nothing in Harralson's single question to Slankard about where she signed the petition which could be reasonably construed as interfering with, restraining, or coercing Slankard in the exercise of her Section 7 rights. *Sunnyvale*, supra; *Rossmore House,* supra. Therefore, under the circumstances surrounding this conversation, I find no independent violation of Section 8(a)(1) of the Act.

4. Informing employee she was discharged for protected activity

Paragraph 4(a)(ii) of the amended complaint alleges that on February 22, Wendy Gibson told an employee that she was being discharged because of her activity in soliciting other employees to engage in protected concerted activity. At the hearing, the parties stipulated that the "employee" referred to in that allegation was Lisa Jochims. Further, they stipulated that if there was a finding that Jochims was a statutory employee, then the Respondent conceded that it violated the Act as alleged. The protected concerted activity referred to was, of course, the solicitation of employee signatures on the petition protesting the proposal to have nurses work the floor. However, as discussed above, I have found that Jochims was a statutory supervisor, without the protection of the Act. Concomitantly, it follows that there was no violation of Section 8(a)(1) of the Act when Gibson informed Jochims on February 22, that she was being discharged principally because of her involvement in circulating the petition and soliciting the nurses to sign the document.

In his posthearing brief, counsel for the General Counsel raises for the first time an allegation that Wendy Gibson committed the same violation of the Act as complained of in this complaint paragraph when at a meeting of the nurses that she conducted on February 22, she told the assembled nurses she was "very mad" about the petition and "Lisa was let go for that reason." Apparently, counsel is basing this allegation on the testimony of nurse Angela McLain. However, as noted above, I found McLain to be a very poor witness. Her testimony about the events in question was confusing, contradictory and, to a large extent, incomprehensible. Therefore, I accord no weight to her testimony.

In any event, even assuming the words in question were uttered by Gibson to the assembled nurses, the allegation is being raised too late to constitute a basis for a finding that the Act has been violated. The complaint paragraph alleges that a single employee was told something by Gibson. Further, the parties stipulated at the hearing that the employee involved was Lisa Jochims. Having entered into that stipulation, counsel for the General Counsel cannot, thereafter, fairly attempt to add other "employees" who were allegedly affected by Gibson's statement. To permit the General Counsel to so amend the complaint would be to certainly prejudice the Respondent who has had no opportunity to offer any rebutting evidence. Counsel for the Respondent relied on the stipulation to conclude that only a single employee, Lisa Jochims, was involved in this allegation. To allow the General Counsel, at this late date, to ignore the stipulation and amend the complaint would be fundamentally unfair to the Respondent, which would have relied on the stipulation to its detriment. This would constitute a denial of due process. Accordingly, I shall recommend dismissal of paragraph 4(a)(ii) of the amended complaint.[6]

[6] In his posthearing brief, counsel for the General Counsel alleges for the first time the contention that the Act was violated when on February 22, at the group meeting with the nurses, Wendy Gibson stated that she "did not ever want to see them do anything like that again," referring to the petition. This allegation is based on the testimony of Angela McLain, who I have found to be an incredible witness. Because of the unreliable nature of this testimony, and the failure to previously raise the issue and provide the Respondent with an opportunity to offer rebutting evidence, I conclude there is insufficient evidence to find a violation of the Act.

5. Disparate restriction on telephone use

Paragraph 4(a)(iii) of the amended complaint alleges that on February 27, Sherry Zans, staffing coordinator, imposed a disparate restriction upon an employee's telephoning other employees at the Respondent's facility. Counsel for the General Counsel, in his posthearing brief, identifies that "employee" as Lisa Jochims. He references Joint Exhibit 2, by which the parties stipulated that the established practice at the Respondent's facility was to permit employees to receive telephone calls during worktime, as long as there was no abuse of such privilege by an excessive number or length of calls. Further, the parties stipulated that an attached memo from Sherry Zans should be admitted into evidence in lieu of testimony. By this memo, Zans acknowledged that, pursuant to a request from Nurse Rebecca Russi, Zans informed Jochims that Russi did not want to talk with her, and further advised Jochims that she should not call the nurses at work. Counsel for the General Counsel contends that the Respondent was attempting to prevent Jochims from calling nurses at work in an effort to restrict the protected concerted activity of the nurses.

However, as noted above, I have found Jochims not to be an "employee," but, rather, a statutory supervisor. As a supervisor, she was unprotected by the Act, and remained equally unprotected as a former supervisor. That was her status on February 27, 5 days following her discharge. While it does appear that the Respondent, through its supervisor Zans, was attempting to restrict Jochims' telephone access to the nurses while they were at work, I am of the view that this was not disparate treatment since Jochims was not an "employee." Jochims was simply not protected by the Act. The term "protected concerted activity" implies "employees" acting in concert. But, a nurse talking by telephone with a former supervisor is not talking with another "employee," and, thus, not engaged in concerted activity, protected or otherwise. Further, as to Rebecca Russi, it does appear that she instructed Zans to tell Jochims that she was not interested in talking with her. The Respondent is certainly not responsible for its nurses being unwilling to talk with Jochims.

Accordingly, I do not believe that the statements of Sherry Zans during her conversation with Lisa Jochims on February 27 constituted a violation of the Act. I shall, therefore, recommend dismissal of paragraph 4(a)(iii) of the amended complaint.

6. Impression of surveillance

In paragraph 4(a)(iv) of the amended complaint, it is alleged that the Respondent created an impression among its employees that their concerted activities were under surveillance. Specifically, counsel for the General Counsel contends that on February 18, Wendy Gibson spoke by telephone separately with Nurse Christine Brackenbury and with Lisa Jochims and questioned them about the petition. The telephone conversation between Gibson and Brackenbury is set forth in detail earlier in this decision. In substance, Gibson asked Brackenbury what she knew about the petition. The questions directed to Brackenbury would have caused her to logically conclude that management had not yet received a copy of the petition. Further, it would have been reasonable for Brackenbury to conclude from Gibson's questions that her protected concerted activities were under surveillance by management.

The Board has held that employees should be free to participate in union organizing campaigns without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities and in what particular ways. *Flexsteel Industries*, 311 NLRB 257 (1993). Further, the test for determining whether an employer has created an impression of surveillance is whether the employee would reasonably assume from the statement in question that his union activities have been placed under surveillance. *Tres Estrellas de Oro*, 329 NLRB 50, 51 (1999); and *United Charter Service*, 306 NLRB 150 (1992). While these cases involved employees engaged in union activity, the Board's holding would be no less applicable to employees engaged in protected concerted activity. Either way, the freedom employees have to engage in Section 7 rights should be unrestrained by an employer's surveillance of their activity or the impression of surveillance.

Accordingly, I conclude that the Respondent violated Section 8(a)(1) of the Act when Wendy Gibson questioned Christine Brackenbury about the petition on February 18, as alleged in paragraph 4(a)(iv) of the amended complaint. However, I do not find the Act to have been violated when Gibson questioned Lisa Jochims about the petition on the same date. As a statutory supervisor, Jochims was unprotected by the Act.

7. Rule prohibiting rumors and gossip

It is alleged in paragraph 4(b)(ii) of the amended complaint that the Respondent has unlawfully maintained in its employee handbook a rule prohibiting "rumors and gossip" within the facility.[7] (See R. Exh. 1, p. 19.) Counsel for the General Counsel contends that the language of this rule is vague, broad, and ambiguous, and would, therefore, have a reasonable tendency to inhibit employees from freely engaging in union or protected concerted activity. On the other hand, counsel for the Respondent argues that an employer rule against spreading gossip is not a per se violation of the Act, and that there is no allegation or evidence of any disparate application of the rule.

In my view, the rule in question is not vague, broad, or ambiguous, and could not reasonably be misconstrued by employees. The handbook rule is written in plain and simple English, which should be understandable to anyone who is literate in the English language. It asks employees "not to participate in rumors and gossip . . . that could cause any type of damage to the facility or anyone employed by the facility." Further, it states that disciplinary action could be instituted against an employee whose statements "slander or cause pain to anyone with a malicious intent." How such a statement could be reasonably misconstrued by employees to restrict or inhibit their Section 7 rights simply escapes the undersigned. It is neither logical nor reasonable to conclude that the rule in question would cause employees to refrain from either union or protected concerted activity.

[7] The amended complaint alleges that since August 26, 2001, the Respondent has maintained a number of rules in its employee handbook, which on their face curtail employee statutory rights. In its answer, the Respondent admits that the employee handbook contains the rules as alleged, but denies that these provisions violate the Act.

Of particular importance is the reference in the rule to "malicious intent." While the Board has held that it is overly broad and restrictive for an employer to prohibit merely "false" statements, the same is not true for a prohibition against "malicious" statements. *American Cast Iron Pipe Co*., 234 NLRB 1126 (1978), enfd. 600 F.2d 132 (8th Cir. 1979). The term "malicious intent" denotes deliberate conduct sufficiently egregious to alert employees that such conduct will not be tolerated. Any employee should reasonably read such language as not including what would be understood to constitute protected activity. I am of the view that the term "malicious intent" in the rule in question is sufficiently clear to remove the prohibition from being considered overly broad or restrictive of employees' Section 7 rights.

The Respondent has a legitimate interest in ensuring, to the extent possible, that employees and managers are not offended by malicious rumors or gossip. It appears to me that is what the rule at issue is intended to do. Further, there is absolutely no contention that the rule has been enforced in a disparate fashion, as would restrict protected activity. There is simply no basis to conclude that the rule, as it appears in the handbook, would reasonably have a chilling effect on the employees' Section 7 rights. Accordingly, I find that the rule does not constitute a violation of Section 8(a)(1) of the Act, and I recommend that paragraph 4(b)(ii) of the amended complaint be dismissed.

8. Rules prohibiting employees from walking off the job and from misrepresenting a fact to obtain a benefit

Paragraph 4(b)(iii) of the amended complaint alleges that the prohibitions against two specific types of employee infractions, as set forth in the Respondent's employee handbook, constitute separate violations of Section 8(a)(1) of the Act. The two infractions that are prohibited, and which may result in suspension and discharge, are job abandonment, and the misrepresentation of a material fact in an attempt to obtain a benefit or advantage. (See R. Exh. 1, p. 34.)

Counsel for the General Counsel contends that a rule which prohibits "[a]bandoning your job by walking off the shift without permission of your [s]upervisor or [a]dministrator," constitutes an unlawful restriction on employee strike activity. However, I am of the opinion that the cases cited by counsel in his posthearing brief are inapposite to the matter at hand.[8] The holding in those cases is merely that an employer may not prohibit employees from engaging in a "concerted" work stoppage, which would be considered protected concerted activity under Section 7 of the Act. The rule complained of in this case does not seek to restrict concerted action by employees, but only seeks to prevent an employee from "abandoning" his job by walking off the shift without permission. There is nothing in the rule as would prohibit employees from engaging in concerted activity, including a strike, in a effort to collectively improve their wages, hours, or working conditions.

One should not lose sight of the fact that the Respondent is operating a nursing home with many elderly patients who are sick or infirm. I am in agreement with the contention of counsel for the Respondent that the rule in question is not intended as a prohibition against strikes or concerted activity, but, rather, as a prohibition against nursing care employees leaving residents to fend for themselves without advising a supervisor. In truth, the Respondent would be negligent in its duty to its patients not to maintain such a rule. Further, any employee whose conduct was so egregious as to simply leave a nursing home patient without adequate care should be considered to have "abandoned" his job. Such conduct is not entitled to the protection of the Act. It has long been held that some employee conduct, even if concerted in nature, loses the protection of the Act when the conduct in question is "indefensible." *NLRB v. Washington Aluminum Co.,* 370 U.S. 9 (1962). Clearly, leaving a nursing care patient without adequate care would constitute indefensible behavior.

I conclude that a reasonable reading of the rule prohibiting an employee from abandoning his job by walking off a shift without permission would not restrict employees from engaging in a strike or concerted work stoppage. Accordingly, I find that the rule in question does not violate Section 8(a)(1) of the Act.

Regarding the rule prohibiting the misrepresentation of a material fact in an attempt to obtain a benefit or advantage, counsel for the General Counsel contends in his posthearing brief that the rule illegally chills employee protected activity. Counsel advances the same theory as he did for the rule prohibiting "rumors and gossip." Further, he argues that the Respondent may not discipline employees for their being erroneous in their disparagement or discussions relating to protected activities.

As to the language in this rule, I am in agreement with the General Counsel. The rule is a per se violation of the Act. It requires the employees to interpret what constitutes a "misrepresentation of a material fact." The language fails to define the area of permissible conduct in a manner clear to employees and, thus, may cause employees to refrain from engaging in protected activity. *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998); and *Spartan Plastics,* 269 NLRB 546, 552 (1984). The rule illegally chills the Section 7 rights of the employees, as they are threatened with discipline if they are simply erroneous in any disparagement or discussions that they may have relating to protected activity. *NLRB v. Washington Aluminum Co.,* supra. Employees would likely find this language vague and ambiguous, and the burden of interpreting whether the rule prohibits certain protected activity should not rest with them.

Accordingly, I conclude that the rule that prohibits a "[m]isrepresentation of a material fact in an attempt to obtain a benefit or advantage," as alleged in paragraph 4(b)(iii) of the amended complaint, violates Section 8(a)(1) of the Act.

9. Rules prohibiting employees from making a false or malicious statement, paycheck disclosure, and soliciting/distributing in work area

Paragraph 4(b)(iv) of the complaint alleges that the prohibitions against three specific types of employee infractions, as set forth in the Respondent's handbook, constitute separate violations of Section 8(a)(1) of the Act. The prohibitions against these three infractions, which may result in suspension and discharge, are the rule against making a false or malicious statement about a resident, employee, supervisor, or the Com-

[8] *Bethany Medical Center*, 328 NLRB 1094, 1101 (1999); and *Walker Methodist Residence*, 227 NLRB 1630 (1977).

pany; the prohibition against paycheck disclosure; and the prohibition against soliciting or distributing written material during working time or in any work area or resident care area. (See R. Exh. 1, p. 33.)

Counsel for the General Counsel contends that the rule prohibiting the making of a "false or malicious" statement about a resident, employee, "[s]upervisor, or the Company," constitutes an unlawful restriction on the employees' Section 7 rights. I agree with the General Counsel and conclude that the rule in question is a per se violation of the Act. As was noted above, the use of the term "false" statement has been construed to been restrictive and overbroad, while the term "malicious" statement has not been so construed. *American Cast Iron Pipe Co.,* supra. The rule in question prohibits making either a "false or malicious" statement about a supervisor or the Company. This reference to "false" makes the entire clause overbroad, despite the reference to "malicious" in the same clause. By using both terms, the Respondent has made the clause vague and ambiguous. The Respondent fails to define the area of permissible conduct in a manner clear to employees and, thus, may cause employees to refrain from engaging in protected concerted activity. *Lafayette Park Hotel,* supra; and *Spartan Plastics,* supra. As such, I find that the maintenance of this clause in the employee handbook, as alleged in paragraph 4(b)(iv) of the complaint, violates Section 8(a)(1) of the Act.

Regarding the rule prohibiting "pay check disclosure," counsel for the General Counsel contends that this cause in the employee handbook interferes with, restrains, and coerces employees in the exercise of their Section 7 rights. In his opening statement at the hearing, counsel for the Respondent conceded that this cause which, "on its face," prohibits employee discussions of pay issues is a violation of the Act. Clearly, the rule in question is a per se violation of the Act.

The Board has held that Section 7 of the Act encompasses the right of employees to ascertain what wage rates are paid by their employer, as wages are a vital term and condition of employment. When an employer prohibits its employees from inquiring as to the wages paid fellow employees, the employer is inhibiting its employees from exercising their Section 7 rights. *Triana Industries,* 245 NLRB 1258 (1979); and *Scientific Atlanta, Inc.,* 278 NLRB 622, 624–625 (1986). There can be no defense to this per se violation, and the Respondent offers none. Accordingly, I find that the maintenance of this clause in the employee handbook, as alleged in paragraph 4(b)(iv) of the complaint, violates Section 8(a)(1) of the Act.

The Respondent's employee handbook also contains the following rule: "Soliciting or distributing written material during working time or in any work area or resident care area is not permitted." Counsel for the General Counsel takes the position that the prohibition of employees from soliciting "in any work area" is unlawful on its face. The General Counsel acknowledges in his prehearing brief that as the Respondent is engaged in the health care field, it enjoys a presumption of validity for a ban on solicitation extending to "immediate patient care areas." However, it is argued that the presumption does not extend to the far more expansive range of "work areas." *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978); and *NLRB v. Baptist Hospital*, 442 U.S. 773 (1979). In his post-hearing brief, counsel for the Respondent is silent as to this issue.

I am in agreement with counsel for the General Counsel. The cases he cites are on point. It is clear that the Respondent's handbook provision that, in part, prohibits solicitation "in any work area" is overly broad and unlawful on its face. As such, it inhibits employees in the exercise of their Section 7 rights. Accordingly, I find that this provision in the Respondent's handbook, as alleged in paragraph 4(b)(iv) of the complaint, violates Section 8(a)(1) of the Act.

10. Disparate application of no-solicitation/distribution rule

Paragraph 4(c)(i) of the complaint sets forth a "No Solicitation/No Distribution" rule contained in the Respondent's employee handbook.[9] (See R. Exh. 1, p. 23.) The General Counsel does not allege that, on its face, there is anything improper about this rule. However, it is alleged in paragraph 4(c)(ii) of the complaint that the Respondent has disparately applied and enforced this rule, as well as, the solicitation/distribution rule set forth earlier in this decision, in a effort to restrict employees from engaging in protected concerted activity.

At the hearing, the parties stipulated that at the time Lisa Jochims was discharged, the Respondent was aware that its employees openly engaged in solicitation and distribution activities during worktime and in work areas of the facility. This included the sale of various products, including "Avon" products. (Jt. Exh. 1.) In his posthearing brief, counsel for the General Counsel argues that as one of the stated reasons given by the Respondent for the discharge of Jochims was a violation of the solicitation/distribution rule, that the rule was being applied in a disparate fashion. The employee disciplinary form for Jochims, which was signed by Wendy Gibson, does list the violation of the solicitation/distribution rule as one of the reasons for her termination. (GC Exh. 3.) Further, the evidence was very clear that the violation of the handbook rule complained of by the Respondent was Jochims' solicitation of signatures and circulation of the petition protesting the proposal that nurses work the floor.

However, as I have previously held, Jochims was a statutory supervisor. As such, she was unprotected by the Act. Counsel for the Respondent argues in his posthearing brief that since the only enforcement of the solicitation/distribution rule was against a statutory supervisor, no violation of the Act was established. I agree with the Respondent. Jochims' involvement with the petition did not constitute protected concerted activity. No disparate application of the rule can be established, as the only enforcement was against Jochims, who was at the time a supervisor. Accordingly, I shall recommend that paragraphs 4(c)(i) and (ii) of the complaint be dismissed.

CONCLUSIONS OF LAW

1. The Respondent, Wilshire at Lakewood, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[9] This "No-Solicitation/No-Distribution" rule is separate and distinct from the solicitation/distribution rule discussed earlier in this decision and found at p. 33 of the Respondent's handbook.

2. By the following acts and conduct, the Respondent has violated Section 8(a)(1) of the Act.

(a) Interrogating employees concerning their own or others' protected concerted activities in the signing, circulating, and/or soliciting of signatures on a petition protesting a proposal to have nurses work the floor.

(b) Creating an impression among its employees that their protected concerted activities in the signing, circulating, and/or soliciting of signatures on a petition protesting a proposal to have nurses work the floor are under surveillance.

(c) Maintaining in its employee handbook a disciplinary rule prohibiting the following: Misrepresentation of a material fact in an attempt to obtain a benefit or advantage.

(d) Maintaining in its employee handbook a disciplinary rule prohibiting the following: Making a false or malicious statement about a resident, employee, supervisor, or the Company.

(e) Maintaining in its employee handbook a disciplinary rule prohibiting the following: Pay check disclosure.

(f) Maintaining in its employee handbook a disciplinary rule as follows: Soliciting or distributing written material during working time or in any work area or resident care area is not permitted.

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

4. The Respondent has not committed the other violations of law that are alleged in paragraphs 4 and 5 of the amended complaint.

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.

[Recommended Order omitted from publication.]